Federalism and Treaty Interpretation

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I: Introduction

The constitutions of Australia and the United States each contain a legislative power to implement treaty obligations. In Australia s. 51(xxix) of the Constitution grants the Commonwealth Parliament power to legislate "with respect to … external affairs."[1] In the United States, Congressional power inheres in the Necessary and Proper Clause,[2] read with the Treaty[3] and Supremacy Clauses.[4]

The Australian High Court and the US Supreme Court have interpreted these legislative powers broadly. In the United States it has been accepted since 1920 that "there can be no dispute about the validity of [a] statute that implements a valid treaty."[5] The High Court has held that the external affairs power can support legislation (*inter alia*) "reasonably capable of being considered as appropriate and adapted to implementing a treaty"[6] — even where the treaty fails to expressly oblige parties to take legislative action.

Both nations were founded on the principle of "dual federalism,"[7] or "dual sovereignty,"[8] and both Courts have acknowledged that federalism imposes limits, at least on some constitutional powers.[9] However, the extent to which federalism limits the power to implement treaties remains unclear.

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1 *Constitution of Australia*, s. 51(xxix).

2 Granting Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" (*inter alia*) "…all other Powers vested by this Constitution in the Government of the United States … or [any] Officer thereof": *US Constitution*, Article I, § 8, cl. 18.

3 Granting Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution" (*inter alia*) "…all other Powers vested by this Constitution in the Government of the United States … or [any] Officer thereof": *US Constitution*, Article I, § 8, cl. 18.

4 Providing that treaties made "under the Authority of the United States" are "the supreme law of the land." *US Constitution*, Article VI, cl. 2.

5 *Missouri v Holland* 252 US 416 (Holmes J).

6 *Victoria v Commonwealth* (Industrial Relations Act Case) (1996) 187 CLR 416.

7 *Airlines of New South Wales Pty Ltd v New South Wales* (No 2) (1965) 113 CLR 54, 115 (Kitto J).

8 *Printz v United States* (1997) 521 US 898, 918 (Scalia J).

9 *Austin v Commonwealth* (2003) 215 CLR 185, 207 (Gleeson CJ).

Both supreme courts may soon have reason to reconsider the scope of the power to implement treaties. In October 2013, the Supreme Court will hear argument in *Bond v United States*,[10] which concerns a statute purporting to implement a treaty; the petitioner's brief raises several federalism arguments.

In Australia, controversial[11] legislation such as Part IIA of the *Racial Discrimination Act 1975* relies on the Convention on the Elimination of Racial Discrimination for its constitutional basis, but has yet to be tested in the High Court.[12] The exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* also cited the external affairs power as its "main constitutional basis" — and although it was never introduced into the 43rd Parliament, any reform to anti-discrimination law undertaken by future Parliaments is likely to rely on the external affairs power as well.

This article argues that the systems of dual federalism imply two constraints on the power to implement treaties.

First, the *scope* of the power should be limited to the domestic implementation of identified international obligations. The extent to which the Australian "reasonably appropriate and adapted" test imposes such a limit is considered in light of the petitioner's argument in *Bond* (impugning legislation that "go[es] far beyond the scope of the [supporting] treaty").

Second, the power should not allow federal governments to usurp a state's "constitutional powers." Bond's argument on legislation which "introduces on traditional state prerogatives" is examined with reference to the Australian *Melbourne Corporation* doctrine.

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[10] Supreme Court docket number 12-158.

[11] See for example *Eatock v Bolt* [2011] FCA 1103 (imposing civil penalties on a journalist for articles "likely to offend" members on the basis of race).

[12] The Full Court of the Federal Court upheld the constitutionality of Part IIA in *Toben v Jones* (2003) 129 FCR 515.

II: The Scope of the Power: Propriety and Necessity

Introduction to the Australian position

At and prior to Federation, an important common law principle prevailed in England and Australia: a treaty cannot affect the private rights under municipal law of British subjects.[13] That is, treaties are not self-executing[14] — the Commonwealth Parliament must pass implementing legislation, pursuant to s. 51(xxix) or some other head of legislative power,[15] to give them domestic effect. Consequently, the Commonwealth Parliament passed a substantial amount of treaty-implementing legislation[16] before the High Court considered its power to do so in 1936 in *R v Burgess*.[17]

The strict implementation doctrine

Burgess concerned legislation which supported the making of air traffic regulations for the purpose of implementing an international air navigation convention. The legislation itself was upheld, but the Court struck down some of the regulations on the ground that they were "not … regulation[s] for carrying out or giving effect to the convention."[18]

Although the regulations were all concerned generally with the regulation of air traffic within Australia, they fell short of implementing all the obligations contained in the convention in that (*inter alia*):

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[13] *R v Burgess* (1936) 55 CLR 608, 644 (Latham CJ), referring to *Walker v Baird* (1892) AC 491. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224 (Mason J) and authorities there cited.

[14] Compare *Foster v. Neilson* (1829) 27 US (2 Pet.) 253 (holding that a treaty may "operat[e] of itself without the aid of any legislative provision").

[15] Although s. 51(xxix) is the most obvious source of power to implement treaties, it is not the only one. For example, the tax and trade and commerce powers could conceivably be used to implement treaties on those subjects.

[16] In *R v Burgess*, the Court was provided with a list of bilateral agreements "extend[ing] over eighteen pages" of which "[t]he subjects [were] so various that it [was] impossible to classify them": (1935) 55 CLR 608, 640-641 (Latham CJ).

[17] (1936) 55 CLR 608.

