Amending the Constitution to Cripple Treaties

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At a time when our country is assuming heavier responsibilities in foreign affairs than ever before, a powerful movement is under way to obtain the adoption of a constitutional amendment which will diminish the ability of the government of the United States to carry out its agreements with other nations. Several different drafts for such an amendment have been promulgated from various sources. Two of especial significance will be examined in this article, one which the American Bar Association has recommended to Congress for consideration and the other introduced in the Senate by Senator Bricker of Ohio. The writer wants to make it plain that both these drafts and any other similar proposal are very objectionable, and that the Constitution should not be amended to cripple the treaty power. The treaty clauses which were framed with great care by the Philadelphia Convention of 1787 have worked admirably for a century and a half and constantly enabled our nation to take its proper place in the world. In the present period of great emergency, it would be disastrous to change the Constitution so as to make ourselves incapable of bargaining like a great nation, or even a little one.

The Treaty Clauses in the Constitution

The treaty-making powers of the United States are granted by two clauses. First, Article II, Section 2, says of the President:

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

Second, the supremacy clause in Article VI, almost at the end of the original Constitution, provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties

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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."

WHY THIS TERROR OF TREATIES?

The strange terror of treaties which has suddenly spread over the land and created novel fears that the familiar language just quoted will somehow or other take away our fundamental liberties plainly stems from the opponents of the Draft International Covenant on Human Rights, the Genocide Convention, and other potential international agreements which are under consideration in the United Nations. I happen to believe that some of the objections to these documents are greatly exaggerated, while others can be removed before they reach final form. But all that is irrelevant to my antagonism to the proposed constitutional amendment. I do not mind much if these UN measures are rejected by our government; they will help only a little for a long time to come, and when a brighter day arrives there will be other ways to promote human rights over the world. But I do care very greatly about the United States Constitution. The Constitution must not be warped and weakened.

The Constitution as it stands provides adequate safeguards against any United Nations treaty which is open to well-founded objections. This will appear in the course of this article. No amendment is needed to protect us against unwise treaties.

The most important thing to remember about this suggested change in the Constitution is that its consequences will go far beyond any UN agreement and any matters of human rights. This amendment will block the enforcement of many familiar kinds of treaties relating to the ownership of property, the privileges of doing business, and the protection of pecuniary rights of foreigners in American courts and Americans in foreign courts.

The American Bar Association Draft Amendment

The bar association proposal originated in its Committee on Peace and Law Through United Nations, which consists of seven lawyers. Although its recommendations have usually, as in this instance, received the approval of the House of Delegates, the law-making body in the association, they are by no means the views of all the members of the American Bar Association. Quite a different attitude toward UN documents and toward this amendment has been taken by the association's Section of International and Comparative Law. That Section is composed of approximately eight hundred members. The membership is drawn not only from lawyers and law teachers who have a special interest in international law because they are dealing professionally with problems of treaties and other aspects of international law, but also from general practitioners who feel that they can help in solving the problems of an effective and free world order by participating in the committee work of the Section and its democratically conducted forums where they have an opportunity to present any ideas that they have which will aid in building the structure of enduring peace.

A committee of the Section on the Constitutional Aspects of International Agreements undertook, under the chairmanship of Harold E. Stassen until December, 1951, and Edgar Turlington thereafter, to make a thorough study of the problems raised by this amendment. This work, when completed, would have been very helpful to the House of Delegates in considering their decision on the proposed amendment. In September, 1951, the Section committee, in an interim report, stated:

"We concur in the wisdom of further study of the proposed amendment, but we of the Section committee are not convinced of its necessity, nor of the correctness of its terms to carry out the announced purpose." 2

However, the Committee on Peace and Law Through United Nations has much more influence in the American Bar Association than the Section on International and Comparative Law. The name of this committee was once appropriate. It was organized in February, 1944, and had referred to it resolutions of the House of Delegates that "a permanent organization of the nations

be established for the purpose of maintaining peace by legal sanctions and the suppression of aggressive war . . .; and that the United States should become a member and share full responsibility for its activities" within our Constitution. In December, 1945, the committee reported a resolution, which the association adopted, "that the interests of world peace and the rule of law will be best served by united American support for the United Nations Organization and its full functioning at the earliest possible moment. . . ." Meanwhile, the President of the American Bar Association, David A. Simmons, was a consultant at the San Francisco Conference and had a great deal to do with getting the human rights provisions inserted in the Charter. It is nearly four years, however, since the Committee on Peace and Law Through United Nations gave positive support to a specific measure proposed in the United Nations. Its recent reports have mostly consisted of vigorous attacks against whatever the United Nations thought might be desirable to do for the promotion of human rights. The committee's arguments have carried great weight in the House of Delegates, the American press, and the Senate.

Although the ratification by the United States of any conceivable UN treaty on human rights has become very improbable, the possibility that such a treaty might somehow get through led the Peace and Law Committee in 1950 to expand its activities from opposing United Nations measures to opposing an important part of the United States Constitution. Insistence on the desirability of amending the treaty clauses eventually produced the draft which the committee laid before the House of Delegates in February, 1952.

Some of the motivation for the bar association draft as a combination of old states'-rights attitudes and current hostility to United Nations measures on human rights is shown by extracts from the latest report of the Peace and Law Committee:

"... the treaty clause of the Constitution in Article VI contains, as stated by Henry St. George Tucker, . . . all the
elements of a 'Trojan horse' . . . in imposing domestic law on
the several states of the union through treaties with foreign
nations, which, in the absence of such treaties, could not be
imposed . . .

"Richard Henry Lee of Virginia and Patrick Henry of
Virginia both strongly objected to the provision concern-
ing treaties at the time the adoption of the Constitution was
under debate."

". . . since the State Department has undertaken to nego-
tiate so extensively with foreign nations in this new area . . .,
regarding the relationship of a government to its own citi-
zens, and on the precautionary assumption that this cause
might be judicially approved, your Committee has prepared
its draft amendment to the Constitution in respect of the
treaty-making power . . .

"If, to use Henry St. George Tucker's colorful phrase,
the present treaty clause is a Trojan horse, the proposed text
will drive the beast outside the walls without more damage
done, and with its remaining armoured soldiery securely
locked within."

Few tasks undertaken by the American Bar Association are
more important than considering proposed amendments to the
United States Constitution. The Section on International and
Comparative Law thus asked, at the February, 1952, meeting of
the House of Delegates, that the matter be put over until the
next meeting (in September, 1952). The Bricker draft amend-
ment had just been introduced in the Senate; delay would give
the section and the Peace and Law Committee time to study its
provisions, which differ considerably from the bar association

United States Supreme Court and several other writers on constitutional law.
See the favorable review by Wilson, 28 Harv. L. Rev. 826 (1915). Compare
with Tucker's position, 2 Story on the Constitution §§ 1505-1523 (2 ed. 1851); Burdick, The Law of the American Constitution §§ 33-35 (1922); 1 Willoughby,
The Constitutional Law of the United States, c. XXXIII (2 ed. 1929); Corwin,

7. If we are to amend out of the Constitution all the provisions to which
Patrick Henry objected (see the index to his speeches in the Virginia ratify-
ing convention in 3 Elliot, Debates, vii-x (2 ed. 1836)) there will not be much
left of it. Henry was later counsel for the debtors in Ware v. Hylton, 3 U.S.
199 (1796). Incidentally, George Washington, James Madison, and John Mar-
shall were also from Virginia. Significantly, the Confederate Constitution
took over the whole supremacy clause. Tucker, The Treaty-Making Power
under the Constitution of the Confederate States of America, 1 Va. L. Rev.
596 (1914). Tucker consoles himself by saying that the Confederate courts
would have interpreted the clause differently, but that is one of the things
we shall never know.
proposition (as hereinafter noted). Nevertheless, the Board of Governors recommended the House of Delegates to pass immediately the Peace and Law Committee's resolution, recommending its draft amendment to Congress for consideration. And the House, after listening to oral arguments, did so on February 26, 1952, the same day the draft was presented. This bar association draft, which will be analyzed shortly, is as follows: 8

"A provision of a treaty which conflicts with any provision of this Constitution shall not be of any force or effect. A treaty shall become effective as internal law in the United States only through legislation by Congress which it could enact under its delegated powers in the absence of such treaty."

