

**Tufts University**  
The Fletcher School of Law and Diplomacy  
**University of Geneva**  
The Graduate Institute of International Studies

**Executive Agreements in the US Legal Esoterica**

**Master of Arts in Law and Diplomacy**

**Thesis** Submitted by **Filippos Manolzas**  
Under the Advisement of Professors MICHAEL GLENNON and LUCIUS CAFLISCH

September 2005

ERINYES: "GODS OF THE YOUNGER GENERATION,  
YOU HAVE RIDDEN DOWN  
THE LAWS OF THE ELDER TIME,  
TORN THEM OUT OF MY HANDS"

Aeschylus, *The Eumenides*, lines 778-79, 808-09,  
in Aeschylus, ORESTEIA.

## PROLEGOMENA

Legal scholars, mastering philosophy of law, more often than not express their surprise about how profoundly legal reasoning is permeated by notions ordinarily attributed to other disciplines. For instance, by discovering *analogies* between primary and secondary rules in, say, criminal law, scholars acknowledge that they intuitively confer a legalistic quality upon the relations of *mathematical sequence* or the dyadic scheme of *cause* and *effect*, borrowed from physics. Legal scholars are also pleased to note that their intellectual input finds additional grounds of authoritativeness when coupled with theoretical tools the usage of which has hitherto been exclusively in the hands of others.

Interdisciplinary parallelisms of such nature are equally recurrent whenever one turns his focus to municipal instruments. For their normative value, consisting of illustrating the axiomatic principles of a given society in legal form and finding a durable equilibrium of allotted powers to different governmental institutions alike, should be put in a *time* and *space* continuum,<sup>1</sup> if the prospering and prolongation of that society are objectives that are seriously pursued. Therefore, it comes to nobody's surprise that constitutional texts, if they deserve their label, shall be coated with an indispensability cloak, adjustable, nonetheless, to the more or less changing moral and political standards of the societies to which they are addressed. If not, constitutional demands would possess nothing more than what is contained in the ordinary rules of quotidian usage.

In their effort to perform the twofold task of drafting principles of supreme legal and ethical value and of elaborating mechanisms contemplating their adjustability thereof, legislators have had recourse to the theoretical device of *self-*

---

<sup>1</sup> With regard to the nature of the societies' constitutive texts, Professor Allott wrote: "In the struggle with new citizens, old laws (the dilemma of becoming), society needs to be able to give substance to the self-created realities which it treats as reality. The *constitution* obviously plays an especially significant role in the drama of the dilemma of becoming. Because the constitution is three-in-one, creating an indissoluble relationship between the past and the present and the future, and because the constitution is actuality and potentiality, it is able to offer the most effective means for organizing the stability-in-charge/changeability which society needs to prolong its existence, to ensure its survival and prospering." See Allott, *Eunomia – New Order for a new World*, Oxford New York, Oxford University Press, at 143.

*reference*,<sup>2</sup> soundly known to those proficient in mathematical analysis. Self-referential rules, in the constitutional architecture, include those rules, which, by virtue of their deposited weight, canonize the processes of altering municipal prescriptions. Incidental to their function is their fate to appear now and then at the epicenter of the political discourse, since their employment follows the rhythms of change of a “society’s self-willing;” anachronistic rules or rules that for a variety of reasons escaped the consideration of the constitutional framers need be redrafted or amended.

Despite its utility, the interdisciplinary approach toward legal reasoning quite often acquires a Janus-faced image, with its obscure side hampering the crystallization of legal thought. For, policymakers, partisan groups of interest, and seasoned members of legal academia have sought to evade solid constitutional prescriptions by speaking a defective and poorly articulated interdisciplinary *meta-language* in order to make their point, thus turning any of its benefits into a nullity. Their diatribes inevitably come to a head with the very idea of constitutional interpretation, as a coherent and constrained legal enterprise, and threaten to alter fundamentally the interconnected constants of constitutional edifices.

Law may be politics, as Louis Henkin suggests.<sup>3</sup> It does or should contain historical, social and economic undertones. Nonetheless, law is, above all, law - contouring its epistemological universe is a mastership calling for principled hermeneutics not biased homiletics. With this view in mind, Anne-Marie Slaughter avers that “lawyers are bound by text as the people are bound by legal rules; the craft of lawyering is in this sense a microcosm of the macrocosm of constitutionalism, it is a

---

<sup>2</sup> Semantic self-reference in number theory is thought to be necessary for the creation of consistent axiomatic systems of mathematical statements and it became possible once the distinction between formal language and meta-language was made. “Statements made in the formal language are expressed in the symbols of the language following the formation rules of the language. The meta-language, on the other hand, is the language used to describe the rules, symbols, and statements of the formal language.” See John M. Rogers and Robert E. Molzon, “Some Lessons about the Law from Self-Referential Problems in Mathematics,” 90 *Michigan Law Review*, 1992, 992-1022, at 994. By analogizing self-reference in mathematics with legal systems, scholars decided that the constitutional language is used to express the legal prescriptions contained in the municipal text [rules], whereas the constitutional meta-language is used to refer to those prescriptions’ legal standing and alteration [meta-rules].

<sup>3</sup> See Louis Henkin, *International Law: Politics and Values*, Martinus Nijhoff Publishers, Boston, 1995, at 4.

habit of mind that gives rise to larger habits of obedience. Similarly, constitutional rules are in some sense arbitrary, as we set them ourselves; but having set them, we abide by them.”<sup>4</sup>

This dissertation is a call for a return to the American constitutional treaty-making standards, which have been perilously undermined, as important international commitments of the United States are being made by executive agreements instead of treaties. Its central thesis is that the executive branch of the US Federal Government must cast an anchor to its “constitutional moorings” and rely less on executive agreements, which are concluded without senatorial advice and consent. It also contends that it is to the benefit of the President to keep the US Senate involved in foreign policymaking, for only collective deliberation and action on key issues is politically wise and constitutionally allowed.

