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THE SCOPE OF THE TREATY POWER IN THE UNITED STATES*

By C. H. McLAUGHLIN†

From the standpoint of international law every independent state is considered to possess full power to conclude treaties upon nearly all subjects of mutual interest.¹ But it does not follow that the central government of such a state must possess a treaty-making power coextensive with that of the state. By constitutional limitations in the nature of a self-denying ordinance the state may elect to confine its government to a prescribed method of concluding international agreements, or to restrict the range of subjects with respect to which the government is authorized to conclude agreements. That such constitutional limitations do not impair the treaty power of the state itself but only that of its central government is evident from the state's retention of power to change the limitations by amendment of the constitution.²

The rights and obligations, or relationship, created under international law by international agreements may equally be invoked

*Sections III and IV of this paper, dealing with recent practice in the use of treaties and executive agreements and with proposals for constitutional amendment, respectively, together with an appendix by Gary J. Meyer tabulating executive agreements with reference to Congressional authorization or approval, will appear in an early issue.

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1. Not all but *nearly* all subjects because some treaties, like contracts within domestic law systems, must be considered illegal and therefore void *ab initio*. Such illegality would consist in provisions violative of general international law, whether established by custom or convention. In the case of particular obligations assumed by a state under a treaty there would clearly be a duty to other signatories not to enter into later treaties incompatible with the discharge of those obligations, but if later inconsistent treaties were nevertheless concluded it might be academic to insist that they must be treated as void *ab initio*. In the absence of mechanisms, other than the use of force, for compelling states to render specific performance under the terms of a treaty it would seem that the offending state will choose which of the two or more inconsistent treaty obligations it will honor, after which the state or states injured by the breach of obligations to them will be left to seek appropriate compensation for damages suffered. It is unnecessary for present purposes to pursue these points. For comment with illustrations see 2 Hyde, *International Law Chiefly as Interpreted by the United States*, §§ 409-92 (2d ed. 1945) (hereinafter cited as Hyde); 1 Oppenheim, *International Law*, §§ 503-06 (8th ed., Lauterpacht 1955); Roxburgh, *International Conventions and Third States* (1917); Verdross, *Forbidden Treaties in International Law*, 31 Am. J. Int'l L. 571-77 (1937).

2. See Potter, *Inhibitions upon the Treaty-Making Power of the United States*, 28 Am. J. Int'l L. 456, 470 (1934), who says:

There is no doubt that a state may decline to conclude a treaty, within the permissive field, on grounds of policy, or on mere grounds of caprice for that matter. So for the government of the state, or the treaty-making organ, speaking on behalf of the state. But it would not seem that the state could, by statute or constitutional provision, destroy, deny that it

whether the agreement be designated as treaty, convention, protocol, *procès-verbal*, agreement, arrangement, accord, act, general act, declaration, *modus vivendi*, statute, regulations, provisions, pact, covenant, charter, or merely exchange of notes.³ Of course these terms do suggest differences in form or content or occasion which are rather loosely observed in diplomatic practice, but the differences do not affect international legal status. For that it is not the form or nomenclature employed but simply the fact of agreement through agencies authorized to act for the states which is significant.⁴ Even oral agreement by authorized persons on behalf of their states when sufficiently established by evidence may be binding.⁵ International usage appears to sanction the use of the term "treaty" in a kind of generic sense to comprehend all formal instruments of agreement between or among states, by whatever title designated, which create among them a relationship governed by international law. In this

or its government possessed, or forbid the general exercise of, the treaty-making power conferred by international law. A state, a subject of international law, its powers fixed thereby, may not by national law reduce the scope of its own treaty-making power, which is necessarily defined by international law, so as to be able afterwards to deny that it possesses, under that law which must be regarded as finally decisive in this matter, the power to make such and such a treaty. A state may refuse to sign a given proposed treaty on grounds of policy, but cannot effectively bind itself, even by declaring that it will not, on grounds of policy, sign such and such treaties in the future, for this would in effect reduce the scope of its internationally given treaty power. The source of that power being the international community and the medium of its grant international law, it cannot be definitively limited in its extent or its exercise by action or law emanating from a lower source, namely, the national community.

If taken literally Professor Potter is demolishing a straw man, for no one would suggest that an independent state could impose constitutional limitations upon itself as a state which it could not avoid by later action, unless it did so by giving up its independence to another state or union of states, which would then assume the treaty power, or by acquiescing in the creation of a restrictive rule of international law. But if he means that a state could not place such limitations upon its government his view hardly accords with the practice of states.

3. See Myers, *Names and Scope of Treaties*, 51 Am. J. Int'l L. 172, 217 (1957); *Research in International Law under the Auspices of the Faculty of the Harvard Law School*, 29 Am. J. Int'l L. Supplement, 710-22 (1935) (hereinafter cited as Harvard Research) (where the significance of these designations is considered at length); see also Hudson, *International Law*, ed. note at 443 (3d ed. 1951); *Treaties and Other International Acts of the United States of America* 9-14 (Miller ed. 1931) (short print).

4. Jones, *Full Powers and Ratification* (1949); 1 Oppenheim, *International Law* §§ 497-98 (8th ed., Lauterpacht 1955); Harvard Research 668-69; McDougal and Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L.J. 181, 534, esp. § II (1945).

5. Harvard Research 728-32; see the case between Norway and Denmark concerning the *Legal Status of Eastern Greenland*, P.C.I.J., Ser. A/B, No. 53, at 73 (1933), in which the Permanent Court of International Justice gave effect to an oral declaration by Norwegian Foreign Minister Ihlen to the Danish Minister made in response to a Danish inquiry. Minutes of the conversation by both parties were in evidence.

sense formal executive agreements although not referred to any legislative body would be included.⁶ Of course it is obvious that what are called "treaties" in the special domestic sense of the constitutional law of the United States, where they are distinguished from "executive agreements," must be referred for consent to ratification to the U.S. Senate, for the Constitution requires this; but these "treaties" may be concluded with other states in which there is no constitutional requirement of reference to the legislative branch, so that signature and ratification are there effected as purely executive acts.⁷

Although treaties in the international sense are defined as formal instruments no particular form is required for international validity beyond the execution of the instruments through signature and ratification by agents authorized to act for the states which conclude them. And informal instruments such as notes, telegrams, or conversations, although not regarded as treaties because not so executed, may equally produce enforceable international rights and obligations. Ratification and exchange of ratifications may usually be assumed to be prerequisite to bringing formal instruments into force but may be dispensed with by special agreement or customary practice.⁸ In any case the constitutional procedures involved in securing ratification in a particular state are a domestic matter not regulated by international law.

The purpose of this paper is to consider legal limitation and definition of the power of the Government of the United States to conclude international agreements, particularly as affected by recent interpretations. Such an inquiry involves constitutional law within the context of international law. The latter provides a general framework which controls the external conduct of the United States in making treaties and which defines international rights and obligations created by them. Within that framework lies a large area of permissive national regulation concerned with domestic procedures of treaty making and with the status of international agreements within the domestic law of the United States.

I. CONSTITUTIONAL PROVISIONS

A. GENERAL DISTRIBUTION OF POWERS

In the United States the national Constitution imposes a familiar division of the total array of powers belonging to the federal state.

6. Harvard Research 686-98; McDougal and Lans, *supra* note 4, at 196-97. It is in this sense that the title of this paper is intended, as comprehending formal international agreements generally.

7. For some variations in state practice which produced misunderstandings, see Jones, *op. cit. supra* note 4, at 118-19.

8. Harvard Research 756-69; Jones, *op. cit. supra* note 4, at 66, 74.

Certain powers enumerated in the Constitution are delegated by it to the national government. These include a number of powers affecting the conduct of foreign affairs which are assigned to the Congress as a whole⁹ or to one of its houses,¹⁰ to the President,¹¹

9. U.S. Const. art. I, § 8. Those most significant for foreign affairs are taxation for the common defense and general welfare; the power to borrow money; regulation of foreign commerce; rules of naturalization; regulations of foreign exchange; provision of postal facilities; copyright and patent protection; definition and punishment of piracy, felonies committed on the high seas, and offenses against international law; declaration of war (although there is no prohibition of military actions ordered by the President as Commander in Chief of the armed forces without a declaration of war, and there have been more than 125 such cases of military actions or maintenance of military positions abroad). See *Powers of the President to Send the Armed Forces Outside the United States*, 82d Cong., 1st Sess., Senate Comm. on Foreign Relations and Armed Services, Feb. 28, 1951, p. 2; *Background Information on the Use of United States Armed Forces in Foreign Countries*, H. Rep. No. 127, 82d Cong., 1st Sess. (1951); issuance of letters of marque and reprisal (a practice now obsolete); prize regulations; provision, maintenance, and regulation of military forces (which, however, when in being, are at the disposition of the President); and legislation "which shall be necessary and proper for carrying into execution the foregoing powers" and any others delegated to the national government or its departments or officers.

10. The House of Representatives has the "sole power of impeachment" of officials (U.S. Const. art. I, § 2, cl. 5), but the trial of impeachments is conducted by the Senate (U.S. Const. art. I, § 3, cl. 6). No cases based upon *ultra vires* acts related to the conduct of foreign affairs have arisen, although from time to time there have been rumblings by individual Congressmen that the President ought to be impeached, *e.g.*, against Harry Truman for ordering U.S. forces into the Korean war without a declaration of war by the Congress, although he considered his action to be based on a treaty obligation under the Charter of the United Nations. Revenue bills must originate in the House of Representatives (U.S. Const. art. I, § 7, cl. 1), but may be freely amended in the Senate, even to striking everything after the enacting clause and substituting a new bill. The debates on appropriations for foreign affairs programs frequently afford opportunities both in appropriations committees and on the floor of House and Senate to reexamine the policies for which financial support is sought, and refusal to grant it could make it impossible for the United States to discharge treaty commitments. The Senate possesses the important exclusive powers to advise and consent to the making of treaties by the President and to the appointment by him of ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose posts are established by law and for whose appointment no other provision is made (U.S. Const. art. II, § 2, cl. 2). The latter part of the clause does not prevent the use by the President of personal agents designated solely by him. Consult Wriston, *Executive Agents in American Foreign Relations* (1929). The employment for international negotiations of Colonel House by Wilson and of Harry Hopkins by F. D. Roosevelt are familiar examples. Because of the constitutional provision Foreign Service Officers are appointed by the President with advice and consent of the Senate, but no career officers are now nominated until they have qualified by competitive examination nor promoted except upon recommendation by disinterested promotion boards after review of their service records. However, some ambassadors and ministers are still appointed as non-career officers.

11. In addition to a broad grant of "the executive power" (U.S. Const. art. II, § 1, cl. 1), and responsibility for faithful execution of the laws (U.S. Const. art. II, § 3), the President is Commander in Chief of the armed forces (U.S. Const. art. II, § 2, cl. 1), makes treaties and appoints "superior" officers with advice and consent of the Senate (U.S. Const. art. II, § 2, cl. 2) and by inference may remove them) *Myers v. United States*, 272 U.S. 52 (1926)

or to the national judiciary,¹² respectively. In the Constitution there are also prohibitions against the exercise of certain powers, in some cases by the national government alone,¹³ in other cases by the State governments only,¹⁴ in still others by either.¹⁵ Interpretative amendments provide that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others

unless their positions are considered to have mixed executive-legislative or executive-judicial functions in which non-executive elements predominate (Rathbun v. United States, 295 U.S. 602 (1935)). The power of the President to control and direct the executive branch is further evidenced by authority to commission all officers of the United States (U.S. Const. art. II, § 3) and to require opinions in writing from principal officers of executive departments upon any subject relating to departmental duties (U.S. Const. art. II, § 2, cl. 1). His control of communications with foreign states is suggested by his appointment of ambassadors, other public ministers, and consuls accredited to them, and his power to receive ambassadors and other public ministers from them (U.S. Const. art. II, § 3). Implied in these powers is the right to recognize foreign states and governments. He also possesses facilities for legislative leadership in his duties to give the Congress information on the state of the Union and to recommend appropriate measures (*ibid.*).

12. Originally the judicial power of the United States extended, *inter alia*, to cases arising under the Constitution, statutes, and treaties, those affecting ambassadors, other public ministers and consuls, cases of admiralty and maritime jurisdiction, controversies to which the United States was a party and those "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects" (U.S. Const. art. III, § 2, cl. 1). The importance of the courts in the definition of the treaty power will become apparent in what follows. In cases affecting ambassadors, other public ministers, and consuls the Supreme Court has original jurisdiction (U.S. Const. art. III, § 2, cl. 2), but this has been held not to exclude state jurisdiction as to a subject traditionally within it. *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930). Since the eleventh amendment states have not been subject to suit by citizens or subjects of other states, domestic or foreign, and by judicial interpretation states may not be sued by foreign states without their consent. *Monaco v. Mississippi*, 292 U.S. 313 (1934).

13. Prohibitions of suspension of the writ of habeas corpus, of capitation or direct taxes except in proportion to population (except as allowed by the sixteenth amendment), of commercial or revenue regulations favoring the ports of one state as against another, of withdrawing money from the Treasury except with appropriation by law and accounting (U.S. Const. art. I, § 9); also the prohibitions against infringement of personal liberties in the first eight amendments.

14. Prohibitions against entering "into any Treaty, Alliance, or Confederation," or without the consent of Congress "into any Agreement or Compact with another State, or with a foreign power"; against granting letters of marque or reprisal, imposing import or tonnage duties, maintaining troops or warships in time of peace, engaging in war unless invaded or in imminent danger; and against coining money, emitting bills of credit, making anything but gold and silver coin legal tender, or passing laws which impair the obligation of a contract (U.S. Const. art. I, § 10); also the important restrictions for the protection of civil liberties in the fourteenth amendment, prohibiting laws which "abridge the privileges or immunities of citizens of the United States" and measures which deprive anyone of "life, liberty, or property, without due process of law" or deny to any person within the state jurisdiction "the equal protection of the laws."

15. Prohibition of bills of attainder, *ex post facto* laws, export taxes, and granting of titles of nobility (U.S. Const. art. I, § 9, cls. 3, 5, 8; art. I, § 10, cls. 1, 2); also the restrictions against interference with personal liberty and suffrage in the thirteenth, fifteenth, and nineteenth amendments.

retained by the people,"¹⁶ and "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁷ Nevertheless, judicial interpretation has attributed to the national government certain powers thought to be implied by the delegation of enumerated powers as appropriate to facilitate the exercise of the latter;¹⁸ also some additional powers said to result from the possession of a coherent group of enumerated powers.¹⁹

It is impossible to review here the particulars of the familiar debate which has run through our constitutional history between those disposed respectively to a liberal or to a strict construction of the powers delegated to the national government. If the result has been generally favorable to a liberal view of the scope of enumerated powers it is nevertheless necessary to consider the terms in which each individual power is granted. In so far as the broader debate may be relevant to the treaty power it will suffice to recall the construction which has been given to the tenth amendment. In the view of James Madison, who sponsored the amendment, it merely confirmed the distribution of powers in the Constitution and provided no additional guaranty of State powers which must be considered immune from interference by the exercise of delegated powers.²⁰ Thus the problem was simply to determine the scope of the powers enumerated or implied. In the same spirit Marshall observed that the national government, "though limited in its powers, is supreme" within its sphere of action. Further, he found: no phrase in the instrument which, like the articles of confederation,²¹ excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to

16. U.S. Const. amend. IX.

17. U.S. Const. amend. X. To avoid confusion "States" (initial capital letter will be used in this paper to refer to States which are members of the international community, subjects of international law; states (lower case) will be used to refer to the 48 states of the United States.

18. The doctrine of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

19. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). See also 1 Works of Hamilton 185 (Lodge ed. 1885); 3 Story, Commentaries on the Constitution 124 (1st ed. 1833); 1 Willoughby, Constitutional Law of the United States 76-84 (2d ed. 1929).

20. 2 Annals of Cong. 1897 (1791). For a good brief summary of judicial construction of the tenth amendment, which I have followed, see Corwin, *The Constitution and What It Means Today* 232-37 (11th ed. 1954).

21. Articles of Confederation art. II. "Each state retains . . . every power . . . not expressly delegated. . . ."

the States, are reserved to the States or to the people;’ thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument.²²

“Fair construction,” which for Marshall admitted a liberal construction of implied powers and the “necessary and proper” clause, is a standard subject to judicial predilections. The Taney court considered certain matters of internal police as an exclusive preserve of State jurisdiction.²³ After the Civil War state instrumentalities were held to be exempt from the national income tax,²⁴ a position abandoned only in 1939.²⁵ In construing the interstate commerce power the Supreme Court was at first content to rest upon the inherent limitations of the clause in rejecting national legislation,²⁶ while upholding as within the power other national regulations which appeared equally to invade the reserved area.²⁷ Finally, by a narrow majority in *Hammer v. Dagenhart*,²⁸ the Court not only relied upon the tenth amendment as expressing an area of “local power always existing and carefully reserved to the States,” but even permitted Mr. Justice Day to ignore Marshall’s argument and to misquote the amendment in his assertion “that the Nation is made up of States to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved.”²⁹ There followed a period in which the Court occasionally upheld national regulation of the production of goods destined for interstate commerce, but rejected it in a series of important cases³⁰ terminating with its holding that the live poultry code under the National Industrial Recovery Act was an infringement of reserved powers

22. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819).

23. *License Cases*, 46 U.S. (5 How.) 504, 573-74 (1847); *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

24. *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871).

25. *Graves v. New York ex rel. O’Keefe*, 305 U.S. 466 (1939).

26. *Employers’ Liability Cases*, 207 U.S. 463 (1908); *United States v. DeWitt*, 76 U.S. (9 Wall.) 41 (1870).

27. *Clark Distilling Co. v. Western Maryland Ry.*, 242 U.S. 311 (1917) (interstate transportation of liquor); *Hoke v. United States*, 227 U.S. 308 (1913) (Mann Act); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (Pure Food and Drug Act); *Champion v. Ames*, 188 U.S. 321 (1903) (interstate transportation of lottery tickets).

