

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Quarterly, November to June, by the University of Pennsylvania Law School,
at 34th and Chestnut Streets, Philadelphia, Pa.

VOL. 73.

NOVEMBER, 1924.

No. 1.

THE SUPREME COURT AND TREATIES.

"That which is the strength of their amity shall prove the immediate author of their variance." (Antony & Cleopatra, II, vi, 137.)

In the British-Costa Rican award, Mr. Chief Justice Taft declares: "The Constitution of the United States makes the Constitution, laws passed in pursuance thereof, and treaties of the United States the supreme law of the land. Under that provision, a treaty may repeal a statute, and a statute may repeal a treaty. . . . In an international tribunal, however, the unilateral repeal of a treaty by a statute would not affect the rights arising under it, and its judgment would necessarily give effect to the treaty and hold the statute repealing it of no effect."¹

"The war began," it is significant, "by a denial on the part of a very great power that treaties are obligatory when it is no longer for the interest of either of the parties to observe them."² The doctrine has grown up in the United States that "the question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts"; that the power of Congress can neither be

¹ In the matter of the arbitration between H. M. the King, etc., and His Excl. the Pres. of the Repub. of Costa Rica, p. 26, Wash., D. C., Oct. 18, 1922, "The Supreme Court cannot under the Constitution recognize and enforce rights accruing to aliens under a treaty, which Congress has repealed by statute." It is important to distinguish between fundamental and granted rights; see also *The Law of Nations and Miscel. Addresses*, Guthrie, 43-44.

² Root, *Amer. Soc. Jud. Settlement of Int. Disp.* 1915, p. 27.

taken away nor impaired by any treaty as to subjects within the legislative power.³ But assuredly, it is the settled law of the Supreme Court that where an enactment of a law is positive, the terms of which are perpetual, and not dependent on a treaty formed with a view to its being perpetual, and where the act is passed for the sole purpose of enforcing the treaty, it is not repealed by implication when the treaty is repealed; and in this light, "if a treaty or any other law has performed its office by giving a right the expiration of the treaty or the law cannot extinguish the right."⁴ Some towering prerogative in the Constitution lifts the permanent right founded by the treaty in the municipal law above the legislative power. What the Supreme Court has declared is that: "If a treaty operates by its own force, and relates to a subject-matter within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress."⁵ This limitation is lost sight of in a subsequent opinion that: "So far as a treaty made by the United States with any foreign nation can be the subject of cognizance in the courts of the United States it will be subject to such acts as Congress may pass for its enforcement, modification or repeal."⁶

Taney declared: "It may safely be assumed that the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the general government, and, as the rights and duties of nations towards one another . . . are a part of the law of nations . . . it follows, that the treaty-making power must have authority to decide how far the right of a foreign nation in this respect will be recognized and enforced."⁷ Principles, established in the Constitution, are

³ Chinese Exclusion Cases, 130 U. S. 581, 600 (1888) and 112 U. S. 536, 562 (1884); see also, *Head Money Case*, 112 U. S. 580 (1884); *Whitney v. Robertson*, 124 U. S. 190 (1887).

⁴ *Chirac v. Chirac*, 2 Wheat. 259, 269, 272, 277 (U. S. 1817); *Carneal v. Banks*, 10 Wheat. 181 (U. S. 1825).

⁵ Chinese Exclusion Cases, *supra*, note 1.

⁶ *Head Money Case*, *Whitney v. Robertson*, *supra*, note 1.

⁷ *Holmes v. Jennison*, 14 Peters 540, 569 (U. S. 1840).

determinative at once of the constitutionality of laws and treaties, of their construction, and their validity, and therefore their obligation as part of the supreme law of the land. They are, in the words of Marshall, "vital principles of perpetual obligation," principles of "universal justice and universal obligation," principles which relieve from "clashing sovereignty," from "*interfering powers*," from "a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up," principles "which are admitted to regulate, in a degree, the rights of civilized nations, whose perfect independence is acknowledged," principles, conservative of those universally obligatory; and principles, coercive, assuring their operation in cases arising under the Constitution, or laws and treaties of the United States.*

There may be no suspension of the judicial power, vested by the Constitution in the Supreme Court of the United States to maintain these principles in their purity. Jurisdiction in cases arising under the Constitution is given to that court by the Constitution, whether the jurisdiction be appellate or original. It is ascertained by the application of the foregoing principles, and principles of national law embodied in the Constitution, to laws and treaties. This primary exercise of the judicial power of the nation is conclusive as to the constitutionality of the law or treaty, as to whether the principles they substantiate are compatible with or repugnant to those embodied in the Constitution. It must be acknowledged that laws, made pursuant to the Constitution, may not transcend principles of the law of nations established in it, and that treaties which stipulate on these principles consistently with the Constitution, and the tacit or expressed consent of all nations, are not subject to the powers of Congress. If, otherwise, the appellate jurisdiction in cases arising under the laws and treaties of the United States be dependent upon legislative enactment, it is not as to the power of the Supreme