Chapter 1 provides a brief analysis of executive agreements’ legal standing, as a category of the generic heading ‘treaties’ or ‘international agreements’<sup>5</sup> in international law, whereas, Chapter 2 discusses their distinct connotation in the US legal esoterica along with their problematic positioning among the prerogatives the US executive branch enjoys. In particular, I examine the constitutional construction with regard to the treaty-making powers and its alleged deficiencies which spurred the emergence of executive agreements, a constitutionally amorphous mode of creating binding obligations. Relevant case law also is taken into account. Chapter 3 deals with the foremost arguments submitted in favor of the conclusion of congressional-executive agreements. By offering historic Court decisions and highlighting the differing qualities of congressional-executive agreements and treaties, I attempt

---

<sup>4</sup> *Memorandum* from Anne-Marie Slaughter, Harvard Law School, to Professor Laurence H. Tribe [on file with the Harvard Law School Library]; quoted in Laurence Tribe, “Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation” [hereinafter, *Taking Text Seriously*], 108 *Harvard Law Review*, 1995, pp. 1222-1303, at 1224.

<sup>5</sup> The terms can be used interchangeably. According to the International Law Commission “[t]he term “treaty” is used throughout the draft articles as a generic term covering all forms of international agreement in writing. ... The question whether, for the purpose of describing all such instruments and the law relating to them, the expression “treaties” and “law of treaties” should be employed, rather than “international agreements” and “law of international agreements,” is a question of terminology rather than of substance.” See “Report of the Commission to the General Assembly” [hereinafter, 1962 “Report of the Commission”], in *Yearbook of the International Law Commission*, 1962, vol. II, 159-186, at 161-162 (2).

to quash submissions seeking to equate those instruments. Subsequently, I criticize interdisciplinary accounts which venture to justify the legality of congressional-executive agreements in an extra-constitutional, non-legalistic leitmotif. Chapter 4 focuses on sole-executive agreements. It gives a historical overview of such agreements, where one can witness a slippage from the constitutional standards. A number of relevant Court decisions follow, which in effect have left the legality of sole-executive agreements undecided, with the sole exception of the *Belmont* and *Pink* cases, which, in my view, have created a hazardous precedent. The chapter ends with the sincere but anemic efforts of the legislature to exert direct control over the content of both sole and congressional-executive agreements [the Case-Zablocki Law]. Chapter 5 argues for the exclusivity of the Treaty Clause of the American Constitution and tests with hermeneutical machinery the viability of those assertions that deem senatorial advice and consent as discretionary, if not parasitic.

## ACKNOWLEDGMENTS

I am grateful to Michael J. Glennon, Professor of International Law at the Fletcher School of Law and Diplomacy, for having introduced me to the legal universe. His methodical knowledge of the rules that govern our international community, together with his outstanding comprehension of the American constitutional system, has enhanced my willpower to become a relentless voyager in my newfound *terra firma*.

To Lucius C. Caflisch, Professor of International Law at the Graduate Institute of International Studies (University of Geneva) and Justice at the European Court of Human Rights, I am indebted for his unyielding willingness to share his invaluable epistemological knowledge and experience with me. Professor Caflisch's lectures, ideas, and suggestions during my studies at the Institute and his remarks on this thesis have served as an excellent *gnomon* in my endeavor to learn more about law.

Many thanks are owed to Brandon Edward Miller, a former Fletcherite and, at present, a student at Harvard Law School, for his friendship, the exhausting discussions we had on the subject matter under examination, and his wise counsel.

I also wish to thank the Fulbright Foundation for having nominated me as one of its scholars. Their welcoming to the society of Fulbright scholars was as gentle as fruitful, for I became acquainted with the wonderful legacy Senator James William Fulbright and his followers have created. Likewise, I am beholden to the McJannet Foundation because, without its generous support, my participation in the joint degree program with the Graduate Institute of International Studies would not have been possible.

Finally, a word of appreciation for Professor of Law and Political Science Bruce Ackerman and Professor of Law David Golove, of Yale and Arizona University, respectively. My categorical objection to their thought-provoking phrase "But all virtues are vicious when carried to extremes," which they address to the Founding Fathers for their courage to draft the constitutive text of the Republic-to-be in the midst of the war, as opposed to their alleged unwise handling of the law-making powers, became the gist of my decision to write about executive agreements. In fact,

early enough on my study of the topic, I came across a paradigm of unparalleled political sincerity and courage, which, albeit “carried to the extremes,” has been received with lavish admiration by the American public and legal community. I am referring to Senator Fulbright’s unconditioned initial approval of the Chief Executive’s prerogative to conclude executive agreements with simple bicameral majorities<sup>6</sup> and his subsequent decision to admit *erga omnes* that he was wrong, by reckoning that “[t]he reduced role of the Congress and the enhanced role of the President in the making of foreign policy ... are the culmination of a trend in the constitutional relationship between President and Congress that began in 1940, which is to say, at the beginning of this age of crisis.”<sup>7</sup> I am confident that neither the framers of the US Constitution nor Senator Fulbright have been negatively appraised by their public for having excessively served the virtues they believed in. Apparently, to the American people, but not to Professors Ackerman and Golove, any quest for virtues in their extremity is not a vicious but an ideal enterprise.

---

<sup>6</sup> “It seems to me that an executive agreement ratified by joint resolution differs from a treaty largely in name only,” J. William Fulbright, *New York Herald Tribune*, Oct. 27, 1943; cited by Quincy Wright, “The United States and International Agreements,” 38 *Am. J. Int’l L.*, 1944, 341-355, at 341.

<sup>7</sup> See J. William Fulbright, *The Arrogance of Power*, Vintage Books, New York, 1966, at 45.

