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Are Labor Conditions a Proper Subject of International Conventions and May the United States Government Become a Party to such Conventions Though They Regulate Matters Ordinarily Reserved to the States?

On August 20, 1934, the United States became a member of the International Labor Organization.¹ The General Conference of that organization which met in Geneva in June, 1935, adopted a series of draft conventions including a convention concerning the employment of women on underground work in mines, a convention limiting hours of work in coal mines, in glass bottle works and others.² Within a year or at the latest within eighteen months from June, 1935, the United States will have to bring the conventions as well as recommendations adopted at that conference “before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.”³ It seems timely, therefore, to consider the entire subject in order to determine what governmental powers there are in this country competent to deal with labor conditions internationally and what procedure should be followed. For the sake of brevity the phrase “labor conditions” will be used instead of “maximum hours, minimum wages, child labor, and other conditions of employment.” The problem seems logically to embrace the following questions: 1. Are labor conditions a proper subject of international negotiations and treaties? 2. Has the federal government power to enter into treaties with foreign nations regulating labor conditions in businesses the regulation of which has been reserved to the States? 3. Have the States power with consent of Congress to enter into agreements or compacts with foreign nations regulating labor conditions? 4. Has the federal government power to enter into treaties with foreign nations regulating labor conditions in businesses the regulation of which has been delegated to Congress? 5. If there is power under any of the above categories, are there limitations on that power, and what are they? 6. Would treaties

² International Labour Office, Official Bulletins, 15 August 1935, Vol. XX, No. 3.
be binding when ratified or would they be binding only when followed by legislation giving effect to the treaty? 7. Can anything be learned from the proceedings of other federal States which ratified conventions drafted by the International Labor Organization, like Canada, Germany before Hitler, Switzerland and others? 8. Specific questions arising in connection with possible ratifications of the International Labor Organization conventions or in connection with concluding other treaties dealing with labor conditions. In this paper an attempt will be made to answer the first two of the enumerated questions.

The applicable provisions of the Constitution of the United States are as follows:

**Article I, Section 10.**

"No State shall enter into any Treaty, Alliance, or Confederation; ... No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State, or with a foreign Power, ... ."

**Article II, Section 2.**

"He (the President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; ... ."

**Article III, Section 2.**

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ... ."

**Article VI, Section 2.**

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

**I. ARE LABOR CONDITIONS A PROPER SUBJECT OF INTERNATIONAL NEGOTIATION AND TREATIES?**

The Supreme Court of the United States has said that treaties are "designed to include all those subjects which in the ordinary intercourse of nations have usually been made subjects of negotiation and treaty."

Subsequently the Supreme Court stated on several occasions that the treaty-making power of the United States extends to all proper subjects of negotiations between the federal government and the governments of other nations.

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5 Geofroy v. Riggs (1889) 133 U. S. 258; In re Ross (1891) 140 U. S. 453; Asakura v. City of Seattle (1923) 265 U.S. 332. See to the same effect, Charles E. Hughes, The Supreme Court of the United States (1928) pp. 111, 114, quoting with apparent approval from Taft, Our Chief Magistrate and His Powers.
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Have labor conditions become matters which "in the ordinary inter-
course of nations" are "usually made subjects of negotiation and treaty"? Are they "proper" subjects for negotiation and treaty between our government and foreign governments? It was not the intention of the framers of the Constitution in 1787 to limit the subject matters of treaties to those only that were then subjects of treaties. There is no evidence of any such intention and since the Constitution was built for an indefinite future it is reasonable to assume that its framers contemplated the possibility of changes in the subject matter of treaties and did not intend to freeze the foreign relations of the United States. The practice of the government is illuminating. In the course of its history the United States has entered into treaties covering numerous subject-matters which had not been regulated by international treaties prior to 1787. Some of the subject-matters are: Unification of the pharmacopoeial formulas for potent drugs (1906);6 suppression of the abuse of opium and other drugs (1915, 1933); suppression of plague and cholera (1907); suppression of the white slave traffic (1908); protection of inventions, patents, trade-marks, designs and industrial methods (numerous agreements going back to about 1860); literary and artistic copyright (numerous agreements going back to the 1890's); repression of the circulation of obscene publications (1911); regulation of technical details and partial regulation of rates for services in the field of International Wireless Telegraph (1912); commercial aviation (1931); limitation of naval armament (1922); setting up of international bureaus for gathering and dissemination of technical information, like the International Bureau of Weights and Measures (1878); the Institute of Agriculture (1908); the International Office of Public Health (1908). As to additional "new" subject matter, not only were treaties entered into to regulate such matters but the treaties were enforced by the courts, for instance, a treaty regulating the killing of migratory birds

