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# Treaties and International Regulation

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## TREATIES AND INTERNATIONAL REGULATION

*by Lori Fisler Damrosch*[*]

On the themes addressed by the other speakers, I have the following comments:

### FEDERALISM

The authority of *Missouri v. Holland* is in no way impaired by developments of the last decade. While Justice Holmes rejected the view that "invisible radiation" from the Tenth Amendment could restrict the treaty power, his approach accepts that a treaty cannot violate "prohibitory words" in the Constitution. Some prohibitory words explicitly protect the interests of the states as against the national government. For example, the framers clearly meant the prohibition in Article I, section 9 on export taxes to bar one form of potential federal taxation that the Southern states found worrisome.[1] In the face of this specific prohibition, which was motivated by federalism concerns, a treaty to impose an export tax would presumably be as unconstitutional as the legislative measures that the Supreme Court has already invalidated under the clause.[2] There is thus enough protection for the interests of the states *qua* states in the prohibitory words analysis, as well as in the practical and political safeguards of the processes for making international agreements.

Furthermore, nothing in the Supreme Court's federalism cases of the 1990s hints at any restriction of national treaty-making power. Indeed, the contrary is true. In *Crosby v. National Foreign Trade Council*[3] and *American Insurance Association v. Garamendi*[4] the Supreme Court struck down state measures that interfered with federal primacy in international relations, even where the federal policy was expressed in an executive agreement rather than in a formal treaty. These cases support a nationalist view of foreign affairs powers.

### DELEGATION

More than a decade ago, at the invitation of Professor Louis Henkin, who asked us to anticipate the Constitution's third century, I suggested that delegation of regulatory powers to international organizations would merit creative thinking from international lawyers.[5] That is still the case: International regulation through treaty-based regimes is the cutting edge for our subject; we should approach it imaginatively with the best new ideas of the twenty-first century, not with the mindset of an early twentieth-century delegation doctrine.

Much insight into the contemporary dimension of international regulation can be gained from comparative constitutional study. For example, the German Federal Constitutional Court in its *Maastricht* decision[6] gave content to the democracy principle in the German constitution as ensuring advance legislative approval of major commitments of regulatory authority to international organizations. The objective of such parliamentary approval is to ensure fidelity to significant democratic values rather than to exalt a particularistic conception of sovereignty.

Within the U.S. constitutional context, the legislative and executive branches should act together to reach a deliberate policy decision that it is in the U.S. national interest to participate constructively in an international regime (for example, in the field of international environmen-

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[1] United States v. International Business Machines Corp., 517 U.S. 843 (1996).

[2] *See id.*; *see also* United States v. United States Shoe Corp., 523 U.S. 360 (1998).

[3] 530 U.S. 363 (2000).

[4] 539 U.S. 396 (2003).

[5] Remarks at 85 ASIL PROC. 191, 195, 197–98 (1991).

[6] Brunner v. European Union Treaty, BVerfGE, 2134/92 & 2159/92, 1 C.M.L.R. 96 (1994).

tal law). Once such a decision is taken, through one of the several proper modes for making international agreements, there should be no constitutional obstacles to accepting the outcomes reached through such a regime, even if the United States has no veto or blocking vote within the regime and even if the outcome of the future decision process in a specific instance is not what the U.S. government would have favored. Participation in such an international regime is not an abdication of sovereignty but an exercise thereof.

## SELF-EXECUTION

Non-self-executing declarations should be disfavored. Courts should assume that the political branches do not want to put the United States in a position of violating international obligations and should exercise their judicial powers to minimize problems of noncompliance.

The *Avena* case, which the International Court of Justice has just decided,[7] specifies obligations of the United States under a self-executing treaty, the Vienna Convention on Consular Relations. The judgment binds the United States as a whole, including the states. States are required to carry out the *Avena* judgment just as they are required to carry out the Vienna Convention itself. Under the supremacy clause of Article VI of the Convention they must do so notwithstanding anything in their own constitutions or laws to the contrary. The *Avena* judgment speaks directly to the rights of particular individuals and is addressed to actions pending in domestic courts where the treaty-based rights of those individuals can now be implemented. There is no need for any legislative or executive action from the political branches to carry the treaty-based obligations of the *Avena* case into execution.