[18] (1936) 55 CLR 608, 651 (Latham CJ).

- the convention permitted countries to register only those aircraft be-longing to the country's "nationals," whereas the regulations permitted the Minister to dispense with the requirement;
- the convention required the regulations to apply to all aircraft other than those "exclusively employed in the [Commonwealth] service," whereas the regulations did not apply to State aircraft and author-ised the Minister to grant further exemptions; and
- the convention prescribed the manner in which the competence of li-cenced pilots should be assessed, whereas the regulations permitted the Minister to determine the method of assessment.

Thus *Burgess* was authority for the proposition that a treaty could enlarge the Commonwealth's legislative powers, even when the legislation applied only domestically[19] — but such legislation would be strictly scrutinised for conformance with the supporting treaty, and would be invalid if it *fell short of* implementing the treaty obligations.

In the *Second Airlines Case*[20] the Court considered regulations which went *beyond* the obligations expressed in a treaty. The majority of the regulations at issue provided for the licensing and regulation of aircraft in accordance with a treaty. However, one regulation[21] purported to enable the *operation* of air transport services by the Commonwealth.

Although the Court divided as to whether the regulation was supported by the trade and commerce power, all five judges agreed that it did not implement any obligations in the relevant convention and therefore was not a valid exercise of the external affairs power.[22]

Tasmanian Dams: a broader approach

The *Second Airlines Case* no longer controls the scope of s. 51(xxix) in Australian law. However, it was the source of the following dictum of Barwick CJ which was of enduring significance:

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[19] (1936) 55 CLR 608, 679 (Evatt and McTiernan JJ).

[20] *Airlines of New South Wales Pty Ltd v New South Wales* (No 2) (1965) 113 CLR 54.

[21] Regulation 200B, providing that "an airline licence authorizes the conduct of operations in accordance with the provisions of the licence."

[22] (1965) 113 CLR 54, 84 (Barwick CJ); 106-7 (McTiernan J); 118 (Kitto J); 126 (Taylor J).

> Whilst the choice of the legislative means by which the treaty or convention shall be implemented is for the legislative authority, it is for this Court to determine whether particular provisions, when challenged, are *appropriate and adapted* to that end.[23]

In granting the Parliament the "choice of legislative means" in implementing a treaty, the High Court had so far held only that the legislature was entitled to go beyond "reproduc[ing] the actual terms of the convention."[24] In the 1970s and 80s, the Commonwealth purported to use this choice for the considerably more political purposes of anti-discrimination and environmental legislation.

On 13 October 1966, Australia signed the *International Convention on the Elimination of All Forms of Racial Discrimination*,[25] which provided (*inter alia*) that:

> Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organisation.[26]

Clearly, this left parties to the Convention with considerable latitude as to what was "required by circumstances." It was not until 1975 that the Commonwealth Parliament ratified the Convention by passing the *Racial Discrimination Act*, which made it unlawful to discriminate on the grounds of race and provided that an individual aggrieved by such discrimination could seek damages.

The validity of the *Act* was considered in *Koowarta v Bjelke-Petersen*.[27] However, the parties conceded that "if the external affairs power extends to the Convention, the relevant provisions of the Act … give effect to its provisions."[28] Thus the Court did not consider what it meant

[23] (1965) 113 CLR 54, 86 (Barwick CJ).

[24] *R v Burgess* (1936) 55 CLR 608, 645 (Barwick CJ).

[25] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 178 (Gibbs CJ).

[26] (1982) 153 CLR 168, 179 (Gibbs CJ).

[27] (1982) 153 CLR 168.

[28] (1982) 153 CLR 168, 235 (Mason J).

for legislation to be "appropriate and adapted" to the implementation of a treaty[29] — only whether s. 51(xxix) was limited to the implementation of treaties dealing with certain subject matters.

More detailed consideration was needed after the passage of the *World Heritage Properties Conservation Act* in 1983. That Act rendered it unlawful to clear or build on proclaimed land, and provided that the Governor-General could make a proclamation where the protection of the property was "a matter of international obligation, whether by reason of the Convention [for the Protection of the World Cultural and Natural Heritage] or otherwise."[30]

That Convention was an aspirational document which contained few precisely-defined obligations. Perhaps the closest it came to obliging Australia to enact the World Heritage Properties Conservation Act was Article 5(d), which provided that:

> [E]ach State Party to this Convention shall endeavour, in so far as possible … to take the appropriate legal … measures necessary for the identification, protection, conservation, presentation and rehabilitation of [its cultural and natural] heritage.[31]

It also contained a "federal clause" providing that in federated nations and to the extent that the implementation of the Convention comes under state jurisdiction, the federal government was obliged only to "inform the competent authorities of such States … of the [Convention's] provisions, with its recommendation for their adoption."[32]

While acknowledging that "it is by no means an easy question to answer,"[33] all four majority judges accepted that the Convention contained binding obligations on Australia,[34] and that the Act implemented

[29] Although Murphy J (at 241) and Brennan J (at 261) held that Queensland was right to concede that the Act implemented the Convention.

[30] *World Heritage Properties Conservation Act 1983* (Cth), s. 6(2)(b).

[31] (1983) 158 CLR 1, 81 (Gibbs CJ).

[32] (1983) 158 CLR 1, 87 (Gibbs CJ).

[33] (1983) 158 CLR 1, 132 (Mason J).