6 Malloy, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS, p. 2209.
7 Ibid., at p. 3025; 48 STAT. (1931) 1543.
8 Malloy, op. cit. supra note 6, at pp. 1935, 1943, et seq.
9 Ibid., at p. 2066.
10 Ibid., at p. 2131.
11 Ibid., at p. 2918.
12 Ibid., at p. 2889.
13 47 STAT. (1928) 1901.
14 Malloy, op. cit. supra note 6, p. 3160.
15 Ibid., at p. 1924.
16 Ibid., at p. 2140.
17 Ibid., at p. 2214.
or a treaty extending the time for filing applications for patents.\textsuperscript{10} Thus it is clear that though a matter may not have been thought of by the framers of the Constitution as a subject-matter of international treaties such matter is a "proper" subject for treaties in our time provided it is actually dealt with in treaties entered into by nations in their ordinary intercourse.

To what extent have labor conditions become subjects of actual negotiations and treaties? Early efforts to make them such are described in a report submitted by the French General Confederation of Labor (Confederation Generale du Travail) to the Conference of Allied Trade Unions held at Leeds, England, in 1916.\textsuperscript{20} Negotiations by governments were carried on on numerous occasions at the end of the 19th century. The Swiss government was especially active in initiating conferences aiming at international regulation of some labor conditions. One of the conferences called by that government was transferred to Berlin at the request of the German Emperor in 1890.

In 1882 and 1897 France and Belgium, with a view to protecting migratory workers, concluded agreements insuring to depositors in savings banks greater facilities for deposit, transfer, and repayment. In 1904 France and Italy entered into an agreement which in addition to facilitating transfer of monies deposited in savings banks regulated questions of workmen's pensions in case of migration, workmen's compensation for accidents, unemployment payments, protection of minors employed in industries, the development of an inspection service in factories, and publication of annual reports on the application of the laws and regulations relating to the work of women and children. Numerous agreements, chiefly relating to accident insurance, were thereafter signed between various European countries in the years 1904 to 1913 of which sixteen were enumerated in the report of the Leeds Conference. There was also a treaty entered into between the Transvaal and Mozambique for the protection of native laborers. The Franco-Danish Treaty of Arbitration entered into in 1911 provided among the matters subject to arbitration, those relating to the international protection of workers. In 1906 two conventions were entered into in Berne, Switzerland; one prohibiting the use of white phosphorus in the manufacture of matches has now been adhered to by thirty-one countries; the other prohibited night work for women and has also been adhered to by a substantial number of nations. In 1913 another conference was held at Berne, Switzerland, composed of experts representing governments

\textsuperscript{10} General Electric Co. v. Robertson (D. Md. 1927) 21 Fed. (2d) 214.
\textsuperscript{20} 2 SHOTWELL, THE ORIGINS OF THE INTERNATIONAL LABOR ORGANIZATION (1934) pp. 11-12.
whose purpose it was to formulate additional international agreements prohibiting night work by young workers and fixing a ten-hour day for women. That conference was to be followed by a conference of diplomats for the purpose of entering into international conventions, but the World War put an end to further steps in that direction until the creation of the International Labor Organization.

