The Bricker Amendment and the Evolving Jurisprudence of the Treaty Power

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7 December 2012

On the evening of the 26th of February, 1954, the United States Senate held a roll call vote on a proposal to amend the Constitution, initially introduced by Senator John Bricker.[1] The Bricker Amendment, as it was colloquially known, was an attempt to place several fundamental and broad-reaching restrictions on the power of the President to make treaties and executive agreements.[2] As with all Constitutional amendments, this bill required the approval of a two-thirds majority in the House of Representatives and the Senate before being sent to the States for ratification.[3] With overwhelming popular support across the nation, and in the House, the junior Senator from Ohio knew that this vote in the Senate was the first and last major obstacle his amendment would likely face on its road to ratification.[4] And, with 63 co-sponsors on his original bill[5]—already exactly two-thirds of the Senate, which then consisted of 96 members—Senator Bricker must have felt just a little optimistic about his chances that night.

After the roll was called the first time through, 60 votes were recorded in favour along with 30 against—just exactly the requisite two-thirds majority.[6] As the clerk called

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[1] Richard O. Davies, Defender of the Old Guard: John Bricker and American Politics 180 (1993).

[2] *See Id. at 154.*

[3] U.S. Const. art. V.

[4] *See* Robert A. Caro, The Years of Lyndon Johnson: Master of the Senate 529 (2003).

[5] Davies, *supra* note 1 at 158.

[6] Davies, *supra* note 1 at 180.

the names of those absent a second time, however, Senator Harley Kilgore entered the chamber.[7] Reportedly having come straight from Bethesda Naval Hospital, the senior Senator from West Virginia stood in the aisle and voiced one single word, "No," before turning and withdrawing from the chamber.[8] By that single vote, Bricker's amendment was defeated, and although he reintroduced the measure, in various forms, several times in subsequent Congresses, the issue never again rose to such prominence on the national stage.[9]

The story of the Bricker amendment—its rise, fall, and legacy—is indelibly woven throughout with the sociopolitical climate of post-World War II America, and inextricably linked to the evolving Constitutional understanding of the President's treaty-making Power and to his foreign affairs powers generally. To understand why the Bricker amendment was so urgently needed—and so intensely feared—in its heyday in the late 1940s and early 1950s, and to appreciate the direction modern jurisprudence has taken on the issues Bricker raised, one must start at the beginning, with the framing of the Constitution of the United States and the establishment therein of a plenary Federal treaty power.

1 – The Framing of the Treaty Power

The delegates to the Constitutional Convention were well aware of the necessity of a strong federal treaty-making power in the new government they were crafting.[10] The

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[7] *Id.* at 180–81.

[8] *Id.* at 181–82.

[9] *See id.* at 184–192.

[10] *See* THE FEDERALIST No. 75 (Alexander Hamilton).

Continental Congress was frustrated at numerous turns by its inability to enforce necessary aspects of its governance on the several States.[11] For example, John Adams, as the first representative of the Continental Congress in London, wrote that he found it impossible to negotiate a commercial treaty with Great Britain, because he could not guarantee that the States would honour any promises to which he committed.[12] Thus, while there was certainly argument and dissent on the matter, as Alexander Hamilton wrote in Federalist 75, the establishment of a federal treaty-making power, vested in the Executive to act with consent of the Senate, was "one of the best digested and most unexceptionable parts of the plan."[13] That treaties concluded under this power would be binding upon the States was, to Hamilton, only a matter of course,[14] and this proposition was recorded in Article 6 of the new Constitution—popularly referred to as the supremacy clause.[15] As ultimately enacted, the supremacy clause states simply,

> 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.[16]

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[11] See GEORGE TUCKER, THE LIFE OF THOMAS JEFFERSON, THIRD PRESIDENT OF THE UNITED STATES: WITH PARTS OF HIS CORRESPONDENCE NEVER BEFORE PUBLISHED, AND NOTICES OF HIS OPINIONS ON QUESTIONS OF CIVIL GOVERNMENT, NATIONAL POLICY, AND CONSTITUTIONAL LAW. IN TWO VOLUMES, VOLUME 1 239 (1837). ("In a letter to Mr. Monroe, in August, in speaking of the importance of a navy to awe the Barbary states, he [Jefferson] observes: 'It will be said, there is no money in the treasury. There never will be money in the treasury *till the confederacy shows its teeth. The states must see the rod; perhaps it must be felt by some of them.*")

[12] JOHN FERLING, JOHN ADAMS: A LIFE. 257–58 (Oxford University Press 2010).

[13] THE FEDERALIST No. 75, at 448 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[14] See *infra* note 20 and accompanying text.

[15] U.S. CONST. art VI, cl. 2.

[16] *Id.*

What precisely this means, however—that is, over what precise domain are treaties "supreme" and to what extent may they regulate that domain—became a topic of heated debate almost immediately following the ratification of the new Constitution.[17]

The extent of this debate may have surprised Hamilton, who considered it no more than an expression of obvious truth, rather than a supplementary grant of powers to the Federal government or an additional restriction thereof.[18] Writing in Federalist 33 (about both the necessary and proper clause and the supremacy clause), Hamilton states eloquently that

> it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers.[19]

The "truth" to which Hamilton here alludes is that "A LAW, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is prescribed are bound to observe."[20]

Nevertheless, the supremacy clause was not omitted from the Constitution, and much as been written on the precise meaning of the simple truth it embodies, especially as it applies to the domestic authority of treaties. Interpretations of the treaty power have been proposed that span a wide spectrum of possible authority. At one end of the spectrum must be the position that a treaty is no more than a promise between nations,

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[17] *See e.g.* Ware v. Hylton, 3 U.S. 199 (1796).

[18] *See* THE FEDERALIST No. 33 (Alexander Hamilton).

[19] The Federalist No. 33, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[20] *Id.* at 200. (emphasis in original).

and its provisions gain authority in domestic affairs only when Congress "executes" the treaty by enacting appropriate implementing legislation. The view which Hamilton and many of his contemporaries may have espoused is that a treaty enacted by the President and Senate is equivalent to a legislative act of Congress, enacted by a majority of both houses and signed by the President—a treaty is binding on the States to the extent to which any federal legislation would be (subject to the Constitution's grants of enumerated powers and the reservations of the 10th Amendment).[21] Further along on the spectrum might be the belief that, to varying extents, treaties somehow transcend the limitations imposed by the Constitution on typical legislation, and may thus touch aspects of domestic affairs kept otherwise outside the reach of the Federal government.[22] And, at the far other extreme is the concern, espoused by many of Senator Bricker's consiglieri, that the supremacy clause elevates the treaty-making power above the protections and limitations of the Constitution itself, and could potentially be used as a backdoor alternative to amending the Constitution, or at least substantially abridging the rights it guarantees.[23]

The precedent that provisions of treaties are *at least* supreme over conflicting State laws was readily established by the courts.[24] As early as 1796, the Supreme Court spoke on this issue, declaring in *Ware v. Hylton* that the 1783 Treaty of Paris, guaranteeing repayment of debts incurred during the American Revolution, overrode a Virginia law

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[21] *See infra* note 30 and accompanying text.

[22] *See* discussion *infra* Part 3 – The New Regime of Missouri v. Holland.

[23] *See* discussion *infra* Part 5 – The Bricker Amendment.

