State Sovereignty and the Treaty-Making Power

It has somewhere been said that the surrender of Lee at Appomattox ended for all time the question of states’ rights. It is true, indeed, that that memorable event did forever refute the doctrine advanced by Calhoun and Hayne that this Republic is but a confederation of states from which the individual members are free to withdraw at will, and that the conclusion of Webster in his reply to Hayne, that this is an indivisible nation, is now accepted without dissent. In a broader sense, however, the question of states’ rights, or rather the extent of the powers which may lawfully be exercised by the Federal Government over the several states, is even more acute and of more importance to our citizens than ever before in the history of the nation.

With the passage of time has come an ever-increasing interference by the Federal Government and its agencies in matters which fifty years ago neither lawyer nor layman would even have suggested, were, from the standpoint of expediency at least, properly matters of Federal concern. Familiar illustrations of this tendency are found in the Pure Food and Drug Act, the Mann Act, the Federal Narcotic Act, the Adamson Law, and, perhaps the high-water mark of all, the Transportation Act of 1920. It is not the province of the lawyer, in his professional capacity at least, to speculate upon the policy or wisdom of legislation, because we deal generally with things as they are rather than as they should be. It may be that government by Federal bureaus and by Congress is preferable to regulation by state legislatures and state boards, or perchance we have too much of both. Theoretically it would seem that the movement must be attributed in part, at least, to the failure of the states to function with sufficient efficiency, although in some cases we may also charge the tendency to the presence of well-paid and vociferous lobbies at the national capitol.

Aside from these questions of policy, however, any movement or any judicial decision which materially changes the ideas generally prevalent with respect to the fundamental structure of our government, must have more than an academic interest to the student of
constitutional law. This must be so because the theory of the American form of government is that the general relations between the Federal and the state sovereignties were fixed in 1787 by the adoption of a national Constitution, and that those relations have since then remained the same except where they have been expressly altered by amendment to the organic law, even though the conditions upon which those principles have operated have since changed from time to time. The Supreme Court of the United States is made by the Constitution the official and conclusive interpreter of the meaning of that instrument. Any decision of that tribunal, therefore, which is inconsistent with the preconceived notions of our profession with respect to the nature of these relations must be of interest to us, not only as citizens but as lawyers, because thereby the knowledge of yesterday becomes the error of today.

The general principles which have been supposed for approximately one hundred and thirty years to govern the relations between the states and the national Government have been so many times reiterated that discussion is unnecessary. The controlling principle of this relation is found in the Tenth Amendment to the Constitution of the United States which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The government of the United States, then, is a government of delegated powers, and with one exception (to which we shall hereafter refer) it can perform no act save as expressly authorized by the national Constitution or necessarily implied from the powers which are expressly conferred. As was said by Mr. Justice Brewer in Kansas v. Colorado:¹

"The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all

powers not so delegated. This Article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

The same thought was expressed in the platform upon which Abraham Lincoln ran for the presidency in 1860, in which it was declared that "the maintenance inviolate of the rights of states, and especially the right of each state to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balanced power on which the perfection and endurance of all our political fabric depends." And in his first inaugural address, President Lincoln, referring to this declaration, said that he would favor a proposed amendment "to the effect that the Federal Government shall never interfere with the domestic institutions of the states," although he thought such amendment not to be necessary.

The doctrine of implied power has been liberally used by the Supreme Court of the United States in the consideration of acts of Congress which operate to limit or abrogate the sovereignty of the various states. That is to say, the court has many times said that where a power is expressly conferred upon the national Government there goes with it all powers necessary to carry into effect that expressly granted. Even though the court may have erred in holding a power to be implied in some particular cases, the principle of these decisions cannot logically be controverted because the Constitution deals only in generalities, and the details are necessarily matters for the consideration of the national legislature if there be a general relation between the particular power sought to be exercised and some express grant contained in the Constitution. Generally speaking, therefore, it may be said that the Supreme Court of the United States has observed the spirit of the Tenth Amendment and has protected the states in the reserved rights which are recognized by that amendment.²

Most lawyers, then, who have not especially investigated the question, if called upon to state what legislative powers are vested in the various states, would probably reply that all legislative power relating to the people of the state as a separate entity, which is not conferred upon Congress, is conferred upon the states, and such, indeed, is the rule with one extraordinary exception.