28. 247 U.S. 251 (1918).

29. 247 U.S. at 275 (emphasis added).

30. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (coal produced outside federal quota regulations); *United States v. Butler*, 297 U.S. 1 (1936) (tax for subsidized crop quota limitations); *Hill v. Wallace*, 259 U.S. 44 (1922) (sale of grain futures in markets not complying with federal regulations); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (products of child labor).

because the matters regulated affected interstate commerce only "indirectly."³¹ Finally, the Court abandoned this approach and returned to Marshall's view of the tenth amendment in sustaining the Social Security Act,³² National Labor Relations Act,³³ and Fair Labor Standards Act,³⁴ expressly overruling *Hammer v. Dagenhart*.

We shall see that the vacillating construction of the tenth amendment apparent in these applications to domestic powers has not been characteristic in the Court's handling of the question whether the treaty power can invade reserved power areas.³⁵ Only in the Taney period was it seriously contended that treaties might be limited solely upon the ground of intrusion into areas considered to be reserved for legislative purposes to the States. Yet it seems probable that disagreement upon this point by judges in some state courts and by a few publicists may stem from the failure of the Court to deal as consistently with internal as with external powers. Mr. Justice Holmes' well known refusal to regard a treaty which contravened no prohibitory words of the Constitution as "forbidden by some invisible radiation from the general terms of the Tenth Amendment,"³⁶ although fully consistent with the practice of the Court, has continued to attract criticism.

In considering the Supreme Court's attitude toward external powers account must be taken of the position urged by Mr. Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*³⁷ Distinguishing sharply the powers of the national government in external affairs from its domestic powers, he asserted that the latter are not even restricted to the enumerated, implied, and resultant powers of the constitutional distribution. This conclusion was based upon his assumption that the states never possessed international powers and therefore could not have delegated them to the national government. He considered that these powers were lodged during

31. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

32. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

33. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

34. *United States v. Darby*, 312 U.S. 100 (1941), overruling *Hammer v. Dagenhart* at 312 U.S. 116-17.

35. See Part II of this article *infra*.

36. *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

37. 299 U.S. 304 (1936). Sutherland's argument had been developed at greater length in a course of lectures delivered at Columbia University before he entered the Court: *Constitutional Power and World Affairs* (1919). Suggestions of his historical analysis are found in Mr. Justice Patterson's opinion in *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 80-81 (1795) and in Rufus King's remarks in the Federal Convention of 1787, 1 Farrand, *The Records of the Federal Convention of 1787*, at 323 (2d ed. 1937) (hereinafter cited as Farrand). Cf. the views of Luther Martin and James Wilson, 1 Farrand 324, 329.

the colonial period exclusively in the British Crown, from which they passed "not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America." During the revolution the Continental Congress, and afterwards the Congress of the Confederation, had acted as the sole vehicles of external sovereignty; hence the States had never possessed it.

It results 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. . . . The power to acquire territory by discovery and occupation . . . , the power to expel undesirable aliens . . . , the power to make such international agreements as do not constitute treaties in the constitutional sense . . . , none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality.³⁸

Sutherland's historical argument can be dismissed as ill founded: there is abundant evidence that the states in the period before the Constitution did engage in diplomacy, conclude treaties, and enter confederations.³⁹ They also obstructed and defeated the operation of treaties made by the Congress, so that it became a principal issue of the Convention of 1787 what additional powers were required in the national government to enable it to curtail these activities.⁴⁰

38. 299 U.S. at 318 (1936).

39. See Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 Yale L.J. 467 (1946) (for a full discussion of the historical data); see also Scott, *Treaty Making under the Authority of the United States*, 28 Am. Soc'y Int'l L. 2-34 (1934); Small, *The Beginnings of American Nationality*, 8 Johns Hopkins U. Studies in History and Political Science (1890); Van Tyne, *Sovereignty in the American Revolution: An Historical Study*, 12 Am. Hist. Rev. 529 (1907).

40. The Randolph resolutions proposed to give the national legislature authority "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of union" to which was added, on Franklin's motion, "or any Treaties subsisting under the authority of the union." 1 Farrand 19, 21, 47, 54. In the debate on this proposal Pinckney argued the power must be universal to be effective, "that the States must be kept in due subordination to the nation; that if the States were left to act to themselves in any case, it [would] be impossible to defend the national prerogatives, however extensive they might be on paper; that the acts of Congress had been defeated by this means; nor had foreign treaties escaped repeated violations. . . ." *Id.* at 164. Madison supported him: "Experience had evinced a constant tendency in the States to encroach on the federal authority; to violate national Treaties, to infringe the rights & interests of each other. . . . This prerogative of the General [Government] is the great pervading principle that must controul the centrifugal tendency of the States; which, without it, will continually fly out of their proper orbits

The doctrine also presents logical difficulties in that grants of external powers are treated as surplusage but prohibitions are not. If the regulation of foreign commerce be considered as an inherent rather than a delegated power of the national government it is difficult to see upon what ground that government can be forbidden to levy an export tax. For what it may be worth the doctrine is also out of harmony with the orthodox constitutional theory of Webster that sovereignty resides in the people of the United States, who have by the Constitution divided the exercise of it between the national government and the states, except as reserved to themselves. On this view inherent, unlimited powers inhere in the state but not in the government or government of the state, as was said of the treaty power at the outset. The constituent power of amending the Constitution seems theoretically inconsistent with the assumption that either level of government possesses inherent powers unless it be argued that there are areas of governmental functions beyond the reach of the amending power.

It is undeniable that exercises of external power have occasionally been sustained by the Supreme Court upon a theory of inherent powers,⁴¹ and that impressive support has been given to that theory by distinguished writers.⁴² Yet it seems doubtful that any case has

and destroy the order & harmony of the political system." *Id.* at 164-65. Elbridge Gerry, however, thought the unlimited negative "a leap in the dark," and the representatives of small states generally feared it. *Id.* at 165-68, 170. When Patterson's plan was presented Madison opposed it as inadequate: "1. Will it prevent those violations of the law of nations and of Treaties which if not prevented must involve us in the calamities of foreign wars? The tendency of the States to these violations has been manifested in sundry instances. The files of Congress contain complaints already, from almost every nation with which treaties have been formed. . . . The existing confederacy does not sufficiently provide against this evil. The proposed amendment to it does not supply the omission. It leaves the will of the States as uncontrolled as ever." *Id.* at 316. See also Madison's Preface to the debates, 3 Farrand 548. In the end the negative was abandoned in favor of the injunctions of the supremacy clause, proposed by Luther Martin. 2 Farrand 21, 22, 27-28. *Cf.* the comments of Gerry and Martin upon it, 3 Farrand 273, 286-87.

41. *United States v. Belmont*, 301 U.S. 324 (1937); *Burnet v. Brooks*, 288 U.S. 378 (1933); *Mackenzie v. Hare*, 239 U.S. 299 (1915); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Jones v. United States*, 137 U.S. 202 (1890); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

42. See Corwin, *The Constitution and World Organization* 16-20 (1944); McDougal and Lans, *supra* note 4, at 255-61. For President Theodore Roosevelt's emphatic denial "that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization for it," see Roosevelt, *Autobiography* 57 (1927). The acquisition of territory by the United States, for which no enumerated power can be shown has been considered to rest upon inherent powers. However, Marshall held it could be inferred from the specific powers of making war and treaties. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542 (1828). *Cf.* 1 Willoughby, *Constitutional Law of the United States*, § 236 (2d ed. 1929). Jefferson, who recognized that the power was not specified in the Constitution, made no defense of the purchase of Louisiana as an exercise of

yet occurred which involved exercises of power that could not, "on a fair construction of the whole instrument," have been sustained without invoking inherent powers. There have been indications of a disposition to set bounds to Justice Sutherland's doctrine,⁴³

inherent powers; he merely suggested that Congress, "risking themselves like faithful servants," must "throw themselves on their country for doing for them unauthorized, what we know they would have done for themselves had they been in a situation to do it." 4 The Works of Thomas Jefferson 500-01 (Washington ed. 1884). The power to act in defense of national security has often been considered inherent. Mr. Justice Bradley in the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 556 (1871), said that to defend its security the federal government "is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions." See also *In re Debs*, 158 U.S. 564, 582 (1895). But more recently Mr. Justice Frankfurter has said that "even the all-embracing power and duty of self-preservation are not absolute. Like the war power, which is indeed an aspect of the power of self-preservation, it is subject to applicable constitutional limitations. . . . The First Amendment is such a restriction." *Dennis v. United States*, 341 U.S. 494, 520 (1951).

43. In *United States v. Belmont*, 301 U.S. 324 (1937), Justice Sutherland relied on the *Curtiss-Wright* case in giving effect to the Litvinov Assignment, an executive agreement, despite a contrary policy of New York. However, on nearly the same facts, Justices Douglas and Frankfurter in *United States v. Pink*, 315 U.S. 203 (1942) avoided the Sutherland thesis. Douglas attributed to Sutherland the view that "the conduct of foreign affairs is committed by the Constitution to the political department of the Federal Government" (*id.* at 222-23), which is not Sutherland's position, and also declares for strict construction of treaties and agreements to avoid derogation from State authority "unless clearly necessary to effectuate the national policy." (*Id.* at 230.) Frankfurter finds ample basis in the power of the President to recognize governments and to settle foreign claims without mention of inherent powers (*id.* at 237-38, 240-41). In *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), there is a strong minority argument by Chief Justice Vinson for upholding the President's power to seize the steel industry, but it rests less explicitly on inherent authority than upon need to act to implement foreign policies expressed in treaties and statutes (*id.* at 668-72). In concurring with the majority Jackson dismisses the *Curtiss-Wright* doctrine as in large part dictum, and in any case inapplicable because concerned with presidential conduct in external affairs and in harmony with legislation. He suggests it will be difficult to sustain presidential acts incompatible with the expressed will of congress (*id.* at 635-38 & n. 2). Nor does he find support for enlarged domestic powers to implement military measures initiated by the President: ". . . no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose control of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture." (*Id.* at 642.) Justice Burton, concurring, asks: "Does the President, in such a situation, have inherent constitutional power to seize private property which makes congressional action in relation thereto unnecessary? We find no such power available to him under the present circumstances. The present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations." (*Id.* at 659.) Justice Clark, although well disposed toward extensive presidential authority "in times of grave and imperative national emergency," whether called "residual," "inherent," "moral," "implied," "aggregate," "emergency," or otherwise, yet finds that the President must follow any specific procedures laid down by the Congress to meet the emergency (*id.* at 662).

culminating in a frontal attack upon it by four Justices of the Supreme Court in the case of *Reid v. Covert*. Speaking for them Mr. Justice Black said:

At the beginning we reject the idea that when the United States acts against citizens abroad [in a court martial trial of civilian dependents of servicemen] it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. . . .⁴⁴

Of course, it is fair to ask whether a free use of the conceptions of implied powers and resultant powers, with a liberal allowance of what is "necessary and proper" to execute them — constructions very likely to respond to preconceptions of what powers the national government ought to exercise — is in substance different from stating powers which are "a necessary concomitant of nationality."⁴⁵ Yet there is practical restraint in the conception of a government of limited powers even when we concede that legal construction of such powers may reflect the vagaries of men.⁴⁶ In the long pull is not a theory of delegated powers better calculated to discourage vagaries than one of inherent powers?

B. PROVISIONS AFFECTING THE TREATY POWER

With respect to the treaty power there are specific provisions of the Constitution which relate to (a) location of the treaty power within the federal system, (b) international agreements other than treaties, (c) the position of treaties in the internal law of the United States, (d) separation of powers and checks and balances in the making of treaties.

Art. I, Sec. 10, Cl. 1: No State shall enter into any Treaty, Alliance, or Confederation; . . .

Art. I, Sec. 10, Cl. 3: No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact, with another State, or with a Foreign Power; . . .

Art. II, Sec. 2, Cl. 2: He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; . . .

Art. VI, Cl. 2: 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

44. 354 U.S. 1, 4 (1957). Two concurring justices appeared not to object to this expression of principle. For further discussion of the case see Section II, *infra*.

45. Cf. McDougal and Lans, *supra* note 4, at 260 n. 214.

46. See the thoughtful remarks in McBain, *The Living Constitution* 37-40 (1934).

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.

Mindful "that it is a constitution we are expounding," one "intended to endure for ages and to be adapted to the various crises of human affairs,"⁴⁷ we shall expect to gather the import of these clauses for our own day from the whole course of judicial interpretation and practice. What the framers of the Constitution meant by what they said is of interest mainly in providing starting points and perhaps in dispelling a few misconceptions which have had traumatic effect upon later interpreters. In fact we cannot on some points establish from the record just what the founding fathers did mean, and are led to conclude they either were deliberately obscure⁴⁸ or failed in the debate to seize the issues which have since puzzled us.

(1). *Location of the Treaty Power in the Federal System*

It seems clear from the prohibitions in article I, section 10,⁴⁹ that it was intended to exclude the states from the powers essential for the conduct of foreign relations. They are not permitted to regulate or tax foreign trade, nor to maintain troops or warships in time of peace, nor to make war except in self-defense, nor to enter into treaties, alliances, or confederations. On the other hand these powers are specifically vested in agencies of the national government by enumeration.⁵⁰

With respect to the treaty power the principle of excluding the states was neither novel nor contested. Even in the less centralized union of states under the Articles of Confederation in which each state was said to retain "sovereignty, freedom and independence, and every Power, Jurisdiction and Right" not expressly delegated to the United States,⁵¹ it was thought necessary to secure the conduct of foreign relations to the national government by prohibiting separate states from sending or receiving embassies or from entering "into any conference, agreement, alliance or treaty with any King prince or state."⁵² The Articles assigned to the national Congress

47. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); *Julliard v. Greenman*, 110 U.S. 421, 439 (1884).

48. Abraham Baldwin, a member of the Convention, told the first Congress that the framers were well aware "some subjects were left a little ambiguous and uncertain," to be "settled by practice or by amendments in the progress of the Government. He believed this subject of the rival powers of legislation and Treaty was one of them. . . ." 3 Farrand 370.

49. See notes 14, 15 *supra*.

50. See notes 9, 10, 11, 12 *supra*.

51. Articles of Confederation art. II.

52. Articles of Confederation art. VI.

“the sole and exclusive right and power of determining on peace and war, . . . sending and receiving ambassadors — entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever. . . .”⁵³ Although the treaty power was thus given to the Congress that body was forbidden to enter into any treaty or alliance without the assent of nine of the states.

The records of the Constitutional Convention of 1787 disclose almost nothing about the framing of the provisions in article I, section 10. These clauses were not included in either the Randolph resolutions or the Patterson plan, both of which exhibit concern not over the question of excluding states from making treaties, which seems to have been taken for granted, but over the measures appropriate to prevent states from continuing to violate or obstruct treaties made by the national government. A committee of detail introduced the provisions in article I, section 10, which were evidently suggested by language of the Articles of Confederation; Pinckney's plan seems to have contained a similar proposal, probably drawn from the same source.⁵⁴ From one of the committee's papers, in the handwriting of James Wilson, it appears that the original draft was simply, “No State shall enter into Treaty, Alliance or Confederation,” after which is inserted in John Rutledge's hand, “with any foreign Power nor with[ou]t Cons[en]t of U.S. into any agreemt. or compact w[it]h any other another State or Power.” When the committee reported its completed draft to the Convention on August 6, Wilson's point had been placed with the prohibitions against coinage of money, issuance of letters of marque and reprisal, and grants of nobility in article XII as actions *absolutely* forbidden to the states. Rutledge's addition had passed into article XIII along with emitting bills of credit, making anything but specie legal tender, taxing imports, keeping troops and ships in time of peace, or engaging in war unless invaded or in imminent

53. Articles of Confederation art. IX.

54. 2 Farrand 135, 169, 187. The language of article VI of the Articles of Confederation forbids the states absolutely to “enter into any conference, agreement, alliance or treaty with any King, prince or state;” in a second paragraph it proceeds, “No two or more States [of the Union] shall enter into any treaty, confederation or alliance whatever between them, without the consent of the united states in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.”

danger, as conduct permitted to the states only with the consent of Congress. Debate upon articles XII and XIII was confined to proposed amendments not affecting the clauses about treaties and agreements.⁵⁵ As a result of minor revisions by the committee of style and some final shuffling of clauses by the Convention, article XII became clause 1 and article XIII was divided to become clauses 2 and 3 of article I, section 10, of the Constitution.⁵⁶

The fact that the treaty power was thus denied to the states and granted to the national government without debate can be understood if placed in context. The members of the Convention fully appreciated the need for unified action in the conduct of foreign relations;⁵⁷ for them the issue was what interests the central agency which conducted them would represent and how it would be controlled. It was necessary to determine first the manner of electing the President and the basis of representation in the two houses of the Congress. When these issues had been resolved after a long debate by major compromises, it became possible to place the treaty power in the hands of the President, subject to advice and consent of the Senate, because the large- and small-state interests were both represented in this separation of powers.⁵⁸ After that it was indeed only a question of detail to draft the prohibitions of article I, section 10.

(2). *Executive Agreements*

The absence of reported discussion of article I, section 10, makes it impossible to determine whether the framers of the Constitution were sensitive to the possibility of executive agreements, for clause 3 is the only reference to them in the Constitution. A distinction is implied in the absolute prohibition of state "treaties, alliances, or confederations," as against the qualified injunction against state "agreements or compacts" unless made with the consent of Congress. Elsewhere the Constitution stipulated that treaties were to be made by the President, with the advice and consent of the Senate without mentioning in any way a power of the national government to enter into agreements or compacts other than treaties.

What is to be inferred from these facts? Perhaps the language chosen is in some degree careless or fortuitous, but how far can one

55. 2 Farrand 169, 187, 435, 439-43.

56. 2 Farrand 577, 596, 619. In the collection in Farrand's third volume of papers and correspondence of members of the convention commenting on the Constitution there are a number of references to prohibitions in art. I, § 10, but none to those affecting treaties and agreements.

