TREATIES AND CONGRESSIONAL-EXECUTIVE OR PRESIDENTIAL AGREEMENTS: INTERCHANGEABLE INSTRUMENTS OF NATIONAL POLICY: I

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"It seems to me that an executive agreement ratified by joint resolution differs from a treaty largely in name only."

SENATOR FULBRIGHT

"It is now admitted that what was sought to be effected by the Treaty submitted to the Senate, may be secured by a joint resolution of the two houses of Congress incorporating all its provisions. This mode of effecting it will have the advantage of requiring only a majority of the two houses, instead of two-thirds of the Senate."

JOHN C. CALHOUN, in 1845, commenting
on the procedure used for annexing Texas.

I*

Above the holocaust of the present war has arisen a demand from the people of the United States for a foreign policy that will do everything humanly possible to prevent future wars and to secure their other interests in the contemporary world. The people have made up their

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*The following short-form citations are used in this article:

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minds as to the general kind of foreign policy they want.¹ In elections and by-elections extending over a period of five years, in Congressional resolutions, and in the platforms and speeches of party candidates, a line of policy has been laid down as precisely as the processes of voting

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1. See, e.g., NATIONAL OPINION RESEARCH CENTER, *THE PUBLIC LOOKS AT WORLD ORGANIZATION* (Report No. 19, April 1944). For figures as of Feb. 6, 1945, see 4 OPINION NEWS (National Opinion Research Center) No. 3.

Typical of the attitude of the nation is a recent poll taken in New Hampshire, reported in N. Y. Times, March 15, 1945, p. 10, col. 3:

and popular expression permit. Firmly, deliberately, and in large majority, the people have said that they want a foreign policy which continues our war-time alliances and which seeks to create upon that foundation both a new general security organization, with the United States as a leading member, and all the other supporting institutions necessary to secure the full advantages—such as economic well-being and the promotion of health, knowledge, and the maintenance of human dignity—that can flow from the free and peaceful cooperation of the peoples of the world.²

This demand of the people of the United States is based upon an increasing consciousness that the world is shrinking ever more rapidly, irrevocably, and imperiously into what a late statesman aptly called "One World."³ It is now common knowledge that revolutionary developments in instruments of destruction, transportation, communication, and production; constant increases in population; increasing reliance upon natural resources of wide distribution; and consequent changes in the various institutions by which man carries on his ac-

"Almost all of New Hampshire's 225 towns expressed overwhelmingly a desire that the United States should enter a world organization which would have police power to maintain peace in the country's first popular vote on the question.

"Returns from 213 towns showed today a vote of about 14,000 for a world organization, such as was proposed at Dumbarton Oaks, with about 800 against it. Unanimous approval came from 103 towns."

2. Secretary of State Stettinius has recently made a brief statement of the principal aims of contemporary American foreign policy. Secretary Stettinius includes, beyond giving to the armed forces the "fullest possible support" in winning the war and taking "effective steps to prevent" the fascist nations "from again acquiring the power to wage aggressive war," the following:

"3. Establishment at the earliest possible moment of a United Nations organization capable of building and maintaining the peace—by force if necessary—for generations to come.

"4. Agreement on measures to promote a great expansion of our foreign trade and of productiveness and trade throughout the world, so that we can maintain full employment in our own country and—together with the other United Nations—enter an era of constantly expanding production and consumption and of rising standards of living.

"5. Encouragement of all those conditions of international life favorable to the development by men and women everywhere of the institutions of a free and democratic way of life, in accordance with their own customs and desires."

Statement before the Senate Foreign Relations Committee, Dec. 12, 1944, reported in N. Y. Times, Dec. 13, 1944, p. 14, col. 1.

Compare the statement of President Roosevelt, Prime Minister Churchill, and Premier Stalin in the Yalta Declaration, Feb. 13, 1945:

"We are resolved upon the earliest possible establishment with our Allies of a general international organization to maintain peace and security. We believe that this is essential, both to prevent aggression and to remove the political, economic and social causes of war through the close and continuing collaboration of all peace-loving peoples."

3. WILLKIE, ONE WORLD (1943).

tivities have all combined to make the peace, prosperity, health, knowledge, respect for human dignity, and freedom of the contemporary world indivisible. The indivisibility of peace has seldom been stated with greater force than by Senator Henry Cabot Lodge, speaking in 1915:

"... there is no escape from the proposition that the peace of the world can only be maintained as the peace and order of a single community are maintained, by the force which unified nations are willing to put behind the peace and order of the world. Nations must unite as men unite to preserve peace and order. The great nations must be so united as to be able to say to any single country, 'You must not go to war'; and they can only say that effectively when the country desiring war knows that the force which the united nations place behind peace is irresistible."⁴

It needs no emphasis that contemporary developments in the technology of war increase the force of Senator Lodge's statement a thousandfold.⁵ Similarly, the indivisibility of economic prosperity has had recent confirmation in the catastrophic convulsions of a world-wide depression; and the great majority of people have come to see "the incontestable truth" that "there is a clear planetary indivisibility of production and employment."⁶ It is obvious that "most of us are now alive" and that "most of us are kept alive" by the "vast cooperative [work of a] world society."⁷ Even assuming that its security position may be impregnable, no nation today can seek refuge from technological imperatives by the erection of neo-mercantilistic trade barriers, without impoverishment of its standard of living. What is true of peace and prosperity is no less true of all our other democratic values. The judgment of the American people that their interests can no longer be protected by nineteenth-century neutrality, isolation, and inaction is

4. The quotation is an excerpt from the commencement oration delivered by Senator Lodge at Union College in June, 1915. SCHRIFTGIESSER, *THE GENTLEMAN FROM MASSACHUSETTS: HENRY CABOT LODGE* (1944) 271-2. See also Lodge's speech before the League to Enforce Peace, May 27, 1916, quoted in part in LODGE, *THE SENATE AND THE LEAGUE OF NATIONS* (1925) 131-2.

5. Commenting on and quoting from Canadian Air Marshall Bishop's book, *Winged Peace*, Lieutenant Bolté has declared:

"The jerky and inaccurate prototype of today will be replaced by machines which 'will leave the ground smoothly, impelled by rocket motors,' will fly through the lower atmosphere by jet-propulsion, and will switch back to rocket-propulsion when they reach the thin stratospheric altitudes, to cross the Atlantic Ocean in 'three hours, perhaps less.' Needless to say, they will arrive at their destination before the sound of their coming; and whether they come laden with passengers and freight or with bombs and air-borne troops depends entirely on what we do in the next several months about the structure of peace. . . ."

Winged Peace or Winged Death (1944) 159 NATION 605, 606.

6. SCHERMAN, *THE LAST BEST HOPE OF EARTH* (1941) 15.

7. *Id.* at 10.

based upon a realistic appraisal of the pervasive interdependence of all peoples. This basic condition of interdependence, the profound weakness of the world's present system of organization, and, conversely, the strong power position of the United States in the world society make it imperative that the United States not only participate, but take a leading part, in establishing a new order of political, economic, and cultural relationships and institutions, both in direct association with other nations, great and small, and through international organizations.

During the interregnum between the first World War and the present one, the United States vacillated uncertainly between a nostalgic isolationism and a growing realization of the need for international cooperation. Since 1941 it has, however, taken the initiative in promoting the organization of international agencies to deal with the multilateral tasks of preserving peace and coping with numerous economic problems, including the administration of post-war relief and reconstruction, the development of backward areas, the control of civil aviation and the stabilization of monetary exchanges.⁸ As the time approaches for the translation of tentative blueprints into appropriate working institutions, the great question in the minds of people, throughout the world, who remember the United States' withdrawal after the last war, is whether this government possesses constitutional procedures sufficiently democratic, flexible, and efficient to permit it to give effect to its majority will and, hence, to assume a position of responsibility and leadership in the world community upon which other governments can rely.⁹

It should be clear that, if the United States is to secure its own interests and to assume a position of responsibility and leadership in the world community, its executive officers, who are charged with the task of conducting negotiations with other governments, must be able to treat the national body politic as a whole and must be able to canvass it promptly and efficiently as a whole for the majority will, without being subjected to delays, obstructions, and disintegrating efforts by

8. For brief reviews of the economic measures and problems see HANSEN, *AMERICA'S ROLE IN THE WORLD ECONOMY* (1945); BIDWELL, *A COMMERCIAL POLICY FOR THE UNITED NATIONS* (1945).

9. "Every government in the world doubts the ability of the United States to help organize the coming victory, because all know that the Constitution of the United States contains a fatal defect. They know that, so far as constructive effort to build a better world goes, our Government is deadlocked within itself by a division of the power to make and execute a foreign policy between the President and the Senate. They know that the constructive plans of the Executive are doomed to be perpetually paralyzed by a self-assertive minority in the Senate." Testimony of Professor Denna Fleming, *Judiciary Committee Hearings* at 67; quoted with approval in the Report of the Committee, H. R. REP. No. 2061, 78th Cong., 2d Sess. (1944) 4. It is the principal purpose of this article to show that there is a perfectly constitutional alternative to this feared deadlock between the President and the Senate.

minorities who conceive their interests to be different from the interests of the rest of the nation. One of the prime purposes for which this nation was established was to make it "one" ¹⁰ with respect to the rest of the world; the causal factors which were urgent 150 years ago are obviously reinforced beyond all gainsaying today. The robot bomb and economic depression, like time, wait for no nation and can strike any part of the United States with equal ease. A leisurely diplomacy of inaction and of deference to dissident minority interests supposedly characteristic of past eras when economic and political change proceeded at a slower pace and the twin ocean barriers gave us an effortless security is no longer capable, if it ever was, of securing the interests of the United States.

The principal instrument by which the United States can, and must, cooperate with other governments in that total institutional process of reciprocities and counter-reciprocities which we call "foreign affairs" or "foreign relations" is, of course, the *agreement*, in all its many manifestations. It is in agreements between the member governments that all of the proposed new international organizations must find their legal bases, powers, responsibilities, and operating procedures.¹¹ If the United States is to attain the goals of its foreign policy, it must, therefore, have efficient, flexible, and democratic procedures, responsible to the majority will, and to the whole nation, for the making, modification, and abrogation ¹² of international agreements. The executive officers of the United States must be able to act promptly and, hence, must be able to ascertain promptly that their action will be supported and implemented by the other branches of the government when that action corresponds with the majority will of the nation. Other governments must know, if they are to be willing to undertake indispensable joint commitments, that the United States can so act to implement integrated and responsible policy.

It is the thesis of this article, not at all novel, that the constitutional practice of the United States, hallowed by 150 years of tradition, does

10. See CORWIN, *THE PRESIDENT*, at 201 *et seq.*; CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917) 1 *et seq.* and citations.

11. On the exceptional importance of the agreement in international law see HARVARD RESEARCH, *LAW OF TREATIES*, *passim*.

12. The necessity of adequate procedures for the easy abrogation of international agreements is developed in Section VI *infra*. Any attempt to endow the configuration of international arrangements existing at any given time with a delusive immortality—however appealing in a period of war-engendered uncertainties—can only result in replacing orderly, regular adjustment with an uneasy stalemate, punctuated by violent unilateral changes. On this subject see generally DUNN, *PEACEFUL CHANGE* (1937); Mitrany, *Territorial Revision and Article 19 of the League Covenant* (1935) 14 *INTERNATIONAL AFFAIRS* 834; BRIERLY, *THE LAW OF NATIONS* (2d ed. 1936) 69-71, 201-8; NEW FABIAN RESEARCH BUREAU, *REVISION OF TREATIES* (1932).

make available all the necessary procedures.¹³ The wise statesmen who drafted the Constitution of the United States not only gave the President a *permissive* power, "with the advice and consent of the Senate," "to make treaties, provided two-thirds of the Senators present concur,"¹⁴ but they also gave both to the President and to the whole Congress broad powers of control over the external relations of the Government which are meaningless if they do not include the instrumental powers, first, to authorize the making of intergovernmental agreements and, secondly, to make these agreements the law of the land.¹⁵ Throughout our national history, these broad grants to the President and the Congress have, furthermore, been in fact interpreted, by all branches of the Government, in hundreds of instances, to include such instrumental powers. The result is that our constitutional law today makes available two parallel and completely interchangeable procedures, wholly applicable to the same subject matters and of identical domestic and international legal consequences, for the consummation of intergovernmental agreements. In addition to the treaty-making procedure, which may—as the nation has found from bitter experience—be subjected to minority control, there is what may be called an "agreement-making procedure," which may operate either under the combined powers of the Congress and the President or in some instances under the powers of the President alone. The practices of successive administrations, supported by the Congress and by numerous court decisions, have for all practical purposes made the Congressional-Executive agreement authorized or sanctioned by both houses of Congress interchangeable with the agreements ratified under the treaty clause by two-thirds of the Senate. The same decisive authorities have likewise made agreements negotiated by the President, on his own responsibility and within the scope of his own constitutional powers, appropriate instruments for handling many important aspects of our foreign relations.¹⁶ Initial choice of the procedure to be followed for securing validation of any particular intergovernmental agreement lies with the President since it is constitutional practice unquestioned since Washington's day that the President alone

13. For the lack of novelty in this thesis see CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944); McCURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* (1941); Wright, *The United States and International Agreements* (1944) 38 AM. J. INT. L. 341.

The present writers have drawn freely from the existing literature on this subject. They are especially indebted to the writings of Professor Corwin, Mr. McClure, Professor Quincy Wright and Mr. David Levitan. Other acknowledgments appear in appropriate places in the text.

The writers are also indebted to the libraries of the University of Chicago and Duke University for the loan of unpublished Ph.D. dissertations.

14. U. S. CONST. ART. II, § 2, PAR. 2.

15. For elaboration of this point see *infra*, SECTION III.

16. See *infra*, SECTIONS III, IV AND VI.

has the power to propose or dispose in the actual conduct of negotiations with other governments.¹⁷ When a specific agreement is submitted to the Congress for approval or implementation, the Congress may of course question the procedure by which the President seeks validation of the agreement, but if the Congress is to act rationally—that is, appropriately to secure the best long-term interests of the whole nation—it should shape its action in terms of the policy issues involved in the specific agreement and not in terms of some misleading and unhistorical notion that the treaty-making procedure is the exclusive mode of making important international agreements under our Constitution.

This suggestion that the Constitution of the United States affords interchangeable procedures for effecting international agreements meets, it must be admitted, with a resistance that is difficult to understand in view of the historical record and of this nation's traditional preference for democracy.¹⁸ Some resistance comes from those who genuinely favor democratic, majority control of our foreign affairs but who, confused about a supposed exclusiveness of the treaty-making clause, think that a constitutional amendment is the only way out.¹⁹ The chief resistance comes, however, from those who explicitly favor minority control of foreign affairs because they fear what majority control may be able to achieve in an integrated, responsible foreign policy. Sometimes the dominant theme of resistance is mere defense of Senatorial prerogative, upon an assumption often none too unconscious that the safety of the nation and the sanctity of the Constitution would be imperiled if one-third of the Senate could not dictate the nation's foreign policy. At other times the theme is, more bluntly, that there are special minority interests in the country that must be given a delusive protection however much the interests of the whole nation, including the long-term interests of all its minorities, may suffer. The argument, whatever its theme in policy, is always bolstered by a legalistic attempt to find in the Constitution, because of a supposed latent

17. See *infra*, Section II, at pp. 206–10.

18. See GIBSON, *THE ROAD TO FOREIGN POLICY* (1944) c. 12; Barnes, Book Review, *THE PROGRESSIVE*, March 20, 1944, p. 10; see also the articles by Professor Borchard cited *infra* notes 21–3.

19. Restrictive interpretations of the proper scope of executive agreements are given, for example, in Morford, *For the Constitutional Amendment as to the Ratification of Treaties* (1944) 30 A. B. A. J. 605; COLEGROVE, *THE AMERICAN SENATE AND WORLD PEACE* (1944) 31, 105, 110; Editorials, *N. Y. Times*, April 17, 1944, p. 22, col. 1, *N. Y. Herald Tribune*, April 17, 1944, p. 14, col. 1, *N. Y. Times*, May 22, 1944, p. 18, col. 2. These writers favor a constitutional amendment permitting approval of treaties by majority vote of both houses. The present impracticality of this suggestion is demonstrated by Professor Borchard in *Executive Agreements*, at 639. The public press of February 27, 1945, carried the story that the Senate Judiciary Committee has foreclosed consideration of all proposed constitutional amendments, specifically including this one, for the duration of the war.

intention of some of its Framers, unstated limitations upon the powers of the whole Congress and the President. The most complete statement of the case for retention of the minority veto and the most complete revelations of the unpersuasiveness of the arguments by which it is sought to be sustained have come in a series of recent articles by Professor Edwin Borchard.²⁰

Writing in the September issue of the *Yale Law Journal*²¹ and the September-October issue of the *Lawyers Guild Review*,²² Professor Borchard has labored valiantly to demonstrate "the inherent unimportance and minor character" of the "executive agreement" and has sought to prove that important international obligations can be contracted only by utilization of the treaty-making power. Invoking a vague distinction from the writings of an eighteenth-century Swiss "natural-law jurist and positivist [sic], Emmerich de Vattel," he first attempts to construct a restrictive theory of Congressional and executive powers from the one brief and ambiguous phrase of the Constitution about the making of treaties and emphatically insists not only that the President has no independent powers to consummate important international agreements on his own but also that "there is no constitutional warrant whatever for the suggestion that the President has an option to submit [important compacts] either to the Senate as a treaty . . . or to the Congress for majority approval." He next compresses all executive agreements into one category to find that "the executive agreement" as "a general substitute for the treaty" is subject to "many objections": such agreements, he alleges, are "an evasion of the Constitution," "dishonest and dangerous to the entire Constitution and to law"; they contribute to the "recent unprecedented inflation of executive power" and "permit the President to involve the country in secret agreements"; they are of uncertain legal effect and duration and are terminable "unilaterally" "without incurring the charge of treaty violation"; they are "unsafe for the United States or any foreign country" "since, if congressionally approved, they can be congressionally disapproved at any time"; and, finally, not being

20. In deference to the high motives and to the public good will of Professor Borchard we yield to none. It is only because the problem on which he writes is of such moment and because his influence is so great that we single out his writings for the detailed examination that follows. In recent hearings before the House Committee on the Judiciary, the question was asked if anybody opposed a constitutional amendment to permit the Congress, rather than two-thirds of the Senate, to confirm treaties. Congressman Kefauver replied: "The chief oppositionist whom I know of outside the Government is Dr. Edwin Borchard, who is professor of international law at Harvard [sic]." *Judiciary Committee Hearings* at 33.

21. Borchard, *Shall the Executive Agreement Replace the Treaty?* (1944) 53 *YALE L. J.* 664 (herein cited as Borchard, *Executive Agreements*). See also the Editorial Comment under the same title in (1944) 38 *AM. J. INT. L.* 637.

22. Borchard, Book Review (1944) 4 *LAWYERS GUILD REV.* 59. This repeats, with considerably less qualification, many of the arguments made in the *Yale Law Journal*.

expressly mentioned in the Constitution, they "do not have the constitutional dignity and force of a treaty." The suggestion that the two-thirds vote required for the Senate's approval of a treaty is undemocratic and hampers the integration of a responsible foreign policy for the whole nation Professor Borchard finds completely unpersuasive: "a treaty should be convincing enough to command a two-thirds vote," and "a unanimous vote of a jury" is required to "hang capital offenders." For a contrapuntal theme, in which the House of Representatives appears as the new villain in the piece, he suggests that reliance upon a majority vote of both houses of Congress for validating international agreements might remove debate and voting from their present allegedly non-partisan level and plunge them into the turmoil of politics. Finally, Professor Borchard admonishes the defenders of executive agreements that the only "lawful" means of terminating minority control is through a formal amendment, changing the treaty-making provisions of the Constitution.

Writing in the November issue of the *American Bar Association Journal*²³ Professor Borchard completes the circle of advocacy of minority control by arguing against amendment of the Constitution to permit treaties to be ratified by majority vote of both houses. His principal points are that "the desires of small states or states with special interests" deserve "protection" against agreements "concluded" by mere majority and that "the unprecedented inflation of the executive power is a strong reason for retaining the decisive requirement of the two-thirds rule." Reiterating his assertion that the participation of the House of Representatives might make more difficult the consummation of international compacts, Professor Borchard also, somewhat inconsistently, finds that "it is not possible to prove that the senatorial check has not on the whole operated to the country's advantage." To quench the last possible hope of reform, he points out realistically that, regardless of its merits, the proposed amendments would never be approved by two-thirds of the Senate and that it is probably undesirable, in light of the complex problems now confronting Congress, to submit so important a proposal at this time.²⁴

23. Borchard, *Against the Proposed Amendment As to the Ratification of Treaties* (1944) 30 A. B. A. J. 608. See also Borchard, *The Two-Thirds Rule as to Treaties: A Change Opposed* (1945) 3 ECON. COUNCIL PAPERS, No. 8.

24. It is not necessary in order to trace the development of a completely adequate, and even preferable, alternative to the treaty-making procedure to establish the need for a constitutional amendment. The present writers have no difficulty, however, in agreeing with Professor Denna Fleming that in the long run "it will be infinitely better to have a clean, swift amendment of the Constitution by an act of the national will. Amendment by usage leaves us subject to the constant danger that a jealous Senate will compel the submission of some great international compact to the obstruction of its minorities and thus invite a final national calamity." *Judiciary Committee Hearings* at 69. Cf. Josephus Daniels, *Judiciary Committee Hearings* at 106: "Even if it did not lie in the power of one-third of the

It was some sixty years ago that Mr. Justice Holmes reaffirmed ancient wisdom in suggesting that the "secret root[s]" from which legal theories draw "all the juices of life" are "considerations of what is expedient for the community concerned," "moral and political theories," "institutions of public policy," "even . . . prejudices."²⁵ Many commentators, including notably Professor James Bradley Thayer, have pointed out that these factors have a special importance in the field of constitutional law, where theories of jurisprudence are inextricably entwined with "statecraft, and with the political problems of our great and complex national life."²⁶ Professor Borchard, commenting that "necessity knows no law," has sought summarily to dispose of a book by a "distinguished author" who "would have us believe that it is so important that the United States join an international organization to preserve the peace—he assumes this to be the goal of an international organization—that we must abandon the constitutional rule providing for consent of two-thirds of the Senate to ratify treaties."²⁷ He has also urged that those who point out that our constitutional practice has created an effective alternative to the treaty-making procedure are motivated by the fear that a minority of the Senate may "prevent the association of the United States with a projected international organization, of a character still unknown."²⁸ He has further characterized as "subversive propaganda" the "fashion to extol the executive agreement as an exemplification of democracy as opposed to the so-called undemocratic requirement of a two-thirds vote in the Senate."²⁹

The major policy premise from which Professor Borchard's own legal arguments stem is not difficult to ascertain. He makes it completely articulate. It is a strong conviction that the United States should abjure participation in international political organizations and retire beyond the Jericho-like walls of his own version of the nineteenth century juristic conception of neutrality. The opening and concluding paragraphs of his article in the September *Yale Law Journal*—characterizing the Treaty of Versailles as "a declaration of war," referring to the "projected international organization, of a character still unknown," and applauding Harry Elmer Barnes' encomium of "the

Senators to defeat [the coming treaty of peace], I should still favor changing the Constitution because the present policy is undemocratic and may in the future, as in the past, thwart the will of the American people. As both Houses of Congress must unite on legislation of the highest importance, and both have equal voice in declaring war, both ought to be equal in declaring and insuring peace by a majority vote of both."

25. HOLMES, *THE COMMON LAW* (1882) 35, 1.

26. 1 THAYER, *CASES ON CONSTITUTIONAL LAW* (1895) v; see also FRANEFURTER, *THE COMMERCE CLAUSE* (1937) 1-10.

27. Borchard, Book Review (1944) 4 *LAWYERS GUILD REV.* 59.

28. Borchard, *Executive Agreements*, at 665.

29. Borchard, *Extraterritorial Confiscations* (1942) 36 *AM. J. INT. L.* 275, 281.

Senate's treaty power" as "probably the last remaining bulwark of our national safety"—indicate that at least one reason for his opposition to the use of procedures other than the treaty procedure for consummating international agreements is the thought that retention of minority veto control may again produce a condition of stalemate, permitting once more a triumph of the statesmanship of withdrawal. This conclusion is further substantiated by his recent article on *Flaws in Post-War Peace Plans*³⁰ in which he takes the position that "peace enforcement" among nations is a contradiction in terms, "at war with the fundamental facts of international life and with the theory of international law and relations," because "sovereign nations," "legally equal," "can not have, or be coerced by, any centralized superior."³¹

30. Borchard, *Flaws in Post-War Peace Plans* (1944) 38 AM. J. INT. L. 284. See also Borchard, *The Place of Law and Courts in International Relations* (1943) 37 AM. J. INT. L. 46; Borchard, *War, Neutrality and Non-Belligerency* (1941) 35 AM. J. INT. L. 618, 622; Borchard, *Book Review* (1935) 29 AM. J. INT. L. 717.

31. In making this explicit reference to Professor Borchard's policy preconceptions, it is not our purpose to suggest that interpreters who do not share these preconceptions may not honestly come to the same legal conclusions. The variables that may produce a legal belief or an interpretation of the Constitution are no less numerous and heterogeneous than those that produce policy preconceptions. (See Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest* (1943) 52 YALE L. J. 203, 239.) It is now common knowledge, however, that policy preconceptions are among the most important variables that predispose legal conclusions and that every interpreter (Professor Borchard and the present writers not excluded) responds to the words and practices of the Constitution with his total personality, which includes both his view of world society and his conception of the role of his government in that society. It is for this reason that we think it relevant to present a fairly comprehensive summary, and criticism, of Professor Borchard's more general views. This summary and criticism will also serve the purpose of making completely explicit our own policy preconceptions.

Professor Borchard's more general views may be summarized thus: (1) "The needs, demands and inter-State relations of nations are relatively few and more stable [than within nation-States!] and require no constant readjustment." (37 AM. J. INT. L. at 52.) The "cold facts of political life" disclose "a marked conflict of interests, political, economic and social" between nations "which admits of little hope that international law, which depends so largely on mutual respect and trust, will soon be restored to its nineteenth century influence and prestige." (*Id.* at 50.) (2) There is little, it appears, that international organization and law can do to preserve peace. The "weakness of international law" is that "it deals with so-called sovereign, independent States." It "presupposes a constellation of so-called independent States which are not bound to subordinate themselves to any central authority and, apart from the general rules of customary law, are not bound at all except for their own agreement." (*Id.* at 51, 48.) (3) International organization must eschew all use of force or sanctions. Force or sanctions cannot be imposed without a "centralized superior." "If there were a superior, it would not be international law; and so long as States are legally equal, as the recent resolutions admit, there can be no superior authority." States "legally equal" cannot be coerced. The methods of international law must be "consultative, deliberative, recommendatory, peaceful." (38 AM. J. INT. L. at 286.) (4) An identification of "preservation of peace with the maintenance of the *status quo*" and "the veneration of the *status quo*, backed by coercion" is what "motivates the practice of intervention, now common to many nations, in spite of the lip-service occasionally paid to non-intervention."

For exploring in some detail the issues of law and policy thus joined, the subsequent Sections of this article will proceed in the following order:

The "opprobrious epithet 'aggressor' " is a term "of uncertain meaning, but applied selectively to those particular disturbers of the *status quo* whom the dominant states happen to dislike." (*Id.* at 286-7.) (5) Statesmen should "confine attention to those economic problems, like food, oil and other raw materials, transport, communications, trade barriers, currency stabilization, credits, and loans and investments, which lie close to the national lifeline" and "postpone the question of any larger political organization until economic cooperation is established, when nations are more likely to seek it instead of having it imposed." (*Id.* at 289.) A "new atmosphere of cooperation, of congeniality to voluntary surrenders of national prerogatives, must be created" which is "utterly inconsistent with the demand for group-force for sanctions against 'aggressors' or disturbers of the *status quo*." (37 AM. J. INT. L. at 51.) (6) "Collective security" is an "unachievable rainbow" the pursuit of which "has produced an unprecedented assault on international law and helped to make international relations well-nigh hopeless." "Self-interest can be relied on to induce hesitation in embarking upon the suicidal recourse to war, if tolerable alternatives are available." (!) (38 AM. J. INT. L. at 289.)

It is interesting, by way of criticism, to note in these attitudes: the underestimation of the contemporary interdependence of nation-States; the assumption that international "law" is some unchangeable absolute inconsistent with some unchangeable "sovereignty" (though a sovereignty curiously modifiable by "custom" and "agreement"); the strange deduction from the "legal equality" of States that it is illegal for them to organize their use of coercion; the suggestion that there is in the nature of things a difference in the procedures available to the contemporary nation-State and those available to the organizations of an international community; the attempt to remove "morality" from international law and relations; the neo-Marxian explanation of the causes of international conflict; the denial to international organization of one of man's principal aims in all of his organizations—security; and the hope that even peoples indoctrinated by the fascist ideologies can be induced by an "atmosphere of cooperation" to adopt self-restraint! One might as well argue that men in a nation-State community are not interdependent, that "law" is inconsistent with "liberty," that the "legal equality" of men before legal institutions prevents them from using their institutions to prevent murder and robbery, that the character of men differs when an observer's perspective is shifted from their national to their international organizations, that national "law" created to secure men's interests has nothing to do with the "morality" that summarizes their interests, that men in any given geographical area should not establish political institutions before they have ordered all their economic and other affairs, and that, in any event, the use of force to keep down murder and robbery is not appropriate because quiet talk and an atmosphere of cooperation will induce self-restraint. The difference between the potentialities of national organization and of international organization is certainly one of degree only, dependent upon the extent of the actual interdependence of peoples and their consciousness of that interdependence.

It is improbable that the prime ministers of those traditionally neutral countries, Holland, Norway, and Denmark, or of Belgium, which shed its alliance with France in 1938 to return to pre-1914 neutrality, would subscribe to Professor Borchard's statement of first principles. See generally GATHORNE-HARDY, *A SHORT HISTORY OF INTERNATIONAL AFFAIRS: 1920-1939* (3d rev. ed. 1942) 420-1, 440-99; HENDERSON, *FAILURE OF A MISSION* (1939); WELLES, *THE TIME FOR DECISION* (1944) 89-120; HAMBRO, *HOW TO WIN THE PEACE* (1942) pt. 2; DUNN, *PEACEFUL CHANGE* (1937) cc. 1-3; ROBBINS, *THE ECONOMIC CAUSES OF WAR* (1939); Viner, *The Economic Problem* in HUSZAR (ed.) *NEW PERSPECTIVES ON PEACE* (1944) 85; CLARK, *A PLACE IN THE SUN* (1935); STALEY, *WAR AND THE PRIVATE INVESTOR* (1935); RAUSCHNING, *THE VOICE OF DESTRUCTION* (1940); Jessup, *Book Review* (1937) 37 COL. L. REV. 1042.

First, an effort will be made to clarify the conventional taxonomy of the different agreements used in the United States' diplomatic practice and to indicate the one available criterion that the facts will sustain for distinguishing between the different agreements permissible under our constitutional practice.³²

Second, the vague suggestions that the treaty-making clause is exclusive and that executive agreements must be confined to matters inherently unimportant will be refuted, and some indication will be made of the broad constitutional powers of the Congress and the President, no less effective or comprehensive than those of the President and the Senate, to authorize the making of international agreements and to make these agreements the law of the land.³³

Third, the full extent to which Congressional-Executive and Presidential agreements have become interchangeable with the treaty in the actual diplomatic practice of the United States will be described and it will be shown that there are no persuasive legal or policy reasons why interchangeability should not be extended to the few remaining problems upon which it has not yet been fully developed.³⁴

Fourth, some important examples of amendment of the Constitution of the United States by usage will be described for the purpose of showing that, if the practice of using Congressional-Executive and Presidential agreements interchangeably with the treaty is in fact a development by usage and not within the original contemplation of the Framers of the Constitution, it is a development not at all unique, but rather within the best traditions of our history.³⁵

Fifth, a comparison of the legal consequences which courts and other governmental officials attach to Congressional-Executive and Presidential agreements and to treaties will be made, and it will be shown that there are no important differences between these classes of agreements in binding effect or duration at either domestic or international law.³⁶

Sixth, the reasons that are alleged to have motivated the original adoption of the treaty-making procedure will be explored and their contemporary relevance appraised; the record of the Senate and the effect of the omnipresent threat of obstructionist tactics by its minority in thwarting the will of the majority and the national interest will be examined, and a brief description will be offered of the tactics that have been used, and are still available for use, by an intransigent minority. Finally, the suggestion that it is not undemocratic to require a two-

32. Section II, pp. 195-210.

33. Section III, pp. 211-61.

34. Section IV, pp. 261-89.

35. Section V, pp. 290-306.

36. Section VI, pp. 307-51.

thirds vote for the approval of important international agreements will be made the subject of at least mild wonder.³⁷

Seventh, and last, some indication will be made of how Congressional-Executive and Presidential agreements may be used, in thorough consonance with our best constitutional traditions, to meet certain of the more urgent problems of the post-war world, if the minority controlled treaty-making procedure should for any reason become inadequate to meet the responsibilities of that world.³⁸

II. THE INSTRUMENTS OF INTERNATIONAL AGREEMENT USED IN AMERICAN DIPLOMATIC PRACTICE*

Much of the misunderstanding that prevails in the contemporary discussion of treaties and executive agreements is caused by simple verbal confusion that obscures the relevant facts and policies. Writers and speakers too often attempt, on the one hand, to make distinctions between allegedly different kinds of international agreements by using ill-defined, or even unspecified, criteria that neither distinguish nor suggest any legal or policy bases for distinction. Just as often these same writers and speakers fail, on the other hand, to make certain necessary distinctions between the very different steps, or governmental activities, that are involved in the total process of "making" an international agreement and, hence, fail also to make necessary distinctions between the sometimes very different, appropriate constitutional bases for each of the different steps involved in the total process.

Despite vague assertions that there is a difference in the international obligation of treaties and executive agreements¹ and despite strenuous efforts to find a "true" distinction between the two types of agreements under our Constitution in the words of that great "natural-law jurist and positivist" Vattel,² it seems clear that the practices

37. Section VII. (To be published in a subsequent issue.)

38. Section VIII. (To be published in a subsequent issue.)

*We have been assisted in preparing this Section by Catudal, *Executive Agreements: A Supplement to the Treaty-Making Procedure* (1942) 10 GEO. WASH. L. REV. 653 (herein cited as Catudal, *Executive Agreements*).

1. See Borchard, *Executive Agreements*, at 678; *Commerce Committee Hearings* at 147, 152, 155. These suggestions stem from the double assumption that executive agreements upon important matters are not valid under the United States' constitution and that the practices and doctrine of international law require other governments to know this invalidity. For discussion of the latter point see *infra*, Section VI.

2. Borchard, *Executive Agreements*, at 668. This is now a common effort of writers and speakers. See *Commerce Committee Hearings* at 209; Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?* (1936) 3 U. OF CHI. L. REV. 453. For discussion see *infra*, Section III.

and doctrines of international law neither offer any criteria for distinguishing between treaties and executive agreements nor attach to such a distinction any differences in legal consequences. Indeed, it appears on good authority not only that international law does not make this particular distinction, but that it makes no distinction of consequence between any of the agreements in common use in international intercourse. The *Harvard Research in International Law*³ puts both points succinctly in its conclusions that "the distinction between so-called 'executive agreements' and 'treaties' is purely a constitutional one and has no international significance"⁴ and that "there is no rule of international law and no definite usage which determines what shall be the essential constituent elements of a 'treaty' or which lays down any tests or criteria by which a 'treaty' may be distinguished from other international instruments such as conventions, protocols, arrangements, declarations, etc."⁵ Both in diplomacy and in the decisions of international and domestic tribunals the brief, obscure suggestion of Christian Wolff, popularized by Vattel and copied without clarification by a few other early jurists,⁶ that there is some kind of a fundamental distinction between the subject matter of treaties and the subject matter of other "agreements" has long been discarded. Thus, the *Harvard Research* demonstrates⁷ that the titles—"covenant," "agreement," "act," "arrangement," "protocol," "statute," "pact," "declaration"—are used interchangeably with, and more often in the conduct of international relations than,⁸ the erstwhile terms of art, "treaty" and "convention." Of the treaties and other international acts to which the United States was a party and which were in force on December 21, 1932, "123 were 'treaties,' 208 were 'conventions,' 102 were 'agreements' (many of them being in the form of exchanges of notes), 55 were 'arrangements' (many of which were also in the form of

3. RESEARCH IN INTERNATIONAL LAW OF THE HARVARD LAW SCHOOL, LAW OF TREATIES: DRAFT CONVENTION, WITH COMMENT (1935) (published as 29 AM. J. INT. L. SUPP., No. 4, and herein cited as HARVARD RESEARCH, LAW OF TREATIES).

4. HARVARD RESEARCH, LAW OF TREATIES, at 697.

5. *Id.* at 687. See also *infra*, Section VI.

6. See 2 WOLFF, *JUS GENTIUM, METHODO SCIENTIFICA PERTRACTATUM* (1764; Carnegie Endowment ed. 1934) 191, 241-4; VATTEL, *LE DROIT DES GENS* (1758; Carnegie Endowment ed. 1916) bk. 2, c. 12, §§ 152, 153. But *cf. id.* at § 192; 1 GROTIUS, *LE DROIT DE LA GUERRE ET DE LA PAIX* (Barbeyrac's trans., 1768 ed.) 474.

Other jurists of the seventeenth and eighteenth centuries appear to have been less enamoured of a terminological taxonomy devoid of consequence. See Weinfeld, *supra* note 2, at 457-8.

7. HARVARD RESEARCH, LAW OF TREATIES, at 710-22; see also 1 HUDSON, *INTERNATIONAL LEGISLATION* (1931) xv; BRIGGS, *THE LAW OF NATIONS* (1942) 409-10; Basdevant, *La conclusion et la rédaction des traités* (1926) 15 RECUEIL DES COURS (Académie de Droit International) 542, 628 *et seq.*; note in HUDSON, *CASES ON INTERNATIONAL LAW* (2d ed. 1936) 843.

8. HARVARD RESEARCH, LAW OF TREATIES, at 711.

exchanges of notes), 35 were 'protocols,' 26 were actually designated by their own terms as 'exchanges of notes,' 8 as 'declarations,' 2 as 'general regulations,' 2 as 'general acts,' 1 as an 'additional act,' 1 as a '*modus-vivendi*,' and 1 as a 'compact.' " ⁹ Not uncommonly a single instrument may be referred to in its text and accompanying documents by three or four of these different titles.¹⁰ Such looseness in taxonomy raises a strong inference that in this domain taxonomy is unimportant, and it is in fact seldom disputed today that in the judgment of international law every validly consummated agreement between governments is binding, with legal consequences according to its terms, irrespective of its title.¹¹

Whatever distinction there is between treaties and executive agreements must be found, not in the practices and doctrines of international law, but in our own unique constitutional law.¹² By common practice under that law, the term "treaty" is used to refer to every agreement, whether written or verbal, important or unimportant, with one or more foreign nations which, prior to ratification by the President,¹³ receives the consent of two-thirds of the Senate,¹⁴ and which is

9. *Id.* at 712. Similarly, of "the principal international engagements to which Japan was a party in 1925, 18 were styled 'treaties,' 34 were 'conventions,' 11 were 'arrangements,' 11 were 'protocols,' 6 were 'declarations,' 2 were 'resolutions,' and there was 1 'accord,' 1 'recommendation,' 1 'decision,' and 1 'statute.' " *Ibid.*

See also *Report of the Committee of Experts for the Progressive Codification of International Law* (1926) 20 AM. J. INT. L. SUPP. 215; DEP'T OF STATE, TREATY INFORMATION BULL. No. 39, Supp. (1932). A similar free use of language has developed in the case of multilateral agreements. See 1 HUDSON, INTERNATIONAL LEGISLATION (1931) lxii-xcviii.

10. Thus the document entitled a "Pact of Cordial Collaboration," between Italy and Czechoslovakia, consummated July 5, 1924, is described in the preamble and caption as a "pact" and in its text variously as a "convention" or "treaty." (1924) 26 LEAGUE OF NATIONS, TREATY SERIES 21; see also the documents in (1920) 2 *id.* at 305; 3 MILLER, TREATIES, at 188.

11. Catudal, *Executive Agreements*, at 654-5. Professor Borchard apparently believes that "form" is one of the factors setting apart "treaties" from other agreements. Borchard, *Executive Agreements*, at 670. However, except for the possible substitution of a different caption, there is no ascertainable difference in the language, declared binding effect, or grammatical correctness of treaties and the various other classes of compacts listed in the text. Borchard cites the *Harvard Research Draft of the Law of Treaties* (page 691) as supporting his criterion. Examination of the Draft reveals only the statement that "treaties" must be incorporated in "written documents"; this practice is equally common, as the *Research* expressly recognizes, when it is decided to call the agreement by one of the other names in common usage. (Furthermore, the *Research* recognizes that there are numerous instances when oral agreements have been held binding by international tribunals without being distinguished from treaties. *Id.* at 689-90.) See also *infra*, Section VI.

12. HARVARD RESEARCH, LAW OF TREATIES, at 697-8.

13. "Ratification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives, and is commonly used to include the exchange of the documents embodying that confirmation." 1 OPPENHEIM, INTERNATIONAL LAW (5th ed., Lauterpacht, 1937) 711. Under American constitutional law and practice, the President has the option of deciding whether or not to ratify a treaty after Senatorial

never submitted for approval to the House of Representatives.¹⁶ The term "executive agreement,"¹⁶ on the other hand, is used both colloquially and in scholarly and governmental writings as a convenient catch-all to subsume all other international agreements intended to bind the United States and another government.¹⁷ Despite many attempts to make distinctions between treaties and executive agreements in terms of form,¹⁸ subject matter,¹⁹ and legal and practical consequences,²⁰ and however surprising or even shocking the conclusion

consent has been given. U. S. CONST. Art. II, § 2. Many executive agreements are also subject to ratification before becoming effective. See *infra*, pp. 320-1.

14. Thus the *modus vivendi* concluded April 18, 1892, limiting the jurisdictional rights of the United States in the Bering Sea and its power to control sealing pending the decision of an international arbitral tribunal, received Senatorial consent under Article II, Section 2, the "treaty clause" of the Constitution. See 1 MALLOY, TREATIES, at 760.

The compact between the United States and 14 Latin American nations signed in 1940 was entitled the "Inter-American Coffee Agreement." As, unlike most recent commodity agreements, it was referred to the Senate for approval before ratification, it is technically speaking a treaty. See (1940) 3 DEP'T OF STATE BULL., No. 75, p. 482; 76 Treasury Decisions 293 (1940).

This definition accords with that of Dr. Hunter Miller, former Director of the Treaty Division of the Department of State (see 1 MILLER, TREATIES, at 9) and, as this article is designed to show, is the only definition that the facts of our constitutional practice will sustain.

15. The limiting clause is inserted to differentiate those agreements with foreign nations which are submitted for approval to both houses of Congress and which happen to be approved in the Senate by a two-thirds vote. Under Article II, Section 2, of the Constitution such agreements are not "treaties."

16. Actually there are few documents which bear the title "executive agreement." See Catudal, *Executive Agreements*, at 655. But this phrase is used by the Department of State as the title of the series of publications listing important international agreements, negotiated subsequent to 1930, which did not receive Senatorial consent under Article II, Section 2, prior to ratification. Sometimes Congress has used the term "treaty" in statutes when it actually sought to describe agreements to be ratified by the President without referral to the Senate or Congress. See REV. STAT. § 398 (1878), as amended by 48 STAT. 943 (1934), 5 U. S. C. § 372 (1940).

17. The limiting clause is inserted to exclude exchanges of notes regarded by the parties as but temporary declarations of policies—such as the Lansing-Ishii "Agreement" of 1917, which was termed by President Wilson a mere "understanding." N. Y. Times, July 11, 1919, p. 1, col. 5.

18. See Borchard, *Executive Agreements*, at 670, n. 23, and 671.

19. Professor Borchard, in *Commerce Committee Hearings* at 172, states that "the subject matter makes it a treaty," and stresses the "importance" of the subject matter. The subject matter of the particular agreement in question was the development and regulation of the mutual use of a river forming the boundary between this government and Canada. Earlier (at page 134) Professor Borchard had admitted, in an opinion introduced into the record, that Congress had "inherent power" to admit new states to the union or acquire new territory. It is not a little difficult to see why, if Congress could, with Canada willing, authorize an agreement to annex the whole of Canada, it cannot authorize an agreement that includes only the development and regulation of a boundary river!

For further discussion of this point, see *infra*, Section IV.

20. See *infra*, Section VI.

may be to any who have not examined the record, this common usage is the only distinction that the facts of our constitutional law and practice will sustain. As will be subsequently demonstrated in great detail, there are no significant criteria, under the Constitution of the United States or in the diplomatic practice of this government, by which the *genus* "treaty" can be distinguished from the *genus* "executive agreement," other than the single criterion of the procedure or authority by which the United States' consent to ratification is obtained. More explicitly, agreements with other governments, when consummated pursuant to Congressional authorization or when subsequently sanctioned by Congress, have the identical legal and practical consequences, both under the municipal law of the United States and at international law, as treaties, consented to by two-thirds of the Senate. Agreements with other governments made pursuant to the President's authority alone, when within the scope of his independent powers, have, furthermore, substantially the same status as treaties under both international law and the municipal law of the United States, except in some cases where there is contradictory legislation.²¹

In addition to the familiar efforts to confine the exercise of the President's independent agreement-making powers to matters of relative insignificance, the principal confusion injected into this simple picture comes from efforts to exclude from the domain of "executive agreements" all agreements with other governments effected by the President pursuant to the authorization or sanction of Congress. Whether consciously sought or not, the end result of this attempted exclusion of the most democratic procedure available to the Government for making international agreements is to pose to the people of the United States a strictly false choice—that is, a choice between non-exclusive alternatives: between treaties, on the one hand, which are subject to minority rejection, and Presidential agreements, on the other hand, which are feared as potential vehicles of dictatorial whim. There have even been vague and unsubstantiated suggestions that the excluded alternative, the negotiation of international agreements by the President pursuant to Congressional authority or sanction, is without constitutional basis.²² The justification proffered for this attitude seems

21. See *infra*, Section VI.

22. Witness Professor Borchard, in *Commerce Committee Hearings* at 153:

"There is nothing in the Constitution which provides that an executive agreement should be sent to Congress subject to the approval of the House and Senate. And I venture to maintain it is not an executive agreement. It is outside the powers of an agreement and it is not really an act within the power of Congress, because Congress has no power to determine what Canada should do in its own territory. It is beyond the power of both branches of the Government." Compare *id.* at 169, 171. He insists (at page 183) that "if it is a valid agreement," the President "doesn't have to submit it to Congress." He assumes (at pages 151 and 165) that an "executive agreement" must become "binding as of the date of signature." Elsewhere (at page 166) he appears to concede the power of Congress to *initiate* action

to be in terms of a semantic confusion that Congress cannot "make agreements," a confusion that infects even some writers in general favorably predisposed toward executive agreements. Thus, Mr. Levitan states: "No international agreement can be made 'under statutory authority.' Statutory authority may validate the international agreement internally but cannot be the legal basis for the international negotiation."²³ The origin of language of this kind seems to be a

but attempts to make a distinction between this and its power to approve agreements already negotiated: "The difference is that the approval is in violation of the Constitution. The Constitution provides for advice and consent of the Senate, and if you could submit a matter to the approval and advice of Congress instead of the Senate, you will have successfully evaded the two-thirds rule. . . . You can initiate certain action, but you cannot by majority ratify, because you conflict with the treaty-making power." (See similarly *id.* at 204.) Still a little later (at page 203), however, he makes a point of the fact that the document submitted to Congress was a "bill" and not a written agreement with another government and he seems to assume that a specific agreement must be before Congress for it to exercise its policy-making powers. Conditioning all of his remarks seems, further, to be an assumption that there is some kind of a physical limit on the powers of Congress. Thus, (at page 166) "I don't think the commerce clause could be stretched to build works in Canada. That could only be done by a treaty with Canada authorizing it. We couldn't authorize ourselves to build any part of the works in Canada," and (at page 167) "I believe the commerce clause can go so far as to authorize the construction of bridges up to the international boundary. It would not authorize the construction of a bridge on the Canadian side. . . ." and (at page 204) "This requires joint action, and that is beyond the power of Congress. That can only be done by an agreement, by a treaty. I don't believe you could draw an act directing the President even to make this kind of a treaty with Canada. I don't think you can do that."

It is difficult to take some of these comments seriously. One wonders whether Professor Borchard assumes that two-thirds of our Senate has the power to determine what Canada shall do. There would appear to be no greater difficulty, in so far as the "three-mile limit" is concerned, in having the whole of Congress, rather than a part of it, declare the policies to guide or sanction the President's conduct of negotiations with Canada to get Canada to do something or to permit us to do something within its borders. One wonders again where constitutional basis can be found for introducing a time element—valid before Presidential action, invalid after Presidential action—into Congress's powers to authorize or sanction international agreements within the scope of its competence. One wonders, finally, what absolute requires that an "executive agreement" must be binding immediately upon signature, why the Congress must have a specific agreement before it to exercise its policy making powers, and why only "treaties" in our unique constitutional sense are capable of securing the "joint" action of other countries.

23. Levitan, *Executive Agreements*, at 371. Curiously, Mr. Levitan himself points out that no distinction between treaties and other agreements is today recognized by writers on international law (*id.* at 370) and he nowhere suggests any constitutional reason why the authority of Congress cannot be "the legal basis for the international negotiation." Mr. Levitan also concludes on a note, strange for his premise of no Congressional authority, that "only international issues of which the domestic counterpart is within the range of Congressional authority can be dealt with satisfactorily by means of executive agreements." (*Id.* at 394-5.) "Executive agreements can be domestically validated," he continues, "as long as they deal with subjects within the legislative competence of Congress, for then Congress assures internal enforcement of the agreement." (*Id.* at 395.) The combination of these statements seems to assume some unstated difference in the authority that determines the domestic and the international validity of agreements.

statement by Professor John Bassett Moore (made in presenting the award for a prize essay) designed to show, not that Congress could not authorize agreements, but that there was not even any "delegation of power" involved in such authorization:²⁴

"In regard to what the author of the essay, following the phraseology so often employed, discusses under the head of 'congressional delegation of power to make international agreements,' I have long, indeed I may say always, been inclined to think that no 'delegation' of power whatever is involved in the matter. As Congress possesses no power whatever to make international agreements, it has no such power to delegate. All that Congress had done in the cases referred to is to exercise beforehand that part of the function belonging to it in the carrying out of a particular class of international agreements. Instead of waiting to legislate until an agreement has been concluded and then acting on the agreement specifically, Congress has merely adopted in advance general legislation under which agreements, falling within its terms, become effective immediately on their conclusion or their proclamation."²⁵

Elsewhere Mr. Levitan suggests that "with the exception of the part played by the Senate through its participation in treaty-making" the Congress serves only "as a mouth-piece of public opinion" which the President is legally free to disregard." (*Id.* at 373.) "It is important to bear in mind," he writes, "that Congressional initiative regarding foreign relations can never assume the position of control, but must remain in the nature of advice only. Because of the frequency with which Congressional advice is eventually acted upon by the President, it is easy to mistake the real nature of the respective roles of Executive and Legislature." (*Ibid.*, footnotes omitted.)

This is a somewhat quixotic use of the word "control." It is true that the Congress cannot force the President to undertake or continue specific intergovernmental negotiations. But neither can the Senate. On problems within the scope of its constitutional competence, however, the Congress can declare the policies which the President must follow in any negotiations that he does undertake. Its sanction for any disregard of these policies can be the withholding of its cooperation, in the matter of appropriations or implementing legislation, which may be indispensable to the performance of any agreement the President makes. Practically, the "control" of the whole Congress here would appear to be even greater than that of the Senate alone.

24. As will appear *infra* (Section III), Professor Moore's conclusion that there is no delegation of legislative power in these cases is correct for other reasons, and any notion that there is a delegation of such power lingers on largely because of a crude belief that "power" is some kind of a physical unit capable of manual transfer which once handed forth is forever gone. What happens is that the Congress never loses control but formulates a general policy that is to guide the President in certain negotiations and authorizes him to execute that policy with varying degrees of discretion. Additionally, it sometimes reserves the right to approve the particular agreement made before it is permitted to go into effect, or, alternatively, to disapprove the agreement within a stated period after its negotiation.

25. Moore, Remarks, reported in (1921) 60 PROC. AM. PHIL. SOC. xv-xvi. It is unfortunate that part of Professor Moore's language can bear the inference that Congress's only participation is in the "carrying out" of international agreements. His concluding reference to "general legislation" enabling agreements to "become effective immediately on their conclusion or their proclamation" seems more accurate. It is worth noting, however, that both

This suggestion that the Congress cannot "make agreements" involves an unnecessary and a deceptive reification of the total, complex process of "making" an international agreement. It is obvious that this total process, even on a minimal breakdown, includes a whole series of activities or steps, such as

- (a) the formulation of the policies that are to guide the conduct of negotiations,²⁶
- (b) the conduct of negotiations and the concluding of an agreement in accordance with the established policies,
- (c) the validation or approval of the agreement by the appropriate constitutional authority for making it the law of the land, and
- (d) the final utterance or ratification of the agreement, when required, as an international obligation of the United States.²⁷

It should be equally obvious that the appropriate constitutional bases

the "making" and the "performance" or "carrying out" of agreements are simply parts of the total process of intergovernmental reciprocity and that the important consideration, from the perspective of statesmanship, is this intergovernmental reciprocity—the anticipations which the conduct of each government reasonably creates in the other and the completeness and promptness with which these anticipations are fulfilled. If the action of one branch of the Government is required to "carry out" an agreement, there is all the more reason why it should be consulted in the "making" of the agreement. This is the core of meaning in the attempts to distinguish between different kinds of agreements in terms of the "obligation" they create. It is clear that in terms of constitutional "power" the President and the Senate can commit the United States Government to any obligation within the scope of the treaty-making power, that the President can commit it to any obligation within the scope of his independent powers, that the President and the Congress can commit it to any obligation within the scope of their combined powers, and that there is in fact a complete overlap between the first and third of these possibilities and considerable overlap between both of these and the second. The resolution of possible conflicts can be found only in the statesmanship and forbearance of the different parties. It should not be made at the expense of our own national interest and effective relations with other governments.

26. It is not intended by this order of presentation to suggest that the power to control policies, when located in the Congress or the Senate, must necessarily be exercised in advance of negotiations. Under our constitutional practice, the President may, if he chooses, negotiate in the first instance on his own responsibility and then come to the Congress or to the Senate for confirmation of his policies. The Congress or the Senate may confirm or disconfirm. In case of disconfirmation, the President is under no constitutional obligation, as practice is presently interpreted, to continue the negotiations. He may drop the whole matter. But, if he does continue the negotiations, he is, as we have seen, constrained, on penalty of losing indispensable cooperation, to follow the policies prescribed by the legislative body. The control of the Congress or of the Senate is thus a *negative* control. The whole history of the nation testifies, however, that it is an effective control with observable positive effects. See Part II, Section VII.

27. Professor Berdahl has suggested that "The function of managing the foreign relations may be classified into two distinct branches: (1) the power of intercourse, intercommunication, and negotiation; (2) the power of entering into formal or binding international compacts." BERDAHL, *WAR POWERS OF THE EXECUTIVE* (1920) 25.

It is believed that a still further breakdown is indispensable to clarity. As indicated in the text, the separate step of "ratification" is dispensed with in some cases.

for each of these different activities or steps in the total process may be different and that it is only by an unrealistic lumping of all of these activities into one unit of behavior, identified solely with the conduct of negotiations, that the Congress can be said to be excluded from participation in the process of "making" an international agreement. No one today doubts that the President has complete control of the actual conduct of negotiations in the making of all international agreements or that he is the appropriate authority to make final utterance of an agreement as the international obligation of the United States. The President has become "the sole mouthpiece of the nation in communication with foreign sovereignties."²⁸ It is completely unnecessary to conclude from this, however, that the Congress has no power to participate in the framing of policies to guide the conduct of negotiations or that it is an inappropriate body to validate agreements, negotiated by the President, as the law of the land. By constitutional usage, and as a matter of practical necessity, the Senate has no greater power than the whole Congress to participate in the conduct of negotiations with foreign governments. Yet no one concludes from this that the Senate has no power to participate in the making of international agreements. It is, likewise, true that the Constitution expressly makes international agreements validated by the treaty-making procedure the law of the land; yet the Supreme Court has found it unnecessary to conclude from this that the Congress and the President cannot give like effect to agreements on subject matters within their competence, and indeed has squarely held that both the Congress and the President have such power.²⁹ The fact is, of course, that under our Constitution, as interpreted since the beginning of the Government, the powers to formulate policies for the guidance of international negotiations and to make any agreements effected in accordance with these policies the law of the land are thoroughly divided among the President, the President and the Senate, and the whole Congress.³⁰

It is only, therefore, in terms of the power by which they are authorized and validated³¹ that international agreements can be distinguished under our Constitution. It is in these terms, furthermore, that distinctions must be kept clear if wise policy decisions are to be made.³² In terms of the location of this power, the following are the

28. Report of the Senate Foreign Relations Committee, SEN. DOC. NO. 56, 54th Cong., 2d Sess. (1897) 21. See also *Durand v. Hollins*, 8 Fed. Cas. No. 4,186, at 112 (C. C. S. D. N. Y. 1860); WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) § 12.

29. See *infra*, Section VI.

30. See *infra*, Section III. In the foregoing sentence and throughout, except where the context specifically indicates otherwise, the term "whole Congress" is used to include the President.

31. See *infra*, Sections III and VI.

32. One consequence of failing to keep these distinctions in mind at all times is illustrated by Professor Borchard's broadside condemnation of all "executive agreements,"

categories of international agreements which may be made by the Government of the United States:

(1) Treaties, *i.e.*, agreements to which, in accordance with the treaty-making clause, the Senate gives its "advice and consent"³³ by two-thirds majority, and which are never referred for formal approval to the House of Representatives.

(2) Congressional-Executive agreements, *i.e.*, agreements either (a) negotiated by the President or other executive officer pursuant to authority conferred in an act or joint resolution of both houses of Congress or in effectuation of a general policy enunciated in legislation, or (b) sanctioned by the Congress after the fact of negotiation.