Since the beginning of its history the Supreme Court of the United States has adhered to the principle that the wild game and fish within the state are the property of the state, held in trust for the benefit of its people. In Smith v. Maryland\(^3\) it was said that "this power results from the ownership of the soil, from the legislative jurisdiction of the state over it, and from the duty to preserve unimpaired the public uses for which the soil is held." And in Geer v. Connecticut\(^4\) the late Chief Justice White reviewed the subject in the light of both the common and the civil laws, and said:

"The ownership being in the people of the state, the repository of the sovereign authority, and no individual having any property rights to be affected, it necessarily results that the legislature, as the representative of the people of the state, may withhold or grant to individuals the right to hunt and kill game, or qualify or restrict, as in the opinions of its members will best subserve the public welfare."

And in Ward v. Race Horse\(^5\) it was said that the admittance of Wyoming into the Union on an equal footing with the original states operated to repeal a treaty theretofore made with an Indian tribe providing for the killing of game, for the reason that without the power to regulate the taking of game within its boundaries Wyoming would have been admitted into the Union "not as an equal member, but as one shorn of the legislative power vested in all the other states of the Union, a power resulting from the fact of statehood, and incident to its plenary existence."

These decisions sufficiently established the principle that the regulation of the taking of wild game is one of those matters which is clearly within the scope of the Tenth Amendment, and not within the powers of the Congress of the United States, either express or implied.

In practice it must be admitted that the states did not efficiently function in so far as the protection of game was concerned, and accordingly the idea was conceived that the movement of migratory birds over state and national boundaries constituted interstate commerce. In 1913 a statute was passed by Congress which attempted to regulate the taking of migratory birds. This statute was held unconstitutional by two lower Federal tribunals in United States v. Shauver\(^6\) and United States v. McCollough.\(^7\) Apparently recog-

\(^3\) (1855) 59 U. S. (18 How.) 71, 15 L. Ed. 269.
\(^6\) (1914) 214 Fed. 154.
\(^7\) (1915) 221 Fed. 288.
nizing the soundness of the conclusion in those cases, the Govern-
ment made no further attempt to enforce the statute, or to have the
question passed upon by the Supreme Court of the United States. In
1916, however, a treaty was entered into between Great Britain and
the United States for the protection of migratory birds in the United
States and Canada. This extraordinary document, although couched
in its formal parts in the language of diplomats, was in reality a
complete and comprehensive game code regulating the taking of
migratory birds in the United States and Canada. Article 8 of the
treaty provided that "the high contracting parties agree themselves
to take, or propose to their respective appropriate law-making
bodies, the necessary measures for insuring the execution of the
present convention." Pursuant to this undertaking, the Act of July
3, 1918, commonly known as the "Migratory Bird Treaty Act," was
passed.

This act was in substance a re-enactment of the treaty with
certain necessary procedural additions, and made violations of it
punishable by criminal proceedings in the Federal courts. The
validity of the act was immediately attacked by the states of Mis-
souri and Kansas in the case of Missouri v. Holland. The conclu-
sion of the court, Justices Van Devanter and Pitney dissenting, was
that the treaty and the act were valid. The major question before
the court was as to the meaning of that portion of Article 6 of the
national Constitution which provides that "all treaties made, or
which shall be made, under the authority of the United States, shall
be the supreme law of the land." It was argued by the states that
treaties made "under the authority of the United States" must be
made pursuant to the Constitution, that is to say, that they must
relate to those matters concerning which the Constitution, either
expressly or by necessary implication, authorized Congress to legis-
late. It was argued by the Government, on the other hand, that the
power to make treaties conferred upon the President and the Senate
by Section 2 of Article 2 was a separate grant of power which was in
no wise affected by the Tenth Amendment, or by any limitations
imposed by the Constitution upon Congress. The contention of the
Government was in effect sustained, although the court apparently
saved the question of whether there might not possibly be some
limitation upon the treaty-making power, saying: "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." That is to say, the court said that those limitations, if they existed, could not be ascertained by reference to the Constitution itself. The opinion then concludes with a considerable discussion as to the necessity for the treaty and the failure of the states to act, matters concerning which it is somewhat difficult to perceive the materiality since the question presented was one of power and not of legislative expediency.

