THE NATURE AND SCOPE OF THE TREATY-MAKING POWER

APPROVED:

[Signatures]

[Names]

Major Professor

Minor Professor

Director of the Department of Government

Dean of the Graduate School
THE NATURE AND SCOPE OF THE TREATY-MAKING POWER

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By
Donald A. Foshee, B. A.

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PREFACE

Today, with the national government entering more and more the fields which affect the daily lives of the American people, it is important to determine the extent to which the powers of that government go. There are those among us who regard any step by the national government toward the establishment of any new service or regulation as an unconstitutional usurpation of the rights and powers reserved to the states under the Tenth Amendment. These critics of the national government fear that the day is not too far distant when the existence of the several states will be a matter for the historians and that with the passing of the states and their powers will also pass the rights and privileges of the citizens.

It is the purpose of this study to determine the scope of the powers of the national government in view of the existence of the treaty-making power. Of course, it would be impossible to ignore the powers of the national government which are granted directly by the Constitution, but for the purposes here it will be sufficient to give only the briefest sketch of those internal powers. The primary objective is to determine what strength the internal prohibitions of the Constitution against action by the national government have in
the face of the external powers recognized to exist by International Law and the Supreme Court of the United States.

The study is divided into three parts: (1) the source of the power to deal in foreign affairs, (2) the nature of the power to deal in foreign affairs, and (3) the power to fulfill international obligations. Under the first part the historical background for the exercise of the treaty power by the national government is given, along with the transmission of that power from the British Crown to the government of the United States. The second part includes an analysis of the treaty power and its meaning under international usages. The third part deals with the power of the national government to use Congressional Acts to enforce treaties.
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CHAPTER I

SOURCE OF THE POWER TO CONCLUDE TREATIES

In any discussion of the limitations of the national government's power to deal in foreign affairs, it is of utmost importance to understand the source of that power, since the source determines the limitations. In order to facilitate the understanding of the source of the foreign power, the three documents which are basic to the system of government of the United States will be considered. The first of these documents is the Declaration of Independence; the second is the Articles of Confederation; and the third is the Constitution of the United States.

The significance of determining the exact source of the foreign powers of the national government may not be readily understood. If the powers which the United States exercise in their corporate capacity can be shown to come from the Constitution itself, it may be assumed that whatever limitations are placed upon the national government by the existence of that instrument also limit the foreign powers of that government. However, if the Constitution is not the source of the powers, and since the Constitution is the only instrument now in effect to limit the exercise of power by the national government, the limitations placed upon the national government

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therein cannot be valid insofar as foreign powers are concerned. It is for that reason that the three documents must be carefully analyzed to determine the exact source of the external powers of the United States.

The Declaration of Independence

Even before the colonies declared themselves independent of Great Britain, they were acting as a single political unit through the Continental Congress. It is true that the Continental Congress was composed of delegates chosen from each of the colonies, but the Congress represented all of the colonies as one unit, one nation. The committees of correspondence of the various colonies had done much to unite them in an effort to resist the exercise of unconstitutional powers over them by Parliament, but no real resistance could be afforded by the colonies as long as they had no official and direct contact with one another. The Virginians recommended to the other colonies that they name delegates to a general congress to deliberate on those matters which the united interests of America might from time to time require. ¹ The first Continental Congress met on September 1, 1774, and proceeded to the task of presenting to the British people, the British King, and the inhabitants of Quebec a statement of the rights and privileges for which they, as the representatives of all the American

¹Marion Mills Miller (ed), Great Debates in American History, I, 84.
people, asked recognition and respect. It is interesting to note that in the debates in the House of Lords on the demands of the American Congress, Lord Chatham referred to the colonies as one nation and supported them in their cause against the oppressive acts of Parliament.  

The first concrete act of sovereignty over the external affairs of all the American colonies by the second Continental Congress was the act of placing the colonies in a state of defence in order to prevent Parliament's putting into effect its unconstitutional acts by force of arms. It organized the first army for defense and unanimously chose George Washington as commander-in-chief. As further indication that the colonies considered themselves one nation, on the sixth of July, 1775, Congress declared to the world the causes which led them to resort to arms. After stating the various acts of Parliament in violation of the rights of the American colonies, Congress, in a statement prepared by John Dickinson, observed:

We are reduced to the alternative of choosing between unconditional submission to the tyranny of irritated ministers or resistance by force. The latter is our choice. We have counted the cost of this contest, and find nothing so dreadful as voluntary slavery. . .

Our cause is just - our union is perfect - our internal resources are great, and, if necessary, foreign assistance is undoubtedly attainable.  

It was further decided at this time that the Congress would issue paper currency which would be discharged by the colonies

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proportionately and that the united colonies would pay that part which any colony should fail to discharge.\textsuperscript{4}

Many, among whom were Thomas Paine and William Henry Drayton, advocated the immediate separation from England. Paine, in his pamphlet "Common Sense," called on Americans to take up arms against the oppressor and declare their independence. He said that the opportunity for a people to establish a nation of their own came but once and that the time for Americans was at hand. At a future date colony might turn against colony because of false pride or greed. If America were to take its place among the nations of the world and from the continent into one government, it must seize the present opportunity. He pointed out to the American people that the intimacy which is contracted in infancy and the friendship which is formed during times of stress are the most lasting. America's union in the spring of 1776 was marked by both these characteristics. Paine urged the colonies to guard against making the mistake so many peoples had made in the past. They had a king to rule and then at some later time had some form of government. America, he said, should profit by the mistakes of others and should form the articles of government first and appoint those to execute them afterward.\textsuperscript{5} Drayton urged the fact that America could not look to a change in the ministry in England to ease the situation in America, nor could she depend upon the

\textsuperscript{4}Ibid., 170. \textsuperscript{5}Ibid., 175-176.
repeal of the oppressive acts by Parliament to end the crisis because they could be re-enacted, nor could she be secure even if Parliament were to issue a most express act for that purpose because it could be easily repealed. America could not be secure until she had removed the power of the British to injure her.  

The actions now taken by the Congress were done so in the name of all the colonies, since Georgia had elected delegates, and since the name "The Thirteen United Colonies" had been chosen to designate the country. On May 10, 1776, Congress passed a resolution recommending to the assemblies or conventions of each of the colonies that they establish governments sufficient to the exigencies of their affairs in preparation for a dissolution of the ties of the United Colonies to the British Crown. The colonies were told to put their houses in order and to be prepared for a declaration by the delegates in the Congress of the United Colonies. Such action was not the work of thirteen separate colonies, but of one central government acting in the name of all of them.

The question of independence was brought directly before Congress on June 7, 1776, by Richard Henry Lee, when he submitted the following resolution:

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6Ibid., 161.  7Ibid., 171.

8Revised Statutes of the United States,(1878), 3.
Resolved, That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiances to the British Crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved. That it is expedient forthwith to take the most effectual measures for forming foreign alliances. That a plan of confederation be prepared and transmitted to the respective colonies for their consideration and approbation. 9

During the debates which followed the introduction of this resolution, those who favored it and those who opposed it were eloquent in its praise or its denunciation. The opposition to it James Wilson, Robert R. Livingston, Edward Rutledge, and John Dickinson argued that though they were themselves friendly to the measure, they were opposed to its adoption at this time. They urged that not all the colonies were ready for so drastic a step as complete separation from the Mother Country. In the middle colonies, particularly Pennsylvania and Maryland, there was no great desire to cast aside altogether the ties to the Crown. Moreover, if such a declaration should be adopted by Congress at this time, the delegates from the middle colonies might retire, and their colonies might secede from the Union, thus weakening it more than could be compensated by any foreign alliance. 10 On the other side John Adams, Richard Henry Lee and George Wythe argued that the question before the Congress was not whether they should declare what did not exist, but whether they should

9 Miller, Great Debates, I, 186. 10 Ibid., 190.
declare at this time a fact which Parliament and the King recognized as such by declaring the American colonies out of their protection and waging war against them. They hinted that the action of some of the middle colonies since the beginning of the difficulties between America and Great Britain gave reason to suspect that it was their policy to remain in the background in the confederacy in order to obtain a better position in the event the Crown succeeded in bringing the colonies to their knees. Therefore, it became necessary for the colonies which had hazarded everything from the very first again to take the lead and declare the fact of the independence of America. In order to encourage Congress further, they cited the example of the Dutch Revolution in which only three states confederated at first, proving that the secession of some of the colonies would not be as dangerous as might at first be feared. As a final argument before Congress, they maintained that only a declaration of independence would make it consistent with European diplomatic practices for European powers to deal with the revolted American colonies.\textsuperscript{11}

On the tenth of June, Congress resolved that a committee should be appointed to prepare a declaration of independence as suggested in the first paragraph of Lee's resolution. The committee reported a draft of a declaration, which was read and ordered to lie on the table until the first of July. On

\textsuperscript{11}Ibid., 190-192.
July 1, the Congress resolved itself into a committee of the whole for the purpose of further consideration of the matter of independency. Finally, on the fourth of July, after two of the delegations had reversed their negative votes, after the third member of the delegation from Delaware turned that colony’s vote in favor of the declaration, and without the assent of New York, Congress formally adopted the Declaration of Independence. The President of Congress ordered the Declaration to be sent to all the assemblies, conventions, councils of safety, and to the commanding officers of the continental troops, and "to be proclaimed in each of the United States, and at the head of the Army." 

The road which led to the adoption of the Declaration of Independence was marked by statements and acts on every side which indicated that the colonies were already formed into a union before they separated from the British Empire. The original call by Virginia for a general congress for the purpose of handling matters which could not be successfully dealt with by individual colonies was issued fully two years before the Declaration of Independence was adopted. Paine and Drayton referred to the colonies as "America" and the "Union," both of which are terms applied to one nation or one government. In its "Declaration to the World," Congress

12 Revised Statutes of the United States: (1878), 3.
13 Miller, Great Debates, I, 84.
referred to the colonies as a union. The name, "The Thirteen United Colonies," adopted by Congress, denotes not thirteen separate, independent nations, but a union of thirteen colonies. During the course of the debates on Lee's resolution, men on both sides of the question of a declaration of independence referred to the possibility of some of the colonies seceding from the Union. The Congressional acts of organizing an army to expel the British, of sending troops against the British in Canada, of dispatching representatives to foreign countries for the purpose of forming military alliances, of establishing a system of currency, and of declaring the United Colonies free and independent of Great Britain are the acts of a sovereign government, not of thirteen separate sovereignties.

The very choice of words in the Declaration of Independence makes it clear that the Union of the thirteen colonies was an accomplished fact, both before the adoption of the Declaration and at the time of its adoption. In the opening paragraph of the engrossed copy, Congress referred to the citizens of the colonies as one people, whose right and duty it was to change their former system of government since it had become destructive of the inalienable right of the people to govern themselves. It was declared to be the right of the people to establish any form of government which in their

Revised Statutes of the United States (1878), 3-6.
opinion would most likely insure their safety and happiness. The last paragraph of the Declaration is of the utmost significance in determining just who or what was declared independent of Great Britain. Here Congress, as the representative of the United States of America, in the name of and under the authority of the people of the colonies declared the United Colonies to be free and independent states. It is important to consider here the meaning of the wording of this final paragraph. The people of the colonies, through their representatives in the General Congress, proclaimed the independence of the United Colonies, not of the several colonies. In the draft of the Declaration presented to Congress by the committee, the final paragraph differed significantly from the one finally adopted. In the committee's first draft the paragraph read:

We therefore the representatives of the United States of America in General Congress assembled ... reject and renounce all allegiance and subjection to the kings of Great Britain and all others who may hereafter claim by, through, or under them; we utterly dissolve all political connection which may heretofore have subsisted between us and the people of parliament of Great Britain; and finally do we assert and declare these colonies to be free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent states may of right do. And for the support of this declaration . . .

