Missouri Law Review

Volume 73
Issue 4 *Fall 2008*

Article 2

Fall 2008

Foreword

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MISSOURI LAW REVIEW

VOLUME 73 FALL 2008 NUMBER 4

Symposium:

Return to *Missouri v. Holland*: Federalism and International Law

Foreword

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I. INTRODUCTION

Columbia, Missouri is a fitting venue at which to continue the conversation about *Missouri v. Holland*[2] and explore the intersection of law-making at the international, national and sub-national levels. This symposium revisits the debate over national and local control over foreign affairs and brings together the constitutional doctrinal discussion and accounts of the globalization of regulation that consider the complexity of influences operating within and between multiple systems of law. Both the factual background of *Holland* (primarily a case about environmental regulation) and the doctrinal context in which it arose (a Supreme Court poised to move toward constitutional endorsement of greater concentration of power in the hands of the national, rather than state, government) presaged things to come. Returning to

1. Associate Professor, University of Missouri School of Law. The convening of this symposium over a mid-Missouri winter weekend could not have happened without the support of my faculty colleagues and the help of many hardworking students and staff. Will Marcantel, Chuck Adamson, Sandra Kubal, and Robin Nichols were indispensible to the success of the symposium and have my deep gratitude for their assistance. I also thank the supporting cast of the Missouri Law Review, especially Taavi Annus, Sundance Banks, and Matthew Feldhaus. Special thanks to Dean Larry Dessem for his support of the Symposium and to Professor David Sloss for co-moderating the roundtable discussion. Finally, thanks to David Talley for research assistance.

2. 252 U.S. 416 (1920).

Missouri – the case and the place – is a perfect point of departure for examining what international law and federalism have become since *Missouri v. Holland* was decided in 1920.

II. MIGRATORY BIRDS, COLLECTIVE ACTION, AND THE IMPORTANCE OF BEING MISSOURIAN

In *Missouri v. Holland* the Supreme Court upheld federal regulation of bird hunting in Missouri on the ground that statutes enacted pursuant to the national treaty power could serve to preempt state regulations – even where the subject matter did not fall within the powers of Congress enumerated in Article 1, Section 8 of the Constitution. The case is often cited for the basic proposition that the national government may do through treaty what it otherwise may not do through national legislation.[3] More precisely, the case is described as holding that limitations on the legislative powers of the national government do not apply when the national government either (1) ratifies a treaty that is self-executing – a treaty that does not require implementing legislation to be given effect, or (2) enacts legislation that otherwise would be outside the enumerated powers of Congress so long as that legislation implements a valid non-self-executing treaty.

The story behind the case begins with a classic collective action problem: regulating the hunting of migratory birds.[4] When European settlers arrived on this continent hundreds of species of migratory birds dominated the North American skies. By the late 19th Century, the unregulated hunting of migratory birds for their meat and plumage (satisfying the then-high demand for feathers for women's millinery) had reduced populations of many species to desperately low levels.[5] Migratory birds were especially vulnerable due to their habit of nesting in great numbers, making them an easy target for market hunters looking to take the highest quantity in the most efficient manner possible.[6] The plight of the now-extinct *Ectopistes migratorius*, or passenger pigeon, is illustrative. They were once the most populous species of bird in North America; naturalists estimate that there were as many as five billion passenger pigeons in North America at the time of the arrival of the

3. *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 190-94 (2d ed. 1996).

4. For additional background on the case, see Mark W. Janis, Missouri v. Holland*: Birds, Wars, and Rights*, *in* INTERNATIONAL LAW STORIES 207 (John E. Noyes, Laura A. Dickinson & Mark W. Janis, eds., 2007); Charles A. Lofgren, Missouri v. Holland *in Historical Perspective*, 1975 SUP. CT. REV. 77.

5. U.S. FISH & WILDLIFE SERV., A GUIDE TO THE LAWS AND TREATIES OF THE UNITED STATES FOR PROTECTING MIGRATORY BIRDS, http://www.fws.gov/migratory birds/intrnltr /treatlaw.html (last visited Nov. 21, 2008).

6. A grisly account of such a hunt can be found in 5 JOHN JAMES AUDUBON, *The Passenger Pigeon*, *in* BIRDS OF AMERICA (1840-1844), *available at* http://www.audubon.org/bird/boa/BOA_index.html.

Europeans.[7] They were so numerous that flocks of the migrating birds could stretch up to a mile wide and over 300 miles long,[8] and were so densely clustered that they were reported to blot out the sun for hours or even days at a time.[9] Yet, by the end of the 19th Century, passenger pigeons had been hunted to the brink of extinction.[10]

Prior to 1900, no federal law regulated the capture of migratory birds. Instead, a patchwork of state and territorial laws regulated bird hunting and resale. The states and territories faced a classic tragedy of the commons. Bird hunting filled a commercial need, which incentivized states to permit capture and incentivized hunters to violate or evade the hunting rules in other states. Absent coordination of hunting rules among the states and territories, overhunting was leading to near-extinction of some bird populations, including insectivorous species essential to agriculture. The movement for national regulation started from the ground up, with state game officials finding common cause with state and national conservation organizations and sportsmen's organizations (forefathers of the modern environmental NGOs). They were joined by the Department of Agriculture, which was increasingly focused on the devastating effect of the depletion of insectivorous birds on crop yields.[11]