The 23 reciprocal trade agreements³⁴ made under the Reciprocal Trade Act of 1934 and its successors³⁵ and the agreements for the annexation and incorporation into the United States of the Texas and Hawaiian Republics³⁶ are examples of agreements made pursuant to authority conferred by statute or joint resolution. The agreements made in the 1920s settling the claims of the United States for funds advanced to the Allies in the first World War were negotiated by the President pursuant to statute, but did not become effective until individually approved by Congress.³⁷ The reciprocity agreements made after the enactment of the Tariff Act of 1890³⁸ are examples of compacts which, although not authorized by specific provisions of a statute, were an appropriate means of effecting its stated purposes.³⁹

In the case of the United Nations Relief and Rehabilitation Administration, the agreement providing for the United States' membership and participation was submitted to the Congress after it had

including those subject to the policy control of the Congress, by creating imaginary horrors that could never be relevant to executive agreements other than those perfected under the exclusive control of the President. See Borchard, *Shall the Executive Agreement Replace the Treaty?* (1944) 38 AM. J. INT. L. 637, 641; Borchard, *Executive Agreements*, at 677-8.

33. The attenuation of the Senate's function as an advisory council to the President, the role contemplated by the draftsmen of the Constitution, is discussed *infra*, pp. 207-8.

34. The texts of the agreements are published in 77 Treasury Decisions 138 (1941); U. S. EXEC. AGREEM'T SER., Nos. 75 (1935), 82 (1935), 91 (1935), 149 (1938), 184 (1939), 216 (1940), 89 (1935), 102 (1936), 67 (1934), 165 (1939); Dep't of State, Press Release, Dec. 29, 1941; U. S. EXEC. AGREEM'T SER., Nos. 147 (1938), 133 (1938), 101 (1937), 97 (1936), 146 (1936), 92 (1936), 78 (1935), 86 (1935), 100 (1935), 95 (1936), 79 (1935), 90 (1936), 163 (1939), 164 (1938), 180 (1939). (The arrangement is in alphabetical order by countries with which agreements were made.)

35. 48 STAT. 943 (1934), 19 U. S. C. § 1351 (1940); 50 STAT. 24 (1937), 19 U. S. C. § 1352 (1940); 54 STAT. 107 (1940), 19 U. S. C. § 1352 (1940); 57 STAT. 125 (1943), 19 U. S. C. A. § 1351 (Supp. 1944).

36. See *infra*, pp. 263-4 and 266-7, respectively.

37. See *infra*, p. 278.

38. 26 STAT. 567 (1890); 26 STAT. 612 (1890).

39. See *infra*, pp. 273-4.

been negotiated.⁴⁰ Similarly, the Albanian reciprocity agreement of 1922 was validated after its negotiation by enactment of Section 317 of the Tariff Act of 1922.⁴¹

The sources of authority for these agreements are the numerous provisions of the Constitution vesting Congress with the power to legislate in various fields,⁴² and the "necessary and proper" clause, which permits effectuation of these explicitly granted functions by any appropriate means.⁴³

(3) Agreements made pursuant to authority conferred in an existing treaty and agreements in effectuation of a policy enunciated in a treaty.

Most of the numerous agreements authorized in this manner have provided for modification or extension of existing treaties.⁴⁴ Here the authority is derived from the treaty-making and the "necessary and proper" clauses.

(4) Presidential agreements, *i.e.*, agreements made by the President (a) pursuant to his explicitly granted authority as "the Executive" and as "Commander-in-Chief of the Army and Navy"⁴⁵ and (b) as "the sole organ of the nation in its external relations, and its sole representative with foreign nations."⁴⁶

Agreements made by virtue of the President's independent powers have dealt with a wide variety of problems. Some have been of minor significance; others were frankly intended to be nothing more than *modi vivendi*, pending consummation of a treaty or an agreement authorized by act of Congress. In many instances, however—such as the Boxer Protocol of 1900 or the British debt compact of 1927—these agreements have dealt with matters of great importance and have remained in effect for long periods of time.⁴⁷

(5) Agreements made by the President pursuant to overlapping authority, *i.e.*, where Congress authorizes agreements dealing with

40. See Pub. L. No. 267, 78th Cong., 2d Sess. (March 28, 1944); Briggs, *The UNRRA Agreement and Congress* (1944) 38 AM. J. INT. L. 650; COLEGROVE, *THE AMERICAN SENATE AND WORLD PEACE* (1944) 25-31.

41. 42 STAT. 944 (1922); re-enacted with minor alterations by 46 STAT. 704 (1930), 19 U. S. C. § 1001 (1940). See McCLORE, *EXECUTIVE AGREEMENTS*, at 176.

42. For further discussion see *infra*, Section III.

43. U. S. CONST. Art. I, § 8, cl. 18; the clause empowers Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers [vested in Congress by the other portions of Article I, Section 8] and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." (Emphasis supplied.)

44. For a description of certain agreements in this category see CRANDALL, *TREATIES*, at 117-9.

45. U. S. CONST. Art II, § 2, par. 1.

46. The statement was made by John Marshall while a member of the House of Representatives. 2 BENTON, *ABRIDGEMENT*, at 466. See also Report of the Senate Foreign Relations Committee, SEN. DOC. NO. 56, 54th Cong., 2d Sess. (1897) 21.

47. See *infra*, pp. 280-1 and 269, respectively.

questions which under the Constitution are also subject to independent Presidential control.

In the remainder of this article, agreements with foreign nations made under sources (1) and (3) will be referred to as "treaties." Agreements made by virtue of sources (2) and (5) will be referred to—when separate discussion of this category is appropriate—as "Congressional-Executive agreements."⁴⁸ Agreements made wholly under source (4) will be referred to as "Presidential agreements."⁴⁹ Where joint reference to the latter two categories is desired, the generic term "executive agreements" will be used.⁵⁰

The President as Leader. Whatever the source of the authority to make any particular agreement, it may bear emphasis that for all practical purposes the active role in its negotiation and ultimate consummation belongs to the President and his subordinates. The Senate or Congress as a whole can authorize or block, but cannot require, consummation of agreements; they can recommend the initiation of negotiations with other nations, but cannot compel their inauguration or continuance.

Thus, whether the instrument which emerges from the diplomatic process is placed in effect as a treaty or an agreement, its actual negotiation is conducted entirely under the President's control.⁵¹ In this respect, the expectations of the Framers have not been realized, and the procedures prescribed in the Constitution have been drastically altered, without a formal amendment. When it emerged from the Convention of 1787, the Constitution sought to give the Senate a measure of negative control over the process of negotiation by making its approval prerequisite to the appointment of "ambassadors, other public ministers and consuls."⁵² During Washington's first term, the practice developed of appointing special Presidential envoys to handle particularly delicate problems, without obtaining the consent of the Senate to such appointments.⁵³ Washington's example has been

48. The term has already been used in this sense in earlier portions of the text.

49. This terminology has been used by Professor Quincy Wright.

50. At some places, the generic terms "international agreement" or "international compact" will be used to refer collectively to agreements validated under any of the above five sources of constitutional power. These catch-all terms are used synonymously.

51. Where the agreement is negotiated pursuant to delegated Congressional authority, the legislative body may of course set limits beyond which the instrument may not go. But within the area of allowable discretion, choice of both policy and details belongs to the Executive.

52. U. S. CONST. Art. II, § 2, cl. 2.

53. In February 1791, President Washington informed the Senate that he had designated Gouverneur Morris to negotiate with the British regarding effectuation of certain terms of the Treaty of Peace and that he had sent Colonel David Humphreys to Madrid and Lisbon on a diplomatic mission. 1 RICHARDSON, MESSAGES, at 96-8. See also 1 BENTON, ABRIDGMENT, at 221-2; HAYDEN, THE SENATE AND TREATIES, 1789-1817 (1920) 31, 37, 59-61.

emulated by almost all his successors in office.⁵⁴ More important, it is clear the Framers anticipated that the Senate would normally function as an executive council, advising the President or his subordinates during the course of negotiations, as had been the case under the Articles of Confederation.⁵⁵ This proposal for continuous consultation or for any significant degree of advance consultation proved to be unworkable and was abandoned during the administration of George Washington.⁵⁶ The quadrupling of the size of the Senate since 1787 has been only one of many factors which has precluded revival of the

54. See WRISTON, *EXECUTIVE AGENTS IN AMERICAN FOREIGN RELATIONS* (1929); 2 HAYNES, *THE SENATE OF THE UNITED STATES* (1938) 590-6; CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917); CORWIN, *THE PRESIDENT*, at 230-2; WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) 328-34.

Despite the restrictions embodied in 35 STAT. 672 (1909), 22 U. S. C. § 31 (1940), and the interpretation of Attorney General Caleb Cushing that under the Constitution the consent of the Senate must be obtained to the consent of all officers having diplomatic functions, whatever their title or designation [7 OPS. ATT'Y GEN. 190, 192-3 (1855)], special agents appointed without such consent have frequently been given authority over-riding that of regularly designated ministers and have been officially referred to as possessing ambassadorial rank. See CORWIN, *THE PRESIDENT*, at 231, 410-1. See also note 60 *infra*.

55. As to the expectations of the draftsmen see C. C. Pinckney's remarks to the South Carolina ratifying convention, 4 ELLIOT, *DEBATES*, at 277-81; Tansill, *The Treaty-Making Powers of the Senate* (1924) 18 AM. J. INT. L. 459, 462; HENRY CABOT LODGE, *The Treaty-Making Powers of the Senate in A FIGHTING FRIGATE AND OTHER ESSAYS AND ADDRESSES* (1902) 219, 231-2. The Foreign Secretary of Congress under the Articles of Confederation was instructed to submit to Congress all correspondence regarding agreements and all drafts of treaties. See ROGERS, *THE AMERICAN SENATE* (1926) 58-9.

56. At the beginning of his first term Washington believed the Senate would regularly function as an advisory council to the President in the negotiation of treaties and that this sphere of its activities was to be differentiated from its general legislative functions. 11 WRITINGS OF WASHINGTON (Ford, ed., 1891) 415, 417-9. In the summer of 1789, Acting Secretary of State Jay and Secretary of War Knox appeared before the Senate to explain the circumstances under which the first treaties submitted to that body, the French Consular Convention and the Fort Harmar Indian agreements, had been negotiated. HAYDEN, *THE SENATE AND TREATIES, 1789-1817* (1920) 4-16. Later in 1789 Washington himself attended two executive sessions with General Knox to secure the advice of the Senate as to the terms of a proposed treaty with the Southern Indian tribes. *Id.* at 25-30. The constraint and tension which marked these sessions and the unwillingness of the Senators to discuss the merits of the proposed treaty in front of the President led Washington to remark: that he "would be damned if he ever went there again." 6 MEMOIRS OF JOHN QUINCY ADAMS (1875) 427; see also JOURNAL OF WILLIAM MACLAY (1927) 128. For 3 or 4 years thereafter Washington, although adhering to his declared intention not to appear before the Senate, transmitted reasonably complete information as to the general provisions of the treaty intended to be made in those cases when he submitted the nomination of the proposed envoy for confirmation. By 1794, when the negotiations for the important treaty with England were commenced, Washington had adopted the policy of giving the Senate only an indication of the contemplated scope of the agreement. See HAYDEN, *supra*, at 30-106. This practice was continued by Adams and Jefferson. See *id.* at cc. 6, 7. Thus the Senate's role was reduced from that of participating vicariously in the negotiation of treaties to that of exercising a right of giving or withholding consent to agreements, in whose making it had played no direct part.

original plan.⁵⁷ Occasionally, Presidents have sought to secure an advance expression of opinion from the Senate as to its views on a particular agreement; but the terms of such references have ordinarily permitted little more than a statement of support or disapprobation, without the opportunity to play a coordinate role in the actual devisal of terms.⁵⁸ But if the institution by the present administration of frequent conferences between State Department officials and leading members of the Senate and House foreign affairs committees on post-war international organization is almost unprecedented,⁵⁹ the delay in establishing so sensible a procedure is in considerable measure the result of the Senate's general past insistence that its "independence" would be jeopardized if representative members were associated with the Executive in the formulation of agreements.⁶⁰

Once an agreement or treaty has been signed and referred for consent, the legislative arm may, of course, exercise its undoubted power to modify or reject completely the President's proposal.⁶¹ But the

57. See also Part II, Section VII.

58. Thus in 1846 Polk obtained an advance declaration from the Senate approving the convention settling the Oregon boundary dispute with Great Britain; certainty of adoption seemed especially essential as the President wished to clear his diplomatic decks before precipitating war with Mexico. For this and other instances of advance Presidential consultation see CRANDALL, *TREATIES*, at 67-72; see also WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) 249-51; Fleming, *The Advice of the Senate in Treaty Making* (1930) 32 *CURRENT HISTORY* 1090-4.

59. Earlier Secretaries of State (e.g., John Hay) regularly consulted with individual Senators as to pending negotiations, but no attempt was made to establish regular machinery for such interchange of views. See WRIGHT, *loc. cit. supra* note 58.

60. Thus objection was made to the appointment of Senators Lodge and Underwood as delegates to the 1921 Conference on Limitation of Armaments and to the appointment of several Senators to the Commission which drafted the Treaty of Paris ending the Spanish-American War. See DANGERFIELD, *IN DEFENSE OF THE SENATE* (1933) 292; CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917) 66; CRANDALL, *TREATIES*, at 78; 2 GEORGE HOAR, *AUTOBIOGRAPHY OF SEVENTY YEARS* (1903) 50. The constitutional basis for these objections was the provision of Article I, Section 6, paragraph 2, that "no person holding any office under the United States shall be a member of either house during his continuance in office." This objection is invalid, however, as it has been authoritatively held that special Presidential envoys are not entitled to compensation and do not hold "office" under the Constitution. 23 *OPS. ATT'Y GEN.* 533 (Knox, 1901). See also CORWIN, *supra*, at 65-8; 4 *MOORE, DIGEST*, at 440. But see note 54 *supra*.

The present national administration has frequently appointed Senators and members of the House of Representatives as delegates to international conferences at which it was contemplated multilateral agreements would be adopted. This practice was followed with the 1933 London Economic Conference, the 1944 Bretton Woods Monetary Conference, the 1944 International Labor Organization Conference, and the 1945 San Francisco Conference of the United Nations.

61. The power of the Senate to alter treaties has an unquestionable constitutional foundation. See *Haver v. Yaker*, 9 Wall. 32, 35 (U. S. 1869); 5 MARSHALL, *LIFE OF GEORGE WASHINGTON* (1804) 360-9. In addition to serving as a medium for expression of Senatorial views, the power to modify has been used by Presidents to attempt to obtain concessions not

power is wholly negative, for there is no procedure by which the President can be compelled to resubmit a modified agreement to the other nations concerned for further negotiations. In addition, in many situations the President possesses power under the Constitution to disregard the Senatorial or Congressional veto and consummate agreements on his own responsibility.⁶²

Nor is the President required to put into operation a treaty to which the Senate has consented or an agreement which Congress has authorized or approved. Generally speaking, diplomatic practice requires a formal act of ratification before an international arrangement will be regarded as binding;⁶³ the decision as to whether or not to ratify an approved agreement or treaty is wholly executive. In more than 50 cases, Presidents have declined to ratify treaties to which the Senate had given its consent.⁶⁴ Moreover, once a treaty or agreement has been ratified, the President's authority to terminate its domestic or international force by an act of denunciation is coequal with that of Congress;⁶⁵ if the lesser alternative of modification seems preferable, numerous precedents sanction use of a simple executive agreement to alter a treaty or any other international compact.⁶⁶

As has already been intimated, the evolution of Presidential supremacy was something dubiously within the contemplation of the Framers. But if usage—stemming alike from the growing need for rapid action and specialized knowledge in the conduct of international affairs⁶⁷ and from the bold course pursued at the beginning of the

secured by the original negotiators or to include provisions suggested by the other signatory after negotiation. See 2 HAYNES, *THE SENATE OF THE UNITED STATES* (1938) 603-23; Tansill, *The Treaty-Making Powers of the Senate* (1924) 18 AM. J. INT. L. 477, 482.

62. See *infra*, Section III.

63. See CRANDALL, *TREATIES*, at 343-52; *United States v. Arredondo*, 6 Pet. 691, 748 (U. S. 1832); *United States v. Sibbald*, 10 Pet. 313, 324 (U. S. 1836). Until there is an exchange of ratifications, either nation is privileged to rescind its acceptance of the agreement, unless, of course, its terms provide otherwise. *Armstrong v. Bidwell*, 124 Fed. 690 (C. C. S. D. N. Y. 1903). But after ratification, all "political" rights created by the agreement, *i.e.*, all rights pertaining to the national States rather than inuring to the benefit of their citizens, are retroactively made effective as of the date of original signature. *United States v. Reyes*, 9 How. 127, 148 (U. S. 1850); *Haver v. Yaker*, 9 Wall. 32, 34 (U. S. 1869). But see *infra*, Section VI.

64. DANGERFIELD, *IN DEFENSE OF THE SENATE* (1930) 91. See also JOHN W. DAVIS, *THE TREATY-MAKING POWER IN THE UNITED STATES* (1920) 15; speech in 1906 by Senator Spooner reprinted in CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917) 171. The President also has power to decline to submit a signed treaty to the Senate or to withdraw it after submittal but prior to the giving of consent. See 2 HAYNES, *THE SENATE OF THE UNITED STATES* (1938) 636-9; DAVIS, *loc. cit. supra*.

65. See *infra*, Section VI.

66. See *infra*, Section VI.

67. The distinguished historian Charles Beard recently stated:

"It may be said, perhaps in tones of horror, that the concentration of forces proposed above would mean the creation of an agency of substantially unlimited power over foreign

Republic by Washington, Adams, and Jefferson⁶⁸—has given the President the whip hand in the formulation of foreign policy, there are weighty practical considerations which preclude arbitrary action except in emergencies; for, on most important problems, the effectuation of international agreements and the implementation of foreign policy are wholly dependent upon the adoption of corollary domestic legislation. Moreover, the President's power to fulfil obligations entered into by treaty or agreement is dependent upon the willingness of both houses to provide necessary appropriations. Here usage has sanctioned complete Congressional independence;⁶⁹ the House of Representatives has invariably insisted upon, albeit never exercising, its right to refuse to appropriate money to implement ratified treaties, upon disagreement with their provisions.⁷⁰

As will be seen in the next Section, neither the affirmative powers of the President nor the negative controls residing jointly or separately in the two houses of Congress are self-sufficient. The conduct of an effective foreign policy is dependent upon cooperation and upon a proper recognition of the especial competence of the Executive in selecting the details and the pace of administration of a mutually acceptable program. The question remains of whether national safety permits this machinery to be unnecessarily complicated by retention in one of its constituent organs of a minority veto power.

relations. The contention is conceded. The answer to objections is that found in the *Federalist*. Since the United States is in no position to limit the powers of other nations, it should set no limits to the powers of its Government to deal with them, save that of ultimate responsibility to the nation from which its authority is derived. It will be said, also, that such power may raise great perils in foreign relations. The answer is that more perils are created by divided, confused, and irresponsible powers, variously directed and often controlled by private interests contrary to the supreme public interest. If power adequate to defining public interest and enforcing it cannot be entrusted to any public body, then national interest is a meaningless shibboleth and the maintenance of national economic security as public interest is impossible. Objections are, in fact, largely academic. There is good reason for believing that the autarchic tendencies of other governments will force such a concentration of policy and power in the United States, despite all theoretical objections that ingenuity can devise and offer. Again, it is a question of a correct interpretation of trends in the world realities of the living present." BEARD, *THE OPEN DOOR AT HOME* (1935) 298-9.

68. See McLAUGHLIN, *CONSTITUTIONAL HISTORY*, at 248-63, 294-9, 331-47; SMALL, *SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY* (1932) 57-72, 75-7.

69. See CRANDALL, *TREATIES*, at 168-70, 176-8, 240; SOL BLOOM, *THE TREATY-MAKING POWER* (1944) 5-8.

70. See WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) 6, 226. The Supreme Court avoided the question of whether the House was required under the Constitution to appropriate money to effectuate a treaty in *De Lima v. Bidwell*, 182 U. S. 1, 198 (1900). A circuit court, presided over by Justice McLean of the Supreme Court, held in 1852 that Congress's power to refuse to vote an appropriation was unquestioned. *Turner v. American Baptist Missionary Union*, 24 Fed. Cas. 344, No. 14,251 (C. C. D. Mich. 1852).

But such refusal would constitute an international delinquency on the part of the United States. See 5 MOORE, *DIGEST*, at 231.

III. THE CONSTITUTIONAL DIVISION OF CONTROL OVER THE MAKING OF INTERNATIONAL AGREEMENTS

To appreciate the full extent to which our Constitution divides control over the making of international agreements between the President, the President and the Senate, and the whole Congress, it is necessary to bear in mind, as indicated above, that the total process of making an international agreement includes a whole series of distinguishable activities or steps, such as the formulation of policies to guide the conduct of negotiations, the conduct of negotiations and the concluding of an agreement in accordance with the established policies, the validation or approval of the agreement by the appropriate constitutional authority for making it the law of the land, and the final utterance or ratification of the agreement, when required, as an international obligation of the United States. Control over the actual conduct of negotiations with other governments and over the final, formal utterance of an agreement as an obligation of the United States is admitted by all commentators to have become the exclusive prerogative of the President. It has been suggested above, in accordance with the views of a number of other contemporary observers, that control over the formulation of policies to guide negotiations and over the authorizing or sanctioning of agreements as the law of the land is so thoroughly divided between the President, the President and the Senate, and the whole Congress as to create two completely adequate, but parallel and independent, procedures for the making of international agreements: a treaty-making procedure under the control of the President and the Senate and an agreement-making procedure under the control, in some instances, of the Congress and the President, and, in other instances, of the President alone.¹ It is our belief that both constitutional practice and decision for 150 years and the words of the constitutional document itself, when construed, as legal documents have immemorially been construed, in terms of contemporary conditions and interests, completely confirm this view.

The argumentation of the writers and speakers who seek both to exclude the whole Congress from any significant participation in the process of international agreement-making and to confine the independent powers of the President to the making of agreements on matters of unimportance or temporary interest can be put in easy summary. Their first effort is to secure a focus of attention solely upon

1. A more complete accuracy might describe the procedures as three, since in dealing with many subjects the President has powers independent of the Congress that cover the whole range of activities involved in making an agreement. It is more common, however, simply to speak of "treaties" and "executive agreements" and this classification suffices for our present purpose of showing that in the combined powers of the Congress and the President there exists a constitutional and much-practiced alternative to the treaty.

the single, explicitly discretionary, and ambiguous "treaty-making" clause of the Constitution to the exclusion of all the other relevant clauses of the Constitution granting powers to the Congress and the President, which are meaningful only if they include the authorizing or sanctioning of international agreements. Their next step is to attempt to extract, with automaton-like precision, from this one "treaty-making" clause of the Constitution a supposedly literal, but admittedly latent, "true meaning" of the words, which limits the powers of the whole Congress and the President because it allegedly includes a distinction (made by an eighteenth century Swiss jurist, popularizing a German)—which does not distinguish even in the work of its author—which some of the Framers of the Constitution may have intended to make, though they did not say so, in another clause of the Constitution expressly limiting only the powers of the states. Their final step is to discount the hundreds of precedents, confirmed by interpretations of Supreme Court Justices, Presidents, and Congressmen, and extending throughout the 150 years of our national history, that sustain the use of Congressional-Executive and Presidential agreements as alternatives to "treaties" on the ground that these precedents are irrelevant for obscure technical reasons or else "unconstitutional" or "evasive of the Constitution." It is our purpose in the ensuing pages to explore these tergiversations in some detail and to show that they are neither sound in law nor wise in policy and that the whole Congress and the President have powers to shape policy for guiding intergovernmental negotiations and to make intergovernmental agreements the law of the land which are wholly comparable to those of the Senate.

Theories of Constitutional Interpretation—Fact versus Fancy.

It may not be inappropriate to recall—by way of prologue—that, during the course of our national history, jurists and statesmen have announced two antithetical theories of constitutional construction. The first of these, perhaps best described as the mechanical, filio pietistic theory, purports to regard the words of the Constitution as timeless absolutes. The sole problem of an interpreter, under this theory, is to find what meaning the words had in terms of the idiosyncratic purposes of the Framers in the light of the conditions and events of their day. It is assumed that this meaning can be discovered and can and must be applied, without loss or change, to the problems of the present day, by completely different people under completely different conditions.²

2. The difficulties that inhere in quixotic attempts to ascertain and apply the "true meaning" of constitutional and legislative draftsmen are carefully outlined in Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863; Landis, *A Note on "Statutory Interpretation,"* *id.* at 886; Llewellyn, *The Constitution as an Institution* (1934) 34 COL. L. REV. 1; Holmes, *The Theory of Legal Interpretation* (1899) 12 HARV. L. REV. 417; Freund, *Interpretation of Statutes* (1917) 65 U. OF PA. L. REV. 207; Jones, *Statutory Doubts and Legislative In-*

This variety of what Bentham has described as "decision without thought or mechanical judicature"³ has seldom been more baldly phrased than in Chief Justice Taney's opinion in the *Dred Scott* case:

"... as long as [the Constitution] continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers. . . ."⁴

The second theory, which may be described as adaptive or instrumental, treats the Constitution as "an instrument of government" rather than as a mere "text for interpretation."⁵ This theory received its classic statement in Chief Justice Marshall's reminder in *McCulloch v. Maryland* that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."⁶ It recognizes that words must take their "meaning" from a total context of people, time, conditions and purposes, and that the Framers could have had no real "intention" with respect to most of the important problems of the present day. The function of an interpreter, under this theory, is not to maintain an impossible fidelity to a fiction but to consider how we have lived under the document and how our whole tradition suggests that the words should be interpreted in the light of the long-term best interests of the nation. Mr. Justice Holmes with his usual happy language has thus summarized the attitude:

tention (1940) 40 COL. L. REV. 957; Horack, *In the Name of Legislative Intention* (1932) 38 W. VA. L. Q. 119; Corwin, *Judicial Review in Action* (1926) 74 U. OF PA. L. REV. 639; de Sloovere, *Extrinsic Aids in the Interpretation of Statutes* (1940) 88 U. OF PA. L. REV. 527; Pound, *Spurious Interpretation* (1907) 7 COL. L. REV. 379; CARDOZO, *NATURE OF THE JUDICIAL PROCESS* (1921) 14 *et seq.*

3. 7 WORKS OF JEREMY BENTHAM (Bowring, ed., 1843) 246.

4. *Dred Scott v. Sandford*, 19 How. 393, 426 (U. S. 1856). The same thought was expressed in Mr. Justice Sutherland's dissenting opinion in *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 448, 449 (1934):

"If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered *in invitum* by a state statute enacted for the relief of hardly pressed debtors to the end and with the effect of postponing payment or enforcement during and because of an economic or financial emergency, it is but to state the obvious to say that it means the same now."

See also Mr. Justice Roberts' opinion in *United States v. Butler*, 297 U. S. 1, 62-3 (1936); Mr. Justice Brewer's opinion in *South Carolina v. United States*, 199 U. S. 437, 448-9 (1905); *The Genesee Chief*, 12 How. 443 (U. S. 1851); 1 COOLEY, *CONSTITUTIONAL LIMITATIONS* (8th ed. 1927) 124.

5. Frankfurter, *Mr. Justice Holmes and the Constitution* in FRANKFURTER (ed.) *MR. JUSTICE HOLMES* (1931) 46, 58. See also WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1911) 192.

6. 4 Wheat. 316, 415 (U. S. 1819).

" . . . when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago."⁷

It should, however, be no cause for wonder, since theories of constitutional interpretation like other legal and governmental theories must often serve as "handmaidens to political necessity,"⁸ that there is abundant evidence of the invocation of both the "mechanical, filiopietistic" and the "adaptive, instrumental" theories by the same justices and the same statesmen, on different occasions for different purposes.⁹ Indeed, there is reason to believe that the chief difference between interpreters is in the extent to which they are conscious that they are inevitably reading into the words of the Framers their own preferences and their own perceptions of past and contemporary events. From a detached scientific perspective, it is utterly fantastic to suppose that a document framed 150 years ago "to start a governmental experiment for an agricultural, sectional, seaboard folk of some three millions" could be interpreted today by contemporary judges in terms of the "true meaning" of its original Framers for the purpose of controlling the "government of a nation, a hundred and thirty millions strong, whose population and advanced industrial civilization have

7. *Missouri v. Holland*, 252 U. S. 416, 433 (1920). See also Chief Justice Hughes' majority opinion in *Home Building & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 415; Chief Justice Waite's opinion in *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9-10 (1877); Mr. Justice Holmes' decision in *Gompers v. United States*, 233 U. S. 604, 610 (1914); Mr. Justice Matthews' opinion in *Hurtado v. California*, 110 U. S. 516, 530-1 (1884); Mr. Justice Brandeis's dissenting opinion in *Olmstead v. United States*, 277 U. S. 438, 472 (1927); McBAIN, *THE LIVING CONSTITUTION* (1927) c. 1; WILSON, *CONGRESSIONAL GOVERNMENT* (1890) 6-9; Corwin, *The Constitution As Instrument and As Symbol* (1937) 30 AM. POL. SCI. REV. 1071.

8. See, e.g., BECKER, *THE DECLARATION OF INDEPENDENCE* (1922); SCHLESINGER, *NEW VIEWPOINTS IN AMERICAN HISTORY* (1922) c. 10; FRANKFURTER, *THE COMMERCE CLAUSE* (1937); CORWIN, *THE TWILIGHT OF THE SUPREME COURT* (1934); RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1926) c. 1; Lerner, *The Supreme Court and American Capitalism* (1923) 42 YALE L. J. 668.

9. Compare Mr. Justice Story's broad language in *Martin v. Hunter's Lessee*, 1 Wheat. 304 (U. S. 1816), written in the ascendancy of the Federalist judges, with the crabbed interpretation, made during the high tide of Jacksonian power, of his dissenting opinion in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 598 (U. S. 1837), and of portions of his *Commentaries on the Constitution*, originally published in 1833. See, e.g., 2 STORY, *COMMENTARIES ON THE CONSTITUTION* (5th ed. 1891) 653.

spread across a continent.”¹⁰ Each generation of citizens must in a very real sense interpret the words of the Framers to create its own constitution. The more conscious the interpreters are that this is what they are doing the more likely it is that their interpretations will embody the best long-term interests of the nation.¹¹ In truth, our very survival as a nation has been made possible only because the ultimate interpreters of the Constitution—Presidents and Congressional leaders,¹² as well as judges¹³—have repeatedly transcended the restrictive interpretations of their predecessors. Forty years ago, Professor James Bradley Thayer, one of the great students of our constitutional history, gave the classic exposition of the Constitution’s expansive powers:

“And so it happens, as one looks back over our history and the field of political discussions in the past, that he seems to see the whole region strewn with the wrecks of the Constitution,—of what people have been imagining and putting forward as the Constitution. That it was unconstitutional to buy Louisiana and Florida; that it was unconstitutional to add new states to the Union, from territory not belonging originally to it; that it was unconstitutional to govern the territories at all; that it was unconstitutional to charter a bank, to issue paper money, to make it a legal tender, to enact a protective tariff,—that these and a hundred other things were a violation of the Constitution, has been solemnly and passionately asserted by statesmen and lawyers. . . . Men have found, as they are finding now, when new and unlooked for situations have presented themselves, that they were left [by the Con-

10. Llewellyn, *The Constitution as an Institution* (1934) 34 COL. L. REV. 1, 3. Woodrow Wilson pointed out that “. . . we have read into the Constitution of the United States the whole expansion and transformation of our national life that has followed its adoption.” WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1908) 157.

11. Unhindered by compulsive subservience to imaginary absolutes, they are free to consider rationally what statesmanship requires in terms of contemporary conditions and objectives. Dean Landis has aptly contrasted those who “drape a corpse with the stars and stripes” with those who “count the pulse-beats of a living organism.” Landis, *Book Review* (1928) 41 HARV. L. REV. 545, 547.

12. See opinion of Chief Justice Taft in *Myers v. United States*, 272 U. S. 52, 106 (1926); MUNRO, *THE MAKERS OF THE UNWRITTEN CONSTITUTION* (1930); 1 BRYCE, *AMERICAN COMMONWEALTH* (1888) c. 34; Hamilton, *Who Are the Fathers?* (1938) 1 NAT. LAWYERS GUILD Q. 287; see also *infra*, Section V.

13. The Supreme Court has contributed to national survival by its willingness to overrule its own decisions when circumstances revealed their inadequacy to meet changing social or economic needs. See, e.g., *Knox v. Lee*, 12 Wall. 457 (U. S. 1871); *Graves v. New York*, 306 U. S. 466 (1939). For a list of decisions in which the Supreme Court reversed its own earlier opinions see dissenting opinion of Mr. Justice Brandeis in *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 405 (1932) including footnotes. See also CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* (7th ed. 1941) 4, 26-7, 42-4, 64, 109-10; Willis, *The Part of the United States Constitution Made by the Supreme Court* (1938) 23 IOWA L. REV. 165; Sharp, *Movement and Change in Supreme Court Adjudication* (1933) 46 HARV. L. REV. 361, 593, 795.

stitution] with liberty to handle them. Of this quality in the Constitution people sometimes foolishly talk as if it meant that the great barriers of this instrument have been set at naught, and may be set at naught, in great exigencies; as if it were always ready to give way under pressure; and as if statesmen were always standing ready to violate it when important enough occasion arose. What generally happens, however, on these occasions, is that the littleness and the looseness of men's interpretation of the Constitution are revealed. . . ." ¹⁴

The Framers Revisited—A Constitutional Exclusiveness That Never Has Been.

No one today seriously contends, when the question is squarely put and answered, that the treaty-making procedure is the exclusive mode by which the Federal Government can under the Constitution make international agreements.¹⁵ The Constitution does not provide that the treaty-making procedure is to be the exclusive mode. The relevant language is in fact "permissive rather than mandatory" in form: "[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." This is in contrast with the clearly mandatory language in the previous section of the same Article that reads: "The President *shall be* Commander-in-Chief. . . ." ¹⁶ Whatever, furthermore, extrinsic evidence may suggest to have been the latent meanings which some of the Framers may have read into these words—and their "true intention," if any, as we will find, is indeed a speculative domain of impenetrable obscurity—the crucial constitutional fact is that the people (Presidents, Supreme Court Justices, Senators, Congressmen and electorate) who have lived under the document for 150 years have interpreted it to be permissive in the treaty-making clause and to possess other clauses that authorize the making of international agreements other than treaties on most of the important problems of peace and war. Yet despite this consistent and continuous interpretation, vigorously and officially confirmed by the Supreme Court, the key argument of those who attack Congressional-Executive and Presidential agreements is an innuendo or half-explicit assumption that the

14. Thayer, *Our New Possessions* (1899) 12 HARV. L. REV. 464, 468-9; see also 1 THAYER, *CASES ON CONSTITUTIONAL LAW* (1895) v-vi; speech of Theodore Roosevelt reprinted in (1903) 37 AM. L. REV. 93; 4 BEVERIDGE, *LIFE OF JOHN MARSHALL* (1919) 308; McLAUGHLIN, *THE COURTS, THE CONSTITUTION, AND PARTIES* (1912) 283-4.

15. See Borchard, Book Review (1942) 42 COL. L. REV. 887; McClure, *EXECUTIVE AGREEMENTS*, at 289.

16. U. S. CONST. Art. II, § 2, par. 1 (emphasis supplied). See Catudal, *Executive Agreements*, at 653; Wright, *The United States and International Agreements* (1944) 38 AM. J. INT. L. 341, 342. See also Hamilton's discussion of an analogous point in THE FEDERALIST, No. 83; *Martin v. Hunter's Lessee*. 1 Wheat. 304 (U. S. 1816).

treaty-making procedure is exclusive. This appears to be the principal implication of the charge that the use of such agreements is a "dishonest and dangerous evasion of the Constitution." Thus Professor Borchard writes: "The Constitution refers only to treaties, giving to them legal effect as the supreme law of the land, and says nothing about Presidential executive agreements" and, again, ". . . executive agreements do not have the constitutional dignity and force of a treaty, since the Constitution makes no mention of them, but specifically mentions treaties."¹⁷ It is unfortunate that lay commentators too—including many persons who are sincerely devoted to the promotion of post-war international cooperation—have followed the Pied Pipers of strict constructionism in attempting a literal construction of a non-existent text and have also concluded that the utilization of Congressional-Executive or simple Presidential agreements in lieu of treaties is a species of constitutional evasion.¹⁸

The complete answer to this charge of constitutional evasion is found, as we have indicated above, in the text of the Constitution itself and in how we have lived under that text for 150 years. The treaty-making clause, despite the exclusive attention which some writers bestow upon it in efforts to woo its enigmatic meaning, does not exhaust the provisions of the Constitution that relate to the control of this government's relations with other governments. In addition to the treaty-making clause with its broad, *permissive* grant of power, there are other clauses of the Constitution which grant equally broad powers to both the Congress and the President, powers which have no practical meaning unless they include control over this government's relations with other governments.¹⁹

The grants of power to Congress which are most obviously relevant are in Article I, Section 8:

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; . . . to regulate

17. Borchard, *Executive Agreements*, at 667, 678.

18. See Editorials, N. Y. Times, April 17, 1944, p. 22, col. 1, N. Y. Times, May 22, 1944, p. 18, col. 2. The Editors of the *Times* believe the Constitution should be formally amended to permit approval of treaties by majority vote of both houses.

See also COLEGROVE, *THE AMERICAN SENATE AND WORLD PEACE* (1944) 28, 31, 95, 105, 110 and *passim*. Colegrove believes the Senate minority veto should be terminated but believes this can be accomplished only by a constitutional amendment modifying the treaty-ratifying process.

19. In formulating these summary statements of the powers of the President and Congress we have greatly been assisted by CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917) 1-6. It should be noted that the somewhat restrictive views on the extent of direct Presidential authority stated in this work have since been modified. See CORWIN, *THE PRESIDENT*, c. 6; CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944) cc. 2, 3.

commerce with foreign nations; . . . to establish an uniform rule of naturalization; . . . to define and punish piracies and felonies committed on the high seas and offenses against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer time than two years; to provide and maintain a navy; . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." ²⁰

In addition, there are numerous other grants of power to Congress, which may appear on their face to relate to matters of wholly domestic import, that have been interpreted to include the power to authorize the making of international agreements. ²¹

The most important grants of power to the President, including the power to make treaties, are stated in Sections 1, 2, and 3 of Article II:

"The executive power shall be vested in a President of the United States of America. . . . The President shall be Commander-in-chief of the Army and Navy of the United States, and of the militia of the several States when called into the actual service of the United States; . . . he shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls. . . . The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session. . . . He shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States." ²²

It is obvious—and has been recognized since the beginning of our history—that, from any objective point of view, these broad grants of power, in comprehensive and undefined terms, to the Congress, to the President, and to the President and the Senate, overlap in their reference to the factual events that constitute the relations between this government and other governments and between our people and the people of other governments. ²³ Thus, Madison emphasized at some

20. The summary, excerpted from U. S. CONST. Art. I, § 8, is quoted from CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917) 2.

21. See, e.g., *infra*, pp. 239–40.

22. Quoted from CORWIN, *op. cit. supra* note 20, at 3.

23. See CORWIN, *op. cit. supra* note 20, at 3–6; WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) c. 18. The restrictive views stated in the latter work as to the

length in 1796 that "if taken literally, and without limit" these passages from the Constitution "must necessarily clash with each other."²⁴ More recently, Professor Corwin has described these constitutional grants as "logical incompatibles,"²⁵ and concluded that "the Constitution, considered only for its affirmative grants of powers which are capable of affecting the issue, is an invitation to struggle for the privilege of directing American foreign policy."²⁶ The factual events that constitute "the foreign relations" or "the foreign affairs" of the United States in fact comprise a total process of continuing activities or institutional patterns of behavior—reciprocities and counter-reciprocities—by which the people of the United States seek to use their government, in cooperation with other governments and peoples, to promote the fuller achievement of all their values. The making and honoring of agreements with other governments is an important, perhaps the most important, functional part of this total institutional process; arbitrarily to sever out from the total process of international cooperation the making and honoring of agreements would certainly, from a functional perspective, if it did not do violence to or even destroy the total process, leave nothing but a bare husk of unimportant activities. Constitutional powers such as "to regulate foreign commerce" and "to declare war" or to act as "Commander-in-Chief" must, therefore, if they are to be powers that include control over their subject matters and not mere nominal investitures of ceremonial attributes, include the power to shape the policy that is to control agreements made with other governments with respect to such subject matters. The power to regulate foreign commerce, for example, is most futile if it does not include the power to authorize the making of agreements indispensable to effecting the regulation desired.²⁷ Taken together, furthermore, the powers of the Congress and the President would appear to cover all

permissible scope and effect of Presidential Agreements have since been modified by the author; see Wright, *The United States and International Agreements* (1944) 38 AM. J. INT. L. 341.

24. Quoted in 1 BENTON, ABRIDGEMENT, at 648; 5 ANNALS OF CONG. 487 (1796). See also 6 WRITINGS OF JAMES MADISON (Hunt, ed., 1906) 154.

25. CORWIN, THE PRESIDENT, at 222.

26. *Id.* at 200. For further references to varying interpretations see Wright, *Treaties and the Constitutional Separation of Powers in the United States* (1918) 12 AM. J. INT. L. 64.

27. Chief Justice Marshall long ago indicated the broad discretion vested in Congress to choose the means for effectuating its delegated powers:

"To have prescribed the means by which the government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. . . . 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."

McCulloch v. Maryland, 4 Wheat. 316, 415, 421 (U. S. 1819).

practical regulation of the whole of the external affairs of the nation.²⁸ Conversely, powers "to make treaties" or the power to advise and consent to the making of treaties, if they are to be construed to grant more than mere authorization to make noises with the throat or to put shapes on paper, must include power to participate in determining the policy that is to control the framing of such agreements. Nor does the Constitution state any limitation upon the scope of the subject matter of treaties. For reconciling these obvious conflicts in the factual reference of the words of the Constitution, different interpreters at different periods in our national history have sought to prescribe meanings for the words that rather arbitrarily limit the powers, now of one branch of the Government, now of another. Some, such as Jefferson and Madison, have sought to limit the treaty-making powers of the President and the Senate by emphasizing the powers of the whole Congress.²⁹ Others, such as the contemporary opponents of the Congressional-Executive agreement, have sought to limit the powers of the whole Congress by emphasizing the powers of the Senate under the treaty-making clause. Still others have sought to circumscribe the President's constitutional initiative and powers in the making of international agreements by emphasizing the powers of both or either the Congress and the Senate.

It should be clear that logic offers no way of putting an end to this controversy. In Madison's now quaint language, there are no "separate orbits" in which the various powers can move and no "separate objects" on which they can operate without "interfering with or touching each other."³⁰ The powers of the different branches of the Government must move in the same orbits and they cover the same objects.³¹ Nor is it of

28. Nor is there any reason why they should not be taken together. Thus Professor Corwin has written:

"Besides, thanks to the fact that the maxim against delegation of legislative power is held not to apply in the diplomatic field, inasmuch as the powers delegated merge with 'cognate' powers of the President, acts of Congress may validly leave the President substantially complete discretion whether he shall enforce them or not, and this freedom of action—or inaction—may be utilized to promote a specific diplomatic policy"

CORWIN, *THE PRESIDENT*, at 226; see also *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 319–20 (1936); POMEROY, *CONSTITUTIONAL LAW* (5th ed. 1880) 452.

29. See *infra*, p. 239 and notes 105 and 106.

30. Quoted in 1 BENTON, *ABRIDGEMENT*, at 649.

31. This point is well recognized in the powers of the whole Congress to terminate international agreements, including treaties, and to control any appropriations necessary to implement such agreements. Both of these powers are discussed *infra*, Section VI.

One report of the Foreign Relations Committee of the Senate, quoted by Professor Corwin in *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917) 36, makes a distinction "between the existence of a constitutional power and the existence of an ability to effect certain results." This may be an apt description of some events for certain purposes, but in this context any distinction between powers, constitutionally exercised, that produce the same results is purely verbal. In the world of reality it is the results that affect the lives

supreme importance today to indulge in literary speculation about why the Framers created these overlaps or how some of the Framers may have expected such conflicts to be resolved. The important fact today, from any consciously adaptive or instrumental approach to the Constitution, is the fact that this very great flexibility in the constitutional language does exist and that such flexibility affords opportunity—and an opportunity of which abundant advantage has been taken—for the development by usage of procedures, immediately responsible to the democratic will of the whole country, in the making of international agreements.³²

It may perhaps bear still further emphasis that the Constitution itself creates the opportunity for this development by usage. The Framers themselves explicitly recognized that there are international agreements other than treaties and put this recognition into the document. In Article I, Section 10 the Constitution, in imposing certain limitations on the states, provides that "No state shall enter into any treaty, alliance or confederation," but continues that "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power." Unless one takes the position that the Framers sought to deny to the Federal Government the power to use techniques of agreement made available to the states—an argument completely refuted by the debates at the Convention and by contemporaneous history³³—the conclusion is inescapable that the Federal Government was intended to have the power to make "agreements" or "compacts."³⁴ The fact that—despite the

of people. Madison's comment is appropriate: "Treaties and laws, whatever the nature of them may be, must in their operation be often the same." 1 BENTON, ABRIDGEMENT, at 649.

Compare also Professor Dodd's comment:

"That statutes enacted within congressional powers may deal with the same subjects as treaties is demonstrated by the judicial problem of construing conflicts between the two, and by the well-established principle that a treaty may be abrogated or modified by statute. (*Pigeon River Co. v. Cox*, 291 U. S. 138)."

Dodd, *International Relations and the Treaty Power* (1944) 30 A. B. A. J. 360, 361.

32. See *infra*, Section IV.

33. See THE FEDERALIST, No. 23 (Hamilton); 1 HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES (1939) 164-6; 1 BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES (1902) 287-90, 294-7, 378; 1 McMASTER, HISTORY OF THE PEOPLE OF THE UNITED STATES (1893) c. 3; see also *Ware v. Hylton*, 3 Dall. 199 (U. S. 1796).

34. This conclusion is also indicated by the fact that before the adoption of the Constitution the United States had entered into three agreements with other nations by procedures other than the treaty-making process stipulated in the Articles of Confederation. The "executive agreements" adopted during this period were the "Preliminary Articles of Peace" with Great Britain of Nov. 30, 1782; the Moroccan ship signals agreement of 1786; and the exchange of notes in 1784 between Franklin, the American Minister, and the French Minister of Foreign Affairs, whereby an "unconditional favored nation" policy was substituted for the "conditional favored nation" provision, contained in the formal Treaty of Amity and Commerce of 1778. 2 MILLER, TREATIES, at 3; these agreements are reprinted

broad grants of substantive power set out above, the permissive formulation of the treaty-making clause, and the express recognition of agreements other than treaties—the power to make agreements other than treaties was not granted in more express terms, can seriously concern only those who make something especially mystical out of “the power to make agreements.”³⁵ As has been indicated above, when broken into its component parts, “the power to make agreements” includes several clearly distinguishable powers, among which are the power to conduct negotiations with foreign governments and the power to frame the policies for controlling such negotiations.³⁶ It can scarcely be denied that the President needs no new powers beyond those expressly granted to him in the document to enable him to conduct negotiations with other governments and that he has the exclusive power to conduct such negotiations. Nor would it appear that any effective question can be raised about the powers of the whole Congress and the President either to frame policies for controlling the conduct of negotiations or to make any agreements concluded the law of the land. From a practical perspective, all the President requires to make his negotiations with other governments effective is an assurance, on problems demanding commitments beyond his own powers to fulfil, that the Congress will honor his negotiations and assist in fulfilling all necessary commitments. For the giving of such assurance by the Congress, the broad legislative powers outlined above would appear to be fully ample. It is thus clear that wholly apart from the

in *id.* at 96, 158, 219. An analogous exchange of notes in September 1778 between the American Minister at Paris and the French Minister of Foreign Affairs had served as the technique for modifying Articles 11 and 12 of the Treaty of Amity and Commerce ratified earlier that year. *Id.* at 33–4. However, abrogation of the treaty in this regard had been directed by the Continental Congress. 2 WHARTON, *REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES* (1889) 569. Accordingly, unless one is prepared to adopt the position that the government created by the Constitution was meant to be weaker in dealing with foreign affairs than its admittedly feeble predecessor, the conclusion follows that it was intended to possess the authority to consummate important agreements by means other than the treaty clause. Actually, as is well known, strengthening of the hand of the central government in controlling foreign relations was one of the primary reasons for the convocation of the Constitutional Convention. See 1 BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* (1902) 156–61, 164; COXE, *JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION* (1893) 274–6; 1 VON HOLST, *THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* (1889) 40–50.

35. An analogy may be appropriate. U. S. CONST. Art. I, § 7, par. 2, in describing the law-making powers of Congress, refers only to bills. Par. 5 refers also to “orders,” “resolutions,” and “votes”; but it is clear that these were not considered to be techniques of legislation interchangeable with the “bill.” See Searcy, *The Use of the Congressional Joint Resolution in Matters Relating to Foreign Affairs* (Unpublished Ph.D. dissertation in the Duke University Library) c. 1.

Yet more than 5000 joint resolutions have been adopted which under Supreme Court decisions are as much “the law of the land” as any bill ever enacted. Searcy, *supra*, *passim*.

36. See *supra*, Section II.

treaty-making clause, admittedly non-exclusive, the Constitution offers a completely adequate procedure for coping with the whole problem of international agreements.

There is in fact a curious, backhand recognition of this completely adequate constitutional procedure, independent of the treaty-making clause, for effecting international agreements even in the writings of those who most vigorously oppose the use of this alternative procedure. Thus Professor Borchard, after writing at great length to prove that agreements negotiated with the approval of the whole Congress are not interchangeable substitutes for the treaty and that "there is no constitutional warrant whatever for the suggestion that the President has an option to submit his compact either to the Senate as a treaty . . . or to the Congress for majority approval,"³⁷ paradoxically reverses his position and seeks to dispose of the many precedents, contradictory of his point of view, in which the President has consummated important agreements pursuant to Congressional authorization or under his own independent powers, by the suggestion that all of these agreements can be justified either by *Congressional statute* or by *Senatorial waiver* of the particular assumption of power. "Circumstances have forced the executive," he writes, "in the conduct of military affairs and certain aspects of foreign relations, to conclude—either with or without Congressional authorization—numerous agreements with foreign countries covering the movement of armed forces, the adjustment of claims, protocols, tariff and postal agreements, *modi vivendi*, and, as in 1898, 1918, and 1943, even armistices"; but he insists, "It suffices here to point out" that these agreements "have dealt either with routine questions, within the President's admitted constitutional powers, or have related to matters which the Senate deemed too unimportant for formal treaty procedure, *or which the Congress had previously authorized*."³⁸ In his classification of executive agreements he recognizes that there are "two major classes: (1) those authorized by Congress, and (2) those negotiated by the President on his own responsibility";³⁹ and, noting that "by far the greater number fall within the former class," he lists some of the more important authorizations with respect to postal agreements, tariffs, debt funding, lend-lease, territorial acquisition, and membership in international organizations. He attempts to distinguish the annexations of Texas and Hawaii on the ground that "in neither case was the annexation outside the powers of Congress,"⁴⁰ powers which he elsewhere describes as "the inherent power of Congress to admit new states to the Union or to acquire territory."⁴¹ Coming

37. Borchard, *Executive Agreements*, at 671.

38. *Id.* at 670 (emphasis supplied).

39. *Id.* at 671.

40. *Id.* at 673.

41. *Commerce Committee Hearings* at 134.

to the agreements which "the President, on numerous occasions, has been obliged" to enter without authorization of Congress, Professor Borchard finds that "In so far as they touch questions which properly are the subject of treaties, they can sometimes be justified on the ground that the Senate has acquiesced in such exercise of executive power, finding nothing in the transaction disparaging to its prerogatives."⁴² He finds it "more difficult to justify the 1940 destroyer-naval bases exchange, on legal grounds, but Congressional acquiescence may be inferred from the almost unanimously approved Lend-Lease Act of March 11, 1941, and from the votes authorizing appropriations for the bases."⁴³ It probably needs no emphasis that this attempt to distinguish between the powers of the whole Congress to authorize important international agreements, interchangeable with treaties, and the powers of the whole Congress or of the Senate to "acquiesce" in such agreements is an incredibly transparent reliance upon tweedledum and tweedledee. If the Constitution contains no provision for the power of authorization, by what miracle of constitutional fundamentalism can the "power of acquiescence" be extracted from the text? It should be obvious that the advocates of a non-expressed exclusiveness of the treaty-making clause, who disregard all the other relevant clauses of the Constitution, cannot even begin to develop a consistent and tenable explanation of the many important international agreements, other than treaties, made during our history.

It has already been noted that some of the difficulty which some writers have, entirely apart from policy preferences, in recognizing the competence of the whole Congress to participate in the process of international agreement-making stems from an unnecessary absolutism about the meanings of "make agreement" and "executive agreement." This attitude may bear further illustration from the writings of Professor Borchard. "The Executive agreement," he writes in his article *Against the Proposed Amendment as to the Ratification of Treaties*, "is limited by its inherently minor and unimportant character and comes into force on signature. It does not depend on approval by anybody but the President."⁴⁴ In rejecting Professor Corwin's suggestion "that since Congress can legislate within an undefined area on foreign affairs, it may delegate these 'cognate' powers—whatever that means—to the President—so that in his hands will be combined executive and legislative powers" (a procedure, it may be noted parenthetically, that has been practiced uninterruptedly since 1794), he reaches a rhetorical climax in insisting that "the argument" would "seem to require Congress—if not the President—to violate its oath of

42. Borchard, *Executive Agreements*, at 674.

43. *Id.* at 676.

44. Borchard, *Against the Proposed Amendment as to the Ratification of Treaties* (1944) 30 A. B. A. J. 608, 609, n. 12.

office and the Constitution.”⁴⁵ In another article Professor Borchard insists with equal vigor that the suggestion “that Congress has an undefined power to legislate in the field of foreign affairs” has “nothing to do with the case.”⁴⁶ He is much vexed by the intimations of other writers that “an executive agreement is as good as a treaty” or “that an executive agreement is the same thing as a treaty.”⁴⁷ It must be admitted that the conventions of our literary usage permit any writer to define any word any way he wants to, so long as he makes clear what he is talking about. When, however, a writer seeks to clothe his own peculiar definitions with attributes of inherence and universality and to demand that other people make important decisions in terms of such definitions it becomes worthwhile to investigate the source of his meanings. It is legitimate for Professor Borchard, if he wishes, to use the phrase “executive agreement” to refer only to those agreements negotiated by the President under his own powers. It is completely illegitimate, however, for him to take his own arbitrary definition of “executive agreement” and to deduce from it the conclusion that the whole Congress has no power to frame policy to guide the President in making important international agreements other than treaties. Nothing in either the Constitution or international law prescribes any such con-

45. *Id.* at 609. The phrase “cognate powers” is one borrowed by Professor Corwin from Mr. Justice Sutherland. See note 192 *infra*. The “whatever that means” is Professor Borchard’s.

The meaning of Mr. Justice Sutherland and Professor Corwin is reasonably clear. The word “cognate” is simply their way of indicating that the powers of the Congress and the President refer in considerable measure to the same subject matter.

46. Borchard, Book Review (1944) 4 *LAWYERS GUILD REV.* 59, 60.

This same semantic confusion about what is involved in the “making” of an agreement seems to underlie Professor Borchard’s novel and repeated insistence that when an agreement is referred by the President to the Congress, the Congress has power only to consent or disapprove, but lacks the power to suggest amendments, such as the Senate possesses in the case of treaties. *Commerce Committee Hearings* at 146, 148, 201 *et seq.* Professor Borchard’s notion seems to be that a legislative body cannot *amend* an agreement unless it has a document physically before it and itself makes verbal changes on the parchment. Thus he states: “This is not submitted to the Senate in the form of a document which you have to consider and have the right to amend as we have amended 162 of our treaties. You have got to take this or leave it. You can’t modify the thing, you can’t place a comma in it.” (*Id.* at 148.) To Senator Ferguson’s question “Is there anything in the law to say that we could not change it? Couldn’t we draft laws as we see fit?”, he replies, “You can draft laws, but you can’t draft agreements between foreign countries.”

It should be obvious that when the legislative function is conceived as that of forming policy, rather than of pushing pens on specific pieces of parchment, there is no difficulty in the Congress making amendments to agreements. The powers of the Congress to tell the President to go back and do his job over and do it in a specific way, if he does it at all, are fully as great as those of the Senate. Senator Ferguson’s answer to Professor Borchard on this point, illustrated by reference to the amendments made by Congress to the UNRRA agreement, would appear conclusive.

47. Borchard, Book Review (1944) 4 *LAWYERS GUILD REV.* 59, 60.

clusion. The fact that there are some agreements called "executive" approved wholly under the powers of the President does not in any realm of logical discourse preclude the possibility of there being other agreements—call them "executive," "Congressional-Executive," or what you will—approved under the powers of the whole Congress. Whether an executive agreement is "as good as a treaty" or the "same thing as a treaty" can, furthermore, be of interest only to legal philosophers still in search of Platonic absolutes. The important facts are that, under the broad grants of power in our Constitution, alternative procedures have developed, and have been utilized throughout our history for the making of international agreements on all important subject matters with identical legal and practical consequences, and that all distinctions in the naming of these agreements—"treaties," "executive agreements," or "Congressional-Executive agreements," etc.—are merely convenient labels, unique to our own constitutional law, to indicate the specific constitutional authority under which a particular agreement has been made.

The Framers and Vattel—A Constitutional Distinction That Never Has Been.

