

International Law and United States Law

[Reprint of Chapter 6, *Treaties as Law of the Land*]

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6 Treaties as the Law of the Land

The supreme law of the United States of America is the Constitution, and this supremacy has been accepted for most of the life of the Republic. If the Constitution generally incorporated public international law as supreme law, binding upon all government actors, then much of this book would be unnecessary. The Constitution does not do so, however. The reasons for not doing so are rooted in the core principles of our constitutional scheme: separation of powers and federalism.

If the Supreme Court could overturn actions of the President authorized by the statutes passed by Congress on the ground that the statute violates customary international law (or a very general treaty provision), then the balance of power between the politically accountable branches of the federal government and the unelected judiciary would be unduly tilted in the direction of the judiciary. Such a tilt in the domestic allocation of powers is not required by the international legal system, which enforces itself laterally—through each state’s self-interest in maintaining a system of binding obligations—regardless of which domestic institution has ultimate power in any particular state. So putting final authority for conforming to international law obligations in the political branches conforms simultaneously to constitutional and international law theory.

Also, if the federal government could accomplish by treaty an infringement of constitutionally-protected rights of the States of the Union, the fundamental compromise of federal and State power—contained in the Constitution and developed following the momentous events of the Civil War and the 1930’s Depression—could be undermined in a destabilizing way. Since no international law principle *requires* the United States to enter into treaties that infringe on the power of States of the Union, it is perfectly consistent with the international legal system for the United States to constitutionalize such restraint.

Thus there are substantial reasons—tied to the fundamental allocation of powers within our constitutional system—for our Constitution not to incorporate international law generally by reference. On the other hand, the Constitution *does* provide for the supremacy of treaties as law of the land: ‘all Treaties made, or which shall be made, under the Authority

of the United States, shall be the supreme Law of the Land'.¹ There are sound constitutional policies for this provision. Without it, it would be difficult for the federal government—the arm of the United States responsible for engaging in foreign relations—to enter into international obligations and thereby take advantage of the benefits of participating in the international legal system.

This is so for two reasons. The first relates to the separation of powers between the executive and the legislature in our constitutional system. Under the Constitution the President may enter into a binding international obligation without the approval of Congress. In many cases he needs the assent of two-thirds of the Senate, but this is of course different from consent of the House of Representatives. How can the President, with the consent of 2/3 of the Senate, enter into a treaty that obligates United States courts to decide matters in a certain way, if legislation were required from Congress to get U.S. courts to follow the treaty? The answer is that he could not—unless he had the consent of Congress, a consent that the Constitution does not require as part of the treaty-making process. So the Treaty Supremacy Clause has the domestic effect of making the Treaty Makers (the President plus 2/3 of the Senate) into legislators. Otherwise the Treaty Makers would be deprived of the power to enter into an important class of treaties without House of Representatives consent—those which require immediate enforceability of treaty provisions in the courts of the parties to the treaties. Such is by contrast *not* the case in a parliamentary system where the executive power is exercised by the head of the majority party in parliament (for instance, Great Britain).

Second, in a federal system the valid legislation of the federal government must be superior to that of political subdivisions. In this sense the supremacy of federal treaty 'legislation' to State legislation is warranted for the same reasons that federal congressional legislation is superior to State legislation. Under the international legal system, moreover, nations are responsible for the actions of political subdivisions. Without the Treaty Supremacy Clause, the federal government responsible for foreign relations would be deprived of the power to enter into an important class of treaties without the consent of the States—those treaties which require immediate enforceability of treaty provisions in the courts of political subdivisions of the parties to the treaties.

Over the years the courts of the United States have had to reconcile

1 U.S. CONST. art. VI, cl. 2.

the policies supporting the Treaty Supremacy Clause with the constitutional policies that militate against wholesale constitutional incorporation of international law by reference. In doing so, the courts have interpreted the Treaty Supremacy Clause, in light of the reasoning underlying the allocation of powers within our constitutional system, to contain the following eminently reasonable limitations:

1. Only 'self-executing' provisions of treaties are *ipso facto* law to be applied in court.
2. Statutes passed by the federal congress supersede previous self-executing treaty provisions as a matter of domestic law.
3. Although the power to make treaties is a free-standing federal power, there are constitutional limits on the content of treaties.

Moreover, the Supreme Court has used the policies underlying the Treaty Supremacy Clause to make the following inference:

4. Valid international agreements that are not subject to Senate approval ('executive agreements') are just as supreme as Treaties, subject to the same limitations.

These four principles, while sometimes difficult to apply, are nonetheless easily understood in concept. They reflect a careful balancing between the national interest in complying with internationally binding obligations and the interests protected by U.S. constitutional provisions for separation of powers, federalism, democracy, and individual rights.

Self-Execution

The doctrine that a treaty provision must be 'self-executing' in order for a court to apply it as controlling law has been the subject of elaborate scholarly analyses.² The theory is not all that difficult, however. Without such a limit, the unelected courts of the United States would have enormous power. Every vague, general, or 'good faith' obligation entered

2 *E.g.*, Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627 (1986); Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995).

into by the United States would become a warrant for the judiciary to prescribe law. It may be in the interest of the United States to enter into treaties that require work toward certain goals, or that practically require future steps toward implementation. Such treaties contrast with treaties under which the international responsibility of the parties turns on the immediate provision of rights within each party's jurisdiction upon entry into force of the treaty. In the former case, separation of powers concerns weigh strongly against giving courts the power to implement the treaty, since such implementation by definition requires the exercise of policy choices. Such policy choices within our system are best left to the political branches. In the latter case, the policy choices have largely been made by the Treaty Makers, and it is simply up to the courts to carry them out. When treaties make the international responsibility of the parties turn on the immediate provision of rights within each party's jurisdiction upon entry into force of the treaty, the interest of insuring U.S. compliance with its obligations, without the need of consent by the House of Representatives, requires that the court interpret and apply the treaty provision.

The foregoing policy analysis supports the conclusion that *a treaty is self-executing as a matter of United States law (i.e., the treaty provisions are applicable law in a United States court without implementing statutes) only if the treaty was intended, as a matter of international law, to stipulate the immediate creation of rights cognizable in domestic courts.*³

The question of whether a treaty provision is self-executing is an issue of *domestic* law even though the (United States constitutional law) issue turns on the (international law) content of a treaty.⁴ For instance, a treaty might require that certain types of emissaries be immune from certain types of civil suits.⁵ Country A, with a domestic law system that admits of *no* self-executing treaties, could accede to the treaty, and comply by passing legislation to establish the immunity. The United States could accede to the same treaty, and Article VI of the Constitution would

3 I am indebted here to Professor Riesenfeld for his particularly clear explanation of the proper touchstone for whether a treaty is self-executing in the United States. Stefan Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892, 896-97, 900-01 (1980).

4 The following three paragraphs repeat the explanation in John M. Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447, 462-64 (1987).

5 See, e.g., Vienna Convention on Diplomatic Relations, April 18, 1961, art. 31(1), 23 U.S.T. 3227, 500 U.N.T.S. 95.

automatically make the immunity enforceable in court.⁶ Such automatic applicability is desirable in a constitutional system such as ours where the treaty-making power (President plus 2/3 of the Senate) is distinct from the law-making power (majority of two Houses, subject to Presidential veto).

