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THE CONSTITUTION AND THE INTERNATIONAL LABOR CONVENTIONS

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THE International Labor Organization, since its establishment in 1919, has become one of the most active of the international institutions of the post-war period. It was founded upon that provision of the Treaty of Versailles which binds each signatory nation and those which should later join the organization to endeavor to secure and maintain fair and humane conditions of labor for men, women and children, both in their own countries and in the countries to which their commercial and industrial relations extend.[1]

I

PROVISIONS OF THE INTERNATIONAL LABOR CONVENTIONS

Since 1919, annual conferences have been held by delegates from countries which are members of the International Labor Organization to formulate recommendations and conventions applicable to labor problems and conditions throughout the world. Fifteen such conferences, including that of 1930, have been held, and a total of thirty-one conventions and thirty-eight recommendations have been drafted which range in subject-matter from the medical examination of seamen to the establishment of public employment agencies.[2] Every state represented at the Conference agrees to present the recommendations and conventions there formulated to the "competent authority" within its own government for ratification or rejection within eighteen months after adoption by the Conference.[3]

There is no international obligation requiring that *recommendations* approved by the Conference and which are submitted to the states represented therein shall be put into effect. In the case of *conventions*, however, any government ratifying them accepts an interna-

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[1] TREATY OF VERSAILLES, Art. 405.

[2] See the summary in the REPORT OF THE DIRECTOR OF THE INTERNATIONAL LABOR OFFICE, 99-133 (1930).

[3] TREATY OF VERSAILLES, art. 405.

tional obligation to put their provisions into effect by whatever means, legislative or otherwise, may be necessary. This obligation does not differ from that imposed by the acceptance of any other type of treaty obligation.

In some instances these international labor conventions attempt a somewhat detailed regulation of the subject-matter involved. Thus, the fourteen nations which accepted the convention regulating hours of work in certain specified industries are required to limit "the working hours of persons employed in any public or private industrial undertaking in which only members of a family are employed, to eight in the day or forty-eight in the week." [4] These regulations must be applied to all mines, quarries, manufacturing plants, construction and transport work and to all industries in which women and children are employed. Several other conventions are similar in the drastic and detailed character of the restrictions they impose.

One of the questions which received considerable attention at the Paris Peace Conference was whether federal governments would find it possible to adhere to the international labor agreements. Obviously most of the subjects with which these conventions deal — hours of labor, unemployment, age of workers, and so forth — are matters which, in federal states, are under the control of the member-states. So general was the belief that federal governments would encounter legal difficulties in adhering to the labor agreements that there was inserted in the Treaty of Versailles the provision that "in the case of a federal State, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only. . . ." [5]

II

WHETHER ADHERENCE TO THE CONVENTIONS IS POSSIBLE UNDER THE TREATY-MAKING POWER OF THE FEDERAL CONSTITUTION

If the United States should join the International Labor Organization (which it may do without becoming a member of the League of Nations), it could accept the conventions presented to it and submit them to the several states as recommendations. Such a course would be manifestly unsatisfactory. The question may, therefore, be appro-

[4] Art. 2 of the Draft Convention, adopted by the Washington Conference, 1919. See also LOWE, THE INTERNATIONAL PROTECTION OF LABOR, xxxviii (1920).

[5] TREATY OF VERSAILLES, art. 405.

priately raised whether such a method is made necessary by the federal system in the United States or whether the national government may accept the international labor conventions by the exercise of its treaty-making power and thereby make of them, as it does of other treaties, a part of "the supreme law of the land."

It has been frequently pointed out that the treaty-making power of the United States as stated in the Constitution has no explicit limitations.[6] The President is given "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; . . . ." [7] and treaties once made, together with the Constitution and laws of the United States, are to be regarded as the supreme law of the land.[8] It has also been noted that laws passed by Congress must be in pursuance of the Constitution, but that the only restriction laid upon treaties is that they be made "under the authority of the United States." [9]

In determining what may and what may not be made the subject of a treaty there is little to guide us in the diplomatic practice or the judicial decisions of the United States. Most of the treaties negotiated in the past have been of the type commonly accepted as matters suitable for international agreement. Where more unusual matters have been made the subject of negotiation, the practice of the United States has been too varied to create a definite rule for the disposition of any uncommon proposals which may arise in the future. [10]

(a) Scope of Treaty Power — Suggested Tests

To assist in solving the problem which the international labor agreements create, three tests have been developed from the interpretation of the Constitution which throw some light upon the extent of the treaty-making power.

