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THE TREATY MAKERS AND THE LAW MAKERS: THE LAW OF THE LAND AND FOREIGN RELATIONS

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It has long been assumed by all—including both sides in the recent Bricker Amendment controversy—that the treaty power reaches considerably further than the power of Congress acting without a treaty. This assumption was explicit in the famous case of Missouri v. Holland. *The author, for ten years a member of the Department of State and author of the recently published book,* Arms Control and Inspection in American Law, *here compares the scope of powers currently entrusted to the treaty makers and the law makers, finds that the powers of Congress are far wider than believed, and suggests for consideration that the same factors which render a matter proper subject for a treaty may also render it appropriate for independent Congressional legislation under the federal foreign affairs power.*

The recent attempts led by former Senator Bricker of Ohio to amend the Constitution in respects relating to treaties and other international agreements achieved perhaps the most extended debate in the history of the nation upon the several issues involved. Even those who believe that these efforts were unfortunate, and that their success might have proved disastrous, may yet admit that the controversy afforded some worthy results. The zeal, the zealotry even, of scholars increaseth wisdom. But inevitably, the views expressed and the positions assumed reflected the exigencies of a determined controversy.

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Now, hopefully, the battle is done. It is perhaps then not too soon to look around at where we are left on basic constitutional issues, to seek understanding as to why the conflict raged as and where it did, to examine assumptions articulated or withheld, and to give second thought to some views declared, some positions taken.

In this Article we would examine some premises about the powers of Congress and the treaty makers to enact law in the United States. These assumptions, underlying the Bricker controversy, were expressed by the Supreme Court of the United States in 1920 in *Missouri v. Holland*.[1] As is now famous, the Court, in an opinion by Mr. Justice Holmes, accepting *arguendo* that in the absence of treaty Congress had no power to regulate migratory birds,[2] held that a treaty with Canada gave Congress the power to adopt a statute dealing with the birds as "necessary and proper" for carrying that treaty into execution.[3] The assumption that Congress itself lacked power to regulate the birds was not discussed. Neither was the related observation: "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." [4]

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1. 252 U.S. 416 (1920).

2. Holmes' assumption may have been based on previous lower court decisions. See note 24 *infra*.

3. Congress, its own powers apart, can "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8.

4. 252 U.S. at 433.

Supporters of the "Bricker Amendments" made Justice Holmes' treaty power assumption their own and, adopting a proposal originating in a committee of the American Bar Association, sought to "repeal" *Missouri v. Holland* so that nothing could be made law by or pursuant to treaty which Congress could not have enacted without treaty. Opponents, adopting the same assumption, resisted the Bricker effort in order to preserve the power of the United States to do by treaty what Congress could not do. And, to preserve the treaty power unimpaired, they found themselves arguing that the legislative powers of Congress, as to matters covered by treaty, were limited. If, as the amendments would have it, a treaty could do no more than Congress could do without a treaty, many of the traditional treaties of the United States could not take effect, because Congress did not itself have power to deal with those matters. The Bricker group, in rebuttal, insisted that the standard treaties would not be affected since Congress did have the power to regulate those areas. The amendments would only prevent the "new" treaties dealing with matters essentially "domestic" in character. See text following notes 13, 46 *infra*. See also note 16 *infra* and accompanying text. It is one of the ironies of the Bricker controversy that opponents of the amendments, generally "nationalist" vis-à-vis the States, "internationalist" in their orientation on United States foreign policy, found themselves arguing that the powers of Congress were limited in matters relating to the foreign affairs of the United States. The Bricker group, on the other hand, including many "States-righters" and "isolationists," argued that Congress had extensive powers in this area. *Compare* Whitton and Fowler, *Bricker Amendment—Fallacies and Dangers*, 48 AM. J. INT'L L. 23, 39 (1954), *with* Finch, *The Need to Restrain the Treaty-Making Power of the United States Within Constitutional Limits*, 48 AM. J. INT'L L. 57, 72 (1954). See also numerous arguments on both sides in *Hearings on S.J. Res. 130 Before a Subcommittee of the Senate Committee on the Judiciary,*

That the relevant powers of Congress do not reach as far as those of the treaty makers was a hypothesis that had little importance in *Missouri v. Holland,* but it has significance for an appreciation of constitutional powers of the national government. Immediately, of course, it appears to deny to Congress the power to deal with at least some matters of "exigency for the national well being." To the treaty power, by comparison, it lends an exaggerated appearance which has invited attack culminating in the Bricker episode. And to see the powers of Congress small while the treaty power looms large gives a distorted appearance to the configuration of federal authority established by the Constitution for dealing with matters which are of concern to the United States in its relation with other nations.

We shall explore first the scope of the treaty power, then compare the reach of related powers of Congress. We shall suggest that whatever the validity of Mr. Justice Holmes' assumptions when he expressed them, they may today be unwarranted; that, in the light of constitutional developments since 1920, the internal effect of any provision of any treaty of the United States could in fact be enacted by Congress without a treaty. Indeed, we shall offer for consideration the suggestion that those factors related to the international relations of the United States which render a matter proper subject for a treaty also render it appropriate for legislation by Congress under its own powers. If this be so, the treaty power and the legislative power of Congress appear as congruent and correlative powers of the federal government to enact law in the United States on matters of concern to the nation in its international affairs.

I

To examine how the powers of Congress in international matters compare to the treaty power, we consider first the nature and scope of the treaty power.[5] Article II, section 2, of the Constitution provides that the President "shall have power by and with the Advice and

82d Cong., 2d Sess. 121, 132, 256, 313-16, 364, 413, 484, 486, 530 (1952); *Hearings on S.J. Res. 1 & 43 Before a Subcommittee of the Senate Committee on the Judiciary,* 83d Cong., 1st Sess. 924, 959, 994, 999, 1010, 1070, 1123, 1130, 1136 (1953); *Hearings on S.J. Res. 1 Before a Subcommittee of the Senate Committee on the Judiciary,* 84th Cong., 1st Sess. 185-86, 281-82, 297, 581-82 (1955).

For a brief discussion of how the thesis of this article relates to the Bricker controversy, see notes 65-68 *infra* and accompanying text.

5. The Bricker Amendment hearings, *supra* note 4, are full of learning about treaties. I too have had other occasion to deal with basic constitutional doctrine about treaties, recently and at length. For convenience and brevity, I shall refer to HENKIN, ARMS CONTROL AND INSPECTION IN AMERICAN LAW (1958) (hereinafter cited as ARMS CONTROL), and to an article, Henkin, *The Treaty Makers and the Law Makers: The Niagara Power Reservation,* 56 COLUM. L. REV. 1151 (1956) (hereinafter cited as *Niagara Power*). On the introductory matters asserted here without citation see ARMS CONTROL 27-34, 168-77; see also *Niagara Power* 1169-72.

Consent of the Senate, to make Treaties, providing two thirds of the Senators present concur." [6] And the supremacy clause of article VI adds: "This Constitution, and the Laws of the United States made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land . . ." These clauses, the Supreme Court has explained, mean that for the United States a treaty has a two-fold effect. It is an international agreement of the United States and, to the extent that it is intended to have domestic effects and consequences, the treaty is also a law of the United States, as much so as an act of Congress. A treaty properly ratified is valid and binding as law in the United States regardless of any inconsistent provision in an earlier act of Congress; for domestic purposes, a subsequent congressional enactment can nullify a treaty provision. But as to what a treaty is, and what is proper subject for a treaty—questions which may appear preliminary and fundamental—the Constitution has no answers. Indeed the questions were not asked. Perhaps no questions existed.[7] Those who framed the Constitution knew a treaty when they talked of it, or wrote of it. Treaties, agreements between nations, had long been known. Sovereigns negotiated about matters which concerned them. Sometimes they reached agreement. When they did, they concluded a treaty. It was not imagined that there were matters which concerned nations as to which they could not make treaties. It was not conceived that two nations might conclude treaties as to matters which did not concern them.[8] For the United States, too, what was the proper subject of a

6. It is generally assumed that the provision in article II established the authority of the United States Government to make treaties. This is not a necessary view of the Constitution and of article II. "It results," said Mr. Justice Sutherland, "that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." Referring to similar powers which the Court had found to be inherent in nationality, Sutherland added that the Court "in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations." United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936), discussed in text accompanying note 36 *infra*. The fact that the treaty power is mentioned does not compel a different view. Article II deals with the powers of the President. The treaty provision of that article merely indicates in which of the separated branches of the federal government the implied, sovereign power of the United States to make treaties is lodged. For our examination of the nature and scope of the treaty power it does not matter whether we consider that article II lodges in the President and Senate an implied power of the United States, or whether the treaty power is expressly established by article II.

7. The only question was who should have the power to make treaties for the United States. That the Founders dealt with. See note 6 *supra*.

8. *Compare Niagara Power*, especially at 1164-69, *with* Power Authority v. FPC, 247 F.2d 538 (D.C. Cir. 1957), *vacated and remanded with directions to dismiss as moot*, 355 U.S. 64 (1958).

treaty did not seem to beg for definition. Later, Mr. Justice Field stated simply: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations is clear. . . . [It] is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." [9]

This appears to be all the relevant learning, in the Constitution or in the cases. A treaty is an international agreement on a matter of international concern. It may not deal with a matter which is not of international concern; there is no matter which is of international concern with which it may not deal. Yet, to many, the latter proposition has been difficult to comprehend and to accept. In particular, the States, and champions of the States, argued that the treaty power extends only to matters within the enumerated powers of the federal government under the Constitution; and that the United States, therefore, cannot

9. Geofroy v. Riggs, 133 U.S. 258, 266-67 (1890). Mr. Justice Field also said: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument . . . [or which may be implied in it]." *Ibid.* See also Santovincenzo v. Egan, 284 U.S. 30, 40 (1931); Asakura v. Seattle, 265 U.S. 332, 341 (1924); Holden v. Joy, 84 U.S. (17 Wall.) 211, 243 (1872).

There is also a well-known statement by Charles Evans Hughes, before he became Chief Justice: "The power is to deal with foreign nations with regard to matters of international concern. It is not a power intended to be exercised, it may be assumed, with respect to matters that have no relation to international concerns. . . . So I come back to the suggestion I made at the start, that this is a sovereign nation; from my point of view the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments. But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power." 1929 AM. SOC'Y INT'L L. PROCEEDINGS 194, 195-96 (1929). Other statements may support the "international concern" requirement. Jefferson in his MANUAL OF PARLIAMENTARY PRACTICE § LII; Madison addressing the Virginia Convention, 3 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 514 (2d ed. 1901); Secretary of State Root, 1 AM. J. INT'L L. 273, 279 (1907).