* The Hiram, 1 Wheat. 440, 444 (U. S. 1816); Ogden v. Saunders, 12 Wheat. 303, 441 (U. S. 1827); McCulloch v. Maryland, 4 Wheat. 316, 730 (U. S. 1819); Wheaton v. Peters, 8 Peters 591, 658 (U. S. 1834); Talbot v. Seaman, 1 Cranch 1, 43, 44 (U. S. 1801); U. S. v. Nourse, 9 Peters 528 (U. S. 1835); Johnson v. McIntosh, 8 Wheat. 543, 571 (U. S. 1823).

Court to apply these principles in the resolution of conflict between treaties and statutes. If the controversy present a case in law or equity, "the third article of the Constitution," as Marshall declared, "enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States."⁹ The jurisdiction conferred upon the Supreme Court extends to rights protected by the Constitution, treaties or laws of the United States from whatever source derived.¹⁰

It is impossible to suppose that if a treaty of the United States stipulates for that which the law and usage of nations without expressed stipulation would have conferred, or submits internationally commerce and navigation with foreign nations to the operation of principles necessarily constraining upon legislative power that Congress may annul its internal obligation. The formidable securities and the equal protection of the laws of nature and of nations, laws not inconsistent under our Constitution, are not within the powers of Congress. It is a firmly established principle of our constitutional law, that our own governmental organs, authorized thereto, are the interpreters in the last analysis of the law of nations for all persons subject to their jurisdiction;¹¹ but, contemporaneously with the enunciation of that principle, the Supreme Court of the United States refused to give statutes a construction "anomalous in a government of laws and principles" or which would infract the "common principles and usages of nations and the general doctrines of national law." It imposed constructions consistent "with those principles which we believe and which it is our duty to believe, the legislature will always hold sacred." Admittedly, the judiciary is not that department of the government to which the assertion of the interests of the nation against foreign nations is confided, and its duty is commonly to decide upon individual rights according to those principles which the political departments have established.¹² If, however, such principles are re-

⁹ *Osborn v. Bank*, 9 Wheat. 738 (U. S. 1824).

¹⁰ *The Mayor v. DeArmas*, 9 Peters 224, 233 (U. S. 1835).

¹¹ *30 Hogsheads of Sugar v. Boyle*, 9 Cranch 191 (U. S. 1815).

¹² *Foster v. Neilsen*, 2 Peters 253, 302 (U. S. 1829).

pugnant to those established in the Constitution, the duty of the judiciary is, in cases or controversies otherwise cognizable by it, "a plain one."

The idea that "a treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty"¹³ that solecism of two powers, both supreme, yet each of them liable to be superseded by the other, that "absurdity of an *imperium in imperio*," as Madison called it, has rightfully no place in our constitutional jurisprudence, no title to respect, in so far as incompatible with those great principles of universal law, of the law of nature and of nations, given a new form of command by the Constitution.

The doctrine that all treaties of the United States are subject to legislative abrogation, modification or repeal, appears to have been unknown at the time of the great debates on the Jay treaty. The major constitutional objection urged against its ratification, was not, that if executed by Congress the treaty would constitute "a direct bar to our treating with other nations,"¹⁴ not that it would tie the hands of Congress; but that by stipulating on legislative subjects, it infringed the powers of Congress. Treaties were regarded as binding the nation, and the question was really whether the subject-matter of the treaty was by the law of nations and the Constitution within the exclusive authority of the legislature. Thus Madison declared, notwithstanding the ratification of the treaty, "a navigation act is always within our power."¹⁵ In the debate in the House of Representatives in the spring of 1796, he admitted that the Convention drafting the Constitution had explicitly rejected the proposition that no treaty should be binding on the United States which was not ratified by law; that it was not argued as to the Jay treaty that "no treaty shall be operative without a law to sanction it," but that it was recognized that some treaties

¹³ Treaties Made or Which Shall Be Made Under the Authority of the United States, 7 *MINN. L. REV.* 113 (Jan. 1923).

¹⁴ Writings of James Madison, VI (Aug. 10, 1795), 234; (Aug. 23, 1795), 247, 242, 253, 255.