**The Bricker Draft Amendment**

Senator Bricker's proposal to amend the treaty clauses in the Constitution also stems from opposition to the same United Nations measures. His interest in this area was first expressed in the Senate on July 17, 1951, when he introduced a Senate Resolution condemning the Draft International Covenant on Human Rights and asking the President to instruct our representatives at the United Nations to withdraw from further negotiations about the Covenant and so on. 9 During the ensuing debate, which in the Congressional Record is entitled "The State Department Endangers Freedom of the Press," the Ohio senator spent several pages calling the free speech article in the Covenant an attempt to destroy our cherished freedoms. He denounced those who drafted it as supporters of tyranny and totalitarianism, although they all happened to be determined supporters of freedom of the press and included the editors of the Christian Science Monitor and the Montreal Star, the publishers of the Providence Journal and the Houston Post, Pertinax, the chief French columnist, editors from Holland and Norway, who had operated underground newspapers at the risk of their lives during the Nazi occupation, and a Czech editor who helped Masaryk free his country from Austria, was kept six years in Buchenwald by the Nazis, and finally was thrown out of his paper by the Communists in 1948 and exiled.

On September 14, 1951, Mr. Bricker again spoke of proposed

international agreements as infringing our Bill of Rights, and announced a joint resolution for a constitutional amendment on the whole issue of treaties and international agreements.\textsuperscript{10}

Finally, on February 7, 1952, Senator Bricker introduced Senate Joint Resolution 130—the draft here to be considered. His resolution was sponsored by about fifty-five other senators, some evidently because they thought the subject important enough to deserve examination although they did not necessarily favor such an amendment. During the debate which followed, Senator Bricker paid "tribute to the magnificent work of the American Bar Association and its committee on peace and law through United Nations,"\textsuperscript{11} which had plainly supplied a good deal of his ammunition. Senator Bricker's draft amendment follows:\textsuperscript{12}

"Section 1. No treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this Constitution, or abridging or prohibiting the free exercise thereof.

"Section 2. No treaty or executive agreement shall vest in any international organization or in any foreign power any of the legislative, executive, or judicial powers vested by this Constitution in the Congress, the President, and in the courts of the United States, respectively.

"Section 3. No treaty or executive agreement shall alter or abridge the laws of the United States or the Constitution or laws of the several States unless, and then only to the extent that, Congress shall so provide by Act or joint resolution."

(Section 4 restricts executive agreements. Section 5 gives Congress power to enforce agreement by appropriate legislation. Section 6 requires ratification of amendment by state legislatures within seven years.)

\textbf{ANALYSIS OF THE TWO DRAFTS FOR A CONSTITUTIONAL AMENDMENT}

The bar association draft falls into three separate parts:

(1) It declares to be void a treaty provision which conflicts with anything in the Constitution.

\textsuperscript{10} 97 Cong. Rec. 11592 (September 14, 1951) mentioning but not printing S.J. Res. 102.

\textsuperscript{11} 98 Cong. Rec. 920-928 (February 7, 1952).

\textsuperscript{12} S.J. Res. 130, printed in id. at 921.
(2) It will prevent a great many treaty provisions from being self-executing. They will not become “the supreme Law of the Land” and bind our courts unless and until Congress follows up the particular treaty by a statute enacted in the ordinary way by both Houses and signed by the President.\(^\text{18}\)

(3) Such a statute will be unconstitutional unless it could be validly passed by Congress under its domestic powers, just as if there had been no treaty. Consequently any treaty provision going beyond those domestic powers can be practically nullified by any state whose law violates the promises made by the United States in the treaty.

Senator Bricker's draft contains substantially everything in the first and second parts of the bar association draft; Section 1 corresponds to (1) of the A.B.A. draft, and Section 3 to (2). However, the Bricker draft omits the third part of the A.B.A. draft, and (apart from the special situation in Section 2) it allows Congress to implement any treaty validly by legislation even if Congress goes beyond its domestic powers. In this respect, the Bricker proposal makes a less drastic change from our long-established constitutional law.\(^\text{14}\)

The Bricker draft adds two features which are not in the A.B.A. draft. I do not intend to discuss these, and shall merely state their nature briefly.

In the first place, Sections 1\(^\text{14a}\) and 2 outlaw special classes of treaties, no matter if they are followed by an act of Congress. Section 2 would block participation by the United States in the UN Draft Statute for an International Criminal Court.\(^\text{15}\) This

\(^{13}\) This, like the Bricker draft, really strikes out all the words about treaties from the supremacy clause in Article VI. The clause might as well begin: “This Constitution and the Laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the Land...” A treaty will not be “Law of the Land” at all, but only the implementing statute (if passed); and this statute falls within the phrase “Laws of the United States” like any other act of Congress.

\(^{14}\) For example, the Bricker draft would not wipe out Missouri v. Holland, 252 U.S. 416 (1920); the ABA draft would.

\(^{14a}\) Several ambiguities in Section 1 are analyzed in a valuable discussion of the whole Bricker draft. Association of the Bar of the City of New York: Committee on Federal Legislation and Committee on International Law, Report on Joint Resolution Proposing an Amendment... Relative to the Making of Treaties... 7-10 (1952).

document was drafted in Geneva in 1951 by a UN committee under the chairmanship of George Maurice Morris, a former President of the American Bar Association. One of its advantages would be that an American newspaper correspondent in the position of Mr. Oatis in Prague could, if charged with fomenting civil strife in the country where he was working, be tried by an impartial international tribunal and not in a court of that country, which is liable to be prejudiced against him. This document is opposed by the Peace and Law Committee, and would undoubtedly be invalidated, along with many other treaties, by the third part of the A.B.A. draft.

The other added feature of the Bricker draft is Section 4, which limits the scope of executive agreements. These lie outside my province. It is important, however, to remember that if executive agreements made by the President alone are to become much more difficult, the need to cover the same subject matter by treaties ratified by the Senate will be correspondingly increased. In that event, there is all the more reason not to cripple treaties.

It is not easy to deal with two different drafts at the same time without being dull and confusing the reader. In order to avoid this as much as possible, I shall direct my main discussion in the text to the bar association draft and make considerable use of footnotes to deal with the Bricker draft, when its effect diverges or otherwise calls for attention.

Treaties Now Subject to Constitutional Prohibitions

The first part of both drafts need not detain us long. It is unobjectionable in itself, but unnecessary. It just states expressly what by well-supported interpretation is already in the Constitution. The fact that Article VI brackets treaties with the Constitution as "the supreme Law of the Land" does not mean that they are both on the same level. Acts of Congress are "supreme Law" too, and yet everybody knows they are on a lower level than the Constitution. For purposes of binding our

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18. This point is fully discussed in Chafee, Federal and State Powers under the UN Covenant on Human Rights, 1951 Wis. L. Rev. 369, 429-472.
courts, et cetera, treaties stand no higher than acts of Congress. A treaty can be subsequently overridden by a federal statute, as was held in the Head Money cases in 1884,\(^{19}\) the Chinese Exclusion case in 1889,\(^{20}\) and several later decisions.\(^ {21}\) When a treaty can be knocked out by a statute, it is certainly not so good as the Constitution, which no statute can contravene. The debates at Philadelphia plainly show that the purpose of this part of Article VI was to make the three main types of federal laws “supreme” over state laws and constitutions, and not to rank them inter se.

The description of treaties as “made under the Authority of the United States” was inserted so as to cover treaties during the Confederation (infra note 78). It was obviously impossible to apply to these past treaties the phrase about “made in Pursuance” of the Constitution, which was used for “Laws of the United States.” The debates supply no evidence that the difference in phraseology meant to the framers that future treaties should not be subject to constitutional prohibitions.

No doubt, the question whether the treaty power is subject to constitutional limitations has never been squarely decided by the Supreme Court, because fortunately no American treaty with a foreign nation has come near enough to violating the Constitution to make the issue worth litigating.\(^ {22}\) However, two

\(^{19}\) 112 U.S. 580, 598 (1884). Mr. Justice Miller said: “A treaty, then is a law of the land as an act of Congress is... But... there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect, which may be repealed or modified by an act of a later date.... “In short, so far as a treaty made by the United States... can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification, or repeal.” (Id. at 598.)

\(^{20}\) 130 U.S. 581 (1889).

\(^{21}\) The authorities are collected in 5 Hackworth, Digest of International Law 185-198 (1940). In the course of an interesting opinion in Taylor v. Morton, 23 Fed. Cas. 784, 785-786 (1855), Mr. Justice Curtis said on circuit: “There is... nothing in the mere fact that a treaty is a law, which would prevent Congress from repealing it.... If by the Act in question they have... departed from the treaty, their Act is the municipal law of the country....” The point was not discussed when the decision was affirmed in 67 U.S. 481 (1862).