The next step in the argument of the advocates of minority control of the foreign affairs of the United States is that, even though the Constitution does not make the treaty-making clause the exclusive mode by which the Federal Government can make international agreements, it does create a fundamental distinction, though one nowhere stated, between the "treaties" and the other international agreements which the Federal Government can make. The contention is that the Constitution establishes not interchangeable procedures for the making of international agreements but rather one procedure, the treaty-making procedure, for all important matters and for agreements with an especial constitutional dignity and legal effect, and another procedure, the Congressional-Executive and Presidential agreement-making procedure, for unimportant subject matters and for agreements of lesser constitutional dignity and legal effect.⁴⁸ It is admitted that there is no warrant for this distinction in the language either of the treaty-making clause or of the clauses granting powers over foreign affairs to the Congress and the President. The effort to ground the distinction in the language of the Constitution relies on Article I, Section 10, already referred to, which prohibits the *states* from entering into "any treaty, alliance or confederation," but permits them, with Congressional assent, to consummate "any agreement or compact with another state, or with a foreign power." It is argued that this language makes a clear distinction between treaties and other agreements and

48. This is the burden of all of Professor Borchard's recent writing in the field.

that the Framers of the Constitution in imposing this distinction as a limitation upon the activities of the states also intended to impose it as a limitation upon the powers of the Federal Government.⁴⁹

It should be obvious that the language of the Constitution itself, even with respect to the limitations on the powers of the states, makes no clear distinction between treaties and other agreements. The only distinction it expressly makes is that the states cannot make the one but can, with the consent of the Congress, make the other. To spell out a distinction in substance, which they seek to apply not only to the states but also to the Federal Government, the advocates of minority control find it necessary to turn to "the great Swiss natural-law jurist and positivist [sic], Emmerich de Vattel,"⁵⁰ a popularizer of the work of an earlier German writer, Christian Wolff.⁵¹ It is alleged that "the framers of both the Articles of Confederation of 1777 and the Constitution of 1787 were under the influence of . . . Vattel"⁵² and that, following Vattel, "The 'Founding Fathers' formulated this distinction in terms of 'important' matters, which were to be the subject only of formal federal treaties—known to the Founders as 'treaties of peace, of amity and commerce, consular conventions, treaties of navigation'—and 'routine' or unimportant questions, which the States were left free to conclude between themselves by mere agreements."⁵³

49. The present writers agree that this language shows that the Framers knew of international agreements other than "treaties." They do not, however, find any clear distinction in the language and see no evidence of an intention by the Framers to use the distinction, whatever it was, to limit the powers of the whole Congress.

50. VATTEL, *LE DROIT DES GENS* (1758; Fenwick's trans., Carnegie Endowment ed. 1916).

51. The relevant language of Wolff is brief:

"A treaty [*foedus* in Latin] is defined as a stipulation entered into reciprocally by supreme powers for the public good, to last forever or at least for a considerable time. But stipulations, which contain temporary promises, or those not to be repeated, retain the name of compacts [*pactiones* in Latin]."

WOLFF, *JUS GENTIUM, METHODO SCIENTIFICA PERTRACTATUM* (1749; Carnegie Endowment ed. 1934) c. IV, § 369.

Wolff does not appear to have made any practical consequences depend upon the distinction. It takes but a brief glance to see that his world of "perfect and imperfect," "equal and unequal," and "real and personal" treaties is completely alien to contemporary problems.

52. Borchard, *Executive Agreements*, at 668. This statement is made on the authority of Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"?* (1936) 3 U. OF CHI. L. REV. 453.

53. Borchard, *Executive Agreements*, at 669-70. Professor Borchard derives this definition from Weinfeld, *supra* note 52, at 460, where it is used as a description of the kinds of international agreements intended by the Framers to be made only by the national government. However, neither Weinfeld nor Levitan [in *Executive Agreements*] concludes that it was intended these "important matters" could be dealt with by the *Federal Government* only through "formal . . . treaties."

The language from Vattel, in translation approved by Professor Borchard,⁵⁴ which is supposed to support this construction reads:

"Section 152. Treaties of Alliance and other public treaties. . . . A treaty, in Latin foedus, is a pact entered into by sovereigns for the welfare of the State, either in perpetuity or for a considerable length of time.

"Section 153. Compacts, agreements or conventions. Pacts which have for their object matters of temporary interest are called agreements, conventions, compacts. They are fulfilled by a single act and not by a continuous performance of acts. When the act in question is performed these pacts are executed once for all; whereas treaties are executory in character and the acts called for must continue as long as the treaty exists.

"Section 192. Treaties executed by an act done once for all. Treaties which do not call for continuous acts, but are fulfilled by a single act, and are thus executed once for all, those treaties, unless indeed we prefer to give them another name (see Sec. 153), those conventions, whose pacts which are executed by an act done once for all and not by successive acts, are, when once carried out, fully and definitely consummated. If valid, they naturally bring about a permanent and irrevocable state of things. . . ." ⁵⁵

In accord with two other recent writers,⁵⁶ Professor Borchard concludes "that the term 'agreement or compact' referred to in the Constitution of the United States is derived from the 'agreement, convention, compact,' or the original French '*accords, conventions, pactions*,' discussed by Vattel." ⁵⁷

It will be noted that the distinction Vattel makes is not in terms of *important* and *unimportant*. His distinction is in terms of agreements "executory in character" and calling for acts which "must continue as long as the treaty exists," and of "matters of temporary interest" "fulfilled by a single act and not by a continuous performance of acts." Nor is it without interest that he indicates in Section 192 that exactly the same type of subject matter which is supposedly appropriate for "compacts, agreements or conventions" can also be appropriately handled by "treaties." This suggests that his distinction may be a mere matter of *names* and that he makes no practical consequences

54. Borchard, *Executive Agreements*, at 668. The translation used was made by Weinfeld, *supra* note 52. It should be noted that the verbal identity of Vattel's classification of the types of international agreements with Article I, Section 10 of the Constitution is not present in Fenwick's Carnegie Foundation translation of *Le Droit des Gens*, produced before the beginning of the current controversy as to the proper function of executive agreements. See 3 VATTEL, *op. cit. supra* note 50, bk. 2, c. 12, §§ 152, 192.

55. LE DROIT DES GENS, bk. 2, c. 12, quoted in Borchard, *Executive Agreement*, at 668.

56. Weinfeld, *supra* note 52, and Levitan, *Executive Agreements*, at 366-9.

57. See Borchard, *Executive Agreements*, at 668-9.

depend upon it.⁵⁸ Examination of the other relevant sections of *Le Droit des Gens* indicates that his distinction is a mere matter of names and that Vattel himself expressly denies that it makes any difference. In Section 206 he states:

"The public compacts called conventions, agreements, etc., when they are entered into between sovereigns, differ from treaties only in the subjects with which they deal (§ 153). All that we have said of the validity of treaties, of their execution, their dissolution, the obligations and the rights they give rise to, etc. is applicable to the various conventions which sovereigns may conclude with one another. Treaties, conventions, agreements, are all public contracts and are all governed by the same law and the same principles. We shall not weary the reader with a repetition of what has already been said, and it would be useless to enter into the details of the various kinds of conventions, which are all of the same nature and which only differ from one another in their subject-matter."⁵⁹

Reference back to Section 153 makes it clear that he is introducing no distinction of "subject matter" other than the one already mentioned. It is, therefore, putting quite a lot into Vattel when Professor Borchard writes, "It is further apparent that Vattel believed that many permanent transactions—such as a cession of territory or peace agreement—should be accomplished by treaty even though consummated by a single act."⁶⁰ Vattel not only knew nothing of the procedural distinction in our Constitution, as he wrote his treatise in 1758, but he made no difference in mode of "accomplishment" or effect depend on his own taxonomy.

Even if it be conceded that a lately reanimated, secret intention of the Framers to incorporate into the Constitution this relatively meaningless taxonomy from Vattel could, despite a different constitutional practice for 150 years, be relevant to the making of important decisions today, it is scarcely credible that the Framers could have had any such intention. It may be granted that some of the Framers were acquainted with the work of Vattel.⁶¹ It is a totally different proposition, however,

58. It may be that this was the kind of distinction that Bentham had in mind when he criticized Vattel "for stating propositions that are 'old-womanish and tautological,' for building castles in the air, and, when he says something, for saying it with so dull a perception of the principles of utility that his statement resolves itself into a formula like this: 'It is not just to do that which is unjust.' " de Lapradelle, *Introduction*, in 3 VATTEL, *op. cit. supra* note 50, at xliv [quoting from 10 WORKS OF JEREMY BENTHAM (Bowring, ed., 1843) 584]. See also HALL, *INTERNATIONAL LAW* (8th ed., Higgins, 1924) 418, n. 1.

59. 3 VATTEL, *op. cit. supra* note 50, bk. 2, c. 14, § 206.

60. Borchard, *Executive Agreements*, at 668.

61. See de Lapradelle, *supra* note 58, at xxix-xxx; Weinfeld, *supra* note 52, at 458-9; 2 WHARTON, *REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES* (1859) 64.

to conclude that they intended, without saying so, to take a distinction, which was without practical consequences with its originator and which had few, if any, proponents among the other important international law writers of the time,⁶² and to create from it not only a limitation upon the power of the states, but also a test for determining the appropriate subject matters for the different procedures by which the Federal Government could make international agreements. Mr. Weinfeld, upon whose researches Professor Borchard depends—after much painful literary detective work in comparing different drafts of the Articles of Confederation and of the relevant clauses of the Constitution with each other and with definitions in Dr. Johnson's dictionary, and after considering the practice under the Articles of Confederation—concludes that the Framers intended to incorporate into the language limiting the states, not Vattel's patent distinction between "executory" and "executed," or Professor Borchard's "important" and "unimportant" agreements, but rather a new latent distinction between "settlements of boundary lines with attending cession or exchange of strips of land" and "regulation of matters connected with boundaries as for instance regulation of jurisdiction of offenses committed on boundary waters, of fisheries or of navigation," and other agreements.⁶³ It is worth noting that Mr. Weinfeld nowhere suggests that the distinction he finds with respect to limitations on the states was intended by the Framers as a limitation on the Federal Government:

Indeed, it is completely gratuitous to assume, whatever the distinction the Framers intended to make between "treaties" and "agreements" in imposing a limitation upon the power of the states, that they also intended to impose this same limitation upon the power of the Federal Government.⁶⁴ Their general designs for the respective powers

62. See Weinfeld, *supra* note 52, at 457.

It may be wondered why, even assuming that the Framers labored under the illusion that they were incorporating some fundamental distinction from international law, such a putative distinction should not be forgotten now that the illusion is recognized. It has already been noted that contemporary international law knows nothing of such a dichotomy. See HARVARD RESEARCH, LAW OF TREATIES, at 686; BRIGGS, THE LAW OF NATIONS (1938) at 409. Professor Oppenheim's words are completely apt: "Again, the distinction made by the Government of the United States between *treaties*, which can only be ratified by the President with the consent of the Senate, and *agreements*, which do not require such consent, has nothing to do with International Law. It is a distinction according to the constitutional law or practice of the United States." 1 OPPENHEIM, INTERNATIONAL LAW (5th ed., Lauterpacht, 1937) 709, n. 3.

63. Weinfeld, *supra* note 52, at 464.

It is not easy to see why the Framers used such vague language if they intended a reference so specific.

64. An aphorism of Mr. Justice Holmes' is relevant: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used." *Towne v. Eisner*, 245 U. S. 418, 425 (1918).

over foreign affairs of these different organs of government were completely divergent. The debates at the Convention and contemporaneous history indicate clearly that the Framers sought to confine the states within narrow limits in order to strengthen the national government and to prevent disunity.⁶⁵ The same evidence affirms, on the other hand, that the Framers sought to make the control of the Federal Government over foreign relations as comprehensive as possible.⁶⁵

Even with respect to the constitutional limitation imposed upon the states, though it is possible that the Framers may have found Vattel's dichotomy between "treaties," on the one hand, and "compacts, agreements, or conventions," on the other, a useful verbal device for creating a distinction in power of an undisclosed nature, there is no conclusive evidence that they had any very specific factual reference in their use of the terms. Instead of embarking upon elaborate essays in retrospective mind-reading upon scant evidence, it seems much safer to conclude with Mr. Justice Frankfurter and Dean Landis that "There is no self-executing test differentiating 'compact' from 'treaty' " and that political judgment was expected to be the decisive factor in circumscribing "the area of agreement open to the states."⁶⁷ The fact that the Framers subjected all compacts between the states to the approval of the Congress, rather than of the courts,⁶⁸ supports the conclusion that they sought to devise a general mechanism, to be used as circumstances might require, for control "over affairs that are projected beyond state lines."⁶⁹ This breadth of interpretation is confirmed also by the record of governmental practice under the Articles of Confederation, in which the terminology ascribed to Vattel had likewise been previously employed.⁷⁰ Five interstate compacts had been nego-

65. See Madison's "Preface," in MADISON, DEBATES, at 1, 11-13; reprinted in 3 FARRAND, RECORDS, at 539, 547-9. See also 1 BUTLER, THE TREATY-MAKING POWER IN THE UNITED STATES (1902) §§ 163-7; CORWIN, NATIONAL SUPREMACY (1913) 21.

66. See sources cited *supra* note 65; see also 1 HOCKETT, CONSTITUTIONAL HISTORY OF THE UNITED STATES (1939) 164-5, 178; Frankfurter and Landis, *The Compact Clause*, at 695-6; CORWIN, NATIONAL SUPREMACY (1913) 21, 33.

67. Frankfurter and Landis, *The Compact Clause*, at 695, n. 37. See also Comment (1935) 45 YALE L. J. 324, 327-8; Levitan, *Executive Agreements*, at 365-71.

68. The delegates to the Constitutional Convention had defeated the proposal that Congress be given a veto power over state legislation (2 FARRAND, RECORDS, at 21, 27-8), but had provided that the federal courts should have jurisdiction over "controversies between two or more states." U. S. CONST. Art. III, § 2.

69. Frankfurter and Landis, *The Compact Clause*, at 695.

70. Article VI of the Articles of Confederation prohibited the states from entering into "any conference, agreement, alliance, or treaty with any King, prince or state," but permitted them to enter into "any treaty, confederation or alliance whatever between them" with the consent of Congress. In practice, the states entered into "agreements" between themselves without consent of Congress; the Supreme Court upheld one of these compacts in *Wharton v. Wise*, 153 U. S. 155 (1894). See also Frankfurter and Landis, *The Compact Clause*, at 732-4.

tiated before the drafting of the Constitution;⁷¹ in addition to the adjustment of boundary disputes, undoubtedly conceived in 1787 as the major *immediate* field for application of the device as between the states,⁷² these dealt with the regulation of navigation and fishing rights and with jurisdiction over boundary waters.⁷³ These compacts were neither "of temporary interest" nor were they "fulfilled by a single act"; moreover, the boundary agreements necessarily involved territorial cessions of greater or lesser magnitude.⁷⁴ They demonstrate unquestionably that the draftsmen were acquainted with a use of interstate compacts for much broader purposes than might be inferred from a literal interpretation of Section 153 of *Le Droit des Gens*.⁷⁵

Whatever, furthermore, may have been the original and undisclosed "intention" of the Framers in creating their limitation on the power of the states, 150 years of history and numerous court decisions clearly invalidate any belated attempt to interpret the "compact clause" as authorizing the states to enter into only a limited class of "unimportant" or "immediately executed" agreements.⁷⁶ Compacts have been utilized to create joint administrative boards to regulate harbor devel-

It is clear that a few of the members of the Second Continental Congress, which drafted the Articles of Confederation, had read Vattel's *Le Droit des Gens*. See 2 WHARTON, *op. cit. supra* note 61, at 64-7.

71. Four were negotiated while the Articles of Confederation were in force; see Frankfurter and Landis, *The Compact Clause*, at 732-4. The broadest-gauged compact was the Virginia-Maryland Agreement of 1785. MD. LAWS (Dorsey, 1840) vol. 1, p. 187; VA. STAT. (Hening, 1822) vol. 12, c. XVII, p. 50. In addition, Virginia and North Carolina had entered into a boundary agreement in 1777, before the ratification of the Articles. See BARNETT, *INTERNATIONAL AGREEMENTS* (1906) 6.

72. See *Rhode Island v. Massachusetts*, 12 Pet. 657, 723 (U. S. 1838). The late Dean Hall of the University of Chicago Law School concluded that Article I, Section 10 was also intended to "enable each state, with the consent of Congress, to make agreements with foreign countries respecting the reciprocal rights of their inhabitants." HALL, *CONSTITUTIONAL LAW* (1910) 328; see also Mikell, *The Extent of the Treaty-Making Power of the President and Senate of the United States* (1909) 57 U. OF PA. L. REV. 435, 528.

73. Frankfurter and Landis, *The Compact Clause*, at 732-4.

74. See *Virginia v. West Virginia*, 11 Wall. 39 (U. S. 1870); Levitan, *Executive Agreements*, at 464.

75. Quoted *supra*, p. 228.

76. See, e.g., *New York v. New Jersey*, 256 U. S. 296, 313 (1921); *Virginia v. West Virginia*, 206 U. S. 290 (1907), 246 U. S. 565 (1918); *Newark v. C. R. R. of N. J.*, 267 U. S. 377 (1925).

Several attempts have been made to differentiate between the various types of arrangements, but these classifications proceed wholly on a verbal level and are refuted by examination of the agreements consummated in the past 150 years. The most curious of these exercises is Chief Justice Taney's assertion—without production of any differentiating criteria—that there must be a distinction between an "agreement" and a "compact." *Holmes v. Jennison*, 14 Pet. 540, 571 (U. S. 1840); see also 2 STORY, *COMMENTARIES ON THE CONSTITUTION* (5th ed. 1891) §§ 1402-5; cf. Frankfurter and Landis, *The Compact Clause*, at 67. For reasonably complete lists of interstate compacts see NAT. CONF. OF COMM'RS ON UNIFORM STATE LAWS, *HANDBOOK*: 1931, 361; ELY, *OIL CONSERVATION THROUGH INTERSTATE*

opment and interstate parks,⁷⁷ to provide protection for women and minors as industrial workers,⁷⁸ to conserve natural resources,⁷⁹ to provide for allocation of water rights,⁸⁰ and, before the enactment of the Federal Power Act of 1935, to regulate interstate utility operations.⁸¹ All of these compacts dealt with problems of more than temporary interest. Certain of them—particularly the 1935 oil agreement⁸² and the New England states minimum wage agreement—contained no provisions of their own, but merely provided for the enactment of legislation by the states. In terms of the conceptualism imputed to the eighteenth

AGREEMENT (1933). There have been several agreements between states and foreign nations dealing with boundary questions or riparian rights. See Bruce, *The Compacts and Agreements of States with One Another and with Foreign Powers* (1918) 2 MINN. L. REV. 500.

77. The most important of these compacts is that providing for the creation of the Port of New York Authority, which since 1921 has supervised the construction of improvements and regulated many aspects of commercial activity in the leading maritime center in the United States. N. J. Laws 1921, c. 151, Laws 1922, c. 9, Laws 1930, c. 244; N. Y. Laws 1921, c. 154, Laws 1922, c. 43, Laws 1930, c. 419; 42 STAT. 174 (1921); 42 STAT. 822 (1922); see also *The Port of New York Authority* (Sept. 1933) 8 FORTUNE 22.

78. Seven northeastern states signed a compact of this nature in May 1934. See Johnson, *Interstate Compacts Affecting Labor* (1934) 24 AM. LAB. LEG. REV. 71.

79. Several compacts have been devised in attempts to prevent destruction of aquatic life. See the New Jersey-Delaware Agreement of 1905, 34 STAT. 858 (1907), N. J. Laws 1905, c. 42, Del. Laws 1905, c. 5; the Oregon-Washington Agreement of 1915, 40 STAT. 515 (1918), Ore. Laws 1915, c. 188, § 20, Wash. Laws 1915, c. 31, § 116. An oil conservation compact was entered into by nine states in 1935; see Comment (1935) 45 YALE L. J. 324, 337, n. 64; Kan. Laws 1935, c. 215; Okla. Sess. Laws 1935, c. 59, art. 6; N. M. Laws 1935, c. 128.

80. The most important agreement in this field is the Colorado River Compact of 1921. See 42 STAT. 171 (1921); Frankfurter and Landis, *The Compact Clause*, at 745-6; Bannister, *Colorado River Compact* (1924) 9 CORN. L. Q. 388.

If, as is contended, the word "agreement" has the same meaning with respect to the Federal Government as with respect to the states, it is curious that there should be any doubt about the constitutionality of the proposed agreement with Canada with respect to the St. Lawrence. But see Professor Borchard's strenuous insistence that the St. Lawrence agreement is unconstitutional. *Commerce Committee Hearings* at 102-216.

81. See the Kansas-Missouri Agreement of 1922, 42 STAT. 1058 (1922); Kan. Laws 1921, c. 304; Mo. H. J. 1258 and Mo. SEN. J. 932 (51st Gen. Ass'y, 1921-1922).

Use of compacts to deal with industrial problems has been widely recommended. See Donovan, *State Compacts As a Method of Settling Problems Common to Several States* (1931) 80 U. OF PA. L. REV. 5; DOUGLAS, *THE LIBERAL TRADITION* (1935) 124; CLARK, *THE RISE OF A NEW FEDERALISM* (1938). Experience suggests, however, that this is a somewhat clumsy and dilatory technique, as contrasted with the federal public corporation or regional authority, such as the TVA. See NAT. RESOURCES PLANNING BD., *REGIONAL FACTORS IN NATIONAL PLANNING* (1935); LILIENTHAL, *THE TENNESSEE VALLEY AUTHORITY* (1944); FINER, *THE TVA—LESSONS FOR INTERNATIONAL APPLICATION* (1944) cc. 1-9; Corwin, *Lessons of the Colorado River Compact* (1927) 16 NAT. MUNIC. REV. 459; Vandenberg, *Regions Versus States* (1933) 21 KY. L. J. 432; Freund, *Concurring Memorandum* in NAT. CONF. OF COMM'RS ON UNIFORM STATE LAWS, *HANDBOOK: 1921*, 357. It is possible that some desirable compromise between efficiency and decentralization can be worked out by combining the interstate compact and the federal public corporation.

82. See note 79 *supra*.

century jurists by Professor Borchard and Mr. Weinfeld, these agreements unquestionably have trenched into the domain deemed reserved for "treaties."⁸³ Usage and judicial legislation, moreover, have departed from the mandatory language of the Constitution even to the extent of permitting the states to enter into certain classes of agreements without securing Congressional consent.⁸⁴ The most important of these categories is that of compacts settling boundary disputes⁸⁵—the very class of agreements with which the Founders are supposed to have been most preoccupied.⁸⁶ It would be indeed strange if a process of historical interpretation which has been so generous to the states, expressly limited by the constitutional language, should be ungenerous to the Federal Government, not expressly so limited, especially since the Constitution was intended "to make our states one as to all foreign . . . matters."⁸⁷

Some may question still, since it is a matter of record that proposals to give the House of Representatives a role in the treaty-making process were defeated in the Constitutional Convention,⁸⁸ why the Framers did not with more complete explicitness confer upon the Federal Government the power to make international agreements other than treaties. It must be admitted that it is in the nature of things impossible in this year of 1945 to obtain any very exact information about what was in the minds of the 55 Framers in 1787 and of the more numerous acceptors of the Constitution in 1788 and the years

83. See notes 56 and 57 *supra*.

84. The doctrinal distinction is that only compacts affecting the "political sovereignty" of the states or the United States need Congressional approval. *Robinson v. Campbell*, 3 Wheat. 212 (U. S. 1818); *Rhode Island v. Massachusetts*, 12 Pet. 657, 726 (U. S. 1838); *Virginia v. Tennessee*, 148 U. S. 503, 518–20 (1893). See also *Wharton v. Wise*, 153 U. S. 155, 170 (1894); *Louisiana v. Texas*, 176 U. S. 1, 17 (1900); *McHenry County v. Bardy*, 37 N. D. 59, 163 N. W. 540 (1917); 2 STORY, COMMENTARIES ON THE CONSTITUTION (5th ed. 1891) §§ 1402–3; 3 OPS. ATT'Y GEN. 661 (Legaré, 1841); WARREN, THE SUPREME COURT AND SOVEREIGN STATES (1924) 75 *et seq.* This result has been sharply criticized as permitting a departure from the mandatory language of Article I, Section 10 of the Constitution; see Comment (1935) 35 COL. L. REV. 76, 78; Comment (1935) 45 YALE L. J. 324, 326.

85. The first of these boundary compacts consummated without advance procural of Congressional consent is the 1803 agreement between Virginia and Tennessee. VA. REV. CODE (Shepherd, 1819) c. 22; 1 LAWS OF TENN. (Scott, 1820) 798 [Laws 1803, c. 58]. In *Virginia v. Tennessee*, 148 U. S. 503 (1893), the Court found that Congress had given its "implied assent" to the compact by its continued silence. An analogous convention between North and South Carolina was ratified in 1815. 2 LAWS OF N. C. (Potter, 1821) c. 885; 1 S. C. STAT. (Cooper, 1838) 419. For a complete list of agreements negotiated up to 1925 without the consent of Congress see Frankfurter and Landis, *The Compact Clause*, at 749–54.

86. Weinfeld, *supra*, note 52, at 453 *et seq.*; *Virginia v. West Virginia*, 11 Wall. 39 (U. S. 1870).

87. The concluding words are from a letter sent to Washington by Jefferson during the course of the Constitutional Convention. Quoted in WARREN, THE MAKING OF THE CONSTITUTION (1928) 451.

88. 2 FARRAND, RECORDS, at 538.

immediately following.⁸⁹ In so far as agreements made by the President under the powers specifically granted to him are concerned, the omission could be a reflection of the eighteenth century view that the conduct of foreign affairs under the tripartite power theory is most appropriately an executive function.⁹⁰ In this, as in other matters, the Framers may have felt no need to express what was commonly regarded as self-evident.⁹¹ With respect to agreements negotiated by the President under authorization from the whole Congress, Professor Quincy Wright has suggested that the fact "that explicit proposals to attach the House of Representatives to the treaty power were voted down" proves only "that the Convention wished to make it possible for the President to make treaties without submission to the House. It does not prove that the Convention intended to prevent Congress from exercising its constitutional powers to authorize or implement international agreements made by the President alone."⁹² Some of the acceptors of the Constitution—and surely no greater deference should

89. It may appear on the surface that it was scarcely rational for the Framers to have contended about whether the House was to participate in the making of treaties or whether the vote was to be by a normal or exceptional majority unless it was intended that the treaty was to be the sole mode of effecting international agreements. Any one who still thinks, however, that a clear and rational intention of the Framers can be gleaned from the document, even when supplemented by the extant records of extrinsic evidence as to the Framers' intention, may disabuse himself of the notion by looking at Mr. Charles Warren's recent summary in *Judiciary Committee Hearings* at 79. (See also *infra*, Section VII.) If this is not enough, a glance at the references in Wright, *The United States and International Agreements* (1944) 38 AM. J. INT. L. 341, and in McClure, *EXECUTIVE AGREEMENTS*, c. 11, should suffice. As has been indicated in the text, too much of the other behavior of the Framers becomes irrational upon any simple assumption that the treaty-making clause, despite its non-exclusive language, was intended to be exclusive. In defense of the Framers, it may be remembered that there are intimations from contemporary psychology and elsewhere that even modern man is not entirely rational in his conduct, verbal and otherwise.

Once it is admitted that the treaty-making clause is not exclusive, as everyone of any intellectual responsibility does and must admit today, the door is opened for all the nebulous speculation which we have recited in the text and for the much more significant developments in practice which have in fact occurred.

90. See 1 MONTESQUIEU, *THE SPIRIT OF LAWS* (Nugent's trans. 1823) bk. 11, c. 6, p. 152; LOCKE, *TWO TREATISES OF CIVIL GOVERNMENT* § 147; 1 VATTTEL, *LE DROIT DES GENS* (1758; Fenwick's trans., Carnegie Endowment ed. 1916) bk. 2, c. 12, § 154. Professor Quincy Wright has presented a somewhat different interpretation of the eighteenth century views, in WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) §§ 74-88. See also statement of William R. Davie, who had been a delegate to the Constitutional Convention, at the North Carolina ratifying convention, 4 ELLIOT, *DEBATES*, at 119; 3 FARRAND, *RECORDS*, at 347-8.

91. Compare *THE FEDERALIST*, Nos. 83 and 84 (Hamilton).

92. Wright, *supra* note 89, at 350.

It may not be amiss to call Vattel to the aid of the general conclusion. The fifteenth of his 45 maxims of statutory interpretation reads: "Every interpretation that leads to an absurdity ought to be rejected." DWARRIS, *GENERAL TREATISE ON STATUTES* (Am. ed., Potter, 1873) 128.

be paid to the hidden purposes of some of the draftsmen of the document than to the announced opinions of the delegates to the state ratifying conventions⁹³—certainly were in part motivated by an understanding that, at least in so far as commercial arrangements were concerned, the powers of the Congress as a whole would be concurrent with, if not superior to, those of the Senate and President under the treaty clause.⁹⁴ It may also be recalled, to emphasize anew the practical dilemma created by the "logical incompatibles" in the grants of the Constitution, that the questions "Why did not the Framers make the treaty-making clause exclusive?" and "What meaning can be given to the grants to the Congress and the President of certain powers over foreign affairs if they do not include the power to authorize the making of important agreements?" are questions just as relevant as the question why the Framers did not more explicitly state the powers of the Congress and the President. Some light may be shed over the darkling waters by remembering, what has not yet been adverted to, that the Framers, while concerned with creating a strong national government, were conscious that there was a great deal of opposition to centralization which would have to be propitiated to ensure ratification of the Constitution.⁹⁵ The need to propitiate the small states⁹⁶—a rationale whose contemporary invalidity is indicated in a subsequent Section⁹⁷—surely might have been adequate reason for failure to state more explicitly the scope of powers conferred on a house selected wholly on the basis of population. Several delegates have indicated the deliberateness with which the Convention left vague certain aspects of the new government's power to remove objections to its ratification. Thus, Gouverneur Morris, one of the principal draftsmen of the final version of the Constitution,⁹⁸ long ago indicated the equivocal nature of certain portions of the document: ". . . it became necessary to select phrases

93. During the debate on the powers of the House in controlling foreign relations in 1796, Madison said:

"If we were to look, therefore, for the meaning of [the Constitution] beyond the face of that instrument, we must look for it, not in the General Convention which proposed, but in the State Conventions which accepted and ratified it."

Quoted in WARREN, *op. cit. supra* note 87, at 794.

94. Congressman Holland stated in 1796 that the North Carolina ratifying convention, to which he had been a delegate, adopted the Constitution only on the understanding that the power of the President and the Senate to make commercial treaties was limited by the delegation to Congress of the power to regulate commerce with foreign nations. 5 ANNALS OF CONGRESS 546 (4th Cong., 1st Sess.).

95. See McLAUGHLIN, *CONSTITUTIONAL HISTORY*, at 198-205; 3 FARRAND, *RECORDS*, at 150 *et seq.*, 172 *et seq.*; 1 ELLIOT, *DEBATES*, at 344-89, 480-2; 2 *id.* at 224.

96. See *infra*, Section VII.

97. *Ibid.*

98. See RODELL, *FIFTY-FIVE MEN* (1936) 192; Mussey, *Gouverneur Morris* in 13 *DICTIONARY OF AMERICAN BIOGRAPHY* (1934) 209, 211.

which, expressing my own notions, would not alarm others" ⁹⁹ Any person who has ever drawn a document of any consequence requiring the approval of a number of people is familiar with this necessity.

The fact of final and decisive importance, however, that puts to permanent rest these obscurities and omissions in the fundamental document is, as we have several times indicated above, the interpretation of the people who have lived and worked under it for 150 years. It has been their conclusion that the treaty-making procedure is neither exclusive nor the sole recourse of the Federal Government for the making of *important* international agreements. Whatever some of the Framers may in their secret recesses have intended about the treaty-making clause, and whatever, furthermore, the much perplexed members of the state conventions may have thought that the Framers intended, the generations of Presidents, Supreme Court Justices, Senators, Congressmen, and plain citizens who have made our Constitution "a continuously operative charter of government" ¹⁰⁰ and our government a living organism, have decreed that the Constitution confers upon the Congress and the President all of the broad powers needed to establish a completely adequate procedure wholly independent of the treaty-making procedure—and considerably more responsive to majority will and the national interest—for the making and honoring of international agreements of all kinds and of all degrees of importance. No illusion as to the exclusiveness of the treaty-making clause, that is at all affected by intimations of reality, can survive the fact that of

99. 1 ELLIOT, DEBATES, at 506-7 (letter to Pickering, Dec. 22, 1814). See also remarks of former delegate Abraham Baldwin, 5 ANNALS OF CONG. 537 (1796).

It may not be inappropriate to compare the language of former Chief Justice Hughes on "legislative ambiguity": "Moreover, legislative ambiguity may at times not be wholly unintentional. It is not to be forgotten that important legislation sometimes shows the effect of compromises which have been induced by exigencies in its progress, and phrases with a convenient vagueness are referred to the courts for appropriate definition, each group interested in the measure claiming that the language adopted embodies its views." Quoted in GRAY, NATURE AND SOURCES OF THE LAW (2d ed. 1921) 173, n. 1.

The general view has been that the maxim of construction *expressio unius est exclusio alterius* has no validity as a canon of constitutional construction. See THE FEDERALIST, No. 83 (Hamilton).

Professor Radin has offered the following cogent language: "The rule that the expression of one thing is the exclusion of another is in direct contradiction to the habits of speech of most persons. To say that all men are mortal does not mean that all women are not, or that all other animals are not. There is no such implication either in usage or in logic, unless there is a very particular emphasis on the word *men*. . . . So far from being logical, as some courts have called it, it illustrates one of the most fatuously simple of logical fallacies, the 'illicit major,' long the *pons asinorum* of schoolboys." Radin, *Statutory Interpretation* (1930) 43 HARV. L. REV. 863-73.

100. Mr. Chief Justice Stone, in *Opp Cotton Mills, Inc. v. Administrator of the Wage and Hour Division*, 312 U. S. 126, 145 (1941).

the "nearly two thousand international instruments" entered into by the United States between 1789 and 1939 "only some eight hundred were made by the treaty process."¹⁰¹ Even the most casual summary must dispose of any lingering, oligarchical hope that these some twelve hundred international agreements other than "treaties" have been confined to matters of unimportance or of Presidential whim. "'Importance' and 'dignity,'" Professor Quincy Wright has written, "are hard words to define, but the United States annexed Texas and Hawaii, ended the first world war, joined the International Labor Organization, the Universal Postal Union and the Pan American Union, settled over ten billion dollars worth of post-World-War I debts, acquired Atlantic naval bases in British territory during World War II, acquired all financial claims of the Soviet Union in the United States, joined the United Nations pledging itself not to make separate peace in world war II and to accept the Atlantic Charter, submitted over a score of cases to international arbitration, and modified the tariff in numerous reciprocal trade agreements, by means other than the treaty-making process."¹⁰²

The Powers of Congress.

The powers of the whole Congress to authorize or sanction international agreements are as broad as its general legislative powers to frame policies for the control of the international affairs of our government and people. The most strikingly relevant of these powers have already been quoted above.¹⁰³ A long line of precedents establishes that within the range of these powers, "the treaty-making power to the contrary notwithstanding," the Congress may authorize the President to deal with other governments "by negotiation and agreement" and can assure the President that any agreements he makes will not only become the law of the land but will also receive all necessary implementation.¹⁰⁴ As we have seen, in the first decades of our national

101. Wright, *supra* note 89, at 344.

102. *Id.* at 343.

103. *Supra*, pp. 217-8.

104. The quoted words are from CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944) 44.

Under the "necessary and proper" clause the powers of the Congress to implement valid agreements are plenary.

The full constitutional role of Congress in the making of international agreements sometimes escapes even writers predisposed to favor executive agreements because of the common failure to distinguish all the steps that are involved in "making" an agreement. Thus, Mr. McClure, following the passage from Professor John Bassett Moore analysed above in Section II, has written: "The making of agreements with other countries is an executive function and hence, under the Constitution, vested wholly in the President." McCLURE, *EXECUTIVE AGREEMENTS*, at 332. Elsewhere he finds "no original Constitutional authority in Congress" to "authorize" the making of international agreements "unless, indeed, 'au-

existence, some interpreters, such as Jefferson and Madison, even took the position that these powers of the whole Congress were exclusive of the treaty-making procedure and that that procedure could not be utilized to ratify international agreements dealing with "subjects of legislation" confided to the Congress.¹⁰⁵ "This last exception is denied by some on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others."¹⁰⁶ While practice under the Constitution has not substantiated this early contention that treaties may not trench into the area of Congressional power,¹⁰⁷ it has confirmed beyond doubt the corollary proposition that the treaty-making power is no barrier to Congressional authorization or sanction of agreements.¹⁰⁸

The first authorization of Congressional-Executive agreements developed under a clause of the Constitution which at first glance appears

thorize' simply means that Congress proposes not to use its power in contradiction"; and he suggests that this now acknowledged power of Congress has its legal basis merely in "constitutional usage." *Id.* at 372. It is true, as we have indicated above, that the Congress has no power to "make agreements" in the sense of conducting negotiations, and that the President needs no authorization in this respect. But the Congress has a considerably more important role in the total process of "making" international agreements than that of merely proposing "not to use its power in contradiction." As we indicate in the text, it can shape policies on subject matters within its powers, it can make agreements effected in accordance with these policies the law of the land, and it can provide any necessary implementation. Whether these powers are based on *interpretation* of the language of the Constitution or on *usage* is, strictly, a matter of concern only for rhetoricians, but it may be recalled, as we have shown in the text, that any other interpretation of the express powers of the Congress makes them completely quixotic. Mr. McClure is more discerning when he writes (at page 353) that, on certain assumptions, "the executive agreement, 'authorized' or confirmed by Congress, becomes an instrument that must be regarded as more conservative and constitutionally better substantiated than the treaty" and that in "actual practice, congressional 'authorization,' as in the Trade Agreements Act of 1934, enables Congress to dictate the terms within which negotiations must be confirmed and hence to participate in a very direct way in the actual conduct of international relations."

105. See JEFFERSON, *MANUAL OF PARLIAMENTARY PRACTICE* (1797-1801) § 52; see also Gallatin's remarks during the debate on the Jay Treaty of 1795, 5 *ANNALS OF CONG.* 465 *et seq.* (4th Cong., 1st Sess., 1796) and Madison's remarks, *id.* at 487-95. See also note 94 *supra*.

The House of Representatives has several times adopted resolutions declaring that it would be unconstitutional for the President to make treaties modifying the provisions of tariff acts, unless pursuant to legislation, approved by both houses. See 2 *HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES* (1907) 989; H. R. REP. No. 1848, 48th Cong., 1st Sess. (1884) 1; H. R. REP. No. 4177, 49th Cong., 2d Sess. (1887); but see H. R. REP. No. 225, 46th Cong., 3d Sess. (1880).

106. JEFFERSON, *loc. cit. supra* note 105.

107. In pursuance of his interpretation, Jefferson at first proposed to submit the Louisiana Purchase agreement with France to Congress, but was dissuaded by his cabinet on the grounds of political necessity. See HAYDEN, *THE SENATE AND TREATIES, 1789-1817* (1920) 139; 5 MOORE, *DIGEST*, at 225. This was one of the earliest Presidential iterations of the interchangeability of agreements and treaties.

108. See Wright, *supra* note 89, at 341, n. 3.

to pertain to purely domestic problems. Article I, Section 8 empowers Congress to "establish post offices and post roads." As early as 1792, Congress interpreted this language to include the power to enact legislation authorizing the Postmaster General to make agreements with foreign nations for reciprocal delivery of mailed matter.¹⁰⁹ Numerous analogous statutes have been enacted in subsequent years, under authority of which more than 300 postal conventions have been negotiated.¹¹⁰ The courts have held that these conventions were "part of the law of the land,"¹¹¹ just as treaties are under Article VI of the Constitution. There is thus evidence dating from Washington's first administration of a "contemporaneous construction" that the treaty-making power is not an exclusive pre-emption of the right to make international agreements.¹¹²

The administrations of President Washington and John Adams furnish two striking examples of situations where authority over specific problems was asserted concurrently under the treaty-making power and the grants of legislative authority to Congress. In 1795 the Jay Treaty with England was submitted to the Senate by Washington. The following year legislation was introduced in the House authorizing appropriations to effectuate certain portions of the Treaty. Although concurring in Washington's assertion that it had no right to participate in the making of treaties,¹¹³ the House asserted that it was not bound to pass implementing legislation, because of its "constitutional right and duty . . . to deliberate on the expediency or in expediency of carrying such Treaty into effect" ¹¹⁴ The House, although generally passing appropriation acts or other legislation incidental to previously ratified treaties, has never receded from the position taken in 1796 ¹¹⁵ under the leadership of Madison and Gallatin.¹¹⁶

Previous to the adoption of the Constitution several treaties and

109. 1 STAT. 236 (1792).

110. See *infra*, p. 277.

111. See *Cotzhausen v. Nazro*, 107 U. S. 215, 217 (1882); *United States v. 18 Packages of Dental Instruments*, 222 Fed. 121, 124 (E. D. Pa. 1915).

112. The Supreme Court has repeatedly emphasized the importance of uniform "contemporaneous constructions" in interpreting the language of the Constitution. *Cooley v. Port of Philadelphia*, 53 U. S. 299, 315 (1851). It has also been held that they sanction an interpretation of the Constitution different from that which might otherwise be reached by the ordinary canons of interpretation. *Ware v. United States*, 4 Wall. 617 (U. S. 1866); *The Laura*, 114 U. S. 411 (1885).

113. See 5 ANNALS OF CONG. 767 (1796); 1 RICHARDSON, MESSAGES, at 194-6.

114. 5 ANNALS OF CONG. 771 (1796).

115. See CONG. GLOBE, 42nd Cong., 1st Sess. (1871) 835; CRANDALL, TREATIES, at 165 *et seq.*; 5 MOORE, DIGEST, at 224, 232; ROBINSON, A HISTORY OF TWO RECIPROCITY TREATIES (1904) 164; 171-2; Burr, *The Treaty-Making Power of the United States* (1912) 51 PROC. AM. PHIL. SOC. 271, 289, 291.

116. See 5 ANNALS OF CONG. 465, 488, 767, 778 (1796); see also McLAUGHLIN, CONSTITUTIONAL HISTORY, at 258-61; 1 WILLOUGHBY, CONSTITUTIONAL LAW, at 483.

an alliance had been consummated with France;¹¹⁷ these instruments had become "the law of the land" under Article VI. Yet in 1798, when war with France seemed imminent and it was decided to abrogate the treaties, the procedure was adopted of enacting a resolution of denunciation by majority vote in both houses¹¹⁸ instead of submitting a resolution for approval by two-thirds vote of the Senate. This course was approved by President Adams and sanctioned in a series of court decisions.¹¹⁹ Since there is no provision of the Constitution which can be construed as authorizing Congress to terminate treaties by enactment of a statute, the 1798 resolutions furnish what is perhaps the first example of the assertion of residual Congressional authority to legislate in the field of foreign relations.¹²⁰ Subsequent Congresses continued to assert the power to abrogate treaties by joint resolution of both houses.¹²¹

There is, moreover, at least one important area which in later years was completely closed to the treaty-making power by Congressional legislation. During the first eight decades of government under the Constitution, agreements with Indian tribes were made exclusively by the President, with the advice and consent of the Senate;¹²² such treaties comprised a substantial proportion of the total number ratified during these years.¹²³ Yet by an act adopted in 1871 it was provided

117. 2 MILLER, *TREATIES*, at 3, 35, 45, 158.

118. 1 STAT. 578 (1798).

119. See *The Eliza*, 4 Dall. 37 (U. S. 1800); *Chirac v. Chirac*, 2 Wheat. 259, 272 (U. S. 1817); *Hooper, Adm'r v. United States*, 22 Ct. Cl. 408, 416 (1887).

In the *Hooper* case, 22 Ct. Cl. at 416, the court said in part: "As to the period after July 7, 1798: On that date the abrogating act passed by the Congress was approved by the President and became a law within the jurisdiction of the Constitution; a law replacing to that extent the treaties, and binding upon all subordinate agents of the nation, including its courts, but not necessarily final as the annulment of an existing contract between two sovereign powers."

120. See *infra*, pp. 255-61.

121. See, e.g., 9 STAT. 109 (1846); 13 STAT. 566 (1865); 36 STAT. 83 (1909); 38 STAT. 1184 (1915); 41 STAT. 1007 (1920).

122. 5 MOORE, *DIGEST*, at 220-1.

123. See HAYDEN, *THE SENATE AND TREATIES, 1789-1817* (1920) 1, 4, 11-16, 21-39, 95-100, 133.

124. REV. STAT. § 2079 (1877), 25 U. S. C. § 71 (1940). The debates on the adoption of this legislation furnish an interesting example of the assertion of concurrent powers in the field of foreign relations. It was conceded that the Congress as such was powerless to interfere with the making of any particular treaty; however, the position was taken that, despite the absence of an explicit constitutional ground of power, Congress was authorized to determine whether the Indian tribes were or were not independent nations with which treaties could be made. CONG. GLOBE, 41st Cong., 3d Sess. (1871) 763-5; *id.* at 1821-5. The fictional nature of the rationalization is evidenced by the fact that the power to recognize foreign governments has generally been treated as an executive prerogative. 1 MOORE, *DIGEST*, at 244 *et seq.*; WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) § 194.

that no future agreements should be consummated by treaties;¹²⁴ this limitation was subsequently upheld by the Supreme Court.¹²⁵

The full record of how the Congress throughout our history has employed its various powers to promote, authorize, and sanction the making of international agreements for securing the multitudinous interests of our people is an impressive demonstration of how democratic procedures can be made to work for the national interest. Some indication of this record will be given under functional sub-headings in the next Section of this article. It may not be inappropriate, however, to make specific reference here to one of the more important powers, the power "to regulate commerce with foreign nations." It has long been considered by representatives of both parties that this particular grant of power to Congress extends to the authorization of reciprocal trade compacts, as well as numerous other types of agreements dealing with commercial problems.¹²⁶ This interpretation of the Constitution was upheld by the Supreme Court in *Field v. Clark*¹²⁷ and *B. Altman & Company v. United States*.¹²⁸ In the latter case, Mr. Justice Day stated:

"We think that the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the Federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the Nation. While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 3, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President."¹²⁹

It needs no emphasis that the area within which Congress may use its expressly delegated powers to authorize or sanction the making of international agreements is very broad. The contemporary judicial constructions of the compass of such Congressional powers as those

125. *Elk v. Wilkins*, 112 U. S. 94 (1884).

126. For excellent general discussion, see [Congressman] Kefauver, *The Trade Agreements Act and the Constitution* (1943) 17 TENN. L. REV. 846; Hackworth, *Legal Aspects of the Trade Agreements Act of 1934* (1935) 21 A. B. A. J. 570.

127. 143 U. S. 649 (1892).

128. 224 U. S. 583 (1912).

129. *Id.* at 601.

over war and commerce are matters of common knowledge.¹³⁰ It is also of common knowledge that it is becoming increasingly difficult to

130. The present scope of the war power is reflected in the First and Second War Powers Acts. 55 STAT. 838 (1941), 50 U. S. C. A. app. § 601 (1944); 56 STAT. 156 (1942), 50 U. S. C. A. app. § 631 (1944). In *Hirabayashi v. United States*, 320 U. S. 81, 93 (1942), Mr. Chief Justice Stone speaking for the Court said:

"The war power of the national government is 'the power to wage war successfully.' See Charles Evans Hughes, *War Powers Under the Constitution*, 42 A. B. A. Rep. 232, 238. It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs." (Citations omitted.)

Cf. *Hamilton v. Kentucky Distilleries and Warehouse Co.*, 251 U. S. 146 (1919); *Bowles v. Willingham*, 321 U. S. 503 (1944); *Yakus v. United States*, 321 U. S. 414 (1944); *Shreveport Engraving Co. v. United States*, 143 F. (2d) 222 (C. C. A. 5th, 1944); *Ken-Rad Tube & Lamp Corp. v. Badeau*, 55 F. Supp. 193 (W. D. Ky. 1944); CORWIN, *THE PRESIDENT*, at 191; Notes (1944) 20 N. Y. U. L. Q. REV. 102, (1941) 41 COL. L. REV. 1039; Dodd, *The Constitution—1787 and Today* (1944) 20 IND. L. J. 55.

Yet these interpretations do not extend materially beyond that given to the Constitution by Lincoln. See RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1926) especially c. 2.

The present scope of Congress's power over domestic commerce is indicated by the decision in *Wickard v. Filburn*, 317 U. S. 111 (1942), which sustained "federal power to regulate production of goods" not "intended in any part for commerce but wholly for consumption on the farm." Mr. Justice Jackson, speaking for a unanimous court, said:

"Whether the subject of the regulation in question was 'production,' 'consumption,' or 'marketing' is, therefore, not material for purposes of deciding the question of federal power before us. That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of Congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' "

Cf. *United States v. South-Eastern Underwriters Ass'n*, 322 U. S. 533 (1944); Powell, *Insurance as Commerce, in Constitution and Statute* (1944) 57 HARV. L. REV. 937; Note (1944) 44 COL. L. REV. 772; Comment (1942) 42 COL. L. REV. 1333.

The recent decisions are within the tradition as to the proper scope of the clause estab-

divide effective control over foreign and domestic affairs if we are to have more prosperity and less depression, or to divide effective control over war and peace if we are to have less war and more peace. Striking recognition of these interdependences of contemporary life was embodied in the Lend-Lease Act of March 11, 1941,¹³¹ empowering the President to make agreements, in accordance with Congressional policies, of the most far-reaching effect for both war and peace and for both domestic and foreign affairs. It can confidently be expected that when the exigencies of the unforeseeable future demand analogous fusions of the legislative and Presidential powers, for vital national purposes, the language of the Constitution will be found sufficiently flexible to meet the needs of government.

The Powers of the President.

Under the Constitution the powers of the President to make important international agreements other than treaties are twofold. He has

lished by Chief Justice Marshall [see FRANKFURTER, *THE COMMERCE CLAUSE* (1937) c. 1], and preserve the definition of "commerce" current in the days of the "Founding Fathers." See HAMILTON AND ADAIR, *THE POWER TO GOVERN* (1937).

131. 55 STAT. 31 (1941), 22 U. S. C. A. § 411 (Supp. 1944), renewed by 57 STAT. 20 (1943) and 58 STAT. 222 (1944), 22 U. S. C. A. § 412 (Supp. 1944).

In *Executive Agreements* at 672, n. 32, Professor Borchard has suggested that the Congress in its 1944 renewal of the Lend-Lease Act "voted unanimously for the Wadsworth Amendment to prohibit the President from making post-war economic or military commitments to any nations in the final Lend-Lease settlements 'except in accordance with established constitutional procedure.'" Section 3(b) of the Lend-Lease Act as approved by the House, in its renewal, read as follows. (Wadsworth Amendment in italics):

"The terms and conditions upon which any such foreign government receives any aid authorized under subsection (a) shall be those which the President deems satisfactory, and the benefit to the United States may be payment or repayment in kind or property, or any other direct or indirect benefit which the President deems satisfactory: *Provided, however, That nothing in this paragraph shall be construed to authorize the President in any final settlement to assume or incur any obligations on the part of the United States with respect to post-war economic policy, post-war military policy, or any post-war policy involving international relations except in accordance with established constitutional procedure.*"

As Professor Borchard indicates, the Senate later struck out the words "in any final settlement" and the House concurred.

These words of the Congress must be read with some care. The only "commitments" by the President that they prohibit are those that "assume or incur any obligations on the part of the United States" with reference to the three stated policies and which are not "in accordance with established constitutional procedure." In its classic 1943 report on the extension of the Lend-Lease Act, H. R. REP. No. 188, 78th Cong., 1st Sess., p. 14, the Foreign Affairs Committee of the House offers clear explanation of what it meant by the Wadsworth Amendment:

"The proposals for forward action in the economic field . . . must be handled in accordance with the normal course of our constitutional procedure, by statutes, treaties, or executive agreements, as may prove proper. The powers of the Senate in the field of treaties are unimpaired, as are those of the Congress in the field of

his own powers, independent of those of the Congress, as "the Executive," "the Commander-in-Chief of the Army and Navy," and "the sole organ of the government" in the conduct of international negotiations.¹³² He may also act under the authorization of Congress within the scope of its powers. Under his own powers, the President may con-

legislation. Section 3(b) of the act clarifies the President's essential Executive powers in the administration of the lend-lease program."

From a long-term perspective the important point is, however, that, whatever the meaning of the Wadsworth Amendment, the constitutional power that can decree the policy and the procedures for the making of the Lend-Lease agreements can also decree the policy and the procedures for their settlement.

132. See generally McCURE, *EXECUTIVE AGREEMENTS*, cc. 9, 10; CORWIN, *THE PRESIDENT*, c. 6; CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944) 38; Wright, *The United States and International Agreements* (1944) 38 AM. J. INT. L. 341; BERDAHL, *THE WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* (1921) 2; Jones, *The President, Congress, and Foreign Relations* (1941) 29 CALIF. L. REV. 565; Foley, *Some Aspects of the Constitutional Powers of the President* (1941) 27 A. B. A. J. 485.

Two clear and definitive summaries have been made by Mr. Justice Sutherland. The first is from the opinion of the Court in *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 319 (1936):

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

The second is from the opinion of the Court in *United States v. Belmont*, 301 U. S. 324, 330 (1937), and refers to direct Presidential agreements:

"The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate."

duct negotiations with other governments upon all subject matters, and upon a subject matter within the scope of his own powers he may conclude agreements, in accordance with his own policies, and make these agreements the law of the land, implementing them to the full extent that his powers permit.¹³³ It has been suggested by distinguished scholars that this power of the President is "plenary,"¹³⁴ and "that he can make international agreements on any subject whatever, limited only by the qualification that he ought not to engage the good faith of the United States to something which may not be carried out."¹³⁵ It is not necessary, however, in order to make it clear that the United States possesses a completely adequate procedure, independent of the treaty-making procedure and more responsive to democratic control and to the national interest, for making important international agreements, to come to a conclusion on this point. What is completely certain is that the powers of the Congress can be superadded to those of the President, and that the two sets of powers taken together are plenary.

It may be helpful to review the specific powers of the President and to note some of the more important instances in which he has acted under authorization of Congress. With respect to specific agreements, it is often impossible, of course, to tell under which of his specific powers the President was acting or even whether he was acting under his own powers or those of the Congress. A more complete review of the precedents will, accordingly, be presented under functional sub-headings in the next Section.

1. "*Commander-in-Chief*." As the Supreme Court has pointed out the President's expressly granted power to act as Commander-in-Chief of the Army and Navy¹³⁶ necessarily includes authority to make agree-

133. Professor Borchard concedes that "History provides numerous examples of the use of the Presidential prerogative through executive agreements with foreign governments." Borchard, *Executive Agreements*, at 673. "It is only," he insists, "agreements of a more important character, involving future commitments, that encroach upon the treaty-making power of the Senate." (*Id.* at 674.) Lesser "examples of the President's exercise of the power" are either explained as "illustrations of the day-to-day activities of the government" or found justifiable "in so far as they touch questions which properly are the subject of treaties . . . on the ground that the Senate has acquiesced . . ." (*Id.* at 674.) One wonders again, on Professor Borchard's theories of constitutional interpretation, whence comes this Senatorial power of "acquiescence."

134. McCURE, *EXECUTIVE AGREEMENTS*, at 330.

135. Wright, *supra* note 132, at 348. See also Wright, *Constitutional Procedure in the United States for Carrying out Obligations for Military Sanctions* (1944) 38 AM. J. INT. L. 678; Wright, *The Lend-Lease Bill and International Law* (1941) 35 AM. J. INT. L. 305.

136. U. S. CONST. Art. II, § 2, par. 1. See generally BERDAHL, *op. cit. supra* note 132, cc. 1, 2. See also White, *The War Powers of the President* [1943] WIS. L. REV. 265; Gilmore, *War Power—Executive Power and the Constitution* (1944) 29 IOWA L. REV. 463; Franklin, *War Power of the President: An Historical Justification of Mr. Roosevelt's Message of September 7, 1942* (1942) 17 TULANE L. REV. 217.

ments with foreign nations to protect the military security of the United States, both in time of war and of peace.¹³⁷ Thus, in time of peace, Presidents have assumed power to make compacts providing for the limitation of armaments,¹³⁸ for joint activity with other nations in providing for common defense,¹³⁹ and for the passage through the United States of foreign troops.¹⁴⁰ The Boxer Protocol of 1900¹⁴¹ indicates that once it has been found necessary to send military forces overseas to safeguard American interests, the President acquires broad powers to enter into agreements which may avert the necessity for future armed intervention.

It needs no emphasis in the days of Yalta and its predecessors that during war-time the necessity for utilization of the President's powers to make agreements is obviously increased. In addition to purely military arrangements, this authority subsumes the consummation of armistice provisions—which in the case of the preliminary peace protocol with Spain of 1898 resulted in an immediate transfer of suzerainty over Puerto Rico and an agreement to relinquish all claims to Cuba¹⁴²—and the settlement of financial claims against hostile or allied powers.¹⁴³

2. To "*Receive Ambassadors and Other Public Ministers.*" The power to determine when to recognize foreign governments¹⁴⁴ is supported by the corollary power to make agreements settling outstanding grievances at the time of recognition. The most important example is the Litvinov assignment of 1934, by which the United States acquired Russian-owned assets located in this country. The Supreme Court has

137. See *Tucker v. Alexandroff*, 183 U. S. 424, 435 (1901).

138. The most famous example is the Rush-Bagot Agreement of 1817 limiting naval armaments on the Great Lakes. President Monroe did not think Senatorial approval of the Agreement was requisite, but six months after its execution, when inquiries had been made by Great Britain, submitted to the Senate the question of whether its advice and consent was needed. The Agreement was approved by the Senate by a two-thirds majority. However, most commentators have treated it as an executive agreement, since ratifications were never exchanged. See generally H. R. Doc. No. 471, 56th Cong., 1st Sess. (1900).

139. Two important recent examples are the Canadian-American defense agreement of August 1940 (see N. Y. Times, Aug. 19, 1940, p. 1, col. 3; N. Y. Times, Aug. 20, 1940, p. 1, col. 1) and the bases-destroyer deal with Great Britain of September 1940. N. Y. Times, Sept. 4, 1940, p. 1, col. 5. Attorney-General Jackson's opinion as to the legality of the agreement is reprinted in N. Y. Times, Sept. 4, 1940, p. 16.