[24] *See e.g.* Ware v. Hylton, 3 U.S. 199.

nullifying those debts.[25] As to how much further they might go, the Supreme Court said in 1870, in a case involving the taxing of tobacco grown on Cherokee lands, "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."[26] Further analogizing treaties with Federal legislation, the Court stated in that same opinion "The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress,[27] and an act of Congress may supersede a prior treaty."[28,29] Through this analogy, Justice Swayne implies that a treaty should be considered to have power equivalent to that of a statute—for how could a statute supersede a treaty if that treaty dealt with subject matter outside the normal purview of Congress to legislate?

Several other arguments tend to rank the treaty power certainly no higher on the totem pole of domestic influence than the Federal government's more conventional power to legislate. In *Marbury v. Madison*, Chief Justice John Marshall wrote for the Court, "It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned."[30] Discussing the implications of this hierarchy, noted constitutional scholar and professor of law at Yale Law School Akhil Amar writes "Isn't it likewise worthy of notice that this very same

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[25] *Id.* at 284.

[26] The Cherokee Tobacco, 78 U.S. 616, 620 (1870).

[27] The Cherokee Tobacco, 78 U.S. 616 at 621 (citing Foster v. Neilson, 27 U.S. 253, 314 (1829)).

[28] The Cherokee Tobacco, 78 U.S. 616 at 621 (citing Taylor v. Morton, 2 Curt.C.C. 454, 23 F.Cas. 784 (C.C.D. Mass. 1855), aff'd, 67 U.S. 481 (1862)).

[29] The Cherokee Tobacco, 78 U.S. 616 at 621.

[30] Marbury v. Madison, 5 U.S. 137, 180, 2 L. Ed. 60 (1803) (emphasis in original).

clause listed federal statutes *ahead of* federal treaties, thereby implying a rank order between the two? Everywhere else in the supremacy clause textual priority signified legal superiority. First came the Constitution, then federal statutes, then treaties, then state constitutions, then state laws."[31]

These scholars observe that treaties are not exactly the same thing as statutes, and this otherness was recognized by writers as early as Hamilton himself. In discussing the decision whether to vest the treaty power in the legislative or executive branches of the Federal government, Hamilton states "The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction [sic] of new ones."[32] Additionally, Hamilton goes on to claim that treaties are "contracts, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."[33] Nevertheless, in the early years of the United States, this distinction was not considered to be of much substance, and treaties were applied by the courts as if they were the equivalent of federal legislation.[34] Within a few decades, however, this had begun to change.[35]

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[31] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY. 303 (2005).

[32] THE FEDERALIST No. 75, *supra* note 13, at 449.

[33] *Id.*

[34] *See* Jordan J. Paust, *Self-Executing Treaties*, 82 Am. J. Int'l. L. 760, 760–66 (1988).

[35] *See id.* at 767-71.

2 – The Doctrine of Non-Self-Execution

The separate nature of treaties and statutes was brought into focus by Chief Justice John Marshall in 1829.[36] Ruling in *Foster v. Neilson* on a case concerning the validity of Spanish land grants in territory ceded under treaty by Spain, Marshall describes, in the Opinion of the Court, the character of treaties under United States' law as distinctly different from the conventional international understanding of the term:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
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> In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. [37]

Chief Justice Marshall contends that the framework for treaties established by the supremacy clause is an institution peculiar to the United States.[38] While treaties are typically regarded around the world merely as promises between sovereigns, to be carried out by *domestic* legislative acts when they concern matters of domestic policy, the United States Constitution establishes that, within its sphere, treaties become law automatically, "equivalent to an act of the legislature."[39]

This view is not different from the understanding of the function of treaties discussed above, as imagined by Alexander Hamilton and applied by the courts.[40]

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[36] *See id.*

[37] Foster v. Neilson, 27 U.S. 253, 254 (1829).

[38] *Id.*

[39] *Id.*

[40] *See* discussion *supra* Part 1 – The Framing the Treaty Power, *see also* Paust *supra* note 34, at 760–66.

However, Marshall adds an important stipulation, which sets in motion the machinery which will eventually create a whole new doctrine. Chief Justice Marshall ends his above statement with the caveat that a treaty enacts domestic law "whenever it *operates of itself* without the aid of any legislative provision."[41] Marshall goes on to explain this limitation, saying:

> But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.[42]

Marshall's distinction may appear simple, but the Court would grapple with the precise meaning of the phrase "operates of itself" for many years thereafter.[43]

Marshall himself soon realized the difficulty of categorizing treaties under this framework.[44] In *U.S. v. Percheman*, decided a scant four years after *Foster*, he reversed his categorization of the treaty at issue in *Foster*, while affirming his categorization methodology.[45] In *Percheman*, Marshall compared the Spanish-language version of the treaty with the English-language translation examined in *Foster*, and concluded that the Spanish construction indicated that the treaty did not contemplate an implementing act by Congress, but instead conferred a personal right automatically.[46] The phrase in question was rendered "[Spanish land grants] shall be ratified" in the English version,

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[41] Foster v. Neilson, 27 U.S. 253, 254. (emphasis mine).

[42] *Id.*

[43] *See* Paust *supra* note 34, at 771–81.

[44] *See* U.S. v. Percheman, 32 U.S. 51, 69 (1833).

[45] *Id.*

[46] *Id.*

and "[Spanish land grants] shall remain ratified" in the Spanish text.[47] Marshall concludes "The English side of the treaty leaves the ratification of the grants executory—they shall be ratified; the Spanish, executed—they shall continue acknowledged and confirmed."[48]

Jordan Paust, Professor of International Law at the University of Houston Law Center, argues that the creation of this new doctrine nevertheless did not substantially change the treatment of treaties under the supremacy clause.[49] Since the test of a treaty's executory effect is the language of the treaty itself, it is the "supreme law of the land" that makes certain provisions of itself not actually "the supreme law of the land."[50] Paust states

> in this sense, all treaties, to the extent of their grants, guarantees or obligations, were to be self-executing. Those that were not were those which, by their terms, required domestic implementing legislation. Law was to operate as law unless the law itself specified that domestic implementing legislation was necessary to produce direct legal effect.[51]

Marshall's distinction, then, accomplished little more than to recognize that certain treaties could, by their own terms, make themselves less than statutes. It did not alter the status of treaties generally, or confer any broader powers on treaties than those they had previously enjoyed.

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[47] *Id.*

[48] *Id.*

[49] Paust *supra* note 34, at 768. ("This viewpoint was relatively consistent with prior patterns of expectation, and it would be expressed later in connection with criteria utilized to test self-executory effect."); *see, e.g.*, Warren v. United States, 340 U.S. 523, 526–27 (1951); Valentine v. United States, 299 U.S. 5, 10–11 (1936); Jones v. Meehan, 175 U.S. 1, 10 (1889).

[50] Paust *supra* note 34, at 767.

[51] *Id.* at 768.