It is not clear whether as a matter of international law a treaty to be binding must deal with a question of "international concern." One may argue that, even in time of peace, nations may enter into any agreement whatever, and "no international concern" would not be recognized as rendering the treaty unenforceable in an international tribunal. If "international concern" is not an international requirement for a treaty, one may ask whether it should be a requirement for a constitutional exercise of the treaty power. As seen, however, it has been assumed—perhaps too lightly—that such a requirement in fact governs the treaty power, although the reasons for this assumption were not examined, and no issue arose to test the assumption or produce a considered discussion of it. Perhaps those who made the assumption thought "international concern" to be an international requirement as well; or perhaps they considered it an additional implied safeguard against abuse of the treaty power. In any event, for this article I adopt that assumption as unquestioned. Whether, assuming that "international concern" is a constitutional requirement, it is one enforceable in the courts, see note 63 *infra*.

deal by treaty with matters "otherwise left to the States." [10] One might show, in refutation, that treaties have in fact dealt with matters which apart from the treaty would be regulated by the States, as early as the earliest treaties of the nation, as late as its latest treaty of friendship, commerce, and navigation. Objections to such provisions have received repeated, consistent and unambiguous blows from the Supreme Court, culminating in the *coup de grâce* in *Missouri v. Holland.* Yet the doubts recurred, at times even among representatives of the United States engaged in the negotiation of treaties.[11]

The reasons why may be several, and of several kinds. Here we would suggest, as a principal explanation, that the treaty power has lent itself to misunderstanding and to misinterpretation, even by its friends. In its view of the scope of that power, *Missouri v. Holland* hardly represents—as has sometimes been made to appear—doctrine sprung full-blown from the mind of Mr. Justice Holmes in 1920. But in the ruling that there could be federal regulation by and pursuant to a treaty when, as Justice Holmes assumed, there could not be regulation by Congress, champions of States rights saw only that federal jurisdiction became broader as a result of an international agreement. Accustomed to measure the federal domain by the reach of congressional power, they met in the treaty power an assertion of federal authority which reached further. Naturally, they recalled and invoked the tenth amendment; and they appeared to assume that those who approved such treaties in the face of the tenth amendment were either violating the Constitution or were asserting that treaties are not subject to constitutional limitations.[12]

And it was not principle alone, not merely the desire to adhere to constitutional doctrine as they saw it, which motivated them. For to them this asserted treaty power appeared highly dangerous, virtually without limit. The United States could make a treaty with any nation on any subject; that took that area out from under local, state authority and made it a federal concern. Nor was this danger wholly imaginary. The character of treaties has changed, their contents radically extended. Once treaties which had domestic effect dealt with the rights of aliens,

10. This was essentially the argument rejected in *Missouri v. Holland.* See 252 U.S. at 417-24.

11. See, for example, authorities cited in ARMS CONTROL 176-77 n.25; see also the reference to "federal-state" clauses, note 66 *infra.*

12. While Mr. Justice Holmes disposed of this mistaken reference to the tenth amendment, he was partly responsible for the legend that treaties are not subject to any constitutional limitations. Though much discussed during the Bricker debates, this view was denied by both sides, and very little support for it could be found anywhere. The ambiguous suggestion by Mr. Justice Holmes based on his reading of the supremacy clause has been rejected. This is considered and the authorities collected in ARMS CONTROL 29, 169-71.

of nationals of the other party to the treaty. The traditional treaty of friendship, commerce and navigation is still of that character, even when it deals with such "local" matters as the right of foreign nationals to inherit land, or to run a pawn shop.[13] Now, however, nations also negotiate what are basically "uniform international laws" on national matters: agreements establishing minimum labor standards in their own countries; fixing "human rights" for their own citizens; defining crimes for their own subjects in their own territory. These are areas, the champions of States rights would argue, left to the States by the Constitution. Congress could not deal with them. But a treaty can come along, take them out of state control, put them into the federal domain.

It is some such view of treaties and the treaty power, of "federal jurisdiction" and of the powers of Congress, I believe, that underlies attacks on the treaty power. But to look at the treaty power in this way is misleading. The argument may be focused differently. Indeed, one may reverse it. The subject of a treaty must be of international concern. And because the matter is of international concern one may say that it is, ever, in the federal domain and might become the subject of a treaty. If, before a treaty, it is left to the States, it is only "defeasibly" so, subject at any time to the assertion of the federal interest by treaty, just as in some other areas of federal power the States may act in the absence of federal regulation. Any matter, then, which is or becomes of international concern is "lifted" into the federal domain when a treaty is negotiated about it only in the same sense that any object or activity is "lifted" when Congress taxes it and regulates it to protect the revenue; or when Congress exercises its commerce power in an area previously left to the States; or when, having declared war, Congress makes the lives, and actions, and the most "local" interests of any citizen of any State subject to federal regulation because they are of "war concern." This is what Justice Holmes was saying, more succinctly, in *Missouri v. Holland.* Holmes assumed in that case that migratory birds were not subject to congressional regulation apart from the treaty; he did not assume that they were without the federal domain. Indeed, the point of the case is that migratory birds, being of international concern, were in the federal domain and subject to the exercise of federal jurisdiction. It is no matter that—on Holmes' assumption—the federal jurisdiction to which they were subject was an exercise not of congressional power but of the treaty power. It was

13. See Asakura v. Seattle, 265 U.S. 332 (1924); Hauenstein v. Lynham, 100 U.S. 483 (1879).

because they were subject to such federal jurisdiction that, said Holmes, they were not "reserved" to the States by the tenth amendment.

This way of looking at the treaty power does not, I believe, reflect distinctions which are merely conceptualistic. It is not rationalization of federal usurpation of state authority. There is no usurpation, for it was ever intended that the federal government have this power to deal by treaty with any matter of international concern. It is as though the Constitution expressly provided: "all matters which are of concern to the Nation in its international relations might be the subject of treaties with other nations." Federal authority over international matters, then, is an independent power; there is no requirement that the subject matter of a treaty be of federal concern on some additional basis, under some other federal power as well. Nor is the treaty power limited to those particular international concerns—say foreign commerce—which the Constitution expressly lodged in other departments of the federal government.[14]

Precisely what is of "international concern," what is inherently in the federal domain and as such can become the subject of a treaty, cannot, of course, be defined or enumerated. If it is not definite, certainly it is not static in the changing character of relations between nations. Nor has it ever been established that a nation's proper concern—that with which it may deal in a treaty—is limited to what is immediately and directly "transnational" in character. Traditionally, it is true, American treaties have in largest part dealt with the rights of other countries or of nationals of other countries in the United States, of the United States and of American citizens in other countries. In exchange for similar privileges abroad, treaties have fixed tariffs and duties, accorded commercial and civil rights to nationals of other countries, given them exemptions from taxes, from conscription, from various kinds of local obligations. Many of the provisions of these treaties have domestic effect and become laws of the United States. Traditionally, too, matters which immediately concern the relations between the United States and its own citizens were not dealt with by international agreement. How a nation dealt with its own was, usually, not a concern of other nations; it was not therefore fit subject for a treaty; it was not—for the United States—dealt with under the treaty power. But it was never accepted, or suggested, or assumed, that matters which were immediately and prima facie "domestic" could not be of concern to other nations, could not be dealt with by treaty. Rather

14. At one time the treaty power had to face a contrary argument, that treaties could not effectively deal with matters entrusted by the Constitution to Congress. See the discussion and citations in WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 102-03 (1922).

it has always been clear that international agreements, like private contracts, may be parallel as well as reciprocal. Parties may bind themselves to do, or not to do, for each other; a nation may also undertake to do or not to do, in its own land and to its own people, in consideration of a similar undertaking by the other party. And when nations became sufficiently concerned to wish to bargain about these "internal" matters treaties resulted.[15]

Such agreements are not entirely recent phenomena—the "new" treaties which have become the subject of controversy and which the United States has resisted.[16] In fact, the United States, like other nations, has itself negotiated treaties and other international agreements which regulate acts of the Government in regard to its own citizens. The United States adhered to some of the ILO Conventions establishing labor standards which this country would apply to Americans.[17] It agreed to control raw and manufactured opium and other drugs within the United States.[18] It agreed to apply to its own vessels

15. Even in matters which earlier might have seemed entirely "domestic." After World War I nations recognized, for instance, that labor conditions in one country affected conditions, wages and prices in other countries, and were related to imports, exports, duties, and to foreign trade generally. Governments accepted, therefore, that labor conditions in one country were a proper concern of other nations and, under the aegis of the International Labor Organization, conventions setting minimum standards were negotiated as treaties. Before and between World Wars nations came to see that a nation's treatment of its own citizens and subjects may intimately, and sharply, affect international peace. Treaties ending the First World War contained undertakings by defeated countries in regard to minority groups in their own countries. After World War II, peace treaties with several countries included provisions requiring observance of human rights for their own citizens as well. The United Nations Charter, a treaty to which more than eighty nations are now party, established an organization whose purpose, *inter alia*, is "to achieve international cooperation . . . in promoting and encouraging respect for human rights." U.N. CHARTER art. 1, para. 3. And members pledged themselves "to take joint and separate action in cooperation with" the United Nations for the achievement of the purpose of the Organization to promote "universal respect for, and observance of, human rights and fundamental freedoms," "with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations." *Id.* at arts. 55(c), 56. For a discussion of different "concerns" negotiating nations might have, compare *Niagara Power* 1164-69.

16. Particularly, the Genocide Convention, which the United States has signed but not ratified, Exec. O, 81st Cong., 1st Sess., 95 CONG. REC. 7825 (1949), and the draft Covenant on Human Rights, on which extensive negotiations continued for several years. American officials have since stated that the United States would not adhere to such a covenant. That the United States has power, under the Constitution, to adhere if it chose, see Chafee, *Some Problems of the Draft International Covenant on Human Rights*, 95 PROC. AM. PHIL. SOC'Y 471 (1951). During the Bricker debates there was also attack on the ILO Conventions.

17. *E.g.*, the conventions relating to masters and seamen, Conventions With Members of the International Labor Organization, Oct. 24, 1936, 54 Stat. 1683, 1693, 1705, T.S. Nos. 950, 951, 952. For a chart indicating the accessions of members to the various ILO conventions, see *Hearings* (1955), *supra* note 4, facing p. 768.