Not a word was said of the United Colonies' being free and independent. Each colony was independent not as a member of

any union, but as one of "these colonies." This paragraph was removed by Congress and was replaced by the one declaring the colonies as a union independent.

This may all seem to have little or no meaning in determining the source of the treaty-making power, but quite the opposite is true. If the Union existed before the Declaration of Independence, or at least as of the moment of its adoption by the legally chosen and empowered representatives of the people and colonies, then all powers to levy war, conclude peace, and contract alliances became the prerogatives of the government of the United States by the very nature of the construction of a federated government. That such a Union existed cannot be denied. It was recognized to exist by all those who sat in the national Congress and by the colonial legislatures themselves, since they authorized the Congress to speak for them in matters of foreign affairs.

The Articles of Confederation

The Articles of Confederation was the first formal document setting forth the position of the various states in relation to the government of the Union. Congress received the first draft of the Articles from the committee on July 12, 1776, but was unable to work out a suitable adaptation of them until November 15, 1777. Two days later Congress adopted a circular letter to accompany the thirteen copies of the Articles to be dispatched to the state legislatures. In that
letter Congress urged each of the states to ratify the Articles, saying:

More than any other consideration it will confound our foreign enemies, defeat the flagitious practices of the disaffected, strengthen and confirm our friends, support our public credit, restore the value of our money, enable us to maintain our fleets and armies, and add weight and respect to our councils at home and to our treaties abroad. 16

All of the states ratified the Articles by May, 1779, with the exception of Maryland. In December, 1778, Maryland instructed her delegates not to agree to the confederation until the matter of the western lands had been settled on principles of equity and sound policy. However, on January 30, 1781, finding that the British were making capital of the difficulties of the United States in working out articles for a form of government and were circulating rumors of the ultimate dissolution of the Union, Maryland authorized her delegates to give their assent to the Articles. 17

In the first paragraph of the Articles of Confederation the Union of the American states was declared to be perpetual. 18 When the thirteenth state gave its approval to the Articles, the Union which had been established in 1774 supposedly became indestructable. It remained only for the states to set forth the conditions under which the Union was to be continued. In Article II each state reserved to itself all of its sovereignty, freedom and independence, and all of its jurisdictions

16 Miller, Great Debates, I, 247.
17 Revised Statutes of the United States (1878), 7.
18 Ibid.
and rights which were not expressly delegated to the United States, in Congress assembled. The states were left completely independent in the exercise of their authority, while at the same time the national government was independent in the exercise of its powers.\textsuperscript{19} The Articles of Confederation proved too weak to provide for the welfare of the United States as a whole, but this situation was not the result of the inability of the national government to deal in foreign affairs, but was the result of the states' not giving the national government enough of their internal powers to enable the Congress to enact laws for the general welfare.

In external matters the government of the Confederation was empowered sufficiently to insure the proper conduct of foreign affairs. The states of the Union were forbidden to send or receive ambassadors, or to enter into any conference, agreement, alliance, or treaty with a foreign power without the consent of Congress.\textsuperscript{20} The power of the states to have any voice in the negotiation of treaties between the United States and any foreign nation was specifically denied by Section 2 of Article VI. The entire Sixth Article was aimed at the removal of any doubt concerning the government in the United States which was to be the voice of the American people.

\textsuperscript{19} Harold Stokes, \textit{The Foreign Relations of the Federal State}, 20.

\textsuperscript{20} Articles of Confederation, Article VI, Sec. 1.
in international affairs. Article IX recognized the power of the Congress of the United States to handle all foreign relations of the nation. It is of interest to note, however, that in one external matter the Congress was forbidden to act freely. Congress could not enter into any treaty which forbade the states' imposing imposts and duties on foreigners on the same basis as their citizens were taxed abroad, nor could Congress by treaties interfere with the power of the states to prohibit the exportation or importation of any species of goods.21

Under the Articles of Confederation, the government of the nation was not empowered to force the states to yield to its will in fields over which it had exclusive power. It is for that reason that the British government refused to enter into a treaty of commerce with the United States. Lord Sheffield voiced the opinion of most Englishmen when he said in his "Observations on the Commerce of the American States":

It will not be an easy matter to bring the American States to act as a nation; . . . No treaty can be made with the American States that can be binding on the whole of them. The act of confederation does not enable Congress to form more than general treaties - at the moment of the highest authority of Congress the power in question was withheld by the several States.22

This strange situation came about as a result of the prevailing notion of "States' Rights," which led the states, in their

21 Ibid., Article IX, Sec. 1.
22 Miller, Great Debates, I, 264.
extreme fear of a re-institution of the severe regulation of local affairs experienced under the Crown, to deny the national government the power to fulfill its international obligations by omitting an article making the Articles of Confederation the supreme law of the land, although the states recognized the exclusive right of the national government to make treaties.

The inability of the national government to conclude treaties binding upon the states in all matters resulted from a denial by the states of the supremacy of the national government in internal affairs, not from a denial of its power to deal with foreign affairs. The United States was at the time of adoption of the Articles of Confederation a free and independent state, and as such was entitled to all the rights and privileges of other nations, among which was the right to equality with any and all other sovereign nations. In order for a nation to exist as a member of the Family of Nations, it must be capable of dealing with others on the basis of equality, otherwise it is not independent at all, or at least its sovereignty is seriously crippled. The United States was by definition a sovereign nation under the Articles of Confederation, but its international sovereignty was crippled by the domestic powers which the states reserved to themselves.

The Constitution of the United States

As has been seen, the Union was created at the time the colonies declared their independence, if not two years before when the first Continental Congress met, and was the sole possessor of international power through the period of the Revolution and the Confederation. The leading statesmen of the period realized that the Union could not long endure the strain which was being placed upon it by the lack of power to force the states to yield to the will of the nation. On February 18, 1787, Hamilton reminded the legislature of New York in a speech proposing legislation to confer on Congress the power of levying imports that, regardless of the provisions of the Articles of Confederation, none of the extensive powers exercised by the Union during the Revolution was completely lost to it by the limitations of the Articles of Confederation. He stated further that the Union was recognized by the same document which created the independency of the states and that the United States existed independently of the states which comprised it. Since the union and the independence of the states were blended and incorporated in one and the same act, the United States, the Union, had in its origin full power of sovereignty. 25 Hamilton was not speaking as an official of the United States government, but his conception of the powers of the Union were held by others, among whom were King, Madison and Jay.

25 Miller, Great Debates, I, 280-281.
When the Constitutional Convention met in Philadelphia in the summer of 1787, the delegates were divided into two camps. In one camp were those who believed that the Union could be saved only if the national government were given the power to coerce the states by power of law and armed forces; in the other were those who wanted to revise the Articles in order to give more authority over domestic affairs to the national government, while at the same time permitting the states to retain most of their powers. It is not necessary to trace the Convention through the many compromises which were necessary in order to secure the approval of the delegates, but some of the remarks of the delegates on the sovereignty of the states and the powers of the Union in international affairs must be mentioned. One of the most important statements on the position of the states in relation to the Union was made by Rufus King, a statement which was to be raised to the position of official constitutional dogma by the United States Supreme Court over a hundred and forty years later.26 During the course of the debates on the Randolph Plan and the Patterson Plan, King observed:

The States were not 'Sovereigns' in the sense contended for by some. They did not possess the peculiar features of sovereignty, they could not make war, nor peace, nor alliances nor treaties. Considering them as political Beings, they were dumb, for they could not speak to any foreign

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Sovereign whatever. They were deaf, for they could not hear any propositions from such Sovereign. They had not even the organs or faculties of defence or offence, for they could not of themselves raise troops, or equip vessels, for war.27

To illustrate the power of the Congress under the Articles of Confederation, King said that foreign affairs were so far removed from the jurisdiction of the states that, though the delegates from every state were instructed, if the delegates violated their instructions, their act would nevertheless be valid. If Congress were to declare war, war was de jure declared, and the states could do nothing to alter the situation. It was this condition, said King, that proved that the states were subordinate corporations or societies and not sovereigns - the states were the confederates and were the electors of the officers who exercised the national sovereignty.28

James Wilson of Pennsylvania agreed indirectly with King. During the course of the debates on the phrasing of the articles giving the power to make treaties to the Senate, the question of whether the entire Congress should be given the power to ratify treaties before they became effective arose. Some of the delegates did not trust the Senate with so great a power as that of concluding treaties, without having some

28 Ibid., 187.
sort of check on the exercise of it. Wilson argued that without having the power of the Senate governed in some way, it would be impossible for that body alone to make treaties which would permit the national government to exercise powers not granted by the Constitution. For instance, the Convention had the day before refused to permit the National Legislature to lay duties on exports, but the clause under consideration would have made it possible for the Senate alone to make a treaty requiring all the rice of South Carolina to be sent to some one particular port. 29 At the time Wilson made his remarks the Senate was to be granted sole power to conclude treaties - the President had not been considered as the proper person in whom to vest the power to negotiate treaties with the approval of the Senate. The general fear at that time was not that the Senate would exercise powers not granted to it by the Constitution, thereby taking power from the executive and the House of Representatives, but that it would permit the government of the Union to usurp the power belonging to the states. No one, not even Governeur Morris, who proposed the amendment making the treaties negotiated by the Senate dependent upon ratification by the House, denied the power of the Union to deal in foreign affairs without a specific grant of such power by the Constitution. The delegates were concerned with imposing, as best they could, so many conditions

29 Ibid., II, 239.
upon which treaties would be valid as supreme law in the territory of the United States that no single person or group of persons could bind the United States by treaties to another nation easily.\textsuperscript{30}

Wilson could not accept the statements made by Luther Martin concerning the separate independence of the thirteen states at the time of the separation from Great Britain.\textsuperscript{31} He read the Declaration of Independence, observing that the \textit{United Colonies} were declared to be free and independent states and inferring that they were confederated by the act of independence.\textsuperscript{32} In this opinion Wilson was joined by Alexander Hamilton, who argued that the states were empowered to form whatever type of government they desired for the Union, but that regardless of what type they decided was the most desirable, the Union was a Being apart from the states and could not be dissolved by an infraction of the articles of organization by a state or any group of states.\textsuperscript{33}

Elbridge Gerry was blunt in his denunciation of those who argued for the equality of the states in the new general government. He took up King's argument that the states were never holders of complete sovereignty, adding that the states and the advocates for them were intoxicated with the idea of their sovereignty. He was a member of Congress at the time the Articles were formed, and, like many others, he had voted

\textsuperscript{30}Ibid. \textsuperscript{31}Ibid. I, 188. \textsuperscript{32}Ibid. \textsuperscript{33}Ibid., 189.
for their adoption, but it was against his better judgment and under the pressure of public danger and the obstinacy of the smaller states. In Gerry's opinion, the Union as organized by the Articles was dissolving, and the Convention was met in Philadelphia for the purpose of saving the nation from the oblivion into which the states were leading it. At the time when all efforts for the preservation of the freedom and well-being of the United States were needed, the delegates seemed to have brought with them the spirit of political negotiators, instead of meeting like brothers of one family.34