[34] (1983) 158 CLR 1, 134, 177-8, 226, 262.

those obligations. In contrast, Gibbs CJ and Wilson J (Dawson J not deciding) held that the Convention gave rise to no relevant obligations.[35]

The majority judges applied the dicta of Barwick CJ and held — without a great deal of discussion — that the Act was appropriate and adapted to the implementation of those obligations.[36]

Importantly, Murphy, Brennan and Deane JJ rejected the strict view of treaty implementation from *R v Burgess*, holding that it is not necessary for "all of [a treaty's] provisions to be implemented," nor must there be "rigid adherence to the terms of the treaty."[37]

The modern test and its application

The *Industrial Relations Act Case*[38] is authority for the modern test for the validity of treaty-implementing legislation:

> To be a law with respect to "external affairs," the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty. Thus, it is for the legislature to choose the means by which it … gives effect to the treaty provided that the means chosen are reasonably capable of being considered appropriate and adapted to that end.[39]

More importantly for present purposes, the Court provided further guidance on what it means for a law to be "reasonably appropriate and adapted" to the implementation of a treaty in circumstances where the existence and content of obligations under the treaty is uncertain. First, the Court imposed requirements on the treaty itself:

> It is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states.[40]

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[35] (1983) 158 CLR 1, 92 (Gibbs J); 198 (Wilson J).

[36] (1983) 158 CLR 1, 139 (Mason J);

[37] (1983) 158 CLR 1, 172 (Murphy J); 234 (Brennan J); 268 (Deane J).

[38] *Victoria v Commonwealth* (1996) 187 CLR 416, 488 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ).

[39] (1996) 187 CLR 416, 487.

[40] (1996) 187 CLR 416, 486.

Second, the Court firmly dispensed with the strict implementation doctrine and imposed a new test for 'deficient' legislation:

> Deficiency in implementation of a supporting Convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention.[41]

The Court went on to apply these tests to various statutory provisions which, the Commonwealth argued, were supported by a number of Convention obligations which themselves varied in specificity.

For example, the Court struck down part of the Act allowing terminated employees to sue on the ground that the termination was "harsh, unjust or unreasonable." The supporting convention required only that an employer must be able to show a valid reason for termination and gave a non-exhaustive list of invalid reasons. Thus the relevant part of the Act "d[id] not implement the terms of the Convention but [went] beyond its requirements and add[ed] an alternative ground for making terminations unlawful."[42]

In contrast, the Court upheld a detailed code providing that certain employees are entitled to up to 52 weeks of parental leave and outlining the procedural requirements for obtaining the leave. The relevant convention contained only general obligations to take measures to enable workers with family responsibilities to (*inter alia*) "exercise their right to [employment] without being subject to discrimination" and "re-enter the labour force after an absence due to [family] responsibilities."[43] The Court held that the legislation was "an obvious means of discharging [those] obligations" and therefore a valid exercise of s. 51(xxix).

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[41] (1996) 187 CLR 416, 489.

[42] (1996) 187 CLR 416, 518.

[43] (1996) 187 CLR 416, 523.

Introduction to the United States position

Both the Australian and US legislatures are empowered to implement treaties. However, the United States power to *make* treaties differs in three important respects from its Australian counterpart. These differences form part of the constitutional — and political — context in which the implementation power has been construed.

The Constitution grants the President the power to "make Treaties"[44] (*Treaty Power*) "by and with Advice and Consent of the Senate"[45] and subject to the requirement that "two thirds of the Senators present concur."[46] Two differences are immediately obvious. The first is that the power is conferred on the President, an office separated entirely from the legislature (unlike the Australian executive government, which "is directly responsible to — nay, is almost the creature of — the Legislature"[47]). The second is that the Treaty Power is an "explicit constitutional mandate to share power"; indeed, the only example of such a power in the US Constitution.[48]

Because it can be procedurally and politically difficult to obtaining the Senate's consent, most international agreements to which the United States is party are not constitutional (*ie.* Article II) treaties.[49] Rather, so-called "congressional-executive agreements" are forwarded by the President to both houses of Congress for approval (and, if necessary, implementation) by a simple majority. Such agreements are "indistinguishable under international law from treaties in their ability

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[44] *US Constitution*, Article II, § 2, cl. 2.

[45] Though the "accepted practice" is that these words merely require the President to submit a treaty to the Senate for approval before concluding it: John Love, "On the Record: Why the Senate Should Have Access to Treaty Negotiating Documents" (2013) 113 *Columbia Law Review* 483, 489.

[46] *US Constitution*, Article II, § 2, cl. 2.

[47] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 29, 147 (Knox CJ, Isaacs, Rich and Starke JJ).

[48] Louis Henkin, *Constitutionalism, Democracy and Foreign Affairs* (1990) 46. See also Love, 487, footnote 22 (noting that Alexander Hamilton considered treaty-making to be neither an executive nor a legislative power).

[49] Between 1939 and 1989, the United States entered into 11,698 congressional-executive agreements and 702 treaties: Senate Committee on Foreign Relations, *Treaties and other international agreements: the role of the United States Senate* (January 2001) 39.

to bind the United States"[50] and include well-known covenants like the North American Free Trade Agreement.

Yet congressional-executive agreements must be supported by an Article I head of Congressional power. *Missouri v Holland* was not concerned with such agreements, and indeed a congressional-executive agreement cannot do "what an act of Congress could not do unaided."[51] This article therefore concentrates on the implementation of Article II treaties.