Article XIII of the Treaty of Versailles is the Constitution of the International Labor Organization. The first conference of that organization was held in Washington, D.C. in 1919 and at that session six conventions were drafted and submitted to members for signature. When the United States refused to ratify the Treaty of Versailles it also severed its connection with the International Labor Organization. But on August 20, 1934, the United States resumed the connection and became a member of the organization. Over thirty conventions drafted by the International Labor Organization have been ratified by various nations.21

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21 International Labour Organization, Draft Conventions and Recommendations Adopted by the International Labour Conference at Its Eighteen Sessions beld 1919-1934. International Labour Office, Geneva, 1934; The Progress of Ratifications, International Labour Office, July, 1935. The following is a list of the conventions drafted by the International Labour Organization together with the year when each convention went into effect and the number of nations that had ratified each convention by July, 1935:

<table>
<thead>
<tr>
<th>Number of convention</th>
<th>SUBJECT MATTER</th>
<th>Came into force in the year</th>
<th>Total number of ratifications</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Limits the hours of work in industrial undertakings to 8 in the day and 48 in the week</td>
<td>1921</td>
<td>22</td>
</tr>
<tr>
<td>2</td>
<td>Concerning unemployment</td>
<td>1921</td>
<td>30</td>
</tr>
<tr>
<td>3</td>
<td>Concerning employment of women before and after child-birth</td>
<td>1921</td>
<td>16</td>
</tr>
<tr>
<td>4</td>
<td>Prohibiting the employment of women in industrial undertakings during the night</td>
<td>1921</td>
<td>30</td>
</tr>
<tr>
<td>5</td>
<td>Fixing the minimum age for admission of children to industrial employment</td>
<td>1921</td>
<td>26</td>
</tr>
<tr>
<td>6</td>
<td>Concerning night work of young persons employed in industrial undertakings</td>
<td>1921</td>
<td>30</td>
</tr>
<tr>
<td>7</td>
<td>Fixing the minimum age of children employment at sea</td>
<td>1921</td>
<td>28</td>
</tr>
<tr>
<td>8</td>
<td>Concerning unemployment indemnities in case of loss or foundering of ship</td>
<td>1923</td>
<td>22</td>
</tr>
<tr>
<td>9</td>
<td>Establishing facilities for finding employment for seamen</td>
<td>1921</td>
<td>23</td>
</tr>
<tr>
<td>10</td>
<td>Concerning age of admission of children and minors in agriculture</td>
<td>1923</td>
<td>17</td>
</tr>
<tr>
<td>11</td>
<td>Concerning rights of association and compensation of agricultural workers</td>
<td>1923</td>
<td>27</td>
</tr>
<tr>
<td>12</td>
<td>Concerning workmen's compensation in agriculture</td>
<td>1923</td>
<td>19</td>
</tr>
<tr>
<td>13</td>
<td>Concerning the use of white lead in painting</td>
<td>1923</td>
<td>23</td>
</tr>
<tr>
<td>14</td>
<td>Concerning the application of the weekly rest in industrial undertakings</td>
<td>1923</td>
<td>26</td>
</tr>
</tbody>
</table>
In view of all those bona fide agreements entered into between and among numerous nations and in force for long periods of time it seems clear that labor conditions have become a proper subject of international negotiations and treaties. Of course, the question as to "propriety" or "impropriety" discussed herein is not based on any rule of international law; it is based on the constitutional law of the United States and arises because of our federal system of government. Though the Supreme Court has never held any treaty invalid on any ground, the statements of that court, concurred in by practically every writer on the subject, indicate that the Supreme Court will inquire into the "propriety" of labor conditions as a subject for an international treaty.