On the other hand, a second treaty might require each contracting state 'to take such measures as may be necessary to establish its jurisdiction over' certain criminal offenses.⁷ Country B might conceivably have a domestic system in which courts can define criminal jurisdiction without legislative action. In country B further legislation may not be required to comply with the treaty. In the United States, however, compliance with the international treaty obligation would require legislation, and to this extent the treaty is clearly not self-executing as a matter of domestic law.⁸

Thus the question of whether a treaty is self-executing as a matter of United States law may *depend* on the nature of the international obligation. This is not to say, however, that whether a treaty is self-executing depends upon whether other countries intend that it be self-executing in their countries as well.⁹ Country A intends that treaty #1 not be self-executing, but the treaty is nonetheless clearly self-executing in the United States. Country B intends that treaty #2 be self-executing, but that treaty is nonetheless clearly *not* self-executing in the United States.

6 The self-executing nature of the Vienna Convention on Diplomatic Relations, *supra* n. 5, is incontrovertible insofar as the United States is concerned, in view of subsequent federal legislation extending its provisions to diplomats of non-parties to the convention, without expressly implementing the convention with respect to diplomats of states parties. 22 U.S.C. § 254b (1994).

7 See, e.g., International Convention against the Taking of Hostages, Dec. 17, 1979, art. 5, T.I.A.S. No. 11081, 1316 U.N.T.S. 205, 18 INT'L L. MATLS. 1458.

8 Congress and the President clearly considered the provision for the establishment of criminal jurisdiction in the International Convention against the Taking of Hostages as not being self-executing. The President informed Congress that he would not submit the instrument of ratification until legislation had been passed establishing the criminal jurisdiction required by the convention. 20 WEEKLY COMP. PRES. DOC. 590, 592 (1984).

9 The Fifth Circuit in *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979), in contrast assumed that since some states party to the Convention on the High Seas had *domestic* law systems in which treaties are *not* self-executing, the treaty could not have been intended by the parties to be self-executing. This reasoning ignores the relevant inquiry: whether the parties have obligated themselves to provide immediate court-enforceable rights to individuals, not whether the parties expect the particular obligation to apply domestically without further legislation. See John M. Rogers, *Prosecuting Terrorists: When Does Apprehension in Violation of International Law Preclude Trial?*, 42 U. MIAMI L. REV. 447, 463-65 (1987).

Thus it was that in the early days of our Republic, Chief Justice Marshall decided two cases in which the question of whether one provision in a treaty between Spain and the United States determined law for the Supreme Court of the United States to apply.¹⁰ Marshall came to differing conclusions on this issue with respect to the identical treaty provision. Reconciling the two decisions can give us insight into the nature of the distinction between a treaty provision that is self-executing in the United States, and one that is not.

When Spain ceded Florida to the United States, the treaty of cession provided that

all the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty.¹¹

The case of *Foster and Elam v. Neilson*¹² involved some land in what is now Eastern Louisiana. Foster and Elam claimed through a chain of title to a purchase confirmed by the King of Spain in 1804 and 1805. Neilson challenged their title on the theory that the land was part of the 1803 Louisiana Purchase from France, therefore already under U.S. jurisdiction in 1804, and thus not included in the Florida territory ceded by Spain to the United States in 1819. Counsel for the parties primarily debated whether certain territory (what is now the Gulf Coast of Alabama, Mississippi, and the part of Louisiana east of the Mississippi) was obtained by the United States from France in 1803 or only later from Spain in 1819 (the argument of Daniel Webster for the latter position is particularly lucid).¹³ Chief Justice Marshall, however, found the issue to be a political question and deferred to the assertions of power over the territory by the President and Congress prior to 1819.¹⁴

This conclusion did not altogether dispose of Foster and Elam's claim, however, since the 1819 treaty with Spain could be interpreted to

10 *Foster and Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

11 *Treaty of Amity, Settlement, and Limits*, Feb. 22, 1819, U.S.-Spain, 8 Stat. 252.

12 27 U.S. (2 Pet.) 253 (1829).

13 *Id.* at 255-97 (1829) (arguments of counsel).

14 *Id.* at 309.

require *post hoc* U.S. recognition of Spanish grants during the period even though the United States had claimed the territory at the time of the grants. This issue was difficult and divided the Court,¹⁵ but Chief Justice Marshall avoided the issue. Instead he achieved a unanimous opinion by finding a requirement that Congress must ‘execute’ the 1819 treaty provision before it could become a rule for the court.¹⁶ Marshall’s reasoning in support of this conclusion has a formalistic, even circular, character:

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. 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.¹⁷

Since all treaties presumably involve some sort of contract-like exchange of reciprocally beneficial promises, it is hard to see how the criterion of whether a treaty term ‘imports a contract’ tells us much about whether the term requires legislative implementation.

Substance to the distinction can easily be inferred, however, from the examples that Marshall goes on to give of how self-executing language differs from non-self-executing language:

The article under consideration does not declare that all the grants made by His Catholic Majesty before the 24th of January, 1818, shall be valid to the same extent as if the ceded territories had remained under his dominion. It does not say that those grants are hereby confirmed. Had such been its language, it would have acted directly on the subject, and would have repealed those Acts of Congress which were repugnant to it; but its language is that those grants shall be ratified and confirmed to the persons in possession, &c.¹⁸

Marshall noted that Congress did proceed to implement the treaty, but not with respect to the territory that it had claimed prior to 1819 under the

15 *Id.* at 310-13.

16 *Id.* at 314.

17 *Id.*

18 *Id.* at 314-15.

Louisiana Purchase.¹⁹

The second case, *United States v. Percheman*, involved land in eastern Florida (i.e., land that the United States could not have claimed under the Louisiana Purchase), that Percheman claimed under an 1815 Spanish grant.²⁰ The Supreme Court affirmed a territorial court order confirming ownership in *Percheman*, and rejected various technical and jurisdictional arguments of the United States. In doing so, the Court overruled its previous holding that the treaty provision in *Foster and Elam* was not self-executing.²¹ The key language in the Spanish version of the treaty, which the Court had not been made aware of in the earlier case, was somewhat different, and this changed Marshall's reading of the treaty:

we now understand that the article, as expressed in [Spanish] is that the grants 'shall remain ratified and confirmed to the persons in possession of them, to the same extent, &c', No violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other. Although the words 'shall be ratified and confirmed' are properly the words of contract, stipulating for some future legislative act, they are not necessarily so. They may import that they 'shall be ratified and confirmed' by force of the instrument itself. When we observe that in the counterpart of the same treaty, executed at the same time by the same parties, they are used in this sense, we think the construction proper, if not unavoidable.²²

The bottom line for John Marshall is that the following formulations *are* self-executing:

grants made by X *shall be valid* to the same extent as if the ceded territories had remained under his dominion

grants made by X are hereby confirmed

grants made by X *shall remain ratified and confirmed* to the persons in possession of them, to the same extent as if the ceded territories had remained under his dominion

19 *Id.* at 315-17.

20 32 U.S. (7 Pet.) 51, 53-59 (1833).

21 *Id.* at 88-89.