57. See note 40 *supra*.

58. See section (4) *infra*.

press such a conjecture? Not only did the committee of detail modify Wilson's draft in order to preserve both the absolute and the qualified prohibitions found in the Articles of Confederation, but in doing so it changed the language of both clauses. What is absolutely prohibited is no longer any "conference, agreement, alliance or treaty" with a foreign state but "any treaty, alliance, or confederation." What is conditionally forbidden is no longer "any treaty, confederation or alliance" between two or more states of the Union, but "any agreement or compact" between states of the Union or between a state and a foreign power. Whatever conjectures may be advanced as to the reasons for such variations it seems unlikely that the framers thought of "treaty," "agreement," and "compact" as wholly synonymous terms.

However, it must be remembered that early discussion of the treaty power on the basis of the Randolph resolutions did not have the benefit of the separation of powers decision under which our "treaties" must be defined, as instruments made by the President but ratified only with the consent of the Senate; Randolph had proposed that "the National Legislature [bicameral] ought to be empowered to enjoy the Legislative Rights vested in Congress by the Confederation," whereas the "National Executive . . . to be chosen by the National Legislature," should "enjoy the Executive rights vested in Congress by the Confederation."⁵⁹ Whether treaty making was to be considered an executive or legislative function or both he did not intimate. The separation of powers point had not been settled when Wilson and Rutledge drafted the words of article I, section 10. Patterson's plan retained the Congress of the Articles of Confederation, merely adding to its powers, which had included treaty making.⁶⁰ Hamilton had suggested the pattern of treaty making finally adopted but in a very different context, for his chief executive and Senate were to serve during good behavior, *i.e.*, for life;⁶¹ however, he did not formally propose his plan. Pinckney's proposals excluded the states but did not cover the mode of making treaties,⁶² and the committee on detail itself proposed that the Senate should make treaties.⁶³ What then did they mean by an "agreement or compact" other than a "treaty"? Were they differentiating in terms of the method of making at all? If so, did they think in terms of the pattern of treaty making used by the states (after

59. 1 Farrand 21.

60. 1 Farrand 243.

61. 1 Farrand 282-93, at 292.

62. 2 Farrand 134-37, art. 9.

63. 2 Farrand 183 (art. IX [VIII]).

all, article I, section 10 is a limitation on the states), or in terms of one of the proposed methods before the Convention? It seems arguable that they were merely throwing in lawyer's language to cover such other possible but as yet undefinable international agreements as might be made; yet this would be a vague basis upon which to found a sharp difference in the extent of the limitation.

To belabor such meager evidence at this late date is unprofitable. It has been suggested that if the framers conceived of agreements or compacts other than treaties in the context of state action they would not have rejected this possibility in national action. Perhaps this is true even though they failed to define their terms. True, they specifically assigned the treaty power to the national government, and said nothing of what we now call executive agreements. But we can hardly argue here *expressio unius est exclusio alterius*, for both powers may be granted — treaties by enumeration, executive agreements by implication or as "necessary and proper"⁶⁴ to carry into execution the broad range of powers with respect to foreign affairs delegated to the national government. This position is ably developed by McDougal and Lans, who argue:⁶⁵

Unless one takes the position that the Framers sought to deny to the Federal Government the power to use techniques of agreement made available to the states — an argument completely refuted by the debates at the Convention⁶⁶ and by contemporaneous history — the conclusion is inescapable that the Federal Government was intended to have the power to make 'agreements' or 'compacts.' The fact that — despite the broad grants of substantive power set out above, the permissive formulation of the treaty-making clause, and the express recognition of agreements other than treaties — the power to make agreements other than treaties was not granted in more express terms, can seriously concern only those who make something especially mystical out of 'the power to make agreements.' As has been indicated above, when broken into its component parts, 'the power to make agreements' includes several clearly distinguishable powers, among which are the power to conduct negotia-

64. "Necessary and proper," of course, in the sense developed by Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." In Marshall's sense is it not "necessary and proper" in exercising the power to regulate foreign commerce for the Congress to authorize the President to make reciprocal trade agreements? Is it not implied in the President's power as Commander in Chief that he may conclude executive agreements with allies concerning strategy or troop dispositions or matériel?

65. McDougal and Lans, *supra* note 4, at 221-23.

66. *Sed quaere*, whether they either asserted or refuted it.

tions with foreign governments and the power to frame the policies for controlling such negotiations. It can scarcely be denied that the President needs no new powers beyond those expressly granted to him in the document to enable him to conduct negotiations with other governments and that he has the exclusive power to conduct such negotiations. Nor would it appear that any effective question can be raised about the powers of the whole Congress and the President either to frame policies for controlling the conduct of negotiations or to make any agreements concluded the law of the land. From a practical perspective, all the President requires to make his negotiations with other governments effective is an assurance, on problems demanding commitments beyond his own powers to fulfill, that the Congress will honor his negotiations and assist in fulfilling all necessary commitments. For the giving of such assurance by the Congress, the broad legislative powers outlined above would appear to be fully ample. It is thus clear that wholly apart from the treaty-making clause, admittedly non-exclusive, the Constitution offers a completely adequate procedure for coping with the whole problem of international agreements.

On this basis a flexible pattern permitting in some cases exclusively presidential, in others joint congressional-executive, agreements may be expected, a fact fully elaborated by McDougal and Lans. The practice of the United States has actually corresponded with these assumptions, which in the end is the real strength of the position.⁶⁷

(3). *Treaties as the Law of the Land*

Although there was little difference of opinion upon the basic principle of locating the treaty power in the national government and excluding states from exercising it, there was sharp disagreement about the sanctions needed to enforce this arrangement. When the proposal of the Randolph resolutions to give the national legislature a veto upon any state legislation contravening national laws or treaties had been rejected,⁶⁸ the alternative advanced was a guaranty of the position of the national constitution, laws, and treaties as "the supreme law of the respective States," binding upon their courts.

The Convention in committee of the whole had discussed the Randolph resolutions informally from May 30 to June 14, postponing action on the veto proposal, and representatives of the

67. For examples of the several types and the extremely varied subject matter of executive agreements in United States practice see Plischke, *Conduct of American Diplomacy* 306-19 (1950); McDougal and Lans, *supra* note 4, at 261-82. See also section III, and the appendix by Gary J. Meyer *infra*.

68. See note 40 *supra*.

smaller states had become dissatisfied with the trend of the debate. They requested a short adjournment to prepare an alternative plan, which was proposed on June 15 by William Patterson, of New Jersey, as a substitute for the Randolph plan. The Patterson resolutions, as reported in Madison's notes, contained the following form of supremacy clause:⁶⁹

6. Resd. that all Acts of the U. States in Congs. made by virtue & in pursuance of the powers hereby & by the articles of confederation vested in them, and all Treaties made & ratified under the authority of the U. States shall be the supreme law of the respective States so far forth as those Acts or Treaties shall relate to the said States or their Citizens, and that the Judiciary of the several States shall be bound thereby in their decisions, any thing in the respective laws of the Individual States to the contrary notwithstanding; and that if any State, or any body of men in any State shall oppose or prevent ye. carrying into execution such acts or treaties, the federal Executive shall be authorized to call forth ye power of the Confederated States, or so much thereof as may be necessary to enforce and compel an obedience to such Acts, or an Observance of such Treaties.

When we consider the implications of this language we must remember that those who drafted it wanted only a revision of the Articles of Confederation, with some strengthening of the central government. They thought still in terms of "sovereign" states. Hence the consistency of "Treaties . . . under the authority of the U. States" as "supreme law of the respective States," to be enforced by "ye power of the Confederated States." In their view it is the states which make treaties, making them not directly but through their agency for external affairs, the national government; thus treaties are concluded under the authority of the "United States" in a sense no different than "Confederated States," used in the same section. The authority is conceived to be in the states, the administration in the national government.⁷⁰

Within this conceptual framework the drafters appreciated the need for assuring concerted action in treaty making, for they went pretty far in authorizing direct action by the national executive. Yet we must again remember the context of the Confederation, which Randolph called "government by supplication"; it was one thing "to call forth ye power of the Confederated States," quite another to obtain any effective response to the call. The provision was not un-

69. 1 Farrand 245.

70. See Scott, *supra* note 39, at 17-20, for a useful development of this view; his application of it to the final form of the supremacy clause may suggest the manner in which the representatives of small states construed it, but is hardly an acceptable view for today.

like the United Nations collective security system today; the possibility of action depends upon the interests of the member states.

It is important to an understanding of the phraseology of article VI, clause 2, of the Constitution to trace its evolution from the original proposal. When the Patterson plan had been set aside and the Convention returned to the Randolph resolutions as a basis of discussion, the proposal for a negative upon state laws contravening national statutes and treaties was brought to a vote and defeated.⁷¹ Luther Martin, of Maryland, then proposed the following supremacy clause, which modifies slightly the clause in the Patterson plan:

Resolved that the legislative acts of the United States made by virtue and in pursuance of the articles of Union and all Treaties made and ratified under the authority of the United States shall be the supreme law of the respective States as far as those acts or Treaties shall relate to the said States, or their Citizens and Inhabitants — and that the Judiciaries of the several States shall be bound thereby in their decisions, any thing in the respective laws of the individual States to the contrary notwithstanding.⁷²

There is no report of debate upon this proposal — only the Journal record: “which passed unanimously in the affirmative;” and Madison’s even more laconic: “which was agreed to nem: con:.”⁷³ The next step was an amended form proposed by Rutledge on August 23:

This Constitution and the Laws of the United States made in pursuance thereof, and all treaties made under the authority of the United-States, shall be the supreme law of the several States, and of their Citizens and inhabitants; and the Judges in the several States shall be bound thereby in their decisions; any thing in the Constitutions or laws of the several States to the contrary notwithstanding.⁷⁴

This too was adopted unanimously, and there is no record of any debate — a singular fact in view of the striking increase in national control implied in: (1) making all treaties, not merely those which relate to the states and their citizens and inhabitants, the supreme law of the states; (2) making treaties superior not only to the laws but also to the constitutions of the states; (3) substituting “Judges in” for “Judiciaries of” the several states, thus opening the way for consideration of conflicts between treaties and

71. Cf. Madison’s comments on the insufficiency of the Patterson plan to prevent contraventions by the States: note 40 *supra*. He continued to advocate a veto power in the national legislature. 2 Farrand 27-28, 589.

72. 2 Farrand 22, 28-29. Martin may have been one of the group which concerted the Patterson plan.

73. 2 Farrand 22, 29.

74. 2 Farrand 381-82 (Journal), 389 (Madison’s notes).

the state constitutions or laws by a federal judiciary, which in fact was later provided. Of course the members of the Convention could not have foreseen the institutional consequences of the doctrine of judicial review, which was permitted rather than authorized by the Constitution, nor could they have anticipated fully the ascendancy of the federal courts under the judiciary acts in matters affecting the Constitution, national laws, and treaties.⁷⁵

On August 25 Madison proposed a further amendment to change "treaties made under the authority of the United States" to "treaties made, or which shall be made, under authority of the United States." "This insertion," he explained, "was meant to obviate all doubt concerning the force of treaties preëxisting, by making the words

75. Nevertheless, if Luther Martin did not rise to the occasion in the Convention, he did show clear appreciation of the consequences of these changes during the debate on ratification in Maryland. In the *Maryland Journal of February 29, 1788* (reprinted 3 Farrand 271-75) "The Landholder" (Oliver Ellsworth), after twiggling Martin unmercifully about his tendency to run on for two or three hours whenever he rose to speak, went on to credit him (not in compliment) with originating the supremacy clause. Martin replied in three long letters which go far to support Ellsworth's charge of prolixity. In the letter of March 19, 1788, he says (3 Farrand 287):

When this clause was introduced, it was not established that inferior continental courts should be appointed for trial of all questions arising on treaties and on the laws of the general government, and it was my wish and hope that every question of that kind would have been determined in the first instance in the courts of the respective states; had this been the case, the propriety and the necessity that treaties duly made and ratified, and the laws of the general government, should be made binding on the state judiciaries which were to decide upon them, must be evident to every capacity, while at the same time, if such treaties or laws were inconsistent with our constitution and bill of rights, the judiciaries of this state would be bound to reject the first and abide by the last, since in the form I introduced the clause, notwithstanding treaties and the laws of the general government were intended to be superior to the laws of our state government, where they should be opposed to each other, yet that they were not proposed nor meant to be superior to our constitution and bill of rights. It was afterwards altered and amended (if it can be called an amendment) to the form in which it stands in the system now published, and as inferior continental, and not state courts, are originally to decide on those questions, it is now worse than useless, for being so altered as to render the treaties and laws made under our federal government superior to our constitution, if the system is adopted it will amount to a total and unconditional surrender to that government, by the citizens of this state, of every right and privilege secured to them by our constitution, and an express compact and stipulation with the general government that it may, at its discretion, make laws in direct violation of those rights. . . .

In his "Objections to this Constitution of Government," George Mason said (2 Farrand 639):

By declaring all treaties supreme laws of the land, the Executive and the Senate have, in many cases, an exclusive power of legislation; which might have been avoided by proper distinctions with respect to treaties, and requiring the assent of the House of Representatives, where it could be done with safety.

'all treaties made' to refer to them, as the words inserted would refer to future treaties."⁷⁶ This of course passed *nem. con.*; it would have failed to meet the very problems in the framers' minds had the supremacy clause been held inapplicable to treaties made under the Articles of Confederation.

No other changes were made except by the committee of style, which substituted "supreme law of the land" for "supreme law of the several States, and of their citizens and inhabitants."⁷⁷ Although no notice appears to have been taken of this in the final debate, it seems something more than a stylistic change, implying as it does a unified legal community. By easy stages the work of Mr. Patterson and his small-state colleagues, which so strikingly reflected their wish to perpetuate the Confederation, had been transformed into the effective instrument of a strong federal state.⁷⁸

These changes show how it came about that article VI, clause 2, refers to laws made in pursuance of the Constitution, but to treaties made or to be made under the authority of the United States. In the Patterson draft the reference was to acts of the Congress "in pursuance of the powers hereby & by the articles of confederation vested in them"; since the states made the Articles of Confederation and would have had to agree to any amendments this was much the same as saying "under the authority of the United States." The states would have been acting through their delegates in a Congress which was in form a diplomatic conference, and the treaties negotiated required the assent of most of the states before ratification. But after the Convention had projected a federal state under a new

76. 2 Farrand 417.

77. 2 Farrand 572, 603.

78. Contemporary reaction to the clause was mixed; it was extensively discussed in ratification conventions in Pennsylvania, Virginia, and the Carolinas in both theoretical and practical terms. There was a difference of opinion how far international practice required that treaties be the law of the land; some urged that in English and French practice legislative assent would be needed to give internal effect to treaties which violated fundamental liberties or existing statutes, dismembered the realm, etc. But there was also strong support for the view that unless internal obligations under treaties were punctually discharged the international position of the United States would be damaged, and realization that although treaties were also the law of the land in the Confederation the States had acted irresponsibly in obstructing execution of them. See Elliot, *The Debates in the Several State Conventions* (2d ed. 1836; facsimile reprint 1941) (hereinafter cited as *Elliot's Debates*); in vol. III, 502-04 (Patrick Henry), 504 (Randolph), 506-07 (George Nicholas), 507-09 (George Mason), 509-10 (Corbin); in vol. IV, 267-68, 312 (John Rutledge), 268 (Izard), 269-70 (Pringle), 270 (Ramsey), 270-71, 277-82 (Charles Cotesworth Pinckney), 271-72, 308 (Lowndes). See additional references as to treaties ceding territory or rights to navigate the Mississippi in note 86 *infra*; on separation of powers and checks and balances in treaty making in notes 95, 97 *infra*. These topics are often mixed with comments on the supremacy clause.

Constitution it was necessary to refer to legislation pursuant to the Constitution. With respect to treaties the retention of the phrase "under the authority of the United States" was evidently intended to include treaties made before the Constitution, a point on which Madison's amendment was intended merely "to obviate all doubt." There is nothing to suggest that the framers ever considered the possibility that treaties inconsistent with the Constitution might become the supreme law of the land. The supremacy clause was formulated to prevent conduct inconsistent with or obstructive of the national Constitution, statutes, and treaties, by the states, and the phrasing used was calculated to assure that all treaties were included. It was not devised with any notion of defining the relationships between the Constitution, federal statutes, and treaties.

This is not to say that nothing about the relationship can be deduced. It is only attributing common sense to the framers (and no one questions that they were abundantly endowed with it) to conclude that they did not suppose the supreme law of the land could comprise three distinct elements—Constitution, statutes, treaties—unless these elements were consistent with each other. Of course one must go a step further, for it is possible that a treaty and a statute, each consistent with the Constitution, may yet be inconsistent each with the other. There is no indication that the point ever occurred to the framers, but the courts have also attributed common sense to them in assuming that in such a conflict they would have preferred the instrument later in time.⁷⁹

The assumption that the words "in pursuance . . . of [the Constitution]" import a requirement of constitutionality for statutes, where as the phrase "under the authority of the United States," applied to treaties, imports only a requirement of conformity with procedural stipulations, seems rather more than the language will clearly support. Is it not open to question whether "in pursuance thereof" meant more than the formal acts prescribed to make the statute?⁸⁰ Chief Justice Marshall did not rest the requirement that

79. For cases see notes 147, 148 *infra*.

80. A paraphrase of Holmes' words with respect to "under the authority of the United States." *Missouri v. Holland*, 252 U.S. 416, 432 (1920). The only anticipation I have found of the recent debate over the words "in pursuance thereof" occurred in the debates of the North Carolina ratification convention, where David Caldwell remarked that "pursuance" was ambiguous: "They may pursue bad as well as good measures. Another thing is remarkable, that gentlemen, as an answer to every improper part of it [the Constitution], tell us that every thing is to be done by our own representatives, who are to be good men. There is no security that they will be so, or continue to be so." Governor Johnston replied: "I do not know a word in the English language so good as the word *pursuance*, to express the idea meant and

statutes be consistent with the Constitution upon any such tenebrous ground when he launched judicial review, but upon the simple thesis that the Constitution was promulgated by authority of the people as the fundamental law and therefore no act repugnant to it can become the law of the land.⁸¹ His reasoning applies as fully to treaties as to statutes and can be avoided only if the treaty power is conceived to be wholly or partly outside the Constitution. It is unlikely the framers of the Constitution so conceived it—they put it in.