<table>
<thead>
<tr>
<th>Number of convention</th>
<th>SUBJECT MATTER</th>
<th>Came into force in the year</th>
<th>Total number of ratifications</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>Fixing minimum age for the admission of young persons to employment as trimmers or stokers</td>
<td>1922</td>
<td>28</td>
</tr>
<tr>
<td>16</td>
<td>Medical examination of children and young persons employed at sea</td>
<td>1922</td>
<td>26</td>
</tr>
<tr>
<td>17</td>
<td>Concerning Workmen's Compensation for Accidents</td>
<td>1927</td>
<td>16</td>
</tr>
<tr>
<td>18</td>
<td>Concerning Workmen's Compensation for Occupational diseases</td>
<td>1927</td>
<td>28</td>
</tr>
<tr>
<td>19</td>
<td>Concerning equality of treatment of national and foreign workers as regards workmen's compensation for accidents</td>
<td>1928</td>
<td>10</td>
</tr>
<tr>
<td>20</td>
<td>Concerning night work in bakeries</td>
<td>1928</td>
<td>10</td>
</tr>
<tr>
<td>21</td>
<td>Concerning the simplification of the inspection of immigrants on board ship</td>
<td>1927</td>
<td>19</td>
</tr>
<tr>
<td>22</td>
<td>Concerning seamen's articles of agreement</td>
<td>1928</td>
<td>19</td>
</tr>
<tr>
<td>23</td>
<td>Concerning the repatriation of seamen</td>
<td>1928</td>
<td>16</td>
</tr>
<tr>
<td>24</td>
<td>Concerning sickness insurance for workers in industry and commerce and domestic servants</td>
<td>1928</td>
<td>16</td>
</tr>
<tr>
<td>25</td>
<td>Concerning sickness insurance for agricultural workers</td>
<td>1928</td>
<td>11</td>
</tr>
<tr>
<td>26</td>
<td>Concerning the creation of minimum wage fixing machinery</td>
<td>1930</td>
<td>18</td>
</tr>
<tr>
<td>27</td>
<td>Concerning the marking of the weight on heavy packages transported by vessels</td>
<td>1930</td>
<td>30</td>
</tr>
<tr>
<td>28</td>
<td>Concerning protection against accidents of workers employed in loading or unloading ships</td>
<td>1932</td>
<td>4</td>
</tr>
<tr>
<td>29</td>
<td>Concerning forced or compulsory labor</td>
<td>1932</td>
<td>16</td>
</tr>
<tr>
<td>30</td>
<td>Concerning regulation of hours of work in commerce and offices</td>
<td>1933</td>
<td>6</td>
</tr>
<tr>
<td>32</td>
<td>Concerning the protection against accidents of workers employed in loading or unloading ships, revises No. 28</td>
<td>1934</td>
<td>5</td>
</tr>
<tr>
<td>33</td>
<td>Concerning the age of admission of children to non-industrial employment</td>
<td>1935</td>
<td>3</td>
</tr>
</tbody>
</table>
II.

HAS THE FEDERAL GOVERNMENT POWER TO ENTER INTO TREATIES WITH FOREIGN NATIONS REGULATING LABOR CONDITIONS IN BUSINESS THE REGULATION OF WHICH HAS BEEN RESERVED TO THE STATES?

We live under a dual system of government. Some powers have been delegated to the federal government by the Constitution of 1787 with the result that others remained with the states or with the people. The power "to make treaties" was delegated to the United States and, in addition, was prohibited to the States.\(^{21a}\) Hence, it was not reserved to the states.

But the question is raised from time to time as to whether there are not limitations on the treaty power of the federal government due to the reservation of certain other powers in the states. When a state passes a law as to a subject matter concededly within its jurisdiction and the federal government enters into a treaty with reference to the same subject matter to take effect in that very state and there is a conflict between the state law and the treaty, which shall prevail? According to Art. VI. of the Constitution it seems that the treaty should prevail.

But then the further agreement is raised that a treaty is supreme only if made "under the authority of the United States," that that phrase refers to authority exercised in accordance with the Constitution, that under the Constitution certain matters are reserved to the states, that a treaty which attempts to regulate such matters is made in accordance with the Constitution and therefore is not made "under the authority of the United States"; hence, that it is not "the supreme law of the land," and the state statute does not yield to the treaty.

This problem has come before the Supreme Court of the United States in many cases and, of course, the holdings of the Supreme Court are the only authoritative answer. It may not be amiss, however, to touch on the general situation in 1787 and the expressed intentions of the framers of the Constitution.

Under the Articles of Confederation, Art. IX, the United States had "the sole and exclusive right and power of entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever."

There was no provision about treaties being the supreme law of the land. Whether or not they were, was a subject of debate. Some States

passed laws to the effect that certain treaties were the supreme law of the land or passed laws giving effect to the treaties. Others claimed the right to interpret treaties and passed statutes in derogation of treaties or left such statutes unrepealed. While the treaty of peace with Great Britain of 1783 called for no confiscation of property of British citizens and for no impediments in their collection of debts several states disregarded those provisions. Because of that failure to comply with the treaty, said the British, they were justified in not vacating certain forts on the frontier. It was hard to negotiate treaties with other nations when it appeared that the United States government had no power to enforce its treaties in the United States.