140. See Simpson, *Legal Aspects of Executive Agreements* (1938) 24 IOWA L. REV. 67, 81-2; 1 MALLOY, TREATIES, at 1144.

141. See *infra*, pp. 280-1, and Part II, Section VIII.

142. See BERDAHL, *op. cit. supra* note 132, at 233-4.

143. See *infra*, pp. 269, 278-9.

144. U. S. CONST. Art. II, § 3. In 1794 Washington made the classic statement of the traditional position that the President's powers in this field are not subject to Congressional control. See CORWIN, THE PRESIDENT, at 213; see also 7 OPS. ATT'Y GEN. 189, 209 (Cushing, 1855); 4 MOORE, DIGEST, at 484-549.

twice upheld the validity of the assignment in language which embodied a broad recognition of the President's capacity to make executive agreements.¹⁴⁵

3. "*He Shall Take Care That the Laws Be Faithfully Executed.*"¹⁴⁶ Early in the nineteenth century, Attorney General Wirt interpreted this clause as referring not only to the Constitution, statutes, and treaties, but also to all "those general laws of nations which govern the intercourse between the United States and foreign nations."¹⁴⁷ This interpretation appears to have been sanctioned by dicta of the Supreme Court in the *Neagle* case in 1890.¹⁴⁸

An important aspect of the President's powers under this clause is the authority to enter into agreements which supplement or modify treaties;¹⁴⁹ but the clause equally sanctions agreements which are necessary to fulfil other international obligations of the United States.¹⁵⁰

4. "*The Executive Power Shall Be Vested in a President of the United States of America.*" At the very first session of Congress, a controversy arose as to whether the vesting of "the executive power" in the President was an affirmative grant of power or mere introductory language. The controversy was precipitated by the debate as to the power of the President to remove officers who, under the Constitution, could be appointed only with the consent of the Senate.¹⁵¹ The controversy broke out again—this time with reference to the international powers of the President—in 1793, when Washington issued a proclamation of neutrality at the outbreak of war between England and France.¹⁵²

The Congressional participants in these debates displayed the common political dexterity at shifting their ideologies in response to immediate political objectives. Thus Madison who had argued strongly in 1789 that the opening clause of Article II was a great reservoir of

145. *United States v. Belmont*, 301 U. S. 324 (1937); *United States v. Pink*, 315 U. S. 203 (1942). The dissenting opinions in these cases are not concerned so much with the authority of the President to enter into agreements of this general character as with the correctness of the majority's interpretation of the Litvinov assignment.

146. U. S. CONST. ART. II, § 3.

147. 1 OPS. ATT'Y GEN. 566, 570-1 (1822).

148. *In re Neagle*, 135 U. S. 1, 64.

149. See *supra*, p. 205.

150. Thus this clause furnishes an alternate source of authority for the Boxer Protocol of 1900. See *infra*, pp. 280-1, and Part II, Section VIII.

151. See 1 ANNALS OF CONG. 462-3, 474, 481-2, 497, 515-9 (1st Cong., 1st Sess., 1789).

152. See CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917) 7-32; 6 WRITINGS OF JAMES MADISON (Hunt, ed., 1906) 138 *et seq.*

The 1793 proclamation had threatened that citizens violating its provisions would be subject to criminal prosecution. One such conviction was sustained by a United States circuit court on which sat Justices Wilson and Iredell of the Supreme Court. *Henfield's Case*, 11 Fed. Cas. 1099, No. 6,360 (C. C. Pa. 1793).

executive power held in 1793, when his desire to befriend the French Republic impelled him to look with disfavor upon Washington's Neutrality Proclamation,¹⁵³ that it was mere tautology.¹⁵⁴

These constitutional tergiversations were not matched in executive deportment. When in power, both the Federalists and the Democrat-Republicans found it essential that the President should exercise powers which are nowhere granted in the Constitution and which can be justified only by acceptance of Madison's original theory as to the proper construction of Article II. The initial examples are furnished in the administration of George Washington. The same section of the Constitution which contains the permissive authority to make treaties provides that the President "by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls" There is no provision in the Constitution authorizing the President to appoint envoys without Senatorial approval.¹⁵⁵ Yet at least four times during his tenure of office President Washington on his own initiative appointed "commissioners plenipotentiary" or "agents" to negotiate treaties.¹⁵⁶ The first of these "extra-constitutional" appointments was made as early as October 1789. In at least two of these instances, Congress subsequently indicated its approval of the President's construction of the Constitution by appropriating funds to defray the expenses of the executive agents.

John Adams, the second President of the United States, carried the process of broad construction of the "executive power" a step further in 1799 when he authorized his Secretary of State to enter into a convention with the Dutch minister, to settle private American claims against the Netherlands.¹⁵⁷ When a member of the House of Representatives in 1800, John Marshall indicated the constitutional basis for

153. For general background see 1 MORISON AND COMMAGER, *GROWTH OF THE AMERICAN REPUBLIC* (1937 ed.) 249-50; FISH, *AMERICAN DIPLOMACY* (1938 ed.) 99-103.

154. MADISON, *loc. cit. supra* note 152. Jefferson thought the proclamation was constitutional although disagreeing with some of the arguments by which Hamilton substantiated this exercise of executive power. See CORWIN, *THE PRESIDENT*, at 211; 6 *WRITINGS OF THOMAS JEFFERSON* (Ford, ed., 1899) 338.

155. True, Article II, Section 2, clause 2 authorizes Congress to vest the appointment of "inferior officers" in the President alone, or in the heads of departments, but no act authorizing general Presidential appointment of envoys to foreign governments has even been passed, nor are such emissaries generally considered to be "inferior officers."

156. In 1789 Gouverneur Morris was designated special envoy to negotiate a commercial treaty with Great Britain. 1 RICHARDSON, *MESSAGES*, at 96. In 1791 Colonel Humphreys was sent to Madrid and Lisbon on a similar mission. *Id.* at 97-8. In 1792 Admiral John Paul Jones was appointed special envoy to the Bey of Algiers. See WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) 328. In 1795 Colonel Humphreys and Joseph Donaldson were appointed agents to negotiate with the Algerian government. See also speech of Senator Livingston of Louisiana, in 1831. 11 BENTON, *ABRIDGMENT*, at 221-2.

157. 5 MILLER, *TREATIES*, at 1075. Negotiations for the adjustment of these claims had been commenced during Washington's administration.

the consummation of direct Presidential agreements, in language echoed 136 years later by the United States Supreme Court:¹⁵⁸ "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."¹⁵⁹

In discussing domestic problems, the Anti-Federalist Presidents continued to espouse the thesis that the Executive (like the Federal Government as a whole) possessed only limited powers.¹⁶⁰ But their views as to the control of foreign relations were cut from a different pattern. When Secretary of State in 1793, Jefferson had declared that "the transaction of business with foreign nations is executive altogether,"¹⁶¹ and the historical record indicates that few Presidents have expanded the notion of executive leadership as much as Jefferson and his disciples and immediate successors.¹⁶² In addition to retaining in the Presidential domain the various powers claimed by Washington and Adams,¹⁶³ the Democrat-Republican administrations pre-empted for the Executive authority to deal with numerous novel problems which arose in the first decades of the nineteenth century. One example came in the first year of Jefferson's first term.

Article I, Section 8, clause 11 of the Constitution authorizes Congress "to declare war"; while the President is made the Commander-in-Chief of the Army and Navy, he is given no authority to embark upon any sort of offensive operations. Yet in 1801 President Jefferson dispatched a naval squadron to the Mediterranean to protect American shipping from Tripolitan depredations;¹⁶⁴ several engagements were fought before Congressional approval was solicited or obtained.¹⁶⁵ Upon this cornerstone was erected the doctrine that the Executive has authority on his own initiative to use diplomatic pressures or military forces to protect the extraterritorial interests of American citizens. There are more than 100 examples of the use, on direct Presidential responsibility, of limited American military or naval contingents outside the territorial borders of the United States to protect American interests.¹⁶⁶

158. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936).

159. 10 ANNALS OF CONG. 613 (1800).

160. See SMALL, *SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY* (1932) 20-5.

161. Quoted in CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917) 203; see also 4 WRITINGS OF THOMAS JEFFERSON (Washington, ed., 1854) 84, 90.

162. See SMALL, *loc. cit. supra* note 160.

163. Thus Monroe resumed Washington's practice of appointing direct Presidential envoys to foreign governments. 4 MOORE, *DIGEST*, at 452-3.

164. See 3 McMaster, *HISTORY OF THE PEOPLE OF THE UNITED STATES* (1897) 201 *et seq.*; 1 RICHARDSON, *MESSAGES*, at 326 *et seq.*

165. 2 STAT. 129 (1802).

166. See statements by Senator Austin and Professor Wright in *U. S. News*, Nov. 3, 1944, pp. 37-8.

Incomplete lists of uses of our forces in Latin America without Congressional authoriza-

During this same era the arbitration of claims against other nations was pre-empted as an executive function. Thus in 1835 President Jackson—conventionally considered to have been a strict constructionist—vetoed an act authorizing composition of claims against the King of the Two Sicilies on the grounds that the President was authorized to proceed on his own initiative.¹⁶⁷

As previously intimated, in Monroe's first administration one of the most important executive agreements in American history was consummated: the Rush-Bagot Agreement of 1817 providing for permanent limitation of naval armaments on the Great Lakes.¹⁶⁸ The enunciation of the Monroe Doctrine—extending the protection of the United States to almost a score of other republics and constituting in part a limited alliance with Great Britain¹⁶⁹—is a more dramatic example of Presidential leadership. We are thus furnished by the conduct of the first and immediately succeeding Presidents with a consistent "contemporaneous construction"¹⁷⁰ that Article II of the Constitution vested in the Executive a general power to make agreements or in other ways take independent action in the field of international affairs.

Subsequent Presidents have continued to act on the theory that they were charged with the responsibility of representing the interests of the United States in international affairs and of enforcing the international obligations owed to the United States even in the absence of explicit constitutional or statutory grants of power. We have already referred to the protection of extraterritorial property and interests of American citizens,¹⁷¹ which has been judicially described as an executive function.¹⁷² To this may be added the action of various Presidents in granting commercial rights to foreign enterprises¹⁷³ in the absence of statutory authorizations.

tion are contained in 2 MOORE, DIGEST, at 202 *et seq.* (covering period before 1905) and in 2 HACKWORTH, DIGEST, at 282 *et seq.* (covering 1905 to 1940).

For general discussion of this topic see CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917) 131-63; WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) §§ 151, 209-10, 214-24; BERDAHL, *op. cit. supra* note 132.

The relevance of this power of the President will appear more clearly in the discussion in Section VIII of the proposed world security organization.

167. 3 RICHARDSON, MESSAGES, at 146. The notion that the Executive has exclusive control over the settlement of international private claims has, however, yielded in favor of a doctrine of coordinate control, with primary Presidential responsibility. See WRIGHT, *op. cit. supra* note 166, at §§ 143-8.

168. See note 138 *supra*.

169. See PERKINS, *HANDS OFF: A HISTORY OF THE MONROE DOCTRINE* (1941) 38-47.

170. The Supreme Court has repeatedly emphasized the high exegetic value of such uniform "contemporaneous constructions." See *Cooley v. Board of Port Wardens of Philadelphia*, 12 How. 299 (U. S. 1852); *Stuart v. Laird*, 1 Cranch 299 (U. S. 1803).

171. See *supra*, p. 250, and Part II, Section VIII.

172. *Durand v. Hollins*, 8 Fed. Cas. 111, No. 4, 186 (C. C. S. D. N. Y. 1860).

173. See CORWIN, *THE PRESIDENT*, at 244-5.

The construction of the first clause of Article II as a broad grant of residual power to the Executive¹⁷⁴ was given the imprimatur of judicial approval in 1926 in *Myers v. United States*.¹⁷⁵ Dismissing the assertion that the presence later in the Article of specific grants of power to the President precludes interpretation of the opening clause as a general investiture of power, Chief Justice Taft concluded that the specific grants merely lend emphasis "where emphasis was regarded as appropriate."¹⁷⁶

The President as Agent of Congress.

One of the most important functions of the President in the conduct of American foreign relations has always been his role as agent of Congress to effectuate the purposes and administer the details of legislative policy.¹⁷⁷ The antecedents of this beneficial policy of cooperation between the arms of government are located in the first years after the ratification of the Constitution, and many of these early delegations of authority were phrased in the broadest conceivable language. Thus, by an act approved on June 4, 1794, during Washington's first administration, Congress authorized the President "whenever, in his opinion, the public safety shall so require, to lay an embargo on all ships and vessels in the ports of the United States, or upon the ships and vessels of the United States, or the ships and vessels of any foreign nation, under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper."¹⁷⁸ The statute of 1799 suspending commercial intercourse with France authorized the President "if he shall deem it expedient and consistent with the interest of the United States, by his order, to remit and discontinue, for the time being, the restraints and prohibitions aforesaid . . . and also to revoke such order [*i.e.*, reestablish the restraints], whenever, in his opinion the interest of the United States shall require."¹⁷⁹

Analogous delegations of authority in the field of foreign relations are contained in statutes enacted during the early Democrat-Republican incumbencies. Numerous embargo and non-intercourse acts were passed during the administrations of Thomas Jefferson and James

174. These actions can also be rationalized on the theory that the Federal Government possesses "inherent" powers.

175. 272 U. S. 52 (1926). See also *In re Neagle*, 135 U. S. 1 (1890).

176. 272 U. S. at 118.

177. For a convenient summary see CORWIN, *THE PRESIDENT*, c. 1, and pp. 126-36.

178. 1 STAT. 372 (1794); see also 1 STAT. 401 (1794); *Field v. Clark*, 143 U. S. 649, 683 (1892). The Act was effective only during a stated term of years and when Congress was not in session.

179. 1 STAT. 615 (1799). See also 1 STAT. 444 (1795); 1 STAT. 566 (1798); 2 STAT. 9 (1800).

Madison with caveats authorizing the President to impose, modify, or suspend their provisions. The conditions of exercise of this power were cast in the broadest terms. Thus, by the Act of March 3, 1805,¹⁸⁰ the President was permitted to act "if he shall think it proper" and, by the Act of February 28, 1806, "if he shall deem it expedient and consistent with the interests of the United States."¹⁸¹ In the *Brig Aurora* case in 1813, the Supreme Court held that Congress had not transgressed its power in authorizing the President to suspend or revive the operation of an embargo act, in response to the degree of retaliatory trade policy pursued against the United States by England and France.¹⁸² An almost identical decision had been rendered by a district court five years earlier, with respect to a similar statute.¹⁸³

Statutes passed in subsequent years dealing with foreign commerce or other aspects of international relations continued to vest broad discretionary powers in the President. Mr. Justice Sutherland summarized this cumulative historical record succinctly in the *Curtiss-Wright* case:

"Practically every volume of the United States statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs " ¹⁸⁴

Although delegation of authority to executive officers for the express purpose of negotiating international agreements dates back as far as the Postal Act of 1792,¹⁸⁵ perhaps the earliest example of the use of broad discretionary language in such a statute came in the Postal Act of 1872, providing that "the Postmaster-General, by and with the advice and consent of the President may negotiate and conclude postal treaties or conventions . . . between the United States and foreign countries."¹⁸⁶ Section 3 of the Tariff Act of 1897 extended the principle of broad delegation of power to make agreements to the field of reciprocal trade arrangements;¹⁸⁷ in 1912, the Supreme Court found that such compacts, "authorized by the Congress of the United States,

180. 2 STAT. 341 (1805).

181. 2 STAT. 351 (1806). See also 2 STAT. 411 (1806); 2 STAT. 490 (1808); 2 STAT. 605 (1810); 3 STAT. 361 (1817); 4 STAT. 3 (1824).

182. 7 Cranch 382 (U. S. 1813).

183. *United States v. The William*, 28 Fed. Cas. 614, No. 16,700 (D. Mass. 1808).

184. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 324 (1936). For lists of such statutes see this opinion and the earlier one in *Field v. Clark*, 143 U. S. 649 (1892).

185. 1 STAT. 239 (1792).

186. 17 STAT. 304 (1872).

187. 30 STAT. 203 (1897).

negotiated and proclaimed under the authority of its President" were constitutional.¹⁸⁸ The extension to the Executive of broad discretionary powers to modify Tariff Act provisions was also specifically approved by the Court sixteen years later in *J. W. Hampton, Jr., & Company v. United States*.¹⁸⁹

The declaration of the *Curtiss-Wright* decision that the permissible scope of delegation in the field of foreign relations exceeds that in the domestic sphere echoes an old doctrine of constitutional law.¹⁹⁰ Thus the distinction was emphasized by Chief Justice Hughes in *Panama Refining Company v. Ryan*—one of two cases in judicial history in which a delegation of power to the Executive was held to be excessive.¹⁹¹ The greater toleration of vague standards of delegation in the field of foreign relations has been justified by reference to the overlapping in the powers of the Congress and the President, Mr. Justice Sutherland commenting that such statutes merely confide to the President "an authority which was cognate to the conduct by him of the foreign relations of the Government."¹⁹² Wholly apart from this not unnatural recognition of the President's independent power in the same premises, it should be clear that the Congress can grant the broadest possible discretion to the President without running afoul of the doctrines of Montesquieu. "The Constitution," Mr. Justice Stone has recently observed, "viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination

188. *B. Altman & Co. v. United States*, 224 U. S. 583, 601 (1912).

189. 276 U. S. 394 (1928), in reference to Section 315(a) of the Tariff Act of 1922, 42 STAT. 858. A similar decision referring to the Tariff Act of 1890, 26 STAT. 567, had been rendered in *Field v. Clark*, 143 U. S. 649 (1892). The extent of the discretion conferred by the flexible provisions of the 1922 Act is realistically discussed in LARKIN, *THE PRESIDENT'S CONTROL OF THE TARIFF* (1936); see also McGowen, *An Economic Interpretation of the Doctrine of Delegation of Governmental Powers* (1938) 12 TULANE L. REV. 179.

190. For recent reaffirmation see *United States v. Boreno*, 50 F. Supp. 520, 523-4 (D. Md. 1943):

"The contention is made that this unlimited power given to the President to prohibit or curtail the exportation of *anything*, regardless of whether it has any relation to the War effort, constitutes a delegation of legislative power which is impliedly forbidden by the Constitution as expressly announced by the decisions of the Supreme Court. . . .

"In considering this question as to the character and extent of the delegation of legislative power to the Executive, we must take into account the distinction that exists between the right to challenge the delegation where it relates solely to internal affairs and where it relates to foreign affairs, and more especially, where, as in the present case, it relates to the powers and function of the President as Commander-in-Chief of the Army and Navy in the prosecution of the war in which our country is engaged."

191. 293 U. S. 388, 421-2 (1935).

192. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 (1936), quoting with approbation from *Panama Refining Co. v. Ryan*, 293 U. S. 388, 422 (1935).

of the legislative policy and its formulation as a rule of conduct."¹⁹³ It should not be difficult for the Congress to perform these "essentials of the legislative function" on specific problems without impairing the ability of the President to adjust the details of the nation's foreign policy to meet the changing realities of international politics.

The Completely Comprehensive Powers of the Federal Government.

It should be obvious that the express powers of the Congress and of the President, in terms of their contemporary construction, are broad enough to cover the making and honoring of international agreements on most, if not all, of the important problems of peace and war. If, however, the occasion should ever arise when these powers are found not to be ample for effecting an agreement of importance, there is at the disposal of statesmen and courts another doctrine, the doctrine of "inherent powers" in the field of international relations, which has had a long and honorable history of effective work in the national interest.¹⁹⁴ This doctrine has, furthermore, been expressly invoked by the United States Supreme Court to sanction the President's making of international agreements other than treaties. In the opinion in the *Curtiss-Wright* case, that arch constitutional conservative¹⁹⁵ Mr. Justice Sutherland used unwontedly blunt language to describe the extent to which the powers of the Federal Government with respect to international affairs transcend the specific grants of the Constitution:

"It will contribute to the elucidation of the question if we first consider the differences between the powers of the Federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. . . .

"The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the Federal gov-

193. *Opp Cotton Mills, Inc. v. Administrator of the Wage and Hour Division*, 312 U. S. 126, 145 (1941). *Cf. Bowles v. Willingham*, 321 U. S. 503 (1944); *Yakus v. United States*, 321 U. S. 414; *Shreveport Engraving Co., Inc. v. United States*, 143 F. (2d) 222 (C. C. A. 5th, 1944); *Notes* (1937) 50 HARV. L. REV. 691 (1936), 36 COL. L. REV. 1162; *Comment* (1935) 48 HARV. L. REV. 798; *Brief for United States, Curran v. Wallace*, 306 U. S. 1 (1939) as reprinted in GELLHORN, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (1940) 278.

194. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944) 17: "In the field of foreign relations, on the contrary, the doctrine of Enumerated Powers has always had a difficult row to hoe, and today may be unqualifiedly asserted to be defunct." *Cf. Corwin, THE PRESIDENT*, at 202; Culp, *Executive Power in Emergencies* (1933) 31 MICH. L. REV. 1066, 1077.

Professor Borchard writes, in *Book Review* (1944) 4 LAWYERS GUILD REV. 59, 60, that "the doctrine of inherent powers has been shot to death so often that it ought to have little life left. . . ." Yet he himself, as we have seen, invokes the doctrine in an effort to distinguish the annexation of Texas by joint resolution. *Commerce Committee Hearings* at 134.

195. See Mason, *The Conservative World of Mr. Justice Sutherland* (1938) 32 AM. POL. SCI. REV. 443.

ernment can exercise no powers except those specifically enumerated in the Constitution, and such implied powers . . . , is categorically true only in respect of our internal affairs. . . ."

"It results that the investment of the Federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal government as necessary concomitants of nationality. Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens (see *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356); and operations of the nation in such territory must be governed by treaties, international understandings and compacts, and the principles of international law. As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. The power to acquire territory by discovery and occupation (*Jones v. United States*, 137 U. S. 202, 212), the power to expel undesirable aliens (*Fong Yue Ting v. United States*, 149 U. S. 698, 705 *et seq.*), the power to make such international agreements as do not constitute treaties in the constitutional sense (*Altman & Co. v. United States*, 224 U. S. 583, 600, 601; Crandall, *Treaties, Their Making and Enforcement*, 2d ed., p. 102 and note 1), none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality." 196

It has been sought by several critics to stigmatize Mr. Justice Sutherland's language as "dangerous," "novel," or "unprecedented." 197 To

196. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 (1936). It is surely significant in a court noted for the freedom with which its members wrote dissenting and concurring opinions that only Mr. Justice McReynolds dissented and that none of the Justices expressed a separate view on the legal doctrine.

197. See Patterson, *In re The United States v. The Curtiss-Wright Corporation* (1944) 22 TEX. L. REV. 286, 445; Quarles, *Federal Government: As to Foreign Affairs Are Its Powers Inherent as Distinguished from Delegated?* (1944) 32 GEO. L. J. 375; Borchard, *Executive Agreements*, at 680-1. The latter article also cites BEARD, *THE REPUBLIC* (1943) 217-8 as criticizing the *Curtiss-Wright* opinion, but the objection by Beard is to the discussion of the President's powers and not to the assumption that the Federal Government possesses inherent powers to handle international problems. For a strong defense of Justice Sutherland's position see CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944) 7-20.

In so far as Patterson is concerned lest the *Curtiss-Wright* decision trench into the domain of state powers, his latter-day revival of doctrines of coordinate power is indeed a lost cause. The Supreme Court has repeatedly held that the powers of the states constitute no restriction on the power of the Federal Government to enter into international agreements. *Ware v. Hylton*, 3 Dall. 199 (U. S., 1796); *Hauenstein v. Lynham*, 100 U. S. 483 (1879); *Missouri v. Holland*, 252 U. S. 416 (1920); *University of Illinois v. United States*,

a considerable extent these criticisms seem to be based on nothing more than an objection to the verbal characterization of the powers of the Federal Government with respect to international affairs as "inherent" attributes of "sovereignty." Thus, Judge Quarles vigorously disputes the assertion that the United States possesses any "inherent" powers, but concludes that the Federal Government may enter into any sort of international arrangement deemed appropriate or necessary.¹⁹⁸ When an argument or controversy evolves itself into a quarrel over terminological predilections, it is difficult to see its significance save for rhetoricians. Constitutional power by any other name is just as sweet.

Similar criticism has been made of Mr. Justice Sutherland's historical delineation of the source of "sovereignty." By analogy to the medieval property lawyer's concept of seisin, Justice Sutherland argues that "Sovereignty is never held in suspense As a result of the separation from Great Britain by the colonies . . . the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."¹⁹⁹ This analysis—which had been made in 1795 by Justice Patterson of the Supreme Court and later by Justices Story and Miller²⁰⁰—unquestionably involves certain metaphorical elements and considerable differences of opinion about his-

289 U. S. 48 (1933); *United States v. Pink*, 315 U. S. 203 (1942). More recently, the Tenth Amendment has been held not to constitute an independent limitation on the powers of the Federal Government in the exercise of its domestic powers. *United States v. Darby Lumber Co.*, 312 U. S. 100, 124 (1941); see Feller, *The Tenth Amendment Retires* (1941) 27 *AM. BAR ASS'N J.* 223.

198. Quarles, *supra* note 197, at 380.

Similarly, Willoughby denies the doctrine that the United States has "inherent powers" in the field of foreign relations but insists that the Federal Government has plenary power by implication from express grants, singly and collectively considered. *Cf.* §§ 57 and 58 of 1 *WILLOUGHBY, CONSTITUTIONAL LAW*. There is, however, no provision of the Constitution which vests the Federal Government with plenary authority in this field. The conclusion—which we believe correct—that the Federal Government must have a large measure of discretion in this field is a shrewd perception of political and economic realities; but the choice of a rationale to justify this course is of little consequence. *Cf.* Professor Willoughby's remarks on the power of the United States to acquire territory. *Id.* at § 236.

With respect to the powers of the President, Berdahl has made succinct summary: "Altho the weight of authority upholds the contention that executive power in the United States is limited definitely to the powers enumerated in the Constitution, or clearly implied therefrom, the interpretation of those enumerated powers is frequently such as to give to the President an extraordinary and practically undefined range of authority." *BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* (1921) 14.

199. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 317, 316 (1936).

200. Justice Patterson's views were expressed in the decision in *Penhallow v. Doane*, 3 *Dall.* 54, 80-1 (U. S. 1795). See also 1 *STORY, COMMENTARIES ON THE CONSTITUTION* (5th ed. 1891) 151-60; *MILLER, LECTURES ON THE CONSTITUTION* (1891) 122; Rufus King's remarks in the Convention, 1787, 5 *ELLIOT, DEBATES*, at 212.

torical facts.²⁰¹ It is, of course, completely fruitless to dispute about whence the legal wousin "sovereignty" came to settle on the Federal Government. The important fact is that the imperatives of survival have required the Federal Government to exercise certain powers. It may be recalled that the concept of seisin served many useful purposes in both England and America for several centuries. Someone has aptly said that a fiction acted upon comes very near to the simple truth. Mr. Justice Sutherland may have been expressing a thought more profound than any involved in quarrels about the naming of powers.

One of the main weaknesses of the Continental Congress and the Congress under the Articles of Confederation was, it is true, its inability to enforce treaties in the face of recalcitrance by the individual states or to prevent the separate states from conducting negotiations with foreign governments behind its back.²⁰² But this was a reflection of the general absence of enforcement machinery. The fact is that prior to the ratification of the Constitution, strong efforts were made to centralize the management of foreign affairs in the hands of the Congress or its agents. In November 1775 the Second Continental Congress designated a Committee of Correspondence to conduct overseas negotiations.²⁰³ The names of the erstwhile separate colonies appear nowhere in the Declaration of Independence;²⁰⁴ in at least two early Supremé Court cases, it was unqualifiedly declared that even before the issuance of the Declaration "congress properly possessed the great rights of external sovereignty" as a revolutionary central government.²⁰⁵ That this recital was not a mere retrospective speculation is demonstrated by the fact that prior to the proclamation of the Articles of Confederation in 1781, the Congress, to which no agreement-making power had then been formally delegated by the states, had entered into two agreements formally ratified and had approved the action of its emissary in modifying one of these by an exchange of notes.²⁰⁶ These

201. See Levitan, *Recent Developments in the Control of Foreign Relations under the Constitution of the United States* (Unpublished Ph. D. dissertation in University of Chicago Library, 1940) 55.

202. See 1 BUTLER, *TREATY-MAKING POWER OF THE UNITED STATES* (1902) § 156; 1 McMASTER, *HISTORY OF THE PEOPLE OF THE UNITED STATES* (1897) cc. 3-4.

203. 3 JOURNALS OF THE CONTINENTAL CONGRESS 392 (1775). Prior to the Revolution, the Colonies had entered into agreements with foreign governments only through the British Crown. 1 BUTLER, *op. cit. supra* note 202, §§ 120-1.

204. See 1 STORY, *COMMENTARIES ON THE CONSTITUTION* (5th ed. 1891) 153-5; 1 BUTLER, *op. cit. supra* note 202, § 137. The Articles of Confederation, however, were drawn as an agreement between the states.

205. Mr. Justice Chase in *Ware v. Hylton*, 3 Dall. 199, 232 (1796); see also Chief Justice Jay in *Chisholm v. Georgia*, 2 Dall. 419, 470 (U. S. 1793).

206. As to the treaties see 2 MILLER, *TREATIES*, at 3, 29 *et seq.*; as to the executive agreement see 2 WHARTON, *REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES* (1889) 569.

arrangements, it has been urged, were "wholly illegal and inoperative" if Congress did not possess inherent powers to control international relations.²⁰⁷

Article VI of the Articles of Confederation vested Congress with the exclusive right to make treaties with foreign governments. During the life of the government under the Articles, six treaties, four agreements not formally approved, and numerous contracts were consummated with foreign governments.²⁰⁸ The Supreme Court subsequently held that these compacts overruled contrary state legislation, although the Articles of Confederation had not contained a supremacy clause akin to that embodied in the Constitution.²⁰⁹ When the Constitution was drafted, the supremacy clause was specifically worded so as to make all previously ratified treaties the "law of the land."²¹⁰

There are, furthermore, numerous cases prior to the *Curtiss-Wright* decision in which the Supreme Court has spoken of the Federal Government as possessing inherent powers in the field of foreign relations, transcending any express or directly inferrable constitutional grants. Thus, in *Fong Yue Ting v. United States*, the Court remarked that the power to exclude aliens, absolutely or conditionally, belonged to the Federal Government as an "inherent and inalienable right of every sovereign and independent nation."²¹¹ In the more recent case of *Burnet v. Brooks*, it was observed that as a "nation with all the attributes of sovereignty, the United States is vested with all the powers of government necessary to maintain an effective control of international relations."²¹²

207. 1 BUTLER, *op. cit. supra* note 202, at 260. The scholarly character of this work is avouched in Borchard, *Executive Agreements*, at 679. The treaties were not submitted to the states for approval.

For other action by the Congress under the Confederation, justifiable only under an "inherent power" doctrine, see 1 HOCKETT, *THE CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1939) 177-8; BUTLER, *supra*, § 161.

208. The treaties and some of the contracts are listed in 2 MILLER, *TREATIES*, at ix. The same source lists three agreements not formally approved; a fourth is described in McCLURE, *EXECUTIVE AGREEMENTS*, at 36-7.

209. See, e.g., *Ware v. Hylton*, 3 Dall. 199 (U. S. 1796); *Georgia v. Brailsford*, 3 Dall. 1 (U. S. 1794); *Clerke v. Harwood*, 3 Dall. 342 (U. S. 1797); *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch 603 (U. S. 1813); *Shanks v. Dupont*, 3 Pet. 242 (U. S. 1830).

210. Article IV; see *Chirac v. Chirac*, 2 Wheat. 259, 271 (U. S. 1817); *Carneal v. Banks*, 10 Wheat. 181 (U. S. 1825).

211. 149 U. S. 698, 705 *et seq.* (1892).

212. 288 U. S. 378, 396 (1933). See also *Church of Jesus Christ v. United States*, 136 U. S. 1 (1890); *Knox v. Lee*, 12 Wall. 457 (U. S. 1870); *Mackenzie v. Hare*, 239 U. S. 299 (1915); *Jones v. United States*, 137 U. S. 202, 212 (1890).

It is also possible to cite a list of cases [see, e.g., *Kansas v. Colorado*, 206 U. S. 46 (1907)] in which the Supreme Court has repudiated the doctrine of inherent powers, but these almost all concern the domestic powers of the Government. Moreover, even in this field, the inherent power rationale has frequently been utilized; see *United States v. Jones*, 109 U. S. 513 (1883); *In re Neagle*, 135 U. S. 1 (1890); *Knox v. Lee*, *supra*; and, since the *Darby*

When attention is focused upon the occasions which have elicited these sweeping asseverations rather than upon the rhetoric itself, the imperative policy of the doctrine becomes apparent. The exclusion of aliens, the acquisition of territory outside the North American continent otherwise than by treaty or conquest, the exercise of the power of eminent domain, the establishment of tribunals in foreign countries, the punishment of counterfeiting of foreign coins, are but a few of the problems which have arisen in the course of United States history as to which the Constitution was silent. Indeed, the fundamental notion that the Federal Government is bound to observe the accepted rules of international law is not sustainable by any language in the Constitution.²¹³ When direct Presidential action is involved, the opening clause of Article II, as previously indicated, is capable of indefinite expansion; but there are obvious objections to vesting control of every problem not otherwise mentioned in the Constitution in the hands of the President. It is also often possible by invocation of the doctrine of resultant powers to spell out a constitutional rationale for legislation dealing with any aspect of international relations.²¹⁴ The inherent powers doctrine has, however, certain advantages—in addition to its well-established historical position—in its relative freedom from cant and in its simplicity. But whatever the rationale used, it is perfectly clear that in the conduct of our international relations, the powers of the Federal Government are ample to deal with any problem, because they derive not only from the Constitution, but “from the necessities of the case.”

It may be suggested that this completely comprehensive power of

Lumber case, 312 U. S. 100 (1941), the Tenth Amendment has lost its potency as a limitation on the expansion of federal power.

Certain writers (see, e.g., Quarles, *supra* note 197) have objected to the doctrine on the ground that the cases state that all governmental powers must be exercised subject to the Constitution. But this merely means that the express prohibitions of the Constitution, e.g., the ban on ex post facto legislation, may not be circumvented and that the due process and similar clauses are limitations on Congressional and executive action, whether predicated on express clauses of the Constitution, implied, or inherent powers. Cf. COWLES, *TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW* (1941) cc. 1, 10, 13, 15.

213. Various Presidents have taken the position that the President as final diplomatic agent of the Government is bound to make reparation for any international delinquencies committed by the Government, even where the Supreme Court, as final arbiter of domestic law, had held the acts in question to be valid. See Part II, Section VIII.

214. The doctrine of resultant powers (*i.e.* that an inference may be drawn from a group of express powers that authority to perform another function was conferred on the Government) was expounded by Marshall in *Cohens v. Virginia*, 6 Wheat. 264 (U. S. 1821); see also *United States v. Gettysburg Elect. Ry.*, 160 U. S. 668 (1896). It is instructive to note, however, that applications of this doctrine usually are bottomed upon a philosophic notion as to the type of powers which *ought* to be exercised by a central government a species of reasoning which appears to end in the position presumably sought to be avoided, *i.e.*, in the bosom of the inherent powers theory. See, e.g., 1 WILLOUGHBY, *CONSTITUTIONAL LAW*, § 57.

the Federal Government over foreign affairs can exhaust itself through the operation of the treaty-making procedure. There are, however, no constitutional or policy reasons why this power should be forced into a single channel. The word "treaty," to summon up remembrance of things past, is neither self-defining nor defined within the Constitution; the present broad scope of the treaty-making power, once bitterly contested, is itself a product of the long and slow process of constitutional construction. "As a matter of history," Professor Corwin has written, "the notion of the indefinite scope of the treaty-making power is itself reflective of the concept of the National Government's plenary powers in the field of foreign relations and was not always conceded in earlier days."²¹⁵ In several recent cases, completely consistent with a long tradition, the Supreme Court has put the executive agreement entirely upon a par with the treaty.²¹⁶ It would be a surpassing paradox if the statesmen and justices of the future should find themselves unable, in the light of the conditions and interests of their time, to infuse as much meaning into the combined powers of the Congress and the President as has been put into the one word "treaty."

IV. THE INTERCHANGEABLE USE OF EXECUTIVE AGREEMENTS AND TREATIES IN THE CONDUCT OF OUR FOREIGN AFFAIRS*

To ascertain the full extent to which Congressional-Executive and Presidential agreements have become interchangeable with the treaty it is necessary to look, not at the vague evaluative judgments of secondary writers, but at the actual record of how these instruments have been used in our diplomatic practice. It is this record that completely refutes all suggestions that the treaty-making clause is exclusive or that the executive agreement is confined to matters of "inherently minor and unimportant character"¹ or that the use of the executive agreement is a comparatively novel and dangerous instrument of governmental policy.²

The temporal pattern of the historical record is especially instructive. Although, as has been previously shown, executive agreements have been used since the first decades of the Government, beginning in the 1830s there has been a consistent trend towards increasing reliance

215. CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944) 19.

216. See *infra*, Sections IV and VI.

* In preparing this Section, we have been greatly aided by McCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* (1941) (herein cited as McCLURE, *EXECUTIVE AGREEMENTS*).

1. Borchard, *Against the Proposed Amendment as to the Ratification of Treaties* (1944) 30 A. B. A. J. 608, 609, n. 12.

2. See Borchard, *Executive Agreements*, at 664, and Borchard, *The Two-Thirds Rule as to Treaties: A Change Opposed* (1945) 3 ECON. COUNCIL PAPERS, No. 8, p. 7.

on such agreements in lieu of treaties. This trend is summarized by McClure:

"During the first fifty years of government under the Constitution the President is known to have entered into some 27 international acts without invoking the consent of the Senate, while 60 became law as treaties; for the second half century the figures appear to be 238 executive agreements and 215 treaties; and for the third similar period 917 executive agreements and 524 treaties."³

To explore the record, it will be easiest to proceed for the most part by functional sub-headings.

Acquisition of Territory.

Few international compacts are more important than those providing for the acquisition of territory or the merger into an existing nation of previously independent States. Yet in consummating the first of these transactions, the United States Government has used agreements at least as frequently as treaties approved by two-thirds of the Senate; the second transaction has been accomplished only by joint resolutions.

Indeed, at the very beginning of our national history, when considering modes of effecting the Louisiana purchase of 1803, President Jefferson first thought that it would be necessary to adopt a constitutional amendment to permit the United States to add to its national domain.⁴ Dissuaded by his cabinet from this narrow construction of the Constitution, Jefferson veered to the opinion that the agreement which had been negotiated by his plenipotentiaries should be submitted to both houses of Congress. Finally, because it seemed desirable to ratify the agreement as quickly as possible before Napoleon changed his mind, he decided to secure its ratification under the treaty clause.⁵

An analogous problem arose in 1811 when it was feared England or France might obtain the East Florida territory from Spain. Accordingly, Congress adopted a joint resolution providing that if this danger seemed likely to materialize, President Madison could proceed to

3. MCCLURE, EXECUTIVE AGREEMENTS, at 4. The totals include Congressional-Executive as well as direct Presidential agreements. Our reason for handling Congressional-Executive and Presidential agreements together here has been explained *supra*, p. 246.

4. For Jefferson's original opinion as to the necessity of a constitutional amendment see Jefferson to the Secretary of State, Aug. 25, 1803, and Jefferson to Levi Lincoln, Aug. 30, 1803, 4 WRITINGS OF THOMAS JEFFERSON (Washington, ed., 1854) 500-5.

5. For accounts of the circumstances under which it was ultimately decided to submit the Louisiana purchase treaty only to the Senate see JOHNSON, JEFFERSON AND HIS COLLEAGUES (1921) 80-1; HAYDEN, THE SENATE AND TREATIES, 1789-1817 (1920) 139 *et seq.* Of course, the appropriation bill necessary to effectuate the treaty was passed by both houses.

acquire the territory on his own initiative.⁶ American military forces entered Florida on several occasions pursuant to this resolution, and in 1819 the territory was acquired by treaty.⁷

The alternative procedure for the acquisition of territory, indicated by Jefferson and Madison, was actually utilized for the first time in the administration of President Tyler. During the 1830s and 1840s, many statesmen in the southern and western states sought to have the United States annex Texas, a position supported by the leaders of that then independent republic. A treaty of annexation was signed in April 1844;⁸ however, motivated in large measure by partisan opposition to Tyler, the Senate rejected it two months later.⁹ President Tyler, who had often been "extravagantly solicitous about constitutional restraints,"¹⁰ then invited Congressional action in a message declaring:

" . . . while I have regarded the annexation to be accomplished by treaty as the most suitable form in which it could be effected, should Congress deem it proper to resort to any other expedient compatible with the Constitution and likely to accomplish the object I stand prepared to yield my most prompt and active co-operation. *The great question is not as to the manner in which it shall be done, but whether it shall be accomplished or not.*"¹¹

By January 1845 it became apparent that Texas, despairing of the possibility of American annexation, might elect to continue its existence as an independent nation; negotiations were already being initiated to secure British and French guarantees of its independence and territorial integrity.¹² At this juncture, the House of Representatives

6. 3 STAT. 471 (1811). The general background of this resolution is explained in BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* (1942 ed.) 186-8; Wyllys, *The East Florida Revolution of 1812-1814* (1929) 9 *HISPANIC AMER. HIST. REV.* 415.

7. 2 MALLOY, *TREATIES*, at 1651.

8. The treaty is reprinted in 4 MILLER, *TREATIES*, at 697; see also 5 WORKS OF JOHN C. CALHOUN (1856) 322 *et seq.*

9. The treaty was defeated, 16-35. 4 MILLER, *TREATIES*, at 699. Most of Tyler's fellow Whigs opposed the treaty since it was believed that Clay, their nominee for President in the 1844 election, would oppose the annexation of Texas during the campaign. On the other hand, many Democrats voted against the treaty in an apparent attempt to make political capital out of the Whig failure to consummate the annexation. Tyler's personal unpopularity also impelled certain Senators to vote against the treaty. See CHITWOOD, JOHN TYLER (1939) 336 *et seq.*; J. H. SMITH, *ANNEXATION OF TEXAS* (1911) 272 *et seq.*; McCORMAC, JAMES K. POLK (1922) 262; GARRISON, *WESTWARD EXPANSION* (1906) 120-1. From the beginning Senator Benton opposed the treaty, urging that the acquisition be accomplished by a joint resolution. See STEPHENSON, *TEXAS AND THE MEXICAN WAR* (1921) 164.

10. McLAUGHLIN, *CONSTITUTIONAL HISTORY*, at 499.

11. 4 RICHARDSON, *MESSAGES*, at 327 (emphasis supplied).

12. See CHASE, *NÉGOCIATIONS DE LA RÉPUBLIQUE DE TEXAS EN EUROPE* (1932) 154-82; REEVES, *AMERICAN DIPLOMACY UNDER TYLER AND POLK* (1907) 128-33, 181; 2 *AM. HIST. ASS'N, ANNUAL REPORT: 1899* (1900) 614-5; ADAMS, *BRITISH INTERESTS AND ACTIVITIES IN TEXAS* (1910) 155-97.

accepted Tyler's invitation and adopted a joint resolution, closely paralleling the language of the defeated treaty, authorizing the annexation and admission to the Union of Texas on certain conditions.¹³ As a concession to the jealousies of some of its members, the resolution was amended in the Senate to permit the President to submit the resolution to the Republic of Texas as an "overture" to an offer to join the United States or, in the alternative, to negotiate a new treaty.¹⁴ The amended resolution was passed by both the Senate and the House.¹⁵ Tyler, then almost at the end of his tenure of office, chose the alternative of submitting an "overture" to Texas;¹⁶ his course was accepted by his successor, James K. Polk.¹⁷ Secretary of State Calhoun—an inveterate strict constructionist—approved the joint resolution method in the forthright language quoted at the head of this article:

"It is now admitted that what was sought to be effected by the Treaty submitted to the Senate, may be secured by a joint resolution of the two houses of Congress incorporating all its provisions. This mode of effecting it will have the advantage of requiring only a majority of the two houses, instead of two-thirds of the Senate."¹⁸

The Republic of Texas then assented to the proposal that it join the United States on the terms stipulated in the Congressional resolution.¹⁹ Congress thereafter ratified the procedure by adopting a formal resolution admitting Texas as a State.²⁰ In the words of Hunter Miller, former Director of the Treaty Division of the Department of State, the exchange of resolutions constituted "an international agreement."²¹ In contrast, the acquisition of territory at the end of the Mexican War was ratified by the Treaty of Guadalupe. It should be noted that, in 1868, the method of acquisition of Texas by joint resolution was held by the Supreme Court to have been constitutional.²²

On several other occasions during the nineteenth century Congress and the Executive acted to increase the territorial domain of the United States by means other than formal treaties. In 1850, on his own

13. CONG. GLOBE, 28th Cong., 2d Sess. (1845) 194.

14. 4 MILLER, TREATIES, at 689-90. See McLAUGHLIN, CONSTITUTIONAL HISTORY, at 501-2.

15. 5 STAT. 797 (1845); 4 MILLER, TREATIES, at 689.

16. Tyler transmitted the resolution to the American chargé, Donelson, with instruction to submit it to Texas as a proposal which the Republic was invited to accept. 4 MILLER, TREATIES, at 707-10.

17. 4 RICHARDSON, MESSAGES, at 385, 386-7; see also FISH, AMERICAN DIPLOMACY (1938) 265-6.

18. Quoted in Garner, *Acts and Joint Resolutions of Congress As Substitutes for Treaties* (1935) 29 AM. J. INT. L. 482, 486; see also 1 MOORE, DIGEST, at 453-4.

19. See 4 MILLER, TREATIES, at 691, 693, 696-737.

20. 9 STAT. 108 (1845).

21. 1 MILLER, TREATIES, at 8.

22. *Texas v. White*, 7 Wall. 700 (U. S. 1868); see also *Mississippi v. Johnson*, 4 Wall. 475, 500 (U. S. 1867).

authority, President Fillmore made an executive agreement with England whereby the United States acquired Horseshoe Reef.²³ In 1856, Congress adopted an act providing that the President might assert American sovereignty over any guano islands discovered and occupied by American citizens which had not previously been claimed by other nations.²⁴ Numerous Pacific islands were claimed for the United States by Presidential proclamations issued pursuant to this statute;²⁵ the procedure was subsequently upheld by the Supreme Court.²⁶

Subsequently, treaties and executive agreements were used interchangeably at various times as methods for asserting American sovereignty over portions of the Samoan Islands. In 1879, the United States, Great Britain and Germany negotiated an agreement with several native chiefs providing for joint administration of the island of Apia.²⁷ This condominium, which lasted until 1887, was never approved as a treaty or ratified by Congressional action.²⁸ In 1889, another agreement was entered into between the three powers and various native chiefs providing for extension of the condominium; this time the agreement was referred to and ratified by the Senate as a treaty.²⁹ In 1899, a compact was entered into between the United States, Germany and Great Britain providing for allocation of spheres of influence over the Samoas between the three powers; the tripartite agreement was submitted to the Senate and ratified as a treaty.³⁰ However, the actual agreements by which the native chieftains assented to American annexation and by which a division of governmental responsibilities, unique in our national history, was established,³¹ were not submitted to Congress for ratification by joint resolution until a quarter of a century after their negotiation.³²

23. See CRANDALL, *TREATIES*, at 114.

In *Commerce Committee Hearings*, at 134, Professor Borchard appropriately justifies the annexations of Texas and Hawaii on "the inherent power of Congress," a concept which he repudiates in *Executive Agreements*, at 681. For further repudiation see Book Review (1944) 4 *LAWYERS GUILD REVIEW* 59.

24. 11 STAT. 119 (1856); 1 MOORE, *DIGEST*, at 556.

25. See McCLURE, *EXECUTIVE AGREEMENTS*, at 69.

26. *Jones v. United States*, 137 U. S. 202 (1890); see also 34 OPS. ATT'Y GEN. 507 (1925).

27. The document is reprinted in H. R. EXEC. DOC. NO. 238, 50th Cong., 1st Sess. (1888) 132-4 (encl. no. 92).

28. See RYDEN, *THE FOREIGN POLICY OF THE UNITED STATES IN RELATION TO SAMOA* (1933) 233-5. However, a treaty had been ratified in 1872 providing for American protection of certain of the Samoan Islands, and several Presidents had taken steps to effectuate this policy. See *id.* at 199-207, 217-33.

29. 2 MALLOY, *TREATIES*, at 1576. See also RYDEN, *op. cit. supra* note 28, at 291-9.

30. 2 MALLOY, *TREATIES*, at 1595.

31. The relevant executive agreements were made by naval officers with various native chieftains in 1900, 1902, and 1904 and ratified by President Theodore Roosevelt. See SEN. DOC. NO. 984, 70th Cong., 1st Sess. (1928) 2. See also McCLURE, *EXECUTIVE AGREEMENTS*, at 68-9.

32. 45 STAT. 1253 (1929), 48 U. S. C. § 1431a (1940).

A more dramatic and important demonstration of the interchangeability of treaties and agreements authorized by Congressional resolution came in connection with the annexation of Hawaii. An agreement providing for annexation of that republic was signed by representatives of the two governments in June 1897 and submitted to the Senate for approval the same month.³³ Because of the almost unanimous opposition of Democratic Senators and extensive lobbying by sugar interests, it became apparent that the treaty would receive a simple, but not a two-thirds, majority; accordingly it was never brought to a vote.³⁴ As a similar treaty had failed of adoption in 1893,³⁵ the Republican leaders apparently felt the requisite Senatorial vote could never be obtained. Therefore, to quote Secretary of State John Foster, who had negotiated the agreement:

"Owing to the opposition of many of the Democratic Senators to the Hawaiian Treaty and the facility of obstruction and delay in that body, it was decided to attempt to bring about the annexation by joint resolution, following the precedent of the annexation of Texas."³⁶

The resolution accepting the offer of the Government of the Hawaiian Republic to cede the Islands to the United States was adopted and signed by the President in July 1898.³⁷ Since, as in the case of the annexation of Texas, there was an offer by one nation and a formal acceptance by the other, it is clear an international agreement was

33. See 31 SEN. EXEC. J. 169-70 (1897).

34. See HOLT, *TREATIES DEFEATED BY THE SENATE* (1933) 163-4.

35. The treaty had been signed on Feb. 14, 1893, and was submitted to the Senate the following day. 28 SEN. EXEC. J. 397-8 (1893). Although Democratic Senatorial leaders had assured Secretary of State Foster, before the agreement had been signed, that they would not oppose it, partisan opposition developed after its submittal, and the treaty never came to a vote. See 2 FOSTER, *DIPLOMATIC MEMOIRS* (1909) 168; 2 McELROY, GROVER CLEVELAND (1923) 65-6; HOLT, *op. cit. supra* note 34, at 152-4. Subsequently, President Cleveland withdrew the treaty because of his belief that the revolutionary Hawaiian government which had negotiated it had come to power largely because of the maneuverings of the American minister and the presence of American forces. This interpretation was contrary to that made by the majority of the Senate Committee on Foreign Relations. See *FOREIGN RELATIONS: 1894*, app. II.

36. 2 FOSTER, *op. cit. supra* note 35, at 174. President McKinley gave the same explanation in a letter to Carl Schurz: "There seems to be some difficulty in getting the necessary two-thirds vote in the Senate for the treaty. But if we fail there, we can annex the Hawaiian Islands by joint resolution, as we annexed Texas. That will require only a majority in the two houses of Congress, which we can easily get." 6 *SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ* (Bancroft, ed., 1913) 272; 1 OLCOTT, *THE LIFE OF WILLIAM MCKINLEY* (1916) 378-9.

37. 30 STAT. 750 (1898), 48 U. S. C. § 661 (1940). The resolution received an exact 2-1 majority in the Senate, but a recent student has intimated that, counting pairs and those recorded not voting, more than a third of the Senate was opposed to annexation. McCLURE, *EXECUTIVE AGREEMENTS*, at 68; see 31 CONG. REC. 6712 (1898).

consummated. Although many of the opponents, and even some of the advocates of annexation, thought the use of a joint resolution, in lieu of the originally contemplated treaty, was unconstitutional,³³ the annexation was approved by the Supreme Court in *Hawaii v. Mankichi*.³⁹ Moreover, Mr. (later Chief) Justice White implied, in one of the *Insular* cases, that mere approval of a treaty by the Senate would not suffice to authorize American annexation of territory outside the North American continent, but that approval by both houses of Congress was requisite.⁴⁰

Although the major territorial acquisitions resulting from the Spanish-American War were ratified by the Treaty of Paris, the United States' right to continued possession of Puerto Rico had been established by the terms of the Armistice Protocol of 1898, an agreement negotiated by President McKinley as Commander-in-Chief and never referred to Congress for approval.⁴¹ Moreover, territorial questions arising as an aftermath of the war were handled interchangeably by treaties and by executive agreements. On the one hand, the leasing by long-term contracts of naval bases at Guantanamo and Bahia Honda in Cuba was authorized by treaty in 1904.⁴² On the other hand, the agreement between General Bates, representing the Governor of the Philippine Islands, and the Sultan of Jolo acknowledging American sovereignty over the Archipelago of Jolo and providing for the retention of a considerable degree of local autonomy was approved by President McKinley in 1899, but was never submitted to the Senate or Congress for ratification.⁴³ In 1907, by executive agreement with Great Britain, President Taft agreed to permit the British North Borneo Company to administer certain islands lying along the undetermined boundary between the Philippine Islands and Borneo.⁴⁴ In 1915, the Sultan of Sulu entered into an executive agreement with representatives of President Wilson, acknowledging American sovereignty over the Sulu archipelago. This amounted to a cession of territory, as the Sultan had been recognized as a quasi-independent

38. Foster was among those who were dubious as to the constitutionality of the procedure adopted. See FOSTER, *loc. cit. supra* note 36. See also 31 CONG. REC. 6148, 6634 (1898).

39. 190 U. S. 197 (1903).

40. Concurring opinion of Mr. Justice White, *Downes v. Bidwell*, 182 U. S. 244, 312 (1901). Justices Shiras and McKenna assented to this statement.

41. See 1 MOORE, DIGEST, at 285; FOREIGN RELATIONS: 1898 at lxxv; FOREIGN RELATIONS: 1899 at xxvii.

42. 1 MALLOY, TREATIES, at 362-3.

43. See H. R. Doc. No. 1, pt. 2, 56th Cong., 1st Sess. (1899); FOREIGN RELATIONS: 1899, app.

44. 3 MALLOY, TREATIES, at 2605. This agreement was kept in force for 23 years, until the enactment of the Treaty of 1930. 4 *id.* at 4261.

ruler by the Spanish and had retained this status during the early years of American control of the Philippines.⁴⁵

A number of other relatively minor agreements affecting the outlying territories of the United States have been consummated by direct executive agreements during the twentieth century. Thus, a condominium of Colombia and the United States over three Pacific Ocean guano islands was recognized by an exchange of notes between the Colombian Minister and Secretary of State Kellogg in 1928.⁴⁶ By an exchange of notes in April 1939, the United States and Great Britain provided for "use in common" of Canton and Enderbury Islands in the Pacific for aviation facilities, leaving unsettled the question of "sovereignty" over the islands.⁴⁷

Settlement of International Claims.

International law and practice provide that claims by citizens of one government against another government may be prosecuted only through the foreign office of the claimant's government.⁴⁸ Assuming that claims have been brought against other governments on behalf of citizens of the United States or are being pressed against this country by the plenipotentiaries of other States and appear, on preliminary State Department investigation, to have some degree of validity, the practice of this government has been to seek adjustment through diplomatic channels or by reference of the dispute to an arbitral body or other international tribunal. Through the course of American diplomatic history, the *compromis* under which disputes, involving claims in favor of the United States, have been referred to arbitration have as often been the subject of executive agreements, consummated by the Executive without Congressional authorization, as of treaties.⁴⁹ Indeed, the doctrine that the Executive had power to submit claims against foreign governments to arbitration on his own initiative had been enunciated by Secretary of State Jefferson as early as 1793.⁵⁰ Perhaps the most important recent example of reference by an executive agreement was the establishment in 1938 of the Commission to

45. See 2 W. CAMERON FORBES, *THE PHILIPPINE ISLANDS* (1928) 472-4. The author was a former Governor-General of the Philippines.

46. See Orent and Reinsch, *Sovereignty over Islands in the Pacific* (1941) 35 AM. J. INT. L. 443, 454.

47. U. S. EXEC. AGREEM'T SER., No. 145. See also Orent and Reinsch, *supra* note 46, at 459-60.

48. See BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS* (1915).

49. An incomplete list of arbitral agreements made by various Presidents without "the advice and consent of the Senate" is printed in 79 CONG. REC. (1935) at 969; earlier lists are contained in Foster, *The Treaty-Making Power* (1901) 11 YALE L. J. 69; Moore, *Treaties and Executive Agreements* (1905) 20 POL. SCI. Q. 385, 408-17. See opinion by former State Department Solicitor Scott quoted in 5 HACKWORTH, *DIGEST*, at 403-4.

50. 1 AMERICAN STATE PAPERS (2d ed. 1817) 174-5.

adjudicate damages resulting from the Mexican expropriation of American-owned oil properties during the 1930s.⁵¹

It has been customary, presumably because it would facilitate the obtainance of requisite appropriations, to have the *compromis* providing for arbitration or adjudication of claims against the United States submitted to the Senate for ratification as a treaty. However, there is not the slightest doubt that, as a matter of law, the President possesses authority to refer to arbitration claims against the United States,⁵² and that it would be a breach of good faith and, in the phraseology of international jurists an "international delinquency," if Congress thereafter failed to appropriate funds to pay the award.⁵³ On several occasions the referral of claims against the United States to arbitration was arranged by direct Presidential agreement. The most important of these agreements was that negotiated by President Coolidge with Great Britain in 1927, whereby it was provided that "neither country will make further claim against the other on account of supplies furnished, services rendered, or damages sustained in connection with the prosecution of the recent war."⁵⁴ Another precedent is furnished by the action of President Hoover in referring to arbitration Canada's claim to damages arising from the sinking of the rum-runner *I'm Alone* by an American revenue cutter in 1929.⁵⁵ Needless to say, when the arbitral tribunal rendered a verdict partly adverse to the United States, Congress did not raise hypothetical constitutional objections, but promptly appropriated funds to pay the award.⁵⁶ Belonging in the same general category is the 1942 agreement, approved the following year by Congress as a joint resolution, whereby the United States

51. See PERSON, MEXICAN OIL (1942) 1-6, 77-83.

52. See the conclusive argument in McCURE, EXECUTIVE AGREEMENTS, at 340.

53. President Jackson considered that France was bound by a convention negotiated with the United States in 1831 even though the Chamber of Deputies had failed to enact necessary appropriation bills. The position of the United States was that the convention bound "every department of the contracting government." Quoted in Brewer, *Executive Agreements* [1943] 2 EDITORIAL RESEARCH REPORTS 1, 12. See also 5 MOORE, INTERNATIONAL ADJUDICATIONS (1933) 309 *et seq.*; 6 OPS. ATT'Y GEN. 296 (Cushing, 1854); WHEATON, INTERNATIONAL LAW (2d ed., Lawrence, 1863) 459.