Notwithstanding the reservation made in the opinion, it must be conceded that for all practical purposes, at least, the decision establishes the principle that the sovereign police power of the state may be abrogated by Congress if the President and some foreign nation can first obtain the consent of the Senate to this abrogation through the simple device of enacting a law to enforce the treaty. To state the conclusion in another way, an unconstitutional law, if enacted by Congress in the original instance, becomes constitutional if passed pursuant to a treaty contract, entered into between the President and some foreign nation, which has been acquiesced in by the Senate. We say "acquiesced in by the Senate" because although the Constitution empowers the President to negotiate treaties "by and with the advice and consent of the Senate" in practice the "advice" has almost uniformly been lacking since the time mentioned by John Quincy Adams in his Memoirs, when George Washington, after debating a draft of a proposed treaty with the Senate for an entire afternoon, left the Senate with the statement that "he would be damned if he ever went there again."

From the standpoint of the various states it is perhaps unfortunate that this question arose in the manner in which it did in the Holland case. This treaty appears to be the first attempt by Congress, by the use of the treaty-making power, to impose its will upon the states in a manner which would otherwise plainly come within the police power of the states and which in no way referred to or affected the rights or disabilities of aliens residing in this country or possible international relations.

The abstract question of whether there are limitations upon the treaty-making power has been the subject of controversy between scholars for many years. Mr. Randolph Tucker, in his work on constitutional law, maintains, and to the writer it appears quite plausibly, that Congress can do no more by the exercise of this power than without it, saying:
"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. We may suggest a further limitation. A treaty cannot compel any department of the Government to do what the Constitution submits to its exclusive and absolute will."9

Although this conclusion is entirely inconsistent with both the decision and the language used in the Holland case, it is not without support in certain dicta contained in earlier decisions of the court, none of which is referred to by Mr. Justice Holmes. In Downes v. Bidwell10 the court had occasion to consider the question of whether Porto Rico might be made a territory of the United States by a treaty and without further Congressional action. While different conclusions were reached with respect to the issue then before the court, six members of the court apparently were of the opinion that a new territory could not be formed by treaty without the consent of the entire Congress. Mr. Justice White, in a special concurring opinion which was concurred in by Justices Shiras and McKenna, said:

"If the treaty-making power can absolutely without the consent of Congress incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. . . . The treaty-making power then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted—vested with the right to destroy upon the one hand and deprived of all power to protect the Government on the other."

Chief Justice Fuller, with whom concurred Justices Peckham and Brewer, while dissenting from the conclusion reached in the case, concurred in this statement, saying:

"The grant by Spain could not enlarge the powers of Congress, nor did it purport to secure from the United States a guaranty of civil or political privileges.

"Indeed, a treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would be simply void.

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our Government. The Cherokee Tobacco, 11 Wall. 616, 620."

Mr. Justice Harlan, in a separate dissenting opinion, reached the same conclusion, saying:

"Of course, no territory can become a state in virtue of a treaty or without the consent of the legislative branch of the Government; for only Congress is given power by the Constitution to admit new states."

If it be true that an exclusive power vested in Congress by the Constitution cannot be exercised by means of a treaty, then logic, at least, would seem to support the conclusion that a power reserved to the states by the Tenth Amendment is likewise beyond the treaty-making power.

In Geofroy v. Riggs, Mr. Justice Field, in referring to the nature of the power, said:

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its departments and those arising from the nature of the Government itself and that of the states. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent."

In his dissenting opinion in the license cases Mr. Justice Daniel declared:

"Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States' save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty no more than an ordinary statute can arbitrarily cede away any right of a state or of any citizen of a state."

The same conclusion was also reached by Chief Justice Taney in the Passenger Cases. While both of the two decisions last referred to were dissenting opinions, it does not appear that in so far as this question is concerned there was any dissent in the mind of the court. Thus it appears that, notwithstanding the statement of Mr. Justice Holmes that the Constitution contains no limitation upon the treaty-making power, the court has in effect, by way of dictum at least, in prior decisions reached a contrary conclusion.