In the initial stages of the debates in the federal Convention that problem was tied up with the general problem of enforcing federal statutes which were in conflict with state statutes.

The Virginia plan as adopted by the Committee of the Whole on May 31 and June 8, 1787 gave the National Legislature the right "to negative all laws passed by the several states, contravening in the opinion of the National Legislature the articles of the Union or any treaties subsisting under the authority of the Union." The New Jersey plan submitted on behalf of the smaller states provided that "all treaties made and ratified under the authority of the United States shall be the supreme law of the respective states." Thus the followers of both plans recognized that state laws had to yield to treaties and this was, by implication, the intent of a plan submitted by Hamilton. In the Committee of Detail (July 26 - August 6, 1787) there seems to have been an intention to enumerate various kinds of treaties which the federal governments permitted to make, for instance, treaties of commerce, peace, alliance but this intention was apparently abandoned and the all-inclusive term was chosen, the federal government was given power "to make treaties." At no time did the remarks of the members of the federal convention indicate that they thought that the treaty power was subject to powers reserved to the states. On the contrary, quite a few remarks were made which indicate the opposite, for instance, that the whole country could be sold by means of treaties or that a treaty might be made "requiring all the rice of S. Carolina to be sent to some one particular port." In the

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22 Ware v. Hylton (1796) 3 Dall. (3 U.S.) 199.
23 1 Max Farrand, Records of the Federal Convention of 1787 (1911) pp. 47, 162.
24 Ibid. at p. 245.
25 Ibid. at p. 155.
26 Ibid. at pp. 144, 155.
27 Farrand, op. cit. supra note 23, at pp. 297, 393.
Virginia convention held to ratify the Constitution fears were expressed that the Union might be dismembered by means of treaties but Madison assured the convention that the power did not extend so far.28

The Supreme Court has uniformly upheld the treaty-making power when its exercise conflicted with state statutes. It may be useful to group the court decisions according to the subject matter of the state rights involved, in order to show in what various fields normally reserved to the states, the exercise of the treaty power has been upheld.

A. Confiscation of enemy property. In the course of the Revolutionary War and prior to the ratification of the Articles of Confederation, Virginia, by statute, confiscated debts due to British creditors. The statute was held to have been overridden by the Treaty of Peace of 1783 entered into between Great Britain and the United States which provided "that the creditors of either side should meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts theretofore contracted."29 The same was held with reference to a statute of Maryland.30 Another provision of the same treaty of peace was held to protect title to land in a British corporation against attempted confiscation by the legislature of Vermont.31

B. State Statute of Limitations. The provision of the treaty of peace against impediments in the collection of debts was held to have the effect of preventing the adding of a period which had elapsed between the execution of a promissory note prior to the war and the outbreak of the war, to a period after the war, and thus the British creditor was able to evade the Virginia five-year statute of limitations.32

C. Acquisition of land by aliens. Two provisions of the law of Maryland, one limiting the rights of aliens to purchase, and the other limiting their right to inherit land in Maryland, were held inoperative as against Frenchmen because of treaties entered into between the United States and France.33 In another case Virginia tried to enforce its claim based on escheat of Virginia land owned by a Swiss citizen who died in Virginia; at a time when the State was about to cause the land to be sold, Swiss heirs of the decedent claimed the proceeds of the sale by virtue of a treaty made between the United States and Switzerland in 1850. Judgment dismissing their petition was removed on the ground that

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29 Ware v. Hylton (1796) 3 Dall. (3 U. S.) 199.
30 Clerke v. Harwood (1797) 3 Dall. (3 U. S.) 342.
32 Hopkirk v. Bell (1806) 3 Cranch. (7 U. S.) 454.
the statute of Virginia had to yield to the treaty.\textsuperscript{34} The states follow and recognize the law as laid down by the Supreme Court of the United States.\textsuperscript{35} Of course, in the absence of a treaty, a state is free to grant or deny an alien the right to inherit land within its borders.\textsuperscript{36}