Members of the Convention, after they had decided in favor of writing a completely new constitution for the United States, realized that any new document would mean little if the states were not forced by the terms of the new constitution to recognize it as superior to the constitutions and laws of the states. After the initial difficulties in getting the delegates of the small states to agree to a new constitution instead of a revision of the Articles, the Convention did not hesitate to remedy the situation which rendered the government of the Union impotent under the Articles, namely, the lack of power to force state compliance with its laws and treaties. On July 17, the Convention unanimously 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

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34 Ibid., 238.
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, anything in the respective laws of the individual states to the contrary notwithstanding.\textsuperscript{35}

The Committee of Detail, which had the task of translating the resolutions of the Convention into a draft of a constitution, reported the above resolution as Article VIII, as follows:

The acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States shall be the supreme law of the several States, and of the citizens and inhabitants; and the judges in the several States shall be bound thereby in their decisions; anything in the Constitutions or laws of the several States to the contrary notwithstanding.\textsuperscript{36}

John Rutledge moved to amend the Article by striking the words "The acts of the Legislature of the United States made in pursuance of this Constitution" and inserting instead "This Constitution and the laws of the United States," thereby removing any doubt concerning the supremacy of the Constitution.\textsuperscript{37}

Without the Rutledge amendment the Article would have declared the acts of the Legislature to be the supreme law of the Union, but would not have declared the Constitution to be superior to the laws and Constitutions of the states. Obviously, such a condition would have been intolerable. The states could legally ignore the limitations placed by the Constitution upon

\textsuperscript{35} Ibid., II, 69. \textsuperscript{36} Ibid., 83. \textsuperscript{37} Ibid., 235.
their powers to levy and collect imposts, to coin money, to enact ex post facto laws, and to enact other legislation which they had had the power to enact under the Articles of Confederation. A federal law governing commerce among the states would have been proper under the Constitution, but without the supremacy of the Constitution, the states could have enacted commerce regulations of their own. Madison was not satisfied with the changes made by the Rutledge amendment and moved that the Article be changed to remove all doubt concerning the supremacy of future treaties, since the Article gave force to pre-existing treaties but left doubt as to treaties made in the future. The Convention inserted the words "or which shall be made" after the words "all treaties made," and that was the last time the Convention as a whole amended the Article.38 The Committee on Stile and Arrangement reported the Article as Section 2, Article VI, as follows:

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.39

The Convention agreed upon the Section along with the Constitution as a whole on September 15 and ordered the Constitution to be engrossed.

The work of the Convention was completed on September 17 with the signing of the proposed Constitution by delegates of

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38 Ibid., 252. 39 Ibid., 359.
twelve of the states, but the real campaign for the establish-
ment of the new government was still ahead. The Convention
had not increased the power of the Federal government in for-
eign affairs - that power already resided in the government
of the Union - but it had removed the embarrassing internal
restrictions which had blocked the full exercise of that
power by the Union. Madison applauded this action as well as
that of removing any doubt as to the power of the Union to
send and receive consuls as well as ambassadors. Under the
Articles of Confederation, the Union could send ambassadors
and receive them from foreign powers, but the interpretation
of the second of the Articles seemed to have limited the
American ministers to those of the highest rank. Madison though
that the admission of consuls may have fallen within the power
to conclude commercial treaties. But in the absence of such
treaties, there was no authority for receiving consuls unless
the Congress violated its authority which, Madison admitted,
it was often forced to do.\textsuperscript{40} John Jay, in one of his contribu-
tions to The Federalist, urged the point that the method of
concluding treaties as set forth in the proposed Constitution
offered the best possible checks on the actions of unwise or
corrupt men in the national government.\textsuperscript{41} He answered those
who objected to the placing of treaties beyond the reach of

\textsuperscript{40} Federalist No. XLII (Madison, 1788), Munro's Ed., 144-5.

\textsuperscript{41} Henry P. Johnston (Ed.), The Correspondence and Public
Papers of John Jay, III, 286.
legislative repeal by stating that treaties, being nothing more or less a bargain between nations, were, by the laws of nations, placed beyond the power of either of the contracting parties to repeal without the consent of the other. He denied that the new Constitution extended the treaty power of the Union. Such would have been impossible, since the treaty power was as binding under the past articles of government as under the Constitution, or any future form of government.\textsuperscript{42}

\textsuperscript{42}Ibid., 292.
CHAPTER II

NATURE OF THE POWER TO DEAL IN FOREIGN AFFAIRS

The Exercise of National Sovereignty

The meaning of "sovereignty".--Sovereignty has meant many things to many men. It has been suggested that to the men in the formative period of human society, when man was little more than a beast, sovereignty, or what we call sovereignty, meant the power of the physically strongest to force his will upon the other members of the community. He was a master, a despot, who could overcome others in combat or force them to obey his will through fear of his strength. As the society matured in the direction of political organization, the long-continued usage developed into a definite governmental form. The idea of chieftainship thus became fixed in primitive society, and the idea of the sovereignty of the chieftain became fixed by the apparent advantages of submitting to a political and military leader.¹

To the men of the Middle Ages sovereignty meant the power of the feudal lord to rule his estates absolutely, while paying only voluntary homage to whatever central authority might exist. It was Machiavelli who first broke with

¹Robert Lansing, Notes on Sovereignty, 11-12.
the ancient theories of sovereignty and substituted in their place the idea of an all-powerful central authority which is supreme over all institutions within the region over which it has jurisdiction. Although Machiavelli did not state it formally, he was looking forward to the modern territorial state when he wrote his recommendations to princes who wished to rule successfully. He suggested that in order to acquire the powers which go with sovereignty the prince use force ruthlessly, use religion to frighten the people into submission, act decisively to prevent the outbreak of revolution, and maintain a strong national army.

Bodin was the first political theorist of the modern era to state the idea of sovereignty which is still in vogue today. To him sovereignty was the absolute and perpetual power of commanding in a State. It must be perpetual since any power which is held for a limited time is not sovereign power, and that person or group of persons who hold it are not sovereign, but are merely the custodians of that power. It matters not how long the period of time during which the custodians are permitted to exercise power - it may be years or even centuries. If there exists any limit at all, real sovereignty rests with others, and, according to Bodin, it may be recalled by the real prince or the people. Sovereignty must

2W. T. Jones, Masters of Political Thought, 51.
3Ibid., 45-49. 4Ibid., 57.
also be absolute. The people or the nobles of a country may
give sovereign power to whomever they choose, but they cannot
give such power conditionally. They must give over to the
sovereign the power to dispose of their goods, their lives,
and the whole of the business of the State. Bodin also speaks
of the marks and rights by which the sovereign power may be
recognized. The primary right of the sovereign is the power
to give laws, but since the term "law" is so general, Bodin
named specifically the additional rights which are included
in sovereignty. For instance:

the right of declaring war and making peace, the
right of being the court of last resort from the
judgment of all magistrates, the right of insti-
tuting and of removing even the most important
officers and ministers, the right of imposing
charges and subsidies on subjects and of exempting
them from such charges, the right of increasing
or depreciating the value of money, the right of
requiring an oath of allegiance from all subjects
and liegemen without exception.\(^5\)

Althusius stated an idea of sovereignty which is closely
akin to that of Bodin, except in one significant feature. Sov-
erignty is defined as "the supreme power of doing what per-
tains to the spiritual and bodily welfare of the members of
the State."\(^6\) Unlike Bodin, Althusius held that this power
inheres, by the very nature of association, in the people.
Not each member of the State is sovereign, but the members
as an aggregate are the sovereign.


\(^6\) *William Archibald Dunning, A History of Political
Theories*, 63.
The theory of sovereignty propounded by Grotius differed from those of Bodin and of Althusius in one respect and agreed with them in another. Grotius agreed with their definition of sovereignty in that it is supreme, absolute, perpetual. He disagreed with Bodin in that he maintains that sovereignty may be transferred for a limited time only. He disagreed with Althusius in that to him sovereignty rests not with the people, but with the State. Specifically, sovereignty rests in the person or group of persons designated by law or the people, but the individuals who hold sovereignty are not important. The significant thing is that once sovereignty has been given to a person or a government of the State, the function of the people giving sovereignty ceases and they are bound to obey the sovereign without resistance. This last theory of the exhaustibility of the power of the people finds little support today from political philosophers or from governments themselves.

The power and right which Hobbes attributes to the State make those attributed by Grotius pale by comparison. Hobbes raised the Will of the State as the source and criterion of all right. He places politics above religion and morals and states that only through the State can the law of nature and the law of nations - even the law of God - have any binding force upon the individual. Spinoza, like Hobbes, derives an omnipotent State from the addition of the powers of a number of omnipotent individuals. These two philosophers arrive at the same conclusions regarding the sovereignty of the State,
while using entirely different approaches. Spinoza and Hobbes differ widely in their conception of the ends for which the State exists. Hobbes insisted that the State exists to promote the security of the members and that the liberty of the individual is not the concern of the State. On the other hand, Spinoza held that the supreme end of the State is liberty.

Rousseau defines sovereignty as absolute and supreme power, but unlike Hobbes he does not base this power upon a historical original contract, but upon a continuously accepted contract.\textsuperscript{7} To Rousseau sovereignty is unlimited because it rests upon the consent of the majority of the members of the State, or what he calls the general will, but here Rousseau goes a little afield in saying that the general will is always just and can never be mistaken. Since the general will is sovereign in the State it can determine the form of government and enact any law it sees fit, and it can also alter any law since it is untenable to suppose that a supreme power may bind itself irrevocably.\textsuperscript{8} The sovereignty of the people cannot be said to have been exhausted by the act of forming a government and granting powers to it. Sovereignty is never exhausted nor is it granted forever to a government.\textsuperscript{9}

\textsuperscript{7}Jones, \textit{Masters of Political Thought}, 281. \textsuperscript{8}Ibid.

\textsuperscript{9}Lansing, \textit{Notes on Sovereignty}, 14; See also Jones, \textit{Masters of Political Thought}, 285; C.E. Vaughn, \textit{The Political Writings of Jean Jacques Rousseau}, 40-41. In these translations of Rousseau's \textit{Social Contract}, Rousseau states that "sovereignty, being merely the exercise of the general will, can never be alienated; \ldots Power, certainly, can be transferred; but not the will \ldots"
The majority of writers on sovereignty since the days of Rousseau have agreed that sovereignty is unlimited and absolute, although they have not agreed as to the location within a State of that sovereignty. American writers have defined sovereignty as being the "supreme power by which any State is governed,"\(^{10}\) "the union and exercise of all human power possessed in a State; it is the combination of all power; it is power to do everything in a state without accountability,"\(^{11}\) "the original, absolute, unlimited, universal power over the individual subject and of all associations of subjects,"\(^{12}\) and "the supreme coercive power in a state."\(^{13}\) All of these definitions have one thing in common, namely, that the sovereign power in a State knows no superior earthly power.

From the definitions given above and from the theories of sovereignty already given, we may state a working definition of sovereignty which will be used as the basis for further discussion. Given the context of American political life, sovereignty is the supreme power which resides in the majority of the body politic as a natural and inalienable right. It should be pointed out here that the State and the government are not to be confused in the definition of sovereignty. The

\(^{10}\) Wheaton, *Elements of International Law*, 29.

\(^{11}\) Story on the Constitution.