\(^{22}\) The case closest to the issue is Miliken v. Stone, 16 F. 2d 981 (2d Cir. 1927), where individuals sued the attorney general, asserting that the Eighteenth Amendment was violated by our treaty of 1924 with Great Britain, allowing British Cunard Lines to bring liquor into American ports under seal. The bill was dismissed because the plaintiffs had no locus standi.

The possibility that some treaties with the Chippewa Indians presented the issue was considered in United States v. Minnesota, 270 U.S. 181 (1926). Mr. Justice Van Devanter said: “The decisions of this Court generally have regarded treaties as on much the same plane as acts of Congress, and as usually subject to the general limitations in the Constitution....” Id. at 208.
of the most distinguished men on the Court have made clean-cut statements on the matter. About sixty years ago, Mr. Justice Field said in Geofroy v. Riggs that the treaty power in the Constitution is limited "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 of that of the States." He repudiated any contention that the treaty power authorizes "what the Constitution forbids, or a change in the character of the government or in that of one of the states. . . ." And about twenty years ago, shortly before Charles Evans Hughes became chief justice, he told the American Society of International Law that the nation would not have the power to make an agreement if there were "some express prohibition in the Constitution" against it, or if the treaty were intended "to make laws for the people of the United States in their local concerns. . . ."

The Supreme Court has never said anything since these two statements which shows the slightest inclination to repudiate them. The Migratory Bird case, although frequently invoked by the supporters of the proposed amendment, flatly denies that either the treaty or the implementing act of Congress "conflicts with any provision of the Constitution" (to quote the A.B.A. proposal). Mr. Justice Holmes refused "to imply that there are no qualifications to the treaty-making power" and no express prohibition in the Constitution was involved in the case. The decision did concern the Tenth Amendment, and this was squarely held not to be violated but to authorize what the national government had done. The true point decided by this case was that the powers "delegated to the United States" in foreign affairs are much wider than those so delegated for domestic purposes, and the powers "reserved to the States" are correspondingly much smaller; therefore, this extensive area of national control over dealings with other countries validated, not only treaties themselves (as had been repeatedly held for more than a century),

He then held that the treaties could be construed so as not to conflict with the Constitution. The case is discussed in Chafee, supra note 18, at 435-436, and in Cowles, Treaties and Constitutional Law 251-252 (1941).

23. 133 U.S. 258, 267 (1890).
26. Ware v. Hylton, 3 U.S. 199 (1796), discussed infra note 31, and many later cases. See Chafee, supra note 18, at 429-430.
but also acts of Congress passed to carry out the promises in

treaties.

In short, Field, Hughes, and Holmes all stress the vital dis-
tinction which the Constitution makes between the relations of
nation and states for domestic affairs and their relations with
regard to the subject-matter of a treaty. Contrast the third part
of the proposed A.B.A. amendment, which would make federal-
state relations coextensive in these two very different realms.27
Later I shall return to this vital distinction and develop it more
adequately.

Whereas the first part of each draft for the suggested amend-
ment does not alter our existing constitutional law, the remainder
of both drafts will certainly bring about very substantial changes.
The nature of each change will now be made clear by comparing
the present operation of the treaty power with the way the pro-
posals would work.

Self-Executing Treaties Compared With Compulsory
Implementation by Act of Congress

The most far-reaching part of the A.B.A. proposal consists
of the words, “A treaty shall become effective as internal law of
the United States only through legislation by Congress. . . .”
Equally disruptive of the way treaties have operated for a hun-
dred and sixty years is Section 3 of the Bricker proposal, which
forbids a treaty to alter federal laws or a state’s constitution or
laws “unless, and then only to the extent that, Congress shall so
provide by Act or joint resolution.”

Either draft will wipe out our existing constitutional prin-
ciple, by which most American treaties are self-executing. In
order to understand this word, it must be remembered that there
are two aspects to the binding effect of a treaty. In the first place,
it becomes internationally binding after the performance of cer-
tain acts—in this country, signing by the executive and its
ratification by two-thirds of the senators present. After these
acts, the good faith of our government is pledged to the per-
formance of the treaty. A violation of it by our government may
lead to diplomatic remonstrances by the other nation involved,
and possibly to stronger measures or to a proceeding before an
international tribunal. This aspect of creating international obli-
gations is true of all treaties in all countries. Secondly, a good

27. The Bricker draft does not contain this provision.
many treaties are intended to become binding upon the officials and private citizens of the nations signing it. In order to have effective performance of this aspect of a treaty, it needs to be enforceable in the ordinary courts in the same way as regular statutes. This domestic effect of a treaty does not inevitably accompany its creation of international duties. For example, some treaty provisions may not call for judicial proceedings at all, for example, our promise to pay Spain for giving up the Philippines. Still, many provisions do need to "become effective as internal law," for example when the citizens of each nation are given reciprocal rights to travel and reside in the other nation. Although in Great Britain the courts will pay no attention to such a provision until it is implemented by act of Parliament, the American situation is quite otherwise. Because Article VI makes the treaty "the supreme Law of the Land" and renders it binding on every state judge, the treaty will usually take effect automatically in the United States. No act of Congress is required to implement it, except on rare occasions when express language in the treaty may require such implementation.

As an example of this self-execution under Article VI, take the treaty which had the greatest importance for the men who framed that article—our treaty of peace with Great Britain in 1783. This treaty agrees "that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money, of all bona fide debts heretofore contracted." Congress did not pass any statute to implement this promise. Within a few years, after the Constitution went into force, a British creditor tried to collect a debt owed him by a Virginian. The lower court denied relief because a Virginia statute of 1777 had confiscated such debts. Thereupon the Supreme Court, in

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29. That express language in a United States treaty may prevent it from being self-executing was held by Chief Justice Marshall in Foster v. Neilson, 27 U.S. 253 (1829). This and other cases to the same effect are discussed in Chafee, supra note 28, at 555-565, and Chafee, supra note 18, at 395-399.

In both articles, the writer agrees with our state department that the International Covenant on Human Rights should not be self-executing in the United States, and that this result can be accomplished by appropriate language in the Covenant.

The United Nations Charter was recently held not to be self-executing by the Supreme Court of California. State v. Sei Fujii, 38 Cal. Adv. Rep. 817 (April 17, 1952). This nullified an erroneous decision to the contrary by the lower court, which was greatly relied on by the ABA Committee on Peace and Law Through United Nations and by Senator Bricker.

Ware v. Hylton, 31 gave the British creditor his money because the treaty was law and kept the contrary state statute from being law.

Now, let us suppose that the language proposed by members of the American Bar Association 32 had been part of Article VI of the original Constitution. The collection of private debts was certainly a matter of "internal law," and hence when Congress did nothing, the Supreme Court would have been helpless to aid the British creditor. The treaty with Great Britain would have been flatly violated, and grave reprisals on the part of the British might well have followed. Yet under the Constitution as its wise framers wrote it, the British creditor was satisfied, and probably many more like him were paid voluntarily, now that litigation was seen to be useless. Thus the renewal of commercial relations between the two countries was encouraged.

The reply may be made that President Washington could have gone to Congress for the legislation made indispensable by the suggested amendment. But would he have got it? Senators and representatives from states whose citizens owed large sums to our former enemies would have fought tooth and nail against the enactment of such a law.

The ability of the President and the Senate to make treaties does not amount to much unless accompanied by national power to get those treaties faithfully carried out. That power to stand firmly behind our international agreements will be gravely impaired if the self-executing operation of treaty provisions affecting states and private citizens is abolished and an act of Congress is the only way to prevent them from flouting our promises to other nations. Even when such provisions happen to fall within the domestic powers of Congress, the good faith of our nation is much more likely to be tarnished under the proposed amendment than under the Constitution as it was written in 1787. During whatever interval elapses between ratification of the treaty by the Senate and the day when both Houses of Congress consent to pass an implementing act, if they ever do, private citizens will be able to violate the treaty with impunity, state legislatures can pass statutes ignoring its terms, state judges must brush the treaty aside as of no concern of theirs, and the nation to which

31. 3 U.S. 199 (1796).
32. If the Bricker draft be substituted in this hypothesis, the effects will be the same.
we gave our solemn promises can hold us up to scorn as contract-breakers and deny our citizens any of the treaty benefits in its own territory. A bargain which is ignored by one side is not going to be observed very long by the other side. And the next time we have some important question to settle with that nation and seek to open negotiations for a treaty, we are unlikely to get very far.