First, does the treaty involve a subject, the control of which is definitely forbidden to the United States? The Constitution, for example, forbids Congress to make any law respecting the establish-

[6] 1 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, 2d ed., 518 (1929).

[7] CONSTITUTION, Art. II, sec. 2, par. 2.

[8] Art. VI, par. 2. The section reads: "This Constitution, and the Laws of the United States which shall be 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; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[9] Missouri v. Holland, 252 U. S. 416 (1920).

[10] See STOKE, THE FOREIGN RELATIONS OF THE FEDERAL STATE, ch. ix.

ment of religion or prohibiting the free exercise thereof.[11] If, for some *quid pro quo*, the national government should negotiate a treaty which grants a more favorable legal position to the exercise of a certain religion than to all others, the validity of the treaty would be immediately attacked because it dealt with a subject expressly forbidden to the national government.[12]

Secondly, does the treaty alter the forms or powers of the several organs of government as determined by the Constitution? A treaty which authorized a method of governmental procedure different from that established by the Constitution would be open to question at once as an alteration of the Constitution itself. If a treaty actually transferred powers from one department of government to another in violation of fixed constitutional principles, its validity could scarcely be upheld.[13] As Wright says,[14]

> "It is believed that a treaty declaring that war should automatically exist in certain circumstances would be an unconstitutional deprivation of Congress's power to declare war, and that a

[11] Amendment I.

[12] "Especially is this true with regard to certain fundamental rights guaranteed to individual citizens. Freedom of speech, of the press, of the right of peaceable assembly, and others of the same nature could not be infringed by the international agreement-making power. . . . The power to break down these guarantees is beyond the 'authority of the United States' as laid down in the constitution, at least so far as the national government is concerned. It is proper to add, however, that these constitutional limitations have offered few obstacles to the negotiation of international agreements since most of them are not of a nature likely to become subjects of diplomatic negotiation." STOKE, FOREIGN RELATIONS OF THE FEDERAL STATE 81. Calhoun, in evaluating the treaty-making power, said: "Whatever, then, concerns our foreign relations; whatever requires the consent of another nation belongs to the treaty power; can only be regulated by it; and it is competent to regulate all such subjects; provided, and here are its true limits, such regulations are not inconsistent with the constitution. If so they are void; no treaty can alter the fabric of our government, nor can it do that which the Constitution has expressly forbade to be done; nor can it do that differently which is directed to be done in a given mode, and all other modes prohibited." Annals, 14th Cong., 1st Sess., 531.

[13] "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government." The Cherokee Tobacco, 11 Wall. 616 (1870). In Geofroy v. Riggs, 133 U. S. 258 (1890), the court said, "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States." For the most recent announcement of the same kind see Asakura v. City of Seattle, 265 U. S. 332 (1923).

[14] QUINCY WRIGHT, CONTROL OF AMERICAN FOREIGN RELATIONS 101-102 (1922), and authorities there cited.

treaty giving Congress power to appoint an officer of the United States, as for instance, a representative in an international body, would be an unconstitutional delegation to Congress of power not of a legislative character."

The third test seeks to determine whether the legislative control of the subject-matter of the treaty has been reserved by the Constitution to the several States, and whether, regardless of that fact, the national government may assume that control by virtue of its treaty-making authority. This is the aspect of the problem which is involved in the relation of the United States to the international labor agreements. An examination of the thirty-one labor conventions reveals none which would be precluded under the first two tests; none which deals with a subject expressly forbidden to the national government by the Constitution; and none which would necessitate a re-arrangement of the powers of the government of the United States. Consequently, if it be found, by applying these tests to the power of the United States to contract international obligations, that this government legally can not adhere to the international labor conventions, the constitutional basis for the limitation must be found in the fact that the control of the subject-matter of the treaties is reserved to the several States.