\(^{12}\) Burgess, *Political Science and Comparative Constitutional Law*, I, 52.

\(^{13}\) Lansing, *Notes on Sovereignty*, 8.
State is the totality of the individuals who live together as an original unit,\textsuperscript{14} while the government is the organ through which the people who reside within the territorial limits of the State communicate orders to one another. This government must possess all the indices of an absolute sovereignty, although in fact it lacks the ultimate index of sovereignty - the right to an independance and a power which are supreme absolutely, not comparatively or as the topmost part in the whole.\textsuperscript{15}

The location of sovereignty in the United States.--It remains now to determine just where the supreme power of the State resides in the United States. In determining the location of sovereignty we are concerned not with determining the source of the power to govern the internal relations between the states and people of the Union and the government of the Union, but with the amount of independent sovereignty which resides in the government of the Union as a result of national independence. That the federal government is the superior government in the United States cannot be denied, but that the federal government is inherently sovereign in domestic affairs is denied by the very existence of a constitution which establishes the relationship between the government of the Union and the states and people of the Union.

\textsuperscript{14} Burgess, Political Science, I, 51.

\textsuperscript{15} Jacques Maritain, "The Concept of Sovereignty," American Political Science Review, XLIV (June, 1950), 349.
Let us consider first sovereignty within the United States. The people are organized by the Declaration of Independence and the Constitution as the real sovereigns in the United States. The people have the right to determine the form of the government of the State and the right to set the limits to the powers of that government, internally at least. Their rights go farther than this. As the real internal sovereign the people may grant to individuals whatever civil liberties they may deem wise, necessary of just. Or, on the other hand, they may withhold any civil liberty or all civil liberties from any group of citizens at their pleasure, since the majority of the people are in a position either to empower the federal government to enforce civil liberties even to the extreme of force of arms or to deny the federal government the power to enact legislation granting civil liberties in the name of the United States.\textsuperscript{16} The people, as the real internal power, may add to or subtract from the power of the federal government, as has been demonstrated by the various amendments to the Constitution. Finally, the people may appoint the governmental agents.\textsuperscript{17} Provisions for all these things are made in the Constitution. There are provisions for the exercise of legislative, executive, and judicial powers by separate departments, each department having a check on the action of the

\textsuperscript{16} Lansinę, \textit{Notes on Sovereignty}, 39.

\textsuperscript{17} \textit{Ibid.}, 20.
others. The Bill of Rights binds the federal government to recognize the civil rights of the people and forbids the infringement of those rights by that government. But what is most significant is the fact that the people and the states of the United States inserted a provision making the federal government the supreme government of the United States, before which states and individuals must bow.18

The other type of sovereignty, external sovereignty, is something above and beyond the power of the individual citizens, of the states of the Union, and of the federal government itself. It is the sovereignty of the State, of the Nation at International Law. The people may possess internal sovereignty, that is, the power to force their will upon the government of the State in internal matters, and they may through constitutional provisions limit the exercise of external sovereignty by establishing strict rules for the making of treaties and other international agreements, but the State has rights and obligations at International Law which are independent of the internal sovereign. This does not mean that the State or the government of the State may ignore the wishes of the people who comprise it. The governmental agents are responsible for their action to the people who elected them to office, but the actions taken by these agents in their official capacity are the actions of the State, and if the agents act against the

18 Constitution of the United States, Art. VI, Sec. 2.
wishes of the internal sovereign, whether the actions affect
internal or external matters, the State is no less bound be-
fore the eyes of the world.

We must turn to the Supreme Court of the United States
for the final determination of the existence of the inde-
pendent external sovereignty of the federal government. In
the earliest case dealing with external powers of the Union,
*Penhallow v. Doane*, the Court said:

In every government there must be a supreme
power or will; this power or will resided in the
[continental]7 congress since the congress was the
general, supreme, and controlling council of the
nation, the center of the union, the center of
force, and the sun of the political system.19

In determining the true nature of the Continental Congress
in relation to the states during the Revolution, the Court
said that the states, individually, were not known nor were
they recognized as sovereign by foreign nations. The states
collectively, under Congress, as the connecting point, were
acknowledged by foreign powers as sovereign. It was only in
this manner that the existence of the states was recognized
at all by foreign powers. The states were recognized as sov-
ereign only in the sense that they comprised the nation for
which the Continental Congress exercised the power to speak
in international affairs.20 The Supreme Court handed down
its decision in *Penhallow v. Doane* in 1795, just six years

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19 3 Dall. 54.  
20 Ibid., 80-81.
after the Constitution was ratified and during the period of American history when the states were considered by the majority to be the real source of all national power, both internal and external. Thus it can be seen that the idea of the enormous power included in the control of external sovereignty is not just a recent development, but was considered to be true when the United States was little more than a toddling infant.

The precedent set by Panhallow v. Doane has been followed by the Supreme Court from 1795 to the present. The most important recent case is United States v. Curtiss-Wright Export Corporation. In this case the Supreme Court said that the doctrine that the federal government can exercise only powers specifically enumerated in the Constitution or power implied from the enumerated powers is categorically true only in respect of the internal affairs of the nation. The language of the Court indicates that there is something more than internal sovereignty to be considered in discovering the extent of the powers of the federal government. The Court made a distinction between purely internal and purely external powers. The Supreme Court position on the matter of sovereignty must remain as the official position of the government of the United States since there is no superior authority which can pronounce

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22 57 S. Ct. 216 (1936).
23 Ibid., 219.
official constitutional dogma. The official position of the
government, then, may be summed up in the words of the Su-
preme Court in the Curtiss-Wright case, since its doctrine
has never been overruled. The powers of external sovereignty
of the federal government, including the power to declare war,
conclude peace, make treaties, and maintain diplomatic rela-
tions are not dependent on affirmative grants of the Consti-
tution.24 These powers, had they never been mentioned in the
Constitution, would still have vested in the government of the
Union as a necessary concomitant of nationality.25

Constitutional provisions and external powers.—In view
of the exclusive control of foreign affairs by the national
government, including the power to conclude treaties binding
on all the states of the Union, it remains now to determine
the strength of that external power, or more accurately, the
strength of the Constitutional prohibitions against federal
action in view of the existence of the external power of the
federal government. There are in the federal Constitution
three doctrines which are primary in the system of government
established by that document: the Federal system, the Doctrine
of Separation of Powers, and the system of Civil Rights. Our
purpose here is to analyze the terms of the Constitution which
establish these doctrines as supreme law, to analyze the nature
of a federalized government, and to contrast the strength of

internal prohibitions with the strength of external power, the treaty power in particular. In analyzing the Federal System a certain amount of repetition of material presented in the first chapter will be necessary in order to include the entire subject in one discussion. In the present discussion of the Federal System the historical background of the external powers of the national government will be omitted, and only the legal source of the powers will be considered in view of the Constitution and the nature of a federal system. The legislative power will be the primary concern in the consideration of the Doctrine of Separation of Powers, but in order to present a more or less comprehensive picture of the effect of external power upon the doctrine, brief mention will be made of the judicial and executive functions under the Constitution. However, no attempt will be made to carry the discussion of the power of the President to the extreme of determining his powers in instituting treaty negotiations, nor will there be an attempt to carry to the extreme a discussion of the part played by the Senate in the conclusion of treaties. It will suffice to consider only the legislative power in detail, since in order to bring the full power of the federal government in external affairs into play, the assent of the Senate and House of Representatives is necessary, the former both in the ratification of treaties and in the passage of enforcing legislation and the latter in enforcing legislation only. In the consideration of Civil Rights it will be
necessary to present evidence of the strength of external power not only in the matter of treaty provisions, but also in the matter of external power in general—war power, the power to maintain diplomatic and consular relations.

The Federal System

Exclusiveness of federal external powers.—The entire field of foreign affairs devolved upon the government of the Union upon the separation of the United Colonies from the British Crown. That this was the true state of affairs can hardly be denied in the face of the pronouncement of the Supreme Court in Penhallow v. Doane and the Curtiss-Wright Case. But it is not sufficient to prove the point by quoting the decisions of the Supreme Court without giving the theories which underlie those decisions. By the very nature of a federal State the control of external matters must reside in the government of the union of all the states comprising the State. If it were otherwise, the evils experienced under the Articles of Confederation would remain in any system of federalized State, regardless of how well the constitution of that State provided for the regulation of internal relations by the federal government. There could be no uniformity of foreign policy—a condition which would quickly lead to chaos. Moreover, there could be no supremacy for the acts of the federal government in situations where the states of the Union

26 Lansing, Notes on Sovereignty, 36.
were free to conclude treaties independently of the other member-states, thereby contracting obligations at International Law which would not permit the states to accept federal laws which would require action in violation of their international obligations. In order to remove any and all doubt as to the exclusiveness of the control by the federal government of all foreign affairs, specific provision was made in the Constitution to that effect, although, as the Court said, such control would reside in the government of the Union even without Constitutional provision.27 The provision in question reads as follows:

No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.28

Chief Justice Taney, commenting in the case Holmes v. Jenkinson,29 held that the states were forbidden absolutely from entering into any sort of agreement, convention, treaty, or understanding with any foreign power or with another state without first receiving the permission of Congress in every case. Further, the Chief Justice declared:

It was one of the main objects of the Constitution to make us, so far as regarded our foreign

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28 Constitution of the United States, Art. I, Sec. 10, Cl. 3.
29 14 Pet. 540.
relations, one people, one nation; and to cut off all communications between foreign governments, and the several state authorities. The power now claimed for the states is utterly incompatible with this evident intention; and would expose us to one of those dangers, against which the framers of the Constitution have so anxiously endeavored to guard.  

Thus it is evident that the states are removed entirely from the field of international intercourse not only by the nature of the Declaration which separated them from the British Empire, but also by the articles of government under which they exist at the present time.

In addition to the limitations upon the external power of the states found in the Declaration of Independence, the Constitution, and in the nature of a federal union, there are requirements made by International Law which must be met by every state. It is one of the basic tenets of International Law that every State is the equal of every other State and that every nation must recognize the legal equality and equal rights of every other State.  

The tests of membership in the family of nations are freedom from external control and the existence of a government which exercises habitual authority over the people of the State. Foreign nations, when viewing the United States, are not concerned with the constitutional structure of the government. They are

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30 Ibid., 574-576.

interested only in satisfying themselves that there exists a
government which is capable of meeting the responsibilities
placed upon independent nations. Federal States are not per-
mitted to plead constitutional limitations in refusing to
carry out international obligations. It is the government of
the Union which is recognized by all foreign powers and it is
that government foreign nations look to for the fulfilment of
the international obligations of the United States.

Reserved powers.--In view of the requirements made upon
the United States by International Law, the question of the
restraining force of the "police powers" of the states on the
treaty power of the federal government becomes of utmost im-
portance. The Constitution places no express limitations on
the treaty-making power of the federal government, but the
Tenth Amendment reserves to the states or to the people all
powers not granted to the government of the Union. The ques-
tion is, then: What strength do the powers of the states under
the Tenth Amendment have in the face of the unlimited powers
of the Union over foreign affairs, the treaty-making power in
particular?