THE PRESENT TREATY POWER, CAPABLE OF DEALING EFFECTIVELY WITH ALL SUBJECTS WHICH CALL FOR INTERNATIONAL AGREEMENTS, COMPARED WITH THE LIMITATION OF TREATY ENFORCEMENT TO THE JURISDICTION OF CONGRESS OVER PURELY DOMESTIC MATTERS

After the second part of the proposed A.B.A. amendment has made an act of Congress indispensable to enforce the kind of treaty provisions which are most likely to be violated, the third and final part refuses to let Congress pass such an act in many situations where it would be badly needed. Congress will not be able to do more to carry out a treaty than it could do anyway under the domestic clauses of the Constitution.

Contrast the present situation with that under the bar association proposal. Any question as to the validity of implementing statutes arises very rarely now, because (as already shown) the self-executing character of our treaties usually makes such implementing legislation unnecessary. Once in a long while, however, an American treaty does call for an act of Congress affecting states and private citizens. The outstanding example is the migratory bird treaty of 1916 with Great Britain, then acting on behalf of Canada. This could not easily have been self-executing because its enforcement required new federal criminal laws to punish hunters who killed migratory birds out of season. Consequently, it agreed that the two nations would “take, or propose to the respective appropriate law-making bodies, the necessary measures” for insuring observance of the treaty. Congress did pass such legislation soon afterwards. There was a good deal of doubt whether it could validly do so under the commerce clause. But with the treaty, the Supreme Court held

33. As already stated in the text, in my analysis of the two drafts (supra p. 351 et seq.), there is no corresponding provision in the Bricker draft, except for the prohibition of special classes of treaties in Sections 1 and 2.
(in the decision already discussed)\textsuperscript{36} that this issue of domestic constitutional law became irrelevant. A great many cases had already decided that self-executing treaties could deal constitutionally with matters which belonged to the states so far as domestic law was concerned, such as title to land, the statute of limitations, local taxation, and regulations as to who could engage in particular occupations.\textsuperscript{37} The \textit{Migratory Bird} case simply applied the same principle to a treaty which was not self-executing. The constitutional scope of treaties is virtually as wide as the realm of foreign affairs, subject to the limitations already quoted from Field and Hughes; and the scope of federal laws enforcing treaties is correspondingly wide. If the nation could make the treaty at all, then it ought to be carried out effectively. Obviously, it was impossible to rely on the chance that every state over which the birds flew would pass game laws to comply with the treaty. Enforcement had to be by the nation or not at all.

The proposed amendment would have caused the case to go the other way, unless the Supreme Court had strained itself to make flying birds interstate and foreign commerce, or owned by the nation like radio bands. Lawyers who consider the extinction of several species of birds no great loss ought to be disturbed by the danger that the proposal will take away effective treaty protection from many rights of private property.

Let me illustrate this danger from another treaty which was well known to the framers of the supremacy clause. The treaty of alliance with France in 1778\textsuperscript{38} entitled Americans in France to dispose of their land and goods by will with complete freedom and also to let their property descend by intestate succession to persons residing in France or elsewhere, without having these privileges impeded under pretext of any rights of local governments or private persons; and French subjects were to enjoy in the United States “an entire and perfect reciprocity” relative to the same matters. The right of Frenchmen to inherit land in several states which then had statutes forbidding all foreigners to own land was certainly a matter of “internal law,” and the second part of the A.B.A. proposal would have required an act of Congress to make the treaty “become effective.”

\begin{footnotes}
\item [37] Ware v. Hylton, 3 U.S. 199 (1796). See Chafee, supra note 18, at 429-430.
\item [38] 11 Journals of the Continental Congress 429 (Washington, 1908).
\end{footnotes}
if Congress had passed such a statute, the third part of the same proposal would have made it invalid. Nothing in the Constitution outside the treaty clauses gives Congress any power to determine who shall inherit land inside a state. Consequently, if a Frenchman had been left by will a plantation in Virginia, a state statute would have kept him out of the land, and our national government would have been helpless to do anything whatever about it. Before long, the French government would have gone back on its side of the treaty and refused to let Americans inherit property in France.

Contrast what actually happened in Virginia under the supremacy clause as the framers wrote it. The first important treaty made after the Constitution was the famous Jay treaty with Great Britain in 1794.39 Samuel E. Morison calls Washington's determined effort in getting it ratified "one of his wisest and bravest acts in a life filled with wisdom and courage." 40 An article of this treaty agreed that British subjects now holding lands in the United States and American citizens now holding lands in the British Empire "shall continue to hold them according to the nature and tenure of their respective estates and titles therein, and may grant, sell or devise the same to whom they please, in like manner as if they were natives...." Without any act of Congress, this treaty provision was given automatic effect by the Supreme Court so as to override a Virginia statute to the contrary.41

Imagine what states would have done to the Jay treaty if the proposed constitutional amendment had been in force. Since the ownership of land was surely "internal law," this treaty could not have "become effective" as internal law without an act of Congress. "While the treaty was still before the Senate in secret executive session, the terms of it leaked out, and a howl of execration went up from one end of the country to the other." 42 A bare two-thirds in the Senate was obtained with the greatest difficulty. If it had been necessary to start all over again after ratification and push a comprehensive implementing statute through both Houses, the hostility to the treaty in the House of Representatives would have made the enactment of such an elab-

39. 8 Stat. 116 (1794).
42. 1 Morison, op. cit. supra note 40, at 175.
orate law almost impossible. And even if it had somehow squeezed through Congress, the third part of the A.B.A. proposal would have made the act unconstitutional. Obviously Congress could not regulate the ownership of lands in a state "under its delegated power in the absence of such treaty." Therefore, this treaty would have been defied by state after state with impunity. The British would have been embittered, and Washington's efforts to restore essential commercial relations with the mother country would have been futile. British anger would have probably led to their total repudiation of the Jay treaty and our consequent loss of the many kinds of advantages which our nation obtained thereby.

To generalize about the third part of the bar association proposal, it cripples the power of the United States to perform promises to other nations in many matters which have customarily been covered by treaties. All sorts of controversial questions about owning and inheriting land, doing business, the protection of property rights in the courts, et cetera, which are reserved to the states for purely domestic purposes, have been put into treaties whenever they were involved in our relations with foreign countries and their citizens. One strong and frequent reason for the insertion of such matters in treaties is the desirability of obtaining reciprocal privileges abroad for American citizens who may reside in the nation with which we are bargaining or who may wish to carry on business there. These are the very matters in which local disobedience to a treaty is most likely to occur. If this proposal should prevail and provisions on these matters should be invalidated, it would be very hard to stop such disobedience by states or their citizens. We shall be back in the muddle which existed under the Articles of Confederation. The only way, under this A.B.A. amendment, to obtain nation-wide compliance with a treaty going beyond the domestic powers of Congress, would be for the administration to persuade every one of the forty-eight states to shape its laws voluntarily so as to carry out the treaty. This is a burdensome and well-nigh hopeless task.

Under the Constitution as it stands, the impact of a treaty upon the relations between our federal government and our

43. Even a simple bill to appropriate money for mixed commissions to settle boundaries and claims just got through the House. 1 Morison, loc. cit. supra note 40.
44. The Bricker draft would not have had this effect, but would have caused the same difficulties about getting an implementing statute.
states can be decided by considerations of policy and wisdom. The negotiators, the President, and the Senate can balance the good of the whole nation against the interests of particular states, which (as the framers foresaw) would be vigorously asserted by senators from those states during the debates on ratifying the treaty.\textsuperscript{45} After this balancing is over and the Senate has ratified the treaty, everything is settled—the treaty is “Law of the Land.” No problems of enforceability remain except in the rare situations where the treaty is not self-executing.

The A.B.A. proposal would vastly complicate this process. It would inject difficult questions of constitutional law into the consideration of treaty after treaty. The disputes and the necessity of overcoming obstacles might drag out for years after ratification—in the House of Representatives when the essential bill to implement the treaty was before it, in the Senate a second time, and finally (if this bill should be enacted) in lengthy litigation up to the Supreme Court to determine whether Congress had exceeded the domestic powers.

Probably the failure of Congress to pass enforcing legislation would render more treaty provisions ineffective than court action under the third part of the bar association draft. What Congress can “enact under its delegated powers in the absence of [a] treaty” is now closer to what it can do with a treaty than it was at an earlier period. The Fourteenth Amendment in 1868 greatly extended the domestic powers of Congress over affairs inside the states. Since 1937, they have been extended still further by the inclination of the Supreme Court to give a very wide scope to the commerce clause and its reluctance to declare any act of Congress unconstitutional. Moreover, if the only way for the Supreme Court to ensure the enforcement of a desirable treaty provision is to make it fall within the domestic powers of Congress, then the Court might be impelled to stretch the commerce clause or the due process clause enough to hold that the implementing statute could be validly enacted without a treaty. Thus an amendment making the treaty powers co-extensive with

\textsuperscript{45} For example, when it was objected in the North Carolina ratifying convention that treaties ought to be approved by both Houses of Congress, Richard D. Spaight (a member of the Philadelphia Convention) replied: “... that it was thought better to put that power into the hands of the senators as representatives of the states; that thereby the interest of every state was equally attended to in the formation of treaties...” 4 Elliot’s Debates 56 (2 ed. 1888), reprinted in 3 Farrand, Records of the Constitutional Convention of 1787, 342 (1911).
the domestic powers in order to narrow the former might actually result in widening the latter. The truth is that nobody can foresee how the third part of the bar association proposal would work, except that its interpretation by the courts would surely cause a great deal of uncertainty and trouble in connection with many treaties which have nothing to do with the United Nations.