¹⁵ Works of Madison, II, 67.

will operate without this sanction; and that the doctrine was no further applicable in any case than where legislative objects were embraced by the treaties.¹⁶ The final passage by the House of acts necessary to execute the treaty, reduced the constitutional objection, writes Story, to the mitigated form of a right in that body to grant or withhold appropriations required by a treaty. But, he says: "the higher ground that commercial treaties were not, when ratified, the supreme law of the land, was abandoned."¹⁷ The most substantial objection was that the treaty sacrificed the rights of neutral nations.¹⁸ Madison writes, that after having subscribed by express compacts to the principle of the freedom of enemy's property in neutral bottoms, the United States had itself effectually checked any progress towards a formal and complete establishment of that principle in the law of nations; but, admits, that at a former period it had been conceded on the part of the United States, that the law of nations stood as the Jay treaty regulated it, but that it did not follow that more than acquiescence in that doctrine was proper. The objection was, not that the treaty was in derogation of a universally admitted principle of the laws of war and neutrality, but that it stipulated for rights in Great Britain incompatible with rights vested in other nations, particularly France, constituting relaxations of the general rule, and therefore constituted an infraction of fundamental principles of the

¹⁶ Writings of James Madison, VI, 263 *et seq.*

¹⁷ Story, Miscel. Writings (1835), 193: "There are two principles," Jefferson had declared, "which may be proposed as the basis of a commercial treaty: (1st) that of exchanging the privileges of natural citizens; or (2nd) those of the most favored nation . . . though treaties, which merely exchange the rights of the most favored nation, are not without all inconvenience, yet they have their convenience also. It is important that they leave each party free to make such *internal* arrangements they please, and to give preferences they find expedient to native merchants, vessels, and productions." (Amer. State Papers, For. Rel., Vol. I, 134); 2 Peters Admir. 423, Fed. Case No. 17790. It was urged that the Jay treaty put Great Britain in a position to overcome the advantage possessed by American shipping under a preferential duty on cargoes imported in American bottoms, and thereby disregarded the "obvious rule of justice and equality" established by all prior treaties of the United States, it being alleged that Great Britain would be entitled to privileges extended to other nations without paying therefor.

¹⁸ Writings of James Madison, VI, 249, 275, 285.

law of nations.¹⁹ The debates turned on the obligation of the House to execute treaties concluded by the President and Senate, not upon the binding effect of treaties, executed or self-executing. Madison's earlier views suffer somewhat by comparison with the exception he sought to establish in favor of commercial treaties in these debates.²⁰ He had declared that treaties, "when made according to the constitutional mode, are confessedly to have force and operation of laws, and are to be a rule for the courts in controversies between man and man, as much, as any other laws";²¹ ". . . treaties formed by the government, are treaties of the nation, unless otherwise expressed in the treaty" . . . (and of consequence) . . . "a nation, by exercising the organ of its will, can neither disengage itself from

¹⁹ Subsequently, Marshall, Pinckney and Gerry, in Paris, addressed Talleyrand, January 17, 31, 1798: "It results from the nature of a contract, which affects the rights of parties, but not of others, and from the admission of a general rule of action, binding independent of compact, which may be changed by consent, but is only changed so far as the consent is actually given, that the treaty between two nations must leave to all others those rights which the law of nations acknowledges, and must leave each of the contracting parties subject to the operation of such rights." (Amer. State Papers, For. Rel., Vol. II, 167.) The fact that this communication to France anticipated by some months the abrogation by act of Congress of July 7, 1798, of the treaties with France (Malloy, *Treaties and Conventions*, 468 *et seq.*) is strongly evidential that the proponents of the Jay treaty regarded these particular relaxations of the law of nations in favor of France, if not previously suspended, then not repugnant to the British treaty.

²⁰ Writings of James Madison, VI, 148, August-September 1793; Madison (February 20, 1818) writes as to the Helvidius Papers: "I see no ground to be dissatisfied with the constitutional doctrine espoused, or the general scope of the reasoning in support of it." On March 14, 1818, he writes: "There are passages to which a turn a little different might have been given; particularly that speaking of treaties *as laws*; which might have been better guarded against a charge of inconsistency with the doctrine maintained on another occasion; and which probably would have been so guarded after accurate investigation of the constitutional doctrine occasioned by Mr. Jay's treaty. The reason, however, . . . is not affected by the question of consistency. . . . I have chosen rather to let the passage stand as it was first published, than to give to it what might be considered a retrospective meaning. Intelligent readers will be sensible that the scope of the argument did not lead to a critical attention to constitutional doctrines properly called forth on other occasions." *Works of Madison*, VIII, 59-61.