(4). *Separation of Powers in Treaty Making*

Some consideration must be given to that provision in article II, section II, clause II, of the Constitution which empowers the President to make treaties "by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur." As an instance of separation of powers and the system of checks and balances between agencies of the national government it defined the terms upon which the framers expected political interests to meet and be reconciled in the exercise of the treaty power. Thus it set practical bounds to the exercise of the power quite as significant as any legal limitations.

intended by the Constitution. Can any one understand the sentence any other way than this? When Congress makes a law in virtue of their constitutional authority, it will be an actual law. I do not know a more expressive or a better way of representing the idea by words. Every law consistent with the Constitution will have been made in pursuance of the powers granted by it. Every usurpation or law repugnant to it cannot have been made in pursuance of its powers. The latter will be nugatory and void." 4 Elliot's Debates 187-88.

81. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803) :

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question . . . not of an intricacy proportioned to its interest. . . . That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. . . . The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . . It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

The course of the debates in the Convention of 1787 shows that the members were keenly aware of the interdependence of powers and political structures. It was this awareness which made it impossible for them to determine the agencies and the relationship of these agencies within the national government which would exercise the treaty power until the great compromises had been reached on the bases of representation in the Senate and the House of Representatives, on apportionment and legislative terms, and on election and tenure of the President.

Experience with the conduct of foreign relations under the Articles of Confederation undoubtedly influenced the delegates. The effort of the Continental Congress to use regular legislative methods for foreign affairs questions had given way first to a standing committee, which was allowed to do little but correspond with American agents overseas, then in 1781, to a Department of Foreign Affairs under the direction of a Secretary for Foreign Affairs.⁸² In the capable hands, successively, of Robert R. Livingston and John Jay this administrative unit of the Congress had placed our diplomatic relations and correspondence in some degree of order but had not been able to solve the difficulties implicit in legislative direction of such functions. Treaties had to be negotiated under special instructions drafted by the Congress for its envoys.⁸³ The inefficiency of these arrangements contributed to the general dissatisfaction with the Congress as a vehicle for executive operations which led the members of the Convention to prefer a separate executive establishment. Even more important, perhaps, was the feeling of many delegates that a separate executive could be made a force for centralized government as against a legislature dominated by state interest.

In 1786 Jay was authorized to negotiate a boundary convention with Don Diego de Gardoqui, the Spanish minister to the United States. Jay's request for appointment of a committee to instruct him

82. See the committee report recommending this, 19 Journals of the Continental Congress 43.

83. Foster, *A Century of American Diplomacy* 96-101 (1900); Hunt, *The Department of State of the United States* 14-53 (1914); Stuart, *The Department of State* 2-12 (1949). It appears that the procedures for ratification were equally troublesome. Jacob Read told the Legislature of South Carolina that "when the treaty should have been ratified, a sufficient number of members could not be collected in Congress for that purpose; so that it was necessary to despatch a frigate, at the expense of four thousand dollars, with particular directions for Mr. Adams to use his endeavors to gain time. His application proved successful; otherwise, very disagreeable consequences might have ensued. The other case was, a party of Indians came to Princeton for the purpose of entering into an amicable treaty with Congress; before it could be concluded, a member went to Philadelphia to be married, and his secession had nearly involved the western country in all the miseries of war." 4 Elliot's Debates 286.

on all points was refused, but he was directed not to accept Spanish proposals until he had laid them before the Congress. Nevertheless, when the Spanish Government offered a broader agreement than had been anticipated, Jay did initial an understanding covering commercial reciprocity and mutual guaranties of Spanish and United States territories in America. As these were conditioned upon at least a temporary relinquishment by the United States of navigation on the lower Mississippi through Spanish territory, Jay asked the Congress to modify his instructions to permit him to agree to such relinquishment for thirty years. In his view this would not be a waiver of the basic right to navigation which the United States claimed as an upper riparian state⁸⁴ and (with even less persuasiveness) on the basis of treaties; in thirty years, he believed, settlement of the west would have increased our capacity to enforce our claim.⁸⁵ The proposal set off a bitter debate in the Congress between seven eastern and northern states, which thought it advantageous to give up navigation on the Mississippi for thirty years in exchange for commercial advantages in Spanish trade, and six southern and western states, which considered the river outlet to New Orleans essential to development of western agriculture. Although this slender majority sufficed to alter Jay's instructions it had become apparent that nine states would not ratify a treaty relinquishing navigation; the negotiations were therefore dropped.⁸⁶ It seems probable from the references to this incident in the Convention of 1787 and in the ratification conventions of Virginia and North Carolina that it was a principal reason for insistence that the Senate, in which all states would have equal representation, must consent to treaties and must do so by a two-thirds vote.⁸⁷

Apart from the proposal of the Patterson plan to retain the old

84. The international law on this point was not settled. See The Faber Case, German-Venezuelan Commission under Agreement of Feb. 13, 1903, Ralston's Report, 600, citing many writers from Grotius to date; see Jefferson's view in his *Report to the President* [1792], 1 Foreign Rel. U.S. 252-57 (1832). See also 1 Hyde 526; 1 Moore, *Digest of International Law* 624 (1906) (hereinafter cited as Moore).

85. See Jay's speech to the Congress, Aug. 3, 1786, and Charles Pinckney's reply, Aug. 16, in Bartlett, *The Record of American Diplomacy* 52-60 (1947).

86. Bemis, *A Diplomatic History of the United States* 75-80 (4th ed. 1955).

87. For the Convention of 1787, see 1 Farrand 308, 579, 585, 604; 2 Farrand 297-98, 442, 548. For the Virginia convention, see 3 Elliot's Debates: 151-52, 315-16, 326, 333, 351-56 (Patrick Henry); 239-40 (Geo. Nicholas); 292-93, 340-42, 349-51, 505-06 (Grayson); 301-02 (Pendleton); 311-13, 333, 344-49, 514-15 (Madison); 333-34 (Lee); 334-40, 344 (Monroe); 356-61 (Wilson Nicholas); 361-64, 602 (Randolph); 507-09 (Mason); 511-12 (Corbin); 609-10 (Dawson). For the North Carolina convention, 4 Elliot's Debates: 115-16 (Porter); 167-68 (Bloodworth).

Congress with power to make treaties, and Hamilton's suggestion that the power be exercised by a chief executive and senators elected for life, there was nothing on treaty making before the Convention until the committee of detail reported on August 6. It proposed that "the Senate of the United States shall have power to make treaties, and to appoint Ambassadors, and Judges of the supreme Court,"—this in the context of a bicameral legislature containing a Senate to which each state legislature would elect two members, and a House of Representatives chosen by the people of the several states in proportion to population (at the rate of one to forty thousand), in a manner prescribed by the state legislatures but subject at any time to alteration by "the Legislature of the United States." Each house was to have, "in all cases," a negative on the other. The President, who was to "be elected by ballot by the Legislature," was not included in treaty making.⁸⁸

Some discussion occurred the next day, when Gouverneur Morris proposed that the negative of each house upon the other be with respect to "legislative acts" rather than "all cases." George Mason contended that since treaties were elsewhere declared to be laws (*i.e.*, in the supremacy clause), the Morris amendment would include them, whereas it was intended they be left to the Senate; in his view the negative should be confined to "cases requiring the distinct assent" of the two houses. Rejecting both suggestions, the Convention approved Madison's motion to delete the phrase authorizing the negative on the ground the power was sufficiently apparent from the distinct character of the houses and the legislative procedures intended.⁸⁹

On August 15 Mason was arguing against permitting the Senate to amend money bills, which were required to originate in the House; "he was extremely earnest to take this power from the Senate, who he said could already sell the whole Country by means of Treaties." Debating a motion to postpone the point until the powers of the Senate could be gone over John Mercer agreed the Senate should not have the treaty power; it belonged to the executive department, but treaties should not become final so as to alter the law of the land until ratified by legislative authority. He understood this to be the British practice.⁹⁰ Mason explained that he did not mean "a Treaty would repeal a law; but that the Senate by means of treaty might alienate territory etc. without legislative

88. 2 Farrand 177-89, arts. III, IV, V, VI, IX, X.

89. 2 Farrand 196-97.

90. Discussion of both British and French practice was frequent. See 2 Farrand 392-95, note 77 *supra* (for ratification conventions). 1 Blackstone, Commentaries on the Laws of England 197-99 (Sharswood ed. 1859), was

sanction. . . . If Spain should possess herself of Georgia therefore the Senate might by treaty dismember the Union."⁹¹ This argument on the possibility of dismembering the Union by treaty became an issue in the ratification conventions in Virginia and North Carolina, where it was argued that under the rule requiring concurrence of two-thirds of those present senators from five states (assuming a bare quorum) could cede territory or rights of other states.⁹²

On August 23 the Convention took up the proposal of the committee of detail. Madison observed that because the Senate represented states alone and for "other obvious reasons" the President should be an agent in treaties. Gouverneur Morris doubted treaties should be referred to the Senate at all but for the present moved to add: "but no Treaty shall be binding on the U.S. which is not ratified by a law." This seemed to Madison and Ghorum inconvenient for treaties of peace or alliance; Ghorum believed negotiations would have to be previously ratified, otherwise negotiators going abroad would not be instructed by the same authority which ratified. Unmoved by this, Morris said it would be well to oblige foreign states to negotiate here, nor was he "solicitous to multiply & facilitate Treaties"; we should wait for good bargaining opportunities. Wilson and Dickinson supported the amendment, but it was defeated by eight states to one, with one divided.⁹³ Madison then "hinted for consideration, whether a distinction might not be made between different sorts of Treaties — Allowing the President & Senate to make Treaties eventual and of Alliance for limited terms — and requiring the concurrence of the whole Legislature in other Treaties."⁹⁴ We hear nothing more of this.

The principal clause was referred to a committee of five, later to a committee of eleven on postponed and remaining questions. On September 4 the latter reported this clause: "The President by and with the advice and consent of the Senate, shall have power to make treaties. . . . But no Treaty shall be made without the consent of two thirds of the Members present."⁹⁵ We have little indication of

frequently invoked; he attributed to the King a complete power to make treaties, but said a check against abuse existed in "parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation." Hence American discussion often questioned vesting trial of impeachments in the Senate, since it would hardly convict the President for impropriety in making a treaty to which it had consented.

91. 2 Farrand 297-98.

92. See note 86 *supra*.

93. 2 Farrand 392-93.

94. 2 Farrand 394.

95. 2 Farrand 495.

the committee's reason for the change,⁹⁶ but it was reported with a number of other final changes in the manner of electing the President, and his powers, which cleared the air.

Many efforts were made to amend, but all were defeated. They included association of the House of Representatives with the Senate in advice and consent; exemption of treaties of peace from the two-thirds rule (at first accepted, then reconsidered and rejected); authorization of treaties of peace by two-thirds of the Senate without the President; complete elimination of the two-thirds requirement; enlargement of the requirement to two-thirds of the whole membership of the Senate; substitution of a majority of the whole membership; requirement of two-thirds of the membership to form a quorum; consideration of treaties only after previous notice to members and a reasonable time for their attending.⁹⁷ These proposals were decisively rejected, except for six to five votes against two amendments which would have reduced the vote required. Since the amendments reflect several points of view the result may indicate a realistic compromise had been struck. Its rationale lay in association of executive capacity for fact finding, negotiation, and swift, secret action with the safeguard of legislative policy review; in the representation of national interest by the President, of state interest by the Senate; in the protection of the interests of a minority group of states against a bare majority by the two-thirds rule.

These considerations can only be inferred from the proposals made in the Convention of 1787, but they became explicit in the explanations which delegates gave to the ratifying conventions.⁹⁸

96. Pierce Butler, a member of the committee of eleven, gave the Legislature of South Carolina this explanation: "It was at first proposed to vest the sole power of making peace or war in the Senate; but this was objected to as inimical to the genius of a republic, by destroying the necessary balance they were anxious to preserve. Some gentlemen were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction. The House of Representatives was then named; but an insurmountable objection was made to this proposition—which was, that negotiations always required the greatest secrecy, which could not be expected in a large body. . . ." 4 Elliot's Debates 263. To similar effect, see Pinckney 4 *id.* at 264-65. Madison, also a member of the committee, described it in terms of checks and balances, as the safest arrangement. 3 *id.* at 515-16.

97. 2 Farrand 534, 538, 540-41, 543, 547-50.

98. See especially 2 Elliot's Debates 466, 505-07 (James Wilson); 3 *id.* at 331, 347, 514-16 (Madison); 4 *id.* at 277-82 (Charles Cotesworth Pinckney). Other comments: 3 *id.* at 510-11 (Corbin); 4 *id.* at 119-24 (Davie); 128-29, 132-34 (Iredell). And see Hamilton's view in The Federalist No. LXXV, that the treaty power is a mixed executive-legislative function which could not properly be assigned to President or Senate alone.

That of Charles Cotesworth Pinckney to the Legislature of South Carolina will serve as an example :

Now let us consider whether the power of making treaties is not as securely placed as it was before. It was formerly vested in Congress, who were a body constituted by the legislatures of the different states in equal proportions. At present, it is vested in a President, who is chosen by the people of America, and in a Senate, whose members are chosen by the state legislatures, each legislature choosing two members. Surely there is a greater security in vesting this power as the present Constitution has vested it, than in any other body. Would the gentleman vest it in the President alone? If he would, his assertion that the power we have granted was as dangerous as the power vested by Parliament in the proclamations of Henry VIII., might have been, perhaps, warranted. Would he vest it in the House of Representatives? Can secrecy be expected in sixty-five members? The idea is absurd. Besides, their sessions will probably last only two or three months in the year; therefore, on that account, they would be a very unfit body for negotiation whereas the Senate, from the smallness of its numbers, from the equality of powers which each state has in it, from the length of time for which its members are elected, from the long sessions they may have without any inconveniency to themselves or constituents, joined with the president, who is the federal head of the United States, form together a body in whom can be best and most safely vested the diplomatic power of the Union.⁹⁹

Events have not in all respects answered the expectations of the framers. They did not indicate in what sense they understood "advice and consent" of the Senate. However, President Washington and the Senate agreed that either oral or written consultation with respect to negotiations or formal assent to written instruments would be appropriate, according to circumstances, and that for oral consultation the President might go to the Senate chamber or convene the senators elsewhere as might be convenient. Washington did go to the Senate to discuss negotiations with the Southern Indians, expecting the Senate to act as an executive council. Instead it entered upon a tedious examination and debate of documents and even proposed to refer items to committee. The President was unable to conceal his annoyance; after the better part of two legislative days he obtained answers to his questions but is reported to have said "he would be damned if he ever went there again."¹⁰⁰ This was the end of oral consultation and consequently of effective solicitation of advice before negotiating; advice and consent have since come to

99. 4 Elliot's Debates 280-81.

100. See Hayden, *The Senate and Treaties 1789-1817* at 11-14, 18-26 (1920).

be directed wholly to treaties already negotiated and signed. Any changes afterwards recommended can be obtained only by reopening negotiations, and issues between the President and the Senate with respect to treaties may thus be accentuated. The original plan might have reconciled these differences in advance.

A reason assigned for excluding the House of Representatives from the treaty power was the impossibility of preserving secrecy of debate in the more numerous house. What was true of the House in 1789 is even more true of the Senate today, in terms not alone of numbers but also of vastly augmented reporting and communications facilities. Neither body is now able to keep a secret. Another reason for preferring the Senate was that it represented state governments as equal units, thus balancing the President, who was elected by the people as a whole to represent national interests. Since the seventeenth amendment senators have been directly elected from the states as districts, but still in equal numbers irrespective of the size, population, wealth, or other differentiating characteristics of states. They no longer speak for state governments and sometimes are out of sympathy with them. They may speak for the people of their states as a whole but so, usually, do the representatives in matters of external relations. The senators tend to have longer political experience, greater party influence. To state any regular pattern differentiating their interests from those of members of the House of Representatives is not easy, except that a larger proportion of individualists may become entrenched in the Senate. If units of population are to be represented in treaty making the House of Representatives would do it more equitably. If state governments are to be represented neither house can do it.

II. JUDICIAL CONSTRUCTION

The positions reached by the framers of the Constitution may be summarized as follows: (1) They placed the treaty powers, without in terms defining it, as an enumerated power in the national government and prohibited treaty making by the states; (2) they left the scope of the treaty power to be defined in practice in the light of the general principles and distribution of powers in the Constitution; (3) it seems unlikely that they conceived of inherent governmental powers in external affairs, for they were at pains to enumerate external powers fully and to authorize powers "necessary and proper" to the exercise of the enumerated powers; undoubtedly they would have differed as to the extent to which additional powers might be implied or result from enumerated powers but left this

question to the courts, which have also differed; (4) they forbade states to make any "agreement or compact" (as distinguished from a "treaty, confederation, or alliance"), without the consent of Congress, but failed to mention a power in the national government to make agreements other than treaties; probably it can be inferred from the exclusion of the states and from the ample powers to conduct foreign relations granted to the President and the Congress; (5) they provided that treaties made "under authority of the United States" should be part of the supreme law of the land; although it is not clear that this phrasing imports a requirement of consistency with the Constitution, such a requirement seems implicit in making both the supreme law of the land, provided the Constitution is considered the fundamental law from which the treaty power derives; (6) although they discussed requirements known or assumed to prevail in other countries of legislative approval of certain types of treaties, they made no such distinction and decisively rejected a proposal that treaties must be put into effect by statutes; nor did they express themselves upon the effect to be given to terms of a treaty which might call for legislative action; (7) they gave the President the right to make treaties with the advice and consent of the Senate, two-thirds of the senators present concurring, intending by this separation of powers to reconcile national and state interests, to join executive and legislative capacities, to avoid irresponsible conduct, and to permit secrecy in consultation; but they left the procedural details to be developed in practice.