22 *Id.* at 88-89.

whereas the following formulation is *not* self-executing:

grants made by X *shall be ratified and confirmed [by the United States]* to the persons in possession of the lands, to the same extent as if the ceded territories had remained under his dominion

Of course in all of these formulations there is an obligation on the part of the United States. So it does not mean much to say that the first three formulations do not ‘import contract’. It is rather the *nature* of the international obligation imposed that makes the difference. The first three imply present recognition or acceptance, and immediate applicability. Further decisions on the part of the party to the treaty are not necessary in order to carry out the requirement. Stated differently, there is little discretion as to *how* the obligation will be carried out.

In contrast, the last formulation (i.e., the original reading in *Foster and Elam*) contemplates future policy-making on the part of the United States in carrying out its obligation. Otherwise there would be no purpose in not requiring instant recognition and acceptance of the grants upon entry into force of the treaty. Of course upon reconsideration Chief Justice Marshall found that the parties *did after all* intend confirmation as of entry into force.

The distinction is easily justified upon separation-of-powers grounds within the U.S. constitutional scheme. If future policy-making is contemplated in the implementation of general treaty obligations, it ought to be the legislature and not a court that makes such policy. If there is room for exercise of significant discretion in determining *how* to comply with a treaty obligation, again it ought to be the legislature and not a court that exercises the discretion. This concern is absent when the treaty provision adequately defines the present legal status of persons and property. Then the court is carrying out policy determined by the treaty-makers, rather than determining policy like a legislature.

Marshall’s rather sharp drawing of the line may have an artificial cast to it, but the line is substantively supported by constitutional principle. If the parties to the treaty contemplated the exercise of significant discretion in the way that the obligation to recognize the grants would be carried out, this would be reflected in language that obligated the United States to take steps to carry out the obligation. The same contemplated exercise of discretion *within our constitutional system* should be exercised by the political branches. If the parties to the treaty contemplated no exercise of significant discretion in the way that the obligation to recognize the grants would be carried out, this would be reflected in language that obligated the

United States to recognize and accept the grants immediately upon entry into force of the treaty. Such recognition should obtain in court *within our constitutional system* without the necessity of action by the U.S. House of Representatives.

Some scholars have argued that there is no constitutional basis for concluding that some treaties are not self-executing.²³ The argument leads to a constitutional absurdity. If all treaties are self-executing in the United States, regardless of how much discretion is retained by the parties as to how the obligations will be carried out, then the Constitution would be read to provide the following anomaly. Every time the United States wanted to retain some choice as to how to comply with a promise, it would have to place that choice in the courts rather than in the legislature or the President.

Let us say that the United States, for instance, agrees to reduce the tariff on one of three products. Or the United States agrees to allow a 10% increase in the number of immigrants from the other state. Certainly the United States must be constitutionally empowered to enter into such obligations, reserving the discretion to decide later which product will get the reduced tariff, or which additional applicants for immigration will be admitted. Yet deciding which product should be taxed, or which class of immigrants should be admitted, is quintessentially a legislative determination within our constitutional system. It is inconsistent with the structure of our constitutional scheme to require that such a decision be made by the courts, yet an interpretation of the Treaty Supremacy Clause to the effect that all, or virtually all, treaties are self-executing would effectively do just that.²⁴ An importer of one of the three products would argue, for instance, that she was entitled to the reduced tariff. She might be, but a decision has to be made as to which product gets the reduction. It is clearly a decision for the political branches. The Congress must legislate the decision, or delegate it to the Executive. Requiring the court

23 See JORDAN PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 51-64 (1996). Professor Paust argues that the doctrine of non-self-executing treaties requires belief in 'one of the most transparent of judicial delusions'. *Id.* at 55.

24 Professor Paust argues that all treaty terms are self-executing in the United States except those that 'require domestic implementing legislation or seek to declare war'. Paust, *supra* n. 23, at 64. He makes the reasonable argument that the Treaty Makers are not precluded from legislating, by self-executing treaty provision, with respect to matters simply because Congress also has the power to legislate with respect to the same matters. *Id.* at 59-62. See p. 97, *infra*. But Professor Paust does not deal with the real problem raised by treaty provisions that reserve options to the states parties—giving too much power to the judiciary under the U.S. system of separation of powers.

to do it makes no sense. Even if it did make sense in some contexts to confer policy-making discretion of this type upon the judiciary, it can hardly have been contemplated by the Framers that the courts always have the power to exercise the discretion whenever an international obligation reserves discretion in how it is to be implemented.

A rather accurate proxy for the reservation of discretion by the United States as a party to a treaty is the lack of immediacy of obligated legal effect. An obligation bestowing legal consequences or capacities on persons or property *immediately* upon entry of the treaty into effect is inherently less likely to be an obligation with respect to which significant policy-making power is reserved. An obligation on the other hand that requires future steps toward a goal clearly contemplates that there may be more than one path toward the goal. *In both cases, it should be remembered, there is an international obligation.* But in the latter, unlike the former, legislation is necessary so that the Congress can make the political decisions as to how to implement the treaty, within the range of discretion permitted by the treaty.

Looked at this way, the doctrine of non-self-executing treaties is perfectly understandable. It preserves the flexibility of the U.S. Treaty Makers to enter into different types of obligations. It is consistent with the responsibility of the United States to comply with its obligations under the international legal system. It preserves the power of the Treaty Makers to legislate where necessary without the participation of the House of Representatives, yet keeps the legislative power from the courts, where it does not conceptually belong in our system.

A well-known, though sometimes criticized, decision of the California Supreme Court reflects the distinction nicely.²⁵ The case involved a California statute that with certain exceptions precluded aliens from owning land. An alien challenged the statute as violative of UN Charter articles 55 and 56, as well as under the 14th Amendment of the U.S. Constitution. The California high court found articles 55 and 56 of the UN Charter not to be self-executing. The court recognized that some provisions of the UN Charter *were* self-executing,²⁶ those that provided that 'The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the

25 Sei Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952) (Supreme Court of California, in Bank). See Paust, *supra* n. 23, at 74, referring to the case as 'infamous' and the opinion as 'old.'

26 242 P.2d at 621.

fulfillment of its purposes²⁷ and that ‘The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes’.²⁸ But the obligations in Articles 55 and 56—to ‘take . . . action . . . for the achievement of . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion’²⁹—were found not to be self-executing.

The California high court reasoned that ‘it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the charter’.³⁰ More to the point, it could easily be said that there are many ways in which fundamental freedoms can be achieved, and within our constitutional system it is not up to the courts to decide *how* such treaty objectives are to be achieved. This contrasts with the courts’ responsibility to decide how to achieve freedoms under the U.S. Constitution. The California high court saw the contrast clearly, and proceeded to invalidate the California land law provision under the 14th Amendment of the U.S. Constitution.³¹

27 U.N. CHARTER, art. 104.

28 U.N. CHARTER, art. 105(1).

29 U.N. CHARTER, art. 55 provides:

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

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

U.N. CHARTER, art. 56 provides:

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

30 242 P.2d at 621.

31 *Id.* at 622-30.