18. See International Opium Convention, Jan. 23, 1912, 38 Stat. 1912, T.S. No. 612, and Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, July 13, 1931, 48 Stat. 1543, T.S. No. 863, implemented by the Opium Poppy Control Act, 56 Stat. 1045 (1942), 21 U.S.C. § 188 (1952); see Stutz v. Bureau of Narcotics, 56 F. Supp. 810 (D. Cal. 1944).

accepted load lines and common standards for safety at sea.[19] It agreed not to bring to trial an American soldier if he has been tried for the same offense by the courts of an allied NATO country.[20] It agreed with other nations to limit its taxes on American citizens.[21] And the United States has agreed to limit its own armaments; it continues to strive for far-reaching controls on arms and armies which would impose strict limitations on activities by Americans within the United States; it sought, for years, agreement for the control of atomic energy which would have governed strictly many domestic activities by Americans in the United States.[22] These agreements, it should be clear, are not

19. International Load Line Convention, July 5, 1930, 47 Stat. 2228, T.S. No. 858; International Convention and Regulation for Promoting Safety of Life at Sea, June 10, 1948 [1952] 3 U.S.T. & O.I.A. 3450, T.I.A.S. No. 2495, replacing the Convention of May 31, 1929, 50 Stat. 1121, T.S. No. 910.

20. See NATO Status of Forces Agreement, June 19, 1951, art. VII, para. 8 [1953] 2 U.S.T. & O.I.A. 1792, T.I.A.S. No. 2846. Although this provision was probably intended primarily to protect a soldier against a second trial by a different country, its terms apply also to bar his own government. That this is a proper reading is indicated by the final sentence which reserves to the soldier's own military authority the right to try him for any violation of "rules of discipline" arising from an act for which he was tried by another country. The implication is that he can be given additional disciplinary but not criminal punishment. *Cf.* United States v. Sinigar, 6 U.S.C.M.A. 330, 337, 20 C.M.R. 46 (1955). The United States has also agreed to confer limited immunities and privileges upon international officials, including those who are United States citizens. See ARMS CONTROL 211, 213-14.

21. Double taxation treaties of the United States include provisions the effect of which is that the United States agrees not to tax American citizens, or undertakes to give them a credit for taxes paid to another country. See, *e.g.*, Convention With France About Double Taxation and Fiscal Assistance, Oct. 18, 1946, Supplementary Protocol, May 17, 1948, art. 5, 64 Stat. B3, T.I.A.S. No. 1982. And recently the United States has signed an agreement with Pakistan under which the United States would give tax "credits" to United States investors in Pakistan although Pakistan will not exact a tax. This provision ran into opposition, and, when the Pakistan law waiving taxes expired, the Senate entered a reservation to this provision in its consent to the ratification of the Convention, July 9, 1958.

22. See ARMS CONTROL 4-9, 104, 161-62 n.5. Parallel disarmament obligations were undertaken by the United States as early as the Rush-Bagot agreement in 1817. *Id.* at 159 n.3, 187-88 n.7.

A very different instance where governments adopted parallel undertakings within their own territory is the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, T.S. No. 981. For instances where United States treaties contained provision designed basically for domestic "effect" only, see *Niagara Power* 1166-69, 1174-75.

It may be argued that the treaties cited in the text are proper subjects for treaty because, although they involve the regulation of domestic activities of local citizens, the matters regulated are directly and essentially "international" in character, *e.g.*, the state of a nation's armaments, or the shipping practices which enable it to compete in international maritime activity and trade. *Cf.* 40 OPS. ATT'Y GEN. 119 (1941). But the extent and character of "international concern" is, of course, a matter of perspective and degree. And in regard to the conventions under discussion recently, it should be obvious that, for example, far more important for United States foreign trade than any shipping restrictions, and of far greater international concern to this country, would be an international convention fixing high labor standards, if it were adopted by the nations with whom the United States competes to sell manufactured goods in the world markets. To recognize that even "human rights" and "genocide" may be matters of authentic international concern, one need only think of recent events in Communist countries, India and Pakistan, Cyprus and other actual or potential situations where the treatment of individuals or minority groups, even if

subterfuges by the United States Government to make law in the United States through the treaty power. The United States is primarily concerned to see standards observed in other countries insofar as they may affect this country. To achieve that, and to give the United States the right to request compliance with those standards, the United States is prepared to pay the price of undertaking to apply similar standards in the United States and to recognize the right of other nations to request American compliance.

It is not the purpose here to argue in favor of any particular international agreement, arrangement, organization. The purpose is to make clear that matters of 'international concern" to the nation are and have been in the national domain. And like the commerce power, which we shall discuss below in a related context, like other constitutional concepts which have grown and developed because they are principles in a Constitution—because they were written not for 1787 but for generations unknown and unnumbered—what is of "international concern" today must also be sought in the light of the nations and the concerns of today. The Fathers did not define the treaty power, not even in terms of "international concern"; they merely asserted the treaty power, asserting that the United States would and should be able to negotiate treaties about matters as to which the United States and other nations found it in their interest to agree. That nations are concerned, negotiate and agree is the best test—is there any other?—of what is a matter of "international concern," of what is a proper subject for a treaty, of what—for the United States—is within the treaty power.

II

In the previous section we stressed the importance of looking at the treaty power as a federal power established by the Constitution to deal with matters of concern to the nation in its international affairs. A treaty does not usurp local, state functions and expropriate them to the federal domain; rather, the national government has authority over matters of "international concern" which it can exercise through the treaty power. Now we would consider the extent to which the national government may deal with the same matters of "international concern"

local citizens, is intimately related to war and peace among nations. The question is not basically whether the United States wishes to submit actions in the United States to the scrutiny of other nations; the question is whether the United States, concerned for the treatment of individuals and groups in other countries and its effect on war and peace, may wish to help regulate such treatment there, and thinks it worth the necessary price—agreement to subject some domestic actions in this country to similar international or foreign scrutiny.

through the legislative powers of Congress. Because our entire inquiry originates with the assumption that the powers of Congress in this area are less than the treaty power, it seems desirable to put the question relatively: How much of the area which is within the treaty power is also subject to the powers of Congress? Are there today, as Holmes assumed in 1920, matters of "international concern" which a treaty can "regulate" but Congress cannot?

Confidently, one may conclude that the common provisions of traditional treaties which apply as law in the United States are within accepted powers of Congress to legislate. Take the most significant category of treaties, the treaties of friendship, commerce and navigation. For our purposes, these treaties, in exchange for reciprocal treatment to the United States and to Americans abroad, accord to the foreign country and to its nationals rights and privileges in the United States. The laws which such treaties establish confer rights relating to international trade and customs, shipping, the entry or transit of goods, the entry of capital and the conduct of business in the United States, taxation, the entry and sojourn of aliens, their status and personal rights, their right to hold and enjoy property.[23] Other treaties which apply as law in the United States deal with taxes, or tariffs, or international trade in other aspects, or the rights of allied soldiers. Early peace treaties of the United States dealt with international claims. One need only run down the list of the enumerated powers of Congress to see how amply they cover these subjects. Virtually every power of Congress can be invoked in some field where the United States has acted by treaty. Some of these well recognized powers are broad enough to cover many treaties, *e.g.*, the power to lay taxes and duties, the congeries of powers now called the "war powers," the power to regulate commerce with foreign nations. The latter in particular has grown considerably since Holmes made his assumption that migratory birds are not subject to regulation by Congress and that other matters may be dealt with by treaty which cannot be regulated by Congress.[24] Under

23. For an analysis of the character and content of modern American treaties of friendship, commerce and navigation, see Walker, *Modern Treaties of Friendship, Commerce and Navigation*, 42 MINN. L. REV. 805 (1958); Wilson, *Postwar Commercial Treaties of the United States*, 43 AM. J. INT'L L. 262 (1949). Walker, *supra* at 808, gives a synoptical outline of the contents of modern friendship, commerce and navigation treaties.

24. Holmes' assumption that migratory birds were not subject to congressional regulation was partly, perhaps, the result of holdings to that effect by lower courts. See, *e.g.*, United States v. Shauver, 214 Fed. 154 (E.D. Ark. 1914), which Holmes cites. Among the claims rejected by the lower courts was that the birds were within the commerce power. Comment at the time seemed to agree that the commerce power of Congress did not reach that far, *e.g.*, 28 HARV. L. REV. 112, 113 (1914). Today, quite clearly, the birds would be held within the commerce power, and the argument that they were the property of the State would fall before that power as

the power "to regulate commerce with foreign Nations, and among the several States," Congress has no less authority over foreign commerce than it has over interstate commerce. And since the revolution initiated by *Jones & Laughlin*,[25] it no longer needs citation of authority or argument to show that under the commerce power Congress can reach all interstate or foreign "intercourse"; it can reach matters precedent to or subsequent to interstate or foreign commerce; it can reach what relates to or affects as well as what is commerce; it can reach strictly local commerce and activities when necessary to make effective a regulation of interstate or foreign commerce. The power of Congress over foreign commerce would then, of itself, support legislation equivalent to a large part of the law "enacted" by treaty.[26]

If it be urged that the right of the nationals of another country to own land, to establish a local pawn shop, to practice a profession, is remote from foreign commerce even broadly conceived, there are other powers of Congress which would authorize legislation on these subjects as they are generally dealt with by treaty. For, generally, the law of the land enacted by the traditional treaties deals with the rights of aliens in the United States, and regulation of the rights of aliens in

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easily as it did before the treaty power in Holmes' opinion. Holmes, then, might have avoided asserting his treaty doctrine and his asumption of the limitations on the powers of Congress, by asserting a broader view of the commerce power. While his own views of that power were probably broad enough, he had been in dissent in Hammer v. Dagenhart, 247 U.S. 251 (1918), decided two years earlier. To take the majority of the Court with him, the treaty doctrine was effective; the commerce power might not have been in 1920.

25. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). For a discussion of the new commerce power see, *e.g.*, Stern, *The Commerce Clause and the National Economy, 1933-46*, 59 HARV. L. REV. 645, 883 (1946).

26. In addition to the powers discussed, there are others, the extent of which has never been fully expressed or explored. Unknown implications of power in regard to matters dealt with in treaties may derive, for example, from the power to establish a uniform rule of naturalization. Compare, *e.g.*, Hines v. Davidowitz, 213 U.S. 52, 66, 73 (1941), discussed in text accompanying note 34 *infra*. Much, though it is not clear how much, can be done to regulate domestic activities related to international affairs through defining and punishing offenses against the law of nations. Compare, *e.g.*, *Ex parte* Quirin, 317 U.S. 1, 27-30 (1942); United States v. Arjona, 120 U.S. 479 (1887). The war powers of Congress, spun out of the power to declare war and other powers, have been held to justify far-reaching congressional regulation during or after war, or in time of danger of war. Since they include the power to act to prepare for war, they may perhaps support legislation in areas which relate to war because they relate to affairs with other nations.