Although writers on the subject of the reserved powers
of the states have differed widely, the Supreme Court of the
United States has never shown vacillation on the subject. In
the leading case, *Marq v. Hylton,* 32 the Supreme Court laid

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3 Dall. 199 (1796).
down the general doctrine that the states may not interfere with rights secured by treaties, even when those rights are contrary to the laws and constitutions of the states. The facts of the case were, briefly, as follows: During the Revolution the legislature of Virginia enacted laws sequestering all British property and debts owed to British subjects by citizens of Virginia prior to the outbreak of hostilities. The debts could be discharged by paying the sum owed into the treasury of Virginia. The American debtor, Hylton, paid his debt according to the provisions of the laws and received a receipt therefor. By the provisions of the Treaty of Paris, 1783, the United States agreed to revive all debts owed by American citizens to British subjects and to permit British subjects to claim restitution or compensation for property confiscated during the war. The Court held that the state of Virginia had all the rights of an individual government and that her laws of confiscation were legal at the time they were enacted. Such action by the state of Virginia would have offered a bar to subsequent action by British subjects, unless their rights were revived by the treaty of peace. The Court held that the fourth article of the treaty of peace nullified the law of Virginia, cancelled the payment, and revived the debt against the original debtor. As to the superiority of treaties over state laws and constitutions, the Court said:

... But if doubts could exist before the establishment of the present national government, they
must be entirely removed by the sixth article of the Constitution which provides 'that all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land.' . . . There can be no limitation upon the power of the people of the United States. By their authority the State constitutions were made and by their authority the Constitution of the United States established; and they had the power to change or abolish the State constitutions or to make them yield to the General Government or to treaties made by their authority. 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 . . . 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.33

The Court has upheld its doctrine of the superiority of treaties over state laws and constitutions from Ware v. Hylton, decided in 1796, to the present.34 However, a few cases decided prior to the Civil War cast doubt upon the validity of any treaty which interferes with the rights of the states. Thus in 1856, the Court held that the United States could not by treaty change the rights of property established by a state prior to the ratifying of the treaty.35 Again, in 1860, the Court held that the United States could not by treaty interfere with the rights of a state to tax property within its jurisdiction, nor could the United States regulate the descent

33 Ibid., 236-237.
35 Prevost v. Grenaux, 19 Howard 1, 7.
of property in a state.\textsuperscript{36} This modification of the earlier doctrine was the direct result of the fear the Southern states had that the national government would interfere with the economic and social system then existent in the South. However, immediately following the Civil War the Supreme Court discarded the limitations of \textit{Prevost v. Greneaux} and \textit{Frederickson v. Louisiana} and restored the doctrine of \textit{Ware v. Hylton} in \textit{Hauenstein v. Lynham}. In this last case the Court was called upon to decide the validity of a treaty between the United States and the Swiss Republic dealing with property rights of Swiss citizens in the United States. Justice Swayne delivered the opinion of a unanimous Court, saying that if the national government did not have the power to do what is done by such treaties, then it cannot be done, since the Constitution prohibits action on the subject by the state authorities. To admit that the Tenth Amendment reserves exclusive control of certain subjects which at times become the concern of the nation as a whole would, if the contention of the state of Virginia had been upheld in the Swiss Case, seriously cripple the national sovereignty of the United States.

As final evidence of the weakness of the Tenth Amendment in reserving exclusive powers to the states, reference is made to the opinion handed down by the Supreme Court in \textit{Missouri v. Frederickson v. Louisiana}, 23 Howard, 445, 448.
Holland, 37 decided in 1920. The Court, in an opinion written by Justice Holmes, held that the validity of an act of Congress regulating the killing of migratory birds might be open to question, but that a treaty on the same subject was valid. An act of Congress designed to protect wild birds throughout the country was contested as an unconstitutional interference with the sovereign powers of the states under the Tenth Amendment. The act in question attempted the regulation in the absence of any treaty on the subject, and the District Court upheld the argument that migratory birds were owned by the states in their "sovereign capacity" for the benefit of their people. The Supreme Court accepted the decisions as far as they regarded the enactment of legislation by Congress in the absence of any provision in the Constitution granting powers to Congress, but the Court would not accept them as tests of the treaty power, saying that acts of Congress are the supreme law of the land only when made in pursuance of provisions of the Constitution, while treaties are the supreme law when made under the authority of the United States. Justice Holmes refused to decide the question of whether the "authority of the United States" means more than the process of concluding a treaty, that is, whether by "authority" is meant the collective provisions of the Constitution or merely the name "United States of America" and negotiation by the President and

37 252 U. S. 416.
ratification by the Senate. However, he did shed some light on the rule applied by the Supreme Court when the validity of a treaty is under consideration by saying:

It is obvious that there may be matters of the sharpest exigency for the national well-being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found.38

The result of this rule, applied to the treaty before the Court, was the destruction of a power which had for a hundred and thirty years resided in the states exclusively. The Court admitted that until the treaty was concluded, the states were left with powers to regulate the killing and sale of migratory birds, but that these powers ceased to exist when the paramount powers of the United States were exercised. In other words, the Tenth Amendment, although it reserved the powers claimed by Missouri to the states, could not prevent the conclusion of a treaty on the subject in view of the independence of the United States in external affairs. Finally, the Court declared: "No doubt the great body of private relations usually fall within the control of the state, but a treaty may override its power."39

Thus, it can be seen that the Supreme Court does not admit that the reserved powers of the states under the Tenth

38Ibid., 417.  39Ibid., 419.
Amendment in any way affect the freedom of the United States to conclude treaties on subjects which are usually within the traditional meaning of the police powers. The Court has never rejected a treaty which has been held by the President and the Senate to be necessary and proper for the well-being of the nation as a whole, even when the terms dealt with subjects over which the states have always had control.

It has been urged that not only does the treaty-making power of the United States frustrate the attempts of the states to enforce legislation which violates the terms of treaties, it might also frustrate attempts to preserve the territorial integrity of the states. The Supreme Court has handed down many decisions on the subject, but they are not all in agreement. In *Fort Leavenworth Railroad Company v. Lowe*\(^{40}\) the Court said that the jurisdiction of the United States extends to all territory within the limits of the states and that the consent of the state in which the territory is situated must be obtained before the territory may be ceded to a foreign nation. In *Geofrey v. Riggs*\(^{41}\) the Court said the United States may not cede the territory of a state under the treaty-making power without the consent of the state in question. Justice White stated in 1901 that territory which is an integral part of the United States may not be disposed of merely as an act of sale.\(^{42}\)

\(^{40}\)114 U.S. 540. \(^{41}\)133 U.S. 258.  
\(^{42}\)*Downes v. Bidwell*, 182 U.S. 244.
Opposed to these views is that expressed by the Court in *Latimer v. Potest.* Here the Court was called upon to determine the legality of a treaty between the United States and an Indian tribe, by the terms of which territory which was admittedly a part of the state of North Carolina was ceded to the tribe. The Court held that "neither the constitutional rights of an individual nor of a state could be imposed upon the national government while carrying out its obligation under territorial treaties." Willoughby takes the stand that the same reasoning which supports the power of the United States to annex territory supports the power of the United States to alienate territory, even though the territory be a part of a state or an entire state.

Of course, the United States would have to cede territory demanded by a conqueror, but in this discussion all elements of force must be excluded and only the legal power of the federal government considered. The Constitution guarantees certain rights to the states, rights which the United States must protect, but these are all political, not geographical. The Constitution guarantees to each state a republican form of government. No new state may be created by a partition of existing states nor by the union of them without the consent

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43 14 Pet. 4.  
44 Ibid.  
46 Art. IV, Sec. 4.
of the legislatures of the states involved. Finally, the Constitution guarantees that no state shall be denied its equal representation in the Senate. In none of these provisions is mention made of the protection of the territorial integrity of the states by the Union.

The case Latimer v. Potts offers evidence that the Supreme Court does not reject the claim of the United States to the power to alienate state territory, although it cannot be said from that one case that the Court will permit cession in all cases. However, one thing is certain. The Court has never inquired into the reasons behind the conclusion of a treaty if the Executive and Legislative Departments declare that it is for the well-being of the nation. The Court has in the past refused to enforce the provision of the Constitution guaranteeing a republican form of government on the grounds that to do so would involve the Court’s entering the field of politics, which practice the Court has said is beyond the judicial power of the United States.

The question put earlier may now be answered. It is obvious that the Supreme Court of the United States has abandoned the idea that the Tenth Amendment to the Constitution can stand in the way of the national government when it is exercising its power to negotiate and conclude treaties.

47 Art. IV, Sec. 3. 48 Art. V.

49 Mississippi v. Johnson, 4 Wall. 475 (1867). Georgia v. Stanton, 6 Wall. 50 (1867).
is even serious doubt as to the strength of the power of the states to preserve their own territorial limits. It is not contended that the United States is morally at liberty to conclude treaties signing away the rights and territory of the states to foreign nations or transferring them to the control of the national government, but it is urged that the United States is legally free to conclude treaties on subjects under state control and conclude treaties affecting the territory of the states.

The doctrine of enumerated powers.--The last element of the Federal System to be examined is that doctrine which holds that the national government of the United States is one of enumerated powers beyond which the authority of the United States may not reach.

The Supreme Court rejected at an early date the theory that the national government can exercise only those powers which are expressly delegated. One of the earliest cases which the Court decided on the nature and source of national powers is McCulloch v. Maryland.50 Here the Court, speaking through its Chief Justice, said that as a result of the fact that there is no phrase in the Constitution which requires that everything granted be expressly delegated, there is a great body of incidental or implied powers residing in the federal government. It was necessary to outline only the broad

50 4 Wheat. 316.
boundaries of power and leave the minor ingredients to be deduced from the nature of those powers. The Constitution does not deprive the government of the Union of the power to carry out its functions by the most appropriate means at hand. The Court summed up its arguments for the existence of implied power by saying:

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.51

The Supreme Court did not say that the powers of the national government were unlimited. On the contrary, the powers of the Union under the Constitution are limited, and those limits are not to be transcended, but Congress must be permitted the right to determine the means which it shall use to affect the desired end.

However, the external powers of the United States present a quite different problem. The argument that the powers which may be exercised by the national government in foreign affairs are enumerated in the Constitution, and thus limited by that document, does not find support today from the Supreme Court. In the Legal Tender Cases52 and the Chinese Exclusion Case53 the Court leaned upon the national independence of the United States under International Law for powers to establish a system of currency as legal tender for the powers to exclude

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51 Ibid., 421. 52 12 Wall. 457. 53 130 U. S. 581.
aliens from the country. In the latter case, Justice Field asserted the unlimited power of Congress to exclude aliens and remarked:

While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with the powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independance and security throughout its entire territory.54

Again, in 1893, the Court, speaking through Justice Gray said that the United States is a sovereign and independent nation, and is vested by the Constitution with the entire control of international relations, and "with all the powers of government necessary to maintain that control and make it effective."55

Finally, in 1936, the Supreme Court drew the line between the domestic and foreign power of the United States in the Curtiss-Wright Case. Here the Court held that in domestic affairs the United States is bound by the provisions of the Constitution and may exercise only those powers which are expressly delegated or which may be implied from any provision or any grouping of provisions of the Constitution. However, in foreign affairs the situation is entirely different. The provisions of the Constitution had nothing to do with the

54 Ibid.
55 Tong Yue Ting v. United States, 149 U. S. 698, 711.
investment of the national government with powers over external affairs; therefore, it can have no power to limit the exercise of those powers. In other words, the power of the national government in external affairs is not drawn from particular enumerated powers, but is an inherent power belonging to the United States as a result of the sovereignty of the American people at International Law.