On the other hand, personal and property rights required to be in effect upon entry into force of a treaty, rights where no significant discretion has been reserved by the United States, have consistently been found self-executing. The Supreme Court has for instance applied the following treaty terms without implementing federal legislation:

‘The citizens [of the Parties] shall have liberty to . . . carry on trade . . . upon the same terms as native citizens or subjects.’³²

A national of the other state ‘shall be allowed a term of three years in which to sell [certain inherited real] property . . . and withdraw the proceeds . . .’ free from any discriminatory taxation.³³

‘in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State . . . in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the State . . . will permit to sell such property, he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty . . .’³⁴

‘no higher or other duties, charges, or taxes of any kind, shall be levied’ by one country on removal of property therefrom by citizens of the other country ‘than are or shall be payable in each State, upon the same, when removed by a citizen or subject of such state respectively’.³⁵

It should be noted, finally, that the Senate in giving its assent to some recent treaties has made declarations to the effect that provisions of the treaty are not self-executing.³⁶ While it is likely that courts will defer to such declarations,³⁷ it is at least questionable whether the courts are bound

32 *Asakura v. City of Seattle*, 265 U.S. 332, 340 (1924).

33 *Clark v. Allen*, 331 U.S. 503, 507-508 (1947).

34 *Hauenstein v. Lynham*, 100 U.S. 483, 486-490 (1879).

35 *Nielsen v. Johnson*, 279 U.S. 47, 50 (1929).

36 See Lori Fisler Damrosch, *The Role of the United States Senate Concerning ‘Self-Executing’ and ‘Non-Self-Executing’ Treaties*, 67 CHI.-KENT L. REV. 515 (1991).

37 *Id.* at 527.

to do so.³⁸

In sum, we can say that the doctrine of non-self-executing treaties

1. reconciles important competing constitutional interests in a reasonable way,
2. is determined as a matter of United States constitutional law,
3. applies without regard to whether or not the treaty is self-executing in the domestic legal systems of other parties to the treaty,
4. is a necessary concomitant of the power of the United States to reserve significant discretion in determining how to comply with treaty obligations that the nation enters into, and
5. has no effect on the international obligations of the United States.

Later Enacted Statutes

A different limitation on the direct applicability of treaty provisions as law in the courts of the United States is the so-called 'later-in-time' rule. That is, if a subsequent federal statute clearly conflicts with a previous self-executing treaty provision, the courts must apply the later federal statute. The rationale for this doctrine was stated at length in the *Head Money* cases,³⁹ which are described in Chapter 5,⁴⁰ and later in *Whitney v. Robertson*.⁴¹ The *Head Money* Court first explained that the primary enforcement mechanism for treaties lies in the international legal system:

A treaty . . . depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to

38 *See id.*; Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 608-609 (1991).

39 112 U.S. 580 (1884).

40 *See pp. 42-44, supra.*

41 124 U.S. 190, 193-95 (1888).

seek redress, which may in the end be enforced by actual war. It is obvious that with all this, the judicial courts have nothing to do and can give no redress.⁴²

The Court explained that treaties may also contain provisions conferring individual rights that are enforceable in U.S. courts under the Supremacy Clause, but there is nothing in the Constitution that makes treaties superior to statutes:

But even in this aspect of the case, there is nothing in this law which makes it irrevocable or unchangeable. The Constitution gives it no superiority over an Act of Congress in this respect, which may be repealed or modified by an Act of a later date. Nor is there anything, in its essential character or in the branches of the government by which the treaty is made, which gives it this superior sanctity.⁴³

Indeed, as a matter of constitutional policy, according to the Court, if either statutes or treaties were as a class higher to the other, it would make more sense to exalt statutes over treaties than vice versa:

A treaty is made by the President and the Senate. Statutes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its repeal or modification than a treaty made by the other two. If there be any difference in this regard, it would seem to be in favor of an Act in which all three of the bodies participate. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the Nations thus at war.⁴⁴

Some international lawyers and scholars are uncomfortable with the later-in-time rule.⁴⁵ It suggests that the United States reserves to itself the power to violate international law obligations. It does nothing of the sort, though. The later-in-time rule is purely a rule of domestic law—United States law. Under the international legal system the United States cannot

42 112 U.S. at 598.

43 *Id.* at 599.

44 *Id.*

45 *E.g.*, Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 426 (1989).

reserve to itself the power to violate its (international) legal obligations. Those obligations bind internationally as part of a system of reciprocally binding entitlements regardless of which domestic instrument of governmental power makes the decision to comply or not (or how). The international legal system binds dictatorships, parliamentary democracies, kingdoms, republics, and military regimes alike. There is nothing inherently inconsistent with the international legal system that in our country the Congress for the most part gets to make the ultimate decision whether (and to what extent) the United States will comply with its treaty obligations.

The later-in-time rule is also consistent with our Constitution because the political branches are appropriately the final arbiters of how our nation will comply with international law. This makes international law different from domestic law, and in particular constitutional law, the final arbiters of which in our legal system are of course the courts. While the later-in-time rule may lead to violations on the part of the United States of international law, the same could be said if the *courts* made the ultimate determination—unless we assume that the courts are infallible. Indeed, with respect to constitutional (domestic) law, the finality of the courts' decisions does not insure that the Constitution is always adhered to even in cases brought to the Supreme Court. The fallibility of courts is demonstrated for instance by the fact that cases get overruled. The finality of the courts with regard to domestic law cases brought before it is logically based not on the assumption that the courts will always be 'right' in some abstract sense, but on the sound policy grounds that the fundamental determinations made by the framers can best be preserved by giving to the nonpolitical branch the final authority to 'say what the law is'. This of course is Justice Marshall's interpretation of the Constitution in *Marbury v. Madison*.

The same reasoning does not apply with respect to 'saying what international law is'. There are sound reasons, consistent with the genius of *Marbury*, for giving that final power to the Executive and Legislative Branches. First, since treaties must be complied with as a part of the conduct of foreign relations in general, the general reasons for giving the conduct of foreign relations to the President apply. To protect the interests, indeed the survival, of the nation, the government must be able to act in the international arena with speed, often with secrecy, and with the benefit of sophisticated, broad-based, often secret information. It is unwise to have courts—without the benefit of a full comprehension of the factors leading to the decision in question—make the final determination of the

international legality of the actions of the United States.

This does not mean that the courts are required by the political branches to violate international law any more than *Marbury v. Madison* means that the President and Congress are required by the courts to violate the Constitution. In each case it is simply a principle that the political branches or the courts have the final say in applying the governing legal obligation.

There is moreover a compelling domestic constitutional reason for the later-in-time rule—without it we would have an extraordinary anomaly. The Supreme Court would have the power to review statutes not only for compliance with the Constitution under *Marbury*, but for compliance with any of the self-executing provisions that the Court could find in several shelves of volumes of United States Treaties. Whenever the Court interpreted a treaty differently from the Executive or Legislative Branches, the only recourse for the political branches (short of constitutional amendment) would be to renegotiate the treaty. This might be altogether impossible in the case of a multilateral treaty, or where the Court interprets the treaty more favorably to the foreign state than the political branches do. The Court would thereby obtain enormous political and foreign relations power, unchecked by the political branches. It does not take too much insight to see that this is not what the Framers had in mind.

Instead, the later-in-time rule reflects a general and appropriate restraint on the part of the courts to avoid getting involved in the interplay between the law making power of the Treaty Makers and that of Congress. The courts do not review self-executing treaty provisions for their compliance with previous acts of Congress, and the courts do not review acts of Congress for their compliance with previous self-executing treaty provisions. When statutes are interpreted to conflict with each other, the courts are in no position to decide which is preferable—they simply apply the later one. When two valid legislative acts—a statute and a self-executing treaty provision—are interpreted to conflict with each other, the courts are similarly in no position to decide which is preferable. The only alternative is to apply the most recent enactment of a federal body having the power to legislate, whether it is the Congress or the Treaty-Makers.