54. See 4 MALLOY, TREATIES, at 4256-61; 2 FOREIGN RELATIONS: 1927 at 745 *et seq.*

55. See BRIGGS, THE LAW OF NATIONS (1938) 358-61. The smuggling conventions of 1924 with Great Britain and Canada (U. S. TREATY SER., Nos. 685 and 718 respectively) had provided for arbitration of claims on behalf of citizens of those nations arising thereunder, pursuant to the Pecuniary Claims Convention of 1910 with Great Britain. 37 STAT. 1625 (1910). While the latter had provided for reference of future claims between the two nations to an arbitral tribunal, it was provided that reference by the United States would be conditioned upon Senate approval. However, the administration acted on its own initiative in the *I'm Alone* situation. But see 2 HYDE, INTERNATIONAL LAW (2d rev. ed. 1945) 1410.

A Mexican claim was referred to arbitration by President Roosevelt in 1934. See U. S. EXEC. AGREEMENT SER., No. 57.

56. See McCURE, EXECUTIVE AGREEMENTS, at 14-15.

transferred several million dollars of disputed assets to the Republic of Panama.⁵⁷ An earlier analogue is the 1896 agreement providing for expulsion to Canada of a portion of the migrant Cree tribe, which involved payment of transit expenses by the United States. Here too the arrangement was never ratified as a treaty or submitted for Congressional approval, but no difficulty was experienced in securing funds with which to meet this nation's commitments.⁵⁸

Adherence to International Organizations.

As a matter of practical expediency, the executive agreement has almost always been the procedure utilized for effecting American adherence to international organizations. A most instructive example is provided by consideration of the circumstances under which the United States joined the International Labor Organization. The constitution of the Organization was originally included in the Treaty of Versailles,⁵⁹ to which the Senate refused assent in 1919. The Report of the Senate Foreign Relations Committee in 1919 expressly disapproved of American adherence to this part of the Treaty but added that American participation would be proper if arranged by Congressional "act or joint resolution."⁶⁰ In June 1934, Congress adopted a joint resolution authorizing the President to accept membership in the International Labor Organization⁶¹ on behalf of the United States. An invitation to join was proffered by the ILO later in 1934 and accepted on behalf of the President by the American consul at Geneva.⁶² Among the obligations incurred by adherence to the ILO was the agreement to refer to the Permanent Court of International Justice "any question or dispute relating to the interpretation" of any part of the constitution of the Organization "or of any subsequent convention con-

57. See (1942) 6 DEP'T OF STATE BULL., No. 152, pp. 448, 452. The Department of State apparently believed that the agreement was an implementation of the Treaties of 1903 and 1936, but there are no provisions of those instruments specifically authorizing transfer of American-owned assets. Professor Borchard has observed that the agreement was considered by Panama to be a "treaty" (Borchard, *Executive Agreements*, at 675, n. 37); but this merely exemplifies the conclusion of the *Harvard Research Draft* that the status of an international compact in any particular country is wholly a matter of domestic law and that characterization in one country has nothing to do with either its international validity or its constitutional characterization in another country.

For an attack on the legality of the procedure whereby this settlement was arranged, see Briggs, *Treaties, Executive Agreements, and the Panama Joint Resolution of 1943* (1943) 37 AM. POL. SCI. REV. 686.

58. See Brewer, *supra* note 53, at 10.

59. Articles 387 to 427 inclusive.

60. See FLEMING, *THE UNITED STATES AND THE LEAGUE OF NATIONS, 1918-1920* (1932) 431.

61. 48 STAT. 1182 (1934), 22 U. S. C. § 271 (1940).

62. EIGHTEENTH INTERNATIONAL LABOR CONFERENCE, *RECORD OF PROCEEDINGS* (1934) 463-9; Dep't of State, Press Release, Aug. 25, 1934.

cluded by the members.”⁶³ Thus, although the United States had rejected a treaty providing for membership in the League and subsequently rejected another providing for membership in the Permanent Court,⁶⁴ the joint resolution process was utilized as a means of securing adherence to one of the important organs of the League and of agreeing to give the Court compulsory jurisdiction over certain classes of disputes.⁶⁵

Transcending in importance the precedent set by American adherence to the ILO is the record of American membership in the Pan-American Union. Established after the first International Conference of American States in 1889–1890 by an exchange of notes between foreign ministers, the Pan-American Union has continued in existence for the ensuing 55 years.⁶⁶ Its structure and machinery are regulated by resolutions adopted at periodic conferences.⁶⁷ No treaty or joint resolution has been enacted formally assenting to American membership in the Union, but Congressional approval may readily be inferred from the long series of acts appropriating funds to defray the United States’ aliquot portion of operating expenses.⁶⁸ This retention of the “power of the purse,” of course, furnishes Congress with an effective means of preventing the United States from participating in any Union activities of which it disapproves.

Numerous international compacts have been negotiated at the conferences convened by the Union, some placing heavy obligations upon the United States. Many of the important engagements—such

63. Article 422 of the Treaty of Versailles.

64. The treaty was defeated on Jan. 29, 1935, by a vote of 52 in favor of adherence and 36 against. 79 CONG. REC. 1127 (1935).

65. See Hudson, *The United States in the International Labor Organization* (1934) 28 AM. J. INT. L. 671.

66. See SCHMECKEBIER, *INTERNATIONAL ORGANIZATIONS IN WHICH THE UNITED STATES PARTICIPATES* (1935) 75–81; SCOTT, *THE INTERNATIONAL CONFERENCES OF AMERICAN STATES* (1931) 3–51; SEN. DOC. NO. 744, 61st Cong., 3d Sess. (1910) 9–11. The convocation of the Conference by the President had been approved in advance by joint resolution. 25 STAT. 155 (1888). The organization was known as the Pan-American Bureau until 1910.

67. See SCHMECKEBIER, *op. cit. supra* note 66, at 81–105; REINSCH, *PUBLIC INTERNATIONAL UNIONS* (1911) 77–121. Until 1896, the organization was under the direction of the Secretary of State of the United States. On the latter’s initiative, a multi-national executive committee was established in that year. See *INTERNATIONAL UNION OF AMERICAN REPUBLICS, ANNUAL REPORT: 1901*, 17. This action was approved at the second Conference in 1902. See SCOTT, *op. cit. supra* note 66 at 92–4. A mutilateral agreement providing for the governance of the Union was drafted in 1928 and consented to by the Senate but has not yet received sufficient assents to come into effect. For exposition of the recent expansion in the Union’s activities see SCOTT, *THE INTERNATIONAL CONFERENCES OF AMERICAN STATES, FIRST SUPPLEMENT: 1933–1940* (1940).

68. The first of these bills were the 1888 and 1889 acts appropriating funds to defray the expenses of the 1889 Conference. 25 STAT. 155 (1888); 25 STAT. 957 (1889). See also 26 STAT. 272 (1890).

as the 1929 General Treaty of Inter-American Arbitration⁶⁹ and the Act of Habana of 1940 providing for joint provisional administration of European possessions in the Americas in the event of an attempted change of sovereignty⁷⁰—have been treated by the Presidents who appointed the plenipotentiaries of the United States as treaties and referred to the Senate for approval. Other compacts of equal importance—such as the 1938 Declaration of Lima providing for consultation “in case the peace, security or territorial integrity of any American Republic is . . . threatened,”⁷¹ the 1939 Act of Panama,⁷² modifying pre-existing rules of international law by establishing a 300-mile security zone in the territorial waters surrounding the American continent,⁷³ and the Inter-American Radio Communications Compact⁷⁴—have been treated as simple executive agreements. Conversely, some relatively unimportant agreements—such as the 1936 multilateral compact providing for exchange of all official documents—have been submitted to the Senate for approval as treaties.⁷⁵

Since the middle of the nineteenth century, joint resolutions have also been the technique for approving American membership in a large number of other international organizations of varying importance, including the Universal Postal Union,⁷⁶ the International Penal and

69. 4 MALLOY, *TREATIES*, at 4756. However, the multilateral protocol permitting States to change the conditions of their adherence to the arbitration treaty (4 *id.* at 4762) was never submitted to the Senate. See McCURE, *EXECUTIVE AGREEMENTS*, at 132.

70. See U. S. *TREATY SER.*, No. 977 (1942). Apparently it had originally been contemplated that the Act of Habana would be approved as an executive agreement [see U. S. *EXEC. AGREEMENT SER.*, No. 199 (1940)], and it is erroneously labeled as such in McCURE, *EXECUTIVE AGREEMENTS*, at 134-5.

71. See DEP'T OF STATE, *CONFERENCE SER.*, No. 50 (1941) 189-90. Assistant Secretary of State Berle called this Declaration a “solemn and binding covenant.” Dep't of State, Press Release, March 7, 1939.

72. See Fenwick, *The Third Meeting of Ministers of Foreign Affairs at Rio de Janeiro* (1942) 36 AM. J. INT. L. 169.

73. In recent years, most nations have accepted the three-mile limit as the maximum area adjacent to their coasts over which they might normally claim general jurisdiction. Before the Habana Conference, no State had formally asked for more than an 18-mile limit [see BRIGGS, *op. cit. supra* note 55, at 196-7] although in the Anti-Smuggling Act of 1935, 49 STAT. 517 (1935), 19 U. S. C. § 1701 (1940), the United States had asserted a limited jurisdiction, which in some cases might extend as far as 100 miles from the coast.

74. U. S. *EXEC. AGREEMENT SER.*, No. 200 (1940), 54 STAT. 2514 (1940). It should be noted that many executive agreements, including some not authorized or sanctioned retroactively by Congressional legislation, are now published in the second part of the Statutes at Large volumes.

75. U. S. *TREATY SER.*, No. 928 (1938). The resolution of consent, authorizing negotiation of complementary bilateral exchange agreements, is contained at 84 CONG. REC. 10703 (1936). At least one such agreement had been negotiated before the approval of the treaty. See U. S. *EXEC. AGREEMENT SER.*, No. 103, presumably negotiated compliant to 49 STAT. 1550 (1936), 44 U. S. C. § 139a (1940).

76. 17 STAT. 297 (1872); 19 STAT. 577; 49 STAT. 2741 (1934). For discussion of the early activities of the Union see SAYRE, *EXPERIMENTS IN INTERNATIONAL ADMINISTRATION* (1919) 19-25.

Prison Commission,⁷⁷ the Inter-Parliamentary Union,⁷⁸ and the International Technical Commission of Aerial Legal Experts.⁷⁹

More recently, the same procedure was used, pursuant to the so-called "Green-Vandenberg-Sayre formula," to ratify American membership in the United Nations Relief and Rehabilitation Administration, in support of which the United States may appropriate upwards of one billion dollars.⁸⁰

International Commercial Agreements.

From the very beginning of the American Republic, executive agreements have been used interchangeably with treaties as modes of entering into arrangements with other nations for the adjustment of commercial and industrial problems. In 1939, Assistant Secretary of State Sayre compiled a list, by no means all-inclusive, of 81 executive agreements dealing with commercial questions; all but 15 had been negotiated before 1933.⁸¹

One of the earliest uses of Congressional-Executive agreements in this field is the series of agreements made after adoption of the Act of March 3, 1815 and its successors, permitting repeal of discriminatory duties against foreign vessels and foreign-carried cargoes, when equivalent treatment was accorded by other nations to American foreign commerce.⁸² In 1850, the Supreme Court clearly recognized the power of Congress in the premises in *Oldfield v. Marriott*.⁸³

Executive agreements have also been used with great frequency as instruments for ensuring reciprocal trade policy between the United States and other nations. We have already referred to their first use for this purpose, the 1784 compact by which an "unconditional most favored nation" clause was substituted for the "conditional favored nation" clause in the 1778 Treaty of Commerce with France.⁸⁴ A series of trade agreements was negotiated in the 1820-1840 period.⁸⁵

After the failure of Congress to enact legislation to effectuate the

77. 29 STAT. 438 (1896).

78. 46 STAT. 790 (1930).

79. 46 STAT. 1162 (1931), 49 U. S. C. § 231 (1940).

80. Pub. L. No. 267, 78th Cong., 2d Sess. (March 28, 1944); see (1943) 9 DEP'T OF STATE BULL., No. 229, pp. 317-9. Though no specific commitment was made in the UNRRA agreement, it has been the traditional policy of the United States to regard the failure of another nation to appropriate funds with which to fulfil commitments made in international compacts as an "international delinquency." See Moore, *Treaties and Executive Agreements* (1905) 20 POL. SCI. Q. 385, 403-8.

81. Sayre, *The Constitutionality of the Trade Agreements Act* (1939) 39 COL. L. REV. 751, 770-5. The list did not include agreements negotiated under the 1934 Trade Agreements Act.

82. See CRANDALL, *TREATIES*, at 121.

83. 10 How. 155 (U. S. 1850).

84. See *supra*, p. 258.

85. See 3 MILLER, *TREATIES*, at 256, 269; 4 *id.* at 275, 349.

Mexican reciprocal trade treaty of 1883,⁸⁶ Secretary of State Blaine initiated the modern trend towards reciprocity agreements by securing the insertion of provisions in the Tariff Act of 1890⁸⁷ authorizing the President to impose penalty provisions upon nations levying "reciprocally unequal and unreasonable" imposts upon American exports. In compliance with this act, trade agreements were consummated with eleven nations without Congressional approval.⁸⁸ In 1892 the Supreme Court held that this delegation of power to the President was constitutional.⁸⁹ The Tariff Act of 1897 contained an ambivalent provision authorizing both Presidential reciprocal trade agreements and treaties.⁹⁰ However, the treaties negotiated under the act were expressly made valid only if "approved by Congress" after consent by two-thirds of the Senate. During the administrations of Presidents McKinley and Roosevelt, numerous executive agreements were negotiated under the provisions of this act;⁹¹ however, not a single reciprocal trade treaty became effective under it.⁹² In *B. Altman & Company v. United States*, where the narrow question at bar was one of interpretation of certain terms used in the 1897 act, the Supreme Court was emphatic that the trade agreements had been constitutionally made and ratified.⁹³

This pattern for facilitating the free flow of trade across international borders has been continued in more recent years.⁹⁴ In the 1920s, a series of more than 30 reciprocal "most favored nation" agreements were negotiated by successive Secretaries of State;⁹⁵ these compacts were in harmony with, but not directly authorized by, the Tariff Act of 1922.⁹⁶ More significant have been the numerous reciprocal trade agreements negotiated by former Secretary of State Hull pursuant to

86. See McCLURE, *EXECUTIVE AGREEMENTS*, at 83.

87. Section 3 of the Tariff Act of 1890, 26 STAT. 612 (1890).

88. See TARIFF COMMISSION, *RECIPROCITY AND COMMERCIAL TREATIES* (1919) 27, 145 *et seq.*, 425.

89. *Field v. Clark*, 143 U. S. 649 (1892).

90. Agreements were negotiated under Section 3 of the Act, 30 STAT. 203 (1897). Section 4 authorized reciprocity treaties to be "ratified by the Senate and approved by Congress." This accords with Jefferson's view as to the proper procedure for securing approval of commercial treaties.

91. See 1 MALLOY, *TREATIES*, at 158, 542, 558, 812, 987; 2 *id.* at 1275, 1463, 1718, 1721, 1775; TARIFF COMMISSION, *op. cit. supra* note 88, at 285-8.

92. See McCLURE, *EXECUTIVE AGREEMENTS*, at 87, n. 155.

93. *B. Altman & Co. v. United States*, 224 U. S. 583, 601 (1912).

94. See Willkie, *Cowardice at Chicago*, *COLLIER'S*, Sept. 16, 1944, pp. 11, 79; *cf.* SCHATT-SCHNEIDER, *POLITICS, PRESSURES, AND THE TARIFF* (1935).

95. A list of these agreements is given in McCLURE, *EXECUTIVE AGREEMENTS*, at 176, nn. 253, 254.

96. 42 STAT. 858. See Sayre, *supra* note 81, at 763-4. These agreements were declared to be constitutional in *Hampton & Co. v. U. S.*, 276 U. S. 394 (1928). In fact, at least one of the agreements had been negotiated before enactment of the statute. See McCLURE, *loc. cit. supra*, note 95.

authority conferred by the Tariff Act of 1934 and its successors.⁹⁷ Under these acts, Congressional approval was not necessary to permit the agreements to go into effect; however, any particular compact could be disapproved by simple resolution enacted within a stated period after it had been signed by the President. The constitutionality of these agreements has not yet been passed upon in any court. However, the tenor of recent decisions expanding the permissible scope of delegation of authority to the President, the traditional Congressional policy of extending extensive discretion to the President in handling international problems,⁹⁸ and the decisions sustaining reciprocal trade agreements made under other statutes,⁹⁹ render ludicrous any attempt to cast doubt upon the constitutionality of the 1934 act.¹⁰⁰ Executive agreements have also been the method of consummating numerous bilateral trade agreements, such as the Russian-American pact of August 1940.¹⁰¹

Another conspicuous example of the interchangeable use of treaties and executive agreements for the resolution of commercial problems is presented by the attempts to prevent pirating of trademarks and the unlicensed printing of literary works. In 1881, Congress enacted legislation providing protection for the foreign owners of trademarks if reciprocal treatment were ensured American citizens by "treaty" or "convention."¹⁰² The first such bilateral convention, negotiated with Italy in 1882, was submitted to the Senate for ratification as a treaty,¹⁰³ and multilateral conventions were signed by the United States in 1883, 1911, and 1934, and ratified as treaties.¹⁰⁴ However, numerous ar-

97. 48 STAT. 943 (1934), 19 U. S. C. § 1351 (1940); 50 STAT. 24 (1937), 28 U. S. C. § 375a (1940); 54 STAT. 107 (1940), 19 U. S. C. § 1352 (1940); 57 Stat. 125 (1943), 19 U. S. C. A. § 1351 (Supp. 1944). For a discussion of the procedures by which the agreements have been negotiated see Hawkins, *Administration of the Trade Agreements Act [1944]* WIS. L. REV. 1.

98. See *supra*, Section III, and Part II, Section VIII.

99. *Field v. Clark*, 143 U. S. 649 (1892); *Hampton & Co. v. United States*, 276 U. S. 394 (1928).

100. But see Borchard, *Executive Agreements*, at 672. The leading authorities supporting and attacking the constitutionality of the agreements are cited *id.* at 672, n. 29. The recent Supreme Court decisions dealing with the delegation of power by the Congress to the President for handling domestic problems would appear, however, to remove the constitutionality of the agreements from serious question. See, e.g., *United States v. Rock Royal Cooperatives*, 307 U. S. 533 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381 (1940); *Opp Cotton Mills, Inc. v. Administrator of the Wage and Hour Division*, 312 U. S. 126 (1941).

101. U. S. EXEC. AGREEM'T SER., No. 179; 54 STAT. 2366 (1940). In return for an agreement by the Commissioner of Foreign Trade of the U. S. S. R. to purchase at least \$40,000,000 of goods in the United States in the next twelve months, the President agreed to admit 400,000 tons of Soviet coal free from the import tax provided in § 601 (c) (5) of the Revenue Act of 1932.

102. 21 STAT. 502 (1881).

103. 1 MALLOY, *TREATIES*, at 984.

104. 2 *id.* at 1935; 3 *id.* at 2953; 4 *id.* at 5517.

rangements for bilateral reciprocity in the protection of industrial property have been made by executive agreement under the 1881 act and its successors.¹⁰⁵ The United States failed to adhere to the International Copyright Convention,¹⁰⁶ but, pursuant to legislation adopted in 1891,¹⁰⁷ numerous arrangements for bilateral extension of copyright privileges have been made by executive agreements.¹⁰⁸ More commonly, the President has followed the policy of issuing proclamations extending copyright protection to nationals of stated countries upon the basis of "formal official assurances" from their governments that reciprocal rights were accorded American citizens.¹⁰⁹ The Department of State has taken the position that the assurances of the foreign ministries constituted "contractual obligations of the governments concerned."¹¹⁰ More than 70 such agreements have been promulgated by the Presidents of the United States since 1891.¹¹¹

The majority of the international arrangements for control of the marketing of raw materials to which the United States has become a party in recent years have been treated as executive agreements; the same has been true of bilateral agreements for the trade of national products.¹¹² Two of the most important examples are the 1941 coffee agreement¹¹³ and the 1933 wheat agreement.¹¹⁴ Congress has retained control over American participation in these commodity pools by its power to withhold appropriations necessary to permit fulfilment of American commitments or by its power to withhold other appropriations if its policies are not honored. An instructive example of interchangeable usage is provided by the arrangements governing American fishing rights off the Canadian and Newfoundland coasts. From the mid-1880s to 1911, these rights were regulated by executive agreement;¹¹⁵ thereafter control was pursuant to the terms of the Treaty of Washington.

105. See, e.g., 1 *id.* at 111, 396, 778, 808; 2 *id.* at 1265, 1769; 3 *id.* at 2852.

106. The text is printed in [1885-1886] 77 BRITISH AND FOREIGN STATE PAPERS (1893) 22. The latest version of the treaty is reprinted in the DEP'T OF STATE, TREATY INFORMATION BULL. No. 26 (1931) 14.

107. 26 STAT. 1110 (1891); as modified by 35 STAT. 1075 (1909), 17 U. S. C. § 1 (1940); 55 STAT. 732 (1941), 17 U. S. C. § 8 (Supp. 1943).

108. See, e.g., 1 MALLOY, TREATIES, at 557; 2 *id.* at 1687, 1710; 3 *id.* at 2585, 2705.

109. See Hyde, *Constitutional Procedures for International Agreement by the United States* (1937) 31 PROC. AM. SOC. INT. L. 45, 49.

110. *Ibid.*

111. Memorandum prepared for the authors by Treaty Section, Division of Research and Publication, Department of State, Jan. 29, 1945.

112. See MCCLURE, EXECUTIVE AGREEMENTS, at 157-62; INTERNATIONAL LABOR ORGANIZATION, INTERGOVERNMENTAL COMMODITY CONTROL AGREEMENTS (1944).

113. See (1941) 4 DEP'T OF STATE BULL., No. 94, p. 461.

114. (1933) 141 LEAGUE OF NATIONS, TREATY SERIES 71. American participation was pursuant to the terms of the Agricultural Adjustment Act of 1933, 48 STAT. 31 (1933), 7 U. S. C. § 601 (1940).

115. See 5 MOORE, DIGEST, § 752.

The Reconstruction Finance Corporation and the Export-Import Bank have, pursuant to statutory authority, entered into loan transactions with various governments to finance purchase of American agricultural products or manufactured goods.¹¹⁶

Control of International Communications.

In an earlier Section we have referred to the postal legislation enacted during President Washington's administration authorizing consummation of reciprocal conventions without submission to the Senate.¹¹⁷ This general policy has continued throughout our national history; of the more than 300 postal conventions entered into by the United States, apparently only three have been submitted to the Senate.¹¹⁸

Except for the Pan-American Convention of 1928,¹¹⁹ which was ratified by the Senate, the vital problem of control of air transportation has hitherto been handled by the United States exclusively by means of reciprocal agreements negotiated with individual foreign nations, providing for issuance of individual licenses, division of routes, the right of "innocent passage" in commercial flights, and for mutual landing privileges.¹²⁰ Authority to negotiate such agreements has been inferred from Section 6(c) of the Air Commerce Act of 1926.¹²¹ Of the five multilateral agreements drafted by the recent Chicago International Aviation Conference, it is planned to ratify four as executive agreements and to submit one, establishing an international regulatory body, to the Senate as a treaty.¹²² Instructively, the most significant compact—that establishing rights of innocent passage across the domains of the signatories—is treated by the State Department as an executive agreement since it effectuates the 1926 act.¹²³

While the United States has adhered to two international telecommunication conventions¹²⁴ which were submitted to the Senate for

116. See McCURE, EXECUTIVE AGREEMENTS, at 59-61; DIETRICH, WORLD TRADE (1938) 76 (Chinese-American wheat and cotton sale agreements).

117. See *supra*, pp. 239-40.

118. McCURE, EXECUTIVE AGREEMENTS, at 6. As to the legal status of these agreements see *infra*, p. 309.

119. U. S. TREATY SER., No. 840 (1928). The provisions of the Pan-American Convention are discussed in LISSITZYN, INTERNATIONAL AIR TRANSPORT AND NATIONAL POLICY (1942) 370-3.

120. See, e.g., U. S. EXEC. AGREEMENT SER., Nos. 24 (1931), 38 (1932), 47 (1933), 50 (1933), 54 (1933), 58 (1934), 76 (1935), 110 (1937), 129 (1938), 143 (1939), 152 (1939), 153 (1939), 159 (1939), 166 (1939), 186 (1940). See also LISSITZYN, *op. cit. supra* note 119, at 387-9.

121. 44 STAT. 572 (1926), 49 U. S. C. 176c (1940).

122. See Van Zandt, *The Chicago Civil Aviation Conference* (1945) 20 FOREIGN POLICY REPORTS 290.

123. 44 STAT. 568 (1926), 49 U. S. C. 171 (1940).

124. The Washington Convention of 1927, 4 MALLOY, TREATIES, at 5031, and the Madrid Convention of 1932, 4 *id.* at 5379.

approval, a large number of arrangements have been made with individual nations by executive agreements, imposing equally great responsibilities upon this country. These agreements have generally been negotiated by the Executive without specific legislative authorization.¹²⁵ The 1937 Inter-American Communications Compact was authorized as an executive agreement;¹²⁶ on the other hand, the 1941 six-power regional broadcasting pact was referred to the Senate.¹²⁷ Similarly, in the field of ocean communications, reciprocal arrangements regarding tonnage duties, inspection, and safety provisions have been made by numerous executive agreements.¹²⁸ Pursuant to the Merchant Marine Act of 1920,¹²⁹ the United States delegated considerable power to make loadline regulations to the American Bureau of Shipping, representing various maritime nations in the western hemisphere; extending the principle of international delegation of power, the Bureau has in general elected to adopt the regulations of the British Board of Trade.¹³⁰

International Financial and War Debt Agreements.

Probably the most important international financial arrangements hitherto consummated by the United States were those providing for refunding of the inter-Allied debts occasioned by the first World War. Negotiations for settlement of these debts were conducted by a special World War Foreign Debt Commission created by statute in 1922.¹³¹ Agreements negotiated by this Commission and approved by the President were thereafter submitted to Congress for approval.¹³² By this process arrangements were made for disposition of American claims amounting to more than ten billion dollars.¹³³ Governmental claims against Germany, arising from American participation in the joint occupation of the Rhineland, were settled by executive agree-

125. See, e.g., U. S. EXEC. AGREEM'T SER., Nos. 34 (1932), 62 (1934), 66 (1934), 72 (1934), 109 (1937), 136 (1938). For earlier examples see 3 MALLOY, TREATIES, at 2707, 2768.

126. U. S. EXEC. AGREEM'T SER., No. 200; 54 STAT. 2514 (1937).

127. U. S. TREATY SER., No. 962 (1941).

128. See, e.g., U. S. EXEC. AGREEM'T SER., Nos. 9 (1926), 21 (1930), 23 (1931), 71 (1930). Several statutes appear to contemplate consummation of such agreements. REV. STAT. § 4154 (1878), 46 U. S. C. § 81 (1940); REV. STAT. § 4228 (1878), 46 U. S. C. § 141 (1940); REV. STAT. § 4400 (1878), 46 U. S. C. § 362 (1940); 45 STAT. 1492 (1929), 46 U. S. C. § 85 (1940). For an example of an earlier agreement see 1 MALLOY, TREATIES, at 386 (Agreement of 1886 with Denmark).

129. 41 STAT. 998 (1920), 46 U. S. C. § 879 (1940).

130. See McCLURE, EXECUTIVE AGREEMENTS, at 155-6.

131. 42 STAT. 363 (1922) as modified and extended by 42 STAT. 1325 (1922) and 43 STAT. 763 (1925).

132. See, e.g., 43 STAT. 20 (1924); 43 STAT. 136 (1924); 43 STAT. 719 (1924); 43 STAT. 720 (1924); 44 STAT. 376 (1926); 44 STAT. 378 (1926); 44 STAT. 386 (1926); 45 STAT. 399 (1928); 46 STAT. 48 (1929).

133. See SCHUMAN, INTERNATIONAL POLITICS (1941 ed.) 452-6.

ment; Secretary of State Hughes declared that the agreements did not need "the consent of the Senate."¹³⁴ Private citizens' claims against Germany arising subsequent to 1914 were referred to a mixed tribunal by an executive agreement originally made in 1922 and extended in 1928.¹³⁵ Our adherence to the Dawes refunding plan was also arranged by executive agreement.¹³⁶ When payment of interest on the war debts became a financial impossibility in 1931, the negotiation of the Hoover moratorium took the pattern of Congressional authorization by joint resolution,¹³⁷ followed by the negotiation of executive agreements with the individual nations concerned.

In the realm of international finance, one of the most important agreements to which the United States has thus far been a party, the four-power consortium governing loans to China after 1921, took the domestic constitutional form of an executive agreement.¹³⁸ Also belonging in this category were the executive agreements of 1905 and 1911 whereby American customs administrations were established for the Republics of San Domingo and Liberia respectively.¹³⁹ The Liberian agreement was the product of negotiation with four other nations. On the other hand, the establishment of a customs administration for the neighboring Republic of Haiti in 1915 was the subject of a treaty.¹⁴⁰ In subsequent years a series of executive agreements were concluded both extending and terminating various phases of American intervention and assistance in the financial, medical and military affairs of Haiti.¹⁴¹ After the adoption of the Revenue Act of 1920,¹⁴² a large number of reciprocal tax-exemption agreements were negotiated by

134. See McCURE, *EXECUTIVE AGREEMENTS*, at 115-6.

135. 3 MALLOY, *TREATIES*, at 2601; 4 *id.* at 4213.

136. See *United States v. Pink*, 315 U. S. 203, 242, 249 (1942).

137. 47 STAT. 3 (1931). Introduction of the resolution had been preceded by informal negotiation with the principal debtor nations. See Dep't of State, Press Release, July 11, 1931; MYERS AND NEWTON, *THE HOOVER ADMINISTRATION* (1936) c. 6.

138. 3 MALLOY, *TREATIES*, at 3822 *et seq.*

139. As to the Dominican agreement see 22 WORKS OF THEODORE ROOSEVELT (Mem. ed. 1925) 580-1; CORWIN, *THE PRESIDENT*, at 237. The agreement had originally been presented as a treaty but had been rejected by the Senate; after the Customs Administration had been in operation for some years, a treaty providing for its continuance was consummated.

As to the Liberian agreement see FOREIGN RELATIONS: 1910 at 695, 709-11; FOREIGN RELATIONS: 1911 at 342 *et seq.*; FOREIGN RELATIONS: 1912 at 667 *et seq.*

140. 3 MALLOY, *TREATIES*, at 2673. The treaty was extended for an additional term of ten years in 1917 by an executive agreement. 3 *id.* at 2677. Extension of the Customs Administration for this term had been contemplated in Article XVI of the original treaty, but no reference had been made in the Senatorial ratifying act to the mode whereby this could be authorized on the part of the United States. See 39 STAT. 1654 (1915).

141. See, e.g., 3 MALLOY, *TREATIES*, at 2677, 2678, 2682; U. S. EXEC. AGREEMENT SER., Nos. 117 (1938), 128 (1938).

142. 42 STAT. 239 (1921); see also 43 STAT. 269 (1924); 44 STAT. 25 (1926).

Presidents Coolidge, Hoover, and Roosevelt.¹⁴³ Another important financial agreement was the Litvinov assignment of 1933—one of a number of agreements attendant upon American recognition of Russia in 1933—whereby American claims against the Soviet government were adjusted. In the *Belmont*¹⁴⁴ and *Pink*¹⁴⁵ cases, the Supreme Court held that this executive agreement overrode state policy and constituted the supreme law of the land, under Article VI of the Constitution.

The 1936 three- and six-power agreements providing for establishment of stabilization of international exchanges¹⁴⁶ were negotiated by the President under authority of 1934 monetary legislation.¹⁴⁷ The five-power silver purchase agreement of 1933 is another example of a Congressional-Executive pact.¹⁴⁸ The question of American adherence to the International Monetary Fund and the International Reconstruction Bank, proposed by the Bretton Woods Conference, has been submitted to Congress for approval by statute.¹⁴⁹

Other Important Executive Agreements.

The list of compacts according to subject matter given in the preceding subsections could, if persuasion required it, be supplemented by an impressive array of additional agreements dealing with subjects less susceptible to cataloguing. Many of these agreements have been of transcendent importance in the evolution of American foreign policy.

In discussing the powers of the President as Commander-in-Chief, we have already referred to the Rush-Bagot Agreement of 1817, the precursor of the famed 3000-mile unguarded frontier between Canada and the United States.¹⁵⁰ Several executive agreements affecting relations with China were of equal significance. By an exchange of notes with diplomatic representatives of England, France, Russia, Japan, Italy, and Germany in 1900, Secretary of State John Hay concluded an agreement whereby the various nations agreed to maintain conditions of commercial equality in all areas of China in which they had spheres of influence; thus the foundation was laid for the so-called "Open Door" policy.¹⁵¹ By the Boxer (or Peking) Protocol of 1901—

143. See McCLURE, EXECUTIVE AGREEMENTS, at 163-4.

144. *United States v. Belmont*, 301 U. S. 324 (1937).

145. *United States v. Pink*, 315 U. S. 203 (1942). See *infra*, Section VI.

146. See McCLURE, EXECUTIVE AGREEMENTS, at vii, 167-73; Dep't of State, Press Release, Sept. 26, 1936.

147. 48 STAT. 341 (1934), 31 U. S. C. § 822a (1940); 48 STAT. 52 (1933).

148. The agreement, 48 STAT. 1723 (1933), was made by the President pursuant to the Agricultural Adjustment Act of 1933, 48 STAT. 52 (1933). This portion of the Act was not invalidated in *United States v. Butler*, 297 U. S. 1 (1936).

149. See Part II, Section VIII.

150. See *supra*, Section III.

151. 1 MALLOY, TREATIES, at 244-60; see also GRISWOLD, THE FAR EASTERN POLICY OF

adhered to by the United States on the direct responsibility of President Theodore Roosevelt—provision was made for temporary occupation of a number of Chinese ports by an international expeditionary force, for modification of various subsisting treaties, and for payment of a large indemnity by China.¹⁵²

In 1919, the United States was one of a dozen nations which entered into an agreement to restrict munitions shipments to China; the agreement was never submitted to Congress.¹⁵³ One of the key instruments in the formulation of American policy to Japan, the Lansing-Ishii Agreement of 1917, was a mere executive declaration of policy;¹⁵⁴ later the policy embodied in this declaration was changed by the multilateral Washington Treaty of 1922.¹⁵⁵ Another important diplomatic arrangement was the 1913 compact whereby the United States surrendered its extraterritorial rights in Tripoli.¹⁵⁶ Visa agreements have also been negotiated with many nations.¹⁵⁷

In other Sections, we have already adverted to several important executive agreements consummated by various Presidents pursuant to their constitutional authority as Commander-in-Chief, including the armistice protocol of 1898.¹⁵⁸ The first significant compacts in this field are the prisoner exchange "cartels" made by President Madison during the War of 1812.¹⁵⁹ Among the other significant precedents are the five-power pact of 1919 providing for occupation of the German Rhineland¹⁶⁰ and the various agreements with Mexico, pursuant to which troops of both nations were permitted to cross the borders of the other in pursuit of Indian marauders.¹⁶¹ The Supreme Court commented favorably upon the constitutionality of one of these military agreements in 1902 in *Tucker v. Alexandroff*.¹⁶²

Pursuant to legislation first enacted in 1920 and 1926, numerous agreements have been entered into with Latin American nations, the Philippine Commonwealth, China, and Saudi Arabia, providing for

THE UNITED STATES (1938) 36-86. The correspondence was transmitted to the House of Representatives in 1900 for its information. 1 MALLOY, TREATIES, at 244; H. R. Doc. No. 547, 56th Cong., 2nd Sess. (1900).

152. See SEN. DOC. No. 67, 57th Cong., 1st Sess. (1901); 2 MALLOY, TREATIES, at 2013; FOREIGN RELATIONS: 1901, app.

153. See Brewer, *Executive Agreements* [1943] 2 EDITORIAL RESEARCH REPORTS 1, 18.

154. 3 MALLOY, TREATIES, at 2720-2. See also *infra*, p. 308, note 1.

155. See *infra*, p. 348.

156. 3 MALLOY, TREATIES, at 2698.

157. See DEP'T OF STATE, TREATY INFORMATION BULL., No. 81 (1936) 22.

158. See also WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS (1922) 241 *et seq.*; Moore, *Treaties and Executive Agreements* (1905) 20 POL. SCI. Q. 385, 391-2.

159. 2 MILLER, TREATIES, at 557, 567, 568-73.

160. See Brewer, *loc. cit. supra* note 153.

161. 1 MALLOY, TREATIES, at 1144, 1145, 1157, 1158, 1162, 1170, 1171, 1177, 1178.

162. *Tucker v. Alexandroff*, 183 U. S. 424, 435 (1902).

establishment of American military or naval missions to assist in modernizing the armed forces of these friendly States.¹⁶³

Numerous important executive agreements were consummated by President Franklin D. Roosevelt, during, and immediately prior to American entrance into, the present World War. Among the more important are the various mutual aid compacts authorized by the Lend-Lease Act of 1941,¹⁶⁴ once described as the most important single blow struck by this country towards United Nations victory; the Canadian-American defense agreement of 1940,¹⁶⁵ and the Caribbean bases-destroyer deal,¹⁶⁶ which protected our vital security interests in the Panama Canal Zone and simultaneously kept the sea lanes to Great Britain open in the desperate months after Dunkerque.

Usage in Domain Still Uncharted.

The wide range of the subject matters with respect to which Congressional-Executive and Presidential agreements have been used interchangeably with treaties is obvious. Indeed, this range is so wide that it seems reasonable to conclude that there is no apparent reason why the use of such agreements should not be extended to any other matter, not yet encompassed, that may appropriately be the subject of intergovernmental arrangement.¹⁶⁷ Following the earlier lead of Profes-

163. The basic statutes involved are 41 STAT. 1056 (1920); 44 STAT. 565 (1926), 10 U. S. C. § 540 (1940); 49 STAT. 218 (1935), 10 U. S. C. § 540 (1940); 52 STAT. 442 (1938), 12 U. S. C. § 264 (1940); 53 STAT. 652 (1939), 5 U. S. C. § 118e (1940). See, e.g., the United States-Peru naval mission agreement of July 1940. U. S. EXEC. AGREEM'T SER., No. 177, 54 STAT. 2344 (1940).

164. 55 STAT. 31 (1941), 22 U. S. C. A. § 411 n. (Supp. 1944), extended by 57 STAT. 20 (1943), 22 U. S. C. A. § 412 (Supp. 1943).

Speaking of reciprocal lend-lease aid to the United States in 1943, Senator Vandenberg declared the record was "tremendously impressive." Quoted in Kellock, *Lend-Lease Settlements* [1944] 1 EDITORIAL RESEARCH REPORTS 43, 52. For general discussion of the Act and agreements made thereunder see STETTINIUS, *LEND-LEASE: WEAPON FOR VICTORY* (1944).

165. See (1940) 3 DEP'T OF STATE BULL., No. 61, pp. 154-5.

166. See U. S. EXEC. AGREEM'T SER., No. 181 (1940). The advantages of the deal to both participants are succinctly outlined in STETTINIUS, *op. cit. supra* note 164, at 38-42. Attorney General Jackson's opinion (finding that the transaction complied with existing statutes and could be consummated without reference to the Senate) is reprinted in MCCLURE, *EXECUTIVE AGREEMENTS*, at 394, and (1940) 3 DEP'T OF STATE BULL., No. 63, pp. 199-207. Even Professor Borchard admits that Congressional "acquiescence" may be inferred from the Lend-Lease Act, Borchard, *Executive Agreements*, at 676.

For criticism of the transaction see Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases* (1940) 34 AM. J. INT. L. 690; Briggs, *Neglected Aspects of the Destroyer Deal* (1940) 34 AM. J. INT. L. 569.

167. "There is clearly no constitutional impediment whatever in the way of recognizing the usage of the executive agreement as including instruments of all known subject matter, whether or not actually utilized at the moment." MCCLURE, *EXECUTIVE AGREEMENTS*, at 50.

"On the basis of these opinions it appears that the President alone, or the President together with a majority of Congress can accomplish most anything in the field of foreign

sor Charles Cheney Hyde,¹⁶⁸ Professor Borchard has, however, insisted that "numerous subjects, like extradition, naturalization, consular privileges, treaties of peace, arbitration of claims against the United States, and compacts modifying acts of Congress are by 'constitutional usage' embodied only in treaties and not in executive agreements," and that "here 'constitutional usage' has no appeal" for an author [Mr. McClure] who suggests complete interchangeability.¹⁶⁹ The notion seems to be that development of the constitution by usage, like an absolutist's attempted interpretation of the words of the document, stops short with a given time and cannot continue in accordance with the changing conditions and the principles of policy that produced its first manifestations.¹⁷⁰ Somewhat more precisely formulated, the argument is that the treaty-making power can be extended to any matter that is properly the subject of international negotiation since the exercise of that power is not restricted to the express grants of power in the Constitution, but that the agreement-making power, on the other hand, is confined to a limited class of subject matters since its exercise is restricted to the specific grants of power to the Congress and the President.¹⁷¹ Thus, Mr. Levitan, in suggesting that Presiden-

affairs." Levitan, *Recent Developments in the Control of Foreign Relations under the Constitution of the United States* (Unpublished Ph.D. dissertation in University of Chicago Library, 1940) 144.

168. Hyde, *Constitutional Procedures for International Agreement by the United States* (1937) 31 PROC. AM. SOC. INT. L. 45. McCLURE, EXECUTIVE AGREEMENTS, at 332-44, provides a persuasive point-by-point refutation of the Hyde article.

169. Book Review (1942) 42 COL. L. REV. 887, 890.

170. It may be supererogation to suggest that in constitutional development by usage, as in constitutional development by precedent, it is the principle of policy that is important and not the specific facts, reduced to lowest abstraction, of any particular instance of the usage. One might as well argue that the principle of the *Belmont* and *Pinh* cases cannot be extended beyond intergovernmental agreements made between men named Roosevelt and Litvinov as to argue that development of the Constitution by usage must stop short with the specific instances of any given day. The relevant question, when the discussion is cast in terms of usage, is whether there are any differences in policy between what has been done by way of executive agreement and what has not been done. So far no such differences have been alluded to.

171. For discussion of the scope of the treaty-making power see CORWIN, NATIONAL SUPREMACY (1913); Feidler and Dwan, *Extent of the Treaty-Making Power* (1939) 28 GEO. L. J. 184; Boyd, *The Expanding Treaty Power* (1928) 6 N. C. L. REV. 428; Kuhn, *The Treaty-Making Power and the Reserved Sovereignty of the States* (1907) 7 COL. L. REV. 172.

It may be emphasized further that the present broad compass of the treaty-making power is itself a judicial creation. In achieving this compass the courts on occasion have found it useful to play on the variance in the language of the supremacy clause (Art. VI., cl. 2) which provides:

"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."

tial agreements can be effectively used only on "international issues of which the domestic counterpart is within the range of Congressional authority," states: "It must be remembered, however, that this is a federal state and that Congress has but limited authority. Many of the international problems are on the internal level beyond the competence of Congress to legislate; these problems can only be dealt with by treaty."¹⁷²

The only judicial authority which is cited in support of this proposition that there is a fundamental difference in the scope of treaties and executive agreements is a dictum by Mr. Justice Holmes in *Missouri v. Holland*.¹⁷³ This decision sustained an act of Congress, adopted under the "necessary and proper" clause, to implement a treaty made with Great Britain for the protection of migratory birds traveling between the United States and Canada. Two lower courts had held a previous act of Congress, not in aid of a treaty but designed to secure the same end, unconstitutional. "The only question" Mr. Justice Holmes found in the case was "whether [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment."¹⁷⁴ But in the course of his opinion he remarked, "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" ¹⁷⁵ This decision has been blown into such fantastic proportions by both those who approve and those who disapprove of it, that it may be appropriate to quote at some length the reasoned summary of two recent commentators:

The verbal difference between "made under the authority of the United States" and "made in pursuance" of the Constitution has been used as a judicial crutch to assist in establishing the supremacy of treaties over state laws, despite the Tenth Amendment. There is no reason to suppose that the courts will turn to it to give a minority of the Senate supremacy over the whole Congress, especially since the Tenth Amendment is no longer a threat to the powers of Congress.

"As to the validity of Mr. Justice Holmes' observation concerning the difference in the constitutional language regarding laws and treaties, that laws to be valid must be made 'in pursuance of the Constitution,' while treaties need not be made 'under the authority of the United States,' the writer entertains serious doubt. The change in the language was clearly intended to embody more than just a change of style. But Professor Farrand has already pointed out that the difference between these two phases grew out of the desire of the framers to guarantee the validity of treaties negotiated previous to the adoption of the Constitution, especially the Treaty of Peace, 1783." Levitan, *supra* note 167, at 13. See also 2 FARRAND, RECORDS, at 417.

172. Levitan, *Executive Agreements*, at 394, 395. The problem with which Mr. Levitan is here specifically concerned, that of making executive agreements the "law of the land," is dealt with at length in Section VI of the present article.

173. 252 U. S. 416 (1920).

174. *Id.* at 433.

175. *Ibid.*

"The Court, speaking through Mr. Justice Holmes, did not determine whether the federal district court was correct in ruling that the first statute was unconstitutional, but assumed such unconstitutionality *arguendo*. It ruled that the extent of the treaty-making power could not be determined by determining what the Federal Government could not do under other powers. In final analysis, the case stands for only two propositions: (1) The exercise of the treaty-making power is not limited by those matters with which the states may deal without interference from the Federal Government under any other federal power. (2) The treaty-making power may be exercised so as to control the killing of birds which by themselves fly to Canada and back and in the return of which both Canada and the United States have an interest. The first proposition was already well established and has been reaffirmed since the *Missouri case*. The second proposition is no more than a finding that the conservation of birds that migrate from one country to another and back again is a subject properly pertaining to foreign relations and a matter of international concern. It is of value only as an analogy in determining whether other fact situations present a matter of international concern properly a subject of foreign relations." ¹⁷⁶

To put Mr. Justice Holmes' broad dictum in a contemporary perspective, it may be recalled (1) that the Justice spoke before the Tenth Amendment as a "doctrine of independent vitality" had received its final interment in *United States v. Darby Lumber Company* ¹⁷⁷ and while that doctrine was still a threat to the express powers of the Congress; (2) that he spoke before the present broad construction, as old in some respects as Chief Justice Marshall, of some of the more important express powers of the Congress had received full acceptance; and (3) that he spoke before a succeeding Supreme Court had extended his other dictum in the second half of the same sentence, that "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," ¹⁷⁸ to executive agreements. The blunt fact is that no court has ever found an executive agreement on

176. Feidler and Dwan, *supra* note 171, at 196. Some indication of the controversy that the case has aroused can be gleaned from Levitan, *supra* note 167, at 16.

In contrast with the careful summary of Feidler and Dwan, Professor Borchard interprets *Missouri v. Holland* as having made a treaty "the practical equivalent of a constitutional amendment." Borchard, *The Two-Thirds Rule as to Treaties: A Change Opposed* (1945) 3 ECON. COUNCIL PAPERS, No. 8, p. 6.

177. 312 U. S. 100 (1941). The quoted words are from Feller, *The Tenth Amendment Retires* (1941) 27 A. B. A. J. 223.

178. *Missouri v. Holland*, 252 U. S. 416, 433. This is, as we have seen, the principal theme of Mr. Justice Sutherland's opinion for the Court in *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936). See also *United States v. Belmont*, 301 U. S. 324 (1937); *United States v. Pink*, 315 U. S. 203 (1942).

any subject matter invalid,¹⁷⁹ and that any gap between what can be done under the combined powers, whether "enumerated" or "inherent," of the whole Congress and of the President and what can be done under the treaty-making power must be a judicial creation of the future. In view of the traditional tendency of the Supreme Court to put executive agreements and treaties on a par in every respect,¹⁸⁰ and in view of the fact that the Congressional-Executive agreement is more responsive than the treaty both to democratic control and to the interests of the whole country, it is permissible to doubt whether such a gap ever will be created.

It may be advantageous to examine in more detail the alleged exceptions to the possible use of executive agreements. The most important item in Professor Borchard's list of subjects to which, he claims, usage has not yet extended is "treaties of peace." The phrase "treaty of peace," when bereft of the reification which makes it some mysterious, special kind of an agreement, comprises merely an accumulation of separate arrangements—with respect to territorial transfers, settlement of claims, reparations, re-establishment of normal relations, modification of pre-existing treaties, etc.—each of which, taken separately, has been the subject of Congressional or executive or combined action.¹⁸¹ The accumulation of such arrangements into a single document would not appear to affect the question of constitutional power.¹⁸² As previously indicated, the multi-nation invasion of Peking in 1899 was terminated by the so-called Boxer Protocol—in language, importance, and multiplicity of content indistinguishable from numerous treaties of peace¹⁸³—which was never referred to the Senate. The hostilities with Mexico in 1914 were terminated by an exchange of notes.¹⁸⁴

179. See Catudal, *Executive Agreements*, at 665.

180. See *infra*, Section VI.

181. Accord: Corwin, *The Power of Congress to Declare Peace* (1920) 18 MICH. L. REV. 669, 671:

"The mere fact that Congress is not specifically authorized to make peace does not prove that it does not possess powers in the exercise of which, on proper occasions, it may bring peace about."

In his concurring opinion in *United States v. Pink*, 315 U. S. 203, 240-1 (1942) Mr. Justice Frankfurter makes interesting references to the President's power to settle claims and to establish "normal relations with a foreign country."

182. The effort to distinguish executive agreements and treaties on some basis other than the source of validating power is hard put when it has to turn to the size or length of a document and the number of articles it contains. Professor Borchard, in *Executive Agreements* at 670, n. 23, writes: "In respect to form it may also be questioned whether the multi-articled agreement with Canada effected by exchange of notes August 18, 1939, as revised later, providing for reciprocal air transportation service, should not have been incorporated in a treaty."

183. See *supra*, 280-1.

184. See LATANÉ AND WAINHOUSE, *A HISTORY OF AMERICAN FOREIGN POLICY* (2d rev. ed. 1941) 659; CALLAHAN, *AMERICAN FOREIGN POLICY IN MEXICAN RELATIONS* (1932) c. 12; *FOREIGN RELATIONS: 1914* at 443 *et seq.*; *FOREIGN RELATIONS: 1915* at 643 *et seq.*

More significant is the experience after the last World War. By joint resolution adopted in July 1921, the pre-existing "state of war" was declared "at an end";¹⁸⁵ the Court of Appeals for the District of Columbia subsequently held unqualifiedly that as of the date of enactment of the statute, "the state of war between the United States and the Imperial [sic] German government was terminated."¹⁸⁶ It is true that treaties relating to the termination of the war were subsequently negotiated with Germany, Austria, and Hungary.¹⁸⁷ But there would appear to be no constitutional reason why every provision of these treaties could not have been incorporated in executive agreements authorized by act of Congress,¹⁸⁸ just as were numerous other important aspects of the peace settlements.¹⁸⁹ There is no necessary constitutional paradox that the whole Congress should be able to declare war by majority vote and yet not be able to approve the terms of a peace settlement by the same procedure.

The other items on the list of supposed exceptions to the possible use of executive agreements may be disposed of more summarily.¹⁹⁰ The Congress is given the express power "to establish a uniform rule of naturalization";¹⁹¹ there is no reason why this grant should not be construed as have other express powers (such as those over commerce and postal affairs) to permit the authorization or sanctioning of international agreements. With respect to the extradition of criminals there are several instances—one dating from Lincoln's administration—

185. 42 STAT. 105 (1921). The resolution also terminated the state of war with Austria and Hungary.

186. *In re Stoffregen*, 6 F. (2d) 943 (App. D. C. 1925).

187. 3 MALLOY, TREATIES, at 2493, 2596, 2693.

188. In 1 WILLOUGHEY, CONSTITUTIONAL LAW, at 535-6, the author writes.

"In support of the view that Congress, as distinguished from the Senate and President acting as the treaty-making power, might, by its action, bring the war to a legal close, it was argued that, since to that body belongs exclusively the constitutional power to declare war, it should logically be held to have the implied power to do what will, in effect, amount to a repeal of such a declaration. Such an argument is absolutely valid, provided it be understood that such congressional action can have no further than a municipal effect, that is, to bring to an end those municipal legal consequences which follow from the existence of a status of war. In other words, such a legislative act is not competent to determine the international legal relations of the United States with the other belligerent Powers. These can be fixed only by means of international agreements negotiated by the President and approved by the Senate of the United States, and agreed to by the other States concerned."

This distinction between the "municipal" and the "international" effect of an act of Congress appears to stem from the semantic confusion, discussed above, that the whole Congress cannot authorize the making of international agreements.

189. See McCURE, EXECUTIVE AGREEMENTS, at 112-6.

190. For more detailed disposition see McCURE, EXECUTIVE AGREEMENTS, at 249 *et seq.*, 332 *et seq.*

191. U. S. CONST. Art. I, § 8.

of such agreements made by the executive department and not referred to the Senate.¹⁹² Chief Justice Taney once suggested, moreover, that the states, with the approval of Congress, would have the power to make extradition agreements with foreign nations;¹⁹³ it would take a strange logic to hold that the President, when authorized by the Congress, would have less power.¹⁹⁴ The practical difficulty in subsuming "arbitration of claims against the United States" under the President's power as Executive is that the Congress may not make available the funds necessary to satisfy any adverse awards. This is a difficulty that the President shares with the Senate when treaties are used to resolve such claims; palpably the safest procedure in case of claims against the United States is to arrange for their resolution by Congressional-Executive agreements. In any case, as previously indicated, there are several examples where claims against the United States were settled or referred to arbitration by executive agreement.¹⁹⁵ The *Pink* and *Belmont* cases would seem to dispose of all doubts about the scope that can be given to consular privileges, especially when there are added to the powers of the President those of the Congress. "Compacts modifying acts of Congress" present no difficulties for Congressional-Executive agreements; what the Congress has done it can undo. Whether Presidential agreements can modify acts of Congress is a matter of more complexity which will be discussed in detail below. Even if it be assumed that by some strange freak of future judicial whim some of the above analyses may be proved wrong and that a procedure which has been used for the annexation of territories, for the conduct of wars, for the control of important peace-time economic affairs, and for entering international organizations of various

192. During the Civil War, President Lincoln entered into an agreement with Spain to extradite a Cuban official. See 4 MOORE, DIGEST, at 249; 1 WILLOUGHBY, CONSTITUTIONAL LAW, at 546. Reciprocal extradition provisions were contained in the 1903 agreement with Cuba for leasing of naval or coaling bases, 1 MALLOY, TREATIES, at 360, 361; the 1913 agreement with Great Britain applying to North Borneo, the Philippines, and Guam, 3 *id.* at 2637, 2639; and the 1899 agreement with the Sultan of Sulu, 2 W. CAMERON FORBES, THE PHILIPPINE ISLANDS (1928) 470, 471. See also CRANDALL, TREATIES, at 117 *et seq.* But see 5 HACKWORTH, DIGEST, at 406-7. In his discussion in Book Review (1942) 42 COL. L. REV. 888, 891, Professor Borchard chides McClure for falling back on the first of these examples.

193. *Holmes v. Jennison*, 39 Pet. 540, 578 (U. S. 1840).

194. At least two nineteenth century Attorneys General thought Congress could enact statutes regarding the extradition of criminals. See 1 QRS. ATT'Y GEN. 509, 521 (Wirt, 1831); 3 *id.* at 661 (Legaré, 1841). Several acts have been enacted providing for extradition of criminals from foreign territory when occupied by American military forces. 1 STAT. 302 (1793), 31 STAT. 656 (1900). See *Roberts v. Reilly*, 116 U. S. 80 (1885); *Neely v. Henkel*, 180 U. S. 109 (1901). This would clearly seem to sanction use of Congressional-Executive agreements for this purpose. On the other hand, it has been established that the President may not require extradition of alien criminals from the United States on his own initiative. *Valentine v. United States ex rel. Neidecker*, 299 U. S. 5, 9 (1936).

195. See *supra*, pp. 269-70.

purposes, cannot be used for some of the items that Professor Borchard lists, one may still conclude in accord with practical wisdom and sound tradition *de minimis non curat lex*.