**CONTEMPORANEOUS EXAMPLES OF THE EFFECT OF THE PROPOSED AMENDMENT**

The foregoing discussion has shown that an amendment wiping out the self-executing operation of our treaties would gravely interfere with the performance of treaty promises made by the United States whose desirability is recognized by virtually everybody. And further, that the damage would be still greater if, as in the bar association draft, the enforcement of many familiar types of treaty provisions were rendered unconstitutional.

For purposes of illustration I have used our three chief treaties between 1776 and 1800. Of course some of their features may not recur in our outstanding and future treaties, but it is just as important as it ever was to keep the treaty powers wide and flexible in order to cover the great range of matters which may call for international action and whose precise nature cannot be known when treaty clauses are put into the Constitution. The A.B.A. draft or the Bricker draft would have been bad in 1787, and they would be similarly injurious to many valuable provisions commonly inserted in twentieth century treaties.

Thus we have over fifty treaties now in force relating to reciprocal inheritance rights\(^{46}\) and about a hundred extradition treaties. If the suggested amendment is retroactive, which is not made plain in either draft, an enormous amount of congressional legislation would have to be passed to preserve the binding effect of these treaties, and the A.B.A. draft would create serious doubts as to the validity of much of this legislation, insofar as the treaties apply to land in states, to proceedings in state courts for the extradition of persons wanted for crimes abroad, and to requests by state governments for the extradition of persons found abroad who are wanted for prosecution by the states. Treaty provisions for non-discriminatory taxation of aliens would seem invalid under the A.B.A. draft insofar as state taxation is

\(^{46}\) These are listed in the government's brief in Clark v. Allen, 331 U.S. 503 (1947).
concerned. Provisions assuring nationals of the signatory foreign nations equal and non-discriminatory access to our courts would be impeded or nullified, because it is hard to see how Congress under its domestic powers could regulate suits in state courts. Remember that many suits involving aliens are not brought in the federal courts, and some of them must be in state courts because of lack of the jurisdictional amount of $3000. Provisions forbidding discrimination against aliens in carrying on occupations would be hindered or upset. A commercial transaction in which a foreigner engages is not necessarily foreign commerce, for example, a restaurant run by an unnaturalized Greek in any American city.

If the suggested amendment is not going to apply to treaties now in force, the difficulties just described will all apply to future treaties of the same kinds. For years to come we shall have one sort of constitutional law for old treaties before the amendment and another sort for new treaties—a very confusing situation for everybody. Moreover, the practical effect of the amendment upon negotiations for commercial treaties might be bad, because foreign governments would soon see that any agreement negotiated with the executive and ratified by the Senate would still have to run the gauntlet of both Houses, in either of which the essential implementing statute could be stifled in committee or killed by a well-organized minority.

Very important treaties of a specialized sort would be gravely impeded. Atomic energy, especially in non-military uses, would be harder to control internationally. This is not the place to go into details, but the proposed amendment is causing much anxiety on this account. The amendment would also have some detrimental effect upon the ability of the United States to negotiate and carry out commercial aviation treaties. For example, the pending revision of the Rome Convention\[47\] involves questions of the limitation of liability of foreign operators causing damage in the United States, rules limiting jurisdiction of the courts to entertain damage suits in relation thereto, and insurance requirements for foreign aircraft operators. Such a civil aviation treaty can now take effect as soon as it is ratified, but under either the A.B.A. or Bricker draft it would have to be followed by an elaborate act of Congress.\[48\]

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47. Hudson, International Legislation 327, 334 (1937), both opened for signature May 29, 1933.
48. Such an act would probably be valid under the commerce clause,
HOW OUR 1948 COMMERCIAL TREATY WITH ITALY WOULD BE AFFECTED BY THE PROPOSED AMENDMENT

Since some readers may wish to get a detailed understanding of a specific treaty as affected by the suggested amendment, I set forth one recent example—the treaty of friendship, commerce, and navigation, which we concluded with Italy in 1948 and the Senate ratified in 1949. Although the amendment, unless retroactive, would not apply to this treaty, it is typical of the sort of commercial treaty which we are likely to make with other countries in the future. Many of its most valuable provisions furnish reciprocal protection to property rights. They certainly relate to "internal law" and so would have to be implemented by Congress under either the A.B.A. or the Bricker draft. As the reader goes through each successive article, he can consider two questions: (a) The difficulties of enacting the essential legislation to make its provisions binding in the United States. (b) The extent to which the protection given Italian citizens by the article would probably be unconstitutional under the A.B.A. draft. Is it doubtful whether the particular provision corresponds to any express power conferred on Congress by Article I, Section 8, or some other part of the Constitution? Could Congress enact such a law "in the absence of [a] treaty?"

Article I entitles the nationals of either party "to engage in commercial, manufacturing, processing, financial, scientific, educational, religious, philanthropic and professional activities except the practice of law . . ."; to own or rent land and buildings for residential, commercial, religious and other professions; and to choose their own employees regardless of nationality.

Article II entitles American corporations in Italy to exercise all these same privileges on the same favorable terms as Italian corporations, and gives reciprocal privileges to Italian corporations to do business in the United States. This last provision "shall be construed as according such rights and privileges in any state . . . of the United States . . ., upon terms no less favorable than those upon which such rights and privileges are or may be accorded therein to corporations . . . created or organized in other states . . . of the United States. . ." By Article III, Americans can organize Italian corporations, hold stock and offices in but the difficulty of drafting and enacting it would be a serious obstacle to the effectiveness of the civil aviation treaty.

them, et cetera, and vice versa. Italian corporations controlled by Americans can engage in Italy in “commercial, manufacturing, processing, mining, educational, philanthropic, religious and scientific activities” on the same terms as other Italian corporations; and American corporations controlled by Italians can similarly carry on these activities in the United States.

Article IV allows citizens and corporations of either country “to explore for and exploit mineral resources” in the other country upon a most favored nation basis.

Article V entitles the nationals of each nation to receive “the most constant protection and security” for their persons and for individual or corporate property in the other’s territories. All sorts of rights in criminal and civil proceedings are then specified, and these of course affect state courts. By Article VI dwellings, warehouses, shops, et cetera, are not to be subject to unlawful entry or molestation, and permissible searches or inspections are to be conducted “so as to cause the least possible interference” with the occupants or the ordinary conduct of business.

Article VI deals fully with reciprocal rights to own and dispose of land, personal property, et cetera, in the other country. Article VII mutually protects patents, trade marks, and other industrial property. Article IX prevents internal taxes of any sort which are more burdensome than those imposed upon citizens and domestic corporations. Article X protects the entry and sojourn of commercial travelers.

The most precious human rights are covered by Article XI—liberty of conscience and freedom of worship, such as the conduct of services in appropriate buildings “without annoyance or molestation of any kind” by reason of religious belief; and freedom of the press and free interchange of information, including freedom of transmission of press material, motion pictures, et cetera, to be used abroad, and freedom of publication in the other country on the same terms as its citizens.

There are a great many more reciprocal privileges given, but enough has been said to show the great need for this treaty, and the numerous similar treaties which have been or will be made with other countries to “become effective as internal law.” Under the Constitution of 1787, this happened automatically to the Italian treaty, and inconsistent state statutes were imme-
ately nullified. If the proposed amendment were in force, the President would have to go to great trouble and delay before he got the necessary act of Congress covering all the complex treaty promises, and he might not succeed at all. Even if he did, part of the act would surely be unconstitutional under the bar association proposal. For instance, the purely domestic powers of Congress do not include the right of an Italian citizen to practice medicine in a state, not at least when the state laws exclude all foreigners from being doctors.