Doctrine of Separation of Powers

The doctrine of the separation of the powers of government by placing them in the hands of three distinct departments has been upheld since the institution of the present form of government in the United States. The doctrine implies that the judicial, executive, and legislative powers are completely separated and that the bearers of those powers are more or less autonomous. However, the Supreme Court has, to a large extent, tied its own hands to protect the constitutional provisions which were intended to put the doctrine into effect in the field of foreign affairs. As an example of the reasoning used by the Court, in 1829, Chief Justice Marshall stated for the first time the Doctrine of Political Questions.56 The Court in this case was called upon to determine the validity of a Spanish land grant made to territory lying between the Perdido and Mississippi Rivers, which territory was at the time claimed by the United States. The Chief Justice

held that the Court was bound by the pronouncements of the
"political departments." He said:

If those departments which are entrusted with
the foreign intercourse of the nation, which assert
and maintain its interests against foreign powers,
have unequivocally asserted its right of dominion
over a country of which it is in possession, and
which it claims under a treaty; if the legislature
has acted on the construction thus asserted, it
is not in its own courts that this construction is
to be denied. A question like this respecting the
boundaries of nations is, as has been truly said,
more a political than a legal question, and in its
discussion, the courts of every country must re-
spect the pronounced will of the legislature.\footnote{57}

Thus the Court removed itself from the field of international
affairs, except in cases where it is called upon to enforce
the laws of the United States which deal with matters in ex-
ternal affairs and which are a part of the law of the land.

It is with the Executive and Legislative Departments
that the Doctrine of Separation of Powers runs into diffi-
culties when the matter of external affairs is considered.
The Constitution grants to the President all the executive
powers of the United States,\footnote{58} and at the same time invests
Congress with the power to declare war.\footnote{59} To separate the
exercise of these powers would be impossible in the conduct
of foreign affairs. The President has the power to conduct
the foreign relations of the United States in such a manner
as to lead to a declaration of war by another nation, and in

\footnote{57}{ibid, 308.} \footnote{58}{Art. II, Sec. 1, Cl. 1.}
\footnote{59}{Art. I, Sec. 8, Cl. 11.}
such a case, the Congress would have to declare war in like manner, even against its will.

But it is not in these matters that our primary concern lies here. We are concerned more with a comparison of the Doctrine of Separation of Powers in domestic affairs and in foreign affairs. Let us first state the rule established by the Supreme Court on the delegation of legislative powers in domestic affairs. Perhaps the most famous recent case, the decision of which turned upon the delegation of legislative powers, is that of A. L. A. Schechter et al. v. United States. 60 Here the Court stated that the Congress is not permitted to abdicate its legislative functions or to transfer them to others. The Constitution provides that all legislative powers of the United States are vested in a Congress, which shall consist of a Senate and a House of Representatives, and further, that the Congress is authorized to make all laws which are necessary and proper for executing its general powers. Nowhere in the Constitution is there provision for the transference by Congress of these powers. Under the provision of the National Industrial Recovery Act 61 Congress permitted the President and industrial or trade associations to establish codes of fair competition which would have the force of law. Such a delegation of the legislative powers of Congress was declared to

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60 295 U. S. 495, 55 S. Ct. 837.
be unconstitutional by the Supreme Court on the grounds that it "is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." The President was not required to follow any standard set by Congress in promulgating the industrial codes which the industry representatives submitted to him for approval. Congress did not even define the meaning of "fair competition" under the Act. And, finally, there was no provision for administrative procedure to determine the fairness of methods of competition or for judicial review to give assurance that the acts taken under the Act were within the statutory authority.

The rule of the Schechter Case may be stated as follows: In order for Congress to delegate constitutionally its legislative powers, there must be provisions in the law (1) laying down policies and establishing standards, (2) defining the subject to be regulated, (3) establishing a method whereby those persons affected by the rules made under the act have an opportunity to appear and give evidence in their own behalf, and (4) establishing methods for judicial review to give assurance that action taken under the act is within the authority of the act and of the Constitution. All of these limits, it will be noticed, are applicable to matters in domestic affairs. The Court did not mention the constitutionality of the act as it dealt with matters in external affairs.

The Doctrine of Separation of Powers remains effective in domestic affairs, but it has been read out of the
Constitution and the form of government in America as a restricting force capable of embarrassing the United States in its negotiations with foreign nations. The Supreme Court refused to apply the general rule against delegation of legislative power by Congress to cases where the delegation is made in matters in foreign affairs. The Court has said:

... It is evident that this Court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day.62

The very nature of international politics makes it necessary at times for the Congress to authorize the President to take action which he could not take were the matter purely domestic. In the Curtiss-Wright Case the Court said, through Justice Sutherland:

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.63

Hence, the Court has gone on record as opposing any construction of the Constitution which restricts the powers of the President and Congress to maintain international intercourse.

62 United States v. Curtiss-Wright, 57 S. Ct. 216, 222.
63 Ibid.
As has already been noted, the Constitution carves from the mass of powers possessed by the states those powers which were deemed necessary for the proper functioning of the national government, and the power over international affairs was never to be found in the possession of the states. As a result the Court refuses to permit the Doctrine of Enumerated Powers to guide it in determining the delegation of legislative powers when external affairs are involved, even when Congress authorizes the President alone to enact legislation under which criminal proceedings may be instituted against private citizens.

Civil Rights

The most delicate question in determining the scope of the external powers of the Union arises when the private rights of American citizens conflict with the pronounced policies of the government of the United States. Although there have been few cases before the Supreme Court involving civil rights and the treaty-making power at the same time, there are three cases which shed some light on the position the Court takes. The first of these is _Ware v. Hylton_, which was discussed above in another connection. The American debtor had certain rights conferred upon him by the law under which he discharged the debt to the British subject, yet the Supreme Court disregarded those rights in upholding the treaty provision which revived the debt against the private
citizen. The debtor could not even appeal to the Fifth Amend-
ment for the protection of due process of law. In this in-
stance the government of the Union had constitutionally de-
stroyed a right by the exercise of its treaty-making power.

The second case alluded to above is United States v.
Pink. 64 Here the Supreme Court ruled that under the execu-
tive agreement by which the United States recognized the
Soviet government of Russia in 1933, both the state and the
federal courts of the United States were bound to recognize
the Soviet decrees of confiscation of the property of certain
Russian companies in the United States and to give priority
to the claims of American citizens and of the United States
government against the Russian government against the property
of these companies over the claims of foreign creditors. The
decision was reached in the face of the rule pronounced in
Wong Wing et al. v. United States 65 and Traux v. Raich, 66 the
former guaranteeing aliens the protection of the due process
clause of the Fifth Amendment against federal action and the
latter guaranteeing aliens the protection of the due process
of the Fourteenth Amendment against state action.

The third case involving the treaty-making power and
civil rights is In re Dillon 67 Under a treaty between France
and the United States, concluded in 1854, consuls of the

64 315 U.S. 203. 65 163 U.S. 228. 66 239 U.S. 33.

67 Federal Case, No. 3914.
contracting parties were not to be compelled to appear as witnesses in the courts. Under the Sixth Amendment to the Constitution that the accused in any case shall have compulsory process for obtaining witnesses in his favor, a subpoena was issued to the French consul in San Francisco summoning him to appear in court. France protested that the treaty provision did not permit the enforcement of such a subpoena. The court avoided the determination of the important constitutional question involved by declaring that since the prosecution was also denied the use of compulsory process, the right of the accused was not violated.

It would be dangerous to state with finality what the reaction of the courts would be to treaty provisions which abridged seriously the rights and privileges of citizens of the United States since there are so few cases on record in which the courts have expressed themselves. Unlike the trend toward reducing the alleged rights of the states in view of the treaty-making power, the trend in civil rights versus treaty provisions is not so clearly marked, although the federal courts have indicated their willingness to uphold at least certain types of treaty provisions against the rights of private citizens.
CHAPTER III

POWER TO FULFILL INTERNATIONAL OBLIGATIONS

To say that the national government has the power to conclude treaties on subjects usually under the control of the states of the Union does not mean, in and of itself, that the rights of the states are automatically limited by treaties. Many treaties are not capable of limiting or changing the rights of the states by themselves; there must be congressional action before the courts are able to apply the treaty to the cases before them. It is here that the full strength of the treaty-making power comes into play.

The Constitution of the United States establishes a national government, defines the powers of that government, and provides for the election of agents to carry out the functions of the national government. The Union has been held to be the possessor of external powers in an inherent capacity, completely apart from any provision of the Constitution.¹ There is here a conflict between the internal prohibitions and the external powers of the Union. Our purpose here is to determine the legal powers of the national government to use its unlimited control of external powers to limit the

powers and functions of the states of the Union. However, before there is a consideration of these powers, we must first consider the application of the Laws of Nations in general to the rights and privileges of the national government in order to determine the full strength of the Union to force the states to yield to its commands on matters in international affairs.

Judicial Application of International Law to Internal Relations

The provisions of International Law have meaning before the courts of the United States only under certain conditions. The strength of international obligations without treaty provisions to enforce them depends entirely upon the willingness of the courts to give them validity. If there exist conflicts between statutes or constitutional provisions and the requirements of International Law, the Supreme Court holds that the courts are bound by the municipal law and must ignore the international obligation. Moreover, Chief Justice Marshall held that an act of Congress should never be held to violate International Law if it can be upheld by any possible construction. On the other hand, the Chief Justice said in the case of The Nereide that until there is an act of Congress which modifies the international obligations of

\(^2\)Paquet Habana, 175 U. S. 677, 794.

\(^3\)The Charming Betsy, 2 Cranch 64. \(^4\)9 Cranch 388.
the United States, the Supreme Court is bound by the Law of Nations which by the terms of the Constitution is a part of the law of the land. In other words, if there exists an act of Congress which violates International Law, it must, nevertheless, be enforced by the courts as the law of the land, and it is only "where there is no treaty and no controlling executive or legislative act or judicial decision that resort must be had to the custom and usages of the law of nations . . . " in the determination of rights.5

The Doctrine of Political Questions is also taken into consideration by the courts in applying international obligations to internal affairs. The Supreme Court has stated that it is not for the judicial department to inquire into the validity of the decisions of the political departments on questions affecting the external relations of the United States.6 Furthermore, the courts have in the past held themselves to be bound by the decisions of Congress and the President even where the decisions have been in conflict with international custom and usage.

The Congress of the United States is given the power by the Constitution to define and punish offenses against the Laws of Nations,7 and the federal courts are given jurisdiction

5Paquet Habana, 175 U. S. 677, 700.
7Art. I, Sec. 8.
over all cases involving ambassadors, ministers, consuls, and the interpretation of treaties. The Supreme Court held that it is not forbidden by the Constitution to look beyond that instrument for legal powers of the national government. The Court has admitted the power of the United States to acquire territory by discovery and occupation and has recognized the power of Congress to enact legislation for the punishment of crimes committed in such territory. In another case the Supreme Court looked to International Law for the power and the obligation to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions.

Thus it can be seen that there are three factors which enter into the determination by the courts of the validity of international obligations. The general rules of International Law have no binding force upon the courts when the Congress has enacted legislation requiring the courts to proceed in a manner contrary to international custom. The courts must consider nothing more than the act of Congress and International Law when rendering opinions, since the reasons for the enactment of the statute are political in nature. The courts are not required to permit the national government to

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8Art. III, Sec. 2.
9Jones v. United States, 137 US. S 202, 11 S. Ct. 80.
10Tong Yue Ting v. United States, 149 U.S. 698, 15 S. Ct. 1016.
exercise only those powers specifically mentioned in the Constitution, but may look to the generally accepted international customs for powers necessary to maintain the security of the United States.