The third important difference is that treaties "made … under the authority of the United States [are] the supreme law of the land."[52] Consequently, treaties are "regarded in courts of justice as equivalent to an act of the legislature, whenever [they] operat[e] … without the aid of any legislative provision."[53] That is, American treaties can be self-executing — and may even be *presumptively* self-executing.[54]

However, this does not negate the function of implementing legislation. As we have seen, treaties do not always provide a precise statement of their intended domestic effect, and individual nations' circumstances will often make it necessary for a treaty to leave implementation details unspecified.

The Necessary and Proper Clause

Congress has no explicit power to legislate "with respect to" or for the implementation of treaties. However, the so-called Necessary and Proper Clause grants it the power:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.[55]

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[50] John C. Yoo, "Laws as Treaties: The Constitutionality of Congressional-Executive Agreements" (2000) 99 *Michigan Law Review* 757, 758.

[51] *Missouri v Holland* 252 US 416, 432 (Holmes J).

[52] *US Constitution*, Article VI, cl. 2.

[53] *Foster v Neilson* (1829) 27 US (2 Pet.) 253, 314.

[54] See Rosenkranz, "Executing the Treaty Power" (2005) 118 *Harvard Law Review* 1867, 1877 (footnote 44).

[55] *US Constitution*, Article I, § 8, cl. 18.

The Treaty Power is not one of the "foregoing" (*ie.* legislative) powers. However, it is one of the "other Powers" vested in an "Officer" of the US government, namely the President.[56] Thus Congress can pass implementing legislation only to the extent that it is "necessary and proper for carrying [the Treaty Power] into Execution."

The Necessary and Proper Clause has been interpreted broadly since the Supreme Court's landmark decision in *M'Culloch v Maryland*.[57] Refusing to interpret the word "necessary" as "absolutely indispensible,"[58] the Court instead used broad language reminiscent of the Australian test discussed earlier:

> [The] means, which are necessary for [the] purpose [of enforcing Congress's enumerated powers], are those which are useful and appropriate to produce the particular end. "Necessary and proper" are, then, equivalent to *needful and adapted*.[59]

The Court applied this test to treaty implementation legislation in *Neely v Henkel*, holding that the Necessary and Proper Clause supports "such legislation as is *appropriate* to give efficacy to any stipulations which it is competent for the President … to insert in a treaty with a foreign power."[60] The relevant legislation provided for the extradition of individuals accused of committing certain crimes in US occupied territories; the appellant was a employee of the Cuban government accused of embezzling funds during the US occupation of Cuba after the Spanish–American War.

The respondent argued that the legislation was supported by the peace treaty between Spain and the US, which did no more than provide that the US would "assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property." Holding that the US's international legal obligation to "protect [Cuban property] in all appropriate legal modes", Harlan J upheld the legislation:

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[56] Rosenkranz, 1881.

[57] (1819) 17 US 317.

[58] (1819) 17 US 317, 325.

[59] (1819) 17 US 317, 356.

[60] *Neely v Henkel* (1901) 180 US 109, 121 (Harlan J).

> What legislation by Congress could be more appropriate for the protection of life and property in Cuba … than legislation securing the return to that island, to be tried by its constituted authorities, of those who, having committed crimes there, fled to this country to escape arrest, trial, and punishment?[61]

Thus *Neely* pre-empted the formation of any strict implementation doctrine in the US by upholding legislation which went beyond implementing clearly-identified treaty obligations. However, it was decided in unusual circumstances and dealt only with activities that took place in a foreign country.

Missouri v Holland

The Court would provide a more general statement of the law with respect to treaty implementation in *Missouri v Holland*,[62] which concerned a treaty providing for the protection of migratory birds and an Act of Congress prohibiting the "killing, capturing or selling" of birds of a species enumerated in the treaty. Its *ratio* — described as "the most important sentence in the most important case about the [US] constitutional law of foreign affairs"[63] — is as follows:

> If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.[64]

Holland's primary effect, therefore, is to preclude courts from finding that the power to implement treaties is constrained by the principles of federalism derived from the Tenth Amendment. The case's correctness and effect in this respect will be discussed in Part II. However, by bluntly asserting that the implementing statute was "a necessary and proper means to execute the [Treaty Power]," *Holland* also suggested that the *scope* of the power to implement treaties was wide. That suggestion has been realized by the Courts of Appeal in a series of cases concerning the federal criminal justice system.

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[61] (1901) 180 US 109, 121-2.

[62] (1919) 252 US 416.

[63] Rosenkranz, 1868.

[64] (1919) 252 US 416, 432 (Holmes J).

The modern Necessary and Proper Clause

One such case was *Lue*,[65] which concerned legislation that implemented the *Hostage Taking Convention*, which was directed towards the "taking of hostages as [a] manifestatio[n] of international terrorism."[66] However, neither the Convention nor the *Hostage Taking Act* were limited to the taking of hostages for political purposes; both extended to the taking of hostages in order to compel a *natural person* (as well as a State or intergovernmental organisation) to "do or abstain from doing any act."[67]

The appellant was convicted of taking a hostage for the purpose of obtaining a ransom from the hostage's family. The Court of Appeals treated *Holland* as holding that, because the *Convention* was a valid exercise of the Treaty Power, there was "little room to dispute that the legislation passed to effectuate [it] is valid."[68] The legislation needed only to bear a "rational relationship to a permissible constitutional end," a standard "plainly" met by the *Hostage Taking Act* because it "track[ed] the language of the Convention in all material respects."[69]

Confirming that the Clause should continue to be interpreted broadly, the Supreme Court stated the test for whether legislation is supported by the Necessary and Proper Clause in *Comstock* in 2010:

> In determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.[70]

Comstock was not a treaty implementation case; it concerned the continuing detention of sexual offenders in federal prisons. However, the *Comstock* test has now been applied twice by federal appellate courts in the treaty implementation context.