There is also the power of Congress, analogous to the one applied in *Missouri v. Holland* vis-à-vis the treaty power, to adopt laws "which shall be necessary and proper for carrying into execution . . . powers vested by this Constitution" in the President of the United States, including his expansive powers to conduct foreign relations and to command the Army and Navy. Indeed the entire foreign affairs power of Congress discussed in this article might be included also as a power of Congress auxiliary to that of the President under the "necessary and proper" clause. Perhaps, as an independent power of Congress, it might be held to reach further than if viewed as an auxiliary power. The former view also avoids the possible assertion that when Congress acts only to implement the powers of the President it cannot override a presidential veto.

these respects would today, it appears, be held to be within congressional authority. Congress has in fact adopted multivarious legislation affecting the rights of aliens. And, with one possible and questionable exception,[27] no act regulating aliens has been held to fall beyond the area of congressional power. So, for example, Congress has assured that aliens, like citizens, shall be entitled "to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all law and proceedings for the security of persons and property . . . and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." [28]

In part this legislation built on the fourteenth amendment, under which the alien enjoys both the equal protection of the laws and the due process of law.[29] If that amendment supports the legislation cited, it may, as well, support any congressional legislation to assure aliens equality with citizens without regard to state laws or wishes.[30] Con-

27. In Keller v. United States, 213 U.S. 138, 148 (1909), a majority of the Court held unconstitutional a statute making it a felony to harbor alien prostitutes. Justices Holmes, Harlan and Moody dissented. Congress then amended the statute to apply only to harboring alien prostitutes illegally in the United States; this was unanimously upheld. Brolan v. United States, 236 U.S. 216, 221-22 (1915).

The *Keller* case, of course, included only indirectly a regulation of aliens. And language in the majority opinion denying Congress a general power to deal with aliens qua aliens is contradicted by the Court later in Hines v. Davidowitz, 312 U.S. 52 (1941). Mr. Justice Stone dissenting in the latter case (in an opinion joined by Chief Justice Hughes and Justice McReynolds) denied the existence in general of a congressional police power over aliens, 312 U.S. at 74, 76; the dissent did not, however, in fact deny the power of Congress to adopt the legislation in that case, but argued merely that Congress had not pre-empted the field. Stone, J., took a more conservative approach than the majority in other "foreign affairs" cases too. Compare his opinions concurring in United States v. Belmont, 301 U.S. 324, 333 (1937), and dissenting in United States v. Pink, 315 U.S. 203, 242 (1942). The majority in *Hines v. Davidowitz* not only upheld the power of Congress to register aliens but used reasoning and language building on the relation of the treatment of aliens to the foreign affairs of the United States, which would apply to any regulation of aliens by Congress. See text accompanying note 34 *infra.*

It is highly unlikely that the *Keller* case would be decided the same way today on the grounds that Congress lacked power; if at all the case might possibly be supported only on the grounds that limiting the crime to harboring resident alien prostitutes is a classification without reason, and therefore a violation of notions of equal protection that might inhere in the due process clause of the fifth amendment. See ARMS CONTROL 190 n.16. In any event the statute in *Keller* is not the kind of legislation relating to aliens that appears in treaties.

28. The Civil Rights Act of 1870, 16 Stat. 144, 42 U.S.C. § 1981 (1952), applies to aliens as well as to citizens: Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

29. Takahashi v. Fish & Game Comm'n, *supra* note 28, at 419-20; Truax v. Raich, 239 U.S. 33, 39 (1915); Wong Wing v. United States, 163 U.S. 228 (1896); Yick Wo v. Hopkins, *supra* note 28, at 369; see also the concurring opinions of four Justices in Oyama v. California, 332 U.S. 633, 647, 650 (1948). See Comment, *The Alien and the Constitution,* 20 U. OF CHI. L. REV. 547, 564 (1953).

30. See authorities cited note 28 *supra.* While there are earlier cases upholding the power of a State to discriminate against aliens in some respects (*e.g.,* Ohio *ex rel.* Clarke v. Dekebach, 274 U.S. 392 (1927); Terrace v. Thompson, 263 U.S. 197 (1923); Heim v. McCall, 239 U.S. 175 (1915)), "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948). The validity of those

gress can declare that "One law shall be to him that is homeborn, and unto the stranger that sojourneth among you," or, in the language of treaties, confer "national treatment" on aliens in all respects in which that has been done traditionally by treaty.

And there is another power. For if the fourteenth amendment supports legislation affording aliens equality with citizens in respects in which that is frequently provided by treaty, it would hardly lend authority for other regulations of aliens, not applicable to citizens, which Congress has enacted. Congress has adopted legislation discriminating against the alien. Aliens have been excluded; they have been deported; they have been subjected to special registrations; in time of national emergency they have been confined, their property taken. And on the other hand Congress has given aliens—as treaties have done—preferences, exemptions, privileges not enjoyed by citizens, for example, certain diplomatic and quasi-diplomatic treatment, or freedom from military service.[31] The power of Congress to regulate the

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cases has been put into question by the *Takahashi* case; and compare the *Oyama* case, particularly the concurring opinions, *supra* note 29.

In none of the earlier cases, the Court itself has pointed out, had Congress passed legislation on the subject. See Hines v. Davidowitz, 312 U.S. 52, 68-69 n.23 (1941); see also Comment, *The Alien and the Constitution*, *supra* note 29, at 569. An act of Congress conferring upon aliens equality in every respect in which alien rights are dealt with by treaty would, I believe, be upheld under the fourteenth amendment and the foreign affairs power discussed below, subject, of course, to limitations on this as on other powers of Congress contained in the Bill of Rights and elsewhere in the Constitution. *Cf.* note 62 *infra* and accompanying text.

31. See *e.g.*, ARMS CONTROL 88-93, 212-17; some of the legislation cited is not in implementation of a treaty. For exemptions of aliens from military service, see, *e.g.*, Selective Draft Act of 1917, ch. 15, § 2, 40 Stat. 77; Selective Service Act of 1940, ch. 720, § 3, 54 Stat. 885 (now 50 U.S.C. § 454 (1952)). While aliens have challenged the right of Congress to draft them, no one has challenged the right of Congress to exempt aliens. Usually it is considered that in either event Congress is acting under its power to raise and support armies. *Cf.* United States v. Lamothe, 152 F.2d 340 (2d Cir. 1945). Congress has also provided that foreign servicemen might be tried by their own military authorities (during World War II), and that some cases involving foreign seamen might be handled by their consuls. See notes 40, 41 *infra*. And of course there are taxes and regulations which apply to Americans only on the basis of nationality which could not apply to aliens, *e.g.*, taxes on non-residents on income from sources abroad; treason. *Cf.* the Logan Act, note 47 *infra*.

That an act of Congress, like a treaty, may sometimes give aliens preferences over citizens was said by the court in Todok v. Union State Bank, 281 U.S. 449, 454-55 (1930), and cited again in Hines v. Davidowitz, *supra* note 30, at 65. *Cf.* Harisiades v. Shaughnessy, 342 U.S. 580, 585-86 (1952). In fact there has been little occasion for the United States to do so either by treaty or by act of Congress. Nations seek such provision, as has the United States in some other countries, where the treatment accorded to nationals leaves something to be desired and where the beneficiary nation has the bargaining advantage, as, *e.g.*, when the western nations obtained extraterritorial privileges in China, Morocco, *et al.* In the United States, the "treatment" accorded to American nationals is very high, and when the United States grants "national treatment" to nationals of a friendly country, they receive favorable treatment indeed. Even apart from treaty, the rights enjoyed by all aliens under the Constitution and acts of Congress are higher than international standards generally. Apart from diplomatic and related privileges and immunities, exemption from military service appears to be the only preference nations have sought in the United States in recent times. And that too is no longer accorded by the newer American treaties.

presence and status of aliens has been related to the power of Congress to admit or exclude aliens. But that too is not an enumerated power. Where does it lie?

While control of alien immigration has been mentioned as an incident of the power of Congress over foreign commerce, the accepted basis is a different power of Congress. The power to admit and to regulate aliens derives from an implied congressional power—the "power of Congress to deal with foreign affairs." The power, we shall see, extends beyond aliens to other matters relevant to our examination of the comparative reach of the powers of Congress and the treaty power. To survey its content, size, and scope, it seems appropriate to trace its genesis, growth and acceptance, so far as that can be done for a constitutional doctrine which has no place or date of birth but was several times found to be there.

In the *Chinese Exclusion Case*,[32] the Court upheld the power of Congress to exclude certain Chinese laborers. Invoking Chief Justice Marshall, Mr. Justice Field asserted the sovereignty of the United States undiminished and equal to that of any other nation. He said that "the United States in their relation to foreign countries and their subjects and citizens are one nation, invested with powers which belong to independent nations." He quoted Mr. Justice Bradley saying that the United States "has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike . . . ." Mr. Justice Field went on to say: "for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." He recognized the inherent, sovereign power of the United States to "preserve its independence, and give security against foreign aggression and encroachment." This power he found in "the government of the United States through its legislative department." But it was apparently not the war power that Justice Field had in mind. The power to exclude aliens was the same "sovereign power" which empowered Congress, not necessarily in the name of the "security" of the United States, to adopt legislation to admit aliens. Subsequently, this same power was held to authorize the deportation of aliens, even though lawfully admitted. This time the Court said also: "The power to exclude or expel aliens being a power affecting international relations, is vested in the political departments of the Government, and is to be regulated by treaty or by act of

32. 130 U.S. 581 (1889). Earlier the Court had found the power to regulate immigration in the foreign commerce power. Head Money Cases, 112 U.S. 580 (1884).

Congress." [33] The power to exclude or deport aliens, then, was itself an aspect of a broader power over matters "affecting international relations."

In *Hines v. Davidowitz*,[34] the Supreme Court invalidated Pennsylvania's Alien Registration Law because it encroached on a field reserved for federal action and pre-empted by valid congressional legislation. Mr. Justice Black upheld the Federal Alien Registration Act and held that it barred state action. He reaffirmed "the supremacy of the national power in the general field of foreign affairs." "When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land." "One of the most important and delicate of all international relationships . . . has to do with the protection . . . of a country's own nationals when those nationals are in another country." And "the regulation of aliens is . . . intimately blended and intertwined with responsibilities of the national government." The "treatment of aliens" is "a matter of national moment." [35]

For purposes here relevant, then, Congress can regulate aliens under a power implicit in the sovereignty of the United States; "the supremacy of the national power in the general field of foreign affairs" includes a power of Congress to legislate in regard to such affairs. But the power reaches beyond aliens, and brings into the ken of Congress much else which is relevant to this inquiry. Perhaps the fullest expression of the power was that of Mr. Justice Sutherland, in a case not involving aliens at all. The *Curtiss-Wright* case [36] upheld the power of Congress to authorize the President to promulgate an arms embargo, and to make it a crime to violate such an embargo. The Court might have limited itself to a reference to the power of Congress over foreign commerce. It might perhaps have mentioned the power to define offenses against the law of nations. It might have invoked

33. Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893). See Harisiades v. Shaughnessy, 342 U.S. 580, 585 (1952). One might suggest that while a sovereign power to decide which aliens may enter and reside would apply to all aliens, a power to admit, exclude, deport and especially regulate aliens based on "effect on international relations" might not support action in regard to stateless persons who have no government, relations with which could be affected.

