"[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters."

Missouri v. Holland

252 U.S. 416, 40 S.Ct. 382, 64 L.Ed. 641 (1920).

As a conservation measure, Congress in 1913 enacted a law limiting the season during which migratory birds could be shot and the number of birds any hunter could kill. Today this sort of federal law would seem unexceptional, but it was unusual for the time. During this period, the Supreme Court had been largely, though not altogether consistently, following a doctrine known as "dual federalism": State and nation were co-equals, each supreme within its own sphere; thus all national powers, even those specifically delegated, had to be interpreted against the Tenth Amendment's reservation of authority to the states. More specifically, in Geer v. Connecticut (1896) the Court had upheld a state law regulating hunting of wild game, ruling that such power had inhered in colonial governments and had been passed on to the states upon independence, "insofar as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution." Following *Geer* a federal district judge held the 1913 act unconstitutional, and the Department of Justice was unwilling to press the case before the Supreme Court.[1]

Even the act's proponents had had some doubts about constitutionality, and Senator Elihu Root had suggested that the United States first sign a treaty protecting migratory birds. Shortly before the district court's decision, the Senate passed a resolution urging the administration to negotiate just such an agreement. The district court's decision made a treaty appear a more prudent route, and Woodrow Wilson's diplomats began several years of negotiations with Britain, acting for Canada. The final treaty went into effect in 1916. Citing the value of migratory birds, including wild ducks, as both a direct source of food and effective in keeping down insects that attacked crops, Congress then passed a new statute to enforce the treaty by providing for, among other things, closed seasons on hunting.

Lobbied by hunters and concerned about state sovereignty, some state officials prepared to resist enforcement. In 1919, Missouri's legislature directed the state attorney general to "investigate the matter of enjoining the Federal game inspectors ... from further interfering with or molesting any or all of our citizens in the exercise of their privileges" to hunt birds. Frank W. McAllister, Missouri's attorney general, added a note of personal drama. He was an avid duck hunter who opposed a long closed season on his sport. After being caught poaching by Ray Holland, the U.S. game warden, McAllister tried to get a state court to enjoin enforcement of the

---

[1]The "facts" offered in the U.S. Reports are sparse. In this headnote we summarize the account of Clement E. Vose, "State Against Nation: The Conservation Case of *Missouri v. Holland," Prologue* (Winter, 1984), p. 233.

federal law, but local officials persuaded him to challenge the act's constitutionality in a U.S. district court. That tribunal sustained the statute, and McAllister appealed to the U.S. Supreme Court, arguing:

> If the Act of Congress now in question would have been unconstitutional when the Constitution and the first [ten] amendments were framed and ratified, it is unconstitutional now. The Constitution does not change.

Mr. Justice **HOLMES** delivered the opinion of the Court. ...

... [T]he question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the states.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government. ...

It is said that a treaty cannot be valid if it infringes the Constitution; that there are limits, therefore, to the treaty-making power; and that one such limit is that which an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the states had been held bad in [two decisions of] the district court. These decisions were supported by the arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like Geer v. Connecticut [1896] this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases ... were decided rightly or not, they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with, but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. Andrews v. Andrews [1903]. ...

We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with

words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

The State ... founds its claim of exclusive authority upon an assertion of title to migratory birds. ... No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. ...

As most of the laws of the United States are carried out within the States, and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. ...

Here a national interest of very nearly first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. ... We are of the opinion that the treaty and statute must be upheld.

Decree affirmed.

Mr. Justice **VAN DEVANTER** and Mr. Justice **PITNEY** dissent.

Editors' Notes

(1) **Query:** To what extent did Holmes address Missouri's argument about the unchanging nature of the Constitution? What line of reasoning did he use to support his claim that the Court must look to "our whole experience" to interpret the Constitution? What authority, textual or otherwise, did he use to support his conclusion?

(2) In addition to the article by Vose, cited in the headnote, see Charles A. Lofgren,

"*Missouri v. Holland* in Historical Perspective," 1975 *Sup.Ct.Rev.* 77.

(3) Among the justices of his time, Holmes stands out as the most ardent supporter of national supremacy. **Query:** But did his opinion waver between a broad assertion of federal power and a much more particularistic discussion of why federal power is valid under the peculiar circumstances of this case? If so, what could account for this ambivalence?

(4) "We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way," Holmes said here. That statement is less than precise, and the Court has not yet offered much clearer guidance. See, for example, Reid v. Covert (1957), and, more generally, Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed.; New York: Oxford University Press, 1996); and Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990). States-righters have frequently voiced fears about the havoc that power could wreak on federalism, and occasionally civil libertarians have speculated about the peril a treaty could present to the Bill of Rights as a bar to governmental action. During the late 1940s and early 1950s, there was a concerted effort to amend the constitutional document to provide: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of the treaty." In 1954, after a great debate, this so-called Bricker Amendment, named after its principal sponsor Senator John Bricker of Ohio, was decisively defeated in the Senate.

(5) In recent years, the Supreme Court has revitalized the Tenth Amendment. See, e.g., New York v. United States (1992; reprinted below, p. 613), and Printz v. United States (1997; reprinted below, p. 625). This revitalization raises the possibility of the Court reconsidering *Missouri v. Holland* and invalidating provisions of a treaty as infringing upon state sovereignty. For debate about whether federalism is a limit on the power to make treaties, see Curtis A. Bradley, "The Treaty Power and American Federalism," 97 *Mich. L. Rev.* 390 (1998); 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); and Bradley, "The Treaty Power and American Federalism, Part II," 99 *Mich. L. Rev.* 98 (2000).