In 1887 the term "self-executing" came into use to describe those treaties which fell under Chief Justice Marshall's "operates of itself" definition.[52] Coined by Justice Field,[53] the term "self-executing" is used in modern parlance to describe those treaties which can by applied by the courts as "the supreme Law of the Land," as contemplated by the supremacy clause."[54] Conversely, "non-self-executing" describes those treaties which do not satisfy Marshall's criterion, and thus cannot be directly enforced by the courts.[55] Non-self-executing treaties only become binding as domestic law when Congress passes legislation implementing their terms, and then it is only the implementing legislation itself that is the enforceable law.[56] It is worth noting, however, that even non-self-executing treaties can have some automatic jurisprudential effect.[57] Paust notes that "Although such treaties cannot operate directly without implementing legislation, they can be used indirectly as a means of interpreting relevant constitutional, statutory, common law or other legal provisions."[58]

Debate over the extent and precise nature of the doctrine of non-self-execution continues mostly unchecked to this day, as the Supreme Court has declined to speak decisively on the issue for the bulk of the 20th century.[59] Not surprisingly, the lower courts have developed a wide-ranging muddle of tests to distinguish self-executing

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[52] *Id.* at 766.

[53] *Id;* Bartram v. Robertson, 122 U.S. 116, 120 (1887) (Field, J., opinion).

[54] *See* Carlos Manuel Vazquez, The Four Doctrines of Self-Executing Treaties, 89 Am. J. Int'l L. 695 (1995).

[55] *See id.*

[56] *See id.*

[57] *See* Paust *supra* note 34, at 781.

[58] *Id.*

[59] Vazquez *supra* note 54, at 722.

treaties from non-self-executing ones.[60] Some courts have extended Marshall's language-based test to a determination based on the totality of circumstances surrounding the treaty's adoption, including not only the language of the treaty but subjective evidence about the intent of the parties.[61] Some courts have applied a justiciability test, ruling a treaty non-self-executing if its language is precatory or vague or aspirational.[62] Still others have concocted a subject matter-based test, holding that while the treaty power permits the concurrent exercise of a number of powers of the Congress, certain powers are vested by the Constitution in the Congress alone.[63] These have been held by various courts to include the power to declare war,[64] the power to raise revenue,[65] the power to establish crimes,[66] and the power to appropriate money.[67,68] In 2008, when the Supreme Court handed down its decision in *Medellin v. Texas*, it implied that the default interpretation of a treaty should be for non-self-execution, unless the treaty or Congress

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[60] *Id. But see* Paust *supra* note 34, at 775, 778, 780–81.

[61] *See* Vazquez *supra* note 54, at 704–10.

[62] *See id.* at 710–18.

[63] *See id.* at 718-19.

[64] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, Reporters' note 5 (1987) [hereinafter RESTATEMENT (THIRD)]). *But see* Paust *supra* note 34, at 778.

[65] RESTATEMENT (THIRD) § 111, Reporters' note 5. Vazquez supra note 54, at 718. *But see* Paust *supra* note 34, at 777–78.

[66] RESTATEMENT (THIRD) § 111, comment i. Vazquez *supra* note 54, at 718. *But see* Paust *supra* note 34, at 777–78.

[67] RESTATEMENT (THIRD) § 111, comment i. Vazquez *supra* note 54, at 718. Hopson v. Krebs, 622 F.2d 1375, 1380 (9th Cir. 1980) ("Treaty regulations that penalize individuals are generally considered to require domestic legislation before they are given any effect."). The Over the Top, 5 F.2d 838, 845 (D. Conn. 1925) ("It is not the function of treaties to enact the fiscal or criminal law of a nation. For this purpose no treaty is self-executing."). *But see* Paust *supra* note 34, at 777–78.

[68] Amar *supra* note 31, at 394. ("Such treaties are understood to require an implementing statute before they can operate fully as domestic law. For example, it is widely conceded that a duly enacted treaty cannot itself authorize a new expenditure, impose a new internal tax, create a new federal crime, raise a new army, or declare a war.").

somehow indicated otherwise.[69] The Court did not specify, however, exactly how self-execution might be indicated.[70]

The doctrine on this question is certainly not settled even to this day. In 1979, the United States Court of Appeals for the 5th Circuit opined that the non-self-execution doctrine was "one of the most confounding in treaty law."[71] And, as John H. Jackson, the Director of the Institute of International Economic Law at the Georgetown University School of Law, observed, "the substantial volume of scholarly writing on this issue has not yet resolved the confusion surrounding it."[72] Nevertheless, it is probably sufficient herein to observe that, at the close of the 19th century, the general jurisprudential view of treaties was that in the general case they functioned as more-or-less equivalents to federal statues, while some were somewhat weaker, requiring a separate statutory enactment to give them domestic effect.

3 – The new Regime of *Missouri v. Holland*

This concept of treaty law, which, despite several minor perturbations, had remained stable since the founding of the Republic, was suddenly turned on its head in 1920, when the Supreme Court handed down its ruling in the case of *Missouri v. Holland*.[73] At bar was a challenge to the constitutionality of a federal statute purporting to regulate the

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[69] Medellin v. Texas, 552 U.S. 491 (2008) ("While a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be "self-executing" and is ratified on that basis.").

[70] *See id.*

[71] Vazquez *supra* note 54, at 695 (quoting U.S. v. Postal, 589 F.2d 862 (5th Cir. 1979)).

[72] *Id.* (quoting JOHN H. JACKSON, THE EFFECT OF TREATIES IN DOMESTIC LAW 141, 148-49 (Francis G. Jacobs & Shelley Roberts eds., 1987)).

[73] *See* Davies *supra* note 1, at 156.

hunting of various species of migratory birds within the territories of the several States: the Migratory Bird Treaty Act of 1918.[74] A previous attempt by Congress in 1913 to legislate in this sphere had been rejected by the District Courts as an unconstitutional exercise of Congress's authority under the commerce clause.[75] Having thus failed, the federal government then entered into a treaty with the United Kingdom.

> [The treaty] recited that many species of birds in their annual migrations traversed many parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified closed seasons and protection in other forms, and agreed that the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out.[76]

Pursuant to that treaty, Congress again passed legislation protecting migratory birds—the Migratory Bird Treaty Act introduced above.[77] This act was challenged by the State of Missouri (which challenge was dismissed by the District Court) and then appealed to the Supreme Court.[78] The Court elected to decide the matter generally—ruling on the treaty power and related powers of Congress themselves, without reference to specific provisions of this treaty or act, claiming "the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States."[79]

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[74] *See* Missouri v. Holland, 252 U.S. 416 (1920). *See also* Migratory Bird Treaty, 16 U.S.C. §§ 703–12 (2006).

[75] *See* Missouri v. Holland, 252 U.S. 416. U.S. v. Shauver, 214 F. 154 (E.D. Ark. 1914). U.S. v. McCullagh, 221 F. 288 (D. Kan. 1915).

[76] Missouri v. Holland, 252 U.S. 416 at 431.

[77] *Id.* at 430–31.

[78] *Id.*

[79] *Id.* at 432 ("It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.").

Writing for the majority, Justice Oliver Wendell Holmes, Jr. stated that the rationale used by the District Courts in evaluating the constitutionality of the prior statute was not applicable to one enacted under the treaty power.[80] Instead, he asserted,

> it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States ... are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.[81]

The question before the Court, then, was reduced to the validity of the treaty itself, all else flowing naturally from that determination.[82]

The plaintiff's argument addressed this proposition directly, arguing along the lines of the conventional understanding of the treaty power—the above-discussed parity of treaties and statutes[83]—and the jurisprudence of the supremacy clause "that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do."[84] Justice Holmes, however, handed down a radical new understanding of the supremacy clause,[85] holding that "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under

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[80] *Id.* at 433 ("Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power.").

[81] *Id.* at 432.