Although most of these provisions were adopted by comfortable majorities in the convention it is fair to add that the delegates reflected the strong nationalist position far more than did the state legislatures or the general electorate. Indeed, they had exceeded their authority by deciding to propose a new constitution rather than amendments to the Articles of Confederation. It is true that the legislatures expected a strengthening of the powers of the national government to deal with external relations, for weakness in this area had been a primary reason for calling the convention. But they had not anticipated that the changes would form part of a strongly centralized federal structure which would lend strength to a nationalist construction of powers. Needless to say, there were important elements of opinion in the country which were not prepared to accept such a tendency. The creation of the new national judiciary, in which federalist leadership continued for a quarter of a century to be dominant, and which possessed the ultimate

power to construe the treaty clauses, was therefore a change of decisive importance.

Some reference has been made to judicial construction of the general principles of the distribution of powers expressed in the Constitution. It is in order now to examine cases more particularly relevant to the treaty power.

A. TREATIES AND RESERVED POWERS

Treaties and statutes are both instruments rather than objects of government. The legislative power is divided horizontally between the national stratum of government and the state stratum according to the subjects to which it can be applied. In contrast with this the treaty power is not defined in the Constitution in terms of subjects and is not divided but vested exclusively in the national government. It thus includes a vertical cross section of the subjects which are horizontally divided for legislative purposes. It may not follow that it embraces all those subjects, but any limitation upon the subjects within the treaty power is not expressed in terms of the division of powers between national and state governments. No prohibition has been stated against treaties which affect subjects within the legislative power of the states, *i.e.*, what have been called reserved powers. Of course early states'-rights opinion took the position that such a prohibition was intended, that it was not supposed the national government could do by treaty what it was not authorized to do by other means,¹⁰¹ but the contrary view has been rather consistently advanced by the federal courts.

The power to make treaties had not been defined in terms of subject matter in the Articles of Confederation any more than in the Constitution, and the case of *Rutgers v. Waddington*,¹⁰² in the

101. George Nicholas told the Virginia ratification convention, with reference to the supremacy clause: "They can, by this, make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers." 3 Elliot's Debates 507. Jefferson believed treaties must concern foreign nations and matters "which are usually regulated by treaty, and cannot be otherwise regulated"; also that "*it must have been meant to except out of these the rights reserved to the States*"; for surely the President and Senate can not do by treaty what the whole government is interdicted from doing in any way." He also excepted subjects of legislation in which the House of Representatives participated, remarking that some felt this "would leave very little matter for the treaty power to work on. The less the better, say others." Jefferson, *Manual of Parliamentary Practice* 110 (1876); 5 Moore 162. (Emphasis added.)

102. Text of opinion in 1 Thayer, *Constitutional Law* 63-72 (1895). Alexander Hamilton, appearing as counsel, argued that "though in relation to its own citizens local laws might govern, yet in relation to foreigners those of the United States must prevail. It must be conceded that the Legislature of one State cannot repeal a law of the United States." Corwin, *The Progress of Constitutional Theory between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 Am. Hist. Rev. 511, 531 (1925).

Mayor's Court of New York City in 1784, had already presented a conflict of state legislation with the treaty of peace. However, the court had managed to avoid the direct issue, giving effect to the treaty upon the ground that the statute did not clearly show an intent to violate the treaty; therefore it thought proper to indulge a presumption against such inconsistency, following Blackstone's tenth rule of statutory construction. The result produced popular demonstrations and sharp differences of professional and legislative opinion.

After the Constitution came into force the immediate issue requiring construction of the treaty power continued to be state statutes inconsistent with the treaty of peace. The issue was presented to the Supreme Court in the leading case of *Ware v. Hylton*,¹⁰³ which involved a conflict between a Virginia statute purporting to release Virginia debtors from debts to British subjects upon payment of the debts into the state treasury, and the treaty commitment "that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted."¹⁰⁴ The Court held that payment by a Vir-

The court rejected this view, declaring that if the Legislature chose deliberately to enact a statute in contravention of a treaty, "there is no power which can control them. When the main object of such a law is clearly expressed, and the intention manifest, the judges are not at liberty, although it appears to them to be unreasonable, to reject it; for this were to set the judicial above the legislative, which would be subversive of all government." 1 Thayer, *Constitutional Law* 70 (1895). Also see Coxe, *Judicial Power and Unconstitutional Legislation* 230 (1893). Even so there was a meeting of protest in New York because the court had given effect to the treaty; a memorial was sent to the Assembly which adopted a resolution condemning the judgment. Jay, the Secretary for Foreign Affairs, who shared Hamilton's views, prepared a resolution with reference to the case for submission to the Congress, in which he described "the thirteen independent sovereign States as having, by express delegation of power, formed and vested in Congress a perfect though limited sovereignty for the general and national purposes specified in the Confederation. In this sovereignty they cannot severally participate (except by their delegates) or have concurrent jurisdiction. . . . When therefore a treaty is constitutionally made, ratified and published by Congress, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention, consent or fiat of state legislatures." He recommended that Congress formally deny the right of State legislatures to enact laws construing or obstructing national treaties, call upon the legislatures to repeal in general terms all statutes contrary to the treaty of peace, and express its view that State courts must decide cases arising under the treaty according to its intent "anything in the said acts . . . to the contrary notwithstanding." 4 *Journals of the American Congress* 730 (1823). The resolution was approved by the Congress unanimously, but its recommendations were rejected in New York, Virginia, and Rhode Island. Haines, *The Role of the Supreme Court in American Government and Politics 1789-1835* at 97-98 (1944).

103. 3 U.S. (3 Dall.) 199 (1796).

104. Preliminary Articles of Peace, Nov. 30, 1782, art. IV, 8 Stat. 54, T.S. No. 102. Definitive Treaty of Peace, Sept. 3, 1783, art. IV, 8 Stat. 80, T.S. No. 104.

ginia debtor to the State of Virginia of money owed to a British subject could not be pleaded in bar of an action by the creditor against the debtor. Several of the justices concluded that the statute either was invalid because confiscatory or ineffective as a confiscation, but it does not follow that they failed to pass upon the effect of the treaty on the statute.¹⁰⁵ On the contrary they noted that the statute declared the debtor discharged upon payment to the state, clearly an impediment to recovery, and all but Mr. Justice Iredell believed that the treaty defeated this consequence. Certainly the opinions contain clear assertions of the supremacy of treaty over statute. Thus Mr. Justice Chase said:

A treaty cannot be the *supreme law* of the land, that is of all the *United States* if any act of a *State Legislature* can stand in its way. If the Constitution of a State (which is the *fundamental* law of the State, and paramount to its Legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the State Legislature, must not be prostrate? It is the declared will of *the people* of the *United States* that every treaty made, by the authority of the *United States*, shall be superior to the *Constitution* and *laws of any individual State*; and their will alone is to decide.¹⁰⁶

Mr. Justice Patterson, referring to the treaty, said:

All lawful impediments of whatever kind they might be [are] removed. . . . The act itself is a lawful impediment, and therefore is repealed; the payment under the act is also a lawful impediment, and therefore is made void.¹⁰⁷

In like vein Mr. Justice Wilson:

Independent, therefore, of the Constitution of the *United States* (which authoritatively inculcates the obligation of contracts) the treaty is sufficient to remove every impediment founded on the law of *Virginia*.¹⁰⁸

The ruling was not an isolated one. In other cases effect was given to rights of British subjects under the treaty of peace in the face of state statutes sequestering debts due them¹⁰⁹ or confiscating

105. For the contrary opinion see Tucker, *Limitations on the Treaty-Making Power* 173-201 (1915).

106. 3 U.S. (3 Dall.) at 236.

107. *Id.* at 250.

108. *Id.* at 281.

109. *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794); *Hylton v. Brown*, 12 Fed. Cas. 1123, No. 6981 (C.C.D. Pa. 1806); *Hamilton v. Eaton*, 11 Fed. Cas. 336, No. 5980 (C.C.D.N.C. 1792); *Jones v. Walker*, 13 Fed. Cas. 1059, No. 7507 (C.C. Va.) (opinion not dated); *Page v. Pendleton*, 2 Wythe 211, 217 (Va. Ch. 1793).

their interests in property,¹¹⁰ or statutes of limitations outlawing recovery.¹¹¹ Other early cases gave effect to provisions of the Jay Treaty of November 19, 1794¹¹² and the convention with France of September 30, 1800¹¹³ which permitted aliens to succeed to or dispose of property in this country, despite state statutes of escheat under which grants had been made to others.

The position thus early assumed by the Supreme Court has never been abandoned, although there were a number of *obiter dicta* during the incumbency of Chief Justice Taney which suggested a contrary tendency. These were generally to the effect that matters within the police power of the states are not subject to regulation by treaty.¹¹⁴ There was of course some tendency in other

110. Carver v. Jackson, 29 U.S. (4 Pet.) 1, 100 (1830); Hughes v. Edwards, 22 U.S. (9 Wheat.) 489 (1824); Orr v. Hodgson, 17 U.S. (4 Wheat.) 453 (1819); Higginson v. Mein, 8 U.S. (4 Cranch) 415, 419 (1808).

111. Hopkirk v. Bell, 7 U.S. (3 Cranch) 454 (1806); Dunlop v. Alexander, 8 Fed. Cas. 87, No. 4166 (C.C.D.C. 1808).

112. Carneal v. Banks, 23 U.S. (10 Wheat.) 181 (1825); Society for the Propagation of the Gospel in Foreign Parts v. Town of New-Haven, 21 U.S. (8 Wheat.) 464 (1823); Fairfax v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 627 (1816).

113. Geofroy v. Riggs, 133 U.S. 258 (1890); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259 (1817).

114. In Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 569 (1840), Taney observed that the object of a treaty must be "consistent . . . with the distribution of powers between the general and state governments." In the License Cases, 46 U.S. (5 How.) 504, 613 (1847), Mr. Justice Daniels declared, "A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State." The Passenger Cases, 48 U.S. (7 How.) 283, 466 (1849), contain several dicta of this sort, notably that of Chief Justice Taney in his dissenting opinion, "For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize nor enforce. I had supposed this question not now open to dispute." Mr. Justice Grier's affirmative opinion seems to take a view of the matter not markedly different. In lower federal courts considering Indian rights under treaties with the United States, dicta of this sort appeared, but the constitutional question was avoided in the only case squarely presenting the issue to the Supreme Court. See *People ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1858); *Lowry v. Weaver*, 15 Fed. Cas. 1057, No. 8584 (C.C.D. Ind. 1846). In *Prevost v. Greneaux*, 60 U.S. (19 How.) 1 (1856), there is a dictum that a treaty cannot divest rights already vested in a State. But this case involved a state tax on aliens taking property in Louisiana by inheritance, and the Court did not conclude that the treaty was intended to apply to a tax already vested and complete before it was concluded. In *Frederickson v. Louisiana*, 64 U.S. (23 How.) 445 (1860), the Court declined to consider whether a treaty could regulate dispositions or laws of inheritance of foreigners with reference to property within the States, but said the question was one of great importance, implying that such a right on the part of the national government was very doubtful.

courts to give effect to the views expressed in these *dicta*,¹¹⁵ until the Supreme Court reasserted its earlier positions. Since that period it has done so consistently, giving effect to many treaties which have invaded significant fields of reserved power.

An important group of cases deals with the position of resident aliens. The courts have sustained treaties removing disabilities of aliens under state statutes to succeed to and dispose of land.¹¹⁶ They have given effect to treaties designed to prevent state discriminations against resident aliens in the conduct of trade or business; or in such travel, tenancy of shops, leasing of land, and other matters, as may be incidental thereto.¹¹⁷ Other treaties have operated to prevent discriminatory treatment of aliens in taxation¹¹⁸ or in awards under workmen's compensation laws.¹¹⁹ Rights given by treaty to foreign consular officers in the United States to be notified of the deaths of their nationals resident here, to take temporary possession of the estates of such persons or intervene in the administration of them, or to take property of intestate aliens having no heirs or next of kin,¹²⁰ have been upheld despite inconsistent procedures required by

115. Compare *Siemssen v. Bofer*, 6 Cal. 250 (1856), with *Forbes v. Scannell*, 13 Cal. 242 (1859); see *Compagnie Française de Navigation à Vapeur v. State Board of Health*, 51 La. Ann. 645, 25 So. 591 (1899), *aff'd*, 186 U.S. 380 (1902) (construing the treaty as not in conflict with the statute). *Magnani v. Harnett*, 257 App. Div. 487, 10 N.Y.S.2d 107 (3d Dep't 1939); cf. *Leong Mow v. Board of Comm'rs*, 185 Fed. 223 (C.C.E.D. La. 1911); *Lubetich v. Pollock*, 6 F.2d 237 (W.D. Wash. 1925).

116. *Todok v. Union State Bank*, 281 U.S. 445 (1930); *Blythe v. Hinckley*, 180 U.S. 333 (1901); *Geofroy v. Riggs*, 133 U.S. 258 (1890); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Bahaud v. Bize*, 105 Fed. 485 (C.C.D. Neb. 1901); *People v. Gerke*, 5 Cal. 381 (1855); *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (1920); *In re Stixrud*, 58 Wash. 339, 109 Pac. 343 (1910); for additional citations, see *Annots.*, 4 A.L.R. 1377 (1919); 17 A.L.R. 635 (1922); 134 A.L.R. 882 (1941).

117. *Jordan v. Tashiro*, 278 U.S. 123 (1928); *Asakura v. Seattle*, 265 U.S. 332 (1924); *Terrace v. Thompson*, 263 U.S. 197 (1923); *Ex parte Heikich Terui*, 187 Cal. 20, 200 Pac. 954 (1921). However, there were many cases in which state restrictions upon aliens were held not to conflict with treaties designed to afford them equal treatment in the pursuit of a livelihood: e.g., *Patsone v. Pennsylvania*, 232 U.S. 138 (1914); *Maiorano v. Baltimore & Ohio R.R.*, 213 U.S. 268 (1909); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Heim v. McCall*, 239 U.S. 175 (1915). Cf. *Oyama v. California*, 332 U.S. 633 (1948). Treaties have been progressively strengthened to avoid such results; see 1 Hyde § 204.

118. *Nielsen v. Johnson*, 279 U.S. 47 (1929); *American Trust Co. v. Smyth*, 247 F.2d 149 (9th Cir. 1957); *Ex parte Heikich Terui*, 187 Cal. 20, 200 Pac. 954 (1921); *Trott v. State*, 41 N.D. 614, 171 N.W. 827 (1919); other citations in A.L.R. annotations *supra* note 115.

119. *De Biasi v. Normandy Water Co.*, 228 Fed. 234 (D.N.J. 1915); *Vietti v. George K. Mackie Fuel Co.*, 109 Kan. 179, 197 Pac. 881 (1921); *Iannone v. Radory Construction Corp.*, 285 App. Div. 751, 141 N.Y.S.2d 311 (3d Dep't 1955).

120. For references to the numerous conventions on these subjects which have been concluded by the United States see, 1 Hyde §§ 478-81. Also see *Santovincenzo v. Egan*, 284 U.S. 30 (1931) (taking property of intestate

state statutes on probate and administration. Provisions exempting foreign consuls from compulsion to appear as witnesses have likewise been upheld.¹²¹

Other treaties affecting reserved power areas are usually designed to control on a reciprocal basis persons whose activities are of mutual concern to two or more states or affect relations between them. A treaty in this category to restrict the hunting of migratory birds passing between the United States and Canada led to the famous case of *Missouri v. Holland*.¹²² Although the principle involved was not novel, the issue was posed sharply because an earlier effort at regulation by national statute had failed when the statute was held to be an invasion of reserved powers and therefore unconstitutional.¹²³ In holding that the migratory bird treaty and a statute implementing its commitments¹²⁴ were valid, the Court thus strongly reaffirmed the principle that the treaty power is not excluded from areas within the reserved legislative powers of the states:

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. . . . We do not mean to imply that there are no qualifications to the treaty-making power; but they must be

aliens); *Todak v. Union State Bank*, 281 U.S. 449 (1930) (right of consuls to administer); *Rocca v. Thompson*, 223 U.S. 317 (1913) (consul's right of temporary possession). For state decisions on the right of consuls to administer see *In re Wyman*, 191 Mass. 276, 77 N.E. 379 (1906); *In re Lobrasciano*, 38 Misc. 415, 77 N.Y. Supp. 1040 (Surr. Ct. 1902); *In re Fattosini*, 33 Misc. 18, 67 N.Y. Supp. 1119 (Surr. Ct. 1900). But see *Rocca v. Thompson*, *supra*, where by a strained interpretation the Court held the treaty did not authorize administration by the consul.

121. In *In re Dillon*, 7 Fed. Cas. 710, No. 3914 (N.D. Cal. 1854) the court held compulsory process ought not to be allowed to force attendance of a consul as a witness for the defense in a criminal case, although it was argued the treaty privilege conflicted with the accused's rights under the sixth amendment to the Constitution. The court concluded the amendment was intended only to give the accused rights equal to those of the government in compelling attendance, hence no conflict between the treaty and the Constitution occurred. For the diplomatic controversy with France over the incident see 5 Moore, 78-81; for Secretary of State Marcy's view, 5 *id.* at 167. *United States v. Trumbull*, 48 Fed. 94 (S.D. Cal. 1891), upholding a similar treaty, avoided the sixth amendment on the ground the consul was called as witness for the prosecution. In *Samad v. The Etivebank*, 134 F. Supp. 530 (E.D. Va. 1955) the court refused libellant's motion to hold a British consul and vice consul in contempt for refusing to answer questions as witness for respondents on the ground they were exempted by treaty as to matters within the scope of official duties and their discretion to judge this must be respected.