## 1. EXECUTIVE AGREEMENTS OR AGREEMENTS IN SIMPLIFIED FORM IN INTERNATIONAL LAW

In an ever more interdependent world, formal treaty-making procedures, notwithstanding their comprehensiveness and high legal standing, seem to have fallen short in meeting modern demands for expediency and informality.<sup>8</sup> The necessity of performing effectively their international rôle urged states and associations of them alike to invent versatile normative vehicles so as to advance their various objectives. Accordingly, a novel type of international agreement, the *executive agreement* or *agreement in simplified form*, with its paraphernalia, came into being as an alternative to creating legally binding obligations.<sup>9</sup> The new technique was devised with a view toward shortcutting the cumbersome formal treaty-making requirements of legislative approval, ratification, or promulgation by the head of state.<sup>10</sup>

### 1.1. CODIFICATION ATTEMPTS - BINDING CHARACTER - DEFINITION OF EXECUTIVE AGREEMENTS

On the basis that its work on the codification of the law of treaties was both declaratory of existing law and the progressive development of it, the International Law Commission [hereinafter, ILC] has grappled with the question of designating executive agreements. The definition agreed upon was put forward in the Report of the ILC to the General Assembly in 1962 and it reads as follows: "Treaty in simplified form means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure."<sup>11</sup>

The commentary devoted a good part of its thematic in dotting the converging lines between treaties and "agreements in simplified form." The ILC expressed

---

<sup>8</sup> Luzius Wildhaber, "Executive Agreements," in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. II, 1995, pp. 312-318, at 313.

<sup>9</sup> See Sir Hersch Lauterpacht (Special Rapporteur), "Report on the Law of Treaties," in *Yearbook of International Law Commission*, 1953, vol. II, pp. 90-162, at 101-106.

<sup>10</sup> Luzius Wildhaber, *op. cit.*, note 8, at 313.

<sup>11</sup> 1962 "Report of the Commission," *op. cit.*, note 5, at 161.

the view that while the term 'treaty' connotes only the single formal instrument, international agreements, concluded by the exchange of two or more instruments, should equally fall into the sphere of the law of treaties.<sup>12</sup> Furthermore, even though single instruments, such as an "agreed minute" or a "memorandum of understanding," are not put under the generic rubric "*formal* instruments," they are undeniably international agreements governed by the law of treaties.<sup>13</sup>

With respect to the onomatology of these "less formal type[s] of agreements," it was correctly suggested that the meaning assigned to the expression "treaty in simplified form" cannot be regarded as all-inclusive, since some thirty-eight different appellations<sup>14</sup> are used with varied frequency. Also, apropos of its nomenclature, the drafters held that an outward characteristic of an instrument, such as its appellation, does not affect its juridical standing. It was by and large reckoned that the juridical differences between treaties and executive agreements could only be witnessed in the field of form and in the method of conclusion and entry into force, and that the law disposing of such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, governs all classes of international agreements. "It would therefore be inadmissible to exclude certain forms of international agreements from the general scope of a convention on the law of treaties merely because, in the field of form pure and simple, and of the method of conclusion and entry into force, there may be certain differences between such agreements and formal agreements."<sup>15</sup>

However, the formulation of draft *Articles* 4 and 12, on the authority to negotiate, draw up, authenticate, sign, and ratify, and on ratification, respectively, called for the drawing of the separating lines between treaties and "agreements in simplified form." Commentary 11 of the 1962 *Report* suggested that a divergence between the two types of agreements can be found in that "agreements in simplified form"

---

<sup>12</sup> *Ibid.*

<sup>13</sup> Thus, the commentary concluded that: "[a] general convention on the law of treaties should cover all such agreements, whether embodied in one instrument or in two or more related instruments, and whether the instrument is "formal" or "informal." *Ibid.*, at 162 (2).

<sup>14</sup> Denys P. Myers, "The Names and Scope of Treaties," 51 *American Journal of International Law*, 1957, pp. 574-605, at 574.

<sup>15</sup> 1962 "Report of the Commission," *op. cit.*, note 5, at 162 (4).

“identify themselves by the absence of one or more of the characteristics of the formal treaty,” but the precision of which characteristic’s absence or presence signifies the difference is impossible to be decided upon.<sup>16</sup> In light of the governments’ criticism over the definition’s lack of sufficient precision, the ILC decided to reformulate those articles to the effect that a clear-cut distinction between the two types of agreements is not required. Accordingly, the definition of “treaty in simplified form” was deleted.<sup>17</sup>

Thus, according to the *Encyclopedia of International Law*, ““agreements in simplified” form may be defined as agreements which are: not subject to ratification; or concluded by an organ in which the municipal constitution did not, *expressis verbis*, vest treaty-making power [minister instead of head of state]; or concluded by an organ vested with treaty-making power, but in a procedure not provided, *expressis verbis*, in the municipal constitution [executive instead of executive plus legislature]; or concluded in a simplified procedure outlined in the municipal constitution [usually executive alone without legislative approval].”<sup>18</sup>

---

<sup>16</sup> The commentary suggests that “[r]atification, for example, though not usually required for treaties in simplified form is by no means unknown.” *Ibid.*, at 163 (11).

<sup>17</sup> “Report of the Commission to the General Assembly” [hereinafter, 1965 “Report of the Commission”], in *Yearbook of International Law Commission*, 1965, vol. II, 155-196, at 158 (23).

<sup>18</sup> Luzius Wildhaber, *op. cit.*, note 8, at 315-316.

## 2. EXECUTIVE AGREEMENTS IN THE UNITED STATES LEGAL ESOTERICA

### 2.1. INTRODUCTION OF THE TERMS

In the United States domestic legal order, the word *treaty* is reserved for an agreement that is made by and with the advice and consent of the Senate.<sup>19</sup> The equivalent constitutional provision envisions that 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.”<sup>20</sup> The term was destined to embrace every form of international agreement.<sup>21</sup>

Regardless of the explicit constitutional prescription which vests the President with the power to negotiate and ratify only “treaties,” Chief Executives have historically expressed their negotiations’ product with other States and internation-

---

<sup>19</sup> On July 24, 1974, the Department of State, in approving a revised *Circular 175 Procedure*, proceeded to a classification of international agreements whereby *Treaties* were defined as “[i]nternational agreements (regardless of their title, designation, or form) whose entry into force with respect to the United States takes place *only* after the Senate has given its advice and consent... .” See “Circular 175,” *Foreign Affairs Manual* 11, ch. 700, 721.2a [hereinafter, *Circular 175*]; reprinted in *Digest of US Practice in International Law* [hereinafter, 1974 *Digest of US Practice*], 1974, at 200 [emphasis added].