²¹ Madison cites the *Federalist* against Pacificus. Writings of James Madison, 151: "The power of making treaties is plainly neither" (a legislative nor executive function) . . . "its objects are contracts with foreign nations, have the *force of law*"; . . . "the vast importance of the trust, and the operation of treaties *as laws*, pleads strongly for the participation of the whole or a part of the legislative body, in the office of making them. Fed. 418, No. 75."

nor forfeit the benefit of its treaties. This is a truth of vast importance, and happily rests with sufficient firmness on its own authority."²² A decade later, he argues, that questions concerning treaties, amounting to laws of nations, must be decided by the general law of nations, not the question concerning the law of nations by the treaty.²³

Marshall's arguments, in Richmond, Virginia, as to the constitutionality of the Jay treaty are shrouded in obscurity. Beveridge says that the defense of the constitutional power of the President and the Senate to make treaties devolved on Marshall.²⁴ In his address in the Assembly, or House of Delegates of Virginia, about November 22, 1795, he argued: "that the treaty in all its commercial parts was still under the power of the House of Representatives."²⁵ In a final address, probably

²² Writings of James Madison, VI, 164.

²³ Writings of James Madison, VII, 236, 237.

²⁴ Life of John Marshall, II, 134 *et seq.*: Randolph wrote Jefferson (Works of Thomas Jefferson, Ford ed., 1896, VII, 37, fn.) that Marshall compared the relations between the executive and the legislative department "to that between the states and the Congress under the old Confederation. The old Congress might have given up the right of laying discriminatory duties in favor of any nation by treaty; it would never have thought of taking beforehand the assent of every state thereto. Yet no one would have pretended to deny the power of the states to lay such." The analogy seems imperfect; *vide* 7 MINN. L. REV. 113 and fn.; see also Hillhouse, 4 Annals of Congress, 1st Sess., Col. 663. Randolph commented that the doctrine had never been admitted by writers in favor of the treaty to the northward. What is important is the admission in his letter that "the sophisms of 'Camillus' and the nice distinctions of the 'Examiner' make up the rest" as indicating Marshall's support of the views therein advanced. Randolph's report that Marshall thought it "more in the spirit of the Constitution" for the national House to refuse support after ratification than to have a treaty "stifled in embryo" by the House passing upon it before ratification, suggests a leaning towards a view well expressed by Adams, who comments on the ultimate actions of the House of Representatives: "I was happy to find that after all there was a majority in that House (a feeble one indeed), who could make a distinction between the *right to ratify* or *reject*, and the power to violate a solemn national engagement, and who did not think proper to construe the latter, which they certainly possessed, into the former, which the Constitution has explicitly placed in other hands." (Writings of John Quincy Adams, I, Ford ed. 497, July 26, 1796.) That there were limitations on this power is evident from Marshall's subsequent decision in *U. S. v. Percheman*, 7 Peters 51 (U. S. 1833), and John Quincy Adams' own pronouncement: "The power of declaring war, of regulating commerce, of defining and punishing offenses against the law of nations are among the special grants to Congress, but over that law itself, thus expressly recognized and all comprehensive as it is, Congress has no alterative power." (Jubilee of Constitution 1839.)

²⁵ Writings of Thomas Jefferson, *supra*, 37, fn.; Jefferson in full accord comments: "He might have added the whole unconstitutional part of it" (p. 38).

April 25, 1796, before the Freeholders in Richmond, his position was²⁶ that a treaty "is as completely a valid and obligatory contract, when negotiated by the President and ratified by him, with the assent and advice of the Senate, as if sanctioned by the House of Representatives also, under a constitution requiring such sanction"; and that "the powers of the House in reference to a treaty were limited to granting or refusing appropriations to carry it into effect." The fact that before the delivery of this address, the Republicans in the Virginia legislature successfully carried a resolution (Marshall voting with them), instructing Virginia Senators and Representatives in Congress to attempt to secure an amendment to the Constitution providing that: "Treaties containing stipulations upon the subjects of the powers vested in Congress shall be approved by the House of Representatives,"²⁷ reveals Marshall's true position as to the obligation of executory treaties. In a letter to Hamilton, April 25, 1796, he avers "the ground we take is very much like that of Mr. Hillhouse."²⁸ The latter had argued in Congress, March 18, 1796, not that a treaty needed any concurrence on the part of the House, or legislative sanction to make it the law of the land;²⁹ but that the legislature had the right and that it was its indispensable duty to inquire whether a treaty "had the constitutional form, whether it related to objects within the province of the treaty power," and that "it might be proper, to examine the merits of a treaty, so far as to see *whether according to the laws of nations*, it would be null and whether they would be justified in withholding legislative provisions to carry it into effect." Certainly the nation would not be bound by a treaty palpably unconstitutional and the possible right of the House to examine into the merits of the treaty, suggests the true criteria

²⁶ Beveridge, *Life of John Marshall*, II, 135; *vide*, Letter to Hamilton, April 25, 1796.