A recent case showing the wisdom of the rule was *South African Airways v. Dole*.⁴⁶ The Court of Appeals for the District of Columbia Circuit upheld implementation of the Comprehensive Anti-Apartheid Act of 1986, which directed the Secretary of Transportation to revoke the right

46 817 F.2d 119 (D.C. Cir. 1987).

of any designee of the apartheid South African government to provide air service pursuant to the terms of a valid 1947 executive agreement between the United States and South Africa.⁴⁷ South African Airways argued that the statute should be construed so as not to violate the international obligation of the United States, but the court of appeals found that Rule of Interpretation inapplicable where the statute was an unambiguous repudiation of a treaty obligation.⁴⁸ (As should be clear from the discussion at the end of this chapter, it made no difference that the international agreement in question was—from the domestic perspective of U.S. constitutional law—an executive agreement rather than a treaty.)⁴⁹ Finding there to be a clear conflict between the executive agreement and the later statute, the court of appeals applied the later-in-time rule to uphold the implementation of the statute.⁵⁰

It is instructive to consider hypothetically how a rejection of the later-in-time rule would have played out in the South African Airways context. Statutorily imposed sanctions against South Africa were a response to the abuses of the apartheid regime there. Advocates of a body of international human rights law might well argue that the South African government owed an obligation to other states not to engage in apartheid abuses against its own citizens.⁵¹ If so, an appropriate retaliation might be to deny South Africa some of the entitlements that it enjoyed under the international legal system—in this case the benefit of air landing rights protected by valid international agreements.⁵² A counter-argument would be based on the long-recognized doctrine that international law permits states to treat their own nationals as they wish. When the popularly-elected and politically accountable branches of the U.S. government decide to act on the basis of one rather than the other of these theories, that theory should govern. That is the effect of the later-in-time rule. Otherwise the court would be in the awkward and inappropriate position of having to decide whether to *overrule* the political branches with regard to such an issue of international law. It should be noted that the later-in-time rule is not necessarily a rule that inhibits the development of international law. In the *South African Airways* context, for instance, it served to facilitate the progressive development of international human rights law.

47 *Id.* at 121.

48 *Id.* at 126. *See* Chapter 5, *supra*.

49 *See* pp. 98-105, *infra*.

50 817 F.2d at 126.

51 *See* Chapter 10, *infra*.

52 *See* Chapter 1, *supra*.

The later-in-time rule has recently been reaffirmed by the Supreme Court. In the *Breard* case, discussed more thoroughly below in Chapter 8, the Court in a *per curiam* opinion held, as an alternative ground for its decision, that the State exhaustion requirements of the 1996 Antiterrorism and Effective Death Penalty Act⁵³ controlled over any arguable right of a criminal defendant arising out of the Consular Relations Convention,⁵⁴ which entered into force for the United States in 1969.⁵⁵

Constitutional Limits on the Scope of the Treaty Power

If we think of self-executing treaty provisions as being on the same level as statutes, it follows that treaty provisions can be reviewed by U.S. domestic courts for compliance with the U.S. Constitution just as statutes can be so reviewed. Since the Constitution of the United States is the highest law of the United States, and U.S. domestic courts are authorized to judge by that very law, they must apply the Constitution whenever it conflicts with any other source of law. This is the teaching of *Marbury v. Madison*,⁵⁶ deeply ingrained in our legal and political culture. This does not mean that in international law—a different system—any state's constitution trumps international obligations. Such a principle would make the international system unworkable. It just means that within our domestic system U.S. courts apply U.S. law.⁵⁷

The domestic supremacy of the Constitution over treaty law can be brought into question by the well-known Supreme Court case of *Missouri v. Holland*, decided in 1920.⁵⁸ Justice Oliver Wendell Holmes in that case held that a federal statute was constitutionally warranted by a previous treaty (with Great Britain) even though the statute might not otherwise be within the federal power to enact. The case involved a federal statute protecting migratory birds. At the time it was accepted that the federal government could not regulate the capture of wildlife, that wildlife was owned in some sense by the States of the Union in their sovereign

53 28 U.S.C.A. §§ 2254(a), (e)(2) (Supp. 1998).

54 Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

55 *Breard v. Greene*, 118 U.S. 1352, 1355 (1998).

56 5 U.S. (1 Cranch) 37 (1803).

57 See Chapter 4, *supra*.

58 252 U.S. 416 (1920).

capacities.⁵⁹ This was prior to the Supreme Court's adoption (starting in 1937) of a hugely expansive reading of the federal power to regulate interstate commerce.⁶⁰ So *at the time* a strong argument could be made that without the treaty, the Constitution prohibited the federal government from legislating to protect the birds. Indeed, Justice Holmes noted that two lower federal courts had so held.⁶¹ Justice Holmes nonetheless upheld the federal statute, *even assuming* that those lower court decisions were correct.⁶²

In upholding the statute, Justice Holmes relied upon a reading of the Supremacy Clause that implies that treaties are immune from constitutional scrutiny:

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.⁶³

Holmes went on to qualify his argument, suggesting the possible unconstitutionality of a treaty that 'contravene[d] any prohibitory words' in the Constitution as opposed to being 'forbidden by some invisible radiation from the general terms of the Tenth Amendment'.⁶⁴ The remainder of Holmes' opinion challenges the idea that wild migratory birds are owned by the States of the Union, and thus appears at odds with his initial assumption that the federal statute would not be constitutional in the absence of the treaty.⁶⁵

Perhaps the best way to read *Missouri v. Holland* is as a presaging of the broad federal power that the Supreme Court confirmed twenty years later. Certainly Holmes' reliance upon the precise language of the Supremacy Clause was misplaced. Thirty-seven years later in *Reid v.*

59 See *Geer v. Connecticut*, 161 U.S. 519 (1896).

60 E.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942). *Geer v. Connecticut* was expressly overruled in *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

61 *Holland*, 252 U.S. at 432.

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

63 *Id.*

64 *Id.* at 433-34. The Tenth Amendment precludes the federal government from exercising powers not delegated to it in the Constitution.

65 252 U.S. at 434-35.

Covert,⁶⁶ a plurality of the Supreme Court explained that the only reason that treaties were not limited to those made in ‘pursuance’ of the Constitution was so that agreements made by the United States under the Articles of Confederation would remain in effect.⁶⁷

Reid involved whether the federal government could constitutionally try by court-martial a civilian dependent of an Armed Forces member abroad. The Court said no, although two justices limited their holding to capital cases. The plurality opinion rejected the possibility that such trials were warranted by international agreements between the United States and the nations in which the crimes occurred.⁶⁸ The plurality stated crisply that ‘no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution’.⁶⁹ The opinion also relied on the parity of legislative effect between treaties and statutes—the same parity that underlies the later-in-time rule: ‘It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.’⁷⁰

Does this mean that *Missouri v. Holland* has been overruled? The opinion in *Reid* had rejected the textual basis for Holmes conclusion. Holmes had assumed for the sake of argument that the constitution forbade the federal government from regulating migratory birds, but concluded that a treaty permitted the federal government to do what the Constitution otherwise forbade. Isn’t that flatly inconsistent with the clear holding of *Reid* that a treaty cannot confer power on Congress free from the restraints of the Constitution? Remarkably, the plurality in *Reid* denied this outright:

There is nothing in *Missouri v. Holland* . . . which is contrary to the

66 354 U.S. 1 (1957).