The result of this alignment of interests was the Lacey Act of 1900, which made it illegal to engage in interstate transport of birds or wildlife taken in violation of state or territorial law.[12] The weak enforcement provisions of the Lacey Act, however, proved inadequate to the task. Congress got tougher with the passage of the Weeks-McLean law of 1913, which deemed all migratory game and insectivorous birds that passed through the borders of any state or territory to be within the custody of the U.S. Government, and prohibited the destruction or taking of those migratory species.[13] As many of its proponents feared would happen, two federal courts declared the Weeks-McLean statute unconstitutional as outside Congress' enumerated powers, and rejected, in accordance with Court precedent at the time, the argument that regulation of game found within the borders of a State could be accomplished through the Commerce Clause.[14] By that time, Senator Elihu Root – who just a few years earlier had founded the American Society of

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7. *The Passenger Pigeon*, ENCYCLOPEDIA SMITHSONIAN. http://www.si.edu/Encyclopedia_SI/nmnh/passpig.htm (last visited Nov. 21, 2008).

8. *Id.*

9. *Id.*

10. The last known specimen, "Martha," died in captivity at the Cincinnati Zoo in 1914. *Id.*

11. Lofgren, *supra* note 4, at 78.

12. Ch. 553, 31 Stat. 187 (codified as amended at 16 U.S.C. §§ 3371-3378 (2006)).

13. Act of Mar. 4, 1913, ch. 145, 37 Stat. 828.

14. United States v. Shauver, 214 F. 154 (E.D. Ark. 1914); United States v. McCullagh, 221 F. 288 (D. Kan. 1915).

International Law – had suggested the use of a treaty as a solution to any constitutional infirmities.[15] In reaction to these court decisions, the United States negotiated and the Senate approved the Migratory Bird Treaty with Great Britain, acting on behalf of Canada, in 1916. Congress passed the implementing statute – the Migratory Bird Treaty Act[16] – in 1918, and President Woodrow Wilson signed the Act in July of that year. The Act prohibited the hunting, killing, or subsequent sale or shipment of the birds protected by the Migratory Bird Treaty.

Later that year President Wilson set sail for the Paris Peace conference with a new adviser in tow, a young native Missourian and law professor from the University of Missouri named Manley O. Hudson. Hudson would go on to teach at Harvard, replace former Secretary of State Frank Billings Kellogg as justice on the League of Nation's Permanent Court of International Justice, and advise the drafters of the UN Charter and the Statute of the International Court of Justice.[17] As the peace negotiations opened in Paris (promising, not for the last time, a new world order under international law) opponents of the new Weeks-McLean law, which included commercial hunters and some avid recreational hunters concerned about federal oversight of their sport, looked for a challenge. They found it when the federal game warden, Ray Holland, arrested and indicted some Missourians caught with ducks hunted out of season for violating the new statute.[18]

The State of Missouri sought to enjoin further action by Holland. The federal district court of the Western District of Missouri dismissed Missouri's application for an injunction, and in so doing remarked that, without the treaty, the Act would have been unconstitutional.[19] It is from this opinion that the State of Missouri appealed to the Supreme Court. The Court upheld the treaty and the implementing statute by a vote of 7-2.[20]

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15. Lofgren, *supra* note 4, at 81.

16. Ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703-712 (2006)).

17. *See* Frederic L. Kirgis, THE AMERICAN SOCIETY OF INTERNATIONAL LAW'S FIRST CENTURY 73 (2006). *Time Magazine* referred to Hudson at the time of his 1936 investiture on the League court as "invincibly small-town" – an interesting description of one of the leading internationalists of the mid-20th Century. *Court and Council*, TIME, Oct. 19, 1936, at 23, 23. Perhaps less well-known about Hudson is the fact that in 1932 he was arrested in Connecticut for driving on the left side of the road. His excuse: he had just returned from a trip to England. The excuse worked and he was released. *Names Make News*, TIME, Sept. 26, 1932, at 44, 44. Both incidents are, perhaps, a useful reminder of the dangers in the tendency to "essentialize" the "local" and "international" that Judith Resnik warns us about in her keynote contribution to this symposium. *See infra* discussion accompanying notes 83-84.

18. Lofgren, *supra* note 4, at 92.

19. United States v. Samples, 258 F. 479 (W.D. Mo. 1919).

20. Missouri v. Holland, 252 U.S. 416 (1920). Two justices – Van Devanter and Pitney – dissented without opinion. *Id.* at 435.