The negative of this proposition is supported with equal vigor by Mr. Charles Henry Butler of the New York bar, in his work on

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12 (1847) 46 U. S. (5 How.) 504, 12 L. Ed. 256.
13 (1849) 48 U. S. (7 How.) 283, 12 L. Ed. 702.
the "Treaty-Making Power of the United States," and seems to be in accord with the somewhat hesitant view of Chancellor Kent in his Commentaries. The work of Mr. Butler contains an exhaustive history of the debates in the Constitutional Convention and the opinion of the leading publicists of the times as to the extent of this power. This history is too voluminous to be reviewed in a paper of this character. Speaking generally, it may be said that these debates and opinions do not support the extreme conclusion which Mr. Butler reaches. The members of the Constitutional Convention seem to have been concerned primarily with the question of who would exercise the treaty-making power. It was apparently assumed, although without discussion, that treaties would be necessary or be negotiated only in those matters which might affect international relations, and the main debate, therefore, arose upon the question of who should negotiate treaties. This is illustrated by the case of Ware v. Hilton,\(^\text{14}\) decided in 1796. An examination of the briefs of counsel in that case shows that the question was raised, but apparently reserved by the court. Likewise in 1796, Thomas Jefferson, in a letter to Monroe, stated that he was of the opinion that Congress as a whole must determine whether or not treaties should go into force, stating, "on the precedent now to be set will depend the future construction of our Constitution, and whether the powers of legislation shall be transferred from the President, Senate and House of Representatives to the President, Senate and piamingo or any other Indian, Algerine or other chief."

It would seem more reasonable to suppose that the members of the Constitutional Convention proceeded upon the assumption that the President and the Senate were bound by the limitations contained in the Constitution in the negotiation of a treaty to the same extent as is Congress in the course of ordinary legislation, rather than that they intended to vest in one branch of the national legislature, the chief executive, and some foreign nation, a power which they at the same time denied to the entire Congress and the same chief executive. Viewed from the standpoint of principle, it would seem that from the very nature of things there must be some limitation upon this power. The word "treaty" appears but twice in the Constitution. Section 2 of Article 2 authorizes the President, by and with the advice and consent of the Senate, to negotiate treaties, and Article 6 provides that treaties made under the authority of the United States shall be the supreme law of the land. To hold that

\(^{14}\) (1796) 3 U. S. (3 Dall.) 199, 1 L. Ed. 568.
these two clauses import unlimited power would lead to the absurd result that the President and the Senate may destroy the very government which the Constitution creates. For instance, the Third Amendment to the Constitution provides that “no soldier shall, in time of peace, be quartered in a house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.” If the broad conclusion of Mr. Justice Holmes be correct, then it would be perfectly competent for the President and the Senate, by means of a treaty made with Costa Rica or Cuba, to provide for the abrogation of this constitutional guaranty, or by the same logic interstate commerce could be regulated and Federal courts abrogated or established by means of treaties, in the face of Section 7 of Article 1, which vests all national legislative power in the Congress of the United States, of which body the House of Representatives is a member. And if these provisions of the Constitution may be so abrogated by treaties consummated in the secret councils of diplomats, then it must equally follow that the rights expressly reserved to the states by the Tenth Amendment can by the same process be destroyed.

It is difficult to appreciate the suggestion of Mr. Justice Holmes that there may be limitations upon the treaty-making power in the light of his express declaration that the yardstick of that power, if it does exist, is not found in the Constitution. It has been so often repeated as to be elementary law that a court has no power to adjudicate a statute unconstitutional because it may seem to the courts to be “excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree.” The only instance in which a court may refuse to enforce the legislative edict is where it can say that the legislative action is a nullity because undertaken in violation of the organic law. If treaties may be made by the President and the Senate without regard to constitutional grants of power to other bodies, then by every rule of constitutional law there is not vested in any court any inherent power to declare a treaty void.