Power to Fulfill International Obligations

by Use of the Treaty Power

Subject matter of treaties.—No treaty has ever been declared unconstitutional, regardless of the subject matter. The Supreme Court, because of its Doctrine of Political Questions, cannot even inquire into the subject of the treaty, but knows the treaty only as municipal law and is not capable of exercising jurisdiction over the parties to it.\textsuperscript{11} As has been seen, the Court did not object to the President and the Senate negotiating a treaty with Great Britain which abridged the property rights of American citizens.\textsuperscript{12} It would have been beyond the judicial power of the United States to consider the wisdom or correctness of the decision of the political departments to conclude such a treaty. In Missouri v. Holland,\textsuperscript{13} the Court stated that when the political departments declared a subject fit for international consideration, the Court would accept such a declaration even when the subject is one which has always been regulated by the states.

\textsuperscript{11}Willoughby, Constitutional Law of the United States, II, 368.

\textsuperscript{12}Ware v. Hylton, 3 Dall. 199. \textsuperscript{13}252 U. S. 416.
Treaties such as the one involved in Missouri v. Holland change the relationship of the states to their own citizens, but such treaties are now to be accepted as valid.

Validity of legislation based upon treaties.--There can be no doubt as to the power of Congress to enact legislation based on treaties dealing with subjects usually under the control of the government of the nation, such as aliens, neutrality, international boundaries, piracy, and others. From the earliest years of the present Constitution, the national government has maintained legislation giving the federal district courts jurisdiction over suits brought by aliens for torts in violation of International Law or a treaty of the United States. Furthermore, Congress has used its powers under the "necessary and proper" clause to enact legislation which removes the power of the states to hold without writ of habeas corpus aliens who claim any right under a treaty. 14

There is little doubt that Congress has the power to punish American citizens, or anyone else within the territorial limits of the United States, who violate the neutrality of the United States. The Supreme Court held in United States v. Arjona 15 that it was within the power of Congress to provide for punishment for the counterfeiting of foreign securities or coins.


15 120 U.S. 472.
in the United States in violation of the treaty obligations of the United States. International boundaries, being completely beyond the power of the states to regulate, are definitely within the power of Congress. There is a responsibility resting with every nation to prevent the occurrence of acts near frontiers which are likely to cause injury to adjacent countries, such as the interference with the natural flow of rivers and streams across the frontier, the tolerance of marauders, conspirators, or revolutionists with design on adjacent territory. 16

The above powers which are claimed by and upheld for Congress are all matters directly in international affairs, and there is no doubt that under the Constitution these matters are under the control of the national government. But there is another power which is claimed by Congress, which power the Supreme Court has admitted and which is of importance here. This is the power to incorporate in the municipal law of the United States acts regulating subjects over which the Congress has no authority under the Constitution.

That the Congress does have the power to enact such legislation is no longer seriously doubted. In Baldwin v. Franks17 the Supreme Court was called upon to determine whether Congress could draw from treaties the power to punish

16 Wright, Control of American Foreign Relations, 163.
17 120 U. S. 672.
offenses against the rights of aliens which had been created by treaties. The Court said, in part:

The precise question we have to determine is not whether Congress has the constitutional authority to provide for the punishment of such an offense as that with which Baldwin is charged, but whether it has done so . . .

That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty, we do not doubt. What we have to decide, under the questions certified from the Court below, is, whether this has been done.18

The Court held in this case that Congress had not acted to make it a punishable offense, but from the language of the opinion it would be a proper exercise of the powers of Congress to do so.

In 1900, in the case Keeler v. Henkel19 Justice Harlan said that the power of Congress to make all laws necessary and proper for carrying into execution the powers enumerated in Section 8 of Article I of the Constitution, as well as all others vested in the government of the United States, includes the power to enact "such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President, by and with the advice and consent of the Senate, to insert in a treaty." Justice Harlan did not attempt to say what stipulations the President was legally entitled to insert in a treaty, but in view of the Supreme Court's

position on the matter of political questions and in view of
the decisions in cases already cited it seems that there
is no stipulation beyond the power of the United States to
include in a treaty.

In Missouri v. Holland the Supreme Court made its most
positive statement on the power of Congress to use a treaty
as a means of broadening the powers of the United States over
internal affairs. It is interesting to note that the Court
did not admit that any and all treaties of the nature of the
Migratory Bird Treaty of 1916 would be held valid, but the
Court did say that the treaty in question could not be held
invalid because it changed the relation of the states to their
own citizens, or the relation of the states to the Union. The
State of Missouri used as an argument against the action of
Congress the contention 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 what an
act of Congress could not do unaided, . . . a treaty cannot do."
With the contention that Congress had not the power to regu-
late a matter within the meaning of the reserved powers of
the states in the absence of treaty provisions, the Court
agreed. However, the Court would not accept the argument

that Congress could not enact valid legislation on the basis of a treaty alone, without regard to the fact that the subject of the treaty and of the statute was one which had admittedly been reserved to the control of the states under the Tenth Amendment. Justice Holmes, speaking for the Court, said, "If the treaty is valid there can be no dispute about the validity of the statute under article 1, section 8, as a necessary and proper means to execute the powers of government." In effect, the Court was saying that any power which belongs to the national government may be used as a basis for legislation and that in addition to the powers of Congress as set forth in Article I of the Constitution, such as the power to regulate interstate and foreign commerce, punish crimes against the Laws of the Nations, establish a postal system, and the like, the treaty-making power may also be used as a basis for legislation. That in itself would have no disastrous effect on the constitutional system in the United States were it not for the fact that the Court has released the political departments from its supervision over the selection of valid subjects for international negotiation.

The effect of the rule of Missouri v. Holland is to remove the qualifying dicta of Geofoy v. Riggs. In the latter case the Court said, "That the treaty-making power in the

22 135 U. S. 258.
United States extends to all proper subjects of negotiation between our government and the governments of foreign nations is clear." However, the Court suggested that a change in the Constitution, in the form of government, or a cession of the territory of one of the states might prove invalid "but, with these exceptions, it is not perceived that there is any limit to the question which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."\(^{23}\) In the application of the rule of the Missouri Case the Supreme Court has allowed a change in the Constitution, an amendment by the President and the Senate without regard to the House of Representatives or the states of the Union. Since the treaty involved in the Missouri Case created new powers of government which the Court allowed Congress to use as a basis for legislation, it had the effect of an amendment of the same force as the Income Tax or Prohibition Amendments.

However, there is one difference between an amendment which is adopted as provided in the Constitution and a treaty which creates new powers. As regards the former, Congress is powerless to act in a manner which violates its provisions if it is of a prohibitory nature. For instance, Congress may not enact legislation respecting the establishment of religion, quartering troops in private homes without the consent of the

\(^{23}\) Ibid.
owner, providing for excessive bail, placing a person in
double jeopardy, or extending the judicial power of the United
States to suits between a state and a citizen of another state.
Congress may not repeal or modify such amendments to the Con-
stitution on its own volition. On the other hand, the prohib-
itory provisions of a treaty may be completely ignored by Con-
gress in its legislation, and the Courts will enforce the
statute, not the treaty. In the Head Money Cases the Su-
preme Court, speaking through Justice Miller said:

It is very difficult to understand how any
different doctrine can be sustained. A treaty is
primarily a compact between independent nations.
It depends for the enforcement of its provisions
on the interest and the honor of the governments
which are parties to it. If these fail, its in-
fraction becomes the subject of international ne-
gotiation and reclamations, ... which may in
the end be enforced by actual war ... A treaty
... is the law of the land as an act of Congress
is, whenever its provisions prescribe a rule by
which the rights of the private citizens or sub-
jects may be determined ... But even in this
aspect of the case there is nothing in this law
which makes it irrepealable or unchangeable. The
Constitution gives it no superiority over an act
of Congress, which may be repealed or modified by
an act of a later date. Nor is there anything in
its essential character, or in the branches of
government by which the treaty is made, which
gives it this superior sanctity.

Again, in the Chinese Exclusion Case, the Court said:

It must be conceded that the act of 1882 is in
contravention of express stipulations of the treaty
of 1868 and of the supplemental treaty of 1880, but
it is not on that account invalid or to be restricted
in its enforcement. The treaties were of no greater
obligation than the act of Congress. By the Constitution . . . no paramount authority is
given to one over the other . . . It can be
dedem only the equivalent of a legislative
act, to be repealed, or modified at the pleas-
ure of Congress. In either case the last ex-
pression of the sovereign will must control
. . . The question whether our government was
justified in disregarding its engagements
with another nation is not one for the deter-
mination of the courts . . . The court is not
the censor of the morals of the other depart-
ments of the Government.

The Court did not in either of these cases declare that the
international obligations of the United States were termi-
nated by the passage of legislation in conflict with its
treaties. Under such conditions the treaty becomes voidable
by reason of violation by one of the parties, but until the
other party or parties to the treaty issue valid proclama-
tions of denunciation, all parties to the treaty are bound
thereby. Until the political departments have acted to de-
nounce a treaty, the courts are bound to recognize it as valid,
and they must continue to apply any provisions of the treaty
which partake of the nature of municipal law in granting rights
and privileges to governments or private individuals. 26

Aliens and the treaty-making power.—During the early
days of the Constitution, what political and civil rights
aliens enjoyed were derived from the laws of the state. The
reserved powers of the states served to subject aliens to the

26 W arr v. H ylton, 3 Dall. 139; Doe v. Braden, 16 How. 638; Fer-
dictates of the state authorities on matters covering the
ownership and inheritance of property, the use of public
services, and the freedom of labor, immigration, and per-
sonal habits.

However, as a result of the negotiation of many treaties
by the national government giving certain rights and privi-
leges to aliens on an equal basis with citizens, the situation
has been greatly changed. The national government has not,
as a result of the conclusion of every treaty, enacted leg-
islation providing for the punishment of offenses against
treaty rights of aliens. Section 1 of the Fourteenth Amend-
ment\(^{27}\) has been interpreted to apply to aliens and has served
to prevent much discriminatory legislation against them.
There is no need for federal legislation to enforce the rights
of aliens in view of this Amendment, since such treaties con-
tain "provisions which confer certain rights upon the citi-
zens or subjects of one of the nations residing in the ter-
ritorial limits of the other, which partake of the nature of
municipal law, and which are capable of enforcement as be-
tween private parties in the courts of the country.\(^{28}\)

The important aspect of this situation is the disap-
pearance of the "states' right" to exercise powers over state

\(^{27}\) "... Nor shall any State deprive any person of life,
liberty, or property without due process of law; nor deny to
any person within its jurisdiction the equal protection of
the laws."

\(^{28}\) Head Manoey Cases, 112 U. S. 580.
land and natural resources, over state public institutions, over classes of persons and businesses in the interest of public safety, health, and morals. It is true that International Law requires that every nation accord to the citizens of other nations the same protection and the same procedural rights for redress for injury which it gives to its own citizens, provided that the protection it gives to its own citizens meets the standard of civilization, but in the absence of the legal authority under the Constitution to do so, the United States must seek another legal means for fulfilling its international obligations.