The *Holland* decision in turn aroused fears over the use of the Treaty Power as an end-run around the constitutional order of dual sovereignty or dual federalism, which envisioned a national government of limited, enumerated powers, leaving all other functions and powers to the states and the people.[21] These fears were manifested in institutional backlash, in particular the efforts of Frank Holman as president of the American Bar Association in the late 1940s to amend the Constitution.[22] These efforts were later taken up by Senator John Bricker of Ohio. To the minds of Holman and Bricker, the sweeping precedent set by *Holland* would permit international legal commitments to blanket the sky – not unlike the migration of the passenger pigeons of yore – blotting out the police powers of the states and overshadowing the limitations on congressional and presidential power.[23] These efforts to amend the Constitution sought to limit the scope of the Treaty power and the use of executive agreements in order to prevent the President from committing the United States to the broad post-World War II internationalist projects, in particular the emerging international human rights system. The fear was that the practices of U.S. states, specifically the institutionalized racial segregation and discrimination of the Jim Crow south, would be found in violation of these new international commitments. The proposed amendments failed, in large part because the United States government committed itself to remain outside the international human rights regime.[24] But the controversies over U.S. participation in treaty regimes that give effect to individual rights, and what such participation means for political and legal theories of the value of

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21. For some early examples, see Joseph P. Chamberlain, *Migratory Bird Treaty Decision and Its Relation to Labor Treaties*, 10 AM. LAB. LEGIS. REV. 133, 135 (1920) (arguing that *Missouri v. Holland* could justify U.S. entering into treaties for international protection of labor); Forrest Revere Black, Missouri v. Holland—*A Judicial Milepost on the Road to Absolutism*, 25 ILL. L. REV. 911 (1931) (raising concern that the U.S. was moving toward complete erosion of federalism).

22. See Nelson Richards, Comment, *The Bricker Amendment and Congress's Failure to Check the Inflation of the Executive's Foreign Affairs Powers, 1951-1954*, 94 CAL. L. REV. 175 (2006), for a brief history of the maneuvering surrounding the Bricker Amendments.

23. *See* Frank E. Holman, *An "International Bill of Rights": Proposals Have Dangerous Implications for U.S.*, 34 A.B.A. J. 984 (1948); Frank E. Holman, *Must America Succumb to Statism?*, 35 A.B.A. J. 801 (1949); *see also* Eberhard P. Deutsch, *The Treaty-Making Clause: A Decision for the People of America*, 37 A.B.A. J. 659 (1951); William Fleming, *Danger to America: The Draft Covenant on Human Rights*, 37 A.B.A. J. 739, 37 A.B.A. J. 816 (1951).

24. President Eisenhower's Secretary of State John Foster Dulles testified against the adoption of the Bricker Amendment in part on the basis that there would be no need to safeguard against treaties such as the "Human Rights Covenant" "because the Administration does 'not intend to become a party to any such covenant' – or to other treaties outside the 'proper field' of international relations." *The Bricker Amendment: A Cure Worse than the Disease?*, TIME, July 13, 1953, at 20, 21.

federalism to our democratic order, are very much alive, as the contributions to this symposium demonstrate.

III. *MISSOURI V. HOLLAND*: CONSTITUTIONAL TEXT, STRUCTURE AND HISTORY

The first four contributions to the symposium return us to the central doctrinal debate over *Missouri v. Holland* through an exploration of the text, structure and history the Treaty Power, the Supremacy Clause, the Article 1, Section 8 powers of Congress, and the Tenth Amendment. Professors Ramsey, Vázquez, Swaine, and Spiro[25] – and the live commentary by Professors Golove and Rosenkranz[26] – address questions that Oliver Wendell Holmes' opinion in *Holland* arguably left unclear: What, if any, subject matter limitations apply to the national Treaty Power? Are there limits on Congress' power to legislate pursuant to the Treaty Clause? Do structural federalism limitations to national power suggest that states, rather than Congress, are the proper bodies to enact non-self-executing treaties?

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25. Each of these contributors has staked out a position on these issues in earlier writings. *See* Carlos Manuel Vázquez, *Treaties and the Eleventh Amendment*, 42 VA. J. INT'L L. 713 (2002) [hereinafter Vázquez, *Eleventh Amendment*]; Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999); Carlos Manuel Vázquez, Breard, Printz, *and the Treaty Power*, 70 U. COLO. L. REV. 1317 (1999) [hereinafter Vázquez, Breard, Printz]; Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM J. INT'L L. 695 (1995); Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003); Edward T. Swaine, *The Undersea World of Foreign Relations Federalism*, 2 CHI. J. INT'L L. 337 (2001); Edward T. Swaine, Crosby *as Foreign Relations Law*, 41 VA. J. INT'L L. 481 (2001); Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127 (2000); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002); Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001); Peter J. Spiro, *Contextual Determinism and Foreign Relations Federalism*, 2 CHI. J. INT'L L. 363 (2001); Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223 (1999).