(b) The Treaty Power Cuts Across the Reserve Power of the States

Students of constitutional law in the United States have long been divided in their views upon the relation of the national treaty-making authority and the reserved powers of the States. One point of view is that the treaty-making power, having been expressly delegated to the United States and definitely forbidden to the States, is absolutely complete. It is contended that even if a subject is within those powers reserved to the States or to the people, the moment it is included in an international agreement it becomes a legitimate expression of the treaty-making power and falls "under the authority of the United States." This view frankly holds that the reserved powers of the States are, in no way, limitations upon the power of the central government to make treaties. Such an interpretation is strongly supported by eminent scholars.[15]

[15] 1 WILLIOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES 518 (1929); Anderson, "The Extent and Limitations of the Treaty-Making Power under the Constitution," 1 AM. J. INT. L. 636 (1907); Kuhn, The Treaty-Making Power and the Reserved Sovereignty of the States," 7 COL. L. REV. 172; BUTLER, THE TREATY-

Opponents of this conception of the treaty-making power have not been wanting in earnestness or argument. They contend that, generally speaking, the national government has no power to make a treaty upon a subject over which it has no legislative control; that the grant to the national government of a power to make treaties can not be used to destroy other powers reserved to the States; and that there was never any intention to grant to the central government an unlimited treaty-making authority. "If one or more of the powers given by the states or the people to the federal government in the Constitution cannot be destroyed by another power given in the same instrument, it must, *a fortiori*, be true that a power or powers reserved by these same states or people in that instrument, as was done in the tenth amendment, cannot be destroyed by a power given." [16]

But the decisions of the Supreme Court have recognized no explicit limitations on the treaty-making power. Although there have been occasional dicta announced by the Court which have cast grave doubt upon an unlimited treaty-making power, no treaty has ever been declared unconstitutional. [17] In fact, in cases of actual conflict between treaties and State laws, the former have always been upheld.[18] Treaty provisions which have been upheld at the expense of State legislation have given aliens the right of ownership and inheritance of land, and have prevented the application of other types of discrimination.[19]

In 1916 the United States negotiated a treaty with Canada which provided for regulating the killing of migratory birds, a subject which, in both Canada and the United States, is normally under the legislative control of the States. The Supreme Court, in upholding the validity of the treaty, pointed out that

"Acts of Congress are the supreme law of the land only

MAKING POWER OF THE UNITED STATES, *passim* (1902); CORWIN, NATIONAL SUPREMACY, *passim*; CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT, ch. XVI (1916); DEVLIN, THE TREATY POWER UNDER THE CONSTITUTION OF THE UNITED STATES, *passim* (1908).

[16] Mikell, "The Extent of the Treaty-Making Power of the President and Senate of the United States," 57 PA. L. REV. 535 (1909). The principle exponent of this view is H. ST. GEORGE TUCKER, in his book, LIMITATIONS ON THE TREATY-MAKING POWER IN THE UNITED STATES.

[17] 1 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES 518 (1929).

[18] The following cases are examples: Ware v. Hylton, 3 Dall. 199 (1796); Chirac v. Chirac, 2 Wheat. 259 (1817); Hopkirk v. Bell, 3 Cranch 454 (1806); Hauenstein v. Lynham, 100 U. S. 483 (1879); Barbier v. Connolly, 113 U. S. 274 (1885); Seon Hing v. Crowley, 113 U. S. 703 (1885).

[19] For a review of such conflicts see CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT, ch. XVI (1916).

when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way." [20]

In an earlier and more extended discussion of the treaty-making authority the Court said that State laws constituted no obstacle to the exercise of that power of the national government. It said:[21]

"It would not be contended that it [the treaty-making power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, 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."

An eminent authority has also recently said, "What the President and the Senate have deemed to be a proper subject of international agreement has never been regarded otherwise by the Supreme Court of the United States; even though the terms of the treaty dealt with matters under State control." [22] This statement finds ample support in our diplomatic history. The United States has negotiated twenty-two treaties for the arrest of deserting seamen, and while these regulations may be justified under the commerce power, such arrests are usually police matters peculiar to the several States. The United States has concluded fifteen treaties which affect the estates of deceased aliens within the States. There are also some thirty treaties which affect property holding by aliens, a matter ordinarily the object of State control. The Supreme Court has repeatedly held such treaties superior to conflicting State law.

The legal possibilities of the treaty-making power are summarized by one eminent authority in the following statement:[23]

[20] Missouri v. Holland, 252 U. S. 416 (1920).

[21] Geofroy v. Riggs, 133 U. S. 258 (1890). "The treaty-power vested in our Government extends to all proper subjects of negotiation with foreign Governments." Downes v. Bidwell, 182 U. S. 244 (1900).

[22] 2 HYDE, INTERNATIONAL LAW, sec. 502.

[23] E. M. Borchard, 29 YALE L. J. 449 (1920).

