AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Powers of the National Government/Treaty Power

**Hearings on GATT Implementing Legislation** (1994)[[1]](#footnote-1)

*The General Agreement on Tariffs and Trade (GATT) was the primary multilateral trade agreement that defined trade relations for much of the world in the postwar period. It was renegotiated and modified in several rounds from the 1940s through the 1980s and had the effect of dramatically reducing tariff barriers between participating countries. The regime of free trade and economic globalization that was launched by the GATT began with some two dozen countries in the immediate aftermath of the World War II, but ultimately included over a hundred countries.*

*The Uruguay Round Agreement in 1994 effectively replaced the GATT with the World Trade Organization (WTO). The WTO is an intergovernmental organization empowered to regulate international trade with its own framework for dispute resolution among member nations. The changes launched by the Uruguay Round raised questions about whether it required a new approach to its adoption by the United States in order to be constitutionally valid. What, if anything, makes an international agreement sufficiently distinctive that it required ratification as a treaty rather than adoption by an implementing statute?*

*In 1994, Congress passed the Uruguay Round Agreements Act which gave legal force to the agreement in the United States and brought the United States into the World Trade Organization. Statutes require a simple majority vote in both chambers of Congress, whereas treaties require a two-thirds vote in the Senate alone. Ultimately, the Uruguay Round Agreements Act was approved as statute with votes in both chambers, but the margin of approval in the Senate was more than the two-thirds that would have been needed for treaty ratification.*

PROFESSOR LAURENCE TRIBE. . . . [I]n the contemplation of the Constitution treaties are a distinct category, and to recognize further that in the eyes of the Constitution a treat is an international arrangement in which we do more than simply strike a one-time bargain with a foreign country, as in the Iran hostage settlement, for example, and more than simply help to set up a multinational agency like the IMF or the World Bank, but in which instead we relinquish a significant aspect of our ongoing self-determination to another nation or group of nations, as in a mutual defense pact or in an agreement to conform our future lawmaking activities to an international body's mandates.

The leading Supreme Court decision on treaties, *Missouri v. Holland,* made clear in 1920 that the treaty power and Congress' legislativepower under article I are not coextensive. In that case, the

Court held that the Constitution permitted the President and Senate in a treaty with Canada to accomplish an alteration in the then-existing relationship between Congress' lawmaking powers and the reserved rights of the States; an alteration that the Court held could not have been accomplished by the President and a mere majority of the House and Senate. So, it is that article II, section 2, clause 2, the treaty clause, is not just an option that the President in a bicameral majority may circumvent at will.

There is a further textual argument for this view. The same paragraph of the Constitution that contains the treaty clause also provides for the advice and consent of the Senate for certain Federal appointments. Now I submit that no one imagines that the Senate would give up its advice and consent power for Supreme Court Justices or Cabinet Members just because an act of Congress was bold enough to provide an alternative mode of confirmation under, for example the necessary and proper clause.

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To circumvent the treaty clause when approving in particular the WTO agreement, the agreement creating a World Trade Organization pursuant to the Uruguay Round, would in my view require nothing less than arguing the treaty clause into oblivion because the undeniable fact is that the WTO agreement would significantly affect the lawmaking sovereignty both of the United States as a national polity, and of the 50 sovereign States that comprise the United States.

The WTO agreement unambiguously says in article 16, paragraph 4, and I quote, "Each member shall ensure the conformity of its laws, regulations, and administrative procedures with its obligations as provided in the GATT."

This seems to me as unmistakable an international commitment as I can imagine henceforth to make and enforce all our laws, Federal, State, and local not in accord with our free choice but in subordination to a newly supreme world order.

Now, please do not get me wrong. Unlike some people, I do not think that is necessarily a bad thing. I do think it necessarily makes the WTO agreement a treaty.

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When a Federal rather than State law is declared illegal by the WTO, is the U.S. Congress that retains final word as to the law's domestic status. Congress may either revise or repeal the law, or keep the law in place and accept trade sanctions which can continue as long as the offending law remains in effect. In other words, even if the law is not repealed or preempted by Congress, overturned by this body, the United States is not home free; it suffers sanctions. But it is up to Congress.

On the other hand, it is the executive branch not Congress that determines the fate of State laws found to be illegal under GATT. If a State chooses not to alter a measure found by the WTO to be GATT-illegal, the U.S. Trade Representative may choose, after consulting with that State, to bring an action against the State in Federal court even if Congress has chosen to allow the State's measure to remain in effect, and chosen to accept trade sanctions on behalf of the entire Nation rather than preempt the offending State law.

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I do not pretend to offer the committee an airtight set of criteria for defining the boundary between treaties and other international agreements. But I think it is plain that whatever the exact contours of that category might be, an agreement warrants the high level of consensus mandated by the treaty clause if it No. 1, creates a governing entity outside the United States with legal powers capable of directly affecting the lives of all of our citizens by affecting State and Federal lawmaking efforts.

No. 2 provides for ongoing, and not simply temporary, cooperation *and* reciprocal commitments among over 120 nations.

No. 3, accepts as lawful the realistic possibility of the United States being subjected to substantial international sanctions against which the United States is not allowed to retaliate without placing itself in violation of the agreement.

And No. 4, for all these reasons, contemplates wide-reaching effects on the legal, economic, and political life of every State.

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PROFESSOR BRUCE ACKERMAN . . . . Before we get to article II and the powers of the Senate prescribed therein the eye begins with Article I of the Constitution which provides fundamental grants to the Congress, including an express authorization to regulate commerce with foreign nations.