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[65] *United States v Lue* (1998) 134 F.3d 79.

[66] (1998) 134 F.3d 79, 83-84 (preamble to the Convention).

[67] (1998) 134 F.3d 79, 81 (Walker J).

[68] (1998) 134 F.3d 79, 84 (Walker J).

[69] (1998) 134 F.3d 79, 84 (Walker J).

[70] *Comstock v United States* (2010) 130 S.Ct. 1949, 1956 (Breyer J).

In *Belfast*, the Court of Appeals for the 11th Circuit held that the rational relationship test can support legislation that goes beyond the words of the treaty it implements: "identicality is not required."[71] The legislation, which purported to implement the *Convention against Torture*, went slightly beyond the treaty by criminalising conduct without requiring the prosecution to prove certain facts as to the accused's motive and official status.[72] The Court was nonetheless satisfied that, as in *Lue*, the legislation "track[ed] the provisions of the [treaty] in all material respects," holding that the treaty "created a floor, not a ceiling, for its signatories in their efforts to combat torture."[73]

The *Bond* challenge

In *Bond v United States*,[74] the US Court of Appeals for the 3rd Circuit held that the *Chemical Weapons Convention Implementation Act* had the requisite 'rational relationship' with the *Chemical Weapons Convention*. The Convention provided that *state* parties would refrain from "using, developing, acquiring, stockpiling, or retaining" certain chemical weapons, and "enac[t] penal legislation" to apply the same prohibition to individuals within the state's jurisdiction.[75] Moreover, it defines "chemical weapons" broadly, including any "toxic chemical … except where intended for a purpose not prohibited [by the Convention]."[76]

Carol Bond had spread chemical irritants on the doorknobs and mailbox of Myrlinda Haynes, a former friend who had become pregnant with Bond's husband's child.[77] While Haynes suffered only "a minor chemical burn on her thumb, which she treated by rinsing with water,"[78] Bond was prosecuted and convicted of acquiring "knowingly acquiring, transferring, receiving, retaining, possessing, and using a

[71] *United States v Belfast* (2010) 611 F.3d 783, 806 (Marcus J).

[72] See (2010) 611 F.3d 783, 803-4 (Marcus J).

[73] (2010) 611 F.3d 783, 806 (Marcus J).

[74] *Bond v United States* (2012) 681 F.3d 149.

[75] *Chemical Weapons Convention*, Article VII(1).

[76] *Chemical Weapons Convention*, Article II(1)(a).

[77] (2012) 681 F.3d 149, 151.

[78] Petitioner's brief, *Bond v United States* (Supreme Court 12-158), 10.

chemical weapon."[79] Because Bond's actions were not "peaceful," they did not fall within the list of purposes "not prohibited" by the Convention.

Despite accepting that Bond's prosecution was a "questionable exercise of prosecutorial discretion" that "trivialize[d] the concept of chemical weapons," the Court held that the Act "closely adhere[d] to the language of the … Convention" and therefore was "sufficiently related" to the Convention.[80]

Bond's petition for a writ of *certiorari* was granted by the Supreme Court on 18 January 2013 and argument will be heard during the Court's 2013 October Term. The first question to be answered by the Court is:

> Do the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where *the federal statute, as applied, goes far beyond the scope of the treaty*, intrudes on traditional state prerogatives, and is concededly *unnecessary to satisfy the government's treaty obligations*?[81] (emphasis added)

The question addresses both parts of the two-step process for testing a law's validity under the Australian Constitution, but the emphasised parts relate to the first question: to what extent is it permissible for implementing legislation to depart from the terms of the supporting treaty? We will now compare the approach taken in the two countries by consider how the question might be answered in Australia.

Is legislation which is 'rationally related' to a treaty 'reasonably appropriate and adapted' to its implementation?

It is suggested that the 'rational relationship' *prima facie* sets a lower threshold for validity — that the process of 'adapting' legislation to the implementation of a treaty necessarily implies the existence of a rational relationship. Yet reasonable minds may differ on the answer

[79] Petitioner's brief, 11.

[80] (2012) 681 F.3d 149, 165 (Jordan J).

[81] Petition for *certiorari*, *Bond v United States* (Supreme Court 12-158), i.

to this question: the precise form of words used by the Court are open to interpretation and, ultimately, not as helpful as an examination of the circumstances of each decided case.

That examination reveals that the Commonwealth Parliament has relied on treaty implementation as a source of legislative power to a greater extent than has the US Congress — perhaps because the wide reading given to the Commerce Clause has rendered it unnecessary for the Congress to resort to treaty implementation, or because the shared nature of the Treaty Power makes it rarer for the US to enter into a treaty that merits controversial implementing legislation. (Contrariwise, perhaps it is because of the relatively narrow interpretation given to s. 51(i) of the Australian Constitution that s. 51(xxix) has become a constitutional battleground.)

Were *Bond* an Australian case, perhaps the best argument against upholding the legislation would be that it is not reasonably appropriate in light of the enumerated purpose of the Convention: the elimination of "weapons of mass destruction."[82] Legislation which is drafted so broadly as to federalise minor assaults is arguably not 'adapted' to that end.