In support of this conclusion there is, in addition to the usage and judicial benediction described above, distinguished academic authority. The late Professor James W. Garner, Reporter for the *Harvard Research Draft of the Law of Treaties*, put into apt words—reminiscent of the position taken by Presidents Tyler, Polk, and McKinley—the view which a considerable number of authoritative scholars have achieved after surveying the relevant records of our history:

“The delegation by the Constitution to the President and the Senate of the power to make ‘treaties’ does not exhaust the power of the United States over international relations. The will of the nation in this domain may be expressed through other acts than ‘treaties’ and such acts do not necessarily need to be ratified by the President by and with the advice and consent of the Senate in order to be valid and binding, unless they so expressly provide by their own terms. In short, the power of the President and the Senate to regulate foreign relations is not an exclusive power; it is only when an agreement takes the form of a ‘treaty,’ as that term is used in the Constitution, that this power belongs exclusively to them. There is no inconsistency between the authority of the President and the Senate to regulate foreign relations through agreements in the form of ‘treaties’ and the power of the President and Congress to deal with matters of foreign policy through legislative action. Which of the two procedures shall be employed in a given case is a matter of practical convenience or political expediency rather than of constitutional or international law. If the procedure of treaty regulation proves ineffective in a particular case because of the constitutional impediment relative to ratification, there is no reason of constitutional or international law why recourse to the easier alternative of legislative action cannot be had, if the President and a majority of the two Houses of Congress so desire, as has been done with success on various occasions in the past.”¹⁹⁶

196. Garner, *Acts and Joint Resolutions of Congress as Substitutes for Treaties* (1935) 29 AM. J. INT. L. 482, 488. Compare CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944). Professor Quincy Wright in *The United States and International Agreements* (1944) 38 AM. J. INT. L. 388 and Mr. McClure in *INTERNATIONAL EXECUTIVE AGREEMENTS* (1941) are inclined to prefer the Presidential agreement to the Congressional-Executive, but reach substantially the same conclusion on interchangeability. Walter F. Dodd concludes, in *International Relations and the Treaty Power* (1944) 30 A. B. A. J. 360, 361, that the “executive agreement authorized or approved by Congress may serve the same purpose as a treaty, with respect to all matters within the power of Congress. Congressional power in all cases may be used in place of the treaty power, except where the power to act is itself derived from the treaty power,” but makes no commitment as to the extent to which the power to act may have to be derived from the treaty power. See also Todd, *The President's Power to Make International Agreements* (1927) 11 CONST'L REV. 160, 164; FLEMING, *THE UNITED*

V. ADAPTATION OF THE CONSTITUTION BY USAGE*

The historical record—outlined in the preceding Section of this article—demonstrates clearly that executive agreements have come to be used interchangeably with treaties in the conduct of the foreign relations of the United States. In Section III it was shown that it is impossible to ascertain from the express wording of the Constitution or from the available shreds of evidence as to the latent intentions of some of the Framers what differentiation, if any, was intended between the scope of the treaty-making power of the President and Senate and that of the agreement-making powers of the Congress and the President and of the President alone. It is as impossible, therefore, as it is unnecessary, to state dogmatically whether the practice of interchangeability which has in fact developed represents an effectuation or a supplementation of the Framers' "real" intentions.

In the light of the Marshall-Holmes adaptive, instrumental theory of constitutional interpretation, previously summarized,¹ any appeal to

STATES AND THE WORLD COURT (1944) 177-83; statement of David J. Lewis, *Judiciary Committee Hearings* at 114, quoting other writers, including Professor Burdick of Cornell.

In the recently published second revised edition of his treatise on international law, Professor Hyde gives an elaborate description of the extent to which executive agreements have been used as instruments of foreign policy but concludes that the record "fails to show that the Government has in fact acted on the theory that the President, with or without the aid of Congress, may conclude in behalf of the United States any arrangement which could be concluded through the instrumentality of a treaty. There have been, moreover, instances where a Secretary of State has felt that for purposes of agreement the use of a treaty was obligatory." 2 HYDE, *INTERNATIONAL LAW* (2d rev. ed. 1945) 1416-7. In support of this statement, Professor Hyde quotes Secretary of State Hughes' remarks regarding agreements negotiated at the Washington Conference of 1921-1922. *Ibid.* With this should be contrasted President Harding's view that if the Senate minority balked ratification of treaties embodying these international agreements, they could be submitted for validation by majority vote of both houses. See *infra*, Section VIII.

* In preparing this Section, we have been greatly assisted by McCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* (1941) 193-255, and HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* (1925). However, the concept of adaptation of the Constitution by usage was explicitly recognized as a significant means of conforming the document to changing political and economic problems many years before. See TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* (1890) and 1 BRYCE, *THE AMERICAN COMMONWEALTH* (1888) c. 34.

Comparison of certain of the "usages" described by these writers with the facts of mid-twentieth century politics furnishes a significant insight into the extent to which the "living Constitution" changes from era to era.

1. See *supra*, pp. 212-6.

In *United States v. Midwest Oil Co.*, 236 U. S. 459 (1915), the Court was confronted with the question as to whether the President was empowered to withdraw public land from private acquisition, although Congress had authorized homesteading thereon in general statutes. The President argued that his powers were established by long continued usage if not by necessary implication from the executive clause. On this point the Court said:

the absolute artifacts of verbal archaeology can scarcely be of decisive, or even of persuasive importance today. For even if the widespread use of executive agreements in dealing with all kinds of problems was not within the conscious contemplation of the statesmen who foregathered at Philadelphia 158 years ago, the continuance of the practice by successive administrations throughout our history makes its contemporary constitutionality unquestionable. "The law of the Constitution," wrote John Bassett Moore some forty years ago "is not more to be found in the letter of that instrument than in the practice under it. . . ." ²

In innumerable respects, the division of functions between the different branches of the Government and the scope of federal authority, as clearly contemplated by the Framers, have been altered by usage and

"We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders like the one here involved. . . .

"It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

"This principle, recognized in every jurisdiction, was first applied by this court in the often cited case of *Stuart v. Laird*, 1 Cranch, 299, 309. There, answering the objection that the act of 1789 was unconstitutional in so far as it gave Circuit powers to Judges of the Supreme Court, it was said (1803) that, 'practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled.'" *Id.* at 469, 472-3.

2. Moore, *Treaties and Executive Agreements* (1905) 20 POL. SCI. Q. 385, 417. We do not mean to imply, however, that Professor Moore supports our view as to the proper roles of treaties and agreements. See Borchard, Book Review (1942) 42 COL. L. REV. 887.

For other statements of the importance of adaptation by constitutional usage see McBAIN, *THE LIVING CONSTITUTION* (1927) c. 1; BENTLEY, *PROCESS OF GOVERNMENT* (1903) 285, 305 *et seq.*; HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* (1925); 1 BRYCE, *THE AMERICAN COMMONWEALTH* (1888) c. 34; SCHLESINGER, *NEW VIEWPOINTS IN AMERICAN HISTORY* (1922) 81 *et seq.*; Llewellyn, *The Constitution as an Institution* (1934) 34 COL. L. REV. 1; Corwin, *The Constitution as Instrument and as Symbol* (1936) 30 AM. POL. SCI. REV. 1070; Hamilton, Book Review (1943) 52 YALE L. J. 186. Professor Willis has recently prepared a long list of clauses of the Constitution whose original connotations have been altered or supplemented by the continuous constitutional conventions of the Supreme Court. Willis, *The Part of the United States Constitution Made by the Supreme Court* (1938) 23 IOWA L. REV. 165.

prescription, without resort to formal textual amendment. "For every time that the Constitution has been amended," as Justice Byrnes has pointed out, "it has been changed ten times by custom or by judicial construction."³ This process of constitutional evolution has by no means been restricted to the numerous phases of government which the draftsmen deliberately left ambiguous or unsettled; in many instances the very words and phrases of the written Constitution have been given operational meanings remote from the intentions of their original penmen.⁴ For example, there are at least three important instances where usage has grafted provisions into "the living Constitution," which the Philadelphia Convention expressly declined to include in its text.⁵

The principal enzymes of change have been the emergence of a more democratic philosophy of government, leading to replacement of some of the patrician institutions devised by the statesmen of 1787,⁶ and a continuous reinforcement of the belief that national survival and growth are dependent upon the maintenance of an effective central government.⁷ It is obvious that had the Constitution been unable to "stretch itself to the measure of the times," it would, as Woodrow Wilson observed, have been "thrown off and left behind, as a by-gone

3. Quoted in Hogan, *Associate Justice James F. Byrnes* (1941) 27 A. B. A. J. 475, 477.

4. George Washington was characteristically blunt in discussing the point: "Time and habit are necessary to fix the true character of governments." Quoted in MUNRO, *THE MAKERS OF THE UNWRITTEN CONSTITUTION* (1930) 14.

5. See *infra*, pp. 296-8, 299-302, 303.

6. "... the general object [of his draft of the Constitution] was to provide a cure for the evils under which the U. S. laboured; that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy. . . ." Edmund Randolph, speaking during the first week of the Constitutional Convention. MADISON, *DEBATES*, at 34.

"The Constitution as it was framed by the Convention was well calculated to keep the plain people in a subordinate place. . . . The more powerful branch of Congress, the Senate, was to be chosen by the state legislatures, acting on behalf of the people. The President was to be selected by a small group of men in each state, who were presumably wiser than ordinary men and who should be chosen in any manner that the state legislature might specify." SCHLESINGER, *op. cit. supra* note 2, at 81. See also BEARD, *THE REPUBLIC* (1944) 279; BEARD, *ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1935 ed.); MUNRO, *op. cit. supra* note 4, c. 1.

"... the general tendency of the body of usage that has grown up has been in the direction of a greater and more direct popular control of the government. The net result has been to make the American political system more democratic than it was at the beginning or than it was originally intended or expected to be." HORWILL, *op. cit. supra* note 2 at 210.

7. "Among these formal additions to the original document only one enlarges the powers of Congress. . . . Were there no other channels of federal expansion than that which the process of formal amendment has provided, the national government would now be relatively weaker than it was when it started. It has gained virtually the whole of its political and economic hegemony of today from statutes, from judicial decisions, and from usages." MUNRO, *op. cit. supra* note 4, at 3. See also BRYCE, *loc. cit. supra* note 2.

device.”⁸ This process of continual adaptation is common in all governments. When, as has proved to be the case in most of the American states, the process of amendment is a relatively simple political problem, adaptation frequently proceeds by way of formal change; when, as has proved to be the case in the Federal Union, the process of amendment is politically difficult, other modes of change have emerged.⁹ To quote Woodrow Wilson again:

“There has been a constant growth of legislative and administrative practice, and a steady accretion of precedent in the management of federal affairs, which have broadened the sphere and altered the functions of the government without perceptibly affecting the vocabulary of our constitutional language. . . .”

“. . . We have been forced into practically amending the Constitution without constitutionally amending it. The legal processes of constitutional change are so slow and cumbersome that we have been constrained to adopt a serviceable framework of fictions which enables us easily to preserve the forms without laboriously obeying the spirit of the Constitution, which will stretch as the nation grows.”¹⁰

The infrequency of resort to formal amendments as a method of modifying the Constitution is itself a striking example of the extent to which the national government has developed along channels unforeseen by the founding fathers. Most historians and political scientists have glossed over the fact that the Framers “intended to make the process of constitutional amendment an easy one. That is why they provided four alternative ways of putting an amendment through.”¹¹ They made it possible to initiate amendments in Congress, or without action by Congress. They provided for ratification by the state legislatures or without action by these legislatures if the occasion required. . . . The framers of the original Constitution anticipated, moreover, that from time to time a national convention would be

8. WILSON, CONGRESSIONAL GOVERNMENT (1890) 9. See also *supra*, pp. 215-6.

9. As intimated in the text, the important factor is not the relative simplicity of the legal procedure by which a Constitution may be “amended,” but the question of whether, as a matter of practical politics, that process is responsive to democratic pressures. Thus there have been great discrepancies in the number of amendments adopted in states whose Constitutions contain identical amending procedures. See MCBAIN, *op. cit. supra* note 2, at 21-3.

10. WILSON, *op. cit. supra* note 8, at 7, 242.

11. Amendments may be proposed by: (1) two-thirds of both houses of Congress, or (2) a convention convened by Congress at the request of the legislatures of two-thirds of the states. Amendments may be ratified by: (a) the legislatures of three-fourths of the states, or (b) conventions in three fourths of the states. U. S. CONST. Art. V.

The procedure used has always been the combination of steps (1) and (a), except in the case of the Twenty-First Amendment which was submitted to state ratifying conventions. See ANDERSON, AMERICAN GOVERNMENT (1938) 109-10.

called for the purpose of undertaking a general revision."¹² Contemporaneously Jefferson urged that the Constitution be amended to provide for a general revision every twenty years.¹³ These views were not confined to the realm of speculation. Before the Constitution had passed its third anniversary, ten amendments had been adopted; before the Constitution had passed its 16th anniversary, more amendments had been adopted than have been enacted in the ensuing 140 years.¹⁴

In preferring to alter the Constitution by informal adaptation, the American people have also been motivated by a wise realization of the inevitable transiency of political arrangements. The ultimate advantage of usage over formal textual alteration as a method of constitutional change is that, while it preserves the formal symmetry of the document, it reduces the danger of freezing the structures of government within the mold dictated by the expediencies or political philosophy of any given era. A formal amendment may be outmoded shortly after it is adopted, but usage permits continual adjustment to the necessities of national existence. Thus the Constitution is enabled to fulfil its role as a symbol of national unity and continuity, while nevertheless being ceaselessly adapted, as its Framers intended, to the problems of "ages to come."¹⁵

12. MUNRO, *op. cit. supra* note 4, at 4, 5-6; see also 2 FARRAND, RECORDS, at 557-63; WARREN, THE MAKING OF THE CONSTITUTION (1928) 672-84, and letters of George Washington quoted in *id.* at 735-9.

Thus the Fifth Article provides that upon the request of the legislatures of three-fourths of the states, Congress may convene a federal convention. The stated purpose of such a convention is merely the consideration of amendments to the Constitution. However, it is clear that such a convention could redraft the entire document. The Convention which met in Philadelphia in 1787 had been convened for the limited purpose of devising "such further provisions as shall appear to them necessary to render the constitution of the Federal Government adequate to the exigencies of the Union. . . ." COMMAGER, DOCUMENTS OF AMERICAN HISTORY (1934) 132-4.

13. See Jefferson's letter to Samuel Kercheval, July 12, 1816, 15 WRITINGS OF THOMAS JEFFERSON (Mem. ed. 1905) 40-3. Jefferson's general comments in this letter on the desirability of constitutional flexibility are of enduring interest: "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding age a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It deserved well of its country. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading; and this they would say themselves, were they to rise from the dead."

14. The first ten amendments came into force in 1791. The eleventh was ratified in 1798 and the twelfth in 1804. ANDERSON, *op. cit. supra* note 11, at 1063-4. Only nine amendments have been adopted since 1804.

15. *McCulloch v. Maryland*, 4 Wheat. 316, 415 (U. S. 1819); see also Corwin, *The Constitution as Instrument and as Symbol* (1936) 30 Am. Pol. Sci. Rev. 1070; Lerner, *The Constitution and Court as Symbols* (1937) 46 YALE L. J. 1290, 1299 *et seq.*; cf. Hamilton, *Constitutionalism* (1931) 4 ENCY. SOC. SCI. 255; Borgese, *Primitivism* (1934) 12 *id.* at 398; WHITEHEAD, SYMBOLISM, ITS MEANING AND EFFECT (1927).

Realization of the pervasiveness of adaptation by usage has been somewhat retarded by the timidity of judicial semantics. In the judicial forum, usage has generally been described by the more orthodox verbal criteria of "long-continued . . . practice" or "legislative interpretation."¹⁶ On occasion, however, there have been more forthright statements; thus, in *Ware v. United States*, the Supreme Court declared:

"When weighed in connection with the immemorial usages of the department, those acts of Congress recognizing the existence of the power, may well be regarded as a legislative interpretation of the provision [of the Constitution] authorizing the Postmaster General to establish post-offices, and as sanctioning a construction in conformity to that well-known usage."¹⁷

In *Myers v. United States*,¹⁸ Chief Justice Taft jumped the final hurdle by declaring that when "long practice" had established the propriety of executive independence in a situation, where the language of the Constitution might have been interpreted to dictate coordinate control, Congress could not thereafter seek to curtail the Executive by enactment of restrictive legislation.¹⁹

The best evidence of the importance of usage is furnished by a summary of a few major examples in which the Constitution has been thus modified or supplemented. This summary plainly demonstrates that the growth of the interchangeable use of treaties and executive agreements—if such growth does represent a departure from the foresight of the Framers—is by no means of unique importance in the catalogue of unwritten modifications of the Constitution. Moreover, if this practice is an example of constitutional modification by usage, it

16. See, e.g., *Field v. Clark*, 143 U. S. 649, 691 (1891); *Downes v. Bidwell*, 182 U. S. 244, 288 (1900); *The Laura*, 114 U. S. 411, 416 (1885); *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 327-8 (1936); *McPherson v. Blacker*, 146 U. S. 1, 36 (1892). See also McCURE, EXECUTIVE AGREEMENTS, at 211 *et seq.*; BRYCE, *loc. cit. supra* note 2.

17. 71 U. S. 617, 633 (1866).

18. 272 U. S. 52 (1926). The question involved was whether the President had the exclusive power of removing executive officers of the United States. Since Article II, Section 2 of the Constitution empowered the President to appoint officials only "by and with the advice and consent of the Senate" or, in the case of minor officials, pursuant to statute, it would seem logical to assume that Congress could impose conditions on the exercise of the removal power. However, usage and the importance of preserving the President's control of the executive departments were held to preclude Congressional control of removals.

The doctrine of the *Myers* case was not overruled in *Humphrey's Executor v. United States*, 295 U. S. 602 (1935), which merely held the President's removal power was limited in the case of members of independent regulatory commissions with quasi-judicial functions. See *Morgan v. Tennessee Valley Authority*, 28 F. Supp. 732 (D. Tenn. 1939), *aff'd*, 115 F. (2d) 990 (C. C. A. 6th, 1940), *cert. denied*, 312 U. S. 701 (1941). See also Comment (1942) 51 YALE L. J. 1358, 1367-8; Notes (1939) 2 LA. L. REV. 183, (1940) 88 U. OF PA. L. REV. 357.

19. *Myers v. United States*, 272 U. S. 52, 174-6 (1926).

clearly proceeds in the main stream of such development—towards democratization of our fundamental political institutions and protection of imperative national interests against any neo-mercantilistic views as to temporary sectional interests.

Revision of the Procedure for Electing the President.

One of the most revolutionary glosses written by usage into the original Constitution is the alteration of the procedure whereby the President of the United States is selected.²⁰ The twin aims of the draftsmen of the Constitution were to prevent the designation of the chief executive by any sort of direct popular vote²¹ and to avoid domi-

20. The relevant provisions of the original Constitution are contained in Article II, Section 2. Paragraph 2 thereof provides that "each state shall appoint" the appropriate number of electors "in such manner as the legislature thereof may direct." Paragraph 3 provides that:

"The electors shall meet in their respective states and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President."

As a result of the 1800 election when the choice of the President passed to the House because Jefferson and Burr, the Anti-Federalist candidates, received the same number of votes, the Twelfth Amendment was adopted requiring the Electors to ballot separately for the President and Vice-President.

21. James Wilson, one of the few delegates who advocated election of the President by direct popular vote, declared his own apprehension that the method "might appear chimerical." Quoted in CLEVELAND, *PRESIDENTIAL PROBLEMS* (1904) 9. The views of the majority were well expressed by the delegate who thought that "it would be as unnatural to refer the choice of a proper person for [President] to the people as to refer a trial of colors to a blind man." *Ibid.* See also *THE FEDERALIST*, No. 10 (Madison); 2 BURGESS, *POLITICAL SCIENCE AND CONSTITUTIONAL LAW* (1891 ed.) 219; WOODROW WILSON, *DIVISION AND REUNION* (1918 ed.) 12; TANSILL (ed.), *DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES* (1927) 395, 412.

nation of the electoral process by political parties.²² To attain the first aim the initial power of selection was confided in the electors, who were expected to vote, without prior commitments, for whomever they thought best qualified.²³ To achieve the second desideratum the Constitution provided that the electors would meet in separate state colleges, that the colleges should all meet on the same day, and that the electors should be permitted to vote only once.²⁴ Actually it was expected that the Electoral College would function primarily as a nominating body; for once George Washington left the Presidency it was assumed that the votes would be so scattered "in the great majority of cases" that no person would receive a majority.²⁵ The House of Representatives would then have to select one of the five persons who had received the greatest number of electoral votes; as each state's delegation is entitled to one vote in this election, the doctrine of majority control would be wholly subordinated in the interests of the smaller states. Examination of the records of the Constitutional Convention of 1787 and of the state ratifying conventions clearly reveals that this scheme was the culmination of much painstaking thought as to the proper method for designating a chief executive. Indeed, it was stated in No. 67 of *The Federalist*: "The mode of appointment of the Chief Magistrate" was almost the only provision of the Constitution which "escaped without severe censure. . . ." ²⁶

The departure from this carefully devised plan for an indirect election resulted from the emergence, in considerable measure because of Washington's policies during his second term, of political parties.²⁷ Beginning in 1796, the Federalist and Anti-Federalist members of Congress began to meet in caucuses to designate party candidates for the Presidency. Continuously in and after 1796, the balloting for

22. See the speech given in the Senate on March 18, 1824 by Rufus King, who had been a delegate to the 1787 Convention. 3 FARRAND, RECORDS, at 462; see also HORWILL, *op. cit. supra* note 2, at 41.

23. See Hamilton's remarks in No. 67 of *THE FEDERALIST*; see also Mr. Chief Justice Fuller's dicta in *McPherson v. Blacker*, 146 U. S. 1, 36 (1892); RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* (1829) 46; [Mr. Justice] SAMUEL MILLER, *LECTURES ON THE CONSTITUTION OF THE UNITED STATES* (1891) 149-50.

24. U. S. CONST. Art. II, § 2, par. 3, quoted *supra*, note 20.

25. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* (1913) 167. George Mason, who had been a delegate to the Constitutional Convention, predicted during the debate at the Virginia ratifying convention that the vote of the electors would be indecisive forty-nine times out of fifty. *Id.* at 169. See also the remarks of other delegates to the Philadelphia Convention quoted in TANSILL, *op. cit. supra* note 21, at 663; *THE FEDERALIST*, No. 66 (Hamilton).

26. It has generally been believed that Hamilton was the author of No. 67 of *The Federalist* (see Earle Sesquicentennial edition, 1937, at 436), but doubt has been cast on this assumption by the recent research, largely unpublished as yet, of Mr. Douglas Adair.

27. See White, *Public Administration under the Federalists* (1944) 24 B. U. L. REV. 143, 183-4.

electors—both in those states where the electors were chosen by the legislatures and in those where popular suffrage was permitted—was conducted on a frankly partisan basis;²⁸ this practice continued after 1832 when the party nominees began to be selected by conventions. Since the election of 1824—when the Congressional caucus broke down and the Democratic Party, then the only organized political group of any strength, was split between four candidates²⁹—there has only been one occasion, and that a freak, when even a single elector has voted for anyone but the party nominee.³⁰

Numerous proposals have been made since 1824 to abolish the Electoral College by formal constitutional amendment; all have failed to secure the requisite two-thirds majority in Congress.³¹ Yet a usage has developed in the interests of party and popular and party sovereignty, whereby, to quote Mr. Justice Story, “. . . in effect, the whole foundation of the [electoral] system, so elaborately constructed, is subverted”³²; for plainly the electors are now regarded as “animated rubber stamps”³³ and mere trustees “to carry out definite instructions.”³⁴ Former President Benjamin Harrison put the matter bluntly:

“An elector who failed to vote for the nominee of his party would be the object of execration, and in times of very high excitement might be the subject of a lynching.”³⁵

28. See STANWOOD, A HISTORY OF THE PRESIDENCY (1898) 44-5, 58-9, 82-3; HORWILL, THE USAGES OF THE AMERICAN CONSTITUTION (1925) 43-5. The voting for Vice-President in 1792 had been conducted on a partisan basis; John Adams was the nominee of most of the Federalist electors and George Clinton of the Anti-Federalists. *Id.* at 32-6.

29. In the 1824 election, 10 of the 14 North Carolina electors voted for Crawford, although the popular vote had gone to Jackson. The New York electors were all instructed by the legislature, which had picked them, to vote for Clay; three turned maverick and voted, one each, for John Quincy Adams, Crawford, and Jackson. See Huddle, *The Electoral College* [1944] 2 EDITORIAL RESEARCH REPORTS, 99, 107.

In the 1820 election, Elector William Plumer, Sr., of New Hampshire, although pledged to vote for Monroe, prevented the latter's unanimous reelection by voting for John Quincy Adams. See WILLIAM PLUMER JR., LIFE OF WILLIAM PLUMER (1857) 493.

30. Horace Greeley, the Liberal Republican-Democratic candidate in 1872, died after he had been defeated in the popular election but before the Electoral College met. Three of the 66 Democratic electors voted for the dead man; the other votes were split among four persons, only 18 of them going to the official nominee for Vice-President. See HORWILL, *op. cit. supra* note 28, at 51-2. This situation has sometimes been mistakenly cited as an example of independent conduct by the electors. See Huddle, *supra* note 29, at 107.

31. See Huddle, *loc. cit. supra* note 29.

32. 3 STORY, COMMENTARIES ON THE CONSTITUTION (1st ed. 1833) § 1457.

33. The phrase is former Vice-President Thomas R. Marshall's, quoted in HORWILL, *op. cit. supra* note 28, at 41.

34. The description is that of James Russell Lowell, a Republican elector from Massachusetts, urged in 1876 to vote for Tilden, the Democratic nominee who had received a popular majority and possibly had his electoral majority stolen by party machinations, to help avert a threatened civil war. Quoted in HAYNES, THE ELECTION OF SENATORS (1906) 132. A shift by Lowell would have elected Tilden.

35. HARRISON, THIS COUNTRY OF OURS (1897) 77.

The Development of Judicial Review.

The allocation to the federal judiciary of the power to pronounce ultimate judgment upon the constitutionality of acts of Congress is another one of the many important structural changes grafted by usage on to the anatomy of the Federal Government.³⁶

The contemporary belief that the power to pass upon constitutional questions in the course of deciding a "justiciable case or controversy" necessarily involves the power to issue an interpretation which is binding upon Congress and the President hinders recognition of the dual aspect which the problem of judicial review assumed in the first seventy years of the Republic. The first question was that of *jurisdiction*—whether the courts were privileged to pass judgment upon the constitutionality of acts of Congress in any situation; the second question was that of the *degree of finality* which adhered to the Court's pronouncements on constitutional questions.³⁷ The text of the Constitution does not confer upon the courts the power to pronounce acts of Congress unconstitutional, and the question was never formally disposed of at the Constitutional Convention. Only a minority of the delegates discussed the problem at all during the course of debate; the preponderant opinion was in favor of some form of judicial review, but the position was never very boldly asserted, nor was any integrated rationale of its desirability or necessity presented.³⁸ While the propriety of judicial review may reasonably be inferred from Section 25 of the Judiciary Act of 1789,³⁹ the language of the Constitution itself indicates the existence of Congressional power to limit or virtually abolish the jurisdiction of the federal courts.⁴⁰ Chief Justice Marshall's opinion

36. See generally CORWIN, *COURT OVER CONSTITUTION* (1938) c. 1; 1 BOUDIN, *GOVERNMENT BY JUDICIARY* (1932) 1-406. The emergence of executive leadership of Congress during portions of the twentieth century is sometimes assumed to be a novel development in American government. Actually, this is merely a return to the policy followed by Washington, Jefferson, Jackson, and Lincoln. See MUNRO, *MAKERS OF THE UNWRITTEN CONSTITUTION* (1930) c. 1; SMALL, *SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY* (1932) cc. 1, 5; THEODORE ROOSEVELT, *AUTOBIOGRAPHY* (1913) 388-9.

37. The distinction is developed at length in CORWIN, *op. cit. supra* note 36, at 1-17, 51-74.

38. See 1 FARRAND, *RECORDS*, at 21, 54, 97-8, 138-40, 150, 164-9, 337; 2 *id.* at 28-9, 73-80, 92-3, 245, 298-300, 390-1, 428, 440, 589. See also FARRAND, *op. cit. supra* note 25, at 154-7; BRETZNER, *CONSTITUTIONAL CHAFF* (1941) 147-52; 1 BOUDIN, *op. cit. supra* note 36, c. 6. For somewhat contrary interpretations of the intent of the Framers see BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (1912); HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (1932) 122-49.

39. 1 STAT. 85 (1789). This provided, inter alia, that in the event of a decision in a state court of final jurisdiction purporting to rest on the invalidity of a federal statute or treaty under the Federal Constitution, the decision might "be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error." *Id.* at 86.

40. Thus the Supreme Court has appellate jurisdiction "with such exceptions, and under such regulations, as the Congress shall make." U. S. CONST. Art. III, § 2, Par. 2.

in *Marbury v. Madison*⁴¹—generally treated as the cornerstone of the doctrine of judicial supremacy—places the Court's power upon allegedly necessary inferences from the very nature of a written constitution. But this argument ignored the *written* constitutions which existed in the states before 1787—all of which proceeded on Blackstone's theory of legislative supremacy⁴²—and was contrary to the position taken by some of the ablest contemporary state judges.⁴³

When, after repeated assertions of authority by state and federal judges,⁴⁴ there emerged a universal concession of the power of the courts to pass upon constitutional questions, the question of finality remained unsettled. Even Chief Justice Marshall never asserted that

In the leading case of *Duncan v. The Francis Wright*, 105 U. S. 381, 5 (1882), the Court stated: ". . . while the appellate power of this court under the Constitution extends to all cases within the judicial power of the United States, actual jurisdiction within the power is confined within such limits as Congress sees fit to prescribe." In the early case of *Wiscart v. D'Auchy*, 3 Dall. 320, 327 (U. S. 1796), Chief Justice Ellsworth declared: "If congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction . . ." See also *American Construction Co. v. Jacksonville, T. & K. W. Ry.*, 148 U. S. 372, 378 (1893).

Original jurisdiction, except in cases affecting ambassadors or consuls or in which a state is a party, can be exercised only by "such inferior courts as the Congress may from time to time ordain and establish." U. S. CONST. Art. III, § 1, and § 2, par. 2. Thus Congress has power to set limits to, or completely withdraw, the jurisdiction of the inferior courts. *Turner v. Bank of North America*, 4 Dall. 8 (1799); *Sheldon v. Sill*, 8 How. 441 (1850); *Kline v. Burke Construction Co.*, 260 U. S. 226, 234 (1922); but see *Martin v. Hunter's Lessee*, 1 Wheat. 304, 328-30 (1816).

41. 1 Cranch 137 (U. S. 1803); see also *THE FEDERALIST*, No. 78 (Hamilton).

42. See THAYER, *LEGAL ESSAYS* (1908) 3-5; CORWIN, *op. cit. supra* note 36, at 23; 1 BL. COMM. *90.

Numerous European countries have adopted written constitutions without providing for judicial review of legislation. See HAINES, *op. cit. supra* note 38, at 1-21, 573-662. This had been the case under the French Republican Constitution of 1791, with which Marshall must have been familiar. 1 BOUDIN, *op. cit. supra* note 36, at 222.

43. See dissenting opinion of Gibson, J., in *Eakin v. Raub*, 12 S. & R. 330 (Pa. Sup. Ct. 1825); Preface, 1 Chipman's Vt. Rep. 22 *et seq.* (1824); see cases and legislative reports discussed in THAYER, *op. cit. supra* note 42, at 5-6, and cases cited in HAINES, *op. cit. supra* note 38, at 261 *et seq.* When Gibson, as Chief Justice, later changed his view as to the right of judicial review, usage was one of the factors emphasized as underlying the shift. *Norris v. Clymer*, 2 Pa. 281 (1845).

Had Adams acted with less haste in appointing John Marshall as Chief Justice in the last days of his term, the vacancy would have been left for Jefferson to fill. It seems clear that Jefferson would have appointed Spencer Roane, Chief Justice of Virginia, in which case the United States would have had a different Constitution—one where the institution of judicial review, if it existed at all, would have had noticeably slighter contours.

44. See THAYER, *op. cit. supra* note 42, at 13-25; DODD, *CASES ON CONSTITUTIONAL LAW* (1941 ed.) 14-15. Justices of the Supreme Court had discussed the constitutionality of federal legislation in several cases antedating the decision in *Marbury v. Madison*. *Hayburn's Case*, 2 Dall. 409 (U. S. 1792); *Hylton v. United States*, 3 Dall. 171 (U. S. 1796); *Cooper v. Telfair*, 4 Dall. 14, 18-19 (1800).

the Supreme Court's opinions were binding upon Congress or the President. Indeed, the *Marbury* case declared nothing more than the refusal of the Court to exercise power conferred by a statute considered to be void; as Professor Corwin has pointed out, this was merely judicial self-defense.⁴⁵ Many of the most distinguished statesmen of the young Republic—Jefferson, Madison, Gallatin, Sumner, Taney, Jackson, Van Buren, Benton—espoused the theory of coordinate construction,⁴⁶ providing that "Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution."⁴⁷ In reliance on this theory, President Jackson vetoed the National Bank Act of 1832 on the ground that it was unconstitutional, although the Supreme Court had rendered a contrary opinion in *McCulloch v. Maryland*; this view was accepted as a correct interpretation of the Constitution by Bancroft, the best known historian of the early Republic, and by George Ticknor Curtis, author of the first history of the Supreme Court.⁴⁸ In his First Inaugural Address, Lincoln reiterated the doctrine of coordinate construction;⁴⁹ and the Republicans in Congress acted on this principle in 1862 when they outlawed slavery in the territories⁵⁰ in disregard of the decision in the *Dred Scott* case.

The emergence of judiciary supremacy is an aftermath of the Reconstruction Period and a triumph of habituation and textbook indoctrination.⁵¹ In the first seventy years of its existence, the Supreme Court repeatedly passed upon the constitutionality of Congressional legislation but only twice declared acts invalid.⁵² Thus the Republic was acclimated to the institution of judicial review without being made to

45. CORWIN, *op. cit. supra* note 36, at 2-3; see also HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835* (1944) 254; 1 BOUDIN, *op. cit. supra* note 36, at 229-33. It is significant that Marshall never uses the term "unconstitutional" in his opinion in *Marbury v. Madison*.

46. See 3 BEVERIDGE, *LIFE OF JOHN MARSHALL* (1920) 144; 1 BOUDIN, *op. cit. supra* note 36, at 466-8; 6 WRITINGS OF JAMES MADISON (Hunt, ed., 1906) 326; 9 *id.* (1910) at 443; 10 WRITINGS OF THOMAS JEFFERSON (Ford, ed., 1899) 141; McLAUGHLIN, *CONSTITUTIONAL HISTORY*, at 415-7. For a general discussion of the doctrine see Lans, *A Study in the Tradition of the Constitution in the United States* (Unpublished thesis in Columbia University Library, 1939) 50-7.

47. The quotation is from President Jackson's Bank Veto Message of July 10, 1832, 2 RICHARDSON, *MESSAGES*, at 576, 582. See also the statement of Leroy Lincoln, Jefferson's first Attorney General, 1 OPS. ATT'Y GEN. 122 (1801).

48. See CURTIS, *CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1896 ed.) 69-70. As to Bancroft's views, see CORWIN, *COURT OVER CONSTITUTION* (1938) 76, n. 80. Jackson's veto message may be found in 2 RICHARDSON, *MESSAGES*, at 582.

49. 6 RICHARDSON, *MESSAGES*, at 9-10; see also the comments of Seward and Chase, quoted in SANDBURG, *ABRAHAM LINCOLN: THE PRAIRIE YEARS* (1928) 368-76.

50. 12 STAT. 432 (1862).

51. See BENNETT, *THE CONSTITUTION IN SCHOOL AND COLLEGE* (1935); JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941) c. 2; Lans, *supra* note 46, c. 3.

52. In *Marbury v. Madison*, 1 Cranch 137 (U. S. 1803) and *Dred Scott v. Sanford*, 19 How. 393 (U. S. 1857). See HAINES, *op. cit. supra* note 38, at 400 *et seq.*

feel its impact. Simultaneously, the destruction of the states' rights doctrine in the crucible of the Civil War placed on firm ground the power of the Supreme Court to pass final judgment upon the validity of state legislation under the Federal Constitution.⁵³ While this involved different problems of policy and constitutional necessity,⁵⁴ it furnished a persuasive popular analogy for the doctrine of judicial finality among the organs of the Federal Government. Moreover, the coordinate power theory was fatally defective in that it provided no means for the resolution of conflicts on questions of constitutional interpretation. In the post-Civil War era, when dissatisfaction with the quality of Presidents and Congressmen was rife and laissez-faire was the predominant social philosophy,⁵⁵ the triumph of the Court was well-nigh inevitable.

When the Supreme Court set aside a number of the Radical Republican reconstruction acts immediately after the Civil War, Congress promptly proceeded to curb its powers of review.⁵⁶ The ultimate proof of the triumph of the judiciary after 1870 and of the popular acceptance of its position is the complete absence of any official attempt to reduce the Court's powers during the 1935-1937 period, despite the recognition that Congress had authority under the Constitution to limit or obliterate completely the jurisdiction of the federal courts.⁵⁷

Modification of the Structure of the National Government by Usage.

Adaptation of the Constitution by usage has been particularly useful as a means of creating a strong executive department, competent to deal with the manifold problems posed by our industrial society. Several examples will serve to illustrate the nature and importance of these modifications:

53. Immediately before the Civil War, the State of Wisconsin had echoed the nullification doctrine of the Virginia and Kentucky resolutions in protests against the decision in *Ableman v. Booth*, 21 How. 506 (U. S. 1859). See AMES, *STATE DOCUMENTS ON FEDERAL RELATIONS* (1906) 304-5. For other examples of opposition to court decisions invalidating state legislation in the immediate pre-war years see SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* (1943) 230-58; 1 BOUDIN, *op. cit. supra* note 36, c. 19.

54. See HOLMES, *COLLECTED LEGAL PAPERS* (1921) 295-6.

55. See JOSEPHSON, *THE POLITICOS* (1938); 3 WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1922) 545; VEBLEN, *THE THEORY OF BUSINESS ENTERPRISE* (1904) 269-304; Hamilton, *The Path of Due Process of Law* in READ (ed.), *THE CONSTITUTION RECONSIDERED* (1938) 167; 3 PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT* (1930) 7-48; 2 BEARD, *RISE OF AMERICAN CIVILIZATION* (1927) cc. 20-22.

56. The validity of the Reconstruction Acts was involved in the *McCardle* dispute, arising as a result of the incommunicado detention of a Southern editor. In 1868, the Supreme Court held that it had jurisdiction to review the lower court's denial of habeas corpus. 6 Wall. 318 (U. S. 1868). Over President Johnson's veto, Congress enacted legislation withdrawing the Supreme Court's appellate jurisdiction over this class of cases, which was specifically made applicable to pending appeals. 15 STAT. 44 (1868). The Court upheld the constitutionality of the act. *Ex parte McCardle*, 7 Wall. 506 (1869). See generally 3 WARREN, *op. cit. supra* note 55, at 187, 195-210.

57. See note 40 *supra*.

1. The Constitution provides that federal officers must be appointed with the approval of the Senate, or according to alternate procedures prescribed by Congress.⁵⁸ However, from the beginning of the Republic there has been general recognition that the President possesses the unfettered power to remove all but certain "quasi-judicial" officers.⁵⁹ As previously indicated,⁶⁰ the Supreme Court has held that Congress is disabled from now altering this practice by legislation, except in certain special situations.

2. It was the original expectation of the Framers that the Senate would regularly advise the President in the conduct of executive affairs.⁶¹ But clearly nothing akin to the present-day cabinet was within the contemplation of the Framers; the various proposals made during the Constitutional Convention for the creation of a formal council of state had been rejected.⁶² The President, however, was empowered to request written opinions from the heads of "each of the executive departments."⁶³ Washington soon found it advisable to convene regular meetings of the various Secretaries;⁶⁴ succeeding Presidents emulated the practice, leading to the gradual emergence of the cabinet as an "extra-statutory and extra-constitutional body."⁶⁵

3. If the emergence of the cabinet marked a parallel to British experience, the relation of its members to Congress proceeded to develop in a manner divergent from the relation of the British ministers to the House of Commons. The Constitution itself precluded executive officers from sitting in Congress although permitting Congressmen to serve as heads of governmental departments provided they received no additional compensation.⁶⁶ In the early years of the Republic, procedures were established whereby the Secretaries could deliver oral

58. U. S. CONST. Art. II, § 2, Par. 2.

59. This was the opinion of the majority during the debate on the removal power at the first session of Congress. Salmon, *History of the Appointing Power of the President* (1886) 1 AM. HIST. ASS'N PAPERS, No. 5. The view has generally prevailed, except from 1867 to 1887, when the Tenure of Office Act was in force. HORWILL, *THE USAGES OF THE AMERICAN CONSTITUTION* (1925) 142-5; *Myers v. United States*, 272 U. S. 52, 109-56, 164-72 (1926).

60. Note 18 *supra*. As a matter of fact, the usage had never extended to quasi-judicial officials since Congress generally had placed express limitations on the power of the President to remove members of regulatory commissions in the acts establishing these agencies.

61. See HENRY CABOT LODGE, *A FIGHTING FRIGATE AND OTHER ESSAYS* (1902) 71; see also the discussion of the gradual atrophy of the Senate's consultative role in the negotiation of treaties *supra*, pp. 207-8.

62. See 2 FARRAND, *RECORDS*, at 539-43.

63. U. S. CONST. Art. II, § 2, Par. 1.

64. See LEARNED, *THE PRESIDENT'S CABINET* (1912) 118-30.

65. WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* (1925 ed.) 30. The office holders who comprise the Cabinet are selected by the President. At first the Vice-President was generally excluded; when he was elected to this position, Jefferson even declared that, under the Constitution, he was entirely "confined to legislative functions." 8 *WORKS OF THOMAS JEFFERSON* (Fed. ed. 1904) 284.

66. U. S. CONST. Art. I, § 6, Par. 2.

reports to Congress.⁶⁷ These devices for cooperation soon fell into desuetude, however, and a usage developed prohibiting cabinet ministers from speaking or even appearing on the floor of Congress, save on ceremonial occasions.⁶⁸

Usage and the Control of Foreign Relations.

The text of the Constitution dealing with the conduct of international affairs has been altered and supplemented by usage as fully as have any of the other provisions of the original instrument. Most of the more important examples have already been mentioned in the analysis of the powers of Congress and the President. A short summary will serve to complete the discussion of the role of amendment by usage in the American governmental structure:

1. *End of the Senate's Role as Coordinate Director of Treaty Negotiations.* The expectations of the Framers that the Senate would continue to play an active role in controlling the details of international negotiations—as Congress had done under the Articles of Confederation—have previously been indicated, and we have discussed the reasons why President Washington and his immediate successors found it necessary to abandon the practice.⁶⁹ Thus the provision of the Constitution that treaties would be made with the “advice and consent” of the Senate has been greatly changed in meaning by a usage initiated by the very man who had been the President of the Constitutional Convention.

2. *Control of Diplomatic Relations by the Executive Department.* Corollary to the assumption of complete control over the negotiation of international agreements by the President has been the emergence of the State Department, under direct Presidential control. In the act establishing the Department of Foreign Affairs in 1789, it was provided that the Secretary would “perform and execute such duties as shall from time to time be enjoined on or entrusted to him by the President.”⁷⁰ Under the Articles of Confederation, the Secretary for Foreign

67. In 1789, Acting Secretary of State Jay and Secretary of War Knox attended the Senate several times, both with and without the President, to discuss pending treaties; due to Washington's dissatisfaction with the length and acerbity of the discussion, the practice of formal consultation was abandoned. See HAYDEN, *THE SENATE AND TREATIES, 1789-1817* (1920) 4-25; see also *supra*, pp. 207-8. The act establishing the Treasury Department in 1789 provided that the Secretary should furnish any requested information to either house “in writing or in person.” Hamilton desired to deliver his reports orally, but was directed instead to communicate in writing. See HORWILL, *op. cit. supra* note 59, at 114.

68. Abortive attempts were made to revive the practice of direct cabinet participation in discussions in Congress late in Washington's second term; thereafter *formal* communication between cabinet members and Congressmen was confined to the transmission of written messages. See HORWILL, *op. cit. supra* note 59, at 114-5.

69. See *supra*, pp. 207-8.

70. 1 STAT. 28 (1789). By an act adopted later in the same year, the name of the Department was changed to that of the Department of State. The official designation of the Secretary was correspondingly changed. 1 STAT. 68 (1789).

Affairs had been directly responsible to Congress;⁷¹ there is nothing in the Constitution which precludes a similar practice.⁷² But as was the case in the act establishing the War Department (although unlike that establishing the Treasury⁷³) the new office of foreign affairs was expressly denominated an "executive department." A more important contrast is provided by the fact that while the duties of the Secretary of the Treasury were prescribed in the statute establishing his office and in supplementary statutes, which further directed him to submit reports to Congress upon request, his counterparts in the War and State Departments were placed under the administrative direction of the President and freed of obligation to report to Congress. With the passage of time, the Treasury Department has increasingly come under Presidential supervision.⁷⁴ However, the Secretary of the Treasury is still under a duty to report to Congress upon all matters,⁷⁵ whereas the State Department still declines to disclose confidential information to Congress, save upon Presidential direction.

3. *Appointment of Special Presidential Envoys.* In discussing the powers of the President, we have already adverted to the practice initiated by George Washington and James Monroe of appointing special envoys to negotiate treaties or to represent the United States in foreign capitals.⁷⁶ Thus usage, beginning in 1789, has furnished a Congressionally sanctioned by-pass around the provision of Article II that ambassadors and other public ministers can be appointed only with the consent of the Senate.

4. *Pre-emption by the Executive of the Power of Recognition.* The Constitution makes no allocation of the power to recognize new governments or new States. At first, Congress and the President vied in seeking to control this phase of foreign relations, but with the passage of time, the legislature's role has become concededly advisory, and the power of recognition has become an admitted executive function.⁷⁷

5. *Termination of Treaties.* In view of the fact that treaties may be made only with the consent of two-thirds of the Senate, the inference would seem reasonable that they may be terminated only in the same

71. See 2 MILLER, *TREATIES*, at xii-xiii; 1 BEMIS (ed.), *AMERICAN SECRETARIES OF STATE AND THEIR DIPLOMACY* (1927) *passim*.

72. See note 66 *supra*. But see BEMIS, *A DIPLOMATIC HISTORY OF THE UNITED STATES* (1942 ed.) 86-7.

73. The act establishing the War Department is 1 STAT. 49 (1789), the Treasury, 1 STAT. 65 (1789).

74. Andrew Jackson is primarily responsible for the attainment of Presidential direction of the Treasury Department. See LEARNED, *op. cit. supra* note 64, at 103-5; GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* (1905) 70 *et seq.*

75. REV. STAT. (1878) §§ 233-44, 5 U. S. C. § 241 (1940).

76. See *supra*, pp. 206-7. See also 11 BENTON, *ABRIDGMENT*, at 221-2.

77. See CORWIN, *THE PRESIDENT*, at 216-28; *Foster v. Neilson*, 2 Pet. 253 (U. S. 1829). See also Part II, Section VIII.

manner. However, the alternate practices have developed of terminating treaties—at least as far as their internal effect is concerned—by joint resolutions of both houses or by simple Presidential denunciation. In point of fact these have been the procedures most commonly utilized. The entire subject will be discussed in more detail in a subsequent Section.⁷⁸

6. *Appropriation of Funds to Effectuate a Treaty.* Mere textual analysis leaves unanswered the question of whether under the Constitution a separate appropriation act is necessary to secure funds with which to fulfil treaty obligations. While it is stipulated that “no money shall be drawn from the Treasury, but in consequence of appropriations made by law,”⁷⁹ this is hardly determinative since it is later specifically provided that treaties are “the supreme law of the land.”⁸⁰ However, in Washington’s administration, the practice developed of seeking separate appropriation acts to defray expenses incurred under previously ratified treaties;⁸¹ this practice still prevails.

Numerous other examples could be cited of the manner in which the structure of government or the allocation of powers contemplated by the Framers of the Constitution have been significantly altered by usage.⁸² The cumulative impact of these prescriptive changes is such as to negate any belated contention that the Constitution may be modified or developed in important respects only by formal amendment; contrariwise, they furnish ample proof of the proposition that the Constitution may be modified or supplemented by practice in any desired manner, except where there are express prohibitions in the text of the document.⁸³ Hence, whether sanctioned by original intent or by virtue merely of the practices of American statesmen since the beginning of the Republic, the use of executive agreements and treaties as interchangeable instruments for effecting international agreements has an unimpeachable constitutional status and dignity.

78. See *infra*, pp. 333–8.

79. U. S. CONST. Art. I, § 9, Cl. 7.

80. U. S. CONST. Art VI, Cl. 2.

81. See HAYDEN, *op. cit. supra* note 67, at 44–51; McCLURE, EXECUTIVE AGREEMENTS, at 230–3. For an early discussion of this problem see RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1825) 64–7.

82. See, e.g.: (a) with relation to the joint resolution, 7 CANNON, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1935) §§ 1036, 1040–1; (b) with relation to the amending process, 1 WILLOUGHBY, CONSTITUTIONAL LAW, § 329; 5 HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1907) § 7040; WARREN, THE MAKING OF THE CONSTITUTION (1928) 682–3; The National Prohibition Cases, 253 U. S. 389, 396 (1919); (c) with relation to concurrent resolutions, SEN. REP. No. 1335, 54th Cong., 2nd Sess. (1897) 8; *cf.* U. S. CONST. Art. I, § 7, par. 3; (d) with relation to patents, HAMILTON, TNEC Rep., PATENTS AND FREE ENTERPRISE, Monograph 31 (1941) 2; *cf.* U. S. CONST. Art. I, § 8; (e) with relation to the spending power, WILMERDING, THE SPENDING POWER (1943); Frothingham v. Mellon, Massachusetts v. Mellon, 262 U. S. 447 (1923).

83. Thus Article I, Section 9 prohibits the enactment of bills of attainder, *ex post facto* legislation, and export duties.

VI. THE IDENTICAL LEGAL CONSEQUENCES OF TREATIES AND EXECUTIVE AGREEMENTS*

Comparison of the consequences of effecting international arrangements by treaties on the one hand or by executive agreements on the other has frequently been characterized by abstract theorizing and a curious obliviousness to the realities of diplomatic practice. Emphasis has been placed upon the unsubstantiated remarks of scholars or statesmen as to the limited effectiveness or uncertain duration of agreements rather than upon how such agreements have actually been treated in the conduct of foreign affairs and by the decisions of courts. Thus many writers have loosely suggested that agreements, in assumed contrast to treaties, constitute only moral obligations or are not "binding," without bothering to examine their functional operation at domestic or international law. There has also been a pervasive tendency to lump all agreements together, without differentiating between the effects of Congressionally authorized agreements and of those negotiated by the President on his own responsibility. At times even Presidents and State Department officials have been guilty of unrealistic overgeneralization in their public utterances.

The present Section seeks to eschew this proliferation of abstract theories without foundation in practice or policy and to concentrate attention on the behavioristic level and on a realistic legal analysis. When the problem is approached in this manner, it becomes apparent that the legal consequences of consummation of international engagements by treaties or by Congressional-Executive agreements are all but indistinguishable with respect to both binding effect and duration, under either domestic or international law. Generalizations as to the significance and effects of Presidential agreements are of limited value without specification of the exact type of instrument under discussion. Many instruments described by this catch-all title are actually intended to be nothing more than short term *modi vivendi* or mere pious declarations of intentions. In such cases—in accordance with their terms—these designedly transient instruments are subject to speedy termination. It is certain, however, as will be demonstrated in detail, that agreements made under the President's own constitutional powers, and intended to be binding on the contracting States and to have a reasonably durable life, share most of the characteristics and have

*In preparing this Section we have drawn heavily upon the comments on the various Articles of the proposed Convention, prepared by the Reporter (Professor James W. Garner) of the RESEARCH IN INTERNATIONAL LAW OF THE HARVARD LAW SCHOOL, LAW OF TREATIES: DRAFT CONVENTION, WITH COMMENT (1935) (published as 29 AM. J. INT. L. SUPP., No. 4, and herein cited as HARVARD RESEARCH, LAW OF TREATIES). We are not, however, in accord at all points with the views expressed in these comments.

legal effects not very dissimilar from the Congressional-Executive agreement and the treaty.¹

Binding Effect of the Executive Agreement under Domestic Law.

1. *The Case History.* In discussing the binding effect of executive agreements at domestic law, some recent writers,² by failing to describe fully the previous course of judicial doctrine, have created the impression that the *Curtiss-Wright*, *Belmont* and *Pink* cases³ represent a startling innovation in constitutional law. The actual fact is, of course, that the binding effect of these agreements was established in a line of decisions long antedating this new unholy trinity.

One of the first functional types of executive agreements to reach the courts was that providing for the annexation of territory. In the 1860s, the Supreme Court declared that the joint resolution-Presidential agreement by which Texas had been annexed complied with constitutional requirements;⁴ the same result obtained in 1903 in *Hawaii v. Mankichi*, dealing with another frank resort to the Congressional-Executive agreement, in lieu of an unratifiable treaty.⁵

Another respectable line of cases deals with reciprocal trade agreements. The first of this genre to come before the Supreme Court was *Field v. Clark* in 1892.⁶ The narrow question *sub judice* was that of the validity of Section 3 of the Tariff Act of 1890, in compliance with which a series of reciprocal trade agreements had been negotiated by President Harrison. None of the agreements was directly before the Court, but the argument was made that the statute invaded the treaty-making power and invalidly delegated legislative authority to the President.

1. Professor Borchard has sought to impugn the binding nature of direct Presidential executive agreements by proving that the Lansing-Ishii Agreement of 1917 was, according to the Secretary of State who negotiated it, "merely a statement of governmental policy, revocable at will, and not binding on the United States." Borchard, *Executive Agreements*, at 679. It is stretching the doctrine of precedent a little far to suggest, because one of our diplomatic representatives once entered into a *modus vivendi* which all parties understood to be revocable at will, that all other executive agreements willynilly acquire the characteristic of unilateral revocability. It would scarcely convince lawyers that no contract can be binding for more than a year to cite the fact that some contracts have been deliberately restricted to this duration.

2. See, e.g., Borchard, *Executive Agreements*, at 664 *et seq.*; except for a quotation from *Four Packages of Cut Diamonds v. United States*, 256 Fed. 305 (C. C. A. 2d, 1919), the only reference to the earlier apposite cases is at page 672, where two are cited in connection with the discussion of the permissible scope of delegation of power.

3. *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936); *United States v. Belmont*, 301 U. S. 324 (1937); *United States v. Pink*, 315 U. S. 203 (1942).

4. *Mississippi v. Johnson*, 4 Wall. 475 (U. S. 1866); *Texas v. White*, 7 Wall. 700 (U. S. 1868).

5. 190 U. S. 197, 216 (1903). See also the discussion of the background of the joint resolution of annexation in Section IV *supra*.

6. 143 U. S. 649 (1892).

The Court overruled both objections and found that the statute was a constitutional means of effecting a granted Congressional power—the control of foreign commerce.⁷

Moreover, in at least seven reported cases the lower federal courts gave the full force and effect of statute law to provisions of reciprocal trade agreements negotiated by various Presidents pursuant to Section 3 of the Tariff Act of 1897.⁸ The issue was presented to the Supreme Court in a procedural guise in *B. Altman & Company v. United States*; the precise question was whether a compact negotiated under the Act was a "treaty" for the purpose of the Court of Appeals statute.⁹ The language of Mr. Justice Day (a former Secretary of State) assimilating the Congressional-Executive agreement to a treaty for this purpose has already been quoted.¹⁰

There are numerous cases in which the validity of postal conventions negotiated by the Postmaster General, with the approval of the President, pursuant to general authorizing legislation has been passed upon by the courts. In at least two—*Cotzhausen v. Nazro*¹¹ (a Supreme Court decision) and *United States v. 18 Packages of Dental Instruments*¹²—the postal conventions were declared to be "the law of the land."¹³

7. *Id.* at 691, 694. Chief Justice Fuller and Mr. Justice Lamar dissented from the opinion but concurred in the judgment of the court. The gravamen of their hybrid position was that the Act (26 STAT. 612), although phrased as granting the President power only to suspend legislation upon the ascertainment of a given state of facts (following a pattern frequently used in the administrations of Jefferson and Madison), actually served as the basis for negotiation of agreements. The majority—which must have been cognizant that this was the real purpose of the Act—contented itself with a discussion of the concept of delegation of legislative authority, insisting that there was not in these cases in any real sense a delegation of such authority.

8. *Nicholas v. United States*, 122 Fed. 892 (C. C. S. D. N. Y. 1900); *United States v. Tartar Chemical Co.*, 127 Fed. 944 (C. C. A. 2d, 1903); *United States v. Julius Wile Bro. & Co.*, 130 Fed. 331 (C. C. A. 2d, 1904); *United States v. Luyties*, 130 Fed. 333 (C. C. A. 2d, 1904); *Migliavacca Wine Co. v. United States*, 148 Fed. 142 (C. C. W. D. Wash. 1905); *La Manna, Azema & Farnan v. United States*, 144 Fed. 683 (C. C. A. 2d, 1906); *Mihalovitch, Fletcher & Co. v. United States*, 160 Fed. 988 (C. C. S. D. Ohio 1908).

9. 26 STAT. 826 (1891), 28 U. S. C. § 213 (1940).

10. *B. Altman & Co. v. United States*, 224 U. S. 583, 601 (1912). See *supra*, p. 242.

11. 107 U. S. 215 (1882). The agreement *sub judice* was a protocol to the 1874 Berne Postal Treaty. From the standpoint of American constitutional law, the title "treaty" is a misnomer since the agreement was never referred to the Senate for approval. See 19 STAT. 577 (1874).

12. 222 Fed. 121 (E. D. Pa. 1915). See also 19 ORS. ATT'Y GEN. 513, 520 (Sol. Gen. Taft, 1890).