67 *Id.* at 16.

68 The international agreements in *Reid* were executive agreements and not constitutional ‘treaties’ that had obtained 2/3 approval by the Senate. As the next section of this chapter reflects, this should make no difference as long as the President had the constitutional power to enter into the executive agreement. The reasoning of *Reid* cannot be limited to executive agreements, however, since the plurality’s opinion assumed for the sake of argument that the executive agreements there had the same force as constitutional treaties. The opinion noted in a footnote, ‘We recognize that executive agreements are involved here but it cannot be contended that such an agreement rises to greater stature than a treaty.’ 354 U.S. at 17 n. 33.

69 *Id.* at 15.

70 *Id.* at 18.

position taken here. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution. The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. 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.⁷¹

There is only one way for this to make sense. That is to conclude that limits on Congressional power inherent in the enumeration of powers in Article I, § 8 (and made explicit in the Tenth Amendment) *do not apply* to the treaty power. In other words, the Treaty Makers (the President plus 2/3 of the Senate) have legislative power *not confined* to the same list of powers that the Congress may exercise by statute. But if not confined to the enumerated list of powers from which the Congress must choose, what limit is there on the legislative power of the Treaty Makers? Of course under *Reid* they are limited by the prohibitions in the Bill of Rights other than the Tenth Amendment.⁷² Commentators have also assumed that the Treaty Makers may not exercise the exclusive power of Congress under the Constitution to prescribe federal crimes, appropriate funds, or declare war.⁷³ But can the Treaty Makers by self-executing treaty intrude upon the rights of the States that are otherwise protected by a negative inference from the enumerated list of powers?

Until recently the question has been almost purely academic. That

71 *Id.* at 18.

72 For an argument, for instance, that the search provisions of the Chemical Weapons Convention violate the Fourth Amendment, see Ronald D. Rotunda, *The Chemical Weapons Convention: Political and Constitutional Issues*, 15 *Const. Comm.* 131, 149-58 (1998), discussing the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-21, 32 *INT'L L. MATLS.* 800 (1993). The treaty power also presumably cannot be used to change the checks and balances embedded in the structural provisions of the Constitution. For an argument that the Chemical Weapons Convention may violate the Appointments Clause by providing for searches in the United States by persons who have not been appointed by the President, see John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 *CONST. COMM.* 87, 117-29 (1998).

73 See Louis Henkin, *Treaties in a Constitutional Democracy*, 10 *MICH. J. INT'L L.* 406, 425 n. 41 (1989); *RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S.* §111, cmt i & reporter's note 6.

is because for over fifty years the power of the Congress to legislate under the Interstate Commerce Clause has been so broadly interpreted that few people could even think of an exercise of federal power that was entirely reserved to the States. In *United States v. Lopez*,⁷⁴ however, the Supreme Court recently struck down, as beyond the Article I power to regulate interstate commerce, a federal statute criminalizing the possession of guns within school zones. In *New York v. United States*,⁷⁵ moreover, the Court reasoned that the federal government could neither force the New York legislature to enact a particular hazardous waste scheme, nor require the government of the State of New York to take title to the hazardous waste in New York, and that therefore the federal government could not impose on New York a choice between the two. The two decisions together indicate that there are at least some exercises of federal power simply not contained within the enumeration in Article I. The question immediately arises whether the Treaty Makers could exercise powers that have recently been held beyond the commerce power of Congress.

Put more starkly, could the United States enter into a treaty with certain foreign states, agreeing that guns shall be banned within schools? Even if the treaty were not self-executing, the theory of *Missouri v. Holland* would permit subsequent federal legislation to implement the treaty. Certainly such a treaty is conceivable even though it governs internal conduct of the nation. These days various human rights treaties require states to treat their own citizens in certain ways.⁷⁶ It is not hard to imagine, for instance, a treaty banning capital punishment, or banning female circumcision.

Reenactment of a federal ban on handguns in schools, following a treaty requiring enactment of such a ban, would set up the question of how much validity remains to *Missouri v. Holland*. The more that the Supreme Court extends *Lopez* to strike down other federal statutes, the more likely it is that courts will in fact have to face up to the question of whether there are implicit limits, albeit with different contours, on the federal treaty power.

Long ago Thomas Jefferson suggested four limits on the federal treaty: (a) a treaty must concern a foreign nation-party—otherwise it would

74 514 U.S. 549 (1995).

75 505 U.S. 144 (1992).

76 *E.g.*, International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 INT'L L. MATLS. 368 (1967); American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 INT'L L. MATLS. 673 (1970). For other examples, see Chapter 10, *infra*, p. 211, n. 17.

be a nullity, (b) treaties must comprehend subjects usually regulated by treaties, and which cannot otherwise be regulated, (c) the treaty power does not extend to rights reserved to the States, and (d) the treaty power does not extend to those subjects of legislation to which the Constitution gave a participation to the House of Representatives.⁷⁷ The first two of these are not much of a limit at all; an international agreement concerns a foreign nation-party whenever the other nation-party is obligated to take some action as a *quid pro quo* for the undertaking of the United States. And nowadays all manner of subjects are regulated by treaties. Jefferson's two remaining suggested limits, moreover, are so constraining that it is inconceivable that they would be accepted by the Supreme Court today. *Missouri v. Holland* itself makes clear that the treaty power goes beyond 'rights reserved to the States'.

And finally, it cannot be that the treaty power 'does not extend to those subjects of legislation to which the Constitution gave a participation to the House of Representatives'. This would mean that the Treaty Makers could not legislate in areas where Congress could legislate. Since the late 1930's the power of Congress to legislate under the Interstate and Foreign Commerce Clauses has been interpreted to be enormous. If every exercise of legislative power by the Treaty Makers is invalid if Congress possesses the same power, then the Treaty Makers have virtually no legislative power. For instance, in *Asakura v. City of Seattle*, the Supreme Court found that a treaty with Japan required Seattle to license the pawn business of a Japanese citizen there. It is hard to imagine today that Congress could not, under the federal commerce power and without any treaty, have required the same equal treatment for aliens that the treaty required.⁷⁸ Thus the matter is one to which the Constitution gave participation to the House of Representatives. Certainly this does not mean that entering into the treaty at issue in *Asakura* was beyond the power of the federal government.

The Supreme Court's opinion in *Lopez* suggests that there must be some real limit on the federal congressional power to legislate, even though the federal power is very broad and the line is hard to draw. Parity of reasoning suggests that there must be some real federalism-based limit on

77 Thomas Jefferson, *Manual of Parliamentary Practice* § LII, quoted in LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 141-42 (1972).

78 See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

the Treaty Makers' power to legislate.⁷⁹ Until recently the expansive reading of federal power under the Commerce Clause has made it unnecessary to determine the contours of such a limit. *Lopez* and its progeny will draw the line for Commerce Clause purposes, but *Missouri v. Holland* and *Reid v. Covert*, read together, demonstrate that the limits found on the Congressional commerce power are not necessarily the same as the limits on the Treaty Makers' treaty power. What limits those may turn out to be are thus currently undeterminable.⁸⁰ All we can say at this point is that the Treaty Makers cannot effectively enter into self-executing agreements that violate the limitations of the Bill of Rights, and that there may be some point where a treaty so intrudes on the rights of States within our constitutional system as to render unconstitutional the exercise of such a power by the Treaty Makers.