26. Although Professors Golove and Rosenkranz did not provide written comments, their commentary can be found on the webcast of the Symposium, available at http://www.law.missouri.edu/faculty/symposium/symposium08/webcast.html. Their commentary there drew from earlier articles. *See* 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); David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 U. COLO. L. REV. 1491 (1999); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

Professor Michael Ramsey applies the methodology of historical textualism to the question of what constitutes a "valid" treaty under the Constitution.[27] Ramsey's methodological approach is a departure from the contextual "living Constitution" approach of Holmes, but leads nonetheless to the same conclusion: "the Constitution's original meaning imposes no generalized subject matter limitations . . . akin to those Article I, Section 8 places on Congress' lawmaking power."[28] The work of scholars who have concluded otherwise – both contemporaneously to the time of *Holland* and more recently – illustrate the ways in which interpretative methodology can drive outcomes and lead to conclusions that Ramsey finds inconsistent with historically rooted textual analysis.[29]

Professor Carlos Vázquez takes up these challenges to the two propositions for which *Holland* stands: first, that "the treaty-makers have the constitutional power to make treaties on matters falling outside Congress' enumerated powers," and second, that "if the treaty-makers make such a treaty and the treaty is not self-executing, the Necessary and Proper Clause gives Congress the power to implement such a treaty through a statute even if, in the absence of the treaty, the statute would be beyond Congress's legislative power."[30] The second proposition (to which, as Vázquez notes, the Court devoted only one sentence), in which federalism meets the doctrine of non-self-execution of treaties, has proved to be the more controversial among commentators. Professor Curtis Bradley, among others, has argued that the "nationalist" conception of the treaty power[31] – which argues that the national government may negotiate treaties on any subject and, through either self-execution or implementing legislation, preempt the states – is contrary to the original intent of the founders and contrary to the Court's history of enforcing state sovereign immunity and the anti-commandeering doctrine. In the case of non-self executing treaties that raise Article I, Section 8, Tenth Amendment or Eleventh Amendment sovereign immunity concerns, Bradley does

27. Historical textualism seeks to "find the closest approximation (as limited by factors such as the lapse of time, shifting background assumption, and imperfect historical records) of how the founding generation in America understood the document produced by the Constitutional Convention in 1787 (and, as relevant, how its Amendments were understood at the time they were adopted)." Michael D. Ramsey, Missouri v. Holland *and Historical Textualism*, 73 MO. L. REV. 969, 970 (2008). Ramsey's methodology is explained fully in his book applying historical textualism to the full range of foreign relations constitutional questions. *See* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS (2007).

28. Ramsey, *supra* note 27, at 970.

29. *Id.* at 996-1004.

30. Carlos Manuel Vázquez, Missouri v. Holland*'s Second Holding*, 73 MO. L. REV. 939, 939 (2008).

31. Louis Henkin is frequently cited as the scholar most associated with this "nationalist" conception. *See* HENKIN, *supra* note 3.

not believe Congress has the power to implement such provisions: The legislation would have to be undertaken by the states.[32]

Professor Nicholas Quinn Rosenkranz has argued on textual and structural grounds that *Holland* was incorrectly decided because Congress lacks the authority to legislate beyond the enumerated powers, and that the Necessary and Proper Clause only empowers Congress to pass laws relating to the "making of" (*i.e.*, negotiation, drafting) treaties, not implementing substantive provisions of treaties.[33] Under this view, the president has the power to make self-executing treaties beyond the enumerated powers of Article I, Section 8, but does not have the power to make non-self-executing treaties – as Congress would never have the power to execute those treaties whose subjects are beyond the enumerated powers.[34] Rosenkranz concludes from this interpretation not that implementation of non-self executing treaties be left to the states, but rather that implementation take place through one of two ways: (1) implementing treaties through constitutional amendment; or (2) requiring that all treaties be self-executing.[35]

Vázquez finds the *Holland* conclusion that the Article II power to "make" treaties is not limited by the enumerated powers of Article I, Section 8,[36] is strongly supported by both the text and structure of the Constitution, as well as the kinds of treaty practice familiar to the founders.[37] Moreover, Vázquez agrees that globalization has brought with it an expansion of the subject matter of treaties – particularly in the area of human rights – that erases meaningful limitations on the subject matter of treaties to those issues of "national" or "international" concern or that are "appropriate for international negotiation."[38] But Vázquez also accepts Bradley's proposition that Congress may indeed be limited in its ability to implement treaties by state sovereign immunity and anti-commandeering concerns.[39] The central question, however, is what domestic legal effect to give treaties made on subjects beyond those enumerated under Article I, Section 8?

To answer this question, Vázquez returns to the Supremacy Clause, which designates "all Treaties" the "supreme Law of the Land" and thus instructs courts to give treaties effect. The text of the Clause and the history of

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32. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 456-61 (1998).

33. Rosenkranz, *supra* note 26.

34. *Id.* at 1928.

34. *Id.* at 1938.

36. Vázquez, *supra* note 30, at 943-44.

37. *Id.* at 944-45 (discussing treaties during the period of the Articles of Confederation extending notions of state responsibility and consular protection, which preempted the ability of states to deny certain rights to aliens, even on matters of local concern).

38. *Id.* at 942-43.