34. 312 U.S. 52 (1941). The Court cited, *inter alia*, several of the Federalist Papers for its view of a broad foreign relations power. *Id.* at 62 n.9.

In Harisiades v. Shaughnessy, *supra* note 33, at 588-89, the Court said, "It is pertinent to observe that any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations. . . ." I do not deem it necessary to deal here with constitutional limitations applicable to all powers of Congress to deal with aliens. Compare the *Harisiades* case; Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); Knauff v. Shaughnessy, 338 U.S. 537 (1950). See note 62 *infra* and accompanying text.

35. 312 U.S. at 62-63, 64, 66, 73.

36. United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936).

history, noting that Congress had authorized such an embargo in the first years of the Nation. But Justice Sutherland developed in full a "foreign relations" power of the United States, implied in its sovereignty. He rejected any doctrine of "enumerated powers" as far as concerned foreign affairs, an area which was not carved from the sovereign powers of the States but which passed undiminished to the federal government from the British Crown. He emphasized that congressional delegation to the President in this field may go very far, and that, when joined, the powers of Congress and President in foreign affairs added up to the whole sovereign power of the United States to act in regard to foreign affairs.

There were other cases, before and since *Curtiss-Wright,* which invoked this power to support legislation relating to American citizens. In 1915 the Court upheld a statute which, in effect, deprived a woman of her American citizenship if she married an alien.[37] The Court said: "But there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers." In 1958, the Court upheld a statute under which an American citizen was expatriated, his citizenship canceled, for having voted in a foreign election. The Court upheld this statute as a valid exercise of the "power of Congress to deal with foreign relations." [38] The case was a five-four decision over sharp dissent. But while three of the dissenters insisted that the Constitution did not permit Congress to cancel citizenship—an implied constitutional limitation akin to those in the Bill of Rights—no dissenting Justice questioned the basis for congressional authority asserted by the majority: that Congress could legislate in regard to these matters under a "foreign affairs power."

So, in addition to several other broad powers in Congress, we have the "foreign affairs power." We may say with confidence that this power supports any reasonable regulation of the rights of aliens; even as to citizens it supports such limitations on freedom of action as may be deemed by Congress reasonably necessary in the interests of United States foreign relations. Without inducing or extrapolating too boldly from what the Supreme Court has held and said, it can be asserted that the foreign affairs power of Congress, of itself or, surely, with other powers we have mentioned, can support enactment of virtually any

37. Mackenzie v. Hare, 239 U.S. 299, 311 (1915).
38. Perez v. Brownell, 356 U.S. 44 (1958).

provision contained in any treaty in the history of the United States: in agreements conferring diplomatic and other rights on foreign governments and foreign officials; in disarmament agreements; in treaties of friendship, commerce and navigation; in extradition treaties, even as applied to American citizens;[39] in reciprocal taxation and trade treaties; in status-of-forces and other military agreements which became law in the United States.[40] Congress could without a treaty make such legislation applicable to nationals of other nations or to Americans on a reciprocal or parallel basis.[41] Congress could also, it would seem, enact them without reciprocity in the hope that other nations would do likewise, or because of other impact which such

39. The Court has not had occasion to rule on the question since Congress has not in fact provided for extradition, except under a treaty or to a country or territory occupied by the United States. Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 9 (1936). See Neely v. Henkel, 180 U.S. 109, 122 (1910); United States v. Rauscher, 119 U.S. 407, 412, 414 (1886); 62 Stat. 823 (1948), as amended, 18 U.S.C. § 1385 (1952). In one case, in a statement perhaps necessary to the result, the Court clearly asserted the power of Congress to extradite, at least as regards aliens, even without a treaty. See Grin v. Shine, 187 U.S. 181, 191 (1902). Where extradition was provided by treaty it was upheld as applied to United States citizens as well. Charlton v. Kelly, 229 U.S. 447, 466 (1913); *cf.* Valentine v. United States *ex rel.* Neidecker, *supra.*

40. Compare the Service Courts of Friendly Foreign Forces Act, 58 Stat. 643 (1944), 22 U.S.C. § 701 (1952).

The settlement of claims between the United States or U.S. citizens and foreign nations or nationals, frequently handled by agreement, is probably also a subject for congressional legislation. Sometimes such settlements are the aftermath of war—like the provision in issue in the leading case, Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)—and would be within the war powers of Congress. *Cf.* The War Claims Act of 1948, 62 Stat. 1240, as amended, 50 U.S.C. § 2001 (Supp. V, 1958). See also the World War Foreign Debts Commission Act, ch. 47, 42 Stat. 363 (1922). In theory, also, transnational claims, even those involving rights of private persons, are regarded, for many purposes at least, as the claims of the government, and can presumably be dealt with by Congress on that basis. *Cf.* ARMS CONTROL 109-10, 230-31.

41. Congress has adopted legislation conferring rights only upon aliens whose governments grant similar rights to United States nationals. *E.g.,* 43 Stat. 113 (1925), 46 U.S.C. § 785 (1952), and 28 U.S.C. § 2502 (1952) (suits by aliens against the United States); REV. STAT. § 4079 (1875), 22 U.S.C. § 256 (1952) (jurisdiction granted to foreign consuls over their seamen, only where other nation grants same to United States consuls by treaty). See also Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567, 612, Field v. Clark, 143 U.S. 649 (1892); Canadian Reciprocity Act, ch. 3, 37 Stat. 4, 6, 10, 12 (1911); Nolan Act, ch. 26, 41 Stat. 1313 (1921), Robertson v. General Electric Co., 32 F.2d 495 (4th Cir.), *cert. denied,* 280 U.S. 571 (1929). See also ARMS CONTROL 215, n.35. The *Robertson* case shows how Congress used reciprocal legislation as a substitute for a treaty to which the Senate did not consent. Germany, in that instance, adopted reciprocal legislation. See also note 57 *infra.* For other reciprocal legislation see 22 Stat. 346 (1882), as amended, 46 U.S.C. § 362 (1952) (reciprocal vessel-inspection); REV. STAT. § 4228 (1875), 46 U.S.C. § 141 (1952) (reciprocal tonnage duties); 45 Stat. 1493 (1929), 49 Stat. 889 (1935), 46 U.S.C. § 85(d), § 88(d) (1952) (reciprocal recognition of ship-load lines). *Cf.* REV. STAT. § 4154 (1875), as amended, 46 U.S.C. § 81 (1952) (similar tonnage—measurement of vessels); see also Act of May 24, 1828, ch. 111, § 2, 4 Stat. 308; Act of May 28, 1864, § 4, ch. 98, 13 Stat. 93. There are also reciprocal provisions in our tax law, *e.g.,* INT. REV. CODE OF 1954, § 883 (reciprocal exclusion from gross income of earnings of foreign vessels and aircraft), and § 861 (authority to double tax on citizens of country which imposes discriminatory or extraterritorial taxes on United States citizens). And see the reciprocal treatment of visa fees in the former law, Act of Feb. 25, 1925, ch. 316, 43 Stat. 976, and in the current act, 66 Stat. 230, 8 U.S.C. § 1351 (1952).

provisions would have or might have on the attitudes of other nations toward the United States and United States citizens.[42]

III

The assumption that there are matters of national exigency that a treaty could deal with but that Congress could not, seems no longer, then, to apply to matters in fact contained in the standard treaties of the United States, past or present. If there are any treaty provisions, particularly those dealing with rights of Americans, which still escape the long reaches of congressional power which we have discussed, they will be subsumed in the discussion to follow. For it remains to be seen to what extent the assumption we are examining has validity in regard to what have been called the "new treaties." The treaty power, we have said, reaches to all matters of international concern, including those new forms which now concern nations, *i.e.*, "uniform international legislation" such as the draft Covenant on Human Rights or a genocide convention. Could Congress reach these too?

The constitutional doctrine which I venture to assert for scholarly debate is far-reaching, but it can be stated simply. Under its foreign affairs power Congress can enact legislation on any subject which deals with, relates to, or affects the relations of the United States with other nations. The foreign affairs power can support legislation on any matter of "international concern." If—to use the difficult examples—genocide in the United States, if local labor conditions in the United States, if the status of human rights in the United States, are deemed to require regulation in the interests of United States foreign relations, Congress has the power to deal with them.

Let it be said immediately that there is no precedent for so broad a proposition in decisions of the Court, and little in other authorities. Congress has not invoked such broad powers, perhaps because other powers amply support legislation which Congress has desired; perhaps because Congress has not recognized its own powers; perhaps because Congress has not seen fit to exercise powers which it possesses. And since Congress has not relied upon the powers, the courts have not had

42. This conclusion is contrary to the position taken by the opponents of the Bricker Amendments. See note 4 *supra*. Their views that the powers of Congress are limited were taken, of course, in the exigency of controversy, to show the dangers of the proposed amendments. Perhaps too they were afraid that courts someday might take the position that various powers of Congress are more limited than here suggested. See note 51 *infra*.

The views here expressed, however, go far beyond the position of the Brickerites, most of whom denied that Congress could deal with the right of aliens to own or inherit land, run pawn shops or practice professions. And, of course, the suggestion in the pages to follow that Congress can legislate on any matter which can be dealt with by treaty would destroy the basis of the Bricker position and of its proposed "remedy." See text and notes at notes 65-68 *infra*.

opportunity to examine whether such powers exist and are validly invoked. An implied power, never exercised or asserted, is of course difficult to prove. And yet, the Court has spoken of the foreign affairs power in the broadest terms. The United States "has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike." [43] "The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and make it effective. . . . The power . . . being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress." [44] "As a nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations." [45] "As it has the character of nationality it has the powers of nationality, especially those which concern its relation and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers." [46]

And there are arguments to be made in behalf of this broad view of the foreign affairs power, and precedents to lend it weight. For, first, we have seen that Congress can deal not only with matters which relate directly to the conduct of foreign affairs,[47] but as well with others merely because of their possible effect on the foreign relations of the United States. If Congress can regulate aliens, if it can deprive citizens of freedom to act under pain of expatriation, because these matters affect or might affect the international relations of the United States, why cannot Congress regulate other matters which affect or might affect the same relations?

Second, we would recall that matters which affect foreign relations are of "international concern" and, therefore, already in the federal domain. They are—as we have seen and as all now recognize, however reluctantly—subject to the treaty power. If today nations are

43. Bradley, J., concurring in Legal Tender Cases, 79 U.S. (12 Wall.) 457, 555 (1871). The sentence quoted did not itself refer expressly to foreign relations, but they are included in the context.