²⁷ Beveridge, *Life of John Marshall*, II, 141.

²⁸ Representative in Congress from Conn., *vide*, 4 *Annals of Congress*, 1st Sess., Col. 660, March 18, 1796; Col. 1077, April 19, 1796; Col. 1283, April 30, 1806.

²⁹ See also *Ogden v. Saunders*, 12 *Wheat.* 213, 346 (U. S. 1827); *Jay, Corresp. and Pub. Pap.*, Vol. II, 387.

consistent with the Constitution and the general law of nations as to what is repealable in treaties. It further indicates the distinction between treaties, whose subject-matter is by the law of nations purely of domestic jurisdiction, and treaties whose subject-matter may yet, although ordinarily within the legislative power, be susceptible of regulation according to the advancing understandings of the law of nations, or principles with respect to whose extended obligation the power of Congress could not, with a just regard to the rights of foreign nations, be presumed to be adversely exercised.

Mr. Hillhouse repudiated the idea that the states could ever, in consenting to the formation of the Constitution, have admitted "that the power of making treaties, this highest act of sovereignty, should ever have been lodged or submitted to the control of a body, where four states should control the sovereignty of fifteen, and one state, that of seven." He admitted that upon sufficient cause treaties might be legislatively suspended or annulled, so far as they related to the people of the United States.³⁰ He holds: "A treaty is . . . capable of being operated upon, suspended or annulled, *so far as the citizens of the United States are concerned* by a subsequent legislative act. . . . This right has generally been lodged in the same hands that had the power of declaring war. It would seem that the power of declaring war must naturally involve in it, the power of doing lesser acts, which might in their consequences lead to war, there being no superior to whom resort can be had to determine when a nation has justifiable cause, *according to the laws of nations*, for departing from a treaty or refusing to observe it."³¹ He urges that the Constitution vested Congress with the whole power to regulate commerce "so far as the object could be accomplished by legislative act; but that this power would embrace but a small part of the objects which come within the term of regulating commerce with foreign nations." It would

³⁰ *Miller v. Resolution*, 2 Dallas 1, 4 (U. S. 1781): "The municipal laws of a country cannot change the law of nations so as to bind the subjects of another nation"; but see 30 Hogsheads of Sugar v. Boyle, *supra*, note 11.

³¹ 4 Annals of Congress, 1st Sess., Col. 671; Story, *Comm.*, 1163; 1 Tucker's *Blackstone Comm.*, 268, 269.

extend no further than the bounds of our own jurisdiction;³² that the total silence of the Constitution as to a distinction between treaties of commerce and common treaties, and amendments urged upon the Congress of the Confederation by the Constitutional Convention, when the Constitution was adopted, to the effect that no commercial treaty should be ratified without the concurrence of two-thirds of the Senate, conclusively repel the suggestion that the execution of commercial treaties was discretionary with the legislature.³³

The great debates on the Jay treaty, and the polemics which it called forth, leave the mind impressed with the entire want of justification for the modern theory that in all cases laws may repeal treaties, and treaties, laws, a construction of the Constitution which, unless qualified, operates to annihilate the treaty-making power and give the legislative almost an absolute control over it.

A useful distinction, secondary to the major one, that so far as treaties may amount to laws of nations, stipulate upon it, or vest equal rights in all nations, they are not subject to legislative modification or repeal, may be found in that between treaties executory and treaties, whose stipulations are contingent. During the preparation of early grants of the Constitution, Madison suggested consideration of whether a distinction ought not to be made between different sorts of treaties, "allowing the President and the Senate to make treaties *eventual* . . . and requiring the concurrence of the whole legislature in other treaties," save treaties of alliance for limited term.³⁴ Tucker comments that Madison, "intimated that in making treaties eventual, that is complete and final *per se*, the treaty-making power might be independent, but where they referred to matters which were incomplete without legislative aid, they would be incomplete

³² 4 Annals of Congress, 1st Sess., Col. 666.

³³ The proposed amendment distinguished treaties ceding territorial rights or claims of the United States from commercial treaties, requiring for the ratification of the former three-quarters of the whole number of the members of both houses.