The treaty-making power has supplied this legal means. The issue has been judicially settled in favor of the national government in reference to state statutes which discriminate against aliens' rights to own land under treaty provisions. On the question of the right to work the states' power to regulate has been restricted on the basis of treaty rights of aliens. In a few cases there have been dicta damaging to the treaty power, but in no instance has a clear treaty provision been superceded by a state statute. On the contrary, state statutes have been frequently declared void when in conflict with a clear treaty provision.

30. Fairfax v. Hunter, 7 Cranch. 603; Chirac v. Chirac, 2 Wheat. 289; Carnesal v. Banks, 10 Wheat. 259; Hauenstein v. Lynham, 100 U. S. 482.
The treaty power has been used, then, to grant rights and privileges to aliens in contradistinction to the supposed reserved powers of the states. Treaty provisions which depend upon subsequent legislation to put them in force are the more difficult to handle in determining the rights of aliens, but provisions which are in the nature of municipal law are automatically binding upon the various state authorities. The latter provisions may be and are enforced against the states under the Fourteenth Amendment.

This situation is similar to the power of the national government to use the treaty-making power as a means of creating new powers of government which it may use as a basis for legislation under Article I, Section 8. If the national government concludes a treaty which is not capable of being applied directly to controversies before the courts, it may, if it sees fit, enact legislation to enforce the treaty. If the treaty is capable on its own terms of being applied by the courts, the President and the Senate have enacted municipal law which changes the federal relation in the United States without the consent of the House of Representatives or the states, and the national and state courts are bound by the Supremacy Clause to enforce the treaty as supreme law.32

32 Head Money Cases, 112 U. S. 580.
CHAPTER IV

CONCLUSIONS

The delegates to the Constitutional Convention of 1787 knew they were creating the instrument which could be the basis for the construction of a nation, an instrument which could weld the people of the various states into one people, but perhaps they did not realize that under that same instrument the states of the Union would be placed in a position which would make it difficult for them to retain their powers as they had before the ratification of the Constitution. The threat to the power of the states existed before the adoption of any articles of government, but the jealousy of the states prevented their giving to the national government the internal powers necessary to constitute a real threat to the quasisovereign status of the member states. So long as the states kept for themselves the control of the internal relations of the United States, they could prevent the national government from reducing their powers, but under the Constitution the states gave up their internal controls and created the legal means for their own destruction.

That the power over external relations belongs to the national government independently of the states cannot be denied in the face of the pronouncements of the Supreme
Court. This power would mean little or nothing if the national government were unable to force the states to yield to its decisions. For instance, if the states had retained under the Constitution, as they did under the Articles of Confederation, the power to reject treaty provisions, they could frustrate the exercise of external power; although they could not deny the theoretical control of external affairs to the national government. One of the glaring defects of the Articles of Confederation was this power of the states to refuse to permit the national government to contract certain commercial obligations with foreign governments which would be binding on the states individually. There was no supremacy clause in the Articles of Confederation, and the states inserted a provision reserving to themselves all rights, powers, and privileges not expressly delegated to the national government.

To correct this situation, the Convention had to include a provision in the Constitution which would remove the power of the states to control external affairs through their internal powers. In doing this, the Convention corrected the mistake of the Articles of Confederation, and the people of the nation gave their assent to the supremacy of the national government. The only control the people had over the exercise

\[1\text{Missouri v. Holland, 252 U. S. 416.}\]
\[2\text{Article IX, Sec. 1.}\]
\[3\text{Article II.}\]
of external power, other than political control through elections, was the power to include in the Constitution a process for making treaties which would offer some guarantee that the agents of government would not hastily bind the nation against the will of the people. Thus they incorporated into the Constitution the requirement that the President must receive the approval of two thirds of the Senators before treaties negotiated by him will be recognized as the will of the United States. But it must be remembered that under the Supremacy Clause a treaty, if negotiated and ratified according to the prescribed process, becomes a part of the supreme law of the United States.

The supremacy of a treaty would not endanger the powers of the states if the states were able to control the choice of the subject matter of the treaty. If the states and the people had expressly denied the national government full freedom in choice of treaty subjects, they would have constructed effective restraints on the ability of the United States to broaden the powers of government. However, they failed to do so.

It is obvious that the states had to be removed from the field of international relations and that the control of the external affairs of the United States had to be entrusted to the national government. If this were not the case, the Constitution would have been incapable of enforcement. But the

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4Article II, Section 2.
states failed to provide themselves with adequate protection against the legal power they gave to the national government under the Constitution. The Ninth and Tenth Amendments were feeble attempts toward that end, but even here the states and the people were not explicit enough to change matters radically. From the earliest days of the Constitution, the Supreme Court has taken the position that there is nothing in either of these Amendments which limits the ability of the United States to exercise full and unlimited powers in the field of international relations. The reasoning of the Court has been based on the theories and principles of International Law which state that in order for a people to be recognized as a State, they must create a government which is capable of carrying out the obligations and meeting the responsibilities of nations and that that government automatically has power equal to the powers of free and independent nations.\(^5\)

The reserved powers of the states are not capable of permanently restraining the national government even in internal affairs. If, in order to fulfill the obligations of the nation, the national government must have powers which are reserved to the states by the Constitution, it has the legal means at its disposal now to take such powers from the states. This is a strong statement, but there is much evidence to back it. The Missouri Case stands as the extreme in the trend toward

\(^5\)United States v. Curtiss-Wright Export Corporation, 57 S. Ct. 216.
centralization of governmental powers in the United States. Before this case there had been small and relatively insignificant encroachments by the national government upon the powers of the states through the use of the treaty-making power. The states successfully contested the power of the national government to enact legislation regulating a subject within the meaning of the reserved powers of the states, but when after the conclusion of a treaty, Congress again enacted such legislation, the states failed completely in their attempt to protect their powers. The Supreme Court held that the states have no right to contest the validity of a treaty on the grounds that its subject is one over which the states have jurisdiction under the Constitution. Furthermore, the courts of the United States have no right under the Constitution to refuse to enforce a treaty because it transfers a power from the states to the nation.6 There have been no indications from the Supreme Court that it would refuse to accept as legal a treaty which removed from the states the right to regulate ownership of real estate, the right to legislate in the interest of public health and morals, or the right to legislate for the economic well-being of their citizens.

There has been evidence that the Supreme Court will not declare invalid a treaty ceding territory of a state.7 There

is nothing which could be so destructive to the powers of a
state as the ability to hold over it the threat of its terri-
torial disappearance. What state would not yield to the de-
mands of the national government, if to resist meant that it
could, under the provisions of some treaty, be turned into a
federal reservation, or otherwise destroyed? For instance,
if the United States were empowered by the terms of a treaty
to guarantee the delivery of specified quantities of petro-
leum to a foreign country and in order to be certain that it
could deliver, it demanded that a state give it control of the
state's oil fields, could the state resist the powers of the
national government legally? From the rulings of the Supreme
Court it is doubtful whether in such a case the state would
have legal grounds for protest, although the morals of the
national government would certainly be open to question.8

There is nothing in the Constitution of the United States
which stands in the way of a reorganization of the three
branches of government through use of the treaty-making power
without regard to the constitutional process for amending the
Constitution. Moreover, the Supreme Court has held that through
the use of its external powers, the national government may in
certain cases ignore the Constitution since the Constitution is
not the source of those powers. In the Curtiss-Wright Case the
Court observed that the Congress, whose right and duty it is

8Chinese Exclusion Case, 130 U. S. 561.
to enact all legislation for the United States, delegated this right to the President. The Court said that such a delegation of legislative power, had it dealt with matters in internal affairs, would have been unconstitutional, but since it dealt with matters external to the United States, it was valid. To support its decision in the Curtiss-Wright Case, the Court looked to the principle of International Law which holds that in order for a nation to exist it must have power and rights equal to those possessed by other members of the Family of Nations, otherwise it is not completely sovereign.\(^9\)

Further, the Court declared that when the resolutions of Congress have as their purpose the changing of conditions in territories external to the United States, the Constitutional provisions designed to separate the powers of government do not apply.\(^10\)

Under the precedents set by the Supreme Court, the civil rights of the citizens of the United States are placed in a precarious position. If the national government may use the treaties it concludes as a source of legislative powers, then the guarantees of the Bill of Rights mean nothing. Following the line of reasoning used by the Court in the Missouri Case, let us consider some of the possible results in connection with civil rights. The basic liberties of which the people are most conscious, freedom of religion, speech, press, and

\(^9\) 57 3. Ct. 216, 216.  
\(^10\) Ibid.
assembly, are placed in jeopardy. If the national government determined that in order to discharge its international obligations it was necessary to establish one of the religions or sects as the official church of the nation, it has the legal right to do so. If in order to guarantee peace the national government determined that no person should be allowed to exercise his freedom of speech or press to the point of criticizing the government or policies of another nation, it has but to negotiate a treaty with the other nation stipulating that it will enforce such a restriction in order to empower itself to enact restricting legislation. The right of assembly, along with any other right of the people, may be curtailed through the same process of treaty negotiation and legislation based upon the treaty. Of course, the government would meet with opposition if it attempted such a course of action, but legally, apart from all considerations of morality or justice, the government of the United States has the power to make such treaties and enact such legislation.

Following the same line of reasoning, let us consider the matter of civil rights from another side. What would be the strength of state laws which are aimed at restricting the civil rights of a portion of their citizens, such laws as those which impose a poll tax, which do not provide adequately for the protection of all citizens against mob violence or arbitrary arrest, which deny equality of opportunity for public services
such as education, housing, health, recreation, and transportation, or which deny equality of opportunity to obtain useful employment? If the Supreme Court followed its own precedent, these state laws would fall before the superior power of a treaty.

That the national government may use its treaty-making power to destroy state discriminatory legislation is not as far from the realm of reality as might be supposed. The President's Committee on Civil Rights suggested that the United States use its treaty-making power to give force to the claim of every citizen to equality.\footnote{Report of the President's Committee on Civil Rights, U. S. Government Printing Office, 110.} Not only did the Committee advocate the use of the treaty-making power to obtain civil rights for all citizens, but it also urged that the United States was already bound by a treaty which offered a basis for civil rights legislation. The Committee referred to Articles 55 and 56 of the United Nations Charter which was approved by the Senate as a treaty. The first of these articles is:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, the United Nations shall promote:

a. Higher standard of living, full employment, and conditions of economic and social progress and development;

b. Solutions of international economic, social, health and related problems; and internation cultural and educational cooperation; and
c. Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

The second of these articles reads:

All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

The Committee admitted that the United Nations Organization is not permitted to intervene in matters which are essentially within the domestic jurisdiction of member States, but the argument is that any member State may take separate action to fulfill its obligations under Article 55.

Thus the powers possessed by the national government under the present Constitution may be legally expanded through the use of the treaty-making power, but this does not mean that the government could or would attempt to change the constitutional system in opposition to the will of the people. The government remains at the pleasure of the sovereign majority of the citizens of the nation, and any attempt by that government to destroy the powers of the states or restrict civil rights without the consent of the people could lead to the overthrow of the regime in power and the destruction of the government under the present Constitution. If, on the other hand, the people demanded the destruction of some power of the states, the government of the Union has the power to carry out the commands of the people without regard to the wishes of the
states themselves or to the constitutional process for amending the Constitution. So long as the present government of the United States exists and so long as there is a constitutional provision making the laws of that government supreme internally, the treaty-making power will offer the legal means to broaden the powers of the United States at the expense of the states and the people.
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