[82] *Id.*

[83] *See* discussion *supra* Part 1 – The Framing of the Treaty Power.

[84] Missouri v. Holland, 252 U.S. 431 at 432.

[85] *See* Davies *supra* note 1, at 156.

the authority of the United States."[86] This simple statement opened the door for a new era of interpretation of the treaty power.[87] Defending his rationale, Justice Holmes argued that the Constitution must be regarded as living being that has grown beyond the initial conception of its Framers. He states eloquently,

> 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. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.[88]

This argument has been held up by scholars of Constitutional construction as one of the foundational remarks of Holmes's doctrine of the "living Constitution."[89]

Nevertheless, Holmes did not precisely throw open the door all the way to a plenary treaty power. His opinion admits, "It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way."[90] Further, Holmes did not *exactly* say that the treaty power could *definitely* create additional federal legislative authority. He merely concluded that the existence of the treaty was sufficient to find

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[86] Missouri v. Holland, 252 U.S. 431 at 433.

[87] *See* Davies *supra* note 1, at 156.

[88] Missouri v. Holland, 252 U.S. 431 at 433–34.

[89] *See* HOWARD GILLMAN, POLITICAL DEVELOPMENT AND THE ORIGINS OF THE "LIVING CONSTITUTION" 5 (American Constitution Society for Law and Policy 2007).

[90] Missouri v. Holland, 252 U.S. 431 at 433.

Congressional authority for the statute, and thus he need not examine the District Court opinions ruling the prior act unconstitutional.[91] It may have been the case that, had the Court found cause to consider them, it would have found the District Court in error and the original statute constitutional notwithstanding the treaty. Thus, although Holmes's language certainly implies that a treaty can extend the sphere of Congress's power, he may not have needed to actually hold as much in this case.[92]

One can also read into Holmes's opinion the idea that treaties like the one at bar operate not by allowing Congress to legislate *around* the protections of the 10th Amendment, but rather operate by allowing Congress to legislate *through* them. Holmes's own assertion that "We must consider what this country has become in deciding what that [10th] amendment has reserved"[93] implies that a 10th Amendment analysis was appropriate in this case. Therefore, it can be considered that Holmes concludes that the statute is constitutional not because the treaty allows it to operate in spite of the 10th Amendment, but rather because the treaties creates an state of affairs in which the statute does not violate the 10th Amendment (even if it would have in the absence of the treaty). That is, the existence of an applicable treaty provides a factual

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[91] *See* Missouri v. Holland, 252 U.S. 431 at 433. If the statute be constitutional without the treaty, than *Holland* did not *actually* use the treaty to extend the legislative power, regardless of how the Court may have described its reasoning.

[92] *But see* Andrews v. Andrews, 188 U.S. 14 (1903) *abrogated by* Sherrer v. Sherrer, 334 U.S. 343 (1948); S*ee* Missouri v. Holland, 252 U.S. 431 at 433 ("It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found.).

[93] Missouri v. Holland, 252 U.S. 431 at 434.

basis for determining the proper scope of the 10th Amendment on a case-by-case basis.[94]

In any event, Holmes's majority opinion in *Holland* established at least the real possibility that a treaty could be used to substantially extend the federal government's authority beyond the powers delegated to it by the Constitution.[95] It would not take an agile mind to imagine that, by the same logic, a treaty could be used to amend or abridge the Constitution in other, perhaps more sinister, ways.[96] However, until it provided the fodder for a consuming apprehension in the minds of Senator Bricker and his company in those reactionary days following the close of the Second World War, this door that Holmes had opened in interpretation of the treaty power drew little notice or comment.[97]

4 – The Rise of Executive Agreements

That door was about to swing wider than even Justice Holmes may have anticipated. The Article II treaty power is not the only way in which the United States can enter into binding agreements with foreign nations.[98] Under customary international law, the term "treaty" has been understood to encompass a much wider array of instruments and methods of approval than those codified in Article II, Section 2 of the United States

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[94] *See generally* New York v. U.S., 505 U.S. 144 (1992) (Court inquired into specific facts regarding functioning of the act to aid in determining its constitutionality under the 10th amendment.).

[95] *infra* note 92 and related text.

[96] Davies *supra* note 1, at 156.

[97] *Id.*

[98] Myres S. McDougal & Asher Lans, Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy, 54 Yale L. J. 181 (1945).

Constitution. The Vienna Convention on the Law of Treaties, drafted in 1969, codifies the traditional understanding of the law of treaties as it has developed over the years.[99] The Vienna Convention defines "treaty" very broadly as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[100] It affirms that "Every State possesses capacity to conclude treaties"[101] and that "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."[102] Further, the Vienna convention recognizes the inherent authority of heads of state to conclude treaties without any further grant of authority.[103]

That the Vienna Convention was drafted as late as 1969 should not diminish its probative value in this debate. The Convention did not create a new formulation of the international law of treaties, but merely codified the previously existing understanding of that subject.[104] That the above-mentioned provisions, at least, are reasonably indicative of the state of international practice as far back as the framing of the U.S. Constitution is borne out by treaty-making practice in the United Kingdom and other

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[99] Vienna Convention on the Law of Treaties, preamble, May 23, 1969.

[100] *Id.*, art. 2(1)(a).

[101] *Id.*, art. 6

[102] *Id.*, art. 11.

[103] *Id.*, art. 7(2) "In virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty".

[104] *Id.*, preamble.

European nations at the time.[105] It may be sensible, then, to understand the "advice and consent of the senate"[106] requirement placed on the treaty-making power by the U.S. Constitution as pertaining to the domestic validity of treaties as "the supreme law of the land,"[107] rather than to the the international validity of similar instruments as binding on the United States in the eyes of the community of nations.[108]

In practice, the federal government began concluding non-treaty agreements with foreign powers—that is, agreements not ratified by a two-thirds majority of the Senate, referred to as "executive agreements"—from the very beginning of the Republic.[109] In 1792, Congress passed a statute authorizing the Postmaster General to "make arrangements with the Postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post offices."[110] Congress also passed early statutes authorizing the executive to borrow money from foreign governments and to pay bribes to the barbary pirates.[111]

The use of executive agreements began modestly, but soon began to grow rapidly. A report of the Congressional Research Service compiled in 1992 reported that

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[105] *See e.g.* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 524 (Johnny H. Killian et. al. eds. 2004) [hereinafter THE CONSTITUTION: ANALYSIS.].

[106] U.S. Const. art. II, cl. 2.

[107] U.S. Const. art VI.

[108] Cf. Holmes v. Jennison, 39 U.S. 540, 571–72 (1840) ("But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the Constitution, the states are forbidden to enter into any 'agreement' or 'compact' with a foreign nation; and as these words could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty. They evidently mean something more, and were designed to make the prohibition more comprehensive.").

[109] THE CONSTITUTION: ANALYSIS *supra* note 105, at 518.