44. Fong Yue Ting v. United States, 149 U.S. 698, 711, 713 (1893).

45. Burnet v. Brooks, 288 U.S. 378, 396 (1933).

46. Mackenzie v. Hare, 239 U.S. 299, 311 (1915), quoted in Perez v. Brownell, 356 U.S. 44, 52 (1958).

47. *E.g.*, the "Logan Act" of 1798, amended but still law, which makes it criminal for a citizen to communicate with a foreign government with intent to influence it in relation to a controversy with the United States. The present version is 18 U.S.C. § 953 (1952). Congress has also made it a crime to harass or assault diplomatic personnel. REV. STAT. §§ 4063-64, as amended, 22 U.S.C. §§ 252-53 (1952); 18 U.S.C. §§ 112, 1545 (1952). Such legislation could be supported amply either under the foreign affairs power of Congress, or as necessary and proper to give effect to the President's powers to conduct foreign relations. See note 26 *supra*.

concerned about the transnational effects of domestic labor standards, of genocide, or of human rights, the United States can negotiate on these subjects and conclude treaties which would be properly law of the land. Is there anything in the Constitution, in the history of its creation or of its development, in the pattern of government which it established, which suggests that this power in the national government to "legislate" on such matters of international concern must be exercised only through the treaty power, not by act of Congress, the nation's principal legislator? The power to make treaties, we suggested, is itself one aspect of the sovereign power of the nation in international affairs. That power authorizes treaties on all matters which concern the United States today in its relations with other nations. The power of Congress to legislate on matters which relate to foreign affairs derives from the same sovereign power of the nation in international affairs; why should not that power authorize legislation on all matters which concern the United States today in its relations with other nations? If in order to affect events and attitudes abroad the United States can enter into a treaty regulating matters in the United States, why cannot Congress so regulate for the same purpose? If a genocide treaty, why not genocide legislation? Is there any reason to conclude that the Constitution requires international agreement before there can be legislation in the United States on matters of international concern? Does the Constitution insist that the United States can adopt "international legislation" on any matter of international concern by treaty, but may not be able to do so by having Congress adopt reciprocal or parallel legislation for the same reasons of international relations, unless the subject matter happens to be a matter which Congress can regulate apart from international consequences?[48] The United States can adhere to a genocide convention or to an agreement on international labor standards or to a treaty on arms control. But if, instead of entering such an agreement, the Soviet Union outlawed genocide in the Soviet Union, or adopted a "uniform labor code," or established an inspection system to permit international inspectors to check on self-imposed armaments limitations, and challenged the United States to do likewise, is Congress without power to adopt such legislation if it chose?

And, further, we would invoke the analogy of the power to regulate foreign commerce. The statement of the proposition that Congress may regulate that which deals with, relates to, or affects the foreign

48. See note 41 *supra*. Congress may adopt such legislation because the Senate rejected a treaty, *ibid.*, or because nations could not agree on a treaty. Reciprocal legislation may be preferable where Congress wishes to be free to discontinue an arrangement without incurring the onus of breaching an agreement.

relations of the United States, may stir familiar echoes, as was indeed intended. For today, there can be little doubt, Congress can under the commerce power reach very far to regulate matters affecting commerce; and in no case since the new doctrine has been discovered in the Constitution has the Court found the effect too tenuous, the relation to commerce too far-fetched, the regulation unreasonable. Is there any reason to read the Constitution as intending greater scope to the foreign commerce power than to the foreign affairs power? Is there any reason to say that the constitutional development of the foreign affairs power must remain at a stage corresponding to the pre-1937 era in the life of the commerce power? Is it unreasonable to infer that the Constitution, which authorizes legislation regulating not only foreign commerce but what affects foreign commerce, authorizes also the regulation not only of other foreign intercourse but also of what affects such foreign intercourse?[49] Linguistic parallels do not, of course, make mathematical equations, and neither afford a sure basis for developing new constitutional doctrine by analogy. "Effect on foreign commerce" may have very different meaning, with different constitutional consequences, from "effect on foreign relations." But similarity of phrasing suggests that behind both commerce and other foreign intercourse is the identical concern of the Constitution to vest in the national government authority to deal with what affects the nation as a whole; it is this concern which authorizes Congress to deal with what "affects" foreign commerce, and—as we have seen—what affects foreign relations (*e.g.*, aliens). May not this same concern empower Congress to deal with any matter which today concerns the nation as a whole because it today has effect on the foreign relations and interests of the United States? Is it more startling, more subject to abuse, that matters which are "otherwise local" may be reasonably deemed by Congress to require regulation in the interest of United States foreign relations, than that Congress make similar assumptions of power in the regulation of commerce, or through the taxing power? Should it be admissible to show, at some times and in some situations, if Congress were disposed so to regulate, that the regulation of standards of labor in the United States is reasonably related to international trade or other international intercourse, or that the regulation of social and economic standards is reasonably related to international peace and to the relations among nations? Differences in degree, of course, are and continue to be constitutionally crucial. But as changing circumstances, as a contracting continent, as greater or more apparent interdependence, have brought within the power to regulate interstate commerce "local"

49. *Cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-90 (1824).

matters whose effect on interstate commerce was not at first recognized, may not changed relations among nations in a smaller, more interdependent world similarly have become the concern of the nation? May not Congress decide that United States foreign interests require this regulation, that "foreign policy begins at home"?

This array of questions is intended, of course, to evoke an affirmative answer; or, at least, to suggest that the answer is not clearly no. In addition to argument and analogy, there is also some precedent which deserves mention. The previous section described the leading cases, the bricks from which the implied foreign affairs power of Congress was built. To extend the compass of this power, other bricks could be found, and some straws from which bricks might be made. Consider the power of Congress by joint resolution to approve or authorize international agreements. Particularly after World War II, in the era of new world organizations and new forms of international cooperation, some government officials and public commentators urged a preference for a method, alternative to the treaty, for making international agreements and enacting them into United States law. The treaty power, it was urged, was not the only method, or indeed the better method. The Senate, it was feared, might again prove to be "the graveyard of treaties," especially since the Constitution has provided that a Senator voting "no" be deemed *"ipso facto* twice as well informed and weighty as one of his colleagues who votes 'yes.' " [50] It might not be possible, it was feared, to obtain consent to the new international agreements from a body which was inherently more conservative and in which both isolationism and States rights had deep roots. Giving the House of Representatives a role in the approval of an international agreement, it was urged, would make for a more "democratic" foreign policy and would bring American practice in this respect into line with that of other democratic countries. It would, in addition, eliminate recurrent uncertainties as to whether a treaty was "self-executing." And Congress could simultaneously enact any necessary implementation.

Extended debate between writers as to whether this method was as appropriate and as effective as a treaty for all purposes seemed to resolve the issue in favor of those who argued that it was.[51] In one

50. The phrase is that of John W. Davis, in support of an earlier effort to circumvent the Senate's "veto" on treaties. 48 A.B.A. REP. 193, 203 (1923).

51. *Compare* McDougal and Lans, *Treaties and Congressional Executive or Presidential Agreements: Interchangeable Instruments of National Policy,* 54 YALE L.J. 181, 534 (1945), *with* Borchard, *Shall the Executive Agreements Replace the Treaty?,* 53 YALE L.J. 664 (1944), *and* Borchard, *Treaties and Executive Agreements —A Reply,* 54 YALE L.J. 616 (1945). Several years earlier a book was devoted to

important instance the Department of State sought and obtained an opinion of the Attorney General to assure members of the United Nations that the proposed Headquarters Agreement between the United States and the United Nations would be as effective for all purposes—including the supersession of state law—if approved by joint resolution rather than by treaty.[52] Thus it was done.[53] But by what authority

the cause of the executive agreement. McCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS (1941).

There is irony, and there are perhaps some lessons, in the fact that many who had earlier decried the treaty power were among its strongest defenders against the Bricker Amendments. The explanation, of course, is that earlier the treaty process was viewed as a serious obstacle to United States ratification of international agreements. Those who favored more extensive international cooperation sought a more liberal alternative in the executive-agreement-plus-joint-resolution. In the Bricker controversy the issues were different. The Bricker Amendments would have made it impossible for the United States to adhere—by either method—to any agreement which went beyond the powers of Congress, which were assumed to be more limited. To preserve this power to make agreements broader than the powers of Congress, opponents of Senator Bricker sought to preserve both the treaty method and the executive agreement. Perhaps, too, they were concerned to keep the treaty power intact lest one day the Senate insist that approval as a treaty was the only appropriate way.

Some versions of the Bricker Amendments did not favor the treaty method as against the President-and-Congress approach. In fact, providing, in the first aspect of the "which" clause (see text accompanying note 65 *infra*), that every treaty must be implemented by legislation, may have rendered it far less likely that the treaty method would be used: Why send an agreement to the Senate for approval by two-thirds of the Senators present, and then again to both houses for legislation to execute it, when the same result could be achieved by one joint resolution of both houses? In the 1957 version of the amendment, however, the fight to cut treaties "down to the size of the powers of Congress" had been abandoned; the "which" clause was to apply only to executive agreements. This would have meant that one of the "new" international agreements, dealing with a matter assumed to be beyond the power of Congress alone, could not be adopted by executive agreement plus joint resolution. Such an agreement would have to get by the Senate as a treaty. And, under § 2 of the 1957 version, congressional implementation would still be required to make that treaty the law of the land, unless the Senate, in consenting, affirmatively provided that it should be self-executing. See S.J. Res. 3, 85th Cong., 1st Sess. (1957).

52. 40 OPS. ATT'Y GEN. 469 (1946). The opinion does not state expressly the basis of congressional authority, but *Curtiss-Wright* is among the cases invoked.

The opinion of the Attorney General dealt only with the particular agreement before him. It may be argued that the executive-agreement-plus-joint-resolution is available as an alternative method only where the agreement in question is within the power of the President or of Congress; the Headquarters Agreement, for instance, was within their power because it implemented a treaty of the United States (the United Nations Charter), and dealt with a matter directly relating to the conduct of foreign relations. One need not conclude, it would be urged, that the sum of these powers of Congress and President necessarily covers any matter of international concern, as does the treaty power. Whether the powers of President plus Congress equal the treaty power may depend on one's view of the scope of the power of the President (see note 54 *infra*), and of the foreign affairs power of Congress. *Curtiss-Wright*, in another context, suggested that the powers of the President and Congress together add up to the full sovereign power of the United States to act in foreign affairs. 299 U.S. at 318. The argument that the Constitution established two equal alternative methods for making international agreements may be more readily acceptable if the power to make treaties, like the foreign affairs powers of Congress and the President, is viewed as an implied power. See note 6 *supra*.