Executive Agreements

Before concluding the discussion of the extent to which treaty law becomes applicable law in United States courts, it is necessary to look at the effect of international agreements of the United States that are not 'Treaties' subject to 2/3 Senate approval under Article II. Under U.S. constitutional practice, there are two types of international agreements. The first type is expressly provided for in Article II: 'Treaties'. Treaties are negotiated by the President, approved by 2/3 of the Senate, and then ratified by the President. The second type of international agreement is called 'executive agreement' because it is entered into by the President without the necessity of 2/3 Senate approval. The term 'executive agreement' is not to be found in the Constitution. The power to enter into such agreements thus must be found in other Presidential powers.

Perhaps the most important Presidential power is the power to carry

79 Professor Bradley has found extensive support for this conclusion in eighteenth and nineteenth century materials. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998).

80 Professor Bradley considers possible tests, including whether the treaty involves an issue that 'requires international cooperation in order to be addressed', Bradley, *supra* n. 79, at 453, but concedes that the proposed line is fuzzy. The difficulty of finding a workable line leads Bradley to advocate using the same line that the Court applies in the absence of the Treaty Power, i.e., the same limits that apply to the Commerce Power. *Id.* at 456-58. Of course such a result would require overruling *Missouri v. Holland*. *Id.* at 458-60.

out (execute) the statutes passed by Congress. Thus if Congress statutorily grants the President the power to enter into an international agreement, the President has that power not under the treaty-making power subject to 2/3 Senate approval, but simply under the power to execute the laws. Since the 1940's the President has entered into a significant number of international agreements on the authority of congressional statute, without obtaining 2/3 Senate approval. Trade agreements in particular have been structured this way. Such agreements have been called 'congressional-executive agreements' and have engendered some controversy. In response to Senate concern that its prerogatives not be infringed, the Executive Branch has endeavored to comply with express guidelines as to whether an international agreement will be handled as a Treaty or as an executive agreement. More recently, Professor Laurence Tribe has argued that congressional-executive agreements that could constitutionally be handled as treaties must obtain 2/3 Senate approval.⁸¹ This is certainly neither the position of the Executive Branch, nor of many other legal scholars,⁸² but Tribe supports his argument by reasoning that the text and structure of the constitution preclude such free circumvention of the 2/3 Senate approval requirement for treaties.⁸³

An evaluation of the merits of this debate is beyond the scope of this book. It is enough to say here that congressional-executive agreements have been entered into, and that if the Congress has the power to authorize the President to enter into such agreements without 2/3 Senate approval, he does so under his power to execute the laws. That means, of course, that the agreement must conform to what is authorized by the statute, and that both the statute and the agreement must not exceed the scope of congressional power under the Constitution. That is, a congressional-executive agreement may violate neither the Bill of Rights nor the limits of federal power implicit in Article I's enumeration of the legislative powers of Congress.

Some executive agreements are not authorized by statute. The power to enter into such agreements derives neither from the treaty power, nor

81 Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). For an overview of the debate, see Detlev F. Vagts, *International Agreements, the Senate and the Constitution*, 36 COLUM. J. TRANSNAT'L L. 91 (1997).

82 E.g., Frederic L. Kirgis, *International Agreements and U.S. Law*, ASIL INSIGHT 1-2 (June 1997); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. § 303, cmt e.

83 Tribe, *supra* n. 81, at 1249-78.

from the power to execute the laws. The Constitution itself gives certain powers directly to the President, and these are powers that he holds independently of statutory grant. Examples that are particularly important in this context are the power to appoint ambassadors and the power to command the Armed Forces. The power to enter into executive agreements without statutory authorization and without 2/3 Senate approval must derive from one of these free-standing grants of power to the President.

In *United States v. Pink*,⁸⁴ the Supreme Court upheld just such an exercise of free-standing power. At issue was the Litvinov Assignment, an executive agreement entered into in conjunction with U.S. recognition of the Soviet Government as the legitimate government of Russia. The agreement assigned to the United States government any claims by the Russian Government against assets in the United States. The United States sued in New York courts to obtain funds of a Russian insurance company whose assets the Soviet Union had nationalized, and which the United States claimed as assignee of the Soviet Government. The New York courts applied New York law to refuse to apply the Soviet nationalization to property in New York. The Supreme Court reversed, interpreting the Litvinov Assignment to require that Russian property in the United States, subject to Soviet extraterritorial confiscations, now belonged to the United States. The Court reasoned that the executive agreement was a valid exercise of the President's power to conduct foreign relations.

This makes sense if we accept a series of inferences of implied powers. The President has the power to appoint ambassadors. Implicit in this is the power to determine which states and which regimes to send the ambassadors to. This is the equivalent of the power to determine which states and governments should be recognized. If the President has the power to grant or withhold recognition of a foreign regime, he has the power to resolve differences that interfere with that power. Claims of Americans against the new government are paradigmatic hurdles to the recognition of a new regime. Obtaining funds of the foreign state to pay off the claims is a logical ancillary power to the power to resolve the American claims. And the funds assigned under the Litvinov Agreement were for that purpose. Thus the executive agreement was an incident of the President's power to recognize foreign governments. As a free-standing power, there was no need for 2/3 Senate approval, or of congressional authorization.

84 315 U.S. 203 (1942). The Court in *Pink* relied on a similar earlier case, *United States v. Belmont*, 301 U.S. 324 (1937). See 315 U.S. at 222.

The Court reasoned:

Recognition is not always absolute; it is sometimes conditional. Power to remove such obstacles to full recognition as settlement of claims of our nationals certainly is a modest implied power of the President who is the 'sole organ of the federal government in the field of international relations'. Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs is to be drastically revised. It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent.⁸⁵

The Supreme Court in *Pink* not only held that the President had the power to enter into the executive agreement, but also that it was the law of the land just as much as a treaty.⁸⁶ The Court reasoned that any constitutional exercise of federal power had to be superior to State law in courts of the United States: 'All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature.'⁸⁷

85 *Id.* at 229-30.

86 For an argument that the Court's holding in this regard was contrary to the original understanding of the Constitution, see Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998).