**THE STRONG REASONS OF THE PHILADELPHIA CONVENTION OF 1787 FOR INSERTING THE PRESENT TWO TREATY CLAUSES IN THE CONSTITUTION**

Having thus described the changes which the proposed amendment would make in our present constitutional law, I next turn to a broader subject—the reasons of the Philadelphia Convention for inserting the present two treaty clauses in the Constitution. With the exception of the compromise between large and small states through equal representation in the Senate and the method of electing the president, no subject probably received more attention from the Convention than treaties. The treaty-making power was at first given to the Senate alone. Then some wanted it to be in the President alone. After the combination of both was arranged, there was considerable controversy about the two-thirds vote, especially for a treaty of peace, since a minority of the Senate might thereby be able to perpetuate a war. The supremacy clause had its start on the very first day that the Convention got down to real business, and during three months it came up again and again in different forms until it took final shape. Instead of going into details, I shall present four features of the treaty power which the debates show the Convention to have had very much at heart while they framed these two clauses.

*First, the scope of the treaty power should be very wide,* as wide as the necessities of international intercourse, of which these statesmen were fully aware. The vital distinction between foreign affairs and domestic matters was taken for granted throughout. Indeed, this distinction was ingrained in their minds long before they met in Philadelphia. It did not begin with the Constitution—it was an outstanding feature of the Articles of

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50. 1 Farrand, op. cit. supra note 45, at 18. This work is hereafter cited as Farrand.
Crippling Treaties

Confederation. In domestic affairs, apart from the management of war and military matters generally, the Articles made the states everything and the Continental Congress almost nothing. It could not even levy taxes, but merely recommend them to the state legislatures. Its only exclusive peace powers were to coin money, fix weights and measures, regulate Indian affairs, and operate post offices. The states could do the rest. In foreign affairs, by contrast, the states were nothing and the Continental Congress was everything. Congress had “the sole and exclusive right and power... of sending the receiving ambassadors—entering into treaties and alliances...” 51 On the other hand, “No state without the Consent of the united states in Congress assembled, shall send any embassies to, or receive any embassies, or enter into any conference, agreement, alliance or treaty with any King, prince or state. . . .” 52 Of this latter provision Madison wrote in The Federalist (No. 44) that “for reasons which need no explanation, [it] is copied into the new Constitution.” 53 At the same time, the exclusive national power to make treaties was continued, but was transferred from the whole of Congress to the President and the Senate.

Because of the vital distinction between foreign affairs and domestic matters, the extent of federal power over the latter was considered as an entirely separate subject from treaties. Nobody in the published debates ever suggested that the scope of the treaty power of the nation should be cut down to the domestic powers of Congress. Throughout it was assumed that the United States ought to possess the same capacities to enter into international arrangements as did the other civilized nations with which we might negotiate. The reason is plain why the Constitution enabled the national government to do things in foreign affairs by treaty which Congress could not do by domestic legislation. In home matters the framers expected that most of the work of governing Americans would continue to be done by the states. Specified legislative tasks of national importance would be assigned to Congress, but state legislatures were to take care of the rest. Except for a few outrageous things nobody could do like enacting bills of attainder, everything in domestic matters

51. Articles of Confederation and Perpetual Union, Article IX (ratified in 1781).
52. Id. at Article VI.
belonged either to Congress or to the states. Thus somebody could do whatever law-making needed to be done in a civilized country—there was no vacuum. But in foreign affairs there were no comparable two areas of national matters and local matters. Everything legitimately possible in foreign affairs was of national importance. Here a vacuum would exist if the federal treaty power were narrowly limited. The states could not take over. They were forbidden to conduct negotiations with other nations. Consequently, unless the national government could act, nobody could act. The people of the United States were accustomed to governing themselves through scores of bodies from town meetings and county commissioners up to Congress, but when it was a question of bargaining with other nations they had to act as a unit. The framers knew that they were founding a great nation, and they wanted it to be able to behave in the world like a great nation.

Contrast the action of the American Bar Association which, after a century and a half of international growth which nobody in Philadelphia could have foreseen, wants to create a No Man's Land, where neither President, Senate, House, nor Supreme Court will be able to relieve international tensions by sensible agreements effectively performed. For the sake of states' rights, this A.B.A. amendment would deprive the nation of functions which the states cannot possibly perform.

Secondly, the framers were anxious to guard the nation against unwise or corrupt treaties and took much pains to do so adequately. They repeatedly expressed such fears as that the Senate, if solely empowered, might sell a big slice of territory or part with the navigation of the Mississippi; or that a President, if acting alone, might make a treaty grossly favoring his own state, or he might be bribed by another nation to yield damaging concessions and then flee to the bribing country for refuge from the indignant vengeance of the American people. There was no carelessness about hedging in the treaty power with

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54. U.S. Const. Art I, § 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. . . ."

55. See, for example, George Mason, 2 Farrand 297-298 (August 15), and Gouverneur Morris, id. at 548 (September 8).

56. See, for example, Charles Cotesworth Pinckney, speaking in the South Carolina legislature, in 3 Farrand 251 (January 16, 1788).
proper precautions. The attitude of the framers on this point was summarized by John Jay in *The Federalist* (No. 64):\textsuperscript{57}

"The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good. The convention appears to have been attentive to both these points.

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And Hamilton wrote in a later issue (No. 75):\textsuperscript{58}

"The qualities elsewhere detailed as indispensable in the management of foreign negotiations, point out the Executive as the most fit agent in those transactions; while the vast importance of the trust, and the operation of treaties as laws, plead strongly for the participation of the whole or a portion of the legislative body in the office of making them."

**Third,** on the other hand, *the framers did not want to have it too hard to conclude treaties.* They were not willing to obtain complete safety from bad treaties by making it virtually impossible to have good treaties. As Jay wrote in *The Federalist*,\textsuperscript{59} "Let us not forget that treaties are made, not by only one of the contracting parties, but by both." The Convention knew that it would be very difficult for us to conduct satisfactory negotiations with a nation which was able to turn its positions at the conference into a formal agreement, if the offers of our delegates were by contrast merely tentative and subject to almost insuperable obstacles before ratification was possible. For this reason, the framers rejected two possible methods of ratification which were brought up in the Convention as alternatives to the method eventually adopted of a vote by two-thirds of the senators present.

One rejected plan was to require two-thirds of all the members of the Senate, including those who were absent. Against this Hamilton wrote in *The Federalist* (No. 75):\textsuperscript{60}

"... all provisions which require more than the majority of any body to its resolutions, have a direct tendency to embar-

\textsuperscript{57}Id. at 400.
\textsuperscript{58}Id. at 467.
\textsuperscript{59}Id. at 405.
\textsuperscript{60}Id. at 469.
rass the operations of the government, and an indirect one to subject the sense of the majority to that of the minority. This consideration seems sufficient to determine our opinion, that the convention have gone as far in the endeavor to secure the advantage of numbers in the formation of treaties as could have been reconciled either with the activity of the public councils or with a reasonable regard to the major sense of the community. If two thirds of the whole number of members had been required, it would, in many cases, from the non-attendance of a part, amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed, is a history of impotence, perplexity, and disorder."

The other plan, which received fuller attention, was to have the House of Representatives participate in treaties, either in making them or in passing a required implementing statute (the method of the A.B.A. and Bricker drafts). On August 23rd Gouverneur Morris made a motion that no treaty should be binding on the United States "which is not ratified by a Law." During the full discussion which followed, much stress was laid on the practical disadvantages of such a requirement. For example, it was said that at the conference which negotiated the treaty, the delegates from the other countries would have definite instructions how to proceed, but not ours. Previous consultation with the President and senators would not enable them to know what course would be approved. If the ultimate power to make the treaties effective was shared by the House, our negotiators would have to be instructed by representatives too, and that was impracticable. Morris's motion was then voted down 8 to 1.61 Two weeks later James Wilson renewed the plan by moving that treaties had to be approved by both the Senate and the House, because if "they are to have the operation of laws, they ought to have the sanction of laws also." He was voted down 10-1.62

Using the House of Representatives was urged by opponents of the Constitution. In replying, Pierce Butler told the South Carolina legislature that negotiations always required the greatest secrecy, which could not be expected in a large body. And Charles Cotesworth Pinckney also stressed the need for speed with some treaties. The Senate being a smaller body, could be

61. 2 Farrand 392-394 (August 23).
62. Id. at 538 (September 7).
called together quickly, but it would be very hard to convene the House at short notice. When a similar objection came up in the North Carolina Convention, William Richardson Davie insisted that treaties were not like ordinary statutes and ought not to be adopted in the same way. "The power of making treaties has, in all countries and governments, been placed in the executive departments." This was not only because of the need of secrecy, planning, and speed, but also to prevent treaties from "being impeded by the violence, animosity and heat of parties which too often infect numerous [large] bodies . . . ." And Hamilton in *The Federalist* (No. 75) pointed out the drawbacks of sharing control over treaties with the House:

"The fluctuating and, taking its future increase into the account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, secrecy, and despatch, are incompatible with the genius of a body so variable and so numerous. The very complication of the business, by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be a source of so great inconvenience and expense as alone ought to condemn the project."