³⁴ 2 Farrand, Records of the Fed. Conv., 392, 540.

until that assent was given."³⁵ Madison, however, averred: "The existence of *essential* engagements, which can only take effect on the declaration of the legislature, cannot, without that declaration change the actual state of the country, any more in the eye of the executive, than in the eye of the judiciary."³⁶ In the first instance it is a self-executing treaty which is referred to; in the latter it is one requiring aid of the legislature to execute it. Treaties, confirming that which is fundamental by the law of nature and of nations, consistently with the Constitution, extending the application of principles to which Congress must be presumed to be bound, which create no new obligation, but convert a subsisting one into terms of contract, a law of nations into a conventional one between the parties,³⁷ are constraining upon legislative power. The sanction of positive and express contract is added to an implied one. It is independent of the powers of Congress. By inherent constitutional limitation, the legislature is precluded from impairing the obligation of such treaties.³⁸ Such a treaty is necessarily self-executing, or if performance be required, it is to be by the Chief Executive. The treaty is not executory as to the legislative department. Those treaties which are conditional and contingent, necessarily however, address themselves to both political departments of the government for their execution.

Marshall observes, in *Foster v. Neilson*³⁹ that while a treaty is in its nature a contract between nations, not a legislative act, a different principle is established in the Constitution. It is not that a treaty is less a contract between nations under our system;⁴⁰ nor that the obligation of a treaty, in itself constitutional and acting directly on the subject-matter, is not admitted;⁴¹ but that if either of the parties engages to perform a

³⁵ Tucker, *supra*, II, 725, par. 3511.

³⁶ Writings of James Madison, VI, 158.

³⁷ 'Curtius,' N. Y. Minerva, 1795, Noah Webster or Kent; Writings of James Madison, VII, 236, 237.

³⁸ Ways to Peace (Amer. Peace Award 1924, 305-6).

³⁹ *Supra*, note 12.

⁴⁰ U. S. v. Arredondo, 6 Peters 691, 735 (U. S. 1832).

⁴¹ The Peggy, 1 Cranch 103, 109-110 (U. S. 1801).

particular act, or, as Marshall later expressed it, if the right granted be not consummated by the ratification of the treaty, such stipulation must be executed by act of Congress before it can become a rule of decision to the Federal Courts and that in the construction of such stipulation, consistently, of course with principles established in the Constitution, the judicial department will follow the political department. In no wise is the Supreme Court relieved of its great duty to apply these principles in the construction of treaties and in determination of their validity; nor, indeed, are its decisions to be construed to imply an independent political discretion in the legislature to refuse the execution or to impair the obligation of such treaties for causes not warranted by the general law of nations, between which and the Constitution no repugnancy is to be presumed.⁴² "From 1781 to this time" (1840) "every treaty of whatever kind, every compact between state and state, states and the United States, articles of capitulation, or even articles of agreement, have been held to effect by their own force every stipulation which declares that a thing 'shall be' done, or not done; that thenceforth the thing is done, everything that 'shall not' be done, if done previously, is repealed or annulled. All treaties, compacts and articles of agreement in the nature of treaties, to which the United States are parties, have been held to be the supreme law of the land, executing themselves by their own fiat, having the same effect as an act of Congress, and of equal force with the Constitution; and if any act is required on the part of the United

⁴² Story comments that it is indispensable that treaties should have the obligation and force of law, and "that they may be executed by the *judicial power*, and be obeyed like other laws. This will not prevent them from being cancelled or abrogated by *the nation* upon grave and suitable occasion; for it will not be disputed that they are subject to the legislative power, and may be repealed, like other laws, at its pleasure." II *Comm.*, 604-5, par. 1838. Story, however, admits that "the law of nations stands on other and higher grounds than municipal . . . statutes . . . it is binding on every people and every government." (Citing Duponceau.) I *Comm.*, 110, fn. It is impossible to believe upon examination of Story's opinions that treaties stipulating on the law or general usage of nations do not equally bind the legislature. As to treaties modifying the rules of the usages or law of nations, he declared: "I hold, with Bynkershoek (*Quaest. Pub. Jur. Ch.* 7) that where such treaties exist they must be observed." *Brown v. U. S.*, 8 *Cranch* 110, 142 (U. S. 1814).

States, it is to be performed by the executive, and not by the legislative power, as declared in the case of *The Peggy* in 1801 and since affirmed with the exception of only *Foster v. Elam*. Whether that case standing solitary and alone, shall stand in its glory, or in its ruins, a judicial monument, or a warning beacon is not dependent on my opinion," declared Mr. Justice Baldwin.⁴³ Treaties made under the authority of the United States bind the nation and bind the individual citizen.⁴⁴ Is it to be supposed that they do not bind the government so far as consistent with the law of nations?