39. *Id.* at 943 (citing Vázquez, *Eleventh Amendment*, *supra* note 25, at 726-33; Vázquez, Breard, Printz, *supra* note 25).

its adoption support the view that the founders sought to avoid leaving treaty compliance to the states, and further created a presumption that made valid executor treaties binding law on the states – a reversal of the non-self-execution rule in place in Great Britain. It is, Vázquez concludes, inconsistent with the Supremacy Clause to find that "treaties validly made" can have no effect as domestic law.[40]

In the case of treaties that might be deemed non-self-executing – including, most importantly, those treaties that explicitly stipulate that the parties will undertake a "future legislative act,"[41] – an act of Congress is required to create binding law on the states. Bradley's suggestion that only the states give effect to such treaties, Vázquez notes, would magnify rather than resolve "the problem posed by the recognition of non-self-executing treaties."[42] Under that approach, "treaties would lack domestic legal force if they address matters outside Congress' legislative power, and Congress would lack the power to enforce such treaties pursuant to the Necessary and Proper Clause. Indeed, treaties would require implementation *in precisely the circumstances in which Congress would lack the power to implement them*" and thus "reproduce the 'imbecilic' aspect of the Articles of Confederation that led the Founders to scrap the Articles in favor of an entirely new Constitution."[43] Vázquez concludes that "[t]he Founders would have been much more likely to have denied the treaty-makers the power to conclude treaties on matters beyond Article I than to allow them to conclude such treaties but rely on the States to implement them."[44] The approach suggested by Rosenkranz faces the same problem: It would leave at least compliance with some valid treaties entirely to the states. At the same time, Rosenkranz's approach may be less protective of states' rights than the traditional approach, requiring two-thirds advice and consent of the Senate, where states are equally represented.

Vázquez pinpoints what he calls "The Real Federalism Problem Posed by *Missouri v. Holland*," which is the problem that arises when the treaty power is used with the *intent* of circumventing the limits of Congress' legislative powers. "If Congress has the power to pass statues to implement *all* non-self-executing treaties, then, given the existence of these treaties, Congress' legislative power is already effectively plenary."[45] Vázquez's solution is to limit the holding of *Missouri v. Holland*, or to recognize that Congress has the power to implement treaties beyond Article I so long as the treaty imposes a specific obligation on the United States.[46] If a treaty is aspirational, as, for example, the UN Charter's invocation to "promote human rights," Congress

40. *Id.* at 946.

41. *Id.* at 949 (discussing Foster v. Neilson, 27 U.S. (2 Pet.) 253 (1829)).

42. *Id.* at 950.

43. *Id.* at 950-51 (emphasis added) (quoting THE FEDERALIST NO. 15 (Alexander Hamilton)).

44. *Id.* at 951.

45. *Id.* at 964 (emphasis added).

46. *Id.* at 965.

should be deemed to lack the power to implement those provisions.[47] It was precisely the broadly aspirational nature of the international human rights regime that prompted the concerns leading to the Bricker Amendment, and Vázquez argues that his approach – restricting Congress' power to implement treaties to those that are clear and obligatory – "fits well with the Founders' concerns" that treaty makers had the power to conclude self-executing treaties, and Congress had the power to implement non-self-executing treaties. The founders wanted to avoid "the foreign relations problems that would be produced by treaty violations" while gaining the benefit of "a reputation for treaty compliance."[48] Non-compliance will only be implicated where treaties impose specific obligations.[49] By contrast, if a treaty is aspirational, then precise violations are impossible to identify.[50]

Professor Edward Swaine focuses on the context – both geographical and political – in which *Missouri v. Holland* arose as a way of understanding "where *Missouri v. Holland* came from, and where it went afterwards" and of undermining both the "contemporary criticisms and defenses of the Court's decision."[51] Swaine takes Holmes to task for stating that "'[i]f the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.'"[52] Given the controversy surrounding the case at the time, as well as the raft of commentary on the case (including the discussions in this symposium), Swaine notes that Justice Holmes "was quite wrong" and possibly disingenuous since "the corresponding unshackling of Congress' implementation power – and its controversial consequences for any notion of a limited national government – must have been apparent to Holmes."[53] Swaine's examination of the briefs of the parties reveals that Holmes accepted the broad construction of the treaty power posited by the United States in the case, a construction that elided the distinction between self-executing and non-self-executing treaties. The contemporary debate between restrictive understandings of congressional power to implement treaties revolves around post-*Holland* contemporary understandings of self-execution.

Examining the text of the treaty between the United States and Canada, Swaine argues it is possible that "the Migratory Bird Treaty was not non-self-executing at all."[54] And if it is possible that at least part of the convention was self-executing, the question of the scope of what was "necessary and proper" for Congress to implement necessarily changes. Swaine argues that

47. *Id.*
48. *Id.*
49. *Id.* at 965-66.
50. *Id.*
51. Edward T. Swaine, *Putting* Missouri v. Holland *on the Map*, 73 MO. L. REV. 1007, 1008 (2008).
52. *Id.* at 1010 (quoting Missouri v. Holland, 252 U.S. 416, 432 (1920)).
53. *Id.*
54. *Id.* at 1020 & n.72.

an examination of the facts surrounding *Holland* reveals that the debate was not, perhaps, centered on concerns that the United States fulfill its treaty obligations – particularly in light of the collapse of the Inland Fisheries Treaty, the content of the congressional debate over the 1913 Act and lack of executive branch enthusiasm for its enforcement, and grounds to doubt whether the 1918 Act would be passed and later upheld.[55] Further, Swaine finds little evidence that the founders understood that the United States would engage in a lot of non-self-executing treaty making. Thus, *Holland* can be seen as "shutting the barn door after the horse (or duck) was gone."[56]