[110] *Id.*

[111] *Id.*

> in the first 50 years of its history, the United States concluded twice as many treaties as executive agreements. In the 50-year period from 1839 to 1889, a few more executive agreements than treaties were entered into. From 1889 to 1939, almost twice as many executive agreements as treaties were concluded. In the period since 1939, executive agreements have comprised more than 90% of the international agreements concluded.[112]

The executive agreement had become an important instrument of U.S. foreign policy as early as the mid-1800s, and by the close of the 19th century had begun to eclipse the treaty as the primary instrument thereof.[113] For example, while reciprocal trade agreements had traditionally been consummated by treaties, starting with the Tariff Act of 1890 Congress began "authorizing the Executive to bargain over reciprocity with no necessity of subsequent legislative action."[114]

In 1892, the institution of the executive agreement withstood a number of legal challenges on the grounds that it was an unconstitutional delegation of the legislative and treaty-making functions to the President.[115] Addressing the delegation of authority to the executive to control various tariff provisions, the Supreme Court concluded that similar practices had been ongoing since the origins of the United States, and that "it is often desirable, if not essential ... to invest the president with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations."[116] Further, in 1912, the Court ruled on whether an act granting jurisdiction to the federal circuit courts of appeal when "the validity or construction of any treaty . . .

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[112] *Id.* at 517.

[113] *Id.*

[114] *Id.*, at 518.

[115] *See* Field v. Clark, 143 U.S. 649 (1892).

[116] *Id.,* at 691.

was drawn in question"[117] was applicable to a trade agreement made pursuant to the Tariff Act of 1987.[118] The Court declared:

> 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. We think such a compact is a treaty under the circuit court of appeals act...[119]

While the Court here is not concerned specifically with the domestic authority of an executive agreement compared to that of a treaty, this 1912 ruling is nevertheless significant, even in the international sphere, for its inclusion of executive agreements under the umbrella of the "treaty" appellation. One can see, however, how this distinction could also have significant implications for a supremacy clause-based analysis of the domestic reach of executive agreements.

Executive agreements come in several forms, and the examples given thus far have all been what are called congressional-executive agreements.[120] That is, these are agreements with foreign powers entered into by the President, acting with some sort of authorization or approval from Congress.[121] They have not been limited to the domain of trade agreements, either; the annexations of Texas and Hawaii, for example, were

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[117] THE CONSTITUTION: ANALYSIS *supra* note 105, at 519.

[118] *Id. See* B. Altman & Co. v. U.S., 224 U.S. 583 (1912).

[119] B. Altman & Co. v. U.S., 224 U.S. 583 at 601.

[120] THE CONSTITUTION: ANALYSIS *supra* note 105, at 517–20.

[121] *Id.,* at 520–22.

accomplished by congressional-executive agreement.[122]Executive agreements on certain matters may also be authorized by a prior treaty.[123] The United Nations Charter, for examples, contemplates the making of special agreements to make armed forces and other assistance available to the Security Council (when it makes such requests).[124] The domestic authority of executive agreements authorized by treaties would seem to be established by the supremacy clause, as is the authority of the treaties themselves. And, if the domestic authority of congressional-executive agreements be thought not to flow from that same font, it can instead be imagined to emanate from the nexus of the President's foreign affairs power and the power of Congress to legislate.[125]

However, a third species of executive agreement has arisen alongside the two discussed above (congressional-executive agreements and executive agreements authorized by treaty), that does not lend itself to so straightforward an explanation.[126] This form is the sole-executive agreement—an agreement with a foreign power entered into by the President on his Constitutional authority alone, without authorization by act of Congress or prior treaty. In 1917 President Monroe concluded negotiations with the United Kingdom restricting the naval forces of each power present on the Great Lakes.[127] A year later, he presented the agreement to the Senate, asking if it was within

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[122] *Id.*, at 518

[123] *Id.*, at 520–22

[124] *Id.*, at 521. *See* United Nations Participation Act of 1945, 22 U.S.C. § 287 (2006).

[125] *See* McDougal *supra* note 98.

[126] THE CONSTITUTION: ANALYSIS *supra* note 105, at 522–26.

[127] *Id.*, at 523.

his power to conclude.[128] The Senate ratified the agreement by the requisite two-thirds,[129] rendering moot the question of whether Monroe could have acted alone.

Commenting in 1902 on several sole-executive agreements made between 1862 and 1893 with Mexico and Canada to allow the troops of these powers to enter U.S. territory and to allow U.S. troops to enter foreign soil on various occasions and for various reasons,[130] the Supreme Court opined:

> While no act of Congress authorizes the Executive Department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States.[131]

Sole-executive agreements continued to develop along lines roughly connected to the commander-in-chief power over the subsequent few decades.[132]

In 1900, President William McKinley sent troops to China on his own initiative as commander-in-chief to rescue the U.S. and foreign legations besieged by the Boxers,[133] and in 1901 he accepted the Boxer Protocol on behalf of the United States.[134] Of this event political scientist Westel Willoughby remarked:

> This case is interesting, because it shows how the force of circumstances compelled us to adopt the European practice with reference to an international agreement ... purely political treaties are, under constitutional practice in Europe, usually made by the executive alone.

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[128] *Id.*

[129] *Id*.

[130] Tucker v. Alexandroff, 183 U.S. 424, 434–435 (1902).

[131] *Id.,* at 435.

[132] *See* THE CONSTITUTION: ANALYSIS *supra* note 105, at 523.

[133] *Id.*, at 523–24.

[134] *Id.*

> The situation in China ... abundantly justified President McKinley in not submitting the protocol to the Senate. The remoteness of Peking, the jealousies between the allies, and the shifting evasive tactics of the Chinese Government, would have made impossible anything but an agreement on the spot.[135]

If McKinley was the President who established sole-executive agreements as a reasonable instrument for conducting substantive foreign policy, Franklin Roosevelt was the one who brought them to the forefront of the United States' foreign affairs toolbox.[136] Beginning in 1933 with an agreement formally recognizing the Soviet Union, and extending through the war years to agreements at the conclusion of the conferences at Cairo, Tehran, and Yalta, President Roosevelt's administration seemed at times to have virtually replaced the treaty with the executive agreement.

Though the institution of the executive agreement was thus firmly established as an implement of foreign policy as early as the presidency of McKinley, the courts had been hesitant well into the 20th century to grant executive agreements the deference in domestic affairs enjoyed by formal treaties.[137] However, in 1937, Justice George Sutherland, writing for the Court in *U.S. v Belmont*, proclaimed a new understanding: executive agreements were supreme over state law to the same extent as treaties ratified by the Senate.[138] Justice Sutherland wrote:

> And while this rule [supremacy] in respect of treaties is established by the express language of clause 2, article 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

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[135] WESTEL WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES. 470 (1910).

[136] *See* THE CONSTITUTION: ANALYSIS *supra* note 105, at 525.

[137] *See e.g.* Four Packages of Cut Diamonds v. U.S. 256 F. 305, 306 (1919) ("such conventions are not treaties...").

[138] *See* U.S. v. Belmont, 301 U.S. 324 (1937).

> 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.[139]

The Supreme Court reiterated this position five years later in *U.S. v. Pink*.[140] The Court declared "state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement."[141] The equivalence of treaties and executive agreements in all spheres was now established. All that seems to determine the form in which a particular international compact will enter U.S. law is whether the President chooses to seek the advice and consent of the Senate and proclaim it a treaty, or chooses simply to declare an executive agreement instead.[142]

5 – The Bricker Amendment

With World War II drawing to a close, the country was ready to start worrying about the ongoing expansion of the federal treaty power.[143] *Pink* had been decided as recently as 1942, and the founding of the United Nations in 1945 brought the spectre raised by *Holland* to the forefront at last.[144] As Frank Holman, then-president of the American Bar Association, said in 1948, his concern was "to save America ... to protect American rights against treaty law ... [and] to [put] a stop to the past, present and any future State department or government giving America away."[145] This speech was the first salvo in

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[139] *Id.*, at 331.