13. In his article in the September *Journal* (53 YALE L. J. at 670, n. 23), Professor Borchard fails to mention the *Cotzhausen* case, 107 U. S. 215 (1882), cited *supra* note 11,—the only Supreme Court decision directly passing on postal conventions—and the *Dental* case, 222 Fed. 121 (E. D. Pa. 1915), cited *supra* note 12, and quotes only a portion of the opinion in *Four Packages of Cut Diamonds v. United States*, 256 Fed. 305 (C. C. A. 2d, 1919). In this case, Judge Ward did say: "[Postal] conventions are not treaties, because not made by and with the advice and consent of the Senate, and they are not laws, because not

There are several cases antedating the allegedly novel decisions in the *Pink* and *Belmont* cases in which the courts have given effect to direct Presidential agreements. In fact, as one recent commentator has observed, there is "no instance known where an executive agreement had been judicially declared to be invalid or go beyond the constitutional authority of the Executive."¹⁴

Perhaps the earliest case in which this type of agreement was enforced is the decision of the Supreme Court of the Territory of Washington in 1870 in which an executive agreement between Great Britain and the United States ratified in 1859, with regard to jurisdiction over San Juan Island, was deemed to modify the Organic Law of the territory, as enacted by Congress.¹⁵ In *Tucker v. Alexandroff*, in 1902, the Supreme Court intimated by way of dictum that the President was empowered to make agreements permitting passage of foreign troops through the United States and could thereby divest all American officials of jurisdiction over such a military force.¹⁶ The general powers of the President to make executive agreements¹⁷ seems to have been first touched by the Supreme Court in 1933, in *Monaco v. Mississippi* wherein Chief Justice Hughes stated: "The National Government, by virtue of its control of our foreign relations is entitled to employ the resources of diplomatic negotiations and to effect such an international settlement as may be found to be appropriate, *through treaty, agreement of arbitration, or otherwise.*"¹⁸

It is against this background that the *Curtiss-Wright*, *Belmont* and *Pink* cases must be considered. In the first case, the Court intimated that the powers of President and Congress to make international agreements other than treaties were limited only by the necessities of maintaining an effective control of foreign relations. The broad and categorical language of Mr. Justice Sutherland on this point has been quoted above.¹⁹

enacted by Congress." *Id.* at 306. But he immediately added: "If we assume that as administrative regulations made by authority of Congress they have the force of law, the package was imported contrary to law." *Ibid.* (The court went on to dispose of the particular case on facts irrelevant to the present issue.) See also the earlier decision of the district court in the same matter, 247 Fed. 354 (S. D. N. Y. 1911), where the court clearly believed postal conventions were enforceable as part of the law of the land.)

14. Catudal, *Executive Agreements*, at 665.

15. *Watts v. United States*, 1 Wash. Terr. (N. s.) 288, 294 (1870).

16. 183 U. S. 424, 432-3, 434-5, (1902).

17. In *In re McCall's Estate*, 28 Pa. Dist. 433, 448 (Phila. Orphans' Ct. 1919), it was held that unless the Senate expressly refused to approve a "protocol" (Chilean-American claims agreement) if and when submitted to it, "courts of equity may and will be bound by all representations and proceedings under a protocol where equity and justice require it." The court, however, found the protocol only pledged the good faith of the United States. On this latter score, the Orphans' Court decision is clearly outmoded by the United States Supreme Court's decisions in the *Pink* and *Belmont* cases.

18. 292 U. S. 313, 331 (1934) (emphasis supplied).

19. See *supra*, Section III.

The dicta of the *Monaco* and *Curtiss-Wright* cases were the capstones of the decisions in the *Belmont* and *Pink* cases, dealing with the validity and interpretation of an assignment of Russian-owned assets in the United States, which was one of several executive agreements negotiated when the United States recognized the Soviet government in 1933.²⁰ In both the *Belmont* and *Pink* cases it was squarely held that agreements made under the President's independent constitutional authority were binding on all courts under the supremacy clause, and were superior to contrary state law or judicial doctrine, to the same extent as treaties. While a dissenting opinion was filed in the *Pink* case, the minority justices confined themselves largely to disagreeing with the majority's interpretation of the particular agreement before the Court. Though Mr. Justice Stone in his dissenting opinion (joined in by Mr. Justice Roberts) indicates some uncertainty as to whether the Litvinov assignment—as interpreted by the majority—was a proper subject for an executive agreement, there is nothing in his opinion which casts any doubt upon the basic question of the finality of a direct Presidential agreement made within the scope of the President's powers.²¹

The breadth of the judicial imprimatur given to Presidential agreements is best indicated in the following quotation from Mr. Justice Sutherland's opinion in the *Belmont* case:

"The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignments and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution, . . . require the advice and consent of the Senate.

"A treaty signifies 'a compact made between two or more independent nations with a view to the public welfare.' . . . But an international compact, as this was, is not always a treaty which requires the participation of the Senate. There are many such com-

20. See *supra*, p. 280.

21. It should be noted, however, that in a concurring opinion in the *Belmont* case he found it "unnecessary to consider whether the present agreement between the two governments can rightly be given the same effect as a treaty" for overriding state law. 301 U. S. 324, 336 (1937).

pacts, of which a protocol, a *modus vivendi*, a postal convention, and agreements like that now under consideration are illustrations." ²²

In testimony recently before a subcommittee of the Senate, Professor Borchard has taken the position that the *Pink* and *Belmont* cases hold only that executive agreements are superior to contrary state law when made in connection with the recognition of a foreign government.²³ Logically, one can of course run generalizations of any degree of abstraction, high or low, through the facts of any case.²⁴ Whether one concludes, on a level of low abstraction, that the decisions in the *Pink* and *Belmont* cases must be confined to agreements connected with the recognition of another government, or even to agreements made between the United States and Russia or made by men named Roosevelt and Litvinov, or, on a level of a higher abstraction, that these decisions can be extended to all agreements made by competent constitutional authorities with any government on any appropriate subject matter, depends not upon logic but upon policy. No principle of policy has yet been suggested for making the constitutional validity and legal effect of an international agreement made by appropriate officers of this government dependent upon its being accompanied by simultaneous formal recognition of the other government.²⁵ The Supreme Court itself cast its opinions in terms of the broader principle applicable to all agreements made by competent constitutional authority with any government on appropriate subject matter. The language of the Court should be adequate answer to all quixotic efforts to narrow

22. 301 U. S. 324, 330-1 (citations omitted). The validity of the Litvinov-Hull agreement of 1933 has been assumed in numerous other cases. See, e.g., *Moscow Fire Ins. Co. v. Bank of New York & Trust Co.*, 280 N. Y. 286, 20 N. E. (2d) 758 (1939), *aff'd per curiam sub nom. United States v. Moscow Fire Ins. Co.*, 309 U. S. 624 (1940), *petition for reh'g denied*, 309 U. S. 697 (1940); *State of Russia v. Bankers' Trust Co.*, 4 F. Supp. 417 (S. D. N. Y. 1933), *aff'd sub nom. United States v. National City Bank*, 83 F. (2d) 236 (C. C. A. 2d, 1936), *cert. denied*, 299 U. S. 563 (1936).

It has been noted that Justice Stone, with Justices Brandeis and Cardozo joining, rendered a concurring opinion in the *Belmont* case which challenged the validity of the majority's interpretation of the Litvinov assignment without finding it necessary to discuss the scope and effect of executive agreements. 301 U. S. 324, 333-7 (1937).

For another recent case containing recognition of the President's powers of negotiation with foreign governments see *Pan American Airways v. Civil Aeronautics Board*, 121 F. (2d) 810, 814 (C. C. A. 2d, 1941).

23. See *Commerce Committee Hearings* at 194.

24. Oliphant, *A Return to Stare Decisis* (1928) 14 A. B. A. J. 71, 159.

25. In fact Professor Borchard appears to have been a strong proponent of the view that formal recognition of another government should in general be regarded as of little practical legal significance. Borchard, *The Unrecognized Government in American Courts* (1932) 26 AM. J. INT. L. 261. See also Note (1942) 51 YALE L. J. 848, 851, n. 23. Professor John Bassett Moore has put this view of the efficacy of recognition into aphorism: "Recognition 'validates' nothing." *Fifty Years of International Law* (1937) 50 HARV. L. REV. 395, 431.

the principle of policy which it was seeking to establish.²⁵ Thus, wrote Mr. Justice Sutherland in the *Belmont* opinion:

"Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective. 'To counteract it by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war.' And while this rule in respect of treaties is established by the express language of cl. 2, Art. 6, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. . . . In respect of all international negotiations and compacts and in respect of our foreign relations generally, state lines disappear."²⁷

In the absence of compelling policy reasons, it is scarcely likely that the Court will in the future be more persuaded by Professor Borchard's efforts to restrict its principles than by its own statement of those principles.

2. *Comparative Legal Consequences.* Moving from an over-all examination of the case law to point-by-point comparison of the consequences of consummation of an international arrangement by treaty or agreement, it is necessary to bear in mind the distinction between agreements authorized or ratified by Congress and those consummated solely on the President's authority.

a. *Enforceability.* In some cases, treaties and Congressional-Executive agreements may furnish a direct basis for proceeding in the federal or state courts, assuming that a justiciable "case or controversy" exists

26. Note the broad interpretation given by ROTTSCHAEFER, *CONSTITUTIONAL LAW* (1939) 385 and the editorial approbation given to the *Belmont* case by the *Harvard Law Review*:

"Although the Constitution does not provide that such agreements, as distinguished from treaties, shall supersede state power, yet in order to effectuate federal control of foreign relations it seems necessary to regard any valid international compact as 'the supreme law of the land.' The result thus reached is desirable in avoiding national embarrassment because of local refusal to enforce the acts of the recognized foreign government, and in insuring uniformity in state decisions through a broadening of the field of federal power." (1937) 51 *HARV. L. REV.* 163.

27. 301 U. S. 324, 331. See also the concurring opinion of Mr. Justice Frankfurter in *United States v. Pink*, 315 U. S. 203, 240 (1942): "The President's power to negotiate such a settlement is the same whether it is an isolated transaction between this country and a friendly nation, or is a part of a complicated negotiation to restore normal relations as was the case with Russia."

and that the agreement is "self-executing."²⁸ When an agreement has been authorized by Congress with respect to a subject matter within the scope of its legislative competence, there can be no question that the act of Congress, like all its other constitutional acts, is binding upon private parties. When an agreement has been negotiated by the President within the scope of his own independent powers, the *Belmont* and *Pink* cases indicate that it is as readily enforceable as a treaty.²⁹ In any situation in which additional legislation may be necessary to implement the agreement, the "necessary and proper" clause vests the Congress with appropriate power in the case of both Congressional-Executive and Presidential agreements, as it does in the case of treaties.³⁰ This clause reads that Congress shall have power:

"to make all laws which shall be necessary and proper for carrying into execution the foregoing powers [the granted legislative powers], and *all other powers vested by this Constitution in the Government of the United States*, or in any department or officer thereof."³¹

b. *Superiority to State Law.* In the first decade of the Federal Government's existence, the Supreme Court gave effect to the provision of the Constitution making treaties the supreme law of the land by holding that a contrary state statute could not be enforced.³² With respect to Congressional-Executive agreements authorized by the Congress within the scope of its powers, there would seem to be no doubt that the statute of Congress prescribing, either expressly or by clear implication, that the agreements it authorizes are to be the law of the land is no less effective than any other Congressional statute in overriding a contrary state statute or common law doctrine. The leading case now cited for the supremacy of treaties over state law is *Missouri v. Holland*³³ which, as we have seen, sustained a treaty providing for the regulation of a subject matter (migratory birds) assumed by lower courts, under the constructions of the "commerce" clause then current, to be reserved to the states, despite the strong urging of the Tenth Amendment by opponents of the treaty. In the *Belmont*³⁴ and *Pink*³⁵

28. As to treaties see *Foster v. Neilson*, 2 Pet. 253 (U. S. 1829); as to Congressional-Executive agreements see *B. Altman & Co. v. United States*, 224 U. S. 583, 601 (1912).

29. *Supra*, pp. 312-3.

30. See 6 OPS. ATT'Y GEN. 293, 295 (Cushing, 1854); CRANDALL, 'TREATIES, § 104; Henry, *When Is a Treaty Self-Executing?* (1929) 27 MICH. L. REV. 776.

31. U. S. CONST. Art. I, § 8 (emphasis supplied). See also *Neely v. Henkel* (No. 1), 180 U. S. 109, 121 (1901). McClure has discussed the potentialities of this clause in some detail. *McCLURE, EXECUTIVE AGREEMENTS*, at 353, 359 *et seq.*

32. *Ware v. Hylton*, 3 Dall. 199 (U. S. 1796).

33. *Missouri v. Holland*, 252 U. S. 416 (1920); see also *The Trade Mark Cases*, 100 U. S. 82, 99 (1879); *Santovincenzo v. Egan*, 284 U. S. 30, 35 (1931).

34. 301 U. S. 324, 331-2 (1937). See quotation *supra*, p. 313.

35. 315 U. S. 203 (1942).

cases the Supreme Court has expressly extended the doctrine of *Missouri v. Holland* to Presidential agreements in language which is broad enough, if it is needed, to cover Congressional-Executive agreements. In the words of Mr. Justice Sutherland, speaking for the Court in the *Belmont* case,

"In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power. Cf. *Missouri v. Holland* . . . *Asakura v. Seattle* . . ." ²⁵

This does not, however, lead to the conclusion that executive agreements, any more than treaties, are in some mysterious, unexplained way above the Constitution. It can be taken for granted that the due process clause of the Fifth Amendment and other specific substantive provisions of the Constitution constitute limitations on the provisions which can be enforced as parts of approved and ratified treaties.³⁷ There is no reason to suppose that these clauses will not be construed to constitute identical limitations on the provisions which can be enforced as parts of Congressional-Executive or Presidential agreements. There is a clear indication in *Guaranty Trust Company v. United States*, one of the cases arising as an aftermath of the Litvinov assignment of

36. 301 U. S. 324, 331-2 (1937). Compare Mr. Justice Douglas, speaking for the Court in the *Pink* case, 315 U. S. 203, 230 (1942): "All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation, as if they proceed from the legislature, . . ." The Federalist, No. 64. A treaty is a 'Law of the Land' under the supremacy clause (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity. *United States v. Belmont*. . . . See Corwin, *The President, Office & Powers* (1940) pp. 228-240."

37. See *Cherokee Tobacco v. United States*, 11 Wall. 616 (U. S. 1870); *Brown v. Duchesne*, 19 How. 183, 197 (U. S. 1856); *Doe v. Braden*, 16 How. 635, 656 (U. S. 1853); *Downes v. Bidwell*, 182 U. S. 244, 370 (1901); 2 BUTLER, *TREATY-MAKING POWER* (1902) 442. The perhaps contrary decision in *Ware v. Hylton*, 3 Dall. 199 (U. S. 1796) is dubious law today. See 27 OPS. ATT'Y GEN. 327, 329 (Wickersham, 1909); COWLES, *TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW* (1941) *passim*.

However, in view of the tenor of certain of the attacks on the *Pink* and *Belmont* cases [see Borchard, *Executive Agreements*, at 682; Borchard, *Extraterritorial Confiscations* (1942) 36 AM. J. INT. L. 275, 282; Comment (1942) 30 GEO. L. J. 663], it is interesting to note the cases holding that titles to land are invalidated when it is determined by interstate compact that sovereignty over the area in question is to be yielded to another state. See *Poole v. Fleeger*, 11 Pet. 185 (U. S. 1837); *Coffee v. Groover*, 123 U. S. 1 (1887).

1933, that the scope of the agreement-making power is limited by the Fifth Amendment.³⁸

In holding that there are no "invisible radiations" from the Tenth Amendment which limit the treaty- or agreement-making powers, the *Missouri* and *Belmont* cases essentially give effect to Chief Justice Marshall's original doctrine that within the ambit of its constitutional powers federal authority is supreme.³⁹ In the decision in 1941 in *United States v. Darby Lumber Company*,⁴⁰ the Supreme Court analogously held that the granted domestic powers of Congress were not subject to independent limitation by virtue of the Tenth Amendment, and might be effectuated by all means "appropriate and plainly adapted to the permitted end." "The amendment states but a truism that all is retained which has not been surrendered."⁴¹ This interpretation is clearly in accord with the general views of Madison, the proponent of the Amendment, and of the majority of the vocal members of the First Congress.⁴²

c. *Relation to Federal Statutes and Treaties.* The Supreme Court has repeatedly held that in the event of a conflict between the provisions of a treaty and those of a statute, the more recent instrument will prevail.⁴³ Accordingly Congressional-Executive compacts—as part of "the law of the land"⁴⁴—would be given effect if they contain provisions contrary to those included in an earlier treaty. As a matter of practice, both kinds of executive agreements have been frequently used to modify or clarify treaties.⁴⁵ The making of international commitments by Congressional-Executive agreement would appear to be as free from the restraint of previously enacted legislation as is the treaty-

38. See *Guaranty Trust Co. v. United States*, 304 U. S. 126, 143 (1937); see also *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 320 (1936).

The decision in the *Pink* case has been criticised because the court did not find that the particular facts of the case called for application of the Fifth Amendment. Jessup, *The Litvinoff Assignment and the Pink Case* (1942) 36 AM. J. INT. L. 282; Note (1942) 51 YALE L. J. 848. Clearly, however, Mr. Justice Douglas put the decision of the Court upon the ground, not that the Fifth Amendment has no application to executive agreements, but that it did not under the facts of the *Pink* case preclude the Federal Government from giving itself priority over foreign creditors. See 315 U. S. at 228. With the merits of this particular difference of opinion we are not now concerned.

39. *McCulloch v. Maryland*, 4 Wheat. 316, 372, 374 (U. S. 1819). See also *Martin v. Hunter's Lessee*, 1 Wheat. 304, 325 (U. S. 1816); 3 STORY, COMMENTARIES ON THE CONSTITUTION (1833) §§ 1900-1.

40. 312 U. S. 100 (1941). See Feller, *The Tenth Amendment Retires* (1941) 27 A. B. A. J. 223; dissenting opinion of Holmes, J., in *Hammer v. Dagenhart*, 247 U. S. 251, 277 (1918).

41. 312 U. S. at 124.

42. See, variously, 1 ANNALS OF CONGRESS 457-8, 761, 767-8, 790-7 (1789).

43. *Alvarez y Sanchez v. United States*, 216 U. S. 167 (1910); *The Chinese Exclusion Case*, *Chae Chan Ping v. United States*, 130 U. S. 581 (1889); *The Head Money Cases*, *Edye v. Robertson*, 112 U. S. 580 (1884).

44. See *Cotzhausen v. Nazro*, 107 U. S. 215, 217 (1882), cited *supra* note 11.

45. See note 119 *infra*.

making process. Plainly the Congress can remove any limitations that are of its own creation—if the danger is realized in advance—by including provisions in its authorizing statute, repealing inconsistent previous legislation.⁴⁶ Thus the reciprocal trade agreement provisions of the Tariff Acts allow the President to modify pre-existing statutes, within prescribed limits. In the event that conflict between an agreement and the terms of pre-existing legislation should become apparent after the adoption of an enabling act that does not clearly establish the primacy of the agreement, the Congress could easily establish the primacy of the agreement by joint resolution incorporating its provisions into the statute law. This is analogous to the procedure used to secure approval of the inter-Allied debt settlement agreements during the 1920s.⁴⁷ The agreement-statute would then have the effect of overruling any inconsistent terms in earlier statutes.⁴⁸

The problem is less susceptible of succinct summarization in the case of a direct Presidential agreement. It has long been established that the President may modify a previously ratified treaty by an executive agreement with the obligee nation if the agreement is within his constitutional powers.⁴⁹ A direct Presidential agreement will not ordinarily be valid if contrary to previously enacted legislation. It may, as pointed out in the preceding paragraph, be validated in this situation by adoption of a joint resolution. Even Professor Borchard has recently conceded this point.⁵⁰ Moreover, if the subject of the agreement is a matter within the President's special constitutional competence—related, for example, to the recognition of a foreign government or to an exercise of his authority as Commander-in-Chief—a realistic application of the separation of powers doctrine might in some situations appropriately permit the President to disregard the statute as an unconstitutional invasion of his own power.⁵¹

The decision of the Supreme Court of Washington Territory in

46. The Congress can reserve an immediate control—as has been done in the Trade Agreements Act of 1934 and its successors—by retaining the power to disapprove any particular agreement within a stated period after its negotiation.

47. See *supra*, p. 278.

48. Various statements by past officials of the State Department suggesting that specific undertakings could not be cast in the form of executive agreements because of contrary statutes clearly relate only to limitations on the powers of the President, when acting without the aid of Congress. See, e.g., Under-Secretary of State Castle's statement to the Canadian Minister in 1932, excerpted in 5 HACKWORTH, DIGEST, at 399-400.

49. Compare *infra*, pp. 366-7.

50. Borchard, *Executive Agreements*, at 676. Professor Borchard was writing about the destroyer bases deal of 1940 which he regards as contravening legislation restricting the disposal of naval property [see Borchard, *The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases* (1940) 34 AM. J. INT. L. 690] but retroactively validated by the enactment of the Lend-Lease Act or by the "votes authorizing appropriations for the bases."

51. Accord: CORWIN, *THE CONSTITUTION AND WORLD ORGANIZATION* (1944) 42.

*Watts v. United States*⁵² involved just such a conflict between a Presidential agreement and a Congressional statute, *i.e.*, the Organic Act of the territory. The Court gave effect to the agreement; however, it is difficult to tell whether this was on the grounds that the subject matter of the agreement, a boundary dispute, was under exclusive Presidential control,⁵³ or on the "political issue" doctrine. The decision of the Supreme Court in *Myers v. United States* analogously sustained President Coolidge's contention that Congressional legislation limiting the chief executive's power to remove postmasters was an unconstitutional invasion of his independent powers.⁵⁴

A wise President will of course ordinarily seek to avoid conflict with the Congress by seeking legislative support for his actions; but this is a question of statesmanship and not of constitutional authority.⁵⁵ Exactly the same sort of problem arises when the Senate and the President combine to consummate a treaty to which the House of Representatives objects.⁵⁶

Binding Effect of the Executive Agreement at International Law.

As we have previously indicated, international tribunals and students of international law⁵⁷ have long repudiated the shadowy distinction between treaties and other types of agreements suggested by Vattel and certain other early writers.⁵⁸ In the day-by-day conduct of international relations, the foreign offices of the world use a variety of instruments interchangeably.⁵⁹ Thus Article 18 of the Covenant of the League of Nations places "treaties" and "international engagements" on the same footing. The authoritative *Harvard Research Draft of the Law of Treaties* concludes, as noted above, that "for purposes of international law [executive agreements] are not to be dis-

52. *Watts v. United States*, 1 Wash. Terr. (N. S.) 288 (1870).

53. The determination of the territorial boundaries of the United States is not vested by the Constitution in any branch of the Government.

54. *Myers v. United States*, 272 U. S. 52 (1926). See also Solicitor General Beck's argument therein that Congress retained a check on the Executive without invading his constitutional prerogatives by virtue of the power of the purse, a thesis whose relevancy to the problem here under discussion is obvious. A portion of the Solicitor General's argument is reprinted in GELLHORN, *ADMINISTRATIVE LAW: CASES AND COMMENTS* (1940) 83, 90-1; see also SEN. DOC. No. 174, 69th Cong., 2d Sess. (1926) 93-4.

55. Compare WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) 339-75.

56. See *supra*, p. 306.

57. It is not clear whether Professor Borchard approves Vattel's attempted distinction as useful in international law or whether he believes that, even assuming the distinction to be relatively meaningless, the Constitution must be interpreted as if it had some significance because certain of the draftsmen of the Constitution were familiar with *Le Droit des Gens*. See Borchard, *Executive Agreements*, at 667-71.

58. See *supra*, Section II.

59. *Ibid.*

tinguished from treaties."⁶⁰ Professors Hyde and Briggs are only two of the many scholars who have taken the same position.⁶¹ As President Searcy has stated:

"International law does not require that agreements between nations must be concluded in any particular form or style. The law of nations is much more interested in the faithful performance of international obligations than in prescribing procedural requirements."⁶²

60. HARVARD RESEARCH, LAW OF TREATIES, at 667; see also *id.* at 686.

61. "It is submitted, however, that the Altman ruling [*B. Altman & Co. v. United States*, 224 U. S. 583 (1912)] is correct; and that even postal conventions are treaties from the point of view of international law." BRIGGS, *THE LAW OF NATIONS* (1938) 409. Accord: Hyde, *Constitutional Procedures for International Agreements by the United States* (1937) 31 PROC. AM. SOC. INT. L. 45; Levitan, *Executive Agreements*, at 370; McNAIR, *THE LAW OF TREATIES* (1938) 3; Searcy, *The Use of the Congressional Joint Resolution in Matters Relating to Foreign Affairs* (Unpublished Ph.D. dissertation in Duke University Library) at 277. See also 1 OPPENHEIM, *INTERNATIONAL LAW* (5th ed., Lauterpacht, 1937) 707-8.

62. Searcy, *supra* note 61, at 277. See also McNAIR, *op. cit. supra* note 61, at 47-50; OPPENHEIM, *loc. cit. supra* note 61.

Professor Borchard has recently taken the position that "form plays an important part, among other matters, in determining what is a treaty." Borchard, *Executive Agreements*, at 670. In support of this proposition he cites:

(1) A decision by the German Reichsgericht stating a distinction between formal and informal treaties based upon the method of securing domestic validation. Professor Borchard refers only to the short summary in 5 HACKWORTH, *DIGEST*, at 397; the fuller summary in WILLIAMS AND LAUTERPACHT, *ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES: 1919-1922* (1932) 313-4, indicates that the "informal" agreement (*i.e.*, one consummated on the independent authority of the President of the German Reich) was enforced by the court. However, German law under the Weimar Republic did appear to make form, rather than content, determinative of whether legislative consent was constitutionally necessary. See WILCOX, *RATIFICATION OF INTERNATIONAL CONVENTIONS* (1935) 232.

(2) A decision by the Circuit Court of Appeals for the Second Circuit, 256 Fed. 305, 306 (C. C. A. 2d, 1919), analogously distinguishing between treaties and postal conventions on the basis of the constitutional source by which they were given domestic effect. But see notes 11-13 *supra*.

(3) An excerpt from the *Harvard Research Draft of the Law of Treaties*, 29 AM. J. INT. L. SUPP. at 691, to the effect that "there is no treaty apart from the instrument which records its stipulations." It is difficult to know what is meant by this apparent primitive identification of "legal obligation" with a piece of parchment, but the Reporter of the *Research* makes it clear that there is no distinction at international law between American constitutional treaties and executive agreements (*id.* at 667 and 686); that the *Research* was stating a series of rules of interpretation applicable to all written agreements, treaties being defined as all written and formal, *i.e.*, dated, signed, and sealed, instruments of agreement between States (*id.* at 689-90); that instruments lacking these characteristics (*id.* at 690) and purely oral agreements have often been considered binding and been enforced by international tribunals (*id.* at 728-32); and finally, that no "particular form" of language is necessary to make an agreement, in general, or a treaty, as specially defined for the immediate purposes of the *Research*, enforceable (*id.* at 722 *et seq.*).

If there is a fundamental difference of form between treaties and "executive" or other agreements, with connotations affecting the use and legal significance of the different classes of instruments, the domain of international relations still awaits a persuasive Emily Post.

While constitutional usage generally requires that the President ratify treaties before they come into effect as the "law of the land," this does not mean that any particular form of ratification must be followed, nor does it condition the international effectiveness of a treaty upon the prior completion of an act of ratification.⁶³ Nor does our constitutional law require that treaties be cast in any particular form in order that they may be transmitted to the Senate for its consent and the subsequent ratification by the President. Upon several occasions an agreement reached by an exchange of correspondence has been submitted to the Senate and, upon consent and ratification, become a constitutional treaty.⁶⁴ Moreover, as Professor Reiff has pointed out, there is no general requirement that treaties must be proclaimed before becoming effective.⁶⁵

It is not uncommon for executive agreements intended to be more than mere *modi vivendi* to contain procedural requirements, comparable to those found in treaties, that they will not go into effect until they have been formally ratified or until they have been proclaimed.⁶⁶ Frequently, the negotiation of important executive agreements is embroidered by inclusion of various formalities traditionally used in the treaty-making process, including the issuance of "full powers" by the President to the American plenipotentiary, the attachment of seals, and the exchange of formal instruments of ratification. How-

63. As we have pointed out, there is a popular misapprehension that the Senate ratifies treaties. Actually the Senate's role is limited to the giving of consent; the President can refuse to ratify a treaty to which the Senate has consented. There are approximately fifty instances where this has taken place. See U. S. CONST. Art. II, § 2; see also MATHEWS, *AMERICAN FOREIGN RELATIONS* (1938) 522; CRANDALL, *TREATIES*, at 97-8; 2 HAYNES, *THE SENATE OF THE UNITED STATES* (1938) 636-9, DAVIS, *THE TREATY-MAKING POWER IN THE UNITED STATES* (1920) 15.

64. A recent example is the exchange of notes between the American and Canadian Governments in 1941 with respect to the diversion of water from the Niagara River. Executive G, 77th Cong., 1st Sess. (1941), reprinted in 87 CONG. REC. 9045-6 (1941). During the debate on ratification of this treaty, Senator Connally maintained that "this is not a treaty in the technical sense," but "it is the same as a treaty. . . ." *Id.* at 9047.

65. Reiff, *The Proclaiming of Treaties in the United States* (1936) 30 AM. J. INT. L. 63, 71. There are not a few instances of agreements ratified by the President, after Senatorial consent, which were never proclaimed.

The chief function of proclamation is, of course, to make definite and to publicize the date on which the treaty becomes effective.

66. See, e.g., the Netherlands-American commercial agreement of 1907, 2 MALLOY, *TREATIES*, at 1276-7; the Cuban-American naval base agreement of 1903, 1 *id.* at 360-1; the 1929 battle monuments agreement, 4 *id.* at 3965; the 1908 French parcel post agreement, 5 HACKWORTH, *DIGEST*, at 412-3; the eight-power silver pact of 1933, McCCLURE, *EXECUTIVE AGREEMENTS*, at 166.

Presidential proclamations have usually been issued in connection with postal conventions, copyright agreements, and the trade agreements made under the Act of 1934 and its successors. See 48 STAT. 943 (1934), 19 U. S. C. § 1351 (1940). See also Catudal, *Executive Agreements*, at 663-4.

ever, these formal trappings are not indispensable prerequisites to the formulation of a binding executive agreement any more than to the consummation of a binding treaty.⁶⁷

Of course, in any case, where an agreement is negotiated by a plenipotentiary other than the head of state or perhaps the foreign minister, insertion of a caveat conditioning its effectiveness upon prior ratification by the head of state ordinarily serves an indispensable practical function. A similar caveat is also necessary where domestic constitutional law imposes a requirement that treaties or other types of agreement be approved by a legislative body and desirable where advance legislative approval is important to increase the probability that the obligations imposed by the agreement will be complied with. However, to repeat, international law does not impose any unalterable requirement that treaties must be ratified by the signatory powers, or that there must be an exchange of ratifications or a formal proclamation before a treaty can become effective.⁶⁸ A recent study has indicated that 35% to 40% of the international agreements negotiated by the major powers during the 1920s did not contain ratification provisions.⁶⁹

In the diplomatic quivers of almost all nations—save certain Latin American countries whose constitutions expressly provide an exclusive procedure—co-exist a series of separate methods for the perfecting of international agreements.⁷⁰ In numerous decisions, national and international tribunals have found that the most informal agreements are binding upon the contracting States. In the *Memel Territory* case, the Permanent Court of International Justice (the World Court) found that formal language and the domestic constitutional characterization of a compact were irrelevant; an agreement intended to be binding was enforceable.⁷¹ The German Reichsgericht rendered a

67. See Catudal, *Executive Agreements*, at 665; Fitzmaurice, *Do Treaties Need Ratification?* (1934) 15 BRIT. Y. B. INT. L. 113.

68. See Fitzmaurice, *supra* note 67; Book Review (1934) 15 BRIT. Y. B. INT. L. 201; Basdevant, *La conclusion et la rédaction des traités* (1926) 15 RECUEIL DES COURS (Académie de Droit International) 513. For examples of treaties which came into effect without ratification by signatories see [1859-1860] 50 BRITISH AND FOREIGN STATE PAPERS (1867) 10; 4 HUDSON, INTERNATIONAL LEGISLATION (1931) 2848 (emigrant visa agreement); 1 OPPENHEIM, INTERNATIONAL LAW (4th ed., McNair, 1928) 721, n. 2. The Boxer Protocol of 1901, one of the most important multilateral agreements of recent years, came into effect upon signature by the plenipotentiaries of the various powers. See 2 MALLOY, TREATIES, at 2006. In such cases, of course, the head of state or foreign minister generally supervises the negotiations with especial care; often the very terms of the agreement have previously been settled in correspondence. See 1 WESTLAKE, INTERNATIONAL LAW (2d ed. 1910) 292.

69. See WILCOX, THE RATIFICATION OF INTERNATIONAL CONVENTIONS (1935) 232. The study was based on an examination of the treaties and other agreements registered with the League of Nations during its first five years, totaling a thousand instruments. Many of these agreements were, however, ratified.

70. WILCOX, *op. cit. supra* note 69, at 231-3.

71. See Interpretation of the Statute of the Memel Territory, Permanent Court of International Justice (herein cited as P. C. I. J.), Ser. A/B, No. 49, at 300 (1932).

similar decision in the *Paris Agreement* case,⁷² and this position has been taken by the British Foreign Office.⁷³

Even unwritten agreements constitute, in the opinion of the overwhelming majority of students of international law, enforceable obligations if it has been the intention of negotiators to make a binding commitment and if their official positions are such as to give them independent power to bind their governments.⁷⁴ Chief Justice Taney expressed the same view in 1840 by way of dictum in his opinion in *Holmes v. Jennison*.⁷⁵ The 1936 agreement between Great Britain, France, and the United States—whereby the contracting States agreed to make gold available from their monetary stabilization funds for purchase by one another—was made by telephone.⁷⁶ In the *Eastern Greenland* case,⁷⁷ the Permanent Court of International Justice held that an oral declaration by the Norwegian Minister of Foreign Affairs, waiving an objection to the extension of Danish sovereignty over Eastern Greenland was binding upon the Norwegian Government.⁷⁸

72. See *Paris Agreement Case*, June 22, 1922, 105 *Entscheidungen des Reichsgerichts in Zivilsachen* 156, digested in WILLIAMS AND LAUTERPACHT (eds.), *ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES: 1919-1922* (1932) 313-4. See also the decision in 1922 of the Polish Supreme Court, Third Division, in *Republic v. Just*, Sept. 27, 1922, 2 *Orzecznictwo Sądów Polskich*, No. 294, summarized in WILLIAMS AND LAUTERPACHT, *supra*, at 317-8; *Spanish Zone of Morocco Case*, abstracted in WILLIAMS AND LAUTERPACHT (eds.), *ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES: 1923-1924* (1933) 19-21; HALL, *TREATISE ON INTERNATIONAL LAW* (8th ed. 1924) 383.

73. See McNAIR, *THE LAW OF TREATIES* (1938) 48-50. The 1924 Franco-Russian agreement providing for recognition of the Soviet Union and adjusting the status of treaties made between France and previous Russian governments took the form of an exchange of telegrams between Prime Minister Herriot and Tchitcherine, Soviet Commissar for Foreign Affairs. See (1925) 12 *BULLETIN DE L'INSTITUT INTERMÉDIAIRE INTERNATIONALE* 26 *et seq.*

74. See the lengthy citation of authorities in HARVARD RESEARCH, *LAW OF TREATIES*, at 728-32; see also McNAIR, *loc. cit. supra* note 73. Of course, most authorities deplore use of this form of agreement because of the difficulties of proof of the terms.

Article 2 of the 1928 Havana Convention on Treaties—in force for Brazil, Dominican Republic, Haiti, Nicaragua, and Panama—provided in part that "The written form is an essential condition of treaties." HARVARD RESEARCH, *LAW OF TREATIES*, at 1205.

75. See *Holmes v. Jennison*, 14 Pet. 540, 572 (U. S. 1840).

76. See McCLURE, *EXECUTIVE AGREEMENTS*, at vii, 167-72. Subsequently, Belgium, the Netherlands, and Switzerland adhered to this agreement. *Id.* at 171, n. 238. The sale agreement was ancillary to the 1936 stabilization pact between the same powers, evidenced by the simultaneous issuance of declarations. (The texts are included in BANK FOR INTERNATIONAL SETTLEMENTS, *SEVENTH ANNUAL REPORT* (1937) annex vii.)

Both agreements were in harmony with the purposes of the Gold Reserve Act of 1934, 48 STAT. 341; see also 48 STAT. 52 (1933).

77. See *Legal Status of Eastern Greenland*, P. C. I. J., Ser. A/B, No. 53, at 71 (1933). Judge Anzilotti, while dissenting from the decision on presently irrelevant grounds, also felt that the oral agreement was binding. *Id.* at 91-2.

78. A minute of the declaration had been initialed by the Norwegian Minister (*id.* at 69-70), but the Court treated this as being of no greater significance than a mere verbal declaration.

In a whole series of cases⁷⁹ before the Permanent Court, oral declarations regarding the intentions of their governments made by the agents appointed to represent various nations in the adjudications of controversies have been declared by the Court to be "of binding character."⁸⁰

The chief attack upon the binding effect of executive agreements under international law comes in the form of a curious, circular argument that assumes as its major premise the very conclusion it sets out to prove. There is a doctrine, accepted by a relatively large number of writers, that a State is not bound by an agreement "made on its behalf by an organ or authority not competent under its law"⁸¹ to conclude the agreement, and that governments are on notice of each other's constitutional limitations. To sustain his argument that executive agreements do not have the "dignity" and "force" of treaties, Professor Borchard accordingly writes: "Foreign countries are deemed to be acquainted only with the Constitution, not with current rationalizations of the executive agreement."⁸² It is upon this foundation that the

79. See *The Mavrommatis Jerusalem Concessions*, P. C. I. J., Ser. A, No. 5, at 37 (1925); *Case concerning Certain German Interests in Upper Silesia*, P. C. I. J., Ser. A, No. 7, at 13 (1926); *Case of the Free Zones of Upper Savoy and the District of Gex*, No. 46, at 170-2 (1932).

80. The characterization is taken from the opinion in the *Upper Silesia* case, P. C. I. J., Ser. A, No. 7, at 13 (1926). Baron Lambermont, arbitrator in 1889 in a dispute between Germany and Great Britain concerning the African Island of Lamu, found that an oral agreement was binding, although deploring use of this form of compact. For the text of the award see (1890) 22 *REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE* 351; a portion of the opinion is quoted in *HERTSLET, MAP OF AFRICA BY TREATY* (3rd ed. 1909) 894.

81. *HARVARD RESEARCH, LAW OF TREATIES*, at 992.

82. Borchard, *Shall the Executive Agreement Replace the Treaty?* (1944) 38 *AM. J. INT. L.* 637, 641, n. 14b. Accord: Borchard, *Executive Agreements*, at 678, n. 48.

To support this proposition, Professor Borchard cites only one article: Fairman, *Competence to Bind the State to an International Engagement* (1936) 30 *AM. J. INT. L.* 439. But Professor Fairman's article is wholly general, containing no reference to the domestic constitutional weaknesses of executive agreements or the international dangers created by their use. One passage appears germane: "An undertaking given [by a foreign minister or diplomatic agent] in disregard of limitations disclosed or otherwise known does not bind. Limitations found to have been notorious *might* be deemed to have been known." *Id.* at 459 (emphasis supplied).

Even this premise—which is by no means unassailable—leads to Professor Borchard's conclusion only if it be assumed that the treaty is the only mode of international agreement open to the United States, or that there are reasonably clear boundaries of subject matter between the treaty and the executive agreement. It should be obvious by now that it is impossible to make any such distinction. This lack of distinction is frankly admitted even by writers who do not subscribe to our view that the treaty and executive agreement are completely interchangeable. See, e.g., Levitan, *Executive Agreements*, at 365; *Notes* (1944) 33 *GEO. L. J.* 57, (1942) 42 *COL. L. REV.* 831; Mathews, *The Joint Resolution Method* (1938) 32 *AM. J. INT. L.* 349.

Foreign governments can hardly be expected to make recondite investigations into the nuances of American constitutional law before accepting the assurance of the President and

argument is made that the United States may terminate executive agreements at any time without "obloquy" and that other nations may not under international law protest if the United States breaches such agreements. It should be obvious that it is completely irrelevant whether "incompetent organs" can bind a State under international law or whether other governments are presumed to know our Constitution unless it be assumed that executive agreements are not in accord with our Constitution. The factual invalidity of the latter assumption—upon which the whole logically fallacious, boot-strapping argument is based—has been sufficiently demonstrated in the previous pages of this article. What Professor Borchard refers to as the "current rationalizations of the executive agreement," as distinguished from "the Constitution," comprises as we have seen, the diplomatic practice of the Government, sustained by all its several branches, since the beginning of the nation. Since it is this practice which determines the foreign policy of the United States, "foreign countries" would appear to be as safe in relying upon a compact the domestic validation of which is secured in the form of a Congressional-Executive agreement as upon a treaty.⁸³ Certainly it is to this long historical record, rather than to the animadversions of dissenting scholars that other governments are entitled to look, if they must look, to ascertain what the constitutional law of the United States is.⁸⁴ Nor could the United States by changing

the State Department, our only constitutional organs of communication with foreign governments, that a given engagement may be consummated by executive agreement. Thus, Professor Fairman writes concerning the debate over *Missouri v. Holland*, 252 U. S. 416 (1920): "It would be surprising if international law contemplated that other high contracting parties were to enter into these disagreements of the doctors, or if the validity of an engagement hung in suspense pending the eventual triumph of one among conflicting theories." Fairman, *supra*, at 456.

It is interesting to compare Professor Borchard's use of the Fairman article in *Commerce Committee Hearings*, at 187:

"Mr. Charles Fairman has written an article for the American Journal of International Law, showing that foreign countries are only deemed to know our Constitution, and not our peculiar local constructions. For example, Mr. McClure justified executive agreements. That is not in our Constitution at all."

Upon the question of whether executive agreements are "in our Constitution" see *supra*, Section III. Mr. McClure's book may not be in our Constitution, but 150 years of practice are.

83. As will be demonstrated, the legal procedures by which a treaty may be terminated are as multifarious and as easy to manipulate as those by which an executive agreement may be terminated. In both cases, the practical motives for respecting obligations are identical.

84. Compare the opinion of the Legal Adviser of the Department of External Affairs of Canada, advising that government that it could safely rely upon a Congressional-executive agreement for undertaking a program of joint development and use of the St. Lawrence, quoted in *Commerce Committee Hearings* at 275, 277:

"... It is understood that the United States authorities will place upon record in a formal manner opinions by the Legal Adviser of the Department of State and by the Attorney General of the United States to the effect that an Agree-

its constitutional practice seek to evade existing international obligations without incurring the charge of violating international law.⁸⁵

A full evaluation of the argument here raised necessitates a brief detour through one of the more labyrinthine mansions of international law. A great diversity of opinion characterizes the discussion by scholars of the abstract question of the extent to which one govern-

ment based upon Congressional legislation would give rise to a valid obligation, binding upon the United States as respecting Canada. It would be impossible for the Government of the United States, after following such a course, to maintain successfully, either in diplomatic negotiation or before an international tribunal, that such an Agreement had no legal validity. International tribunals are accustomed to recognize as an important source of law the formal opinions submitted by persons in the position of the Legal Adviser of the State Department or of the Attorney General. One could have complete confidence that an international tribunal seized of a dispute of this character would decide that such an Agreement created a legal obligation of which it could properly take cognizance.

"Notwithstanding the difficulty in pronouncing upon a question of this sort, closely related to the constitutional law of the United States, it is submitted:—

- (a) That an Agreement based upon the legislative authority of Congress would give rise to a valid obligation, recognized by the Courts of the United States;
- (b) That it would not be possible for a Government of the United States, either in diplomatic negotiation or in the course of arbitration before an international tribunal, successfully to challenge the validity of such an Agreement as creating an obligation recognized in International Law and cognizable by international tribunals."

". . . From this point of view it might be contended that authorities in the United States would be inclined to give more weight to a treaty than to a legislative pact. It should not be overlooked that a treaty could be overridden by inconsistent legislation in the United States just as a legislative pact could be overcome by the repeal of the legislation which invested it with authority. It should also be borne in mind that the precedents, in which this procedure has been used, extend over many generations and that there has been no instance in which an arrangement based upon agreement and legislation has been questioned by any Government in the United States. Bearing in mind these factors, there can be no doubt that the two countries concerned would live up to the terms of an arrangement based upon a legislative pact and it could be safely assumed that such an arrangement would be as permanent as one based upon a treaty.

"In considering this problem, it is necessary to go behind the screen of legalism and to examine fundamental aspects of the problem. The strength of a St. Lawrence pact would not lie in legalistic concepts. It would lie in the fact that a state of affairs had been brought about which could only work on the basis of both countries loyally carrying out their undertakings." *Id.* at 278.

On the general point compare Levitan, *Recent Developments in the Control of Foreign Relations under the Constitution of the United States* (Unpublished Ph.D. dissertation in University of Chicago Library, 1940) 189.

85. Compare the Tinoco arbitration (1923), reprinted in (1924) 18 *AM. J. INT. L.* 147. A persuasive analogy is the doctrine that "vested" rights established by a treaty are not destroyed by its denunciation or repeal. *Carneal v. Banks*, 10 Wheat. 181 (U. S. 1825); *Society for the Propagation of the Gospel v. New Haven*, 8 Wheat. 464 (U. S. 1923); *The Chinese Exclusion Case*, 130 U. S. 581, 609 (1889).

ment is bound to take notice of provisions of the constitutional law of its co-contractors in effecting international agreements.⁸⁶ To a considerable extent, this seeming confusion is the result of attempts by most writers to state sweeping generalizations instead of focusing attention upon the various probable fact situations. Thus, if there were a plain and readily apparent transgression by an agent of one State of an express constitutional interdiction, it might be reasonable to infer that the obligee nation had acted in bad faith and could not enforce the agreement; such at least was the inference of Arbitrator Taft in the *Tinoco* decision.⁸⁷ The same result would seem proper where an agreement had purportedly been made by an officer of a government known not to be charged with general supervision of its international relations⁸⁸ or by an officer who had been bribed by agents of the other State. However, such bald infractions are comparatively rare. The more common situation is one where a belatedly disgruntled State, or one where there has been a *coup d'état* or change of governments, seeks to avoid performance of an international obligation by hiding behind some technical argument of its domestic constitutional law. Thus attempts have been made to maintain that an agreement was not binding because authorized by a procedure which, while admittedly valid in certain cases, was allegedly not applicable to the particular situation. This sort of argument—which, if valid, would require nations to make a recondite investigation into the constitutional and statutory law of their co-contracting States before entering into any agreements—has generally been brushed aside by international tribunals. In the *Serbian Loans* case, the World Court intimated that a country could not seek refuge in technical provisions of its law, but was bound by the working interpretation of its constitution followed in its everyday diplomatic practice.⁸⁹ Analogously, in the *Lighthouses* case, the Court held that an agreement (in the form of a contract)

86. See, e.g., WILLOUGHBY, *FUNDAMENTAL CONCEPTS OF PUBLIC LAW* (1924) 321-4; Fairman, *supra* note 82; 2 HYDE, *INTERNATIONAL LAW* (1922) § 494; 1 WHEATON, *INTERNATIONAL LAW* (Dana's ed. 1866) § 266; HARVARD RESEARCH, *LAW OF TREATIES*, at 992-1002; 1 ANZILOTTI, *COURS DE DROIT INTERNATIONAL* (Gidel's trans. 1929) 364 *et seq.*; Cavaglieri, *Regles du droit de la paix* (1929) 26 *RECUEIL DES COURS* (Académie de Droit International) 500; Basdevant, *La conclusion et la rédaction des traités* (1926) 15 *id.* at 581.

87. The decision is reprinted in (1924) 18 AM. J. INT. L. 147. However, various authorities appear to deny even this position on the grounds that the declaration of a State in its act of ratification that a treaty has been constitutionally consummated is conclusive as to the facts and may not be impeached. See, e.g., 1 ANZILOTTI, *op. cit. supra* note 86; Cavaglieri, *supra* note 86.

88. This argument is one of several made at various times by the Chinese Republic in seeking to avoid performance of provisions of various treaties made in its early anarchic years. See WILLOUGHBY, *FOREIGN RIGHTS AND INTERESTS IN CHINA* (1920) 3-6.

89. See Case concerning the Payment of Various Serbian Loans Issued in France, P. C. I. J., Ser. A, Nos. 20/21, at 46-7 (1929).

consummated in a manner frequently used by the contracting State was binding and that the argument could not successfully be used that its laws stipulated a different mode of ratification for the particular agreement at bar.⁹⁰ Similar opinions have been rendered in several arbitral decisions.⁹¹ Secretary of State Bayard in 1893 reproached the Spanish Government for seeking to evade a claims settlement, negotiated by executive agreement, on the grounds—not mentioned in the negotiations—that the consent of the Cortes was necessary.⁹²

The reasonable conclusion that a State may not under sanction of international law seek to escape fulfilment of its international compacts because of alleged constitutional defects in the machinery by which they were consummated is strongly re-enforced by consideration of the accepted doctrines regarding inquiries by one State regarding the authority of another's officials. Repeating Jefferson's admonition in 1793 to the French Minister, Citizen Gênet, that emissaries were

90. See *Lighthouses Case between France and Greece*, P. C. I. J., Ser. A/B, No. 62, at 22 *et seq.* (1934). The dispute was between the French Government (on behalf of a domestic corporation) and the Greek Government. The contention of the latter State was that a concession contract given to the French corporation by the Turkish Government, Greece's predecessor in sovereignty in the area where the concession was located, had not been validly ratified under Ottoman law.

See also the decision of the German Reichsgericht in the *Paris Agreement Case*, June 22, 1922, cited *supra* note 72.

91. See, e.g., (1) the French-Swiss Arbitration of 1912; for the umpire's decision see (1912) 6 AM. J. INT. L. 1000; and (2) the Anglo-Spanish Arbitration of 1924 with regard to the British consulate in the Spanish Zone of Morocco; the decision is reprinted in *RÉCLAMATIONS BRITANNIQUES DANS LA ZONE ESPAGNOLE DU MAROC: RAPPORTS* (1925) 17; see also summary in WILLIAMS AND LAUTERPACHT (eds.), *ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES: 1923-1924* (1933) 19-21. The decision of the Permanent Court in the *Eastern Greenland case*, P. C. I. J., Ser. A/B, No. 53 (1933), clearly leads to the same result; see also Hudson, *The Argentine Republic and the League of Nations* (1934) 28 AM. J. INT. L. 125.

While various national courts have refused to give effect to treaties on the grounds that they contravened the constitutions of their states, this has little significance on the international law question here under discussion, since a domestic court is always obliged to follow the constitution or statutes of its own country even if international law is thereby transgressed. See HARVARD RESEARCH, *LAW OF TREATIES*, at 1005.

The statements of American Secretaries of State Marcy and Blaine sometimes cited for the proposition that treaties "not in conformity with the Constitution" (5 MOORE, *DIGEST*, at 169) cannot bind the United States, dealt with the problem of treaties containing provisions contravening substantive restraints of the Constitution, not with the question of the status of agreements other than those validated through the treaty-making procedure.

92. See Moore, *Treaties and Executive Agreements* (1905) 20 POL. SCI. Q. 403. A similar position was taken by President Jackson in the Franco-American indemnity claims dispute in 1831. See 5 MOORE, *DIGEST*, at 231-3; 5 MOORE, *INTERNATIONAL ARBITRATIONS* (1898) 4463 *et seq.* Of course, various Secretaries of State have sought refuge beyond the constitutional division of powers between Congress, the Senate and President, and the President when useful to justify breaches of good faith on the part of the United States.

not privileged to inquire into American governmental practices, save through diplomatic channels,⁹³ Secretaries of State Foster and Seward took the position that foreign governments could not properly inquire whether existing agreements had been validly ratified under the American Constitution.⁹⁴ The Executive's declaration as to their legitimacy was held to be unimpeachable by foreign nations. It is obvious that the conduct of the officials of one government in challenging the authority of the head of state or foreign minister of another to enter into an agreement, or in seeking to verify the assertion that valid municipal ratification had been obtained, could be considered a national affront. The possibility of independent verification is thus so sharply curtailed that even many of those writers who assert with solemn fervor that a government is not bound by an "invalidly ratified" agreement conclude that it may be bound in good faith to make reparation to the obligee co-contractor, on the grounds of estoppel or implied warranty.⁹⁵

Almost a century ago, in the classic case of *Doe v. Braden*,⁹⁶ the Supreme Court held that the determination of whether an agent who purported to ratify a treaty on behalf of a foreign government had acted within the scope of his authority was a political decision, which could not be raised in a law action. The effect of this decision—reiterated by the Circuit Court of Appeals in 1934⁹⁷—was to allocate the determination of the authority of foreign emissaries to consummate agreements to the President and the State Department. We cannot think of any reason why foreign nations are not equally justified in relying upon the solemn assertion of the President, who is the final governmental agent of the United States in conducting international relations and in directing fulfilment of our international law obligations,⁹⁸ that in a given situation a Presidential or a Congressional-Executive agreement is a constitutional means of committing this government.

93. See WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) § 13; 4 MOORE, *DIGEST*, at 680.

94. See Fairman, *Competence to Bind a State* (1936) 30 AM. J. INT. L. 439, 444-5. It is not to be denied, however, that many States have at times sought to evade agreements on the ground that the process of ratification failed to meet constitutional requirements. See HARVARD RESEARCH, *LAW OF TREATIES*, at 992-1009; see also Potter, *Inhibitions Upon the Treaty-Making Power of the United States* (1934) 28 AM. J. INT. L. 456.

95. See McNair, *Constitutional Limitations upon the Treaty-Making Power* in ARNOLD, *TREATY-MAKING PROCEDURE* (1933) 1, 6-7; and authorities cited in HARVARD RESEARCH, *LAW OF TREATIES*, at 1007-9. As to the recognition that the always useful doctrine of estoppel is applicable at international law see the *Serbian Loans* case, P. C. I. J., Ser. A, Nos. 20/21, at 39.

96. 16 How. 635 (U. S. 1853).

97. *State of Russia v. National City Bank of New York*, 69 F. (2d) 44, 47-8 (C. C. A. 2d, 1934).

98. Thus a number of prize cases which had been decided by the United States Supreme Court were referred to the international arbitral tribunal established by the Treaty of

As Professor Willoughby has stated:

"It has sometimes been said that one State when dealing with another is presumed to know which organ of that other State is qualified to enter into treaties which will be constitutionally binding upon itself. Thus, for example, it has been asserted that, although the Crown in Great Britain possesses the full treaty-making power, the rulers of that country may be held to know that, in the United States, treaties, after negotiation and approval by the President and his advisers, require to be ratified by the Senate before they become constitutionally operative. This is probably a correct proposition but it is also correct to say that, in any given case, one State is entitled to rely upon the assertion of the executive head of a State or of his plenipotentiary agent, that he is qualified to negotiate a treaty which will be immediately binding without *ad referendum* proceedings. The assertion thus made might be without constitutional warrant, but the State would none the less be internationally bound, for it could not be held that the other contracting State would be qualified or obligated to determine the question, which might be a very technical one, of the proper interpretation and application of the provisions of the other State's constitutional laws. Thus, for example, the many matters between the United States and China arising out of the Boxer troubles of 1900 were settled not by a treaty but by a 'protocol' which, though a very important international agreement, was not submitted to the American Senate for approval. It must be assumed that those who acted on behalf of the United States assured all the other parties concerned that simple approval by the President was sufficient to bind the United States. The constitutional validity of this action has, indeed, never been contested in the United States, but had it been and had the courts of that country declared that, though termed a protocol, the agreement was, in fact, a treaty, and that, therefore, to be constitutionally binding, required the approval of the Senate, China and the other participating Powers would have a basis for a claim that

Washington of 1871 on the British assertion that the Court's decisions had not conformed to international law. In six cases the international arbitral tribunal decided adversely to the decision of the Supreme Court; in six it upheld the Court's decision. See FOREIGN RELATIONS: 1910 at viii, 597 *et seq.*; 4 MOORE, INTERNATIONAL ARBITRATIONS (1898) 3838, 3902, 3911, 3928, 3935, 3945, 3950, 3957; 3 *id.* at 3159. In other words, although the Supreme Court was bound by the domestic law of the United States, the President had the responsibility of acting to ensure that the United States respected obligations imposed upon it by international law.

Thus also President Wilson released neutrals in situations where the federal courts had held they had been validly convicted for violation of the Selective Service Act of 1917, on the ground that international law precluded drafting of persons. See *Ex parte Larrucea*, 249 Fed. 981 (S. D. Cal. 1917); see also Borchard, *The Treaty-Making Power as Support for Federal Legislation* (1919) 29 YALE L. J. 445, 448-9.

As to the general doctrine, see HALL, TREATISE ON INTERNATIONAL LAW (6th ed., Atlay, 1909) 295; 3 GÉNET, TRAITÉ DE DIPLOMATIE ET DE DROIT DIPLOMATIQUE (1932) 162

whatever might be the constitutional situation according to its own municipal law, the United States was still internationally bound by the assertion of authority made by its official or organ which had acted as the agency through which negotiations with other States were to be carried on."⁹⁹

The rationale of this argument is much the same as that which underlies the doctrine of "apparent authority" in the law of agency. As a practical matter, in addition to the duty imposed by the traditional tenet of the equality and sovereignty of States, a foreign government has no option but to rely upon the assurance of the head of state of another government that constitutional procedures have been followed in the consummation of international agreements. Bad faith can be charged to the co-contracting State so as to excuse breach of obligations allegedly created by an agreement only when there is an egregious departure from constitutional requirements. The day has long since passed—if it ever existed—when it can be charged that foreign governments act in bad faith in assuming the United States can be bound by Congressional-Executive or direct Presidential agreements. It would be little short of fantastic to assume that foreign governments which have seen the United States make and respect debt settlements involving more than \$10,000,000,000 (the inter-Allied claims after the last war), undertake during the present war the Lend-Lease agreements transferring many billions of dollars worth of assets, acquire important portions of its territorial domain, and enter into vital tariff and commercial arrangements without referral to the Senate under the treaty clause were on notice that executive agreements have no "constitutional dignity and force" or are inherently restricted to "unimportant" or "administrative" matters.