Professor Peter Spiro argues that, for all the academic discussion it has generated, *Missouri v. Holland* "has never been put to work."[57] Surveying the behavior of Congress and the executive branch since the time of *Holland* – with particular attention to the debates over the failed Bricker Amendment – Spiro concludes that the holding "appears never to have been internalized by the political branches" which acted "for something approaching a century, as if they didn't have the authorities ascribed to them by the Court."[58] Despite, or perhaps because of, the "dangerous potentialities" ascribed to *Holland* by supporters of states' rights, the "loaded gun" created by *Holland* was never deployed. To Spiro, any account of the Treaty Power post-*Holland* must take account of this practice, which itself "established a constitutional counter-norm, under which the Treaty Power adds nothing to other authorities of the national government."[59] Rather than aggrandize national power, the political branches have agreed to attach federalism limitations on those few international human rights treaties the United States has adopted, a strategy that Spiro views as on shaky ground going forward, as new multilateral treaties take a more aggressive stance toward reservations, whether based on federalism grounds or otherwise. Moreover, as "globalization is massaging international law into the sinews of American political culture," certain international regulation may begin to appear less threatening to American federalism.

IV. STATES AND LOCALITIES AS INTERNATIONAL LAW MAKERS

If, as Spiro points out, the national government has been reluctant to take up the power handed to it by *Missouri v. Holland*, state and local governments appear to have been much less reluctant to step in and engage directly in transnational rule-making. Professor Julian Ku's essay summarizes developments in private international law to find that state law "can . . . effectively replace federal implementing legislation or even federal acquiescence

55. *Id.* at 1027.

56. *Id.*

57. Peter J. Spiro, *Resurrecting* Missouri v. Holland, 73 MO. L. REV. 1029, 1029 (2008).

58. *Id.* at 1030.

59. *Id.*

to the treaty itself" with the effect that states "become the primary governmental actors in the integration of . . . private international law norms."[60] One of the vehicles for this integration is the National Conference on Commissioners for Uniform State Law (NCCUSL), through which states have adopted uniform rules – as with the Washington Convention on the International Recognition of Wills[61] – that reflect international treaty standards even where the national government has not formally adopted the treaty. [62] Leaving private international law to the states reflects "a strong traditional allocation of federal-state powers" and "a stickiness of state control over certain areas of law" even though that allocation may not be constitutionally mandated.[63] Ku concludes that the "story of the states and private international law treaties reminds us that nationalization is not always necessary, even when it is constitutionally authorized."[64]

Professor Paul Stephan explores in more detail the question of how, and through which actors, international commitments of the United States are met. His starting point is the assumption, as articulated by Justice Joseph Story in *Swift v. Tyson*, that local interests will more often than not act opportunistically against outside interests. Rebutting that assumption, Stephan argues, "[l]ocal officials do not always need federal supervision to promote acts that redound to the nation's benefit," a point which Stephan declares "fundamental to any inquiry into the role federalism plays in international law."[65] Indeed, many scholars have made structural and functionalist arguments that, for example, federal judges are to be preferred over state judges in determining "international matters that may embroil the nation in foreign policy disputes."[66] Stephan argues to the contrary that, "if customary international law can emerge among nation-states without the supervision of an international enforcer, why insist that the U.S. states always must submit to the nationalist discipline of the federal courts?"[67] He demonstrates that because local regulation is subject to competition from other jurisdictions, it is subject to market forces that tend to incentivize local law makers to take into account the interests of outsiders, who, in a market-based analysis, are the "consumers" of the regulations. Stephan's argument that national supervision is not a necessary prerequisite to compliance with international obligations

60. Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 MO. L. REV. 1063, 1066 (2008).

61. S. TREATY DOC. NO. 99-29.

62. Ku, *supra* note 60, at 1067-68.

63. *Id.* at 1068-69.

64. *Id.* at 1069.

65. Paul B. Stephan, *What Story Got Wrong – Federalism, Localist Opportunism and International Law*, 73 MO. L. REV. 1041, 1042 (2008).

66. Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1849 (1998).

67. Stephan, *supra* note 65, at 1044.

finds support in the examples of the uniformity of negotiable instrument law prior to *Swift v. Tyson*, the Hague Child Support Convention,[68] and the UNCITRAL Electronic Commerce Convention.[69] For some types of international obligations, he argues, "federal override is neither necessary nor a sufficient mechanism for guaranteeing strict compliance with international law,"[70] as frequent non-compliance by local law enforcement to meet the obligations of the Vienna Convention on Consular Relations[71] demonstrates. And uniformity – as Ku also demonstrates – can often be obtained through bottom-up processes of law-making that begin with market participants (in the case of negotiable instruments, the banking industry) who recognize the need for transparency and cooperation. Rather than view action by state and local actors as an obstacle to international law making, Stephan argues that the presence of non-national actors leaves the United States "free to explore a wide range of options for implementing the obligations that it undertakes."[72]

Viewing the constitutional foreign affairs framework as creating a tension between the federal government and states that leads to "squaring off over states' rights limitations on the federal government's treaty-making power,"[73] Professor Duncan Hollis returns to text and history to examine whether U.S. state participation in international agreements and other international regulatory measures is constitutional. Where states act to make international law through agreements with foreign nations or their subsidiary parts, they risk running afoul of the Compact Clause: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power."[74] States are further prohibited from entering into "any Treaty, Alliance, or Confederation."[75] Whether a state has, in entering into regulatory arrangements or agreements with other nation states, violated the Constitution, appears from the text of Article I to be a question addressed to Congress.[76] Hollis illustrates that practice has proved to be quite different – including in the case of Missouri's Memorandum of Understanding with the Canadian Province of Manitoba over the Missouri River watershed.[77] The Executive branch, not Congress, has played the lead

68. Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=131 (last visited Oct. 10, 2008).