Mr. Willoughby, in his work on constitutional law, suggests the true test to be this:

“If, however, as we have seen, individual rights and the reserved powers of the states may, upon occasion, be sacrificed to the treaty-making power, under what circumstances, and according to what principle, may we expect these limitations to be imposed? Briefly stated, the answer is that these limitations are to be found in the very nature of treaties. That is, that the treaty-making power may not be used to secure a regulation or control of a matter not properly and fairly a matter of international concern. It can-
not be employed with reference to a matter not legitimately a subject for international agreement, any more than can the states under the claim of an exercise of their police powers regulate a matter not fairly comprehended within the field of police regulation. Thus, while it might be appropriate for the United States, by treaty with England, to provide that English citizens living in the United States should have certain rights of property, or schooling privileges, etc., within the states, state law to the contrary notwithstanding, it would not be appropriate and, therefore, would not be constitutional for the United States by such a treaty to provide that all aliens, whether British subjects or not, should enjoy these rights within the states in which they might live. So, likewise, it would not be a proper or constitutional exercise of the treaty-making power to provide that Congress should have a general legislative authority over a subject which has not been given it by the Constitution; or that a power now exercised by one of the departments of the general Government should be exercised by another department. For there are matters of domestic national law with which foreign power has no concern. In short, the treaty-making power is to be exercised with constitutional bona fides."

This is probably the limitation which Mr. Justice Holmes had in mind when he stated: "We do not mean to imply that there are no qualifications to the treaty-making power." This is undoubtedly a timely and proper limitation to be observed by the President and the Senate in the negotiation of treaties with foreign nations, but it is difficult to see any process of legal reasoning by which a court could refuse to enforce a treaty on account of the failure to observe these limitations if we accept the view that the express limitations of the Constitution do not apply.

Even, however, if the test suggested by Mr. Willoughby should be accepted, the substantial effect of the Holland case is to declare the treaty-making power to be unlimited. The migratory bird treaty was nothing more than the joint exercise by the governments of Great Britain and the United States of a purely local police power over the citizens of Canada and the United States, a police power which the Tenth Amendment of our Constitution expressly denies to the national Congress. It did not in any way involve international relations between the two countries. No question of war or peace was presented, no conflicting rights to territory or property, nor was there in issue claims of one citizen against the government or citizens of another. The fact that migratory birds sometimes pass from one country to the other obviously did not make the question an international one within the scope of the test proposed by

Mr. Willoughby. If this were so, then a sixteen-hour day could be imposed upon employees in our steel works, or the manufacture of automobiles could be prohibited by treaty, because steel products and automobiles manufactured in this country are sold in Great Britain, and that nation, therefore, would be economically affected by such a treaty.

To summarize, then, it is a fair statement that under the decision of the court in the migratory bird case, the sovereignty of the state is completely subordinate to the treaty-making power and the legislative power of Congress in the exercise of the enforcement of a treaty, except perhaps in some extreme case where the virtual disruption of the Union or the destruction of the Government is threatened by a treaty, and even this qualification appears to be debatable, according to Mr. Justice Holmes.

The provisions of the migratory bird law were undoubtedly of much merit and the results of its enforcement so beneficial to the game that the possibilities of the decision have, to a large extent, escaped popular notice. The practical effect of this decision is this: We have in this Republic a third legislative branch of the Government, composed of the President and some foreign nation, with the veto power vested in the Senate, which is authorized to enact local police regulations governing the affairs of our citizens. In this day of internationalism the possibilities inherent in such a system are not lightly to be disregarded. A perfect illustration of the place to which this may logically lead is found in the comparison of an article written by Mr. Quincy Wright, entitled, "Treaties and the Constitutional Separation of Powers," which appeared in the American Journal of International Law for January, 1918, with certain events which have occurred since the publication of that article. In this article Mr. Wright shows that for many years special consular courts have been established beyond the borders of the United States by treaties, and he argues quite convincingly that an international court may be created by the same process with power to pass upon all treaty questions, and that the jurisdiction of the Supreme Court of the United States over the lower Federal courts may be abrogated in so far as these matters are concerned by passing an act to enforce the treaty. This article was written before the close of the World War, and but for the action of the Senate of the United States it is not altogether impossible that at the present time we would be submitting questions of treaty interpretation to international tribunals as Mr. Wright suggests.
Article 14 of the covenant of the League of Nations requires the council of the League to "formulate and submit to the members of the League for adoption plans for the establishment of a permanent court of international justice." In the official journal of the League of Nations for September, 1920,\(^\text{16}\) appears a draft of a scheme for this proposed court. Article 34 of this draft defines the jurisdiction of the court, which includes the power "to hear and determine cases of a legal nature concerning (a) the interpretation of a treaty." With such a court in existence and an unlimited treaty power, that court, without practical knowledge of local conditions, could construe treaties in such a manner as absolutely to destroy all state sovereignty. Notwithstanding the failure of the Senate to approve the covenant of the League, there is a widespread movement for the establishment of an international court which is strongly supported by men like Chief Justice Taft and Elihu Root.\(^\text{17}\) A further illustration of the tendency of the times is found in the first meeting of the international labor organization of the League of Nations, held pursuant to the provisions of the covenant on October 29, 1919, at Washington, D. C.\(^\text{18}\) At this conference, by a queer coincidence, the conference recommended that "the charging of fees by employment agencies be forbidden." The Supreme Court of the United States, in the case of Adams v. Tanner,\(^\text{19}\) has already held that a statute of Washington which contained a similar prohibition was in violation of the Constitution of the United States. It thus appears that almost the first recommendation made by one of the agencies of the League is for an international agreement in violation of the organic law of this Nation.