However, the Court of Appeal correctly held that the legislation "closely adheres" to the language of the Convention — that is, to the extent that Bond's conviction was *unreasonable*, the fault is in the treaty itself. Given that the High Court has decided against requiring treaty-implementing legislation to deal with a 'matter of international concern,'[83] it would seem that there is no bar to the power's expansion in circumstances where the treaty itself contains provisions not reasonably appropriate and adapted to its objectives. We turn, then, to consider the extent to which legislation which validly implements a treaty might nonetheless be unconstitutional on the ground that it "intrudes on traditional state prerogatives" or upsets the "federal balance."

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[82] Petitioner's brief, 3.

[83] Originating in Stephen J's judgment in *Koowarta*, but disapproved by the majority in *Tasmanian Dams*.

III: Overriding Limitations: Traditional State Prerogatives

The implied federalism limitation in Australia

The Constitution created a system of government in which legislative power is shared between State and Commonwealth legislatures. By contemplating the continued existence of that system of government, the Constitution impliedly limits Commonwealth legislative powers.[84] Thus to determine whether a Commonwealth law is constitutional involves a two-stage process: first, the Court asks whether the law can be characterised as one "with respect to" an identified head of legislative power. Only if the answer is 'yes' must the Court consider whether the law is contrary to any implied limitations.[85]

It has always been accepted that such implied limitations apply in principle to the external affairs power. Of the judges in *R v Burgess*, all but Dixon J accepted that implied limitations confined s. 51(xxix), although without explicitly identifying those limitations.[86] In *Koowarta*, Stephen J had "no doubt" that s. 51(xxix) is in particular subject to "limitations to be implied from the federal nature of the Constitution and which will serve to protect the structural integrity of the State components of the federal framework."[87]

To ascertain the extent of those limitations, one must balance the tension between the High Court's decisions in the *Engineers*[88] case and the doctrine developed in *Melbourne Corporation*[89] and *Austin*.[90] The former held that the Commonwealth legislative power is not to be limited by reference to powers "reserved to the States,"[91] while the latter

[84] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).

[85] *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, 294 [25] (French CJ). However, his Honour did acknowledge that "consideration of the two questions may overlap."

[86] (1936) 55 CLR 608, 642-3, 658, 687.

[87] (1982) 153 CLR 168, 216 (Stephen J).

[88] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 29.

[89] *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

[90] *Austin v Commonwealth* (2003) 215 CLR 185.

[91] Compare the Tenth Amendment to the US Constitution.

held that Commonwealth laws shall not "restrict or burden one or more of the States in the exercise of their constitutional powers"[92] in a "significant manner."[93]

The apparent contradiction between these principles is resolved in two ways. First, the effect of *Engineers*, when "stripped of embellishment and reduced to the form of a legal proposition," was that Commonwealth laws which "affect the operations of the States and their agencies" are not *ipso facto* invalid.[94] The Court did not hold that such laws could *never* be invalid — it merely held that it was "a fundamental and fatal error" to read down the scope of *express* grants of Commonwealth legislative power by reference to the way in which the unlimited, but subordinate, legislative power of the States has been exercised historically. To do so is to "mak[e] an *a priori* assumption about the consequences of the division of legislative powers."[95]

The *Melbourne Corporation* principle is an example of a 'reservation'[96] to the *Engineers* doctrine. It assumes not that legislative powers will be divided in a certain way, but merely reflects the Constitution's assumption of "the continuing existence of the States, their co-existence as independent entities with the Commonwealth, and the functioning of their governments."[97]

The *Melbourne Corporation* doctrine will generally not prevent the Commonwealth from enacting "laws of general application," even when those laws affect "constitutional office holders" such as senior State public servants.[98] The Commonwealth may therefore impose income and fringe benefits taxes on such constitutional office holders. What is prohibited is legislation which "singl[es] out another government and specifically legislat[es] *about* it,"[99] and hence "curtails or intereferes in a substantial manner with the exercise of constitutional power by

[92] *Austin v Commonwealth* (2003) 215 CLR 185, 258 [143] (Gaudron, Gummow and Hayne JJ).

[93] (2003) 215 CLR 185, 265 [168] (Gaudron, Gummow and Hayne JJ).

[94] (1947) 74 CLR 31, 78 (Dixon J).

[95] *Pape v Commissioner of Taxation* (2009) 238 CLR 1, 118 [333].

[96] (1947) 74 CLR 31, 78 (Dixon J).

[97] *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272, 289 [15].

[98] (2009) 240 CLR 272, 292 [19] (French CJ); (1947) 74 CLR 31, 49 (Dixon J).

[99] (1947) 74 CLR 31, 61 (Latham CJ).

the other."[100] The question, then, is what are a State's "constitutional powers" (or "functions,"[101] to adopt the language used by the Court in *Austin*)?

"Constitutional functions"

Melbourne Corporation itself recognised that this question "may be difficult to determine in some cases,"[102] but Latham CJ held that there was "no doubt" that "the raising of money by taxation, … [the] management and disposition of public moneys, [and] the power of borrowing money" were "essential to the very existence of a Government."[103] Thus a law which prohibited banks from dealing with State authorities without the consent of the federal Treasurer impaired the States' constitutional functions and was beyond power.

Subsequent applications of the principle have focused on interference with the employment of State public servants — particularly senior public servants such as "ministers, ministerial assistants and advisers, heads of department, senior office holders, parliamentary officers and judges."[104] In *Re Australian Education Union* the Court therefore struck down legislation purporting to make awards in relation to the conditions of employment of such public servants, holding that "critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged."[105]

As Dixon J said in *Melbourne Corporation*, "in the case of most [Commonwealth] legislative powers … some ingenuity would be needed to base a law squarely on the subject matter of the power and at the same time effect by it a restriction or control of the State, [but] to attempt to burden the exercise of State functions by means of the power to tax

[100] (1947) 74 CLR 31, 75 (Starke J).