69. Convention on the Use of Electronic Communications in International Contracts, G.A. Res. 60/21, U.N. Doc. A/RES/60/21 (Dec. 9, 2005).

70. Stephan, *supra* note 65, at 1056.

71. Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

72. Stephan, *supra* note 65, at 1061.

73. Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1071 2008).

74. U.S. CONST. art. I, § 10, cl. 3.

75. U.S. CONST. art. I, § 10, cl. 1.

76. U.S. CONST. art. I, § 10, cl. 3.

77. Hollis, *supra* note 73, at 1100.

role in determining "the appropriateness of state interactions with foreign governments."[78] Hollis concludes that "Congress has done little to agree to foreign compacts, little to object to them, and little to even monitor what U.S. states actually do abroad" because, as a formal matter, Congress has been left in the dark about state activities.[79]

Moreover, in the area of U.S. state compacts with foreign states, the Supreme Court has spoken only once. And although the Court applied a stricter view of the prohibition of foreign state compacts than interstate compacts (where it generally permits any commitments that are political, rather than legal),[80] the Executive branch has assumed that the Court would be likely to loosen its formulation along the lines of its interstate jurisprudence. Thus, states have not sent their "political," "non-binding" compacts with foreign states or international organizations to Congress, and Congress (and the Executive) have assumed the Court will play an appropriate role in policing the boundaries of these agreements. While the Executive should have some role in overseeing state compacts with foreign governments, Hollis views it as insufficient on informational, functional and structural grounds. He recommends a more sustained inquiry into foreign compacts, including Congress' role, as a means to accomplishing the goal of protecting the unity of the federal government and its supremacy in the field of foreign affairs.[81]

V. FEDERALISM AND THE INTERNATIONAL MIGRATION OF NORMS: PERSPECTIVES FROM INTERSYSTEMIC GOVERNANCE, LEGAL PLURALISM AND RATIONAL CHOICE

Professor Judith Resnik's keynote contribution to the Symposium is a *tour d'horizon* of the "Internationalism of American Federalism." Her work here (and elsewhere)[82] explores the ways in which American federalism

78. *Id.* at 1074.

79. *Id.* at 1083.

80. *Id.* at 1084-91. Noting that the Court has narrowed the Compacts Clause in the interstate context such that "congressional consent [is] required only for interstate agreements that 'encroach upon or interfere with the just supremacy of the United States,'" and that "agreements that do not legally bind states, by definition, pose no such threat." *Id.* at 1088 (quoting Northeast Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175-76 (1985)).

81. *Id.* at 1074.

82. Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereigntism of the Nation-State*, 6 INT'L J. CONST. L. 33 (2008); Judith Resnik, *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAS)*, 50 ARIZ. L. REV. 709 (2008); Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006);

permits local and state entities to engage transnational legal and political processes, while at the same time raises notes of caution about the implications of how the "foreign" or "international" becomes the "domestic" through these multiple ports of engagement. Indeed, the history of political and judicial efforts to apply foreign or international norms at the local, state and national levels demonstrates the dangers of "essentialism" in attempting to distinguish, as the *Holland* case did, between subject matter that is "national" in nature and that which is not.[83] What is at stake in this labeling battle are assertions of power and process, which are at the center of contestations over the nature of U.S. federalism and democratic governance. Thus, where opponents of the Kyoto Protocol (including President Bush) expressed concern about delegating "national" authority to an international institution with power to enforce compliance with an international standard, many local and state governments embraced the emissions targets under that treaty and took them on as their own regulations. As Resnik notes, "many of today's challenges have local, national and global dimensions," and these "translocal-transnational" efforts at regulation are here to stay. To that extent, the so-called "sovereigntist" critics of international legal regulation are correct that outside law-making affects domestic law-making. But the processes that result from these outside influences are not, in Resnik's view, undemocratic, but reflect majoritarian preferences within various levels of governance. Rather than pit a nationalist conception of the treaty power against federalism concerns, Resnik proposes that "federalist commitments . . . be harnessed in service of treaties by considering how to bring such local action to the fore and into the frameworks of transnational provisions."[84]

Professor Robert Ahdieh's contribution picks up on the utility of embracing the structures of federalism to complement traditional understandings of national foreign affairs power.[85] Ahdieh posits that two frequent claims of foreign affairs constitutionalism and international law – that a coherent foreign affairs regime requires a unitary voice, and that international law silences sub-national interests – are wrong. By examining processes of coordination – "internally directed" coordination and "externally directed" coordination – Ahdieh locates spaces where international law can be an effective vehicle for coordination of national policy (or of an expression of national impulse, as it was in the statute at issue in *Holland*) and also where local or state law can be part of broader transnational coordination around a norm. As the pendulum of American political and jurisprudential understandings of dual-federalism swings away from preferences for national control over

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Judith Resnik, *Afterword: Federalism's Options*, 14 YALE L. & POL'Y REV. 465 (1996).