<sup>20</sup> US Const., art. II, § 2, cl. 2.

<sup>21</sup> See Michael Glennon, *Constitutional Diplomacy*, Princeton University Press, New Jersey, 1990, at 178, citing the Staff of the Senate Committee on Foreign Relations, *Treaties and Executive Agreements* (Comm. Print, 1944). Indeed, in the embryonic classification presented in the constitutional text only one different category of international agreements appears, that of “compacts.” Article I, §10, cl. 3 of the Constitution prohibits states from entering into such agreements with another state, without the consent of Congress. Professor Edgar Bodenheimer argued that the Framers were familiar with Vattel’s distinction between treaties and compacts. Thus, they deliberately reserved for the Chief Executive the authority to bind the nation with significant undertakings through the treaty-making procedures while they afforded conditional [upon congressional approval] compact-making powers to the states of the Union. Edgar Bodenheimer, *Jurisprudence: The Philosophy and Method of Law*, Harvard University Press, Cambridge, Mass., 1974, §71 at 339. See also Edwin Borchard, “Shall the Executive Agreement Replace the Treaty?” [hereinafter, *Shall*], 53 *Yale Law Journal*, 1944, pp. 637-643, note 10, at 639-640; Edwin Borchard, “Treaty and Executive Agreement: A Reply” [hereinafter, *A Reply*], 54 *Yale Law Journal*, 1945, 616-664, at 628. According to Professor Tribe, a safe method for discerning the two types of agreements is to “consider the degree to which an agreement constrains federal or state sovereignty and submits the United States citizens or political entities to the authority of bodies wholly or partially separate from the ordinary arms of federal or state government.” Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1268. But, compare: “There is no self-executing test differentiating ‘compact’ from ‘treaty.’ Story and other writers have attempted an analytical classification. ... The attempt is bound to go shipwreck for we are in a field in which judgment is, to say the least, one of the important factors.” The authors conclude that it is the Congress that should be shouldered with the task of circumscribing “the area of agreement open to the States”. Frankfurter and Landis, “The Compact Clause of the Constitution – A Study in Interstate Adjustments,” 34 *Yale Law Journal*, 1925, 685-758, note 37, at 695. For an excellent analysis of the allocation of treaty-making powers between the States and the Federal Government, see Louis Henkin, *Foreign Affairs and the Constitution*, The Foundation Press, New York, 1972, at 227-248.

al organizations in forms subsumed under the caption “executive agreements,”<sup>22</sup> or “international agreements other than treaties.”<sup>23</sup> The American Law Institute, in Chapter I § 303 of the 1987 *Restatement* [Third] of the *Foreign Relations Law of the United States*, has codified the practice of the executive branch to submit the United States to legally binding agreements, both within and outside the scope of the Treaty Clause [article II, Section 2], as follows:

“Subject to § 302(2),<sup>24</sup>

- (1) the President, with the advice and consent of the Senate, may make any international agreement of the United States in the form of treaty;
- (2) the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution;
- (3) the President may make an international agreement as authorized by treaty of the United States;
- (4) the President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.”<sup>25</sup>

---

<sup>22</sup> In proposing legislation to the Subcommittee on the Separation of Powers of the Senate Committee on Foreign Affairs towards the senatorial review of such agreements, Senator Loyd M. Bentsen, Jr. defined an executive agreement as “any bilateral or multilateral international agreement or commitment, other than a treaty, which is binding upon the United States, which is made by the President or any officer, employee, or representative of the executive branch of the United States Government.” See A. Rovine (ed.), “Executive Agreements,” in 1974 *Digest of US Practice*, *op. cit.*, note 19, at 294. Shortly after Senator Bentsen’s bill [S. 632], Senator John Glenn [S. 1251] sought to establish more severe senatorial checks by proposing that executive agreements be subject to Senate disapproval only, rather than disapproval by concurrent resolution of both Houses that Senator’s Bentsen bill was contemplating. Senator Glenn considered an executive agreement to be “any bilateral or multilateral international agreement or understanding, formal or informal, written or verbal, other than a treaty, which involves, or the intent is to leave the impression of, a commitment of manpower, funds, information, or other resources of the United States, and which is made by the President or any officer, employee, or representative of the executive branch of the United States Government.” (*Ibid.*) Both bills failed to acquire the requisite voting majority. Monroe Leigh, Legal Adviser of the Department of State, testifying before the Subcommittee in opposition to the bills, emphasized their “constitutional deficiencies” and concluded that cooperation between the executive and legislative is preferable to “attempted controls by one branch over another in ways that are hazardous to our ability to deal effectively with other nations and appear to be constitutionally unsound.” *Ibid.*, at 307.

<sup>23</sup> See Lawrence Tribe, *American Constitutional Law*, The Foundation Press, New York, 1988<sup>2</sup>, at 228; Thomas Franck and Edward Weisband, *Foreign Policy by Congress*, Oxford University Press, New York 1979, at 143; Henkin, *op. cit.*, note 21, at 177; Glennon, *op. cit.*, note 21, at 180.

<sup>24</sup> Subsection 2 § 302 reads “[n]o provision of an agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States. *Restatement* [Third] of the *Foreign Relations Law of the United States* (hereinafter, *Restatement* [Third]), American Law Institute Publishers, Washington D.C., 1986, at 153.

<sup>25</sup> *Ibid.*, at 159.