[101] (2003) 215 CLR 185, 251 [129] (Gaudron, Gummow and Hayne JJ).

[102] (1947) 74 CLR 31, 52 (Latham CJ).

[103] (1947) 74 CLR 31, 52-3 (Latham CJ).

[104] *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[105] (1995) 184 CLR 188, 233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

needs no ingenuity."[106] Thus many of the decisions have concerned the use of the Commonwealth economic powers.

As to the power to implement treaties, whether in its interpretation "due regard should be had to the fact that the Constitution is federal in character"[107] was considered by Gibbs CJ in the *Dams* case. His Honour concluded that while "for myself, I should have preferred a more precise test," the federal balance could be protected by applying Stephen J's criterion of "international concern" from *Koowarta*.[108] Of course, Gibbs CJ dissented in *Dams*, and the majority applied no such qualification to s. 51(xxix).

However, the Court did use the *Melbourne Corporation* doctrine to read down a number of legislative provisions which implemented a treaty in the *Industrial Relations Act Case.* The Court concluded that the minimum wage,[109] equal remuneration,[110] parental leave,[111] discrimination[112] and right to strike[113] provisions should be read down so as not to apply to 'high level' State employees.

The Court's most recent decisions on the *Melbourne Corporation* doctrine, *Austin*[114] and *Clarke*,[115] both concerned legislation which imposed special taxes on senior public servants. The doctrine as so far developed would therefore appear to have little utility in a case such as *Bond*, where the petitioner seeks to prevent the federal legislature from interfering in areas "traditionally" dealt with by, but not forming a "critical" part of, State governments. We turn now to compare the position in the United States.

[106] (1947) 74 CLR 31, 80 (Dixon J).

[107] (1983) 158 CLR 1, 100 (Gibbs CJ).

[108] (1983) 158 CLR 1, 101 (Gibbs CJ).

[109] (1996) 187 CLR 416, 503 (Brennan CJ, Toohey, Gaudron, McHugh & Gummow JJ).

[110] (1996) 187 CLR 416, 510.

[111] (1996) 187 CLR 416, 524.

[112] (1996) 187 CLR 416, 532.

[113] (1996) 187 CLR 416, 560.

[114] (2003) 215 CLR 185.

[115] (2009) 240 CLR 272.

The Tenth Amendment and *Missouri v Holland*

The US Constitution contains a provision expressly protecting the "federal balance": the Tenth Amendment, which states:

> The 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.[116] (emphasis added)

The most significant holding in *Missouri v Holland* was not that the *Migratory Birds Act* was a necessary and proper means of implementing the supporting treaty, but that the Tenth Amendment does not restrict the content of such treaties. Holmes J's reasoning was as follows:

> 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* … 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.[117] (emphasis added)

In his detailed critique of *Missouri v Holland*, Nicholas Q. Rosenkranz "argues from text and structure that Justice Holmes misunderstood the relationship between the Treaty Clause and the Necessary and Proper Clause."[118] In Rosenkranz's view:

> A treaty and the "Power … to make Treaties" are not the same thing … a treaty is not a power. To the contrary, a treaty is the fruit of the exercise of a particular power — the "Power … to make Treaties." Yet Neuman and others have tacitly assumed that since Congress has power to make laws carrying into execution the "Power … to make Treaties" (for example, to appropriate money for John Jay's passage to England), it necessarily has power to make laws carrying into execution

[116] *US Constitution*, Amendment X.

[117] (1920) 252 US 416, 432, 434 (Holmes J).

[118] Rosenkranz, 1875.

> the fruit of an exercise of the "Power … to make Treaties" — that is, treaties themselves.[119]

The Court of Appeals in *Bond* acknowledged Rosenkranz's argument, but held that "*Holland* … forecloses this line of reasoning."[120] It thus declined to consider Bond's Tenth Amendment argument, though it did "urge the Supreme Court to provide a clarifying explanation of its statement"[121] in *Holland*. Should the Court overrule or read down *Holland*, how far the Tenth Amendment might limit the power to implement treaties merits consideration.

Does the Tenth Amendment go further than the *Melbourne Corporation* doctrine?

In one of its first decisions the High Court in fact considered the Tenth Amendment to be "undistinguishable in substance, though varied in form"[122] from s. 107 of the Australian Constitution, which provides:

> Every power of the Parliament of a … State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, *continue* as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be. (emphasis added)

Yet in *Engineers* the Court held that while s. 106 *continues* the (concurrent) powers of the States, it does not *reserve* those powers from the Commonwealth.[123] The Tenth Amendment might thus be seen as a constitutionalising the very proposition that *Engineers* rejected in Australia.

However, the Supreme Court has only rarely upheld challenges to federal statutes on Tenth Amendment grounds. In *Darby*, the Court dismissed the clause as "a truism" — that "all is retained which has

[119] Rosenkranz, 1885.

[120] (2012) 681 F.3d 149, 157 (Jordan J).

[121] (2012) 681 F.3d 149 (Ambro J).

[122] *D'Emden v Pedder* (1904) 1 CLR 91, 112-3 (Griffith CJ).