[140] *See* U.S. v. Pink, 315 U.S. 203 (1942).

[141] *Id.*, at 230–31.

[142] *See* McDougal *supra* note 98.

[143] *See* Davies *supra* note 1, at 156-57.

[144] *See id.*

[145] *Id.*, at 157 (quoting Sept. 1948 speech of Frank Holman to the California Bar Association.).

what would quickly become the Bricker amendment movement, and although the proposed amendment bore Senator Bricker's name, the ongoing influence of Frank Holman on its development should not be underestimated.[146]

The specific treaty power-related concerns of the day, given voice by Holman, Bricker, and many of their compatriots, broke down into two general categories. The first was the that *Holland* doctrine might allow the treaty power to be used to legislate in areas not delegated to federal government by the Constitution, and, if so, that the doctrine might allow a treaty to abridge or amend the Constitution in even more significant ways.[147] The second was the even-more unsettling concern that the same might be accomplished by the President acting alone, through a sole-executive agreement, without even the necessity of receiving any form of consent from the legislature.[148]

If these fears were not scary enough in the abstract, the post-war geopolitical climate provided some very real windmills for Brickerites to tilt at.[149] As Senator Everett Dirksen proclaimed, "We are in a new era of international organization. They are grinding out treaties like so many eager beavers which have effect upon the rights of American citizens."[150] Senator Bricker himself set his sights on the nascent UN, declaring, "There is hardly a phase of human activity which some UN agency or

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[146] *See* Davies *supra* note 1, at 153–83.

[147] *See id.*

[148] *See id.*

[149] *See id.*

[150] *Id.*, at 154 (quoting Everett Dirksen from *Time*, 13 July 1953, p. 20.).

commission is not seeking to regulate."[151] John Davies observes in his biography of Senator Bricker that Bricker's supporters "believed that ratification of proposed United Nations covenants on human rights, labor, and genocide could force upon American society socialized medicine, mandatory unionization, and racial desegregation."[152]

Senator Bricker's fears, if slightly exaggerated, were sufficiently dramatic to draw substantial support from both sides of the aisle, and from all parts of the country.[153] His supporters had real cause for concern.[154] In 1950, a California appellate court handed down a ruling in the case of *Sei Fujii v. State* that claimed the racial-equality provisions in the recently-ratified UN Charter, a duly-ratified treaty, superseded a state law restricting the property ownership rights of Japanese aliens.[155] Bricker and Holman's fears were coming true already. Crisis was averted when the California Supreme Court overturned the ruling, holding that the UN Charter was not self-executing, and thus could not have any effect on state law without an affirmative act by Congress.[156] This narrow victory probably did little assuage the anxiety of Bricker's camp.

Senator Bricker introduced an initial version of his amendment at the start of the 83rd Congress, without first consulting with Frank Holman.[157] The ABA president responded with his own version, drafted by the ABA's Committee on Peace and Law, and

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[151] *Id.*, at 154 (quoting John Bricker from *Address to the New York Railway Club*, 16 April 1953, Box 94, JWBP).

[152] *Id.*, at 154.

[153] *Id.*, at 153.

[154] See Sei Fujii v. State, 217 P.2d 481 (Cal. Ct. App. 1950) *vacated*, 242 P.2d 617 (1952).

[155] *Id.*, at 488.

[156] Sei Fujii v. State, 242 P.2d 617 (instead, invalidating the statute on 14th amendment grounds)

[157] Davies *supra* note 1, at 158–59.

soon the measure before the Senate was amended to include a compromise between the two.[158] The language of the Bricker Amendment, at this point, consisted of three sections:

> Section 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.
>
> Section 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty.
>
> Section 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.[159]

This language represented a simple combination of the basic positions of Bricker and Holman.[160] The third section addressed the primary concerns of Senator Bricker, curtailing the burgeoning power of the executive to conclude international agreements on its own initiative.[161] The second was the darling of Frank Holman.[162] It would have operated simultaneously to make all treaties non-self-executing and to close the 'loophole' through the supremacy clause created in *Holland*. Bricker, though, was concerned that the language of this section was over-broad, and that it would be an obstacle to the amendment's passage.

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[158] *Id.*

[159] *Id.,* at 161-162. (quoting Reprint of Senate Joint Resolution 1, 83rd Cong. 1st sess., Box 91, JWBP.).

[160] *Id.*, at 162.

[161] *Id.*

[162] *Id.*

President Dwight Eisenhower adamantly opposed the Bricker amendment through its entire legislative history, particularly Section 2.[163] Eisenhower believed that the Bricker amendment would cripple the President's ability to conduct an effective foreign policy.[164] Nevertheless, because of the amendment's extreme popularity, especially within his own party, Eisenhower's campaign against the Bricker amendment was conducted primarily behind the scenes, assisted quite adeptly by none other than Senate minority leader Lyndon Johnson.[165]As Eisenhower's resistance began to take its toll, Senator Bricker engaged in several discussions with the administration over dropping the pesky 'which' clause from the second section, but Frank Holman would not allow it.[166] Unable to risk losing Holman's support, Bricker ultimately refused to compromise.[167]

In response, Johnson arranged for a "less-drastic" substitute amendment to be introduced into the Senate by Senator Walter George.[168] The George amendment dropped the 'which' clause and folded the section concerning executive agreements into the other two:

> Section 1. A provision of a treaty or other international agreement which conflicts with this Constitution shall not be of any force or effect.

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[163] *See id.*, at 153–83.

[164] *Id.,* at 155.

[165] See id, at 155, 157, 162–63, 166, 174–75, 180, 182.

[166] *Id.*, at 168.

[167] *Id.,* at 172.

[168] *Id.*, at 174.

> Section 2. An international agreement other than a treaty shall become effective as internal law in the United States only by an act of the Congress.[169]

This more moderate proposal seriously undercut Bricker's support in the Senate. After much legislative wrangling, Senator Bricker's original proposal was defeated, and he turned his attention to salvaging the George substitute, which Senator George graciously declared should still be referred to as the "Bricker amendment."[170] Nevertheless, in the final tally even this compromise version was defeated, and the era of the Bricker amendment lapsed quietly into history.[171]

It is clear that the Bricker amendment was seen as a major reworking of the constitutional understanding of the foreign relations power.[172] However, it is not quite so evident that the amendment would have accomplished precisely what its drafters intended, or that such a reform was entirely necessary.[173] For example, it is unlikely that the first section of either Bricker's or George's version of the amendment would have altered constitutional interpretation of the treaty power at all.[174] In the very case this section seemed most directly to address, the Supreme Court argued that the treaty in question, and the related act of Congress, gained its authority through the relevant provisions of the Constitution, not in derogation of them.[175] Not only would this section

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[169] *Id*., at 175.

[170] *Id.,* at 180.

[171] *See* discussion *supra* Introduction.

[172] *See* Davies *supra* note 1, at 161.

[173] *See id*., 191-92; *see* Reid v. Covert, 354 U.S. 1 (1957).

[174] *See, e.g.* Missouri v. Holland, 252 U.S. 431; U.S. v. Belmont, 301 U.S. 324; U.S. v. Pink, 315 U.S. 203 (in each case, Court considered expansive treaty power to be *within* Constitution).