The classification of the different constitutional sources, from which the presidential powers to conclude “agreements other than treaties” can be derived, helped distinguish three different kinds of such agreements. Accordingly, subsection 2 of § 303 of the *Restatement* refers to “congressional-executive agreements,” subsection 3 of § 303, to those “pursuant to a treaty,” and subsection 4 of § 303, to “sole-executive agreements.”<sup>26</sup>

So far as the first category of agreements is concerned, the commentary suggests that they sometimes follow congressional legislation that calls for the conclusion of a further agreement, so that the legislation in question can be properly executed.<sup>27</sup> Additionally, Congress may ask the President to negotiate and conclude an agreement, whose subject matter falls within the powers the Congress possesses or it may invite him or her to bring into force an agreement already negotiated, with presidential reservations welcomed.<sup>28</sup>

“Some executive agreements are expressly authorized by treaty or an authorization for them may be reasonably inferred from the provisions of a prior treaty.”<sup>29</sup>

---

<sup>26</sup> *Ibid.*, at 160-162. The classification provided in *Circular 175* differs from that of the *Restatement* [Third] in that it puts under the heading of “executive agreements” only those made solely on the basis of the constitutional authority of the President [“sole-executive agreements,” according to the American Law Institute], while the term “agreements pursuant to legislation” is used to describe what the *Restatement* [Third] delineates as congressional-executive agreements. *Circular 175*, 721.b(2),(3). In the pages that follow the terms will be used, as provided in the *Restatement* [Third].

<sup>27</sup> For instance, Section 3(a) of the Peace Corps Act (22 U.S.C. 2502) stipulates that “The President is authorized to carry out the programs in furtherance of the purposes of this Act, on such terms and conditions as he may determine.” Quoted by Monroe Leigh in “Memorandum of law on the subject of the authority of the President to enter into executive agreements pursuant to his independent constitutional powers”, [hereinafter, “M. Leigh’s Memorandum”], reprinted in 1975 *Digest of US Practice in International Law*, at 314.

<sup>28</sup> “Some areas in which Congress has authorized the conclusion of international agreements are postal conventions, foreign trade, foreign military assistance, atomic energy cooperation and international fishery rights.” See “Treaties and Other International Agreements: The Role of the United States Senate” [hereinafter, *The Role of the US Senate*] (Study prepared by the Congressional Research Service, Library of Congress), (Committee Printing 2001), at 8. Likewise, Congress has assented to the presidential conclusion of agreements already negotiated, “as in the case of the Headquarters Agreement with the United Nations, and various multilateral agreements establishing international organizations, e.g., UNRRA, the International Bank and the International Monetary Fund, the International Refugee Organization. Henkin, *op. cit.*, note 21, at 174; *Restatement* [Third], at 166.

<sup>29</sup> In *Wilson v. Girard* [354 U.S. 524, 77 S.Ct. 1409, 1 L.Ed.2d 1544 (1957)], the Court gave effect to a congressional-executive agreement disposing of jurisdictional matters with regard to the United States forces in Japan, in pursuance of a prior bilateral treaty between the two countries. *Restatement* [Third], at 165.

“Executive agreements pursuant to treaties” usually involve arrangements and understandings under security treaties.<sup>30</sup>

Sole-executive agreements are concluded by the President acting within the limits of the authority the constitutional text is said to “allow” and their purpose shall not be inconsistent with legislation already enacted by Congress.<sup>31</sup>

The absence of executive agreements from the constitutional design coupled with their increasing use by US Presidents ever since the end of World War II has incited important constitutional frictions and added much to the *entropy* of the lasting power-struggle between the executive and the legislative branch of the federal government. The sharp controversy over the legal standing of executive agreements reflects two different currents of thought. On one side rest those who view the President as an omnipotent organ of foreign policy-making and, on the other, those who claim that such a presidential authority is constitutionally unfounded and politically precarious. In the analysis that follows, both trends clash with the constitutive text of the United States and only one withstands the fight.

## **2.2. PRESIDENTIAL POWERS OVER TREATY-MAKING AND US CONSTITUTIONAL CONSTRUCTION**

Serious engagement in sorting out the powers that governmental institutions, or state officials personifying them possess, militates the need for meticulous reading of the relevant constitutional provisions. Although there is not much to be said in contradiction to this suggestion, there is, indeed, much to be extrapolated or even invented, when municipal instruments provide little inkling of such powers.

---

<sup>30</sup> The conclusion of “executive agreements pursuant to treaties” has not spurred notable constitutional problems, probably because of the assumption that “Senate’s consent to the original treaty implies consent to supplementary agreements.” Henkin, *op. cit.*, note 21, at 176. Thus, they do not comprise part of the problem this paper wishes to address.

<sup>31</sup> In *US v. Clarke*, (20 Wall. 92, at 112-113, (1874)) the Court held that “[n]o power was ever vested in the President to repeal an act of Congress.” Likewise, in *US v. Guy W. Capps Inc.* (204 F. 2d 655, 4<sup>th</sup> Cir. 1953) affirmed that executive agreements are not internally operative so as to override previous federal legislation. G.J. Horvath is right in arguing that “[i]t seems out of harmony with the entire tenor of the Constitution to hold that the President, even when dealing with international matters, may in the absence of express constitutional declaration achieve results which overrule the national legislature.” See, G.J. Horvath, “The Validity of Executive Agreements – A Casestudy,” in 30 *Österereichische Zeitschrift für Öffentliches Recht und Völkerrecht*, 1979, pp. 105-131, at 121.

The municipal blueprint of the United States sought to establish a ‘more perfect Union,’ but constitutional lawyers agree that the construction, at least with regard to foreign affairs powers of the Republic-to-be, was lacking of some bricks.<sup>32</sup> Louis Henkin, summarizing what the text has left unsaid, observes, *inter alia*, that a “power to conduct foreign relations” is vested neither in the federal government, nor in any of its branches.<sup>33</sup> Accordingly, even though treaty-making powers are explicitly delegated to the President with the “advice and consent of the Senate,” the authority to break, denounce, or terminate them is covered by the sound of constitutional silence.<sup>34</sup> “These “missing” powers, and *a host of others*, were clearly intended for and have always been exercised by the federal government, but where does the constitution say it shall be so?”<sup>35</sup>