83. Judith Resnik, *The Internationalism of American Federalism: Missouri* and *Holland*, 73 MO. L. REV. 1105, 1121 (2008).

84. *Id.* at 1127.

85. Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 MO. L. REV. 1185, 1209 (2008).

certain domestic regulatory areas (including, importantly, in areas in which the United States has rejected active international regulation), the sub-national necessarily rises as a locus of coordination for international policy making. The redundancy that international regimes may bring to regulation of a particular subject is therefore something to be embraced by sub-national authorities.[86] The danger of chaos that a traditional nationalist account of foreign affairs powers fears from participation by a multiplicity of sub-national actors is, by this account, overstated. "In place of familiar, centralized patterns of coordination, the coordination dynamic at work in the engagement of sub-national authorities with foreign affairs and international law is *horizontal* in nature."[87] Adopting these trends to the frame of "intersystemic governance," Ahdieh concludes that "[a]s such horizontal coordination takes hold, a new dynamic of intersystemic governance might well be expected to emerge, in which sub-national, national, and international institutions enjoy overlapping jurisdiction, and face a regulatory interdependence likely to encourage creative new modes of law and regulation."[88]

Professor Paul Schiff Berman joins Resnik and Ahdieh in taking a broad view of the overlap and redundancy between the local, state, national and international regulation.[89] For Berman, legal pluralism, which "start[s] from the premise that people belong to (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups,"[90] is not only "an accurate description of the world we live in,"[91] but also "normatively desirable."[92] Berman recognizes it is a "controversial move,"[93] but places pluralism in contradistinction to sovereigntist approaches to international law that are centered on essentialist notions of both power and law. In the context of jurisdiction, pluralism creates spaces "for dialogue, multiple voices, and creative innovation,"[94] which are not available in either a strict territorial or universal approach. "[I]n a pluralism context . . . the key questions involve the normative commitments of a community and the interactions among normative orders that give rise to such commitments, not their formal status."[95]

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86. *Id.* at 1236-37.

87. *Id.* at 1214-15.

88. *Id.* at 1245.

89. Paul Schiff Berman, *Federalism and International Law Through the Lens of Legal Pluralism*, 73 MO. L. REV. 1149, 1155 (2008).

90. *Id.* at 1152.

91. *Id.* at 1151.

92. *Id.*

93. *Id.* My own critique of this approach is found in my commentary, *Federalism and Horizontality in International Human Rights*, 73 MO. L. REV. 1265 (2008).

94. Berman, *supra* note 89, at 1175.

95. *Id.* at 1158.

Professor Ilya Somin takes a different perspective on the regulatory spaces created by jurisdictions.[96] In *Tiebout Goes Global: International Migration as a Tool for Voting with Your Feet*, Somin examines the potential benefits of opening international migration to permit individuals to select political jurisdictions – an expression of international "foot voting." In a world with quite disparate political systems and levels of protection of individual liberties and political participatory rights, Somin argues that "free international migration . . . provides a much greater potential range of options for migrants" than the migration within domestic jurisdictions permitted within structural federalism.[97] The granting of migratory "exit options" would satisfy diverse policy preferences, promote inter-jurisdictional competition, and provide protection for oppressed minorities. Somin criticizes current international law for granting the corresponding "entry rights" only to those who qualify for political asylum, which keeps out those who "flee[] poverty that is in large part caused by the flawed policies of the governments they live under."[98] Somin favors instead a broader international right to free migration.

VI. CONCLUSION

The diverse approaches to international law and U.S. foreign affairs scholarship are evident from the variety of perspectives these contributions bring to the subject of federalism and international law. The history and development of U.S. constitutional doctrine remain at the center of any discussion of the exercise of governmental power within the United States, even where the exercise of that power intersects with legal and political engagements of the United States internationally. Correspondingly, traditional international law doctrines are central to understanding the nature of international rights and obligations. But neither traditional constitutional doctrine nor traditional international law doctrine holds exclusive claim to an enlightened understanding of the globalization of law. Doctrinal discussions are necessarily complemented by alternative approaches drawing from, for example, legal realism, law and society, transnational legal process and legal pluralism. Legal doctrine is further complemented by insights from other disciplines, including economics, international relations, and sociology. This spirit of methodological diversity – in which each of us learns from the approaches and perspectives of others – is present throughout this symposium issue. And it is a spirit that we hope continues to enrich the debates within and between American constitutional law and international law.

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96. Ilya Somin, *Tiebout Goes Global: International Migration as a Tool for Voting with Your Feet*, 73 MO. L. REV. 1247, 1248 (2008).

97. *Id.*

98. *Id.* at 1261.