These reasons against treaties going to the House are very important in connection with the amendment now under consideration. In substance both drafts of it simply revive the overwhelmingly defeated motions of Gouverneur Morris and James Wilson. To require an act of Congress before a treaty can be made effective is almost the same thing as requiring it to be ratified by the House in the first place. Indeed it is worse in some ways, because the interval between the customary ratification by two-thirds of the Senate and the discussion of the implementing legislation in the House will allow plenty of time for fresh

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63. 3 Farrand 250-251.
64. Id. at 348.
65. Federalist, at 468-469.
animosities to gather. The framers were even more anxious that treaties should not be hard to get enforced after they were ratified than they were to prevent it from being too hard to make treaties. A broken national promise is a greater blot on our honor than no promise at all.

Fourth, the framers wanted the national government to be able to have treaties performed after they were ratified. They were fully aware that for many treaties this meant having them "become effective internally" (in the words of the A.B.A. draft). Compliance by state officials and by citizens of the states had to be assured. Both the French treaty of 1778 and the British treaty of 1783 made this plain to them, and some of their drafts were even more explicit on this point than the final text of Article VI. Thus the basic formulation of this article, made by Luther Martin of Maryland, declared that the legislative acts of the United States and all treaties "shall be the supreme law of the respective States, as far as those . . . Treaties shall relate to the said States, or their Citizens and Inhabitants. . . ." This draft was at once adopted unanimously. 66

The Convention was thoroughly satisfied with the fact that the Articles of Confederation had concentrated the control of foreign affairs exclusively in the central government. Yet it was also keenly aware of one damaging defect in this control. This was that the central government was helpless whenever a state or its citizens chose to violate treaty provisions. On the very first day when the Convention got down to the merits, Randolph of Virginia enumerated the defects of the Confederation, among which was—"they could not cause infractions of treaties . . . to be punished." 67 These complaints of state breaches of treaties kept recurring. Madison, writing years later, said that in every proceeding of the Convention, from start to finish, the necessity of "paramountship" of national laws over state laws was taken for granted: 68

"Every vote in the Journal involving the opinion, proves a unanimity among the Deputations, on this point. . . . [The] necessity of some adequate mode of preventing the States in their individual characters, from defeating the Constitu-

66. 2 Farrand 22, 28-29 (July 17). Italics supplied.
67. 1 Farrand 19 (May 29).
68. Unsent letter from Madison to John Tyler, written after February 6, 1833, in 3 Farrand 527; letter from Madison to W. C. Rives, October 21, 1833, id. at 523.
CRIPPLING TREATIES

Reginald L. Hiller

1952] CRIPlING TREATIES 375

ational authority of the States in their united character, ... had been decided by a past experience. ... [The] radical defect of the old confederation lay in the power of the States ... to disregard or to counteract the authorised ... regulations of Congress.”

The only disagreement in the Convention was as to what should be the remedy against recalcitrant states. Five such remedies were suggested at various times. (1) Randolph’s opening speech suggested a Council of Revision, composed of the chief executive and a convenient number of national judges, with power to examine every national and state law and to veto it.69 (Some early state constitutions had set up such a body.) (2) Two days later, however, he moved to entrust Congress with the power to negative all state laws contravening the articles of Union, which Franklin amended to include “any Treaties subsisting under the authority of the union.”70 From this motion there was no dissent. (3) An additional remedy proposed simultaneously was for Congress to be able to call forth troops against any offending state,71 but this caused controversy. Madison thought this was like declaring war against the state, and Gerry said the new system would give the national government the means to secure itself without this method of armed force.72 (4) On June 15th, Patterson of New Jersey introduced his comprehensive draft, which included the remedy eventually chosen. Treaties were to be “the supreme law of the respective States,” so far as they related “to the said States or their Citizens,” and to bind state judges, regardless of state laws to the contrary.73 (5) A final remedy, suggested by Hamilton soon afterwards, but never taken seriously, was for the national authority to appoint all the state governors, who would have power to veto state statutes.74

After a month’s consideration of remedies (2), (3), and (4) by the Committee of the Whole, it reported in favor of remedy (2)—letting Congress negative state laws which contravened acts of Congress or treaties. The Convention struck this out on July 17th for fear it would disgust all the states and prevent their acceptance of the Constitution,75 and unanimously adopted

69. 1 Farrand 21 (May 29).
70. Id. at 47 (May 31).
71. Id. at 21 (May 29); 47 (May 31); 2 Farrand 182 (report from Committee on Detail) (August 6).
72. Id. at 54, 61 (May 31).
73. Id. at 245 (June 15).
74. Id. at 283 (June 18).
75. 2 Farrand 27-28 (July 17). The vote was 7-3.
Luther Martin’s proposal (already quoted), which vested the negative power in the judiciary. A month later, the remedy of control by armed force was unanimously rejected, because Gouverneur Morris said it was superfluous when treaties were going to be laws, enforceable in the courts. After some slight alterations, such as leaving no doubt that past treaties made under the Confederation were included, the supremacy clause assumed its present form.

The proposed amendment would upset everything the unanimous vote on Luther Martin’s motion accomplished. Treaties would be the “supreme Law of the Land” only in words. Most treaties could not be enforced without the added difficulties of getting an act of Congress; and under the A.B.A. draft many treaty provisions could not be enforced at all, although international exigencies might make it very desirable to promise more than what Congress can do under its domestic powers. For instance, American citizens and corporations might be receiving valuable corresponding privileges abroad, as in the Italian commercial treaty of 1948. Under the proposal, however, the states will be supreme in this area of foreign affairs, and not the nation. As Charles Pinckney told the Convention, “if the states were left to act of themselves . . . , it would be impossible to defend the national prerogatives, however extensive they might be on paper;” by this means, he went on, foreign treaties had been violated repeatedly under the Confederation.

**OUR TREATY CLAUSES ARE CLOSELY RELATED TO OUR SYSTEM OF GOVERNMENT**

One point which stands out prominently in all the Convention debates about treaties is the close linkage between problems of the treaty power and the nature of our federal system. Questions of how treaties should be concluded and enforced cannot be viewed in isolation from the rest of the Constitution. They were constantly tied up in the minds of the framers with questions about the length of the President’s term, the composition of the Senate, and the proper relation between the states and the

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76. Id. at 28-29 (July 17); Federalist, at 468-469.
77. Id. at 389-390 (August 23).
78. Id. at 417 (August 25).
79. Id. at 572 (referred to Committee on Style); id. at 603 (reported by Committee on Style).
81. 1 Farrand 164 (June 8).
nation. Thus the treaty power is part of a seamless web. Supporters of the proposed amendment have made a good deal of the facts that we are almost the only country on earth where treaties are self-executing, and that in many other countries both houses of the national legislature participate in the ratification of treaties. But what other nations do about treaties has very little significance for us, because they do many other related things very differently from us.

Our whole political system has at least three characteristics which are intimately connected with the operation of our treaty power. Some or all of these general characteristics are lacking in nations whose handling of treaties resembles methods in the proposed amendment.

(1) Ours is a federal system, in which forty-eight divisions of the nation have a large amount of sovereignty and do a great deal of independent law-making. Thus with us there is a big opportunity for local legislation to conflict with national promises to other nations. The self-executing operation of treaties is a badly needed safeguard against such breaches of national good faith. No such safeguard is needed in a unitary nation like Great Britain where Parliament is an omnipotent legislature. There, the national government which makes the treaty is the only government with the practical ability to enact statutes bearing on the subject matter of the treaty. Here, forty-eight small sovereigns can do so, and unless they can be effectively restrained, our country might be a checkerboard with some states complying with the treaties and others flouting it. Such an evil can exist only in a federal system, and the framers made treaties self-executing because that was the best way to stop this evil, which had cursed the Confederation.

(2) The national legislature in the United States does participate to some extent in the conclusion of treaties, through a two-thirds vote of the senators present. This is a fair equivalent for the majority votes in both houses which is necessary in some countries to ratify the treaty, and in Great Britain to transform the treaty into domestic law. The British insistence on such action by Parliament is a natural outgrowth of their constitutional struggles against the Stuart kings. The Crown can make treaties all by itself, and if treaties so made became the law of the land without anything more happening, this would enable the Crown to change domestic law without any participation by
Parliament. Such a result would violate the whole principle of Parliamentary supremacy, which is a main part of the unwritten British Constitution. When Charles I endeavored to make laws without Parliament, he lost his head. The Revolution of 1688 took place to make sure that that sort of thing would never happen again. Domestic law-making through royal treaties is as abhorrent as royal levying of ship-money or royal suspension of habeas corpus.