---

<sup>32</sup> Henkin, *op. cit.*, note 21, at 17; Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1249; Tribe, *Constitutional Law*, *op. cit.*, note 23, at 211. The text speaks a laconic language, the reasons for which can be traced to the peculiarity of the historico-political momentum under which the document was drafted. John Hart Ely wrote on this issue that “it was the quarrel with Britain that forced Americans to reach upward and bring natural law from the skies, to be converted into a political theory for use as a weapon in constitutional argument. ... At such times it is the winning of a cause, not the discussion of problems of ontology, which occupies men’s minds.” See, J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge, Mass., 1980, at 49. Consequently, essential legal doctrines, adequately formulated in constitutional texts which have been drafted in less tumultuous or turbulent eras, are poorly developed in the US Constitution. A telling example is the Separation of Powers Doctrine. The Framers created a system of interbranch checks and balances and denied a strict division of constitutional powers, thinking that each governmental agency would benefit from having an equal voice regarding the actions of the others, hence precluding arbitrary rule. See Philip Kurland, “The Rise and Fall of the ‘Doctrine’ of Separation of Powers,” 85 *Michigan Law Review*, 1986, pp. 592-613, at 593. From a different angle, Greenawalt points out that the idea of a “rule of recognition,” setting out the criteria for assessing the validity of other rules, was totally absent from the minds of the Founding Fathers, posing, thus, problems whenever we turn our focus to their intent. See Greenawalt, “The Rule of Recognition and the Constitution,” 85 *Michigan Law Review*, 1987, pp. 621-671, at 621. [The “rule of recognition has been introduced to legal scholarship by H.L. Hart. See H.L. Hart, *The Concept of Law*, Oxford University Press, Oxford, 1961, at 97-107]. However, Professor Glennon believes that the “American constitutional jurisprudence may in a sense lag behind international law in its failure to articulate a rule of recognition. But it does offer a rich platter of doctrines aimed at letting us know which candidates for rulehood qualify.” Glennon, *op. cit.*, note 21, at 34.

<sup>33</sup> Henkin, *op. cit.*, note 21, at 16.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, at 17 (emphasis added). Professor Henkin’s question would merit much attention if it was not a rhetorical one. Arguing on the constitutionality of the congressional-executive agreements, the author disregards the constitutional objections his question imply, and, in a subsequent paragraph of his writing, sanctifies executive *practice* by unreservedly suggesting that “the constitutionality of the Congressional-Executive agreement is established, it is used regularly at least for trade and postal agreements, and *remains available to Presidents for general use should the treaty again prove difficult.*” *Ibid.*, at 176 (emphasis added). Similarly, Monroe Leigh asserts that the authority of the Chief Execu-

The provisions of the US Constitution, which account for the foreign affairs powers of the executive branch, are the following:

The executive Power shall be vested in a President of the United States of America. [U.S. Const. art. II, § 1, cl. 1]

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; [U.S. Const. art. II, § 2, cl. 1].

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; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors,... . [U.S. Const. art. II, § 2, cl. 2]

[H]e shall take Care that the Laws be faithfully executed,... . [ U.S. Const. art. II, § 3]

Legal scholars and Supreme Court decisions attempted to fill the lacunae of the missing powers.<sup>36</sup> Chief Justice John Marshall, speaking on the floor of the House of Representatives in 1797, declared: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”<sup>37</sup> Unsurprisingly, the proponents of presidential monarchy over foreign affairs isolated this statement from its overall context and made it the banner of their submissions, when fierce controversy over the allocation of constitutional powers arose.<sup>38</sup> The declaration was made during a congressional debate on President Adams’ power to extradite to Great Britain one Jonathan Robbins, charged with murder. Contrary to the impression to be gained from its rather uncompromising wording, which led many to infer that President Adams had an ‘inherent’ power to extradite an individual to another state, the Chief Justice in fact meant that it was Adams’ responsibility to act upon the Jay Treaty, and that it was that Treaty, not the President’s ex-

---

tive to enter into executive agreements has ceased to be a disputable question. “M. Leigh’s Memorandum,” in 1975 *Digest of US Practice*, at 308.

<sup>36</sup> Tribe *Taking Text Seriously*, *op. cit.*, note 4, at 1236.

<sup>37</sup> 6 *Annals of Congress*, 1800, at 613; quoted in Glennon, *op. cit.* note 21, at 8.

<sup>38</sup> It is suggested that the culmination of this conflict can be traced back to the era that followed the end of the First World War and the senatorial rejection of the Treaty of Versailles.

clusive constitutional power,<sup>39</sup> that sanctioned the extradition in question.<sup>40</sup> In short, Justice Marshall's point was that the President of the United States cannot do whatever he wishes as "the sole organ of the nation in its external relations,"<sup>41</sup> more than ever, when there are sound constitutional provisions, laying down certain rights or imposing certain obligations. In the case under examination there existed precise conventional obligations emanating from the Jay Treaty<sup>42</sup> and a constitutional order that the President "take care that the laws of the land be faithfully executed."<sup>43</sup> Consequently, Marshall's famed avowal bore no resemblance to *a carte blanche*, allowing for a full-fledged presidential monarchy in treaty-making.

Toward the same conclusion lean the historical records of the Founding, which instruct us that it was only at the closing phase of the deliberations of the Constitutional Convention of 1787, where the presidential office entered the scene as giving a 'national' perspective to the foreign affairs power. Madison "observ[ed] that the Senate represented the States alone, and that for this as well as other obvi-

---

<sup>39</sup> The Marshallian interpretation of the presidential [non]powers over extradition was endorsed in *Valentine v. United States ex rel. Neidecker*, where the Supreme Court held that the President had no independent power to extradite an individual to France. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936).

<sup>40</sup> Glennon, *op. cit.*, note 21, at 8; Citing the Jay Treaty, Nov. 19, 1794, United States-United Kingdom, 8 Stat. 116, T.S. No. 105.

<sup>41</sup> Jefferson's communication to the French Minister of the time Genêt sheds light on the proper meaning of the "sole organ" theory: "[The President] being the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation; and whatever he communicates as such, they have a right, and are bound to consider as the expression of the nation, and no foreign agent can be allowed to question it. ..." T. Jefferson, 6 *Writings*, (Ford, Paul Leicester ed.), G.P. Putnam's Sons, New York, 1895, at 451; quoted in Henkin, *op. cit.*, note 21, at 300, note 18. Professor Glennon has pointedly argued that there has been confusion over the distinction between the US President as being representative to the community of nations, and being the formulator of principal policy objectives. "Few would now quarrel with Sutherland's assertion that "the President alone has the power to speak or listen as a representative of the nation." But the power to speak *what*? The power to say that the United States will coin a new ten-dollar gold piece to relieve pressure on the dollar? The power to say that in the interest of hemispheric stability, the United States will reimburse the Bank of America for bad loans made to developing nations? The power to declare war against Nicaragua? Of course not: These powers, and many others, are allocated by the Constitution, and policies concerning such policies may be made as prescribed by the Constitution. Some of these policies may be made by the President alone; others require that he seek congressional authorization. But his power to act as the "sole organ" or "representative of the United States" in communicating those powers to foreign countries hardly implies that he alone may formulate those policies." Glennon, *op. cit.*, note 21, at 24.