The nature of the treaty power, delegated by the states for the benefit of the whole people, the assumption of the obligations of the states to foreign nations under the law of nations by the United States, and the recognition by the Constitution of prior treaties made under the authority of those states, all these circumstances import a trust the execution of which, it is inconceivable to believe, was left discretionary with Congress to render nugatory. No construction is to be given to a legislative enactment which would defeat the purpose of the Constitution, no negative or exclusive sense which would destroy important objects for which a power under the Constitution was created. "When the United States declared their independence they were bound to receive the law of nations in its modern state of purity and refinement."⁴⁵ The early American treaties engrafted great and new principles in the law of nations, provided for relaxations of others deemed onerous. The Constitution did not in the least extend the obligation of pre-existing treaties made under the authority of the states, but it expressly protected treaties made or to be made under the authority of the United States

⁴³ *Lessee of Pollard's Heirs v. Kibbe*, 14 Peters 353, 415 (U. S. 1840); *U. S. v. Percheman*, 7 Peters 51, 88 (U. S. 1833).

⁴⁴ *Kennett v. Chambers*, 14 How. 38, 45, 50 (U. S. 1852).

⁴⁵ *Ware v. Hylton*, 3 Dallas 199 (U. S. 1795); *Iredell, Charge to Grand Jury*, Dist. N. C., June 2, 1794 (Madison writes that Washington supported Iredell's charge: *vide*, Madison's Works, II, 95); *Hamilton's Works, Federalist XLIV*, 283; *Ogden v. Saunders*, 12 Wheat. 303, 304 (U. S. 1827); *Barron v. Mayor*, 7 Peters 243, 249 (U. S. 1833); *Cohens v. Virginia*, 6 Wheat. 264, 382 (U. S. 1821); *Secret Proceedings of the Con. Convention*, 194; *The Common Law and the Law of Nations Under the Federal Constitution*, 9 CALIF. L. REV. 481.

from repeal by the states. In so far as constitutional they would be binding on the United States. "In their national character and capacity the United States were responsible to foreign nations for the conduct of each state relative to the laws of nations and the performance of treaties." Therefore, the expediency of establishing the national courts. The security of the nation against innovation by treaty prejudicing principles of fundamental law and inalienable right established in the Constitution rests in the superintending judicial power of its Supreme Court, a power commensurate with the ordinary legislative, and executive powers of the general government and the power which concerns treaties, and "goes further."⁴⁶ International regulation of commerce and navigation according to these principles and by treaty may not be said to infringe legislative power nor to disarm the legislature or its successors of the right to exercise such power consistently with those principles.⁴⁷ The Constitution most certainly authorizes the extension internationally of principles which the Supreme Court has declared are deservedly to be held sacred in the view of policy, as well as of justice and humanity.⁴⁸ Substantive powers arising from the nature of sovereignty and the government of the United States, acknowledge no limitations, declares Marshall, other than those which are prescribed in the Constitution; and, again, all exceptions to the exercise of such powers must be traced up to the consent of the nation itself, be it by treaty or otherwise.⁴⁹

If the proposition be true that the Constitution is permissive of the legislative repeal of treaties, amounting to laws of nations, for causes not warranted by that law, or great principles established in the Constitution, it is equivalent to the admission that the Supreme Court of the United States in the exercise of

⁴⁶ Jay, Charge to Grand Jury, Richmond, Va., May 22, 1792; *The Treaty-Making Power and the Restraint of the Common Law*, 1 BOSTON UNIV. L. REV. 113; *Chisholm v. Georgia*, 2 DALLAS 419, 435 (U. S. 1793).

⁴⁷ *Doe v. Braden*, 16 HOW. 635, 657 (U. S. 1853).

⁴⁸ *Henderson v. Poindexter's Lessee*, 12 WHEAT. 530, 535 (U. S. 1827); *Delassus v. U. S.*, 9 PETERS 117, 130 (U. S. 1835); *U. S. v. Clarke*, 8 PETERS 436 (U. S. 1834); *Soulard v. U. S.*, 4 PETERS 511 (U. S. 1830).

⁴⁹ *Gibbons v. Ogden*, 9 WHEAT. 1, 211 (U. S. 1824); *The Exchange*, 7 CRANCH 116 (U. S. 1811).

its great, inalienable and obligatory jurisdiction in cases arising under the Constitution, both appellate and original, is incompetent to adjudge what is of permanent obligation in treaties, or what is consistent with the equal right of all nations, temporary or permanent; that conflict between a statute and a treaty is not relieved by the application of principles established in the Constitution, by the natural equity and justice of a law, which, said Marshall, "is the law of all tribunals in the society of nations and is supposed to be equally understood by all."⁵⁰ Either the Supreme Court of the United States is not a court of the law of nations as to the territorial application of principles of universal law established in the Constitution, or the Supreme Court, a court which sits and judges by the law of nations, may lose, by a violation of that law, its jurisdiction to maintain the law of treaties substantiating its principles as embodied in the Constitution. Between the anomaly of the first and the solecism of the latter, the range of the *justiciable*, as to the power of the nation's supreme tribunal to maintain as the supreme law of the land the integrity of the nation's international executory obligations, the sanctity of public contract, and consistently with the principle of the perfect equality of nations, the equal right, equal justice and equal obligation of treaties of the United States amounting to laws of nations, reduces to naught.