122. 252 U.S. 416 (1920); see also *United States v. Rockefeller*, 260 Fed. 346 (D. Mont. 1919).

123. *United States v. McCullagh*, 221 Fed. 288 (D. Kan. 1915); *United States v. Shauver*, 214 Fed. 154 (E.D. Ark. 1914).

124. Migratory Bird Treaty, Aug. 16, 1916, 39 Stat. 1702, T.S. No. 628; Migratory Bird Treaty Act, 40 Stat. 755 (1918), 16 U.S.C. §§ 703-11 (1952).

ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by 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. . . . What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. . . . The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved. . . . Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. . . . We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forest and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld.¹²⁵

In this reasoning there appear to be two elements: (1) the treaty violated no prohibition in the Constitution and none is to be inferred from the division of powers for legislative purposes; (2) control was possible only through national action in concert with another power. The first point is sufficiently explicit on the reserved power question. As to the second, if the subject is here considered one of national interest appropriate for diplomatic action, are we to infer that questions of local interest which neither invite nor require diplomatic action are beyond the treaty power? To this we shall return shortly.

Related to the migratory bird question are the regulations by treaty of fishing within the territorial waters of coastal states; such conventions are now common, and the same answer has been given.¹²⁶

Analogous to the treaties waiving state statutes of limitations are those which authorize the extradition to other countries of fugitives from justice, although within the jurisdiction of states,¹²⁷ and those which limit the usual liability under local law for

125. 252 U.S. at 432-35.

126. See *Commonwealth v. Trott*, 331 Mass. 491, 120 N.E.2d 289 (1954); 22 Ops. Att'y Gen. 214 (1898).

127. *Terlinden v. Ames*, 184 U.S. 270 (1902); *United States v. Rauscher*, 119 U.S. 407 (1886); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840); *Ex parte Charlton*, 185 Fed. 880 (C.C.D.N.J. 1911).

negligent injury;¹²⁸ both have been sustained despite their invasions of jurisdiction normally local.

In all these cases the courts have felt that the treaties in question fell within any bounds which may limit the treaty power. They declare that the limits of the delegated powers are not the limits of the treaty power, but they do not, unless as *obiter dicta*, provide criteria for determining what the limits of the treaty power are.

B. TREATIES AS DOMESTIC LAW

Cases giving effect to treaties as against state statutes of course hold that the former are the supreme law of the land before which contrary local regulations can not stand. However, in *Foster v. Neilsen*,¹²⁹ the Supreme Court developed an important distinction between what are now called self-executing and non-self-executing treaties, which determines the procedures whereby treaties become the law of the land. From what has been said of the Convention of 1787 it seems unlikely that the framers intended legislative action should ever be required to give effect to treaties in domestic law.¹³⁰ Nevertheless Chief Justice Marshall concluded that when the terms of the treaty stipulations in themselves "import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."¹³¹

In a number of decisions stemming from Marshall's distinction courts have indicated as criteria that treaties may be considered self-executing so as to take effect without legislative implementation, when their terms clearly convey such an intention and provide in sufficient detail standards for executive-administrative application. Where, on the contrary, treaties impose obligations intended to be discharged through legislative action or fail to provide guides for executive action, they are taken to be non-self-executing.¹³² The

128. *E.g.*, the Warsaw Convention, to which the United States adhered, International Air Transportation, Oct. 12, 1929, T.S. No. 876, which limits liability of international air carriers. See *Pierre v. Eastern Air Lines*, 152 F. Supp. 486 (D.N.J. 1957); *Noel v. Linea Aeropostal Venezolana*, 144 F. Supp. 359 (S.D.N.Y. 1956); *Komlos v. Compagnie Nationale Air France*, 111 F. Supp. 393 (S.D.N.Y. 1952).

129. 27 U.S. (2 Pet.) 253 (1829).

130. See notes 92, 93 *supra*.

131. 27 U.S. (2 Pet.) at 314-15.

132. See *Cook v. United States*, 288 U.S. 102, 119 (1933); *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39 (1913); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *United States v. Rauscher*, 119 U.S. 407, 418 (1886); *Head Money Cases*, 112 U.S. 580, 598 (1884); *Chew Heong v. United States*, 112 U.S. 536 (1884); *United States v. Forty-Three Gallons of*

courts have been cautious in holding treaties to be self-executing, especially as to those affecting fields of normal legislative regulation.¹³³

Among recent cases have been several on the question whether human rights provisions of the United Nations Charter are self-executing so as to invalidate state laws or actions inconsistent with them. In form these provisions are general statements of policy coupled with commitments to "take joint and separate action in cooperation with the Organization for the achievement of the purposes" stated.¹³⁴ However, there had been earlier indications that local policy must yield to an authoritative expression of foreign policy.¹³⁵ Ought this view to be extended to give effect to a commitment to act to promote and encourage "respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"?¹³⁶ Answers both affirmative and negative had been given by Canadian courts,¹³⁷ and concurring opinions in cases in this country had assigned obligations under the Charter as at least additional grounds for decision.¹³⁸ Finally the issue was squarely presented by *Sei Fujii v. California*.¹³⁹ In this case the district court of appeal had struck down a provision of the California Alien Land Law under which land transferred to an alien not eligible for citizenship would escheat,¹⁴⁰ on the ground that the statute must yield to the Charter provisions as the supreme law of the land. The California Supreme Court affirmed the judgment, but did so solely because it believed the effect of the statute was to discriminate arbitrarily against the Japanese in violation of the equal protection clause of the fourteenth amendment. It rejected the reasoning of the district court, and in describing the Charter as "a moral commitment of foremost importance,"¹⁴¹ held the human rights clauses to be non-self-executing

Whiskey, 93 U.S. 188, 196 (1876); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 247 (1872); *Robertson v. General Electric Co.*, 32 F.2d 495 (4th Cir.), cert. denied, 280 U.S. 571 (1929); *Vanity Fair Mills, Inc. v. T. Eaton Co.*, 133 F. Supp. 522 (S.D.N.Y. 1955).

133. *Taylor v. Morton*, 23 Fed. Cases 784, No. 13799 (C.C.D. Mass. 1855); *Vanity Fair Mills, Inc. v. T. Eaton Co.*, *supra* note 132.

134. U.N. Charter, arts. 1, 2, 13, 55, 56; quotation from art. 56.

135. *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

136. U.N. Charter, art. 55.

137. See *Re Noble*, [1948] O.R. 579, 4 D.L.R. 123 (H.C.) (negative); *Re Wrenn*, [1945] O.R. 778, 4 D.L.R. 674 (H.C.) (affirmative).

138. See *Oyama v. California*, 332 U.S. 633 (1948); *Perez v. Lippold*, 32 Cal.2d 711, 198 P.2d 17 (1948).

139. 38 Cal.2d 718, 242 P.2d 617 (1952).

140. *Sei Fujii v. California*, 217 P.2d 481, rehearing denied, 218 P.2d 595 (1950).

141. 38 Cal.2d at 724; 242 P.2d at 622.

and not intended to supersede existing domestic legislation. This result certainly seems consistent with the criteria developed in earlier cases, for the human rights clauses contemplate a future development of detailed standards and enforcement procedures.¹⁴²

The Supreme Court has not directly passed upon this point, but it seems probable it would take the same position. In *Shelley v. Kraemer*¹⁴³ it held restrictive covenants unenforceable solely upon constitutional grounds, ignoring a brief submitted for the United Nations Association in which the applicability of the Charter provisions was urged on the ground they either stated a controlling public policy or were supreme law of the land as a self-executing treaty. In *Rice v. Sioux City Memorial Park Cemetery*,¹⁴⁴ the plaintiff complained of a cemetery association's refusal to bury her husband because of a restrictive covenant in the contract for sale of the cemetery lot, claiming violation of both the fourteenth amendment and the human rights clauses of the Charter. The second ground was dismissed as irrelevant by the Iowa courts, which held that the restrictive covenant could be pleaded as a defense because this would not amount to its enforcement by the state. The Supreme Court initially affirmed the decision per curiam, as the bench was evenly divided; but on rehearing the per curiam decision was vacated and the initial grant of certiorari was dismissed as improvidently granted on the ground that an Iowa statute had made such covenants illegal and the case was therefore not one of general interest.¹⁴⁵ In the majority opinion Justice Frankfurter said, with reference to arguments of counsel on the United Nations question:

The Iowa courts dismissed summarily the claim that some of the general and hortatory language of this Treaty [the Charter], which so far as the United States is concerned is itself an exercise of the treaty-making power under the Constitution, constituted a limitation on the rights of the States and of persons otherwise reserved to them under the Constitution. It is a redundancy to add that there is, of course, no basis for any infer-

142. See *Sipes v. McGhee*, 316 Mich. 614, 25 N.W.2d 638 (1947); *Kemp v. Rubin*, 188 Misc. 310, 69 N.Y.S.2d 680 (Sup. Ct. 1947) (the Charter clauses were held not to apply to a restrictive covenant because of the domestic jurisdiction reservation in art. 2, cl. 7); Hudson, *Charter Provisions on Human Rights in American Law*, 44 Am. J. Int'l L. 543 (1950). Cf. *Gandolfo v. Hartman*, 49 Fed. 181 (C.C.S.D. Cal. 1892) (a restrictive covenant against renting to Chinese was held void as an infraction of a treaty which contained a most-favored nation clause).

143. 334 U.S. 1 (1948).

144. 245 Iowa 147, 60 N.W.2d 110 (1953). The contract reserved burial privileges to members of the "Caucasian race"; the deceased, a Korean war veteran, was partly Winnebago Indian. President Eisenhower authorized burial in Arlington National Cemetery.

145. *Rice v. Sioux City Memorial Park Cemetery*, 348 U.S. 880 (1954), per curiam decision vacated, certiorari dismissed, 349 U.S. 70 (1955).

ence that the division of this Court reflected any diversity of opinion on this question.¹⁴⁶

This seems to mean that the Court agreed with the Iowa courts that the human rights clauses were inapplicable, presumably because non-self-executing but perhaps because merely "general and hortatory." The writer cannot undertake to judge whether a distinction is intended between exhortation to reform and a non-self-executing legal commitment to reform. The words of article 56 do seem to be a commitment to action by the signatories.

Assuming that a treaty has become the supreme law of the land either through the force of its own language or by legislative implementation, what is its relation to those other constituents of the supreme law, the Constitution and the federal statutes pursuant thereto? With respect to the latter the courts have consistently held that treaties and statutes are mentioned in terms of equal dignity in the supremacy clause, and therefore in the event of a conflict between them whichever is later in time must prevail.¹⁴⁷ Courts tend to hold that conflicts are not intended when by a reasonable construction of the instruments they can be avoided.¹⁴⁸ Even so, cases of clear inconsistency have occurred frequently.

It results that Congress does keep in its hands important controls over treaties. As soon as treaties have been ratified and the ratifications exchanged or deposited the treaties impose international obligations upon the United States, the violation or non-observance of which will expose it to legal liability to other signatories. Yet if the treaty be non-self-executing (which the Senate could insist upon as a condition of consent to ratification), it is possible for the Congress to balk its domestic effect by refusing to implement it by

146. 349 U.S. at 73.

147. *Moser v. United States*, 341 U.S. 41 (1951); *Clark v. Allen*, 331 U.S. 503 (1947); *Pigeon River Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138 (1934); *Sanchez v. United States*, 216 U.S. 167 (1910); *Hijo v. United States*, 194 U.S. 315 (1904); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Chinese Exclusion Case*, 130 U.S. 581 (1889); *Head Money Cases*, 112 U.S. 580 (1884); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871); *Ballester v. United States*, 220 F.2d 399 (1st Cir. 1955); *Arizona v. Hobby*, 221 F.2d 498 (D.C. Cir. 1954); *United States v. Rumsa*, 212 F.2d 927 (7th Cir. 1954); *Colonial Molasses Co. v. United States*, 152 F. Supp. 242 (Cust. Ct. 1957); *United States v. Gredzens*, 125 F. Supp. 867 (D. Minn. 1954).

148. See, e.g., *Johnson v. Browne*, 205 U.S. 309 (1907); *Lem Moon Sing v. United States*, 158 U.S. 538 (1895); *United States v. Forty-Three Gallons of Whiskey*, 108 U.S. 491 (1883); *American Trust Co. v. Smyth*, 247 F.2d 149 (9th Cir. 1957); *In re Lobrasciano*, 38 Misc. 415, 77 N.Y. Supp. 1040 (Surr. Ct. 1902).

149. *Whitney v. Robertson*, 124 U.S. 190 (1888). See the views of Murray, Lyman, Gallatin, Madison, in the debate on Jay's Treaty in the House of Representatives, 1796: 4 Elliot's Debates 435-38. A few writers have argued Congress has a duty to implement treaties. See 1 Kent, Commentaries on American Law 286-87 n. 1 (14th ed. 1896).

legislation.¹⁴⁹ And if the treaty be already in effect as external obligation and internal law, a statute may still frustrate its domestic operation or force international abrogation.¹⁵⁰ This result is a logical consequence of our separation of the governmental powers to assume obligations and to discharge them. It was clearly put by Chief Justice Taft:

[T]he treaty-making power is the promising power of the government; and when we make a promise . . . the treaty-making power is the government. Congress is the performing power of the government. . . . [I]f Congress does not perform the promises made by the government . . . then it breaks its promise, that is all.¹⁵¹

Conversely, a treaty will prevail over a prior inconsistent statute, but the possibility in practice of overriding federal statutes in this way is negligible because opportunities for treaty making are limited by the wishes of other independent states and to subjects of mutual interest. Statutes are not so limited and could be directed toward deliberate frustration of particular treaties. Since the treaty power extends to some objects which are beyond the legislative power of the Congress it has been thought an inconsistency that it should be subject to negation by the Congress.¹⁵² The difficulty is more theoretical than practical. Granted that international responsibility would be best assured if the promising and performing capacities were vested in the same organ of government,¹⁵³ it is nevertheless inevitable that in mixed governments some disjointedness will occur. As usual the proof of the pudding is in the eating, however self-defeating the recipe may seem. International commitments undertaken by the President with the assent of the Senate, two-thirds present concurring, have seldom been deliberately dishonored

150. *I.e.*, "force" in the sense of making it practically necessary for the President to act. See the Act of July 7, 1798, 1 Stat. 578, denouncing the treaty with France, and the comment of Davis, J., in *Hooper v. United States*, 22 Ct. Cl. 408, 418 (1887): "The treaties therefore ceased to be a part of the supreme law of the land, and when Chief-Justice Marshall stated, in July, 1799 . . . that there was no treaty in existence between the two nations, he meant only that within the jurisdiction of the Constitution the treaties had ceased to exist, and did not mean to decide, what it was exclusively within the power of the political branch of the Government to decide, that, as a contract between two nations, the treaties had ceased to exist by the act of one party, a result which the French ministers afterwards said could be reached only by a successful war."

151. Taft, Address: *The League of Nations*, 40 Can. L.T. 1025, 1037 (1920).

152. Boyd, *The Expanding Treaty Power*, 6 N.C.L. Rev. 428, 430 (1928); Stinson, *The Supreme Court and Treaties*, 73 U. Pa. L. Rev. 1 (1924).

153. Assuming, of course, an organ with a sense of international responsibility. *Merum imperium* of a Nazi or Soviet type would scarcely qualify.

by legislative action of the President and a majority of both Houses. Statutory frustration of treaties results more often from inadvertence, unforeseen circumstances, and incidental conflicts between instruments intended for quite different purposes.

It is open to the Senate to stipulate conditions which alter the terms or effect of a treaty, but these must be accepted by the other signatories before the treaty can enter into force. If the Senate's consent to ratification is accompanied by stipulations which do not affect the terms or effect of the treaty but relate only to domestic arrangements under it, these will not by association with the treaty acquire status as the law of the land or affect existing statutes.¹⁵⁴

C. CONSTITUTIONAL LIMITATIONS UPON THE TREATY POWER

In considering the relationship between treaties and the Constitution we may begin with Justice Holmes' remark that if it is open to question whether treaties must be consistent with the Constitution to qualify as having been made "under authority of the United States," it does not follow that they can be inconsistent with the Constitution and still qualify as supreme law of the land.¹⁵⁵ As already suggested we are spared this result if we accept Chief Justice Marshall's premise that the Constitution is the fundamental law which governs the disposition of all powers.¹⁵⁶ If the treaty power is conceived as a *constitutional* power it cannot rise above its source, and treaties repugnant to the Constitution must be void. Even those who accept the Sutherland view that external powers are inherent and do not derive from the Constitution have not denied that constitutional limitations must be observed. Since provision is made for the treaty power in the Constitution they have argued not that this power is to be emancipated from constitutional restraints but that organs of the national government possess additional instruments and methods of external action not specified in the Constitution. The danger of irresponsible action implicit in such a position is apparent, whether it involves the treaty power or not; it is therefore gratifying to note that the Supreme Court has first qualified and more recently sharply attacked the position.¹⁵⁷

154. *Power Authority of the State of New York v. Federal Power Comm'n*, 247 F.2d 538 (D.C. Cir. 1957).

155. *Missouri v. Holland*, 252 U.S. 416, 433 (1920): "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way."

156. See note 81 *supra*.

157. See text discussion of *Reid v. Covert*, at note 44 *supra*.

At no time has the Court given any support to assumptions that treaties inconsistent with the Constitution can be valid or take effect as law of the land. A characteristic expression was that of Justice Field in *Geofroy v. Riggs*:

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 from that of the States. It would not be contended that it 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.¹⁵⁸

Similar statements can be found in many cases.¹⁵⁹ It is sometimes said that their force is weakened by the fact the Court has

158. 133 U.S. 258, 267 (1890).