> "It is within the power of the federal government by treaty to remove from state control any matter which may become the subject of negotiation with a foreign country. With the continued drawing together of the world by increased facilities of travel and communication, the subjects of common interest which require international action will continue to grow in variety. Uniformity of legislation by withdrawal from state control of such subjects as marriage and divorce, labor legislation, the ownership and inheritance of property, and all matters affecting aliens would be possible by the exertion of the necessary treaty power."

The principle may therefore be regarded as settled that the treaty-making power of the United States is broader than its legislative authority. And the contention that the reserved powers of the States present a limitation to the power of the national government to enter into treaties seems to be overborne by the weight of judicial decision and diplomatic practice. The dictum of the Supreme Court in *Geofroy v. Riggs* that a treaty may be made "touching any matter which is properly the subject of negotiation with a foreign country" appears to be a sound evaluation of the treaty-making power.

If this broad interpretation of the treaty power is studied in connection with the ever-widening scope of other federal powers, such as the commerce and taxing powers, a very plausible case for the validity of the international labor agreements can be established. The Supreme Court has held in numerous decisions that the police powers of the States must give way before a legitimate exercise of authority by the United States. For example, in dealing with problems incidental to the control of commerce, the Supreme Court has said, "Of course, such [police] rules [of the States] are inoperative if conflicting with regulations upon the same subject enacted by Congress. . . ." [24] If the United States, in the exercise of its authority over commerce and taxation, can override the police powers of the States, it is even more reasonable to suppose that, in the negotiation and enforcement of treaties, a function vested exclusively in the federal government, the reserved powers of the States should not prove an insuperable barrier.

The Supreme Court clearly intimated that the powers conferred upon the national government for conducting its foreign relations were meant to be broad enough to meet not only the ordinary demands of international intercourse but any extraordinary situations as well.

[24] Houston v. Mayes, 201 U. S. 321 (1905). See also Keller v. United States, 213 U. S. 138 (1909).

Justice Field, in the *Chinese Exclusion Case*,[25] expressed the view forcibly:

> "While under our Constitution and form of government, the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. The powers to declare war, make treaties, suppress insurrection, repel invasion, regulate foreign commerce, secure republican government to the states, and admit subjects of other governments to citizenship, are all sovereign powers, restricted in their exercise only by the Constitution itself and considerations of public policy and justice which control more or less, the conduct of all civilized nations."

In a more recent opinion Justice Holmes ably states the same principle:[26]

> "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."

If the President and Senate should decide that our national welfare would be fostered by an agreement with another nation regulating hours and conditions of labor, would that not be an exercise of the treaty-making power wholly in keeping with its purpose and with the precedents of its use? If a matter should become of profound significance for the peace of the world and hence for our own welfare, it would certainly be at variance with the history of our international relations to hold that such a subject was not a proper one for negotiation with a foreign country.[27]

Judged by this standard alone, the international labor agreements, although applying to matters which, in the United States, are under the legislative control of the States, would appear to be "proper subjects of international negotiation." Yet it is possible, without re-assert-

[25] 130 U. S. 581, 604 (1888).

[26] Missouri v. Holland, 252 U. S. 416 (1920), citing Andrews v. Andrews, 188 U. S. 14, 33 (1902).

[27] See an interesting article by T. I. Parkinson, "The Constitutionality of Treaty Provisions Affecting Labor," 9 AM. LABOR LEG. REV. 21-31 (1919).

ing a narrow and outworn view of the treaty-making power, to distinguish between the proposed labor treaties and those agreements which, in the past, the United States has negotiated regardless of invasion of the powers of the States.

(c) A Distinction — The Conventions Affect Foreign Relations Only Incidentally

If the treaties negotiated by the United States which invade the reserve powers of the States are carefully analyzed, it becomes apparent that they have all involved matters which affected *directly and immediately* the interests of a foreign country or the property or personal rights of its citizens. Either the treaties have prevented the States from imposing discriminations and disabilities upon aliens, or they have sought to confer rights which, for reasons of sound international policy, could not be left to the discretion of the States.[28] The right to own land in the various States has been conferred upon aliens by treaties, and treaties have also been the means of permitting aliens to enter various types of business, to inherit property, to travel freely and to secure for themselves the protection of legal processes available to citizens.[29] All of these subjects, in the absence of treaty regulations, are under the legislative authority of the several States.