[175] *supra* note 174.

on its own have accomplished little[176], the later sections do not seem to rely on it to achieve their own ends.

The second section of Bricker's version, the one championed by Holman over Bricker's concerns, would decidedly have had noticeable effect. For one, this section would have peremptorily determined all treaties to be non-self-executing, putting to rest the debate started by Justice Marshall in 1829.[177] The domestic effects of this amendment on the existing body of self-executing treaty law not separately enacted by Congress would be difficult to predict or imagine.[178] Additionally, the 'which' clause in this section would summarily close the door on the ability of treaties to override state law in their own right, rendering forever impossible such exigent legislation as Justice Holmes imagined in his opinion in *Holland*.[179] That this would protect the states from the abuses of a runaway federal foreign policy seems self-evident. However, it would also subject the United States to countless risks of international opprobrium (as occurred in the events surrounding *Medellin v. Texas*) when State intransigence prevents the federal government from carrying out its international obligations as established by a duly-ratified treaty.[180]

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[176] STEPHEN AMBROSE, EISENHOWER, VOLUME 2: THE PRESIDENT. 68 (1984) (Eisenhower considered the Bricker amendment "an addition to the Constitution that said you could not violate the Constitution.").

[177] See discussion supra Part 2 – The Doctrine of Non-Self-Execution

[178] The amendment does not suggest a purely prospective application, so one would assume all prior self-executing treaties would suddenly become void in domestic law upon its ratification.

[179] *See supra* note 92.

[180] *See generally* Medellin v. Texas, 552 U.S. 491 (2008). (discussing ICJ ruling that U.S. had violated Vienna Convention on Consular Relations.).

Bricker's third section, and George's second, would both have operated on executive agreements in approximately the same way.[181] It is unlikely that either version would have prevented the President from continuing to use executive agreements in foreign negotiations, as the authority of the President to bind the United States in the international community arises from the international customary law and the Vienna Convention on the Law of Treaties, which grants the head of state plenary authority to conclude treaties.[182] Both would nevertheless have prevented executive agreements from having domestic effect without the approval of Congress.[183] This restriction would not have any effect on congressional-executive agreements, as Congress would have by definition already acted to approve those agreements by the time they were consummated.[184] Similarly, executive agreements authorized by treaty would likely escape as well, as their power could be seen as emanating from that of the prior treaty, already duly ratified.[185] Only sole-executive agreements, it turns out, would actually be implicated by this amendment. Automatically binding on the U.S. in the international arena,[186] they would explicitly require a ratifying act to become binding in U.S. domestic law.[187]

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[181] That is, George's version would have made sole-executive agreements always non-self-executing. Bricker's version would have allowed Congress to declare sole-executive agreements to be non-self-executing, but would not have had that automatic effect.

[182] *See* discussion *supra* Part 4 – The Rise of Executive Agreements.

[183] *See* discussion *supra* Part 5 – The Bricker Amendment.

[184] *See* discussion *supra* Part 4 – The Rise of Executive Agreements.

[185] *See id.*

[186] *See id.*

[187] See Davies supra note 1, at 162.

6 – The Treaty Power in a World After Bricker

The Bricker amendment movement can be seen as trying to accomplish three specific things: requiring all treaties to be interpreted as non-self-executing, preventing the treaty power from being used to extend or modify the grants and protections of the Constitution, and restricting the ability of the President to legislate domestically via the sole-executive agreement. But the failure of the Bricker amendment itself to achieve these aims was followed by several decades of evolving constitutional jurisprudence and executive practice in which nearly all of these goals came to be realized in one form other.[188]

Less than a year after the defeat of the Bricker amendment, in fact, the United States Court of Claims handed down an important pro-Bricker ruling.[189] This case, *Seery v. U.S.*, concerned a petition by a citizen of the United States to recover damages to her property in Austria, on 5th Amendment grounds, which had been seized for use as an officers' club by the United States armed forces.[190] The government contended in *Seery* that the claim was barred by an executive agreement between the United States and Austria purporting to settle all claims against the United States incurred in Austria during that time.[191] The court disagreed, holding that Seery's 5th Amendment claim was not impaired by that agreement.[192] The court declared that "Whatever may be the true doctrine as to formally ratified treaties which conflict with the Constitution, we think

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[188] *See* discussion *infra* this Part, concerning Seery v. U.S., Reid v. Covert, U.S. v. Guy W. Capps, Inc., and Medellin v. Texas.

[189] *See* Seery v. U.S., 127 F. Supp. 601 (Ct. Cl. 1955).

[190] *Id.*, at 602–03.

[191] *Id.,* at 605–06.

[192] *Id.*, at 606.

that there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair Constitutional rights."[193]

Two years later, the same question concerning full-fledged treaties was decided by the Supreme Court.[194] In *Reid v. Covert,* the Court was confronted with a petition for habeus corpus filed by the civilian wife of an American military officer stationed in the United Kingdom, who was being prosecuted for murder under the Uniform Code of Military Justice, as stipulated in the Status of Forces agreement concluded between the United States and the United Kingdom.[195] Writing for the Court in broad, sweeping language, Justice Black declared:

> There is nothing in this [supremacy clause] language which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution. Nor is there anything in the debates which accompanied the drafting and ratification of the Constitution which even suggests such a result ... It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.[196]

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[193] *Id.*

[194] Although an executive agreement was implicated in *Reid*, it was made under authority of a prior treaty. Additionally, the Court phrased its holding in language so broad as to include treaties in its scope, even if the agreements in *Reid* had had no treaty basis.

[195] *See* Reid v. Covert, 354 U.S. 1 (1957).

[196] *Id.*, at 16–17.

This opinion would seem to have limited the doctrine created by Justice Holmes about as far as it could possibly be taken without actually overturning *Holland*.[197] At the very least, *Reid* and *Seery* certainly established the precedent that the protections of the Bill of Rights were beyond the reach of treaties to abridge, whatever else they might be able to do in domestic affairs.[198]

In only a few years the courts had already all but satisfied one of the main concerns of Bricker's legacy: protecting the Constitution from the runaway treaty power. In that time, the courts had also taken a stab at another of Bricker's remaining issues: restricting the domestic authority of sole-executive agreements.[199] In *U.S. v. Guy W. Capps, Inc.*, ruling on the validity of a contract made pursuant to an executive agreement between the United States and Canada, the Fourth Circuit Court of Appeals declared, "We think, however, that the executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related."[200] The Supreme Court upheld this decision on unrelated grounds, and did not consider the validity of the executive agreement.[201] While obviously not conclusive, some precedent had at least been set for restricting the domestic influence of sole-executive agreements. The only goal of the Bricker

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[197] *But see* U.S. v. Bond, 681 F.3d 149, 162 (3d Cir. 2012) (quoting Reid v. Covert, 354 U.S. 1 ("To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.")).

[198] There seems to be a grey area between that which *Holland* has explicitly allowed, and that which *Reid* and *Seery* have explicitly forbidden—that is, treaty-empowered legislation that reaches beyond the traditional powers of Congress but does not impinge on the protections of the Bill of Rights. It is not clear what the current state of the law is in this area. *See* discussion *infra* related to U.S. v. Bond and Fries v. U.S.

[199] *See* U.S. v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953) *aff'd*, 348 U.S. 296 (1955).

[200] *Id.*, at 658.