159. See *Reid v. Covert*, 354 U.S. 1 (1957); *United States v. Minnesota*, 270 U.S. 181, 207-08 (1926); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *Missouri v. Holland*, 252 U.S. 416, 433 (1920); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 242-43 (1872); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1871); *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1853); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840); *United States v. Rockefeller*, 260 Fed. 346 (D. Mont. 1919); *People v. Gerke*, 5 Cal. 381, 384 (1855). See also Hamilton's comment in *Camillus*, 5 Works of Alexander Hamilton 301 (Lodge ed. 1885):

The only constitution exception to the power of making treaties is, that it shall not change the Constitution; which results from this fundamental maxim, that a delegated authority cannot alter the constituting act, unless so expressly authorized by the constituting power. An agent cannot new-model his own commission. A treaty, for example, cannot transfer the legislative power to the executive department.

There have been occasional executive statements to the same effect. In 1854 Secretary of State Marcy informed the Government of Venezuela that the President could not submit a treaty which had been signed to the Senate without advising against acceptance of a clause he thought contrary to the Constitution. Mr. Marcy wrote, 5 Moore 169:

In reply, the undersigned hastens to inform Mr. Aspuruia that it is believed not to be competent to the treaty-making power of the United States to enter into such an engagement as that contained in the twenty-fifth article of the convention concluded at Caracas on the 20th day of September by the plenipotentiaries of Venezuela and the United States, viz:

'Whenever one of the contracting parties shall be engaged in war with another state, no citizen of the other contracting party shall accept a commission or letter of marque for the purpose of assisting or co-operating hostilely with the said enemy against the said party so at war, under the pain of being considered as a pirate.'

The Constitution of the United States provides that Congress shall 'define and punish piracies and felonies committed on the high seas.' Although several conventions have been made by this government with foreign governments, some of which continue in force, containing, in substance, the stipulation just quoted, they were evidently contracted by an oversight of one of the provisions of the Constitution—the supreme

never held any treaty unconstitutional; hence any criteria of constitutionality it has stated are only *dicta*. But its observations have been made with consistency and in cases in which the constitutionality of treaties was in issue. If it has not found any treaty unconstitutional this results from the care with which the drafters have observed constitutional limitations, from the admittedly broad scope of the treaty power, and from the Court's tendency to avoid unconstitutional applications by construing treaties as not having intended them.¹⁶⁰ It also seems possible that there have been a few unconstitutional treaties which have not been tested in the courts, although professional opinion is divided as to this.¹⁶¹

law of this country. The President, entertaining this opinion, can not consent to transmit the convention negotiated by Mr. Eames, which in all other respects meets with his approval, to the Senate for ratification without presenting to that body his objections to the article aforementioned.

5 Moore, Dig. of Int'l Law 169.

160. See *In re Dillon*, 7 Fed. Cas. 710, No. 3914 (N.D. Cal. 1854); the court sustained the broad consular privilege granted by the treaty by a construction of the sixth amendment of the Constitution which certainly leaves some doubt. More often it is the treaty which is construed into consistency with the Constitution. For a good example see *New Orleans v. The United States*, 35 U.S. (10 Pet.) 662 (1836), where limited rights of the Spanish crown to exercise a police power over a quay and public areas along the Mississippi River bank, although they were not crown lands, were held not to pass by the treaty of cession to the United States Government, despite rather clear words conveying the whole of the crown's rights, because the national government cannot under the Constitution exercise such rights except in the national domain. See comment in Feidler and Dwan, *The Extent of the Treaty-Making Power*, 28 Geo. L.J. 184, 190-91 (1939).

161. Although the Supreme Court had held in *Cunard Steamship Co. v. Mellon*, 262 U.S. 100 (1923), that the eighteenth amendment and the Volstead Act were violated by carrying liquor as ship's stores for use of crew and passengers into United States' territorial waters, the United States entered into treaties with a dozen or more foreign states in which it agreed that the penalty or forfeiture under the laws of the United States shall not apply to such transport of liquor if kept under seal while within territorial waters. In *Milliken v. Stone*, 7 F.2d 397 (S.D.N.Y. 1925), *aff'd*, 16 F.2d 981 (2d Cir.), *cert. denied*, 274 U.S. 748 (1927), the courts declined to pass upon the constitutionality of the treaty with Great Britain on the ground plaintiffs failed to show a sufficient interest to justify relief in equity. However, Secretary of State Hughes expressed confidence in the constitutionality of the treaty because the eighteenth amendment did not make provision for penalties and forfeitures. As Congress in implementing the amendment had exempted transit of liquors through the Panama Canal from penalties, acting in aid of "what may be called the *morale* of that enforcement," because to apply them would discredit the amendment and injure the interests of the United States "without the slightest compensation in the way of carrying out the actual purpose of the amendment," so the treaty power could make a like exception as to ship's stores in territorial waters. Statement by Secretary Hughes, Dec. 8, 1923, quoted in 5 Hackworth, *Digest of International Law*, 13-14 (1943). This conception of aiding enforcement of the amendment by exempting certain violations of it from penalty may seem casuistical to some, however realistic as to practical possibilities. "A sensible argument could be made that the prohibition amendment resembled more closely the commercial and real-property legislation which the Supremacy Clause was intended to affect

What, then, are the criteria which the court has applied to the determination of constitutionality. They appear to fall into three groups: (1) violation of an express prohibition of the Constitution; (2) violation of an implied prohibition of the Constitution; (3) use of treaties to regulate purely local matters not affecting international relations.

(1). *Express Prohibitions*

Most of the express prohibitions of the Constitution can be dismissed as having little relevance to treaties. Those directed against suspension of the writ of habeas corpus, bills of attainder, *ex post facto* laws, capitation or direct taxes when not in proportion to population, taxes or duties on exports, regulations discriminating against the ports of one state as against those of another or levying duties on intra-state coastal traffic, withdrawal of money from the Treasury without appropriation by law and regular statement and accounting, and granting titles of nobility, appear to be directed primarily against obnoxious legislation. Assuming general application, it appears improbable that treaties would be made for such objects, and cases have not yet been presented.

However, it may be suggestive of certain possibilities that the United States entered into the London Agreement of 1945, with an annexed Charter for the International Military Tribunal which sat at Nuremberg, authorizing application to conduct of Axis war criminals of novel definitions of "crimes against peace" and "crimes against humanity."¹⁶² The *ex post facto* character of such applications cannot be doubted, and the Tribunal itself was at pains to show that it was under no obligation to apply the principle *nullum crimen sine lege, nulla poena sine lege*.¹⁶³ Of course the agreement presented no constitutional issue because the German war criminals were outside the protection of the constitutional prohibition.¹⁶⁴

With respect to appropriation of money by law it seems probable that "law" would here be construed to mean "statute," although it has been argued that the term would include a treaty as law of the land.¹⁶⁵ However, it seems a reasonable surmise that a treaty pur-

than it resembled provisions of the Bill of Rights, and that the treaty of 1924 was valid while a treaty purporting to establish, say, press censorship would not be." Sutherland, *Restricting the Treaty Power*, 65 Harv. L. Rev. 1305, 1319 (1952).

162. Charter of the International Military Tribunal, Aug. 8, 1945, art. 6, 59 Stat. 1544, 1546, E.A.S. No. 472. See also 1 Trial of Major War Criminals 10 (1947).

163. The Nurnberg Trial-1946, 6 F.R.D. 69, 107-08 (1946); *Judicial Decisions*, 41 Am. J. Int'l L. 172, 217 (1947).

164. Cf. *In re Yamashita*, 327 U.S. 1 (1946), where claims by a Japanese war criminal to certain constitutional safeguards were denied.

165. Feidler and Dwan, *supra* note 160, at 192.

porting to appropriate money would be treated as non-self-executing. The prohibition refers to the method of appropriating; it certainly does not bar international commitments to provide money although they can be discharged only with the aid of the Congress.¹⁶⁶ Such commitments have been extremely numerous and their constitutionality has never been doubted.¹⁶⁷

There is one group of express prohibitions which have particular significance—those designed to protect individuals against interferences with their personal liberties. Most of these are blanket prohibitions against governmental acts infringing the rights specified. However, the language of the first amendment is confined to prohibiting Congress from making a law impairing freedom of religion, speech, press, assembly, or petition. It is possible to argue that other types of governmental activity, *e.g.*, treaties, are not subject to the prohibition. Until recently the point has been of no moment because these liberties have been considered to fall within areas of purely domestic concern and therefore to be outside the treaty power on that account. Today there are some points relating to first amendment freedoms upon which the formulation of minimum international standards has been thought desirable. That the Government of the United States would by treaty subscribe to any such international standard in a manner intended to supplant a higher constitutional standard is not to be expected.¹⁶⁸ And the broad language of the Supreme Court in recent cases suggests that it would not exclude the amendment from the prohibitions applicable to treaties.

These cases have dealt with the rights of United States nationals in other countries. The only significant older case of this type was *In re Ross*,¹⁶⁹ in which it was held that in a murder trial before

166. When in 1844 the Senate Committee on Foreign Relations reported adversely on a reciprocity treaty with Prussia drafted by Mr. Wheaton, Secretary of State Calhoun said it was clear the mere fact of a power having been delegated to Congress did not exclude it from being the subject of treaty stipulations "—of which the power of appropriating money affords a striking example. It is expressly and exclusively delegated to Congress, and yet scarcely a treaty has been made of any importance which does not stipulate for the payment of money. No objection has ever been made on this account. The only question ever raised in reference to it is, whether Congress has not unlimited discretion to grant or withhold the appropriation." 5 Moore 164.

167. For a digest of such treaties with references to judicial comment see Crandall, *Treaties, Their Making and Enforcement* (2d ed. 1916) (indexed *sub. nom.* "Appropriations, treaties involving").

168. The United States has expressed objections to the United Nations Draft Convention on Freedom of Information and Right of Review. 25 Dep't State Bull. 504 (1951). For consideration of the relationship of various international conventions to domestic jurisdiction and standards see section III *infra*.

169. 140 U.S. 453 (1891).

an American consular court in Japan, exercising an extraterritorial jurisdiction permitted by treaty, the accused was not entitled to the constitutional guaranties of indictment by grand jury or jury trial. The accused was a British subject but had signed as a seaman on a ship of United States registry and flag; in the view of the Supreme Court he was therefore to be treated as a United States national for purposes of trial. The denial of the procedural rights in question was founded upon the conclusion that these constitutional guaranties are not applicable in the peculiar circumstances of consular jurisdiction in another country. The court used language needlessly broad in saying they "apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad." However, on its special facts the case may be no more extreme than the later *Insular Cases*,¹⁷⁰ in which the Court held that only "fundamental rights," not including jury trial, need be protected in the unincorporated territories.

In recent years the United States has entered into a number of "status of forces" agreements defining jurisdiction over members of its armed forces stationed in other countries.¹⁷¹ These recognize the territorial jurisdiction of these countries over offenses of United States servicemen unless committed at a United States military post, camp, or station, or in line of duty. Among hundreds of cases which have passed without event there have occurred two which attracted widespread interest. Pvt. Richard T. Keefe and another soldier had entered Orleans, France, after completing a brief confinement in a United States guardhouse in Germany. They spent some time in drinking and gambling, then hired a taxicab driven by an elderly French national. Outside the city they beat the cabman until he was unconscious, left him lying on the road, and drove to Paris. On these facts they were of course surrendered to French jurisdiction, tried, and convicted. The trial and sentence were in all respects regular under French law, and the Army observer who attended reported no irregularities. Thereafter Keefe's wife applied in his behalf for habeas corpus, naming as defendants the Secretaries of State, Defense, and Army; and for a mandatory order to the Secre-

170. *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901).

171. NATO Status of Forces Agreements, June 29, 1951, 4 U.S. Treaties & Other Int'l Agreements 1792, T.I.A.S. No. 2846 (effective Aug. 23, 1953); Administrative Agreement with Japan, Feb. 28, 1952, 3 U.S. Treaties & Other Int'l Agreements 3341, T.I.A.S. No. 2492 (effective Apr. 28, 1952); Protocol Agreement, Sept. 29, 1953, 4 U.S. Treaties & Other Int'l Agreements 1846, T.I.A.S. No. 2848 (effective Oct. 29, 1953).

tary of State to secure Keefe's release through diplomatic negotiations. The absurdity of these requests is apparent, for habeas corpus tests only the propriety of the jurisdiction to order detention or to detain, not errors in the exercise of jurisdiction, and in any case Keefe was not in the defendants' custody; furthermore the district court certainly lacked jurisdiction to order the Secretary of State to take affirmative diplomatic action. In affirming the district court's dismissal of the petition the court of appeals made it clear that it found no violation of Keefe's constitutional rights in the jurisdictional arrangements or the conduct of his trial.¹⁷²

In *Girard v. Wilson*¹⁷³ a United States soldier stationed in Japan sought habeas corpus against the Secretary of Defense and others to prevent their surrendering him to Japanese jurisdiction for trial. While guarding military equipment on a firing range in Japan he had placed an expended cartridge case in the grenade launcher on his rifle and projected it, striking and killing a Japanese woman who had come on the field to pick up discarded brass. As Girard was then on duty at a military installation but was acting in a wholly unauthorized manner there was a difference of opinion whether he should be tried by court martial or surrendered to Japanese jurisdiction. American military authorities in Japan thought he fell within military jurisdiction, but meeting strong insistence from the Japanese Government that he be surrendered they referred the question to the Department of Defense. The Department decided to surrender him and so notified the Government of Japan. The United States District Court, District of Columbia, held that surrender of the petitioner to Japanese authorities would violate his constitutional rights, but refused habeas corpus on the ground he remained properly within court martial jurisdiction. The Supreme Court affirmed refusal of the writ but reversed the finding that surrender of Girard would violate his constitutional rights. It observed that the Administrative Agreement under which jurisdiction was determined authorized a waiver of jurisdictional rights in favor of the other state by authorities of the state having the primary right,¹⁷⁴ and

172. *United States ex rel. Keefe v. Dulles*, 222 F.2d 390 (D.C. Cir. 1954, *cert. denied*, 348 U.S. 952 (1955)).

173. 152 F. Supp. 21 (D.D.C.); *aff'd on other grounds*, 354 U.S. 524 (1957).

174. "3(c). If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance." Protocol Agreement, Sept. 29, 1953, 4 U.S. Treaties & Other Int'l Agreements 1846, T.I.A.S. No. 2848.

concluded that discretion to waive United States jurisdiction had been properly exercised by the Secretary of Defense and Secretary of State, with confirmation by the President. On the constitutional question the Court noted that Japan had exclusive jurisdiction to punish offenses against its laws within its borders except as it had consented to surrender it, citing *The Schooner Exchange v. M'Faddon*.¹⁷⁵ Japan's surrender of jurisdiction was conditioned by the discretionary arrangement under which Girard was given up, and the Court found "no constitutional or statutory barrier to the provision as applied here."

The *Girard* case cannot be taken simply as a relinquishment of normal military jurisdiction by executive fiat. Normal jurisdiction over Americans in Japan lies with Japanese civil courts. No constitutional right to trial by an American tribunal can exist. Although the Protocol Agreement under which Japan permitted United States military jurisdiction in certain cases was an executive arrangement it was authorized to be made by an Administrative Agreement in turn authorized by the Security Treaty signed in 1951. The Administrative Agreement specified the pattern of the NATO Status of Forces Agreement signed in 1951 and ratified in 1953; it also provided that jurisdiction in any case might be waived by the United States. The Administrative Agreement was considered by the Senate before it gave consent to ratification of the Security Treaty, and it came into force on the same day as the treaty. After ratification of the NATO Agreement the Protocol Agreement with Japan on jurisdiction was signed. Thus the principle of waiver of jurisdiction by executive discretion was considered and approved by the Senate; it was merely spelled out by executive agreement. The view of the district court that it deprived Girard of constitutional rights to deny him the right to be tried under the Uniform Code of Military Justice enacted by Congress seems untenable, for the arrangements under the Security Treaty were later in time than the statute. Perhaps the wisdom of placing discretion to waive jurisdiction over armed forces abroad in executive hands is questionable, but the power to do so by treaty is clear.

175. 11 U.S. (7 Cranch) 116, 136 (1812). However, in deciding that a public armed vessel is exempted from territorial jurisdiction when it enters the waters of another state, Chief Justice Marshall suggested *obiter* that if troops are permitted to pass through a State's territory it consents without express declaration to waive territorial jurisdiction. During Senate hearings on the NATO Status of Forces Agreement the Attorney General submitted a memorandum to demonstrate the incorrectness of Marshall's dictum. Hearings before Comm. on Foreign Rels., U.S. Senate, 83d Cong., 1st Sess., Apr. 7 and 8, 1953; supp. hearing June 24, 1953.

That these cases were not intended to have any application to the personal liberties of civilians is apparent from the ruling in *Reid v. Covert*.¹⁷⁶ There the Supreme Court held that dependents of servicemen who accompanied them abroad could not be subjected to trial under court martial jurisdiction for capital offenses in time of peace. Speaking for four members of the majority Justice Black dismissed *In re Ross* as an historical anachronism resting on a fundamental misconception of the applicability of the Constitution abroad; the decisions in the *Insular Cases* he distinguished as appropriate temporarily in newly acquired territories of very different traditions and institutions. At the time of Mrs. Covert's offense, which occurred in England, United States military courts exercised exclusive jurisdiction of offenses there by American servicemen and their dependents under an executive agreement; it was later superseded by a treaty, the NATO Status of Forces Agreement. In the other case, in Japan, the agreements mentioned in connection with the Girard case governed jurisdiction. It was argued by the Government that the Uniform Code of Military Justice was legislation necessary and proper to carry out United States obligations under these agreements. To Justice Black,

The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution. . . . There is nothing in . . . [the supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. . . . It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

There is nothing new or unique about what we say here. This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty. . . . We recognize that executive agreements are involved here but it cannot be contended that such an agreement rises to greater stature than a treaty.¹⁷⁷

176. 354 U.S. 1 (1957).

177. *Id.* at 16-17 & n.33.

He refers also to the fact that treaties and statutes are on a parity so that in case of inconsistency the one later in time must prevail, and concludes that "it would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument."¹⁷⁸ Finding that a court martial does not meet the requirements of article III, section 2 or of the fifth and sixth amendments, applicable generally, and that article I, section 8, clause 14, authorizing congressional regulation of the armed forces, is not broad enough to include civilian dependents in time of peace, he concludes that international agreements cannot alter these dispositions.