In the case of the treaty of 1916 between Canada and the United States for the protection of migratory birds, it may be properly argued that the treaty concerned a matter of equal interest and of equal value

[28] The Treaty of Paris of 1783 served to prevent Virginia from interfering by statute with the right of British subjects to collect debts legally due them. Ware v. Hylton, 3 Dall. 199 (1796). The treaty of 1850 with Switzerland gave the right of inheritance to Swiss citizens in spite of their alienage, State laws to the contrary notwithstanding. Hauenstein v. Lynham, 100 U. S. 483 (1879). In the case of Blythe v. Hinckley, 127 Cal. 431 (1900), the supreme court of California said that the question of the rights of aliens to possess, enjoy and inherit property in the United States is a proper subject matter of treaty, and a treaty regulating those rights must control all state legislation contrary thereto as the supreme law. Other supporting cases are: People v. Gerke, 5 Cal. 381 (1855); Maiden v. Ingersoll, 6 Mich. 373 (1858).

[29] Thus the treaty with China of 1868 has served to free Chinese in the United States from many discriminatory laws passed by the States. See In re Tiburcio Parrott, 6 Sawyer 349; Chy Lung v. Freeman et al., 92 U. S. 275 (1875); Baker v. City of Portland, 5 Sawyer 566. Treaties with France of 1778 and 1800 have also conferred rights upon citizens of that country in the face of discriminatory legislation by the States. See Chirac v. Chirac, 2 Wheat. 259 (1817); Geofroy v. Riggs, 133 U. S. 258 (1889); Bahuaud v. Bize, 105 Fed. 485 (1901). For a good summary of such treaties and adjudications made under them, see CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT, Appendix I (1916).

to both nations and hence was an appropriate subject for international negotiation.[30] Likewise, when Attorney-General Griggs in 1898 advised the President that a treaty with Canada regulating fisheries within the territorial limits of the several States would be legal, the opinion was based upon the fact that the interests of both nations were involved and could not be protected by any other convenient means.[31] In every instance where these treaties or others which invaded the reserve powers of the States have conflicted with State legislation, the former have prevailed, despite the fact that were it not for the existence of the treaties, the State laws would be supreme. In every instance, however, where a treaty has been negotiated and conflicting State legislation has, as a result, been set aside, the matter involved has been of direct consequence to a foreign country or to its citizens.

The proposed international labor conventions may be reasonably differentiated from other agreements of the type discussed above on the ground that they do not involve the rights or interests of foreign states or individuals of a kind cognizable by the courts. They aim at the creation of an economic condition within nations which will have incidentally a desirable international effect. This international effect, however, must necessarily be secondary. Obviously the regulation of child labor, of hours of work, of workmen's compensation, and so forth, will be of more significance for the economic development of nations internally than it can possibly be for international relations. Such agreements affect no property or personal rights of a foreign country or of its citizens. They simply provide a legal basis (where such a basis is lacking in its ordinary legislative authority) whereby the federal government can enact legislation regulating the relations between its own citizens in the conduct of their business when no connection with foreign relations is involved. Hence, it may be doubted whether such treaties, insofar as they affect citizens alone, are matters of international relations at all. Should they not rather be regarded as entirely domestic regulations, exerting only incidentally an international influence?

It has been suggested above that none of the treaties negotiated by the United States has invaded the reserved powers of the States unless there was involved a substantial matter of international concern, such as the personal or property rights of aliens or the interests of a

[30] See the arguments in Missouri v. Holland, 252 U. S. 416 (1920).

[31] 22 Op. Att'y Gen. 214. A treaty in accordance with this advice was negotiated and put into effect in 1908. Its validity has not been questioned.

foreign country. It is believed that no treaty has been made the basis of legislation which superseded the authority of a State in its relations to its own citizens,[32] where no immediate interest of a foreign country or of its citizens was involved. In fact, whenever the United States has been approached regarding treaty negotiations which would have the immediate effect of changing the legislation of a State so far as its own citizens are concerned, it has declined to proceed with the project even though foreign countries or their citizens might also be involved. Thus the United States has consistently refused to accept the conventions drafted by the Hague Conferences on International Private Law which provide for uniform regulations among the signatory nations of marriage, divorce, succession to property, and several similar subjects.[33] As recently as 1928 the delegation from the United States to the Conference of American States refused to pledge adherence to a code of international private law.[34] Sometimes these refusals have been accompanied by the admission that the United States is incompetent to make treaties dealing with matters of internal concern under the control of the States.[35]