[123] (1920) 28 CLR 129, 154 (Knox CJ, Isaacs, Rich and Starke JJ).

not been surrendered."[124] In *New York* (1991), the Court explained that the Tenth Amendment merely confirms the existence of other implied limits:

> The Tenth Amendment [like the First Amendment] restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which … is essentially a tautology.[125]

In the result, the few cases in which the Supreme Court has struck down legislation on Tenth Amendment grounds involved federal legislation which could well be described as "curtail[ing the] capacity of the States to function as governments."[126] For example, *New York* itself forced state governments to choose between "accepting ownership of [radioactive] waste or regulating according to the instructions of Congress."[127] Because each choice "would commandeer state governments into the service of federal regulatory purposes,"[128] the statute was unconstitutional.

In *Printz*,[129] the Court struck down an attempt to compel State law enforcement officers to conduct background checks on behalf of gun vendors under the *Brady Handgun Violence Prevention Act*. Again, the Court held that "commandeering" state law enforcement officers in this way was contrary to the "system of dual sovereignty"[130] contemplated by the Constitution.

It seems likely that the same result would have been reached were *New York* decided in Australia. Clearly to permit the Commonwealth Parliament to direct the State Parliament to pass certain legislation is fundamentally contrary to the basis of *any* federation. The same could well be said for *Printz*, given that the legislature's commands were directed to the *chief* law enforcement officer of each local jurisdiction —

[124] *United States v Darby* (1941) 312 US 100, 124.

[125] *New York v United States* (1991) 505 US 144, 157 (O'Connor J).

[126] Compare *Austin* (2003) 215 CLR 185, 249 [124].

[127] (1991) 505 US 144, 175 (O'Connor J).

[128] (1991) 505 US 144, 175 (O'Connor J).

[129] *Printz v United States* (1997) 521 US 898.

[130] (1997) 521 US 898, 918 (Scalia J); *Gregory v Ashcroft* (1991) 501 U. S. 452, 457.

arguably a senior officer of the kind protected under *Australian Education Union.*[131]

While minor assaults are traditionally dealt with by State legislatures in both nations, to criminalise such assaults under federal legislation imposes no obligation on either the legislative or executive arm of the State government.[132] As "questionable" as the decision to prosecute Bond may have been, "the courts have no power to excise, as trivial, individual instances of the class [of conduct proscribed]."[133]

IV: Conclusion

Come October, the Supreme Court will decide whether federalism arguments can be used to limit the power to implement treaties. The fact that Bond's petition for *certiorari* was granted indicates that at least four members of the Court think such arguments have some merit. But there are indications in Australia, too, that the High Court is willing to revive the importance of federalism in its interpretation of Commonwealth powers — particularly the executive power.

For example, in their dissent in *Pape,*[134] Hayne and Kiefel JJ were critical of the Commonwealth's assertion of a broad spending power, holding that the Commonwealth's "understanding of the structure of the Federation does not fit easily with the long-accepted understanding of the constitutional structure … of separate polities … in which the central polity is a government of *limited and defined* powers."[135]

More recently, French CJ began his judgment in *Williams*[136] by referring to Inglis Clark's concept of a "truly federal government," an "essential feature" of which is "the preservation of the separate existence and corporate life of each of the component States of the commonwealth."[137] In that case French CJ was part of the majority holding

[131] *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 233 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[132] (2012) 681 F.3d 149, 168 (Jordan J).

[133] (2012) 681 F.3d 149, 168 (Jordan J).

[134] (2009) 238 CLR 1.

[135] (2009) 238 CLR 1, 115 [325] (Hayne and Kiefel JJ).

[136] *Williams v Commonwealth* [2012] HCA 23.

[137] [2012] HCA 23, [1] (French CJ).

that Commonwealth expenditure on the National Schools Chaplaincy Programme was invalid in the absence of legislation specifically authorising the expenditure — arguably a federalist victory, although one quickly followed by the Commonwealth Parliament's "abject surrender to the Executive"[138] in passing legislation[139] to authorise such expenditure in the future.

Now that Heydon and Gummow JJ have been replaced by Gageler and Keane JJ respectively, it is possible that the newly reconstituted Court will move to confine the scope of s. 51(xxix). Part IIA of the *Racial Discrimination Act 1975* is controversial, purports to implement a treaty under s. 51(xxix), and has yet to be scrutinised by the High Court (although it has been held constitutional by the Full Federal Court[140]). Unless the provision is repealed,[141] it seems likely that its constitutionality will be challenged in the High Court eventually.

In the "second half of the twentieth century" it was "possible to characterize both the United States and Australia as federal countries."[142] It is still possible to do so — but there is "almost no aspect of life which under modern conditions may not be the subject of an international agreement."[143] If the power to implement such agreements truly has "no practical limit,"[144] the "assignment of particular carefully defined powers" to a federal government becomes "absurd."[145]

[138] Twomey, "Parliament's abject surrender to the Executive" (blog post), 27 June 2012.

[139] *Viz.* the *Financial Framework Legislation Amendment Bill (No 3) 2012.*

[140] *Toben v Jones* [2003] FCAFC 137.

[141] As the Opposition Leader has publicly promised to do if elected: Abbott, "Address to Institute of Public Affairs 70th Anniversary Dinner" (speech), 5 April 2013, Melbourne.

[142] Thomson, "A United States Guide to Constitutional Limitations Upon Treaties as a Source of Australian Municipal Law (Part Two)" (1977-78) 13 *UWA Law Review* 153.

[143] (1983) 158 CLR 1, 100 (Gibbs CJ).

[144] *Richardson v Forestry Commission* (1988) 164 CLR 261, 321 (Dawson J).

[145] (1983) 158 CLR 1, 100 (Gibbs CJ).