If the treaty-making power were confined to strictly international questions we would find much merit in this movement. If treaties, however, are to perform the functions of general laws and are to be used even to the point of regulating the number of mallard ducks that may lawfully be taken, then it must be confessed that we would at least desire to examine, with careful scrutiny, any proposition to vest in some international tribunal, composed perhaps in part of learned men from Japan or Siam, the power of judicially construing that treaty. These are not mere theoretical possibilities. The preliminary steps for the formation of an international court have already been taken. If such a court be formed, its formation will

\(^{16}\) 14 American Journal of International Law, 377.

\(^{17}\) 15 American Journal of International Law, 1.

\(^{18}\) Idem, 42.

be acquiesced in by this country by means of a treaty, and its jurisdiction will likewise be prescribed by the same method. Facilitating legislation may or may not be required from the entire Congress, but in any event all of us, as citizens of states, should be informed that we shall have no voice other than through our two Senators, and perhaps in part our Representatives, in whatever action is taken. however destructive may be that action to the rights which some of us may have erroneously assumed that our forefathers reserved by the Tenth Amendment to the Federal Constitution.

The worst objection to, and the greatest danger in the use of the treaty-making power as a substitute for the process of ordinary legislation is in the method which is ordinarily followed in the execution of a treaty. The Constitution provides that a treaty shall be made by the President by and with the advice and consent of the Senate. In practice, with one notable exception, treaties are negotiated either directly by the Department of State or by commissioners appointed by the President. This stage of the treaty-making power may be likened to the committee work performed in the ordinary legislative body. These proceedings are seldom, if ever, of a public nature, and neither is any public record ever kept of the discussion had or the amendments proposed. After a treaty has been agreed upon by the representatives of the two governments it is referred to the President. If he is satisfied with its contents he transmits it to the Senate. The Senate usually considers all treaties in executive session, to which representatives of the press are not admitted. The debates had at these sessions do not appear in the Congressional Record and are supposed to be kept secret, unless the Senate, by resolution, removes the injunction of secrecy. After ratification by the Senate the treaty is proclaimed by the President and becomes the supreme law of the land. Unless the chief executive or the Senate choose to make these matters public, the first and last notification which the people directly affected have that a treaty is even contemplated, is when that treaty is in fact proclaimed.

There are two peculiar virtues in the ordinary legislative process which obtains in the United States: (1) the fact that people in general are advised of the steps which it is proposed to take, and are therefore enabled by protest, resolution or other appropriate means, to give to the legislative body the benefit of any knowledge which they may possess; and (2) the fact that public records are kept of legislative proceedings from which, in cases of ambiguity, the court may ascertain the legislative intent. Publicity is one of the distinguishing characteristics which mark the difference between a free government
and an autocracy. From a legal standpoint, the people of the United States are entitled to no more notice of a proposed treaty than the peasants of Russia had of the decrees of the czar in the days of the Russian empire. Secrecy, perhaps, is sometimes necessary in those delicate matters which affect international relations between nations, but it is difficult to see any such necessity where a treaty is used as a substitute for the ordinary legislative process in the consideration of questions of local police power, and concerning which no legislature can intelligently act without some consultation with its constituents.