The Chief Justice has said: "The Supreme Court offers in its precedents, rules not only on the merits of international law, but rules that ought to be very influential in determining what the course of a permanent international court should be in dealing with litigation between nations."⁵¹ "*Acupia verborum sunt iudice indigna.*"

The question whether a law is constitutional which purports to repeal a treaty, authenticating and substantiating great principles of the general law of nations established in the Constitution, or extending their positive obligation internationally consistently with the principle of the perfect equality of nations,

⁵⁰ *Rose v. Himley*, 4 Cranch 241, 283 (U. S. 1808).

⁵¹ Taft, *Amer. Soc. for Jud. Settl. Int. Disp.*, Vol. VI (1916).

is not the question whether a constitutional law may repeal a treaty. If the treaty is in its nature a legislative compact, conditional and temporary, and presupposes the subject-matter thereof to have been by the Constitution and the law of nations devolved upon the legislature and subject necessarily to its independent political discretion in all cases, such exercise of the treaty-making power cannot be said to transcend the power of Congress. The question in the first instance is a judicial one; in the latter it is said to be a political one; and "justiciable issues," the Chief Justice has declared, "are those which can be decided upon principles of law and equity."⁵² It is difficult to see that both questions are not judicial. Otherwise the adoption of the Constitution and of the division of governmental powers between the states and the federal government must have abrogated a vital principle of universal obligation in the law of nations, as the fundamental law of the Supreme Court. Such an admission compels consideration of a system in which no convention of the nation with foreign nations is of binding obligation.⁵³ Since justiciable questions are those determinable by an international court only upon some common factor of juristic principles, common to all nations, and universally accepted by their governments as in harmony with their state policies, it would result that the question whether a constitutional law could repeal a treaty would not be justiciable. In the narrower sense all controversies between nations are political, not judicial; and the submission by sovereigns or states to a court of law or equity, of a controversy between them, without prescribing any rule of decision, gives power to decide according to the appropriate law of the case and the law that governs them. From the time of such submission, the question ceases to be a political one, to be decided *sic volo, sic jubeo*, of political power. If the

⁵² Taft, *League to Enforce Peace* (1916); *vide*, *The World Court of Justice*, Inter. Law Assn. (The Hague 1921), 59-60; it is a grave question what is internationally meant by "equity." Lately questions if it means a correction of law where it fails through its generality, as the term is used in Chancery. But if it means "interpreting what is a *consentement des nations* (Vattel), according to the intention of the parties," Lately agrees.

⁵³ Root, *Amer. Soc. for Jud. Settl. Int. Disp.*, Vol. V (1915).

Supreme Court have no judicial power in the premises, the objection against a delegation of judicial power cannot be interposed; but where the legislature, within its constitutional prerogative, repeals a treaty, it does so in the exercise of a substantive, sovereign and inalienable power. Whether it have rightly exercised its power, that is consistently with the Constitution and the general law of nations, cannot be of ultimate determination other than by Congress, or the superintending judicial power of the nation. It is the determination of that which binds the nation. Independent sovereignty ceases when that determination is delegated to an international court, unless the recognition of its judgments be by some international comity. The comity of the nation does not presuppose any obligation upon the United States to obey the sentences or mandates of a foreign court. The express extension by the Constitution of judicial power to controversies between a state, a citizen thereof, and foreign states, citizens or subjects, repels the suggestion that the Supreme Court is devoid of power to maintain the integrity of treaties made under the authority of the United States and within the trust imposed by the states upon the federal government as to their obligations, coincident with those of the people, under the law of nations towards foreign nations. Such grant of judicial power and of jurisdiction, presupposes no suit, of such nature, that it could not "on the settled principles of public and international law, be entertained by the judiciary of the other state at all."⁵⁴ Is it to be supposed then, that an international court could take jurisdiction of this alleged political question?

J. WHITLA STINSON.
(Copyright, 1924.)

New York, N. Y.

⁵⁴ *The Sapphire*, 11 Wall. 164, 167 (U. S. 1870); *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, 289, 8 Sup. Ct. 1370 (1887); *Rhode Island v. Massachusetts*, 14 Peters 210, 275 (U. S. 1840); *Reeves*, *Amer. Soc. for Jud. Settl. Int. Disp.*, Vol. V (1915); see also *Proceedings Grotius Society, Justiciable Disputes* (Jelf, 1921).