[201] *See* U.S. v. Guy W. Capps, Inc. 348 U.S. 296 (1955).

amendments remaining unaddressed into the 1960s, therefore, was for all treaties to be non-self-executing.

In light of the victories in *Reid*, in *Seery*, and in *Guy W. Capps, Inc.*, this last would seem to be the least important of the Bricker goals. Nevertheless, over the latter half of the 20th century, its proponents would gain at least some comfort, interestingly enough, not from a decision of the judicial branch, but from the developing practices of the executive.[202] Noted scholar of international law and former president of the American Society of International Law Louis Henkin describes how the United States has adopted the practice of appending to various UN human rights-related conventions a standard package of reservation, explicitly limiting the ways in which these treaties may affect domestic law.[203] Specifically, these reservations include the declaration that each treaty is to be considered non-self-executing.[204] The reservations that Henkin describes also include statements to the effect that the United States will not be bound to carry out treaty obligations found to be in violation of the Constitution, and the implementation of the treaty terms will be left as much as possible up to the States.[205] With the policy of attaching these reservations, the last of the Bricker goals has at least partially been met. Of course, the federal government is certainly not committed to attaching these reservations to every treaty it negotiates, nor to continuing the practice indefinitely. Regardless, Henkin's observations constitute a profound statement by a post-Bricker

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[202] *See* Louis Henkin, Editorial Comment, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int'l L. 341 (1995); *see* Vazquez *supra* note 54, at 706–07.

[203] Henkin *supra* note 202, at 341.

[204] *Id.*, at 341, 346–48.

[205] *Id.,* at 341, 345–46.

executive branch that is committed to avoiding the possibility of litigation in the federal courts concerning the precise nature of the grey area left open between *Holland* and *Reid*.

A recent Supreme Court case established this doctrine a little more firmly. In 2008, the Court handed down a ruling in *Medellin v. Texas* that implied that treaties are to be considered non-self-executing unless they explicitly purport to be otherwise.[206] This new doctrine, that the default status of a treaty is non-self-executing, was a substantial break from the understanding of the Framers (who considered all treaties to be self-executing) and the regime of *Foster* (in which Chief Justice Marshall considered treaties to be self-executing by default unless by their language they made themselves otherwise),[207] and a minor victory for modern-day Brickerites.

21st century jurisprudence has not all been pro-Bricker, however, and the constitutional supremacy of treaties is not dead.[208] In *U.S. v. Bond*, the Third Circuit Court of Appeals considered the conviction of a Pennsylvania woman for violation of the Chemical Weapons Convention Implementation Act of 1998.[209] Following *Holland*, the court argued in May of 2012 "that 'there can be no dispute about the validity of [a] statute' that implements a valid treaty,"[210] and thus concluded its inquiry must be confined to the question of "whether the Act goes beyond what is necessary and proper

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[206] Medellin v. Texas, 552 U.S. 491 ("While a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty itself conveys an intention that it be "self-executing" and is ratified on that basis.").

[207] *See* discussion *supra* 2 – The Doctrine of Non-Self-Execution.

[208] See, e.g. U.S. v. Bond, 681 F.3d 149, 151 (3d Cir. 2012).

[209] *Id*.

[210] *Id*., at 153 (citing Missouri v. Holland, 252 U.S. at 432).

to carry the Convention into effect."[211] Bond's petition for certiorari is currently pending before the Supreme Court.

Additionally, as recently as August 27, 2012, the United States District Court for the District of Arizona elected to follow *Bond*.[212] The court, ruling on a motion to dismiss for lack of subject-matter jurisdiction in *U.S. v Fries*, declared that "the statute is constitutional pursuant to the federal government's Treaty Power under Article II, § 2 of the United States Constitution in conjunction with the Necessary and Proper Clause, Article I, § 8."[213] These are certainly heady times. As these cases make their way through the court system, there is the distinct possibility that the Supreme Court will hand down a ruling within the next few years clarifying the gulf between the doctrines of *Holland* and *Reid*, if not at least partially overturning one or the other.

7 – Conclusion

The two and a half centuries since the founding of the United States have seen a number of important jurisprudential shifts in the understanding of the treaty power. While the Framers may have originally intended all treaties to be self-executing—in that they would automatically become the supreme law of the land by virtue of the supremacy clause—the early 1800s saw the creation of the view that some treaties were non-self-executing if their language indicated as much.[214] These treaties would not affect

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[211] *Id.,* at 162.

[212] *See* United States v. Fries, 2012 WL 3704684 (D. Ariz. Aug. 28, 2012).

[213] *Id.*

[214] *See* discussion *supra* Part 2 – The Doctrine of Non-Self-Execution.

domestic law unless Congress passed legislation implementing their terms.[215] This doctrine developed and expanded in numerous forms, until in 2008 the opposite position became the norm—treaties are now non-self-executing unless they somehow indicate a positive intent to operate directly.[216]

At the same time, the institution of executive agreements—that is, agreements with foreign nations made without the ratification of two-thirds of the Senate—grew from practically nothing and came to virtually eclipse treaties in the field of U.S. foreign policy.[217] The Constitution makes no specific mention of non-treaty international agreements, but early Congresses soon began authorizing the President to make various minor agreements with foreign nations, particularly concerning trade, under some theoretical mixture of the powers of the legislature and the executive.[218] The President proceeded to enter into increasingly more agreements premised on the authorization of prior treaties, and before long on his own authority as the "sole organ" of foreign policy.[219] The Supreme Court initially held up even these sole-executive agreements as enjoying the same domestic supremacy as treaties, but more recently lower federal courts have started to carve out exceptions to that blanket rule.[220]

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[215] *See id.*

[216] *See id.*; *also see* discussion *supra* Part 6 – The Treaty Power in a World After Bricker.

[217] *See* discussion *supra* Part 4 – The Rise of the Executive Agreement.

[218] *See id.*

[219] *See id.*; *also see* U.S. v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (discussing the role of the President as the "sole organ" of foreign policy.).

[220] *See* discussion *supra* Part 4 – The Rise of the Executive Agreement; *see* discussion *supra* Part 6 – The Treaty Power in a World After Bricker.

Possibly of greatest significance, however, is the evolution of the understanding of the supremacy clause.[221] Hamilton considered the supremacy clause the be an unnecessary statement of obvious fact.[222] Early jurists interpreted it to roughly equate treaties with federal statutes in terms of their domestic scope and influence.[223] In *1920,* Chief Justice Holmes interpreted it to give treaties power to extend additional grants of legislative authority to Congress.[224] In 1957, Justice Black restrained that power, at least as far as derogating the Bill of Rights is concerned, and possibly much farther.[225] Nevertheless, several cases making their way through the federal court system today follow Holmes's doctrine,[226] and it remains to be seen whether the Supreme Court will speak decisively on any of them in the next few years.

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[221] *See* discussion *supra* Part 1 - The Framing of the Treaty Power; *see* discussion *supra* Part 3 – The New Regime of *Missouri v. Holland*; *see* discussion *supra* Part 6 – The Treaty Power in a World After Bricker.

[222] *See* discussion *supra* Part 1 - The Framing of the Treaty Power;

[223] *See id.*

[224] *See* discussion *supra* Part 3 – The New Regime of *Missouri v. Holland.*

[225] *See* discussion *supra* Part 6 – The Treaty Power in a World After Bricker.

[226] *See id.*