Again, the construction of the meaning of treaties is not always an easy matter. Usually they are not couched in the exact legal language which is found in a well-drawn statute. This may be attributed, to a large extent, to the fact that they are drafted by persons speaking different languages. A draft sometimes prepared originally in a foreign language becomes the supreme law of the land when translated into English. Translations can never be exact and the result is often serious ambiguity. In a similar case involving ordinary legislation the courts may have recourse to legislative journals, records and debates. All of this is lacking where treaties are concerned because public records are not kept either of these diplomatic proceedings or even of senatorial debates. The writer recently experienced a striking illustration of this. A case arose in the Federal court involving the construction of a certain treaty. We were not able to find any official document which gave the history of the treaty in any way, or explained its meaning. We found, however, in the Library of Congress a translation of an official document published by the foreign government, which contained copies of an extensive correspondence between the Department of State and that government, and which gave the history of the treaty, matters which should have been of public record so that they could be referred to by the courts, but which we would have not been able to obtain had not the other government elected to give it publicity. Terrace v. Thompson.20 In Sullivan v. Kidd21 the court attempted to avoid this difficulty with the statement that it would generally follow the construction of a treaty announced "by the executive department of the government charged with the supervision of foreign relations." It is submitted that a Federal executive construction based upon secret facts which are beyond the judicial knowledge of

20 (1921) 274 Fed. 841.
the court is a dangerous thing to follow when there is involved a question of whether the power of a sovereign state has been suspended. It is analogous to permitting a judge to try a case in which he is interested, because Federal officers are but human, and in general Federal executive construction will always be found on the side of the Federal Government as opposed to that of the states.

It is not the purpose of this paper to discuss, save incidentally, the policy or wisdom of state sovereignty versus national domination. The Constitution was framed upon the theory, as has been stated by the Supreme Court of the United States, that ours is "a dual system of government, national and state, each operating within the same territory and upon the same persons," and that further "to preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts." The experience of one hundred and thirty years has demonstrated that there is at least sufficient merit in this idea of government to justify some caution before we should willingly consent to the destruction of that idea. The treaty-making power as exercised in the migratory bird statute and treaty points out to the enemies of state sovereignty a method whereby a portion of Congress, with the aid of some foreign potentate, may substantially destroy this dual system. The exercise of this power is but in its infancy.

Already a treaty has been approved by the Senate which provides for the regulation of the taking of salmon in certain waters of the Pacific Ocean. The recent adjournment of Congress prevented the passage of congressional legislation enforcing the provisions of the treaty, as did also the fact that the treaty was apparently defective in its original draft in that it was not made binding upon British subjects other than those of Canada. It seems certain, however, that this omission will be immediately cured by the British government, and that at the next session of the national Congress facilitating legislation will be passed for the purpose of enforcing the terms of the treaty. We have not had an opportunity to examine this treaty, and so are not informed whether it covers waters within the boundaries of a sovereign state. If the precedent for the treaty be the case of Missouri v. Holland, then doubtless it operates to divest the State of Washington of its police power over a portion of its territory.

The covenant of the League of Nations, if it had been adopted, would, we predict, in operation have disclosed some startling poten-

22 Supra, n. 8.
tialities with respect to the possibilities of the power. Today we are without the covenant, but no man knows what we may have tomorrow. A desire and thirst for power is inherent in the hearts of men, however pure may be their motives or high their aspirations—a fact which is recognized in every state by our system of division of governmental powers into executive, legislative and judicial departments. Wise as have been our chief executives, patriotic as are our Senators, they are but human. It is inevitable that as time passes they will resort to this method of destroying the sovereignty of the state when they believe the good of the nation, or their own high official prerogatives, justify that destruction. If our dual theory of government be a failure, if the states have failed in the proper exercise of the powers which the original thirteen states sought to reserve by the Tenth Amendment, then without apprehension we may view this process, or perchance we may advocate the repeal of the amendment and the vesting of all power in the national legislature or in the President and foreign diplomats. If, on the other hand, we believe that the successful perpetuation of this Republic depends upon the segregation of these powers, upon the direct participation of the people in their local government, with the consequent direct responsibility of our public officers to their constituents, then, indeed, should we observe with jealous care the exercise of the treaty-making power, because it is not beyond the bounds of possibility that even in our generation it may be necessary to protect that idea of government by amendment to the national Constitution.

L. L. Thompson.

Attorney-General, State of Washington,
Olympia, Washington