The opinion is the strongest and most pointed statement yet made by the Court of the principle that treaties and executive agreements are subject to the prohibitions of the Constitution. If it can be taken at face value it should lay many doubts at rest. In fact there is no indication that other members of the Court contested Justice Black's propositions concerning the treaty power. Two concurring opinions by Justices Frankfurter and Harlan take somewhat different views of the extent to which *In re Ross* must be considered outmoded. The two dissenting justices would retain the principles of that case. Thus their differences center upon what the constitutional guaranties are; they do not affect the principle that whatever those guaranties are they cannot be altered by treaty.

(2). *Implied Prohibitions*

How far implied prohibitions against the exercise of the treaty power are to be drawn from the Constitution is doubtful. Presumably an alteration in the structure of the governmental agencies and offices prescribed by the Constitution, or in the constitutional allocation of powers to them, could not be effected by treaty; there are *dicta* to this effect.¹⁷⁹ There is also a dictum that the Government of the United States could not by treaty cede territory within the limits of one of its constituent states without the consent of that state.¹⁸⁰ But the opinion relied upon the fact that Secretary of State Webster obtained the consent of the States of Maine and Massachusetts before proceeding with the adjustment of the Northeastern Boundary dispute in 1842, whereas Webster himself stated that he adopted this course because it seemed to him politically expedient

178. *Id.* at 18.

179. *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890); *Holden v. Jay*, 84 U.S. (17 Wall.) 211, 242-43 (1872); *United States v. Rockefeller*, 260 Fed. 346, 347 (D. Mont. 1919); *People v. Gerke*, 5 Cal. 381 (1855).

180. *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 540-41 (1885).

and not because he supposed it a legal requirement.¹⁸¹ There has been much difference of opinion upon the point,¹⁸² but it is difficult to point to any basis for inferring the prohibition. In practice such a cession could hardly be anticipated unless upon the assumption of a military defeat. In that case it would seem the means of compliance would have to be found. It is useless to belabor such a point.

(3). *Domestic Questions*

In general terms the Supreme Court has suggested a limitation inherent in the nature of treaty-making as a function of government, *i.e.*, that it is a technique for international adjustment of problems of concern to two or more states. "[T]he treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations;"¹⁸³ it "is broad enough to cover all subjects that properly pertain to our foreign relations."¹⁸⁴ In a frequently quoted statement Charles Evans Hughes said:

What is the power to make a treaty? What is the object of the power? The normal scope of the power can be found in the appropriate object of the power. 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.

Noting that there will inevitably be subjects of mixed local and international interest he suggested an adaptation of the doctrine that intrastate commerce which burdens or affects interstate commerce

181. In a letter to Governor Kent of Maine he said: ". . . although I entertain not the slightest doubt of the just authority of the government to settle this question by compromise, as well as in any other way, yet in the present position of affairs, I suppose it will not be prudent to stir, in the direction of compromise, without the consent of Maine." 5 Moore 174. It should be noted, however, that article V of the Webster-Ashburton Treaty provided that the United States should pay certain sums to Maine and Massachusetts "in equal moieties, on account of their assent to boundary limits described in this treaty."

182. Chancellor Kent and Chief Justice Marshall believed territory might be ceded by treaty although within the boundaries of a state. 2 Butler, *The Treaty Making Power* 391 (1902); 5 Moore 173. See also Mr. Justice McLean in *Lattimer v. Poteet*, 39 U.S. (14 Pet.) 4 (1840). Jefferson, when Secretary of State, expressed the view that only a disastrous war could supersede the obligation to maintain the territorial integrity of the states, Report to the President [1792], 1 Foreign Rel. 252 (1832). This was also Mr. Justice White's view in *Downes v. Bidwell*, 182 U.S. 244 (1901) (concurring opinion). Materials on the question are collected by Butler and Moore (*loc. cit.*) and by Corwin, *National Supremacy* 129-34 (1913).

183. *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890); quoted in *Asakura v. Seattle*, 265 U.S. 332, 341 (1924). Similar language: *Missouri v. Holland*, 252 U.S. 416 (1920); *In re Ross*, 140 U.S. 453, 463 (1891).

184. *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931).

is subject to regulation under the interstate commerce power. Thus the treaty power might properly be applied to a matter of intermingled international and local concern if the "international regulation could not appropriately succeed without embracing the local affairs as well." And he concludes:

. . . 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 jurisdiction 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.¹⁸⁵

It is unlikely the point would be contested, but the criterion of constitutionality suggested is a very general one. The Permanent Court of International Justice once observed that "the question whether a certain matter is or is not solely within the jurisdiction of a State is essentially a relative question; it depends upon the development of international relations."¹⁸⁶ What questions are today so purely local that regulation of them by treaty would be thought unconstitutional? Probably the domestic criminal law (apart from extradition) would qualify.¹⁸⁷ Regulation of marriage and divorce, except as it presents a problem of conflict of laws, family relations generally, requirements for the exercise of suffrage, regulation of private property and of descent and distribution of estates, except as aliens may be involved, are perhaps examples. But it is clear that many subjects considered only a few years ago to be wholly local have become matters of international concern for which at least partial regulation by treaty seems appropriate. These changes would press against any rigid categories of permissible subject matter which could be proposed. Discretion must necessarily be left with the courts.

D. EXECUTIVE AGREEMENTS

Although a good deal can be learned about the legal position of executive agreements by a study of practice with respect to them,¹⁸⁸

185. Proceedings, 23 Am. Soc'y of Int'l L. 194-96 (1929).

186. Nationality Decrees Issued in Tunis and Morocco, P.C.I.J., Ser. B, No. 4, at 24 (1923).

187. In *The Over the Top*, 5 F.2d 838, 845 (D. Conn. 1925) it is said: "It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing. . . . Certain it is that no part of the criminal law of this country has ever been enacted by treaty." As to the Genocide Convention, not ratified by the United States, see Section III *infra*.

judicial materials on the subject remain meager. No doubt this is due in part to the absence of specific constitutional provisions controlling practice. Agreements vary in kind: some are authorized by the Congress, others are made under authority of a prior treaty, some are made solely under executive authority.¹⁸⁹ That these authorities or combinations of authorities can appropriately act with respect to external relations within the range of delegated powers cannot be doubted. To what extent this imports a power to make international agreements other than treaties is less clear, or to turn the point around, to what extent the total pattern of delegated powers and prohibitions inhibits such agreements is not clear.

The lack of procedural prescriptions favors the position of the President. It is he who must act for the United States in international negotiations; in the sense that the agreement must be brought into force through his action it is always "executive." With Mr. Justice Sutherland's remarks upon the peculiar capacities of the President in external relations it is possible to agree thoroughly, even though rejecting his view of inherent powers:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be

188. This is the primary approach in the full treatments by McDougal and Lans, *supra* note 4; McClure, *International Executive Agreements* (1941); 2 Hyde 1405-18. For certain aspects of recent practice see Section III and the appendix by Gary J. Meyer *infra*.

189. See *USAFFE Veterans Association, Inc. v. Philippines*, printed in 50 Am. J. Int'l L. 686 (1956) (Ct. of First Instance of Manila, 1956) for an account of American practice incorporating the McDougal-Lans categories.

highly necessary, and the premature disclosure of it productive of harmful results.¹⁹⁰

Justice Sutherland concluded that a Joint Resolution of the Congress of May 28, 1934, authorizing the President to impose an embargo upon sale of munitions to certain belligerents was superfluous; he could have done this in his own executive capacity. Whether or not this be true there are certain areas in which the President possesses a primary power and responsibility, *e.g.*, as commander in chief of the armed forces, which would clearly support his individual action in concluding agreements appropriate to the function.¹⁹¹

In other agreements the President has appeared to act as an agent to effect congressional purposes. Of course the terminology of agency is in a formal sense inappropriate, not only because of the President's independent position but also because the doctrine of separation of powers opposes delegations of legislative power to the executive branch. Nevertheless the cases upon this subject have shown great tolerance of congressional authorizations to the President to enter into agreements modifying within specified limits the statutory regulations of tariff and trade.¹⁹² The large number of agreements under the Reciprocal Trade Agreements Act of 1934, from time to time extended, is proof of the continued vitality of the practice. A very broad authorization was given in the Postal Act of 1872, that "the Postmaster-General, by and with the advice and consent of the President, may negotiate and conclude postal treaties

190. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

191. *Tucker v. Alexandroff*, 183 U.S. 424, 435 (1902) (military security); *United States v. Pink*, 315 U.S. 203 (1942) (assignment of claims against Americans by U.S.S.R. as part of agreement leading to recognition of the U.S.S.R. by the United States); see *United States v. Belmont*, 301 U.S. 324 (1937). The Rush Bagot Agreement of 1817, limiting naval armament on the Great Lakes was negotiated as a presidential agreement. Later it was submitted to and approved by the Senate but seems never to have been regarded as a treaty—no ratifications were exchanged. The Attorney General in advising the President with respect to the exchange of over-age destroyers for naval and air bases in 1940, emphasized, without relying exclusively upon, his powers as commander in chief: "[I]t will hardly be open to controversy that the vesting of such a function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations for the utilization of the naval and air weapons of the United States at their highest efficiency in our defense." 39 Ops. Att'y Gen. 484, 486 (1939). See also the Security Agreement with Iceland, July 1, 1941, 55 Stat. 1547, E.A.S. No. 232. The Potsdam, Yalta, and Teheran Agreements of the Second World War fell largely within the President's war powers.

192. *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928); *Field v. Clark*, 143 U.S. 649 (1892); *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813).

or conventions . . . between the United States and foreign countries."¹⁹³ Since then postal conventions have regularly been concluded without submission to the Senate. The Supreme Court has favored a greater latitude of congressional delegation in the field of external relations than in domestic matters, perhaps viewing it, in Sutherland's words, as "an authority which was cognate to the conduct by him of the foreign relations of the Government."¹⁹⁴

Treaties also provide authority for subordinate or supplementary executive agreements. A long established type is the *compromis* which defines the terms of submission to arbitration under a basic convention. Recently, a complex of executive agreements has been formed under the principles of the Chicago Air Convention of 1945. The case of *Girard* has been noted, in which the Status of Forces Agreement defining jurisdiction over United States forces in Japan was authorized by an Administrative Agreement, which in turn was virtually incorporated into the Security Treaty of 1951.

It does not appear that the varied pattern of authorization affects the international status of the agreements. They have all been considered as effective in engaging the international responsibility of signatories as treaties could be. In *B. Altman & Co. v. United States*, the court, in referring to a commercial agreement with France, remarked:

While it may be true that this commercial agreement . . . was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court.¹⁹⁵

In internal law the executive agreement occupies an anomalous position. It is not mentioned in the supremacy clause as part of the supreme law of the land, and therefore may not occupy a position equal in dignity to that of statutes and treaties. Perhaps it is neces-

193. 17 Stat. 304 (1872) (later amended by 48 Stat. 943 (1934), 5 U.S.C. § 372 (1952)).

194. See *Panama Refining Co. v. Ryan*, 293 U.S. 388, 422 (1935); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936).

195. 224 U.S. 583, 601 (1912).

sary here to make some distinction among different types of agreements. The many agreements authorized by the Congress, under which the President modifies statutory tariff schedules are clearly instances in which the executive agreement sets aside the statute. But the conjunction of Congress and President in doing this gives the executive agreement the same political basis that a statute has. To permit the one later in time to prevail is therefore logical. Postal conventions have occasionally been described by courts as law of the land,¹⁹⁶ however, in *Four Packages of Cut Diamonds v. United States*,¹⁹⁷ the court said such conventions "are not treaties, because not made with the advice and consent of the Senate, and they are not laws, because not enacted by Congress." However, the court added: "If we assume that as administrative regulations made by authority of Congress they have the force of law, the package was imported contrary to law." There appears to be a disposition here not to press legal distinctions to logical conclusions which would in political terms seem unrealistic. In a formal sense it may be impossible to give advice and consent in advance to conventions within a limited field, which have not yet been negotiated; in a practical sense it offends no one's sense of separation of powers requirements and may even be a reversion to that consultative function of the Senate in treaty making which Washington supposed had been intended. An agreement under authority of a treaty presents less difficulty; as it derives from one of the elements of the supreme law it may properly follow the regular rule favoring the instrument later in time in case of inconsistency with a statute.

In the case of purely presidential agreements there is a problem of more substance. They are not supreme law of the land by reason of any language in the supremacy clause, nor is it possible to say that they satisfy the political requirements which would justify assimilating them to any of the elements mentioned in that clause. In *United States v. Belmont*, Mr. Justice Sutherland dealt with the question whether foreign policy stated in a presidential agreement (the Litvinov Assignment) would displace a contrary policy of the State of New York:

196. *Cotzhausen v. Nazro*, 107 U.S. 215, 217 (1882); *United States v. Eighteen Packages of Dental Instruments*, 222 Fed. 121, 124 (E.D. Pa. 1915).

197. 256 Fed. 305 (2d Cir. 1919). In the earlier decision of the district court, 247 Fed. 354, 358 (S.D.N.Y. 1911), Manton, J., said, "Postal Conventions cannot be deemed treaties, because they are not adopted by the Senate, and they cannot be deemed statutes, because Congress alone has power to adopt statutes, and that power cannot be delegated. They cannot be considered treaties, because the treaty-making power is confined in the President and the Senate by the Constitution. They are but provisions which determine what merchandise may be received in the mail. . . ."

Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. . . . And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power.¹⁹⁸

And in *United States v. Pink*, Mr. Justice Douglas, although he qualified the Sutherland doctrine of inherent powers, asserted:

'All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; . . .' *The Federalist*, No. 64. A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity.¹⁹⁹

When taken within the peculiar facts of these cases to apply to an executive agreement incidental to the President's admitted right to recognize a foreign state the extremeness of this position is mitigated but not altogether removed. The President's right to make the agreement is certainly not in question, and the assertion that it takes effect as if it were supreme law of the land need not be taken to mean it is free from such constitutional limitations as would attach to the President's powers. Nevertheless, those powers in external affairs are so broad and so little defined that it would seem, in Corwin's words, "more accordant with American ideas of government by law to require, before a purely executive agreement be applied in the field of private rights, that it be supplemented by a sanctioning act of Congress."²⁰⁰

198. 301 U.S. 324, 331-32 (1937).

199. 315 U.S. 203, 230 (1942).

200. Corwin, *The Constitution and What It Means Today* 113-14 (11th ed. 1954).

The disposition of the Supreme Court to apply the constitutional restrictions in favor of personal liberty to such presidential agreements is not in doubt. It suggested that the fifth amendment would be applicable in appropriate cases to claims affected by the Litvinov Assignment,²⁰¹ and in *Reid v. Covert* has reasserted these protections in the broadest terms.²⁰²

The position of the executive agreement in relation to federal statutes has been examined by the federal courts in *United States v. Guy W. Capps, Inc.*²⁰³ Here the Capps Company sought to evade penalties to which it was liable under an executive agreement concluded with Canada on November 23, 1948,²⁰⁴ for having violated a contract by diverting to table use potatoes imported for seed purposes. It argued that the agreement was inconsistent with provisions of the Agricultural Act of July 3, 1948, and therefore void. Chief Judge Parker, in the court of appeals, agreed, holding that the executive agreement:

[W]as void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related and that the contract relied on, which was based on the executive agreement, was unenforceable in the courts of the United States for like reason. . . .

We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign

201. See *United States v. Pink*, 315 U.S. 203, 226-28 (1942); *United States v. Belmont*, 301 U.S. 324, 332 (1937); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1937).

202. See text at notes 174-76 *supra*. In *Seery v. United States*, 130 Ct. Cl. 481, 127 F. Supp. 601 (1955), the Court of Claims held that the guarantee of just compensation in the fifth amendment would apply to a claim by a naturalized citizen against the United States based on damage to her house in Austria, which had been taken over by the United States Army for an officers' club. This result was reached although under an executive agreement with Austria all claims of persons owning property in Austria for losses caused by United States forces were to be assumed by Austria. The Court overruled contrary statements in *Etlimar Societe Anonyme of Casablanca v. United States*, 123 Ct. Cl. 552, 106 F. Supp. 191 (1952). See also *Turney v. United States*, 124 Ct. Cl. 202, 115 F. Supp. 457 (1953). The principle of the Seery case seems more acceptable than the application; by the fact of her naturalization the plaintiff exchanged a claim under the agreement which would have resulted in payment in a then depreciated currency in the country in which the investment was made, for a recovery in United States' dollars; however it may be argued that the executive agreement had violated the fifth amendment in removing her right of action under statutes permitting claims. For comment on possible applications of the doctrine see Oliver, *Executive Agreements and Emanations from the Fifth Amendment*, 49 Am. J. Int'l L. 362 (1955).

203. 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). See Sutherland, *The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 Harv. L. Rev. 281 (1953).

204. Agreement with Canada on Exports, Nov. 23, 1948, 62 Stat. 3717, T.I.A.S. No. 1896.

commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress.²⁰⁵

Unfortunately for the clarity of this position, there is some reason to believe that the Congress had delegated to the President authority to vary the terms of the Agricultural Act of 1948 by just such an executive agreement as the one actually concluded.²⁰⁶ Furthermore, the Supreme Court in affirming the judgment declined to consider the relationship of the executive agreement to the statute because it concluded the evidence did not show there had been a violation of the contract with the Canadian exporter. Nevertheless Judge Parker's statement of principle seems a correct one, whether relevant to the case or not.

It cannot be said that these cases have defined the constitutional position of executive agreements with that nicety which may be desirable, but their tendency is certainly toward subordinating them to the elements of the supreme law of the land enumerated in the supremacy clause.

(To be Continued)

205. 204 F.2d at 658-60.

206. 62 Stat. 1250 (1948): "No proclamation under this section shall be enforced in contravention of any treaty or other international agreement to which the United States is or hereafter becomes a party."

