

The resulting contributions provided not only a foundation for the panel's own debate but may also serve as a useful springboard for the inevitable further discussion of these issues in the years to come.

### FEDERALISM AND THE TREATY POWER

*by Curtis A. Bradley\**

Article II of the Constitution gives the president the power, with the advice and consent of two-thirds of the Senate, to make treaties. The supremacy clause in Article VI of the Constitution provides that treaties made under the authority of the United States shall be the supreme law of the land and shall bind state judges. Thus, like federal statutes and the Constitution itself, treaties can override inconsistent state law. The Constitution also expressly prohibits states from entering into treaties, thereby ensuring that the making of treaties is the exclusive prerogative of the national government.

Unlike the statutory powers of Congress, such as its power to regulate interstate and foreign commerce, the treaty power is not limited to specific subject matters. Nor is it clear from the constitutional text whether or to what extent the treaty power is affected by the Tenth Amendment, which provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is possible that the word "Treaties" in Article II might carry with it some implied limitations. If nothing else, the word would seem to require that there be an actual international agreement rather than a mere unilateral action by the United States. At times it has been suggested that the word also implies that the agreement must relate to a matter of international concern, as opposed to a merely domestic matter, but there is no consensus on either the existence or the content of such a limitation.

This raises what some would perceive as a structural constitutional concern. If there are no subject matter limits on the treaty power and if the powers reserved to the states present no obstacle to the treaty power, it is in essence a plenary power of the national government. Yet the constitutional founders stated, and the structure of the Constitution suggests, that the national government's powers were intended to be limited and enumerated.

This tension between the potentially unlimited treaty power and the limited and enumerated powers structure of the Constitution might not have been a significant issue at the time of the founding, when there were relatively few treaties, and the treaties that did exist focused on a handful of issues and involved matters of truly reciprocal concern. In recent years, however, the number and range of treaties have vastly expanded. Treaties now regulate many matters that traditionally have been thought to be domestic in nature, such as criminal punishment and procedure, family law, and environmental protection.

The principal Supreme Court decision addressing the relationship between the treaty power and U.S. federalism is the Court's 1920 decision in *Missouri v. Holland*.<sup>1</sup> The *Holland* case concerned a federal statute, the Migratory Bird Treaty Act, which implemented a treaty between the United States and Great Britain concerning the protection of migratory birds in the United States and Canada. (Great Britain then handled Canada's foreign policy.) Among other things, the act made it unlawful to hunt, capture, or sell any migratory birds covered by the terms of the Convention, except as allowed by regulations to be issued by the Secretary of Agriculture.

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<sup>1</sup> 252 U.S. 416, 433-34 (1920).

The state of Missouri sought to enjoin a federal game warden (Holland) from enforcing the act, arguing that it invaded the reserved powers of the states, in violation of the Tenth Amendment. Missouri pointed out that two federal district courts had found a similar migratory birds protection statute, enacted before the treaty, to be beyond the scope of the powers of Congress. In an opinion written by Justice Holmes, the Supreme Court rejected Missouri's argument.

The Court acknowledged that, in the absence of the treaty, the act might have exceeded Congress's powers as they were then interpreted but noted that Congress has the authority to make laws that are necessary and proper to put into effect the constitutional powers of the other parts of the government. As for the validity of the underlying treaty, the Court pointed out that the treaty did not "contravene any prohibitory words to be found in the Constitution" but rather was alleged to violate "some invisible radiation from the general terms of the Tenth Amendment." To show that a treaty is invalid, however, the Court reasoned that "it is not enough to refer to the Tenth Amendment, because by Article II, section 2, the power to make treaties is delegated expressly." The Court also noted, however, that it did "not mean to imply that there are no qualifications to the treaty-making power."

In part because of Holmes's cryptic style, the precise implications of *Holland* are debatable. If nothing else, the decision appears to stand for the proposition that the treaty power can be used, at least in some instances, to regulate matters beyond the scope of Congress's powers.<sup>2</sup> There was some concern after this decision that the treaty power might not be subject to *any* constitutional limitations, including limitations imposed by the Constitution's individual rights provisions. The Supreme Court later made clear, however, that the Article II treaty power is subject to the individual rights protections of the Constitution.

The Court's conclusion in *Holland* that the treaty power is not subject to the limitations on congressional powers might seem obvious from the constitutional text. After all, the treaty power is contained in Article II, not in the list of congressional powers in Article I, and thus the limits on Article I powers might seem irrelevant. There are a number of complications, however, that make this issue more difficult than it first appears.