## IMPLICATIONS FOR CURRENT AND FUTURE TREATY NEGOTIATIONS

I turn to the implications of these debates for the current agenda of treaty negotiation, ratification, and implementation.

First, who will set our negotiating objectives and strategy? The president-centered model has been dominant since the days of President Washington, but in the more complex, globalized world of the twenty-first century, the treaty process should not be a closed, secretive preserve, as if the president were an eighteenth-century monarch with the Senate his coterie of courtiers. What about opening up the processes of international agreement-making to more inclusive forms of consultation and participation? The models of broad consultation that have been developed for congressional law-making and administrative rule-making allow affected sectors—industries, consumers, or interest groups of other kinds—to be heard before crucial decisions are taken. Already in the late twentieth century, consultative processes have been adopted and followed for "fast-track" trade agreements.

Surprisingly, there seems to be resistance in the current Department of Justice to legislation that would provide for consultative procedures in advance of setting U.S. policy in the framework of international regimes. This resistance has surfaced most recently in respect to proposed legislation to implement the Stockholm Convention on Persistent Organic Pollutants (POPs), the Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, and the POPs Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution. The issue is the process for evaluating whether various substances should be added to or removed from the coverage of one or more of these conventions. In the case of a treaty regime involving a POPs review committee that recommends to a Conference of Parties (COP) what designation it should make at the international level, how should U.S. positions in respect of the review committee and the COP be developed,

[7] Avena and Other Mexican Nationals (Mexico v. United States of America), ICJ (Judgment of Mar. 31), *available at* <http://www.icj-cij.org>.

and how should decisions of the COP be implemented domestically if the United States were to become party to the treaty?

Under one approach, which we could call a "democratic participation and accountability approach," U.S. positions might be informed through an inclusive consultative process, much as addition or removal of toxic substances from comparable lists under U.S. domestic law could be made subject to the notice and comment procedures that are standard features of domestic administrative law. By contrast, the administration asserts that consultative procedures that would be utterly unremarkable in the domestic regulatory context become constitutionally suspect if the setting has to do with U.S. positions preparatory to casting a vote in an international forum.

Even if the administration is correct in its reliance on cases like *United States v. Curtiss-Wright*[8] for the proposition that there may be aspects of presidential negotiating prerogatives that Congress could not invade by statute, surely it goes too far to say that Congress would act unconstitutionally if it established a mechanism to allow affected interests to have input into the formation of positions for negotiations, in a domain (such as environmental law) where Congress has undoubted regulatory powers.

The *Curtiss-Wright* dicta insulating the president from any outside involvement may make sense in a context like counterproliferation in respect of North Korea, where negotiating positions have to be closely held. In the environmental field, where domestic regulatory actions typically do require some form of engagement with those who might be affected by or interested in a decision, it is hard to understand why there should be a constitutional objection to consultation in the setting of objectives to be pursued in an international arena.

The Justice Department has likewise asserted that statutes cannot direct the president to vote a certain way in an international forum. That position is wrong as a matter of democratic political theory, historical experience, common sense, and constitutional law. Congress can surely set the broad contours of national foreign policy, including policies to be pursued through votes in international bodies. Congress has done so many times, including in statutes that require U.S. representatives to exercise the voice and vote of the United States in international financial institutions to advance major U.S. policies, such as human rights. In the *Crosby*[9] case, where Congress had instructed the president to pursue a "comprehensive, multilateral strategy" concerning Burma, the Supreme Court's treatment of the preemptive effects of that federal law cast no doubt whatsoever on its constitutionality as between Congress and the president.

If the administration is advancing some version of an "international nondelegation doctrine" in respect of the POPs Convention, such a position might counterproductively disable the United States from exerting influence in international arenas. As the insights from comparative constitutional law suggest, constitutionalism and internationalism are not contradictory choices. We can be "living constitutionalists" and "living internationalists" at the same time.

[8] 299 U.S., 304 (1939).

[9] 530 U.S., 363 (2000), *supra* note 3.