53. Agreement With the United Nations Regarding the Headquarters of the United Nations, June 26, 1947, 61 Stat. 756, 3416, T.I.A.S. No. 1676. The Headquarters Agreement, § 8, provides that state as well as federal law may be rendered inapplicable in the Headquarters District by appropriate United Nations regulations. See ARMS CONTROL 149.

does Congress authorize or approve such international agreement? If it could be assumed that the Executive had authority of his own to make the agreement, one might urge that Congress is only adopting legislation "necessary and proper" to implement the President's power. If the treaty-making provision of the Constitution is to have meaning, however, it would hardly be urged that every international agreement is within the President's power to make as an executive agreement without Senate consent.[54] The President's power alone, then, would appear, in some cases at least, inadequate to support the international agreement and make it so binding on the United States as to be enforceable in courts of the United States. If the joint-resolution-*cum*-executive-agreement is the full equal of a treaty it must be on some theory under which congressional approval of an executive agreement is part of the process of adopting the agreement on behalf of the United States, like the role of the Senate in making a treaty.[55] In the case of the United Nations Headquarters Agreement, indeed, Congress authorized the President in advance to conclude an agreement already negotiated but not ratified. This, surely, is not to be considered "advance implementation" under the same "necessary and proper" power.[56] Congress, one may rather say, is acting under a power to legislate in regard to foreign relations, just as it does under other powers when it authorizes international postal or trade agreements.[57] And if indeed this method is fully as effective as ratification of a treaty, if it is not limited to agreements dealing with matters "otherwise" within the

54. For argument in support of plenary executive power, see McCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 330, 359-64 (1941).

A somewhat different statement is the view that the President has authority to bind the United States in every case, just as he can by treaty, but that to become law of the United States the executive agreement requires congressional implementation. This view too has its difficulties. Even to bind the United States internationally it would seem that executive agreements alone are not sufficient in every case; otherwise there is little left to the role reserved to the Senate by the Constitution. And, on the other hand, some executive agreements themselves have effect as law of the land. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

55. See McDougal and Lans, *supra* note 51. This is another respect in which the powers of Congress and the President when joined are plenipotentiary. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-20 (1936), discussed in text accompanying note 36 and in note 52 *supra*.

56. But *cf.* Moore, in PROC. AM. PHIL. SOC'Y, xv-xvi (1921). Compare WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 233, 375 (1922); McDougal and Lans, *supra* note 51, at 201.

McCLURE, *op. cit, supra* note 54, at 332, 372, suggests that perhaps congressional "authorization" is merely an assertion by Congress that it does not intend to use its power in opposition. This assumes that if Congress is silent the executive agreement can in every case become *sua sponte* law of the land. McClure himself prefers to find some constitutional authority for the role of Congress in authorizing executive agreements, though he seems to treat it as a special power that has developed; he does not apparently relate it to the foreign affairs power. *Ibid.*

57. See McDougal and Lans, *supra* note 51, at 255-61.

jurisdiction of Congress, it suggests that in this respect at least the power of Congress reaches to include any provision which can be enacted by treaty.

As another instance, consider one aspect of the relation of Congress to treaties to which we have already alluded. It is established, we have seen, that legislation adopted by Congress is law of the land and would supersede any inconsistent, earlier treaty provision.[58] Usually, however, the doctrine expressed is that for domestic purposes Congress has the power to repeal a treaty or treaty provision. Every case which has so held, every context in which this was said by the Court, involved a statute under an admitted power of Congress—say, a tariff inconsistent with a treaty obligation, or a discriminatory immigration provision in violation of an international undertaking. But it has not generally been suggested that there are some treaty provisions which Congress could not repeal since Congress could not enact such provisions.[59] In the *Head Money Cases*,[60] while the legislation which

58. See text following note 6 *supra*. And see particularly ARMS CONTROL 173-74.

59. But Mr. Justice Field in the *Chinese Exclusion Case* said: "If the treaty operates by its own force, *and relates to a subject within the power of Congress*, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress." 130 U.S. 581, 600 (1889). (Emphasis added.) This limitation was asserted previously by Mr. Justice Curtis, on circuit, in the early case much cited in the Supreme Court in support of the power of Congress to repeal a treaty. See Taylor v. Morton, 23 Fed. Cas. 784, 786 (No. 13,799) (Curtis, Circuit Justice 1855), *affirmed*, 67 U.S. (2 Black) 481 (1863).

60. 112 U.S. 580, 599 (1884). See also La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460 (1899).

In the *Head Money Cases, supra*, Mr. Justice Miller seems to derive some support for the power of Congress to repeal treaties from its power to declare war, which usually suspends or destroys treaties. *Cf.* the Chinese Exclusion Case, *supra* note 59, at 600. It seems somewhat strained to say, in regard, for example, to a multilateral treaty with eighty nations, that because Congress could theoretically declare war on each of those eighty nations, it can also repeal provisions of that treaty domestically without declaring war. And Mr. Justice Curtis (see note 59 *supra*), while he derived support from the war power, said that under that power Congress could destroy treaties only by actually declaring war.

One might perhaps labor and bring forth an argument supporting the power of Congress to repeal treaties by its authority to define offenses against the law of nations. Violation of a treaty is an offense against the law of nations. Congress can define and punish the violation of any treaty provision as such an offense. Congress can, then, also declare that violation of a particular treaty obligation shall not be an offense within the U.S., by "repealing" it.

There have been suggestions also that the power of Congress to repeal a treaty provision is part of, or related to, a power to denounce treaties or direct the President to denounce them. Congress has in fact presumed to do so, *e.g.*, 1 STAT. 578 (1798), quoted by both Field and Curtis (see note 59 *supra*) in a discussion of the power of Congress to enact legislation inconsistent with a treaty. But Curtis, in support of the power of Congress to repeal the treaty in that case, argued that if Congress could not do so, repeal could be achieved only by a new treaty requiring the agreement not only of the President and Senate but also of the other party, thus leaving the state of United States law in the control of a foreign government. Justice Curtis, then, did not, apparently, believe that anyone—the President, alone or with the Senate, or the Congress—could terminate *any* treaty domestically by denouncing it. The 1798 denunciation by Congress, which Curtis cited, he accepted apparently because it dealt with a subject on which Congress could legislate. It has also been suggested

was upheld in fact involved an act of Congress which had support in other congressional power, Mr. Justice Miller asserted without qualification that a treaty "is subject to such acts as Congress may pass for its enforcement, modification or repeal." And indeed the power to repeal treaties has been widely asserted as one of the safeguards against abuse of the treaty power, with particular reference to the "new treaties," those which deal precisely with matters which, it has been assumed, are beyond the powers of Congress.[61]

On what authority can Congress "repeal" a treaty provision by legislation which cannot be justified under "accepted" powers of Congress? *Missouri v. Holland* does not provide an answer. Congress, that case said, has powers to adopt legislation "necessary and proper" to implement a treaty. A statute to repeal a treaty is hardly "necessary and proper" for carrying it into execution. In fact, the power to modify or repeal for domestic purposes *any* treaty provision can only be supported if Congress has full legislative power to deal with any matter which can be "enacted" by treaty, if the power of Congress extends to all matters of "international concern" coincidentally with the treaty power.

IV

The Constitution amply provides the national government with necessary powers to act effectively in matters which relate to other nations, which affect relations with other nations. This includes power to make agreements with other nations on matters of "international concern"; it includes also power to enact laws in the United States on matters of international concern. The national government may make

that that particular denunciation by Congress was, in the political context, practically a declaration of war. In general, directions of Congress to the President to denounce treaties have sometimes been disregarded by Presidents, and this alleged power of Congress has been questioned. WRIGHT, *op. cit. supra* note 56, at 258-59. Denunciations of treaties, moreover, are "international acts" rather than legislative in character. The power to declare war is the only such "international act" expressly committed to congressional authority. Like the power to declare war, the power to denounce treaties would not as such necessarily confer the power to repeal treaty provisions as domestic law without actual denunciation.

On the other hand the existence of the power in Congress to declare war, and the power to denounce treaties and perform some other "international acts," if Congress has it (*e.g.*, Congress declared both wars with Germany at an end, the first after the Senate refused consent to a treaty, S.J. Res. 16, July 2, 1921, ch. 40, 42 Stat. 105; H.J. Res. 289, Oct. 19, 1951, ch. 519, 65 Stat. 451) suggest a major role in foreign affairs for Congress which lends support to the view that the Constitution gave Congress a broad legislative foreign affairs power as well.

61. See, *e.g.*, comments of both sides in the Bricker debates, *Hearings* (1953), *supra* note 4, at 77, 103, 835, 924-25. It would have been a telling argument for the Bricker Amendment if Congress could not repeal, say, a genocide convention because Congress did not have authority to enact one or otherwise to deal with that subject. No one on either side, apparently, seized on the hint to this effect offered by Mr. Justice Fields and Mr. Justice Curtis, *supra* note 59.

such laws by ratifying and proclaiming a treaty; it may make such laws also through exercise of legislative power by Congress, in most cases clearly, perhaps—we have suggested less confidently—in all cases.

These powers are far-reaching, but there exist limitations upon these powers, and safeguards against their abuse. Both the treaty power and the powers of Congress are, of course, subject to the limitations of the Bill of Rights and of other constitutional provisions governing all federal action.[62] There are some limits also implicit in the very requirement that the matters dealt with be of "international concern," a limitation that is not without significance even today. While the fact that nations have concluded a treaty is itself the strongest evidence that it deals with a matter of international concern, legislation grounded in the foreign affairs power will have to reveal plausible links to the international interests of the United States. It should not be assumed that Congress or the treaty makers will be irresponsible. And both act of Congress and treaty are subject to the safeguards of judicial scrutiny.[63] Although the courts now only infrequently say no to the political branches, it will be the courts who ultimately decide whether treaty or statute may reasonably be deemed to be pregnant with "international concern," with effect on the foreign relations of the United States. In regard to treaties there are also the practical limitations inherent in the fact that, usually, another party or parties must be willing to undertake reciprocal or respective commitments. There are also safeguards, in the discretion and wisdom of elected representatives of variegated, counterbalancing political opinions, who—on numerous occasions—refrained or refused to negotiate treaties on many matters; who refused to sign agreements which had been negotiated; who refused—in the Senate—to consent to agreements signed; who refused to ratify agreements which had been signed and to which the Senate had consented. There is the different safeguard in that Congress can "repeal," for domestic purposes, earlier treaty provisions. And, whether as to treaty or statute, is there nothing left of the ultimate safeguard—an electorate exercising final authority over elected representatives?