87 *Id.* at 230, quoting THE FEDERALIST, No. 64. This explains the Second Circuit's assumption in *Fioccone v. Attorney General*, 462 F.2d 475 (2d Cir.), *cert. denied*, 409 U.S. 1059 (1972), that the principle of specialty applies (i.e., an extradited criminal defendant cannot be tried for a crime that was not the basis for the international extradition), even where an extradition is not based on a treaty obligation. The court of appeals followed the Supreme Court's decision in *United States v. Rauscher*, 119 U.S. 407 (1886), in this regard, even though the Supreme Court had found the specialty principle to be a obligation arising from a treaty in *Rauscher*. (*Rauscher* and the principle of specialty are discussed in Chapter 9, pp. 171-178.) Judge Friendly explained that there was 'no reason in principle why the judicial remedy fashioned in *Rauscher* should not also apply when extradition has been obtained as an act of comity by the surrendering nation; the need for preserving the United States from a breach of faith is equally strong'. 462 F.2d at 480. The international 'breach of faith' would result, according to Judge Friendly, if the

Of course the power of the President to act outside of the Treaty power (i.e., without 2/3 approval of the Senate) *and* without statutory authority (as in *Pink*) must be limited, if the fundamental constitutional idea is to be preserved that the President alone does not have general legislative power. An ordinary commercial agreement, for instance, restricting the import of certain commodities, would not be within the President's free-standing power. The Fourth Circuit found such an executive agreement to be beyond the President's power, for instance, where its terms were inconsistent with a previously enacted statutory scheme.⁸⁸ The Fourth Circuit appropriately quoted Justice Jackson's concurrence in the case in which the Supreme Court invalidated President Truman's seizure of the steel mills during the Korean War:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.⁸⁹

On the other hand, the Supreme Court upheld the President's free-standing power to resolve the Iran hostage crisis by an executive agreement that, among other things, suspended claims brought in U.S. domestic courts against Iran by U.S. citizens.⁹⁰ (The case, *Dames & Moore v. Regan*, is

receiving country should 'try an extradited person for an offense for which the surrendering country would not have granted extradition'. *Id.* at 479. The content of this international obligation had to have arisen from the informal agreement between the United States and Italy to extradite the defendant; there is no other way to ascertain which non-treaty offenses would be extraditable. Italy's agreement to extradite the defendant was thus—for U.S. constitutional purposes—an executive agreement. As in *Pink*, the international *quid pro quo* for obtaining the defendant from Italy—not trying him for other crimes—was integral to the executive agreement. Though Judge Friendly did not cite *Pink*, its principle explains nicely his analysis in this respect.

88 *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

89 204 F.2d at 659, *quoting* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

90 *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981).

discussed more thoroughly in Chapter 9.)⁹¹

There is an enormous difference, it should be noted, between the scope of what the President can do under the treaty power, and the scope of what the President can do outside of the treaty power and without congressional authorization. The treaty power is very broad, though not entirely unlimited. In contrast, the power to enter into executive agreements without congressional approval is narrow, but has some content. The large bulk of federal legislative power under the Commerce Clause overlaps with the former but is excluded from the latter.

Just as valid executive agreements are the law of the land to the same extent as treaties, they are also subject to analogous limitations on their applicability in domestic courts. Treaty provisions, we have seen, are not law in court (1) if they are not ‘self-executing’, (2) if they are superseded by later statute, or (3) if they exceed constitutional limits on their content. For each of these qualifications, there is an analogous limit to the applicability of executive agreement provisions in U.S. courts.

First, just as in the case of treaties, there is conceptually the possibility that an executive agreement will promise a future action on the part of the United States, and reserve significant discretion as to how it will be carried out. For the court to make the discretionary choice in the absence of an exercise of legislative judgment by the Congress would be an unwarranted exercise of political discretion by the judiciary. Other executive agreements may with sufficient clarity declare the legal effect of persons or property immediately upon entry into force of the agreement, and thereby be self-executing under the theory of *Pink* (that valid exercises of federal power are the law of the land as much as treaties). Thus it is meaningful to speak of the distinction between self-executing and non-self-executing executive agreements.

The distinction between treaties and executive agreements is thus *very different* from the distinction between self-executing and non-self-executing international agreements. The former has to do with the President’s power to enter into the international obligation (does or does not require 2/3 Senate approval); the latter has to do with whether the obligation that has been entered into is law that can be relied upon in domestic courts (does or does not apply without implementing legislation). A treaty requiring 2/3 Senate approval may have both self-executing and non-self-executing provisions (e.g., the UN Charter as determined in *Sei Fujii*). On the other hand, an executive agreement may also be self-

91 See pp. 194-204, *infra*.

executing (as in *Pink*) or not (as for instance a congressional-executive agreement to exempt one of three products from a certain tariff, where the agreement does not state which one).

As a practical matter, however, there is often little need to determine whether a congressional executive agreement is 'self-executing'. A non-self-executing treaty requires implementing legislation to be law of the United States. In the case of a congressional-executive agreement, there is always legislation either authorizing the President to enter into the agreement, or implementing the agreement afterward. A court may apply the agreement just as it would any exercise of congressionally delegated power to the President. Even in the case of an executive agreement without congressional authorization or approval, there is often little need to determine whether the executive agreement is 'self-executing'. Because the President is acting pursuant to his own free-standing power, he can exercise his discretion under the executive agreement unilaterally at any time.

Second, a self-executing congressional-executive agreement is of course subject to being superseded by a later statute. Since the very basis for such international agreements under the constitution is the statutory provision that authorizes the agreement, a later inconsistent statute controls just as in any case of two inconsistent statutes. On the other hand, it is questionable whether a statute may supersede a valid executive agreement that did not need congressional authorization. But this is because the statute itself might be unconstitutional as an infringement of executive power. For instance, what if a federal statute had sought to nullify the rule of law that the Supreme Court derived from the Litvinov Assignment? If the President agrees with the later statute and seeks to execute it, then domestically the later statute should control. In such a case there is no conflict between the President and Congress. But if the President refuses to execute the later statute on the grounds that it is an infringement of his free-standing power, or objects to the statute's enforcement in court on that ground, the courts may refuse to enforce the later statute on the very ground that it is beyond the power of Congress. Thus if the President were to enter into an executive agreement recognizing a certain regime, and settling international claims with that regime, a statute derecognizing the regime and invalidating the settlement might so infringe on the President's constitutionally authorized conduct of foreign policy as to be

unconstitutional.⁹²

Third and finally, an executive agreement must of course comport with the Constitution, just as a treaty must. The Bill of Rights applies with full force, and *Reid v. Covert* in fact involved executive agreements. Congressional executive agreements must moreover be founded on an enumerated power, and are subject to whatever limits the doctrine of *United States v. Lopez* turns out to put on congressional power in the coming years. Finally, as the Fourth Circuit explained in *Guy W. Capps*, executive agreements that do not require statutory authorization or acceptance must be within the narrow scope of constitutionally authorized free-standing Presidential authority in order to be valid in the first place.

In short, the United States can enter into international agreements that are domestically categorized as treaty or executive agreement. If properly entered into they provide law in the courts of the United States (1) to the extent that their provisions are self-executing, (2) to the extent that they are not superseded by later (constitutional) statute, and (3) to the extent that they do not violate—by their terms or in their passage—prohibitions of the Constitution of the United States. Otherwise they are not *ipso facto* law by operation of the Constitution.

92 During consideration of a bill that recognized Jerusalem as the capital of Israel and required that a U.S. embassy be established there, the U.S. Justice Department prepared a memorandum arguing that the bill would unconstitutionally interfere with the President's power to conduct foreign affairs and make decisions pertaining to recognition. Malvina Halberstam, *The Jerusalem Embassy Act*, 19 *FORDHAM INT'L L.J.* 1379, 1381 & n. 20 (1996), *citing* Memorandum from Walter Dellinger, Assistant Attorney General, U.S. Dept. of Justice to Abner J. Mikva, Counsel to the President (May 16, 1995). The bill was subsequently enacted, but with the addition of a provision authorizing the President to postpone opening the embassy in Jerusalem by successive six month increments. *Id.*; *see* Jerusalem Embassy Act of 1995, §§ 3(a)(2), 3(a)(3), & 7(a)(2), 104 Pub. L. No. 45, 109 Stat. 3989 (1995).