(3) Our country does not have a parliamentary government like Great Britain. There the necessity of an implementing statute to make any treaty domestically binding is not a serious obstacle to its effective enforcement, because the executive is chosen by the majority of the House of Commons. The Cabinet and that majority are one at heart. The Cabinet advises the King to make the treaty, and the Cabinet can count on the Commons to pass whatever legislation is needed to make the treaty work. The House of Lords will go along or be whipped into line.

Our President has no such assurance of obtaining a rapid vote in both Houses of Congress for a statute to implement a treaty. Sometimes he belongs to the opposite political party. Still more often, the majority at one or both ends of the Capitol feels completely free to disregard his wishes. Although two-thirds of the Senate ratified it, a majority may turn against him on the statute; and when the majority of the senators is still with him, there is always the possibility of filibustering to delay the statute indefinitely. Of course, the House will be still more uncertain. Remember that several states may be defying the treaty. Consequently, it would be far more difficult to get a treaty to become enforceable internally through indispensable implementing legislation than is the case in England. The British situation is so different from ours that it has no lessons for us.\(^2\)

82. The supporters of the ABA amendment argue that the situation it would create is comparable to that in Canada, now that the British government and Parliament can no longer make and implement treaties for Canada. Although the Canadian legislature, unlike our Senate, takes no part in making treaties, the Parliament in Ottawa must act to make them internal law; and the Privy Council in London held that its powers for this purpose are restricted by the rights of the provinces as much as if it were legislating for purely domestic purposes. Attorney-General for Canada v. Attorney-General for Ontario (1937) A.C. 326 (J.C.). The case involved International Labor Conventions.

The Canadian situation, however, is “an example to avoid and not a model to be imitated.” Many Canadian lawyers are greatly disturbed by this crippling of treaties. For instance, N.A.M. MacKenzie of the University of Toronto Law School wrote soon after the decision: “[T]he outlook is anything but encouraging to those who are interested in the welfare of Canada
What matters infinitely more is the wisdom of the Philadelphia Convention in fitting the treaty power into the federal system so that the great nation they founded would be able to manage its foreign affairs effectively.

**No New Facts Justify Abandoning Our Long-Established Operation of Treaties**

After the plan for treaties set up by the Philadelphia Convention for the strong reasons outlined above has operated with considerable success for one hundred and sixty years, what new facts have arisen which ought to lead us to throw overboard their reasons and their plan? Aside from the existence of different treaty methods in nations with very different political systems from ours, the chief argument advanced seems to be the possibility that the United States might at some indefinite time become a party to some treaty emanating from the United Nations, and that such a treaty might be very harmful to us. UN treaties now under consideration are denounced for having novel features:83

"At the time the Constitution was adopted and until recently, treaties were restricted to their traditional field of agreements... imposing duties and obligations on the contracting states. ... Today, however, treaties are being made and submitted to the Senate for ratification,84 and others are proposed, which impose criminal and civil liabilities directly on individual citizens. ... [The] State Department has undertaken to negotiate... extensively with other nations in this new area, ... regarding the relationship of a government with its own citizens."

83. Report cited supra note 5, at 11-12. I have not reprinted suggestions that these treaties are contrary to our Bill of Rights or encroach on state affairs. These are questions which the President and Senate may be trusted to consider. Ultimately any unconstitutional treaty provision can be nullified by our courts, as set forth in my discussion, supra p. 353 et seq.

84. Presumably this refers to the Genocide Convention, which the Senate has had before it for over a year without acting.
The proper answer to this is that of course new treaties are bound to have new features. International law has to keep up with life, which refuses to stand still. Aviation and atomic energy were unthought of by the framers as subjects for treaties, but we are thinking about them today. The conception of international responsibilities upon individuals began with the Nuremberg Trials and the Tokyo Trials, in which our government was a prominent participant. Whether this conception should be adopted in other international agreements is a question on which reasonable men differ, but there is nothing so abominable about it that it ought not to be submitted to the judgment of the President and the Senate, acting under the influence of public opinion, the same as any other controversial problem of foreign affairs.

Even if we assume that a very bad UN treaty might be submitted by the United Nations, why do we need a constitutional amendment to protect us from it? If the treaty is bad, past experience indicates that either the President would not sign it, or at least thirty-three senators would vote against it. I see no basis in fact for believing that the Senate, which has been called the graveyard of treaties, will suddenly nurture treaties like a crowded incubation ward in a lying-in hospital. The safeguards set up in Philadelphia against unwise treaties are there as much as they ever were. If we cannot trust the President to refuse to sign a harmful treaty and if we cannot trust over two-thirds of the senators to refrain from ratifying this bad treaty, then the country will have come to a sorry pass indeed. There will be little use then in relying upon Supreme Court Justices, who are chosen by the President and the Senate, to save us through their interpretation of the proposed constitutional amendment. One of the few sure maxims of government is that you have to trust somebody.

AN EXISTING REMEDY, IF TREATIES ACTUALLY RATIFIED ARE LATER THOUGHT TO BE BAD, RENDERS THE PROPOSED AMENDMENT WHOLLY UNNECESSARY

However, let us suppose that a bad treaty is signed and ratified by the Senate, contrary to all past experience. Then it does not have to remain "the Law of the Land" forever. The moment that Congress decides that a treaty is producing evil results, a majority of both Houses can pass an act ending the internal effect of this treaty. That is exactly what was done in the Chinese Exclu-
sion case,⁸⁵ and it can be done again whenever the need arises. No doubt, such a repudiation of a treaty is a breach of our good faith, but so is the failure to make treaties effective at all internally, which is rendered easy by the suggested amendment. The existing remedy has the great advantage of being applied only to an occasional treaty after it has been definitely condemned as bad. The remedy in the proposed amendment would interfere with the observance of a great many treaties, whether good or bad.

THE CONSTITUTION OUGHT NOT TO BE AMENDED TO MEET ONLY CONJECTURAL HARM

At most, the alleged danger from the making of harmful treaties is only hypothetical. The backers of this proposal do not point to a single American treaty that was ever ratified, and say, “This treaty is so bad that it shows the urgent need for changing the Constitution.” They give fears and not facts.

Is “the home of the brave” going to let itself be scared into changing a hitherto satisfactory part of our fundamental law because of something that never has happened yet and may never happen at all? Every constitutional amendment in the past has been adopted to meet a situation which has actually happened, and not something which is vaguely apprehended. The first Ten Amendments were promised in order to prevent the Constitution from being rejected in several state conventions. The Eleventh and Sixteenth were adopted to supersede specific decisions of the Supreme Court, which were widely regarded as objectionable. The Twelfth and the Twentieth cured confusing situations which had occurred in the choice of a President and in the delay between the election of a new President and Congress and their assumption of office. The three Civil War amendments were primarily aimed to end slavery and attempts to treat the emancipated slaves as second-class citizens; beyond this, the framers were aware of the desirability of avoiding other types of arbitrary state action. The Seventeenth Amendment was meant to remedy unsatisfactory conditions which had plainly revealed themselves in the legislative election of senators. The Eighteenth Amendment was aimed at the evils of liquor, and the Twenty-first was aimed at the evils of prohibition. The Nineteenth removed the existing evil of the denial of suffrage to half the adult population. The latest amendment, forbidding a

⁸⁵. See notes 19, 20, 21, supra.
third term, was not proposed until after a President had been elected for four terms.

Thus far we have adopted every constitutional amendment like practical men for practical reasons and so as to take care of practical situations. The complexity of international affairs is far too great today for us to stop being practical and cripple our power to negotiate effectively with other nations, on merely conjectural grounds.

CONCLUSION

The essence of both drafts of the proposed constitutional amendment is nullification by states of one of the most important functions of the national government. Therefore, it is highly appropriate to quote against this proposal the statement made by James Madison toward the end of his life on the attempted nullification by a state of the tariff laws of the United States:86

“A political system which does not contain an effective provision for a peaceable decision of all controversies arising within itself, would be a government in name only. Such a provision is obviously essential; and it is equally obvious that it cannot be either peaceable or effective by making every part [of the nation] an authoritative empire. The final appeal in such cases must be to the authority of the whole, not to that of the parts separately and independently. ... It was this view which dictated the [supremacy] clause.”

86. 3 Farrand 537-538, written in 1835 or 1836.