First, in *Holland* the issue was not simply whether the treaty-makers could impose an international obligation on the United States. The issue was whether Congress could enact legislation having domestic effect as part of its implementation of the treaty. Even if the treaty-makers have unlimited ability to create international obligations, one could still question whether they have unlimited ability to change domestic law.

Second, although some treaties can be self-executing and thus have direct effect without implementing legislation, it is generally agreed that some of the limitations in Article I of the Constitution restrict the ability of treaties to be self-executing, for example, the stipulation that appropriations measures require a statute and the requirement that revenue bills originate in the House. At least some Article I limitations, therefore, do apply to the exercise of the treaty power.

Third, it is also well established that self-executing treaties and federal statutes have a last-in-time relationship: the later in time prevails as a matter of U.S. law. The last-in-time rule breaks down to some extent, however, if treaties can change domestic law beyond the scope of congressional powers, because in that situation Congress presumably would not be able to override the treaty.

Fourth, some individual rights protections in the Constitution, such as the First Amendment, are written as limitations on Congress. The First Amendment says that "Congress shall make no law . . . abridging the freedom of speech." While that amendment has been applied to the states through the Fourteenth Amendment, there is nothing in the Constitution expressly

<sup>2</sup> Dicta in a recent Indian law decision by the Supreme Court could be read to suggest a continued commitment to this holding. See *United States v. Lara*, 124 S. Ct. 1628, 1633–34 (2004). That decision did not involve either a treaty or an issue of federalism, however.

extending it to the treaty power. Nevertheless, the Supreme Court has held that the treaty power is subject to the First Amendment.

Finally, as a predictive matter, it is possible to imagine the Supreme Court resisting a construction of the treaty power that would allow the political branches to easily circumvent the Court's federalism decisions. For example, the Supreme Court held in its 1997 decision, *Boerne v. Flores*,<sup>3</sup> that the Religious Freedom Restoration Act was unconstitutional because it exceeded Congress's powers. If Congress attempted to reenact that statute to implement the religious freedom clause in the International Covenant on Civil and Political Rights (as some commentators argued was possible), the Supreme Court might balk at such a blatant evasion of its constitutional decision, especially since it was so resistant in *Boerne* itself to the effort of Congress to second-guess an earlier religious freedom decision.

In any event, *Holland* addressed only one type of federalism restriction—the Article I limits on the powers of Congress, such as its power to regulate commerce. Under recent Supreme Court decisions, however, there are at least two other categories of federalism limitations: anti-commandeering and state sovereign immunity. The current Court appears to think of those categories as general structural limitations applicable to the national government as a whole, not just to Congress. As a result, these limitations may apply to treaties as well as statutes. Indeed, in its 1998 *per curiam* decision in *Breard v. Greene*,<sup>4</sup> which involved a state violation of the Vienna Convention on Consular Relations, the Court expressly suggested that a suit under a treaty would be subject to state sovereign immunity. Thus, even if *Holland* were fully reaffirmed today, constitutional principles of federalism might still be relevant to the treaty power.<sup>5</sup>

### RESISTING INTERNATIONAL DELEGATIONS

by Edward T. Swaine\*

Concerns about international delegations are a tough sell in a society devoted to the appreciation of international law. For some, it may evoke Brickerism and black helicopter paranoia that are properly confined to Capitol Hill and the outskirts of Roswell, New Mexico, respectively. I want to speculate about the reasons for this resistance and why skepticism may be lessening before relating the problem of international delegations to the other issues before this panel.

One basis for resisting delegation objections has to do with the potential sweep of the argument. A broad array of agreements might be said to entail delegations; one might in theory consider *any* agreement inhibiting the exercise of U.S. sovereign authority—even authority that had previously been inhibited by another international arrangement—to comprise a delegation, and sometimes critics of internationalism use the term this way. The disadvantages are clear enough. Such usage makes little use of any distinctive notion of delegating authority, as opposed to, say, reciprocal limits on autonomy, or nonbinding memoranda of understanding (MOUs), and invites the criticism that delegations fundamentally are simply ordinary exercises of government authority. By the same token, in losing the distinctive character of delegations, such usage unnecessarily suggests that all international law is at stake, prompting *reductio ad absurdum* critiques of any nondelegation doctrine.

<sup>3</sup> 521 U.S. 507 (1979).

<sup>4</sup> 523 U.S. 371 (1998).

<sup>5</sup> For additional discussion of the relationship between the treaty power and U.S. federalism, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003). See also GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY*, ch. I (2004).

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