<sup>42</sup> By virtue of the Supremacy Clause, as a duly concluded treaty it was qualified as supreme law of the land, prevailing over inconsistent state laws.

<sup>43</sup> U.S. Const. art. II, § 3.

ous reasons it was proper that the President should be an *agent* in Treaties.”<sup>44</sup> Visibly, the last-minute inclusion of the Chief Executive as an *agent* in Treaties does not lend itself to far-fetched inferences that he was accorded exclusive treaty-making powers.

The Marshallian construction, being well founded on constitutional pillars, posed insurmountable impediments to those who wished for an omnipotent US President regarding the conduct of foreign affairs. Avoiding challenging its rather flawless grounds, they sought to give the controversy an *extra-constitutional* leitmotif. In *US v. Curtiss-Wright Export Corp.*,<sup>45</sup> the Supreme Court took distance from the well-settled constitutional understanding that the federal authorities cannot exceed those “specifically enumerated” in the Constitution.

Undeniably, the *US v. Curtiss-Wright Export Corp.* litigation bears significant heaviness on the American constitutional life, as most of the cases where actions of the executive are put under judicial scrutiny. Nonetheless, it was the analysis of Justice Sutherland that made it particularly worth noting. The Chief Justice maintained that “[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”<sup>46</sup> In his unduly broad opinion,<sup>47</sup> Suth-

---

<sup>44</sup> See Solomon Slonim, “Congressional-Executive Agreements,” 14 *Columbia Journal of Transnational Law*, 1975, 434-450, at 438 [emphasis added]. The proposal was meant to counterbalance the smaller states’ victorious struggle over disproportionate authority in national management, which was brought to a close by the abolition of the relevant article of the Confederation, envisaging congressional prerogatives over treaty-making.

<sup>45</sup> In that case, a Joint Resolution of both Houses had authorized President Roosevelt to pronounce arms sales to the countries at war in Chaco illegal upon his finding that “a ban on those sales would serve the cause of peace.” Franklin Roosevelt proclaimed the embargo and the defendant company (Curtiss-Wright) violated it, was convicted, and on appeal challenged both the Resolution and the Proclamation on constitutional grounds. The Congress, according to the defending line, had improperly delegated legislative powers to the President. Glennon, *op. cit.*, note 21, at 18, Henkin, *op. cit.*, note 21, at 19. The case would have been dismissed swiftly had the Court held that the law did not grant *unlimited* authority to the President and then examined the scope (indeed limited) of the Resolution. However, the core-question of the case acquired far-reaching dimensions: “[a]ssuming that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign policy?” See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, at 315 (1936).

<sup>46</sup> *Curtiss-Wright*, 299 U.S. 304, at 315. Justice Sutherland’s opening observation raised no particular objections, since it has been broadly reckoned that somebody from the executive branch shall have

erland added that, in foreign affairs, the powers exercised by the President are not originally derived from the Constitution, but from external sovereignty. "When the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union."<sup>48</sup> "As a member of the family of nations, the United States assumed all the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign."<sup>49</sup> Accordingly, "the powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitant of nationality."<sup>50</sup>

Justice Sutherland's dictum has been criticized from many quarters. Professor Henkin, restating Justice Sutherland's theory, came to the conclusion that:

"Since the powers of the United States to conduct its foreign relations, and other powers inherent in national sovereignty, do not derive from the Constitution, one cannot identify them exclusively, or even principally, by construction of or inference and extrapolation from constitutional language. In particular, although some of them are mentioned, foreign affairs powers are not "enumerated powers" and are not denied (or reserved to the States) if they are not enumerated; but one must look elsewhere – to political philosophy, to international law and the practices of nations – to determine their full array. And these powers *are not subject to doctrines of interpretation and limitation applicable to powers granted by the Constitu-*

---

the authority to enter into non-treaty international agreements disposing of trivia, which facilitate the proper execution of capital US foreign affairs commitments. However, it is the broad framing and the extra-constitutional derivation of the foreign affairs powers forwarded by the Chief Justice that were received with skepticism by the legal community. Tribe, *Taking Text Seriously, op. cit.*, note 4, at 1268.

<sup>47</sup> It has been advanced that Sutherland's contribution went far beyond the reasoning that necessitated for the Court's disposition of the case. Levitan suggests that "a careful check indicates that the whole theory [of Curtiss-Wright] and a great amount of its phraseology had become engraved on Mr. Sutherland's mind before he joined the Court, waiting for the opportunity for it to be made the law of the land. The circumstances show that he had performed opinions, on the subject and that when he spoke in the Curtiss-Wright decision, he did little to re-examine his long cherished ideas." See, D.M. Levitan, "The Foreign Relations Power: An analysis of Mr. Justice Sutherland's Theory," 55 *Yale Law Journal*, 1946, 467-497, at 478. Professor Tribe is of the same mind as Levitan. Tribe, *Constitutional Law, op. cit.*, note 23, at 211. See also, Berger, "The Presidential Monopoly of Foreign Relations," 71 *Michigan Law Review*, 1972, pp. 1-58, at 1. Sutherland's views were first publicized in an article entitled: "The Internal and External Powers of the National Government," S.Doc. No. 417, 61<sup>st</sup> Congr., 2<sup>nd</sup> Sess. (1910), cited in Tribe, *ibid.*, at 211.

<sup>48</sup> *Curtiss-Wright*, 299 U.S. 304, at 317.