If both Houses find that approval of the World Trade Organization is a necessary and proper way of exercising these article I powers, the congressional decision merits complete respect under the most fundamental principles announced long ago by Chief Justice Marshall in *McCulloch v. Maryland* (1819).

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The crucial point is to recognize both article I, and its commerce power, and article II for what they are--great and independent grants of power, each of which suffices to justify the creation of international obligations.

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Let me turn first to the precedents. This is not the first time that an agreement like the World Trade Organization has seriously been considered by the United States. Both President Truman and President Eisenhower made similar efforts to displace GATT with a more substantial organization to govern international trade.

On both occasions, Presidents Truman and Eisenhower announced their intention to submit these agreements as congressional-Executive agreements and not as treaties.

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So far as the Constitution is concerned, the Clinton administration is not breaking new ground in submitting the WTO for consideration as a congressional-Executive agreement. It is simply following the same course marked out by Presidents Truman and Eisenhower.

More generally, the modern Senate has cooperated with the

House in invoking its article I powers on a wide front over the last 50 years. Congressional-Executive agreements have served us well on a broad range of issues from Bretton Woods to SALT I.

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CHAIRMAN ERNEST HOLLINGS (Democrat, South Carolina). . . . It is domestic lives that are being affected here, because commerce and trade now has developed into nontariff trade barriers, rather than just tariff barriers.

We have got child labor involved here, we have got worker's rights involved, we have got cartels involved, keiretsu. All of these things are the subsets of international trade, not just a boatload of stuff dropped on a dock back 200-and-some years ago at the time of the Framers of the Constitution.

It is more than commerce; it affects all the lives and affects the States in their findings like proposition 65 in California, regarding pesticide labeling, which could be subject to a GATT challenge.

We know from the European Commission, we know from Japan, that they find section 301 violates the GATT. We are committing to change our laws or face the sanctions if we do not follow through on the commitment. Then that to me is more than just article I and regulation of commerce.

If anything has ever reached the treaty level, let us put it that way that affects all the lives and every phase of life and law, it would be this Uruguay Round, it seems to me.

ACKERMAN. Well, I agree these are serious, substantive concerns, but as a constitutional lawyer, I have to think of commerce as a general idea that embraces both domestic and interstate commerce and foreign commerce. Think of all the things that we consider commerce for purposes of article I. The civil rights laws are justified as regulations of commerce. The Environmental Protection

Agency is justified as a regulation of commerce. It is much easier to say the World Trade Organization is fundamentally concerned with the regulation of commerce than to reach the same conclusion for the EPA.

What else is the WTO concerned with if not commerce? It might be a bad policy, a bad way of regulating commerce, but if it is not regulating commerce, I wonder what would qualify?

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SENATOR TED STEVENS (Republican, Alaska). . . . Professor Ackerman, having read your comments and your letter to the President and listened to you this morning, if you are correct, is there any document that the President must-must send us as a treaty?

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ACKERMAN. Any document that in your judgment does not involve the exercise of the delegated powers to Congress under article I is such a document.

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TRIBE. . . . What really has to be submitted as a treaty, [Professor Ackerman] is asked. Well, there is a kind of functional answer, if you can possibly squeeze it into any of the pigeonholes in article I-and I have yet to see a pigeon that will not fit into one of those holes-then, if you can fit into one of those pigeonholes, the President has no choice. The fact is that at the time of *Missouri v. Holland* in 1920-I do not know what kinds of birds were flying between United States and Canada, but they were not pigeons-but there was a notion that article I did not extend to migratory birds, and therefore a treaty was entered with Canada that expanded under the necessary and proper clause the implementing power of the U.S. Congress. But it was never suggested in that case, or in any other, that the treaty clause suddenly evaporates as a source of protection just because we happen to be living in an era when just about anything can be called commerce.

The Supreme Court, for instance, has a case before it now involving an interesting attempt at legislating gun control. It is a law that says, I think, that within 1,000 feet of a school you cannot have a gun, and it is being defended under the commerce clause.

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This one is quite a stretch. Now, I take Professor Ackerman's position to be that if, and only if, the Supreme Court of the United States says, "Oh, well, there really are limits to the commerce clause; you cannot pretend to be using the commerce clause when you are saying you cannot have a gun within 1,000 feet of a school."

If the Court says that, then the President would have to find some country with which to make a treaty about guns, and then you could pass the law. I think that gets the whole constitutional structure inside out and upside down.

That is not what the treaty clause is about. It is about significant limitations on sovereignty. . . .

ACKERMAN. Professor Tribe is missing the main point, first, that the article I powers are independent of article II powers. It certainly is the case that if the Supreme Court decides that *the* Safe Schools Act is unconstitutional under the commerce clause, then the only way that could be addressed would be through a treaty, and I would agree that the use of a treaty in that context would also be improper.

The second point is that Professor Tribe is not correct in saying whenever the President calls something an agreement, then the Senate is bound to go along. To the contrary, the Senate must make, and has in this case made, an independent judgment as to the balance of advantages.

There are pros and cons on both the article I side and on the article II side. In this case, I think, the balance of advantages decisively tips in favor of article I. The Senate was right in so holding when it went along and passed this fast track procedure for the WTO. But this is a judgment that not only the President but the Senate has and should make.

It is very dangerous, however, to lead an assault on the expansive conception of interstate and foreign commerce that has been the foundation of much of our legislation. We cannot afford to be transfixed by this particular issue, however important the WTO may be. The Environmental Protection Agency is also justified on the ground that it is regulating commerce. There is no other ground.

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1. Excerpt taken from Senate Commerce Committee*, Hearings on GATT Implementing Legislation,* 103rd Cong., 2nd Sess. (November 14, 1994). [↑](#footnote-ref-1)