D. Prohibition of employment of foreign laborers on public works and prohibition of employment of foreign laborers by State-chartered corporations. A statute of Oregon which forbade the employment of Chinese labor "on improvement of streets and public works in this state" was held void because of a treaty between China and the United States which was construed to prevent such prohibition.\textsuperscript{37} This was also the fate of a provision in the California constitution and of a California statute of 1880, both of which prohibited the employment of Chinese by corporations chartered in California.\textsuperscript{38}

E. Limiting the business of pawn brokerage to citizens of the United States. An ordinance of the City of Seattle, Washington, which, in effect, limited the business of pawn brokerage to citizens of the United States, was held not to apply to a citizen of Japan because of a treaty between the United States and Japan guaranteeing the citizens of either country freedom to engage in business in the other on the same terms as are enjoyed by natives.\textsuperscript{39}

F. Issuance of letters of administration on estates of alien residents. Where a treaty between the United States and a foreign country gave the foreign consul a right to obtain letters of administration on the estates of his countrymen dying intestate in this country such treaty was given full effect even though the state law gave other persons the right to take out letters of administration under those circumstances.\textsuperscript{40}

\textsuperscript{34} Hauenstein v. Lynham (1879) 100 U. S. 483.

\textsuperscript{35} People v. Gerke (1855) 5 Cal. 381; Wunderle v. Wunderle (1893) 144 Ill. 40, 33 N. E. 195; Opel v. Shoup (1896) 100 Iowa 407, 69 N. W. 560. A treaty with Austria-Hungary made in 1848 was held to override the statutes of New York which denied an alien enemy the right to inherit land, even after this country had declared war against Austria-Hungary in 1917 in the absence of a proclamation suspending or abrogating the treaty. Techt v. Hughes (1920) 229 N. Y. 222, 128 N. E. 185, per Cardozo, J., cert. den. (1920) 254 U. S. 643.

\textsuperscript{36} Blythe v. Hinckley (1900) 180 U. S. 333; Wunderle v. Wunderle; Opel v. Shoup, both supra note 35.


\textsuperscript{38} In re Tiburcio Parrott (C. C. D. Cal. 1880) 1 Fed. 481.

\textsuperscript{39} Asakura v. City of Seattle (1923) 265 U. S. 332.

\textsuperscript{40} In re Wyman (1906) 191 Mass. 276, 77 N. E. 379; Carpiignani v. Hall (1911) 172 Ala. 287, 55 So. 248; In re Infelise's Estate (1915) 51 Mont. 18, 149 Pac. 365. In Rocca v. Thompson (1911) 223 U.S. 317, the court construed a treaty not to show the intention to give the foreign consul that right and continued: "Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakable terms. For instance, where that was the purpose, as in the treaty with Peru in 1887 [August 31, 1887, 25 Stat. 1444], it was declared . . . " There was no intimation on the part of the Supreme Court that such a treaty would exceed the treaty-making power of the federal government.
G. Taxation of aliens by States. A statute of Iowa imposed a 10\% inheritance tax on estates passing to relatives who were non-resident aliens. A treaty between the United States and Denmark secured to the citizens of each country the right to remove property acquired by inheritance from the territory of the other without payment of any other taxes than those paid by natives. Held, the treaty superseded the statute.\textsuperscript{41} Similarly a California poll tax on resident aliens imposed by statute and constitution of California had to yield to a treaty between the United States and Japan which provided that the citizens of either country “shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.”\textsuperscript{42}

H. Creation of penal law. In 1894 the Nez Perce Indians ceded a part of their land to the United States. The agreement provided that for 25 years thereafter the federal statutes prohibiting introduction of liquor into the Indian country should continue in force in the ceded part. In 1905 a section of that land had been organized into a village under the laws of Idaho which State had full jurisdiction over the village and its inhabitants. An Indian exchanged liquor in that village and was convicted under the federal statute. The Court held that the village was not Indian country within the contemplation of the federal statute but that it must be treated as if it were Indian country because of the agreement between the United States and the Indian tribe. The conviction was therefore upheld.\textsuperscript{43} A similar result was reached when the United States brought a libel to forfeit liquor introduced by a white person into a regularly organized county in the State of Minnesota. The United States relied on a treaty by which the Indians had ceded that land, with a proviso continuing in force the federal statutes against introduction of liquor into the Indian country. A judgment sustaining a demurrer to the information was reversed.\textsuperscript{44} In the latter case the Court strongly relied on the commerce clause too, and the commerce clause was referred to in the former case. But it was admitted in both cases that there was no Act of Congress which justified the indictment or the information. In other words, the prohibitions were not enacted by Congress by virtue of its power to regulate commerce with Indian tribes. The prohibitions were created by the treaty-making power alone.