62. See notes 9, 12 *supra*. The first amendment, too, is a limitation on the treaty power, although its terms apply only to Congress. See ARMS CONTROL 37, 179. There are apparently other limitations on the treaty power in the guarantees of the Constitution in favor of the States, *e.g.*, the republican form of government, the integrity of state territory, perhaps of the state militia. See ARMS CONTROL 34-36, 60-61, 172 n.15, 177 n.30.

63. It is generally accepted that the courts will scrutinize the validity of a treaty as they do an act of Congress. For the possibility that courts might consider the validity of a treaty a "political question", see ARMS CONTROL 171-72, 173. While foreign affairs is peculiarly an area into which the courts are reluctant to enter (*cf.* JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS ch. I, (1933)), courts would hardly refuse to examine a claim that a statute putatively related to foreign affairs has in fact no such relevance.

These limitations and safeguards may not be sufficient to allay fear of the federal powers we have examined. "We fear to grant power and are unwilling to recognize it when it exists." [64] Hypothetical discussion of constitutional issues involves dangers, not least of which is the danger resulting from the fact that it is difficult to hypothesize persuasively the circumstances in which Congress or the treaty makers would exercise these powers we claim for them. Without the limiting, framing context of an actual treaty or statute in fact ratified or enacted, the powers asserted loom larger, their sweep more overwhelming and frightening. For, it may well be asked, with the interdependence of all nations increasingly obvious; with virtually any act or occurrence in the United States having some impact or influence in some foreign land; with virtually every act or occurrence in the United States scrutinized by friends and would-be friends, by enemies and might-be enemies; with the United Nations a "town meeting of the world" from which no subject is barred; is there any act or event within the national boundaries which cannot be deemed of "international concern," which does not relate to or at least affect the foreign affairs of the United States? Is everything then to be within both the treaty power and the foreign affairs power of Congress? And what of the federal system? If any matter which may somehow affect our standing, our relations, with one or all other nations, is subject to federal regulation, what of the States, the vitality that derives from local variations, the importance of allowing different areas to solve problems in their different ways? Assuming even that the Constitution indeed tolerates such sweeping congressional authority, has the world grown so small that we can no longer afford our brand of federalism? Is substantial autonomy for the States too great a luxury in an age of atoms, missiles and cold war?

I believe not. Dangers to American federalism cannot be discounted, and admittedly external affairs, in particular, create strong pressures for national rather than local action. But the federal system has withstood other, greater pressures and dangers. The narrowing continent of the United States, the complexity, interdependence and trans-state character of commerce, were recognized by the Supreme Court more than twenty years ago. The interstate commerce power has, as the Court has since read it, few and far limits. But the far reaches of the commerce power have not destroyed the States. Moreover, we have lived for almost two decades in war and emergency of varying degrees. The war powers reach deep into local matters. In single, selected areas—the control of atomic energy, for a major in-

64. Holmes, J., dissenting in Tyson & Brother v. Banton, 273 U.S. 418, 445 (1927).

stance—the power of Congress has been exercised in time of non-war with hardly a nod to the States. But the war power of Congress has not destroyed the States. If the continued application of these extended powers does not destroy the resiliency or distort the shape of the federal system, neither, I venture to guess, will the acceptance of a congressional power to legislate on matters of "international concern" —a power which in its far reaches may never be invoked. I do not know whether Lord Acton's aphorism referred only to power exercised, or even to power merely possessed. In any event, the possession of this additional power by Congress need not spell or accelerate the absolute corruption of federalism. In fact, of course, the federal government has had the identical power from the beginning; the treaty power has not rendered the States obsolete. To recognize that this legislative power always inherent in the treaty power may also be exercised independently by Congress should not evoke new federal preemptions, new and radical intrusions into local activities and responsibilities.

Perhaps what we have said will be deemed tantamount to an assertion that there are already virtually no limitations on federal power, so that yet another broad federal power can do no further harm. Others have already suggested that the commerce and war powers as now interpreted have given Congress authority to adopt any legislation whatever, and have eliminated, practically, the once basic doctrine that the Constitution established a federal government of enumerated powers. On that view, propounding an additional source of congressional power is supererogatory, academic play. The charge has some point but is, I believe, exaggerated. How much truth and how much exaggeration are involved may only be authoritatively determined at some later day—if Congress attempts to exercise the powers we have discussed and the courts proceed to scrutinize them. But even before then, to recall and underline the foreign affairs power is not without purpose. The complicated facts of national and international life have also complicated the powers of Congress themselves. Few situations requiring regulation fall within one area only of congressional interest and authority. Analysis of congressional power may, then, tend to deal in sums of congressional powers. In the sum, the foreign affairs power—whether it reaches far or falls short of what we have suggested—looms as a new and important source of power. Congress may—it must—take account of this effect of its actions, and its failures to act, on the foreign relations and interests of the United States.

Having—forbid it!—no desire to stir the ashes of controversy, it yet seems inevitable to relate what has been said to the Bricker issues.

The key provision of the Bricker amendments, containing the celebrated "which" clause, would have provided that "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." [65] Adopting Holmes' assumption that there were matters which could be dealt with by treaty that were beyond the powers of Congress alone, the provision would have cut the treaty power down to the size of the relevant powers of Congress; it would have prevented treaties on those matters of "international concern" with which Congress could not deal. But as the sweep of the powers of Congress approaches the scope of the treaty power, the significance of the "which" clause approaches zero. If the foreign affairs power of Congress goes as far as has been argued, if it too reaches all matters that affect the foreign relations of the United States, all matters of "international concern," the assumptions of the amendment and its proposed remedy must fall. The powers of Congress reach as far as does the treaty power. That relation to the national concern in regard to its foreign affairs which makes a provision a proper subject for a treaty, puts—or finds—it also in the federal domain for possible legislation by Congress. Any matter about which United States law is to be made which is properly a subject for international agreement, is, ipso facto, also a proper subject for legislation under the implied foreign relations power of Congress. That a treaty is concluded virtually proves that it deals with a matter of international concern; under the foreign affairs power, then, Congress could have enacted such legislation even in the absence of the treaty. And the "which" clause is then strictly useless, tautological, meaningless. Of course, if it were enacted, a future court might feel impelled to give it meaning. A court might even decide that the assumptions about the limitations on the power of Congress which the clause reflected, even if erroneous, had been enacted with the amendment. Still, if some future Senator Bricker would limit the effective subject matter of treaties he had better find another way of describing the limitation.[66] For, however the scope of treaties be limited, Congress would still

65. S.J. Res. 43, 82d Cong., 1st Sess. § 2 (1953), as reported by the Judiciary Committee. Another version sought the same ends in different words, S.J. Res. 1, 84th Cong., 1st Sess. § 2 (1955).

66. Perhaps for the present at least the efforts will cease. Those who made the last effort may find, if not satisfaction, consolation in what the proposed amendments have already wrought. For the executive branch has, during several years, refrained from proposing to the Senate for its consent any treaty of the kind which the Brickerites most fear. It has not pressed for consent to the Genocide Convention which has been before the Senate since 1949. It has fought in the United Nations for the abandonment of draft covenants on human rights. It withdrew from the Senate for "further study and consideration" several ILO Conventions long pending for the Senate's consent. Even as to traditional treaties of friendship, commerce and navigation, it has been careful, generally, not to include provisions which might

retain its far-reaching powers, including the power to deal by legislation with the same matters which affect United States foreign relations. Congress could authorize or approve an international agreement by the President.[67] Or it could adopt relevant legislation even without an international agreement. Efforts to "reserve" to the States some matters of international concern, however ingeniously carved out and defined, would have to amend the Constitution to take power from Congress as well as from the treaty makers.

This may show the issues in a different light. Members of Congress may be more tender for their own powers than were many for those of the President-and-Senate. Political and academic leaders who have faith in the present constitutional pattern and strive to preserve it may not feel constrained to argue away congressional power in the exigency of controversy. More important, the worried citizen who may have seen an anomalous and oversized treaty power towering above other federal powers will perhaps see the matter otherwise if the treaty power and the powers of Congress appear equally as correlative federal powers to deal with matters of concern to the nation in its relation to other nations. If the issue is not the unusual treaty power, but the powers of the federal government looming—admittedly—frighteningly large under the foreign relations power, the war power, the commerce power and the taxing power, one may recall that "it is excellent to have a giant's strength"; what is tyrannous, the poet said, is to use it like a giant. Dangers must be met by efforts directed toward assuring the wise exercise of those powers, by seeing that the liberties of the citizen are preserved and enhanced, that legitimate local interests and considerations are given due regard. They can hardly be dealt with meaningfully by denying those powers to the federal government. Constitutional amendments designed to curb the powers of the national government, not in the proved interest of the liberty of the citizen but

appear too "local" to some in the Bricker camp. Provisions which are clearly constitutionally proper subject matter for treaties have been rejected by the Senate and abandoned for the future by the Executive because they involved matters as to which the States were deemed to have a special interest—*e.g.*, reciprocal provisions allowing nationals of the two parties to practice their professions in the territory of the other. See ARMS CONTROL 201. And while in international negotiations, United States representatives no longer deny that the United States has power to bind the States, they have sought the insertion of "federal-state" clauses which would relieve the United States of the obligation to enforce some treaty provisions without the consent of the States. Chafee, *Federal and State Powers under the UN Covenant on Human Rights*, 1951 WIS. L. REV. 389, 623. For a discussion of these clauses, see Liang, *Notes on Legal Questions Concerning The United Nations*, 45 AM. J. INT'L L. 108, 121 (1951); Sorensen, *Federal States and the International Protection of Human Rights*, 46 AM. J. INT'L L. 195 (1952). Of course, whatever may be practiced at one time by one Administration, it is something else to preach it, to ordain it into binding constitutional principle.

67. See note 51 *supra* and accompanyng text.

in order to give of that power to the States, would be an incredible anachronism. Not since the tenth and eleventh amendments—the latter in 1798—has the Constitution been amended to limit federal power in favor of the States. And even at the height of state power, no role was sought or suggested for the States in regard to United States international affairs. The States have never existed where relations with other nations were involved. There have been few "States righters" in foreign affairs.[68]

Many will have deep sympathy for those who dream of old days thought good, or better; who yearn for decentralization even in foreign affairs and matters of international concern, for limitations on federal power, for increase in the importance of the States; who thrill to a wild, poignant, romantic wish to turn back all the clocks, to unlearn the learnings, until the atom is unsplit, weapons unforged, oceans unnarrowed, the Civil War unfought. The wish remains idle, and the effort to diminish power in this area for fear that it may not be used wisely is quixotic, if not suicidal. It is not the moment to attempt it when all ability, flexibility, wisdom are needed for cooperation for survival by a frightened race, on a diminishing earth, reaching for the moon.

68. Not even Chief Justice Taney, or Senator Calhoun. See ARMS CONTROL 168 n.3.