A similar problem was involved in the *Metzger* case. The Haitian Secretary for Foreign Relations had assured the State Department that a given obligation would be respected. Thereafter, the Haitian Government sought to extenuate its failure to effectuate the agreement on the ground that under the law of the Republic, the matter in question was not subject to federal control and that the agreement, since it exceeded the minister's authority, was not enforceable. In overruling this contention, the arbitrator, Justice Day of the United States Supreme Court, said:

"I do not understand that the limitations upon official authority, undisclosed at the time to the other government, prevent the enforcement of diplomatic agreements."¹⁰⁰

The same result would obtain even in the situation where the initial instrument of international agreement contained a clause which re-

99. WILLOUGHBY, *FUNDAMENTAL CONCEPTS OF PUBLIC LAW* (1924) 313-4.

100. *FOREIGN RELATIONS*: 1901 at 262, 271.

cited that the United States would not be bound unless the Senate had given its consent.¹⁰¹ If, thereafter, a new instrument of agreement were drafted and approved by joint resolution or Presidential declaration, the foreign government would still be privileged to accept the assurance of the State Department that this was an alternate effective means of binding the United States.¹⁰² Thus the acquisition of the Texan and Hawaiian Republics by agreement had been preceded by the negotiation of treaties containing reservations as to Senate approval. In one case, the Senate declined to consent by the required two-thirds majority; in the other, a presumed inability to obtain the requisite vote precluded action from being taken on the treaties. In both cases invitations authorized by joint resolution of both houses were proffered as substitutes for treaties and were accepted by the foreign governments; in both cases the Supreme Court held that the procedure followed was effective.¹⁰³

The Duration of Executive Agreements.

The nadir of unrealistic analysis in the comparison of treaties and executive agreements is usually reached in the discussion of their comparative durations. Thus, in a recent catalogue of the "dangers and weaknesses" of executive agreements, Professor Borchard concludes that

101. In contemporary practice, the ratification clauses are frequently ambiguous with regard to the mode of domestic validation to be pursued. Thus Article XX of the Bretton Woods Monetary Agreement provides:

"SEC. 1. *Entry into force.*—This Agreement shall enter into force when it has been signed on behalf of governments having sixty-five percent of the total of the quotas set forth in Schedule A and when the instruments referred to in Section 2(a) of this Article have been deposited on their behalf, but in no event shall this Agreement enter into force before May 1, 1945.

"SEC. 2. *Signature.*—(a) Each government on whose behalf this Agreement is signed shall deposit with the Government of the United States of America an instrument setting forth that it has accepted this Agreement in accordance with its law and has taken all steps necessary to enable it to carry out all of its obligations under this Agreement."

Articles of Agreement in INTERNATIONAL MONETARY FUND AND INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT (U. S. Treas. Dep't 1944) 36. Analogous provisions are contained in the Bank Agreement, *id.* at 81.

102. Accordingly, a corollary good faith obligation is imposed upon the United States not to enter into agreements—not performable by direct executive action—where there is reason to believe that Congressional approval will not be forthcoming, or to insert a clause in such agreements providing that the obligation will not be binding until approved by Congress or under the treaty clause.

103. See *supra*, this Section. Professor Borchard has suggested that in "neither case was the act of Congress preceded by an executive agreement." Borchard, *Executive Agreements*, at 673. One wonders what kind of an agreement did precede the annexations. It is interesting to compare the language of Chief Justice Chase in *Texas v. White*, 74 U. S. 700, 726 (1868): "The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body."

"executive agreements either bind a) only the administration that made them, as Theodore Roosevelt and others have thought, or b) are of uncertain duration. In the third place, they may be terminated unilaterally by any future President at any time, without incurring the charge of treaty violation. Fourthly, it is unsafe for the United States or any foreign country to enter into such agreements since, if congressionally approved, they can be congressionally disapproved at any time."¹⁰⁴

In evaluating this categorical prediction of perils in executive agreements, it is important to recall the major practical considerations determinative of the survival value of any category of international agreement. In the first place, through a familiar legal process of transubstantiation, treaties and executive agreements possess a dual status: simultaneously they constitute (a) part of the law of the United States, cognizable in the courts, and (b) intergovernmental contracts.¹⁰⁵ In dealing with either treaties or executive agreements, acts which constitute valid termination of their status as the law of the land may not affect their character as obligations to another government, and vice versa. In the second place, a substantial proportion of the treaties and other international agreements negotiated in the past hundred years have either contained permissive termination clauses or been declared to have effect only for a given term of years; often both limiting clauses have been included.¹⁰⁶ In 1931, Elihu Root prepared a list of more than four hundred international agreements made by the United States which contained termination clauses.¹⁰⁷ A recent study by Professor Robert R. Wilson¹⁰⁸ indicates that there has been a tendency in drafting both bilateral and multilateral international agreements after 1918 to include provisions either calling for automatic changes upon occurrence of stated conditions or authorizing the signatories to initiate proceedings or convene a conference to undertake general revision.¹⁰⁹ In many cases modification by mere exchange of

104. Borchard, *Executive Agreements*, at 678 (footnotes omitted).

105. See *Botiller v. Dominguez*, 130 U. S. 238, 247 (1889); *United States v. Ferreira*, 13 How. 40, 46 (U. S. 1852); MATHEWS, *AMERICAN FOREIGN RELATIONS* (1928) c. 27; CRANDALL, *TREATIES*, at 465.

106. See HARVARD RESEARCH, *LAW OF TREATIES*, at 1177; TOBIN, *THE TERMINATION OF MULTIPARTITE TREATIES* (1933) 202-5.

107. See SEN. EXEC. DOC. No. 1, 72d Cong., 1st Sess. (1932) 51, 79 *et seq.*

108. Wilson, *Revision Clauses in Treaties Since the World War* (1934) 28 AM. POL. SCI. REV. 901. The study was limited to the period from 1918 to 1932 and subsumed only agreements to which Great Britain, the United States, France, Germany, Russia, Italy, or Japan were parties.

109. The general retention of the unanimity rule in effect converted the revision provisions in the multilateral conventions discussed by Wilson, *supra* note 108, into provisions authorizing convocation of a conference, at the request of a given number or percentage of the signatory powers.

notes between the respective foreign ministers was authorized. In some cases, it has been provided that failure to undertake such revision or inability to agree on the terms of alteration after a stated period of time would justify denunciation of the agreement.¹¹⁰ Professor Wilson concluded that there has been in recent years

"not a relinquishment of the rule of *pacta servanda sunt*, but at least some evidence of a realization that *pacta*, if they are to be really effective, should be consistent with actual conditions, and should thus reflect the continuing will of party states."¹¹¹

Hence the inarticulate premise of Professor Borchard's argument, that treaties constitute permanent international arrangements, is factually erroneous.¹¹² In the third place, any assumption that treaties or any other form of international arrangement can or should be considered permanent in nature represents an impossible Canute-like attempt to hold back the constant evolution and flux of power relations. While not providing an effective means for revision of outmoded engagements, Article 19 of the Covenant of the League of Nations was an explicit recognition of the undesirability of seeking to endow treaties with a putative immortality.¹¹³ In the fourth place, in the present parlous state of international relations, there are no judicial or police sanctions available to enforce agreements between nations. The only currently operative sanction (aside from fear in the case of smaller States) is the practical necessity of honoring obligations so as to augment the probability of reciprocal respect for engagements on the part of other States. These considerations are hardly operative only when an instrument bears the charismatic title "treaty."¹¹⁴

In the ensuing paragraphs, we propose to explore the implications of these fundamental data of international relations for the problem of the comparative duration of treaties and executive agreements.

1. *The Termination of the Domestic Effect of International Compacts.* If Professor Borchard is correct in his assertion that "it is unsafe for the United States or any foreign country to enter into [executive] agreements, since if congressionally approved, they can be congress-

110. See, e.g., the Honduran-United States agreement of December 1927, 45 STAT. 2618; the German-Polish treaty, (1922) 12 LEAGUE OF NATIONS, TREATY SERIES 63, at 73.

111. Wilson, *supra* note 108, at 909.

112. Riesenfeld, *The Power of Congress in International Relations* (1937) 25 CALIF. L. REV. 643, 671, indulges in the same assumption.

113. See HU, TREATY REVISION UNDER ARTICLE NINETEEN OF THE COVENANT (1931); DUNN, PEACEFUL CHANGE (1937).

114. See former Secretary of State Hull's views as to the permanency of certain executive agreements negotiated at the Habana Conference of American States in 1940. DEP'T OF STATE, CONFERENCE SER., No. 48 (1941) 20-1. See also the remarks of Secretary of the Treasury Morgenthau on the 1936 telephonic stabilization agreement, *infra*, p. 343.

sionally disapproved at any time,"¹¹⁵ exactly the same statement can be made for treaties; for, in so far as their internal status as municipal law is concerned, the two categories of international compacts are terminable by approximately the same procedures and with equal ease. The "international delinquency" resulting from unjustified unilateral termination of an obligation is, as we have seen, equally serious in terms of practical negotiations, albeit equally without juristic consequences in the present stage of international organization, whether the instrument abrogated had been validated domestically as a treaty or as an agreement.¹¹⁶

There are seven procedures by which the domestic status of treaties as the "law of the land" may be terminated. First, provisions of a treaty lose their operative effect if inconsistent terms or an express stipulation of repeal are included in a later treaty.¹¹⁷ In the second place, following a precedent established in 1784 when the Treaty of Commerce and Amity with France was modified by an exchange of notes between the French Foreign Minister and Benjamin Franklin,¹¹⁸ executive agreements have not infrequently been utilized as a method of altering treaties.¹¹⁹ Thirdly, a treaty may be terminated in whole or in part by a Congressional act or joint resolution expressly providing for its denunciation.¹²⁰ This procedure, advocated by Presidents Hayes and Grant,¹²¹ has been upheld in a series of court decisions,¹²² culminated

115. Borchard, *Executive Agreements*, at 678.

116. See *supra*, pp. 318-31.

117. Thus the Clayton-Bulwer Treaty of 1850, with Great Britain, regulating the construction of a canal across the Isthmus of Panama was expressly modified by the Hay-Pauncefote Treaty of 1901. 1 MALLOY, *TREATIES*, at 782. Similarly, the treaty of 1902 with Spain terminated a whole series of previous treaties. 2 *id.* at 1710. For other examples of supersession of treaties by inclusion of inconsistent provisions in later instruments see 5 MOORE, *DIGEST*, at 363-4.

118. See 2 MILLER, *TREATIES*, at 3, 158, 159-60.

119. See, e.g., U. S. *TREATY SER.*, No. 32-A (1915) (agreement terminating Article 34 of the Treaty of 1858); *FOREIGN RELATIONS*: 1916 at 33-6; U. S. *EXEC. AGREEMENT SER.*, No. 67 (1934) art. XVI; 1 MALLOY, *TREATIES*, at 854; WILSON, *HANDBOOK OF INTERNATIONAL LAW* (1939 ed.) 226, n. 55.

120. The first example of express abrogation by Congressional resolution was the statute adopted in 1798 terminating, because of violation, the treaty with France ratified in 1778. 1 *STAT.* 578 (1798). The act asserted that the abrogations were justified by the prior infractions of the treaties by France, but this claim was subsequently impliedly abandoned by the United States. See 5 MOORE, *INTERNATIONAL ARBITRATIONS* (1898) 4429-32. See also 10 *STAT.* 1089 (1854); 13 *STAT.* 566 (1865); 22 *STAT.* 641 (1883); 36 *STAT.* 83 (1909); 37 *STAT.* 627 (1911); 38 *STAT.* 1184 (1915).

121. See as to Grant's views, *FOREIGN RELATIONS*: 1876 at 255; as to Hayes' views, 7 RICHARDSON, *MESSAGES*, at 518. However, President Wilson thought the action of Congress in directing denunciation of treaty provisions in the Merchant Marine Act of 1920 had unconstitutionally interfered with the treaty-making power. See CORWIN, *THE PRESIDENT*, at 222-3.

122. The earliest case in point is *Bas v. Tingy*, 4 *Dall.* 37 (U. S. 1800) (dealing with the

by the Supreme Court's recent opinion in *Van der Weyde v. Ocean Transport Company*.¹²³ With reference to the question of Congressional denunciation, the Court said:

"In this instance, the Congress requested and directed the President to give notice of the termination of the treaty provisions in conflict with the act. From every point of view, it was incumbent upon the President, charged with the conduct of negotiations with foreign governments and also with the duty to take care that the laws of the United States are faithfully executed, to reach a conclusion as to the inconsistency between the provisions of the treaty and the provisions of the new law. It is not possible to say that his conclusion as to articles 13 and 14 are arbitrary or inadmissible. Having determined that their termination was necessary, the President through the Secretary of State took appropriate steps to effect it."¹²⁴

effect of the 1798 statute discussed *supra* note 120). The Court's logic is somewhat confused by an assertion that the statute of 1798 constituted a declaration of "limited war" against France; a general declaration of war clearly would have terminated the treaties. See CONWIN, *NATIONAL SUPREMACY* (1913) 70. Later cases expressly or impliedly assume that the act operated as an abrogation of the treaty under the *rebus sic stantibus* doctrine. See Hooper, *Adm'r v. United States*, 22 Ct. Cl. 408 (1887); *The Brig William*, 23 Ct. Cl. 201 (1888). See also Professor W. Y. Elliott's summary of the cases with citations in *Judiciary Committee Hearings*, at 58-9.

123. 297 U. S. 114 (1936).

124. *Id.* at 117-8.

The point is so well accepted one wonders what Professor Borchard can mean in his statement, *Commerce Committee Hearings* at 187, that "As I said yesterday, an Executive agreement is repealable by the Executive or by Congress, which is not true of a treaty; and, moreover, I don't think it is desirable to have this government or any part of it charged with constitutional evasion." Compare his remarks in *The Two-Thirds Rule as to Treaties: A Change Opposed* (1945) 3 ECON. COUNCIL PAPERS, No. 8, at 6: "A treaty is something quite different from a statute. A treaty binds the nation and cannot be changed by an act of legislation. A statute can be." If Professor Borchard means to distinguish Congress's control over the "international obligation" of a treaty from its control over that of an executive agreement, then he is forced, as the concluding half of his sentence suggests, back upon the vicious circle described in the text above that assumes, contrary to fact, that the executive agreement is not a valid mode of effecting international engagements under our Constitution.

It is this same vicious circle that renders futile an attempted distinction said to have been under consideration in recent months by the Senate Foreign Relations Committee. Krock, *Treaty vs. Agreement Challenge to Congress*, N. Y. Times, Nov. 26, 1944, § 4, p. 3, cols. 1-2, which reads in part:

"A treaty is any permanent undertaking by the United States the international commitments of which cannot be repealed by Congress, or terminated, except as provided in the treaty, and which calls for the possible use of our armed forces, or economic sanctions, or both, or other resources over which Congress has all or a measure of control.

"An agreement is a compact between the United States and one or more other nations definitely not involving the use of the Army or Navy, or economic sanctions, and terminable at any time by a majority vote of Congress."

In the fourth place, treaties have frequently been terminated indirectly, by the enactment of conflicting or inconsistent legislation.¹²⁵ In the fifth place, Congress may nullify a treaty by refusing to pass supplementary legislation needed for its enforcement or by mere failure to appropriate necessary funds.¹²⁶ These last two methods, while not formally denominated terminations of a treaty, palpably have the same operative effect. In the sixth place, termination may be effected by executive denunciation, with or without prior Congressional authorization. The administrations of Presidents Madison,¹²⁷ Grant,¹²⁸ McKinley,¹²⁹ Taft,¹³⁰ and possibly Lincoln¹³¹ furnish pre-

The first half of this proposed definition of a "treaty" assumes that there is a difference in the international commitments of a treaty and an executive agreement, which assumption, as we have seen, is in turn dependent upon an unfounded assumption of a difference in constitutional validity. Wholly apart from its bottomless circularity, this purported distinction is, furthermore, a difference in terms of *legal consequences*, once it is known whether an agreement is a treaty or an executive agreement, and not in terms of *criteria* that aid in distinguishing the one from the other. When the problem is to determine whether an agreement is a treaty or an executive agreement, it helps no whit to be told that if it is a treaty Congress cannot repeal its international commitment but if it is an executive agreement Congress can. The last half of the definition of a treaty and the part of the definition of an agreement which are in terms of subject matter are completely unhistorical and, interestingly enough, rely upon the powers of the whole Congress, and not of the Senate, to give them whatever distinguishing effect they might have. Indeed, the most striking fact about these two attempted definitions, apart from their failure either to distinguish from each other or to divide the whole field, is their clear recognition of the powers of Congress over the entire field of international relations.

125. See, e.g., *The Cherokee Tobacco*, 11 Wall. 616, 621 (U. S. 1870); *United States v. McBratney*, 104 U. S. 621, 623 (1881); *The Head Money Cases*, *Edye v. Robertson*, 112 U. S. 580, 599 (1884); *Pigeon River Co. v. Cox*, 291 U. S. 138 (1933).

126. James G. Blaine, who served long terms both as Speaker of the House and as Secretary of State, once stated that the House of Representatives had never considered itself obligated to appropriate money to enforce a treaty which it disapproved. See CORWIN, *THE PRESIDENT*, at 401-2; see also GEORGE WHARTON PEPPER, *FAMILY QUARRELS* (1931) 23-5; *Botiller v. Dominguez*, 130 U. S. 238 (1889).

127. In 1815, Secretary of State Monroe notified the Dutch Minister in Washington that the Treaty of 1782 with the Netherlands had been terminated "by causes proceeding from the state of Europe for some time past." See 2 *FOREIGN RELATIONS: 1873* at 722.

Madison's earlier uncertainty as to whether the power of termination belonged to Congress or to the President and Senate acting in cooperation under the treaty clause is indicated in his letter to Pendleton in 1791. 6 *WRITINGS OF JAMES MADISON* (Hunt, ed., 1906) 22, 24.

128. In a message to Congress in 1876, Grant asserted that, in the absence of Congressional action, he had power to decline to enforce a treaty when he thought the other contracting nation had abrogated its terms. The operation of the treaty was thereafter suspended for six months. 7 *RICHARDSON, MESSAGES*, at 371-3, 414-6; *FOREIGN RELATIONS: 1876* at 204-309.

129. In 1899, McKinley directed the American minister to Switzerland to serve notice of denunciation of several clauses of the Treaty of 1850. *FOREIGN RELATIONS: 1899* at 754-7.

130. In 1911, Taft directed the American Ambassador to notify the Russian Government of our intention to terminate the Treaty of 1832. Thereafter the President's course was approved by joint resolution. 37 *STAT. 627* (1911). Taft subsequently declared he had

cedent for this type of executive action.¹³² President Franklin D. Roosevelt denounced at least two treaties on his own initiative: in 1933, the extradition treaty with Greece, and in 1939, the treaty of commerce and amity with Japan.¹³³ There are dicta in the 1910 decision of the Supreme Court in *Charlton v. Kelly* indicating the validity of direct Presidential termination.¹³⁴ In the seventh place, a treaty may be terminated by the President after enactment of a resolution of denunciation by two-thirds of the Senate. It is an illuminating example of the pervasiveness of constitutional usage to note that this procedure—which appears to accord with the language of the treaty-making clause of the Constitution more closely than do the methods commonly followed—has been utilized only twice: in 1854 when the Senate authorized President Pierce to denounce a treaty with Denmark “at his discretion,”¹³⁵ and in 1920.¹³⁶

An executive agreement authorized by act of Congress, such as a postal convention or reciprocal trade agreement, is subject to termination by the first six of the procedures indicated in the preceding para-

taken the initiative to circumvent Congressional adoption of an abusive resolution of abrogation. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS (1925) 116-7. See also FOREIGN RELATIONS: 1911 at 695-9.

131. In 1864, Seward instructed the American Ambassador to Great Britain to give Great Britain the required six months' notice of termination of the Rush-Bagot convention of 1817, limiting naval armament on the Great Lakes. The Senate had assented to the agreement. Thereafter, Congress adopted a joint resolution ratifying this action; Lincoln, however, subsequently withdrew the notice of termination, taking the position he had the authority to determine whether or not to terminate a treaty. See SEN. EXEC. DOC. NO. 9, 52d Cong., 2d Sess. (1892) 24-32.

132. For other cases dealing with the Executive's power of denunciation see *Ropes v. Clinch*, 20 Fed. Cas. No. 12,041, at 1174 (C. C. S. D. N. Y. 1871); *Teti v. Consolidated Coal Co.*, 217 Fed. 443, 450 (N. D. N. Y. 1914); *Taylor v. Morton*, 23 Fed. Cas. No. 13,799, at 785 (C. C. Mass. 1855), *aff'd on more restrictive rationale*, 2 Black 481 (U. S. 1862).

In a series of cases, it has been held that the decisions of the Executive with respect to the interpretation of treaties, the possession of sovereignty over foreign territory, or other “political” aspects of international law were conclusive on the judiciary. See *Foster v. Neilson*, 2 Pet. 253, 307 (U. S. 1829); *United States v. Arredondo*, 6 Pet. 639, 711 (U. S. 1832); *Garcia v. Lee*, 12 Pet. 511 (U. S. 1838); *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 420 (U. S. 1839); see also *Phillips v. Payne*, 92 U. S. 130 (1875). Similarly, it has been held that the courts may not question the decision of the Executive as to whether a “treaty” retains its international validity. *Hooper, Adm'r v. United States*, 22 Ct. Cl. 403, 420-1 (1887).

133. On the Greek extradition treaty see *McCLURE, EXECUTIVE AGREEMENTS*, at 17-18; on the Japanese commerce and amity treaty see *id.* at 18-20.

134. 229 U. S. 447, 476 (1913). See also *CRANDALL, TREATIES*, at 461; 1 *WILLOUGHBY, CONSTITUTIONAL LAW*, at 585.

135. 9 SEN. EXEC. J. 431 (1854). Subsequently Pierce gave Denmark such notice; this procedure was held valid, *Bertram v. Robertson*, 122 U. S. 116 (1887). See also *Hayes' statement*, 7 *RICHARDSON, MESSAGES*, at 619.

136. President Wilson secured the consent of two-thirds of the Senate to termination of the United States' adherence to the International Sanitary Convention of 1903. 3 *MALLOX, TREATIES*, at 2877-9.

graph,¹³⁷ and presumably may be automatically terminated by repeal of the authorizing act.¹³⁸ The status of an agreement negotiated by the President on his own authority is more indefinite. Clearly any President has power to terminate the internal status of such agreements as the law of the land. If the agreements deal with questions, such as the war power, where Congress has concurrent jurisdiction, it is possible that such agreements may also be terminated by legislation. But where such agreements are predicated upon the President's independent constitutional powers, such as in the field of foreign relations,¹³⁹ under the separation of powers doctrine, Congressional action might not affect either the domestic effect of the agreement or its status as an international contract.¹⁴⁰ These are obviously uncharted problems to which it is impossible to give dogmatic answers.

The existence of this variety of techniques for terminating the municipal life of international agreements does not imply that Presidents or Congresses will behave irresponsibly in ignoring the expectations created by their promises to other nations. But—speaking purely of power—a treaty clearly may be terminated by as many procedures as a Congressional-Executive agreement and, paradoxical though it may seem, even appears to be subject to termination in more ways than is a direct Presidential agreement.

2. *Of International Obligations and Pacta Sunt Servanda.* In speaking of the "dangers" of executive agreements, Professor Borchard apparently seeks to transcend municipal law and invoke the authority of some unstated principle of international law, of some "brooding omnipresence in the sky" that makes some mysterious difference in the obligations created by treaties and executive agreements;¹⁴¹ for whereas the denunciatory powers of Congress and the President are alleged to be held in check by the fear of "incurring the charge of treaty violation," there is presumed to be no similar inhibition in the case of executive agreements.¹⁴²

137. See discussion and list of examples, Simpson, *Legal Aspects of Executive Agreements* (1938) 24 IOWA L. REV. 67, 87-8.

138. This situation existed when the Tariff Act of 1897 was repealed by enactment of the Act of 1909. The United States took the position that it was required to terminate all commercial agreements concluded under the former act. See 5 HACKWORTH, DIGEST, at 429-30; see also FOREIGN RELATIONS: 1894, at 77-81.

139. See *supra*, Sections II and III.

140. Compare the views of President Jackson, 3 RICHARDSON, MESSAGES, at 146.

141. Borchard, *Executive Agreements*, at 678.

142. In light of the pitfalls into which Professor Borchard assumes Congressional action will lead the United States and all other nations, it is curious that he concludes his article by quoting approvingly Harry Elmer Barnes' assertion that the Senate's treaty power "is the last remaining bulwark of our national safety." Borchard, *Executive Agreements*, at 683. If he has so much confidence in a minority of one house, it is difficult to see how he could have so little confidence in a majority of both houses.

Considered initially from the standpoint of practical international relations, this argument is a curious conglomerate of unreality and cynicism. However repugnant the thought may be, the fact remains that most countries have declined to observe particular international engagements under one or another pretext when their provisions were considered excessively onerous and when it was assumed that violation would not lead to effective retaliatory action or have other adverse countervailing effects. The circumstance that a particular contract between nations bore the magic name "treaty" or had been "ratified" by the "treaty-making process" has not in practice vested it with any guarantee of longevity or inviolability. A citation to the record of history will serve to establish the point. A study made by John Bigelow indicates that between 1783 and 1913 approximately 30 separate treaties were concluded between the United States and Great Britain. Of this total, no less than eight treaties were found to have been violated, several being transgressed by both signatories.¹⁴³

The rationale for such evasion has usually been a plea that force or threats were used to induce the party seeking to avoid its obligations to ratify the agreement, or that the agreement has become overwhelmingly difficult to observe, or, alternately, some variation of the maxim *rebus sic stantibus*.

The first two of these pleas, while raised at times by the diplomats of almost every nation, have as invariably been characterized as invalid by the States to whom they were addressed and have won little favor at the hands of authorities in international law.¹⁴⁴ The question of whether, and to what extent, changing conditions justify unilateral termination of a treaty, is perhaps the thorniest problem in the entire law of treaties. Great diversity of opinion has been expressed by writers on the subject, with many taking the position that the principle of *rebus sic stantibus* is untenable.¹⁴⁵ Possibly this antipathy stems

143. BIGELOW, BREACHES OF ANGLO-AMERICAN TREATIES (1917), especially at 183-4. In 1922, Professor Borchard frankly recognized the frequency with which the United States has committed infractions of treaties: See Borchard, *The United States as a Factor in the Development of International Relations* in WALSH (ed.) *THE HISTORY AND NATURE OF INTERNATIONAL RELATIONS* (1922) 229, 289-90.

144. See CARR, *THE TWENTY YEARS CRISIS* (1940) 233-4, 242-4; 2 HYDE, *INTERNATIONAL LAW* (1922) 9; HARVARD RESEARCH, *LAW OF TREATIES*, at 1152-3. This doctrine should not be confused with the rule invalidating treaties when duress is directly exerted on the plenipotentiaries. *Id.* at 1149-52.

145. This is the conclusion of Professor Garner, Reporter for the *Harvard Research Draft of the Law of Treaties*. See HARVARD RESEARCH, *LAW OF TREATIES*, at 1102. For significant recent contributions to the controversy, see RADOIKOVITCH, *LA RÉVISION DES TRAITÉS* (1931) pt. 2, pp. 69-191; Williams, *The Permanence of Treaties* (1928) 22 AM. J. INT. L. 89; 1 OPPENHEIM, *INTERNATIONAL LAW* (5th ed., Lauterpacht, 1937) § 539; Woolsey, *The Unilateral Termination of Treaties* (1926) 20 AM. J. INT. L. 346, 349; CATTARD, *LA CLAUSE "REBUS SIC STANTIBUS" DU DROIT PRIVÉ AU DROIT INTERNATIONAL* (1929);

from the fear that the doctrine, once admitted into the House of International Law, would provide a convenient rationalization for constant unilateral denunciation of treaties. Yet it is clear that an attempt to endow agreements with eternal life is foredoomed to failure and, even in those cases where it could be imposed on weak powers by force or threats, would be unjust.¹⁴⁶ Both Thomas Jefferson and John Adams took the position that changing political and strategic conditions might permit a nation to terminate all or parts of its obligations under a treaty, without obloquy. On this subject Jefferson, although declaring that treaties were in general inviolable, wrote: ". . . if performance becomes *self-destructive* to the party, the law of self-preservation overrules the laws of obligation to others."¹⁴⁷

There are a few cases in which national or international tribunals have admitted, usually in a somewhat backhanded manner, the necessity of permitting successful invocation of the *rebus sic stantibus* doctrine. The pioneering Swiss Federal Tribunal has held in intercantonal cases that the maxim was an implied condition in all long-term treaties,¹⁴⁸ but had to be raised before a court as a basis for rescission rather than utilized as the basis for immediate abrogation. The Permanent Court indicated in the *Franco-Swiss Free Zones* case that it was prepared to recognize the principle in a proper situation.¹⁴⁹ The only Amer-

McNAIR, *LAW OF TREATIES* (1938) c. 34; BRIERLY, *LAW OF NATIONS* (1936) 200-8. See also GROTIUS, *DE JURE BELLI AC PACIS* (1625) bk. 2, c. 16, § 25.

One source of confusion is the dispute over whether the maxim permits legal denunciation of a treaty by one signatory in the event of a significant change in the conditions under which it was negotiated or merely its termination by a court under such circumstances. The international jurists are quite properly disturbed by the first interpretation, and have sometimes been misled into extending their objections to the second also.

146. See Briery, *Some Considerations on the Obsolescence of Treaties* (1926) 11 *TRANSACTIONS OF THE GROTIUS SOCIETY* 11, 18-9; DUNN, *PEACEFUL CHANGE* (1937) 106-11; RADOIKOVITCH, *op. cit. supra* note 145, at 64-8; John Stuart Mill, *Treaty Obligations* (1870) 8 *FORTNIGHTLY* (N. S.) 715, excerpted in 5 MOORE, *DIGEST*, at 338-40.

147. 7 *WORKS OF THOMAS JEFFERSON* (Fed. ed. 1904) 286. This position was taken by Jefferson during the discussion in Washington's cabinet in 1793 as to whether the United States could, if necessary, refuse to honor the commitment of the French Alliance Treaty of 1778 to protect France's West Indian colonies, in order to avoid war with England. Since the French Government never requested that we fulfil our treaty obligations, the issue was not brought to a head. See BAILEY, *DIPLOMATIC HISTORY*, at 72; for general background see McLAUGHLIN, *CONSTITUTIONAL HISTORY*, at 248-55.

148. See *Canton of Lucerne v. Canton of Aargau*, Swiss Trib. Fédéral, Feb. 17, 1882, 8 *Recueil Officiel* 43; *Canton of Thurgau v. Canton of St. Gallen*, Swiss Trib. Fédéral, Feb. 10, 1928, 54 *id.* I. 188; see also *Lepeschkin v. Gosweiler & Co.* (1923) 71 *JOURNAL DES TRIBUNAUX ET REVUE JUDICIAIRE* 582; abbreviated translation in HUDSON, *CASES ON INTERNATIONAL LAW* (1929) 100. The first two cases deal with inter-cantonal agreements but involve the same principal as international agreements.

149. *Free Zones of Upper Savoy and the District of Gex*, P. C. I. J., Ser. C., No. 58 (1932), especially at 156-8. See also LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE* (1934) 43.

ican case in point—the 1882 decision of the Court of Claims in *Hooper v. United States*¹⁵⁰—contains what is perhaps the strongest judicial recognition of the doctrine. Except for the *Hooper* case, the effect of all these assertions is weakened by the premise that the doctrine can prevail only when there is evidence that the parties expressly intended the particular agreement should cease in the event of a significant change in the “circumstances” existing when it was ratified.

A rule against perpetuities is as necessary in international jurisprudence as in the law of property, and failure to give such a doctrine effective implementation is fraught with far more serious consequences.¹⁵¹ Complete resolution of the conflict between the need for change and the desirability of preventing unilateral action in transgression of international obligations is obviously dependent upon the establishment of an international tribunal with jurisdiction to consider pleas that provisions in treaties or agreements have become outmoded.¹⁵²

In the absence of any recognized international tribunal, capable of

There is a partial recognition of the doctrine by the Reichsgericht in *Bremen v. Prussia*, June 29, 1925, 112 Entscheidungen des Reichsgerichts in Zivilsachen 21-32, summarized in HARVARD RESEARCH, LAW OF TREATIES, at 1104-5. However, on the equities of the case, the doctrine was found inapplicable.

150. 22 Ct. Cl. 408, 420-1 (1887).

151. The problem is analogous to that created by the existence of “absolute” conditions or perpetual restrictive covenants in deeds which eventually led courts of equity to develop the doctrine of “changing neighborhood conditions,” which has served to rationalize decisions modifying the agreements. See *Downs v. Kroeger*, 200 Cal. 743, 254 Pac. 1101 (1927); *Notes* (1938) 36 MICH. L. REV. 138, (1936) 103 A. L. R. 735, (1934) 88 A. L. R. 405, (1927) 16 CALIF. L. REV. 58.

152. See Garner, *The Doctrine of Rebus Sic Stantibus and the Termination of Treaties* (1927) 21 AM. J. INT. L. 509; Williams, *supra* note 145; Brierly, *supra* note 146; McNair, *Legal Character of Treaties* (1930) 11 BRIT. Y. B. INT. L. 100, 109; Lauterpacht, *The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals*, in *id.* at 134, 145. However, there are serious limitations on the extent to which an international court can or should be expected or entrusted with the post of revising outmoded agreements of international arrangements. As Judge Kellogg of the Permanent Court observed in the *Franco-Swiss Free Zones* case:

“... the Court is competent to construe and apply treaties between the nations and decide questions susceptible of solution by the application of well recognized rules and principles of international law or domestic law where such law is applicable to the question in hand. . . . It certainly does not, however, include cases for the solution of which there exist absolutely no rules or principles of law, and which the Court must decide solely upon the basis of its conception of political or economic expediency. . . . But these questions of political or economic policy are within the sovereign jurisdiction of every independent State and should not and cannot be submitted to the International Court of Justice. There is also the League of Nations, which is a political conciliation body to which all the members may appeal. There is no need to impose upon the Court any such political questions destructive of its influence as a Court of justice.” P. C. J. J., Ser. A, No. 24, at 38, 42 (1930):

enforcing its decrees, almost all nations have found it appropriate or necessary on occasion to invoke the maxim unilaterally. Whatever the logical tergiversations of professed scholars in the field of international law, statesmen have readily recognized that the doctrine, although potentially dangerous, has played an invaluable function. The practice of nations—as contrasted with the theoretical law of nations—has been well summarized by the English writer, E. H. Carr:

“‘Every treaty,’ wrote Bismarck in a famous phrase, ‘has the significance only of a constatation of a definite position in European affairs. The reserve *rebus sic stantibus* is always silently understood.’ The same effect is produced by the doctrine occasionally propounded that a state enjoys the unconditional right to denounce any treaty at any time. This view was stated in its most uncompromising form by Theodore Roosevelt: ‘The nation has as a matter of course a right to abrogate a treaty in a solemn and official manner for what she regards as a sufficient cause, just exactly as she has a right to declare war or exercise another power for a sufficient cause.’ Woodrow Wilson observed in private conversation during the Peace Conference that, when he was a teacher of international law, he had always supposed that a state had the power to denounce any treaty by which it was bound at any time. . . .

“Even Great Britain which, as the strongest Power in the world, had most interest in upholding the validity of treaties, was manifestly disinclined to accept the view that treaty obligations were unconditionally binding. The most famous example is that of the Belgian Guarantee Treaty of 1839, under which the principal European Powers, including Great Britain, bound themselves jointly and severally to resist any violation of the neutrality of Belgium by one of their number. In 1870 Gladstone told the House of Commons, in a passage which was cited with approval by Grey in his speech of August 3, 1914, that he was ‘not able to subscribe to the doctrine of those who have held in this House what plainly amounts to an assertion that the simple fact of the existence of the guarantee is binding on every party of it, irrespective altogether of the particular position in which it may find itself at the time that the occasion for acting on the guarantee arises.’ Such an interpretation Gladstone thought ‘rigid’ and ‘impracticable.’ ”¹⁵³

These considerations are as applicable to treaties as to executive agreements. In fact, if we disregard *modi vivendi* or other admittedly

153. CARR, *THE TWENTY YEARS CRISIS* (1940) 234-5 (footnotes omitted). See also FOSTER, *THE PRACTICE OF DIPLOMACY* (1906) 299-301. (The author was a former Secretary of State.)

For further examples of the practice of nations see the extensive list of references collected in HU, *TREATY REVISION UNDER ARTICLE NINETEEN OF THE COVENANT* (1931) 2, n. 10.

temporary pacts, it is impossible from the standpoint of practical international relations, to discern any reason why "executive agreements" are any more susceptible to evasion than "treaties." As Professor Borchard has pointed out on innumerable occasions, there are at present no judicial sanctions compelling nations to adhere to international law or fulfil their contractual obligations with other States.¹⁵⁴ If the normal (and desirable) policy of nations is that of respecting their commitments, the rationale of obedience—although cloaked in the latinity of *pacta sunt servanda*—is merely the same desire for stability and avoidance of conflict which motivates men to obey the laws of their community most of the time.¹⁵⁵ Nations obey agreements because of the expectation that if they respect their obligations, other nations will do likewise and both will benefit thereby. Assuming the obligation was intended by the contracting parties to be durable, the same motives for obedience exist whatever the name inscribed at the head of the document or whatever the mode of validation. Speaking of the oral gold stabilization fund exchange agreement, entered into between Great Britain, France, and the United States in 1936, Secretary of the Treasury Morgenthau said: "I would rather have a gentleman's agreement based on mutual good faith than any number of signed ones."¹⁵⁶

The records of American diplomatic experience reveal precisely, as the foregoing discussion would lead a realistic observer to expect, that many direct Presidential agreements have survived and been honored by the contracting nations for considerable periods of time. As Mr. Levitan says: "History refutes the contention that executive agreements are binding only on the administration entering into them."¹⁵⁷ In fact, one international engagement—considered by the State Department to be a mere exchange of notes¹⁵⁸—has remained in effect continuously since 1817,¹⁵⁹ a lifespan measurably greater than that of

154. In fact, Professor Borchard takes the extreme position that the imposition of sanctions is completely incompatible with international law. See Borchard, *The Place of Law and Courts in International Relations* (1943) 37 AM. J. INT. L. 46, 55.

155. Compare LAWRENCE, A HANDBOOK OF PUBLIC INTERNATIONAL LAW (11th ed. 1938) 88-9; GROTIUS, *DE JURE BELLI AC PACIS* (1625) bk. 3, c. 25, § 1; RADOIKOVITCH, *op. cit. supra* note 145, at 16-18.

156. Quoted in McCURE, EXECUTIVE AGREEMENTS, at vii.

157. Levitan, *Executive Agreements*, at 376.

158. See Secretary of State Foster's discussion in H. R. Doc. No. 471, 56th Cong., 1st Sess. (1899) 14 *et seq.* Since the agreement went into effect by executive orders issued by both governments on the date the original notes were exchanged, and since no ratifications were exchanged when the Senate gave its consent a year later, Foster concluded that the arrangement from the international standpoint never took the shape of a treaty. Secretary of State Seward called the agreement an "informal" arrangement in 1864. *Id.* at 30.

159. In 1940, negotiations between the Canada and the United States modified the agreement to the extent of permitting naval construction and other activity on the Great Lakes. 3 JONES AND MYERS (eds.), *DOCUMENTS ON AMERICAN FOREIGN RELATIONS* (1941) 169-78.

any political or military treaty to which the United States has ever been a party. The agreement referred to is that negotiated by Acting Secretary of State Rush and Bagot, the British Minister, providing for limitation of naval armaments on the Great Lakes. Another executive agreement dealing with Canadian-American relations—that leasing to the United States the territory of Horseshoe Reef in the Niagara River¹⁶⁰—has remained in effect continuously since 1850.¹⁶¹

The nineteenth century Anglo-German-American consortium providing for joint occupation of certain Samoan Islands remained in effect for 25 years until it was determined to divide the archipelago among the three powers. The Anglo-American Agreement of 1907 regarding the boundary between the Philippines and the Borneo Colony lasted until 1930, when a treaty was negotiated and ratified altering the boundary.¹⁶² The United States has remained a member of the Pan-American Bureau and its successor the Pan-American Union continuously since 1889 although the original adherence resulted from a simple executive agreement and was approved merely by inference from the recurrent Congressional acts appropriating funds to defray the American portion of the organization's expenses or to meet the cost of sending delegates to conferences. Similarly, the United States has remained a member of the Universal Postal Union since 1875. In this case also, the agreement was approved only by the President, pursuant to authority contained in the postal statutes.¹⁶³ American membership in a half-score other international organizations—also resulting from direct Presidential agreement, as authorized and implemented by Congressional joint resolutions or appropriation bills—has not been rendered precarious nor become a source of uncertainty to our associates because of the failure to secure the magic imprimatur of Senatorial consent under the treaty clause.

Even of those agreements which were admittedly intended only as short-lived *modi vivendi* many have remained in effect through several national administrations until it was possible to work out a more permanent arrangement. Thus the *modus vivendi* agreed to in 1888 fixing the conditions under which American fishing vessels might enter Canadian and Newfoundland ports to purchase supplies¹⁶⁴—which

160. The text of the agreement is printed in 1 MALLOY, TREATIES, at 663.

161. Thus note the recognition of the continuance of the agreement in the Treaty of 1908, 5 MILLER, TREATIES, at 919.

162. See 3 MALLOY, TREATIES, at 2605; 4 *id.* at 4261.

163. 17 STAT. 304 (1872), re-enacted and modified by 48 STAT. 943 (1934), 19 U. S. C. § 1351 (1940).

164. The *modus vivendi* was contained in a protocol to the treaty negotiated in 1888 and was originally intended to be in effect only until the treaty was ratified. See CRANDALL, TREATIES, at 112-3. The Senate, however, refused to consent to the treaty and the *modus vivendi* continued in operation. See 1 SEN. Doc. No. 870, 61st Cong., 3d Sess. (1910) 206; 4 *id.* at 15; see also TANSILL, CANADIAN-AMERICAN RELATIONS, 1875-1911 (1943) cc. 1-4.

has been characterized as "the most persistently vexatious dispute in the diplomatic history of the United States"¹⁶⁵—endured until the Hague Arbitral Tribunal award of 1910, with certain modifications, was confirmed by convention in 1912.¹⁶⁶ The allegedly "temporary" arrangement fixing the Canadian-Alaskan boundary on the Stickline River, effected by exchange of notes in 1878, survived undisturbed until the border line was determined by an arbitral award in 1903.¹⁶⁷ The *modus vivendi* of 1859 providing for joint British-American occupation of San Juan Island, off the coast of British Columbia, remained in effect until the termination of an arbitration proceeding in 1873.¹⁶⁸ In 1870, the Supreme Court of Washington Territory held that the agreement, then 11 years old, had the effect of temporarily modifying contrary provisions of the Organic Act of the territory, a Congressional statute.¹⁶⁹ The series of executive agreements negotiated by various Secretaries of War with the Republic of Panama in 1904, 1905, and 1911, and ratified by statute enacted by Congress in 1911, survived until 1923, when a treaty was negotiated after the completion of construction work on the Panama canal.¹⁷⁰ The Monroe Doctrine, though originating as a mere statement of one President's policy, has, despite its absence of any elevated status in the putative hierarchy of instruments of foreign policy beloved by taxonomical scholars, been maintained as a key tenet of American foreign policy from 1823 to date. The Covenant of the League of Nations gave especial recognition to its status at international law. By the 1940 Act of Habana (ratified by the Senate as a treaty) all the Republics of the Americas committed themselves to enforce its provisions precluding acquisition of additional territory or transfers of sovereignty as to existing possessions, by European powers.¹⁷¹

Professor Borchard has taken the position that executive agreements may validly be terminated unilaterally at any time.¹⁷² For the uninitiated this may create a picture of official guillotiners, busily engaged in the hidden recesses of the State Department in killing

165. BAILEY, *DIPLOMATIC HISTORY*, at 586; see also *id.* at 33, 151, 158, 295-8, 415 *et seq.*, 422, 438-9.

166. The 1912 treaty and the 1910 award were very similar to the treaty negotiated by President Cleveland to which the Senate had refused its consent in 1888.

167. See CRANDALL, *TREATIES*, at 113; see also Bailey, *Theodore Roosevelt and the Alaskan Boundary Settlement* (1937) 18 CAN. HIST. REV. 123.

168. See CRANDALL, *TREATIES*, at 106.

169. *Watts v. United States*, 1 Wash. Terr. (N. S.) 288 (1870).

170. See Senator Lodge's remarks, 64 CONG. REC. 1274 (1923). See also TAFT, *OUR CHIEF MAGISTRATE* (1916) 111 *et seq.*; the statute referred to is 32 STAT. 561 (1912).

171. See BEMIS, *DIPLOMATIC HISTORY OF THE UNITED STATES* (1942 ed.) 779; LIPP-MANN, *U. S. FOREIGN POLICY* (1943) pt. 1.

172. See Borchard, *Executive Agreements*, at 678; see also COLEGROVE, *THE AMERICAN SENATE AND WORLD PEACE* (1944) 105.

agreements. A measure of support is lent to this view by Theodore Roosevelt's erroneous belief that executive agreements negotiated under direct Presidential authority lapsed when the President who had put them into effect left office.¹⁷³ But the historical fact, as indicated in the previous sections, is that a large number of agreements have remained in effect long after the Presidents who had negotiated them left office. As far as we have been able to ascertain, there is not a single instance of a Presidential agreement which has been deemed abrogated by the mere change of national administrations. The practice of the State Department is indicated in a letter written by the head of the Treaty Division in 1934 to a student who had inquired if various accords made during the Coolidge and Hoover administrations were still in force:

"Executive agreements with foreign governments entered into under one President continue to remain in force under his successors unless and until the statutes or regulations in pursuance of which they are entered into are repealed or the specified time for their operation has expired, or notice of a desire to terminate is given by one side or the other. As none of these eventualities has happened in the cases of the executive arrangements mentioned . . . those arrangements are in force at the present time."¹⁷⁴

The plain purport of this statement is (a) that as a matter of governmental practice direct Presidential agreements remain in force until they expire according to their terms or until rescinded by negotiation, and (b) that, subject to the same methods of termination, Congressional-Executive agreements remain in force unless the act of Congress pursuant to which they were negotiated or by which they were ratified is repealed. As has previously been noted, this latter limitation is neither a greater nor a lesser limitation than exists in the case of a treaty, which also ceases to be binding domestically when a contrary statute is enacted.

It does not, however, follow that an executive agreement which is not predicated upon statutory authorization will necessarily be terminated domestically if contrary legislation is enacted. This might not be the case if the statute invades the President's independent constitutional powers. The principle is exemplified by Lincoln's disregard of Congress's expressed views in the matter of the projected termination of the Rush-Bagot Agreement. Early in 1865 Congress adopted a joint

173. See 22 WORKS OF THEODORE ROOSEVELT (Mem. ed. 1925) 580-1. It may be urged that a direct Presidential agreement as a sheer question of power can be terminated when a new chief executive comes to office. But, as pointed out above in the text, a treaty can also as a sheer question of power be denounced at any time by a new President or abrogated by enactment of a contrary act of Congress.

174. Quoted in Simpson, *Legal Aspects of Executive Agreements* (1938) 24 IOWA L. R. 67, 86.

resolution¹⁷⁵ purporting to ratify the President's previous action giving notice to Great Britain of his intention to terminate the agreement pursuant to its terms. Thereafter President Lincoln changed his mind and notified the British Government that he had elected to rescind his notice of termination.¹⁷⁶ In other words, in the face of a contrary legislative enactment, President Lincoln and Secretary of State Seward held that the executive department possessed the exclusive authority to decide whether or not to perpetuate this type of executive agreement.¹⁷⁷

Conflict between the legislative powers of Congress and the President's constitutionally allocated control of foreign affairs arose after the last war because of the enactment of Section 34 of the Merchant Marine Act of 1920,¹⁷⁸ directing the President to give notice of termination of provisions of all Congressional-Executive agreements¹⁷⁹ and treaties restricting the right of the United States to levy discriminating duties on imports entering the United States in foreign-owned ships or to levy discriminatory tonnage dues on foreign vessels entering American ports. However, the termination clauses in the executive agreements and treaties thus sought to be modified authorized total, but not partial, denunciation. Consequently, the Congressional mandate could not be complied with by the President without commission of an international delinquency, unless the consent of the various nations were obtained. President Wilson declined to terminate the Congressionally proscribed provisions of either the executive agreements or the treaties, asserting that the statute was an invalid attempt to invade the Executive's prerogative to conduct American foreign policy. President Wilson's position has been followed by all his successors in office.¹⁸⁰ We do not mean to imply that the Lincoln-Wilson doctrine constitutes a general declaration of Presidential independence from Congressional control in all matters relating to the termination or the implementation of international compacts to which the United States is a party. But the limitations imposed by the practical necessity for

175. 13 STAT. 568 (1865). The resolution had been signed by Lincoln, before he changed his mind and decided to perpetrate the agreement.

176. See Levitan, *Executive Agreements*, at 377.

177. In discussing the history of the Rush-Bagot Agreement, Secretary of State Foster appears to have concluded that the Lincoln-Seward position was a correct interpretation of constitutional law. See H. R. Doc. No. 471, 56th Cong., 1st Sess. (1899) 36-7. However Lincoln's Secretary of the Navy, Gideon Welles, thought the President's action had been illegal. 2 DIARY OF GIDEON WELLES (1911) 36, 45-6. See also CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN AFFAIRS* (1917) 125.

178. 41 STAT. 988, 1007 (1920).

179. The agreements had been negotiated pursuant to authority conferred in a series of general tariff or merchant marine statutes.

180. The entire episode is discussed in McCLURE, *EXECUTIVE AGREEMENTS*, at 23-4. President Harding's objections to the Congressional mandate are quoted *id.* at 24, n. 87.

cooperation between the different branches of the Government and by the general principle that, in dealing with matters subject to both Congressional and executive control, the President should be guided largely by the legislative mandate¹⁸¹ are, upon the Seward-Lincoln doctrine, the same in the case of an executive agreement as of a treaty.

The Way of Cooperation.

As good faith requires, when it becomes necessary or appropriate because of the enactment of contrary legislation to terminate an executive agreement or when an administration desires to alter articles of its foreign policy embodied in a pre-existing compact, the traditional practice has been to resort to negotiation with the co-contractor State. This has been done repeatedly during the lifetime of the Great Lakes Limitation of Naval Armaments Agreement. The same policy has been followed when, because of enactment of inconsistent legislation or changes in diplomatic policy, it has seemed desirable to abrogate an informal "understanding" with another nation. The Root-Takahira "Agreement" of 1908,¹⁸² stating the opinions of the current executive heads of the two nations as to the proper extent of American and Japanese interests in the Far East, was operative during the administrations of three Presidents until modified by the Lansing-Ishii "Agreement" of 1917.¹⁸³ In turn, the new "Agreement" remained in effect during the administrations of Presidents Wilson and Harding, although considered a mere declaration of policy,¹⁸⁴ until it became apparent that its terms had been outmoded by the agreements made during the 1921-1922 Washington Conference. Secretary of State Hughes then entered into negotiations with the Japanese government with a view towards termination of the Lansing-Ishii "Agreement"; this was accomplished by an exchange of notes in April 1923.¹⁸⁵ A similar course was pursued when enactment of the Immigration Act of 1924 outmoded the famous Japanese-American "Gentleman's Agreement" of 1907.¹⁸⁶

Moreover, the fact that an executive agreement (like a treaty) is superseded domestically, as a general rule, by enactment of contrary legislation does not mean that the international obligations of the

181. See *Van Der Weyde v. Ocean Transport Co.*, 297 U. S. 114, 117-8 (1936); *Comment* (1936) 35 MICH. L. REV. 88.

182. 3 MALLOY, TREATIES, at 2720.

183. However, the Sino-Japanese treaties of May 25, 1915 probably transgressed the terms of the Root-Takahira Agreement. See FOREIGN RELATIONS: 1915 at 79-206; GRISWOLD, THE FAR EASTERN POLICY OF THE UNITED STATES (1938) c. 5.

184. See testimony of Secretary of State Lansing, *Hearings before Committee on Foreign Relations on Treaty of Peace with Germany*, 66th Cong., 1st Sess. (1919) 139-253.

185. See 3 MALLOY, TREATIES, at 3825-6; GRISWOLD, *op. cit. supra* note 183, at 216, 331.

186. See Hyde, *Constitutional Procedures for International Agreement by the United States* (1937) 31 PROC. AM. SOC. INT. L. 45, 48, n. 19.

United States under the agreement are forthwith terminated. Unilateral action on the part of the United States precipitated by act of Congress not in conformance with the termination provisions of the agreement cannot free the United States from the "obloquy" of a breach of international law. Those who seek to deny this result and to maintain that an executive agreement is inferior to a treaty in this regard¹⁸⁷ generally rely heavily upon Secretary of State Gresham's rejection of the Brazilian claim that the United States had breached its international obligations in giving notice of instantaneous termination of the reciprocal trade agreement negotiated in compliance with the Tariff Act of 1890 upon the repeal of the Act.¹⁸⁸ But examination of Gresham's correspondence with the Brazilian minister reveals that the terms of the special legislation adopted in both republics under which the arrangement was consummated "were well known to the executive departments of both governments, and were recognized by them as the basis of their action."¹⁸⁹

Thus, the Brazilian government was on notice from the first that the arrangement was subject to termination upon repeal of the authorizing act, and the possibility of this action was an implied condition subsequent in the agreement.¹⁹⁰ In other words, Gresham's note furnishes no authority whatever for the position that an Congressional-Executive agreement may as a general rule be unilaterally abrogated by the United States without breaching international law.¹⁹¹

To prevent frustration of the expectations of foreign governments, it would obviously be desirable policy for American diplomatic officials in negotiating agreements which are based upon special Congressional

187. Borchard, *Executive Agreements*, at 678, n. 49. Professor Wright took a similar position in his *THE CONTROL OF AMERICAN FOREIGN RELATIONS* (1922) 235-6. Wilcox repeated the misapprehension of this episode in *THE RATIFICATION OF INTERNATIONAL CONVENTIONS* (1935) 231.

188. *FOREIGN RELATIONS: 1894* at 76, 79-82.

189. *Id.* at 80. It should be noted, however, that Gresham took the position that nations in entering into international arrangements were bound to take notice of provisions of their co-contracting State's constitutional law. *Id.* at 81. As to the irrelevance of this argument to executive agreements see *supra*, pp. 317-8.

If it be insisted that what Gresham says is true of this particular agreement must *ipso facto* be true of every Congressional-Executive agreement, by parity of reasoning exactly the same thing is true of every treaty. As we have seen, a treaty is equally subject to Congressional termination and there is nothing in international law which gives agreements put through our Senate any special status.

190. Gresham held that the United States was also subject to having the agreement terminated by Brazil if that country's Congress repealed the act by virtue of which its President had been authorized to enter into the agreement.

191. Professor Borchard cites Gresham's assertion that the trade agreement was not a treaty and his conclusion that it could be unilaterally terminated by act of Congress, in *Executive Agreements* at 679, n. 49, without noticing the emphasis upon the disclosure to Brazil of the fact that the agreement had been made pursuant to special legislation.

legislation to make the statutory authority clear to the other nation. Inclusion of provisions providing for termination upon brief notice would subserve the same end. Similarly, in making both treaties and agreements dealing with problems expected to be the subject of reasonably frequent legislation, there has been a recent tendency in the United States to include provisions providing for lapse of the entire instrument in the event either signatory should enact inconsistent legislation,¹⁹² or provisions providing for termination on short notice.¹⁹³ Thus the attempt has been made to remove prospectively the possibility of a situation in which the Executive would be forced through act of Congress to commit international delinquencies by unilaterally terminating international engagements. When Congress elects to repeal statutes pursuant to which international agreements have been negotiated, comity would seem to require inclusion of provisions providing that agreements entered into under the statute should be terminated in the manner provided in the compacts themselves, rather than forthwith. It would of course be equally desirable—because of the greater political freedom which the American Congress possesses, in contrast to the legislative bodies of countries with ministerial systems of government—to include similar notice provisions in treaties, and to insert provisions in statutes which have the effect of repealing treaties delaying their effective date until appropriate notices of abrogation have been given.

In point of fact, Congress has, in recent years, been increasingly attentive in enacting legislation to avoid transgression of obligations incurred by executive agreement. We have previously adverted to the well intentioned but maladroit attempt to fulfil treaty and agreement obligations made by the draftsmen of the Merchant Marine Act of 1920. When the Tariff Act of 1909 was enacted, repealing the Act of 1897 and requiring termination of agreements negotiated thereunder,

“the Congress adopted the provisions contained in section 4 of the new tariff act. It was deemed proper that the stipulations in regard to termination by diplomatic action contained in certain of the commercial agreements should be observed faithfully in every case. . . . Inasmuch as the agreements with France, Switzerland,

192. See, *e.g.*, the 1923 commercial treaty with Germany, 44 STAT. 2132; the 1925 treaty with Estonia, 44 STAT. 2379; the 1929 aviation agreement with Canada, U. S. EXEC. AGREEMENT SER., No. 2, par. 9; *cf.* the escalator clause of the London Naval Treaty, 46 STAT. 2858.

193. See, *e.g.*, the 1929 high frequency radio wave length assignment agreement, U. S. TREATY SER., No. 777-A, par. 17; the 1926 Roumanian customs agreement, U. S. TREATY SER., No. 733; 1 MALLOY, TREATIES, at 558-9; *id.* at 987. (It should be noted, to avoid confusion, that prior to 1930, the texts of many important executive agreements made by the United States were printed in the Department of State Treaty Series; the same practice was, and still is, followed by Malloy, Miller, and other compilers of sets of “treaties” and “other international acts” made by the United States.)

and Bulgaria contain no stipulations in regard to their termination by diplomatic action, it was deemed proper by the Congress of the United States that these agreements should not be terminated abruptly, but should be continued in force until the expiration of six months from April 30, 1909, the date when the foreign Governments concerned were formally notified by the Government of the United States of the intended termination of the commercial agreements. . . ." ¹⁹⁴

These practices evidence Congress's general determination to respect obligations incurred by the United States through executive agreements. ¹⁹⁵

(Sections VII and VIII of this article and a reply by Professor Borchard will be published in a subsequent issue.)

194. See Acting Secretary of State Wilson's message to the French Chargé d'Affaires, Lefèvre-Pontalis, reprinted in *FOREIGN RELATIONS: 1909* at 251; 5 *HACKWORTH, DIGEST*, at 430-1.

195. Senator Pepper has recently expressed an appropriate morality for the Government, *Commerce Committee Hearings* at 35: "In my opinion, we are just as much morally bound to carry out the obligations of an agreement entered into between our executive department and another executive department and agreed to by a majority of both Houses of Congress. That is just as much governmental action of a responsible character as another kind of agreement which happens to be agreed to by two-thirds of the Senate." Certainly this principle is more likely than its opposite to secure reciprocal treatment from other governments.