I. Regulation of migratory birds. Congress attempted to regulate the killing of migratory birds within the states but the Act was held

\textsuperscript{41}Nielsen v. Johnson (1928) 279 U. S. 47.
\textsuperscript{42}Ex parte Heikich Tend (1921) 187 Cal. 20, 200 Pac. 954.
\textsuperscript{43}Dick v. United States (1907) 208 U. S. 340.
\textsuperscript{44}United States v. Forty-three Gallons of Whiskey (1874) 93 U. S. 188.
unconstitutional in lower federal courts on the ground that it was an invasion of rights reserved to the states, the states being the owners of migratory birds. After that and in 1916 the United States entered into a treaty with Great Britain regulating the killing of migratory birds in the United States and Canada and in pursuance of the treaty Congress passed an Act in 1918, to give effect to the treaty. The treaty was held within the treaty-making power and the Act valid.

Mr. Justice Holmes said in that case: "No doubt the great body of private relations usually falls within the control of the state, but a treaty may override its power."

**J. Police Power.** There is a considerable body of dicta, originating for the most part during the twenty-five years preceding the Civil War, to the effect that the police power of the states cannot be infringed upon by any act of the federal government, be it Act of Congress or treaty. The phrase "police powers" is frequently employed as synonymous with "powers reserved to the states." The cases discussed so far clearly show that the treaty power is superior to powers reserved to the states. Even where the phrase is employed to describe measures which provide for health, morals, safety, etc., it is perfectly clear that these measures being "laws" must yield to the treaty power in accordance with the plain language of Article VI of the Constitution. The difference between police powers and legislative powers in general is very vague. Every law can be shown to relate to the welfare or health or morals of the people. Apart from that, some of the decisions clearly involve matter which ordinarily would be considered within the police power of the states, for instance, whether or not aliens should own land or should engage in the pawn brokerage business, or whether liquor should be dealt in on state territory, or when inhabitants of the state may or may not shoot migratory birds. In those decisions, however, the treaty power has been uniformly upheld.

In spite of the successive decisions of the Supreme Court the followers of the so-called state-rights doctrine continued to argue that the rights reserved to the states, by virtue of the system of government or by virtue of the Tenth Amendment to the Constitution, are superior to the treaty-making power. It seems that those arguments have been effectively disposed of by the opinion of Mr. Justice Holmes in *Missouri v. Holland*, wherein it was decided: (1) Powers reserved to the

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47 For instance, License Cases (1847) 5 How. (46 U.S.) 504; Passenger Cases (1849) How. (48 U.S.) 283.
49 Supra note 46.
states must yield to a treaty. Thus things which Congress cannot do the Federal Government may do by means of a treaty; (2) The Treaty being valid the Act that gave effect to the treaty was valid too as the necessary and proper means to execute the power of government; (3) It is not lightly to be assumed that a power enjoyed by every civilized government is not found in the governmental system of this country.

Prior to *Missouri v. Holland* it was argued that regulation by treaty of matters reserved to the states would be upheld by the Supreme Court only where a treaty regulated rights of aliens. In *Missouri v. Holland* the Supreme Court for the first time upheld a treaty that regulated affairs of residents whether citizens or aliens, and this decision was expressly stated by the Court to be in accordance with the long line of its previous decisions and did not embody a new principle by any means.

It seems to be established that the federal government has power to regulate labor conditions by treaties with foreign nations, though but for the treaty power, those conditions would be within the regulatory powers of the states as matters reserved to the states.\(^\text{50}\)

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