Briefly stated, therefore, the argument against the constitutionality of the international labor agreements is this: The international agreements are not, so far as the United States is concerned, properly subjects of international negotiation because they do not involve any immediate or substantial right or interest of any foreign country or of its citizens in such a way that the courts can take cognizance of those rights or interests. The treaties would supersede the legislative authority of the States in their relation to their own citizens in matters of primarily domestic concern. They would have only an incidental effect upon international relations, an effect decidedly secondary to that upon internal economic conditions. Consequently, the interna-

[32] An apparent exception to this view is the adherence by the United States to an international opium agreement in 1912. 3 TREATIES OF THE UNITED STATES 302. The Harrison Narcotic Act, passed January 17, 1914, fulfilling the terms of the agreement, was not based upon adherence to the international convention but upon the taxing power of the United States. Upon that basis its constitutionality was upheld. United States v. Doremus, 249 U. S. 86 (1918). The international agreement was not involved.

[33] Kuhn, 7 AM. J. INT. LAW 778 (1913); ACTES DE LA CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVÉ *passim* (1909).

[34] REPORT OF CONFERENCE, 167-168.

[35] See the REPORT OF THE FIRST INTERNATIONAL CONFERENCE OF AMERICAN STATES 907 (1889). Also, see the statement of the Secretary of State declining to negotiate a treaty with Italy providing for the administration of property of Italians dying intestate in the United States. FOREIGN RELATIONS 366 (1894).

tional labor conventions can hardly be classed as proper subjects of international negotiation in the light of our diplomatic precedent.

Mr. Charles E. Hughes has concisely summarized this argument in the following statement:[36]

> "... 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 out 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."

It should be pointed out, however, that one of the tests for determining a proper subject of international negotiation is to discover whether it has been a common matter of treaty agreement among the nations. More than thirty nations have signed the labor conventions, and what they have thus signified to be of international importance cannot be lightly ignored by the United States. It ought, perhaps, to be recognized that, "now the time has come when economists are fully aware that in a world of international markets and international industrial competition there are conditions of production that can be most effectively controlled in the interest of labor, as well as of all others concerned, by international agreements."[37] It may also be argued that if the power of other nations over foreign relations includes authority to accept the labor conventions, so does the treaty-making power of the United States.[38] This view holds, in the language of

[36] PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 196 (1929). This statement should be regarded as an informal one since it was made before Mr. Hughes' appointment as Chief Justice of the Supreme Court.

[37] LOWE, THE INTERNATIONAL PROTECTION OF LABOR 10 (1921).

[38] For two able and interesting articles holding this view see Chamberlain, J. P., "The Power of the United States under the Constitution to Enter into Labor Agreements," 9 AM. LABOR LEG. REV. 330 (1919), and T. I. Parkinson, "The Constitutionality of Treaty Provisions Affecting Labor," 9 AM. LABOR LEG. REV. 21-31 (1919).

the Supreme Court, that "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." [39]

The argument that the United States may, in estimating its own powers, be guided by the practice of other nations is open to serious question. It must not be forgotten that the powers of the federal government are derived from the Constitution, while other governments may find themselves possessed of unlimited powers. As Willoughby points out, the imputation of sovereign powers to the federal government

> "cannot properly be resorted to when recognition of an international obligation on the part of the United States is not involved, and when, therefore, the matter is purely one relating to the reserved powers of the States or to the private rights of the individuals. To permit the doctrine to apply within these fields would at once render the Federal Government one of unlimited powers." [40]

It may be argued that the development of uniform labor conditions will, in the future, be a vital factor in the promotion of world peace by the mitigation of economic rivalries, and that the attainment of peace is a matter of immediate concern to every nation. But this argument relates to policy, not to constitutionality. In the United States, lack of uniformity of labor conditions has not been keenly enough felt to induce the States to abolish the differences among themselves. It may be that tariffs, geography, and differences in climate and in the possession of raw materials may be far greater factors in economic rivalry than diverse labor conditions. It is not necessary to take a narrowly argumentative view of the treaty-making power to believe that the international labor conventions are too indirect in their international effects and too all-embracing in their internal effects in order to rightly consider them proper subjects of international negotiation within the meaning of the treaty-making power of the United States.

[39] Mackenzie v. Hare, 239 U. S. 299 (1915). Also in Fong Yue Ting v. United States, 149 U. S. 698 (1892), the court said, "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 to make it effective." See also Ekiu v. United States, 142 U. S. 651 (1891).

[40] 1 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES 516 (1929).