held void, the Constitution being superior to both. And indeed the Court has numerous times so stated.[358] It does not appear that the Court has ever held a treaty unconstitutional,[359] although there are cases in which the decision seemed to be compelled by constitutional considerations.[360] In fact, there would be little argument with regard to the general point were it not for dicta in Justice Holmes' opinion in *Missouri v. Holland*.[361] "Acts of Congress," he said, "are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention." Although he immediately followed this passage with a cautionary "[w]e do not mean to imply that there are no qualifications to the treaty-making power . . . ,"[362] the Justice's language and the holding by which it appeared that the reserved rights of the states could be invaded through the treaty power led in the 1950s to an abortive effort to amend the Constitution to restrict the treaty power.[363]

---

[358] "The treaty is . . . a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States." Doe v. Braden, 57 U.S. (16 How.) 635, 656 (1853). "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." *The Cherokee Tobacco*, 78 U.S. (11 Wall.), 616, 620 (1871). *See also* Geofroy v. Riggs, 133 U.S. 258, 267 (1890); United States v. Wong Kim Ark, 169 U.S. 649, 700 (1898); Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).

[359] 1 W. Willoughby, supra, at 561; L. Henkin, supra, at 137. In Power Authority of New York v. FPC, 247 F.2d 538 (2d Cir. 1957), a reservation attached by the Senate to a 1950 treaty with Canada was held invalid. The court observed that the reservation was properly not a part of the treaty but that if it were it would still be void as an attempt to circumvent constitutional procedures for enacting amendments to existing federal laws. The Supreme Court vacated the judgment on mootness grounds. 355 U.S. 64 (1957). In United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), an executive agreement with Canada was held void as conflicting with existing legislation. The Supreme Court affirmed on nonconstitutional grounds. 348 U.S. 296 (1955).

[360] *Cf.* City of New Orleans v. United States, 35 U.S. (10 Pet.) 662 (1836); Rocca v. Thompson, 223 U.S. 317 (1912).

[361] 252 U.S. 416 (1920).

[362] 252 U.S. at 433. Subsequently, he also observed: "The treaty in question does not contravene any prohibitory words to be found in the Constitution." Id.

[363] The attempt, the so-called "Bricker Amendment," was aimed at the expansion into reserved state powers through treaties as well as executive agreements. The key provision read: "A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." S.J. Res. 43, 82d Congress, 1st Sess. (1953), § 2. *See also* S.J. Res. 1, 84th Congress, 1st Sess. (1955), § 2. Extensive hearings developed the issues thoroughly but not always clearly. *Hearings on S.J. Res. 130: Before a Subcommittee of the Senate Judiciary Committee*, 82d Congress, 2d Sess. (1952). *Hearings on S.J. Res. 1 & 43: Before a Subcommittee of the Senate Judiciary Committee*, 83d Congress, 1st Sess. (1953).