<sup>49</sup> *Ibid.*, at 318.

<sup>50</sup> *Ibid.*

tion, for example those implied in principles of “separation of powers” or “federalism.””<sup>51</sup>

One should not resist the comment that the presidential prerogatives over foreign affairs, which Justice Sutherland’s views seek to establish, resemble those exercised by George III, whose royal absolutism was vehemently protested against by the Founding Fathers.<sup>52</sup> Their decisiveness not to imbue the President with unfettered treaty-making prerogatives can be reasonably inferred from Hamilton’s premonition that “the joint possession of the power in question, by the President and the Senate, would afford a greater prospect of security, than the separate possession of it by either of them. ... The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of ... a President of the United States.”<sup>53</sup> Justice Sutherland’s ideas, if they were to be welcomed by the American legal establishment, would, inexorably, run against the notion of constitutional democracy and cast doubts on the liberal sentiments of its founders.<sup>54</sup>

With regard to the “external sovereignty argument”, Professor Laurence Tribe dismisses Sutherland’s historical accounts and adds to it a more legalistic per-

---

<sup>51</sup> Henkin, *op. cit.*, note 21, at 23 [emphasis added].

<sup>52</sup> Tribe, *Constitutional Law, op. cit.*, note 23, at 229; Philip Kurland, “The Impotence of Reticence” [hereinafter, *The Impotence*], 4 *Duke Law Journal*, pp. 619-636, 1968, at 626; Berger, *op. cit.*, note 47, at 39.

<sup>53</sup> A. Hamilton, 75 *The Federalist Papers / Alexander Hamilton, James Madison and John Jay*, (Cook, J. ed.), The New American Library, New York, 1961, at 488, 505-506. Similarly, in *Dames & Moore v. Regan* (453 U.S. 654), which involved the constitutionality of President Reagan’s use of the Iranian-hostage settlement agreement [concluded by his predecessor, Jimmy Carter], Justice William Rehnquist opposed to the idea of plenary presidential powers in foreign affairs and noticed that: “The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.” *Ibid.*, at 662. Notice that, even though the Court abstained from considering the case as involving the exercise of plenary presidential powers in foreign affairs, it did stir the Court’s sensitivity over the “evils” of royal absolutism the British Crown had inflicted to the colonial states.

<sup>54</sup> Importantly, in 1981 the D.C. Circuit refuted a broad stretching of *Curtiss-Wright*: “To the extent that denominating the President as the ‘sole organ’ of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of our country, we reject that characterization.” *American Intern. Group v. Islamic Republic of Iran*, 657 F. 2<sup>nd</sup> 430, 438 n.6 (D.C. Cir. 1981).

spective by holding that “ascribing the concomitants of nationhood to the federal government says nothing about their allocation among its three coordinate branches.”<sup>55</sup> His words find expression of their full meaning upon one’s discovering that the US domestic law says, in fact, a lot about this issue. The delegation doctrine poses significant constraints on executive power since it bestows all legislative authority on Congress.<sup>56</sup> “[T]he President cannot make laws, and Congress cannot make laws that permit the President to make laws.”<sup>57</sup> Thus, seen under the prism of the delegation doctrine, what happened to Sutherland’s plenary foreign affairs powers of the Chief Executive and, in particular, his alleged exclusive authority to legislate alone by entering into legally binding agreements with other nations?

What is more, Justice Sutherland’s theory on the succession of sovereignty is premised on the false assumption that it was the Union that became the immediate beneficiary of the power-vacuum created by the British Crown’s giving up of its sovereignty. Yet, this is not what precisely occurred. The rule passed from the British authorities to the colonies, which established among them interstate relations, akin to those the sovereign states of the time enjoyed.<sup>58</sup> In a subsequent stage, the colonial authorities sought to create a Confederation, but their initiative was doomed to failure as parochialism, which served as an avenue for securing sectional economic interests, was hardly put aside for the benefit of federalism.<sup>59</sup> Even if one accepts the idea of external sovereignty as a source of internal power, why is it that this power fell from the international sky to the head of the Union – the third entity to appear after the British departure - and not to those of the colonies or the Confeder-

---

<sup>55</sup> Tribe, *Constitutional Law*, *op. cit.*, note 23, at 212. Professor Glennon, highlighting the very essence of Professor Tribe’s argument, wrote: “[t]hat a nation exercises certain prerogatives under international law logically says nothing about whether under its domestic law the government of that nation is accorded the power to exercise such prerogatives.” Glennon, *op. cit.*, note 21, at 22.

<sup>56</sup> US Const. art. 1.

<sup>57</sup> Glennon, *op. cit.*, note 21, at 22. In more explanatory terms, Lawrence Tribe argues that “[c]ongress is permitted to delegate its foreign relations power, but it is not required to do so. Because acquired executive power may be exercised only so long as Congress does not object, Congress retains the power to limit executive action in areas which were previously wholly discretionary with the Executive, as long as Congress acts within its constitutional grants of enumerated authority.” Tribe, *Constitutional Law*, *op. cit.*, note 23, at 213.

<sup>58</sup> See Levitan, *op. cit.*, note 47, at 467.

<sup>59</sup> See, for instance, the storms aroused by the proposed “Mississippi sailing” treaty with the Spaniards in 1786, as a result of the conflicting economic interests among the federal states its provisions created. Slonim, *op. cit.*, note 44, at 443.

ation?<sup>60</sup> The distinction is of paramount importance for, if we adhere to the regularities of time sequence, we would rather easily recognize that external sovereignty was passed to the colonies. Accordingly, what Justice Sutherland attempts to describe is not presidential, but state powers.

Sutherland's suggestion was grinded down under the pressure of both history and logic and, as is always the case with inept premises, it was destined to come to the surface as an ancillary tool of manipulation rather than of persuasion, whenever the controversy over the gamut of presidential powers over treaty-making reached new partisan heights. To the contrary, Marshall's position seems to have withstood the time. The central tenets of his analysis were bought to the fore anew in 1952, in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>61</sup> where the advocates of predominant Presidential powers in US foreign relations were dealt a second blow. With Marshall's considerations in mind, Justice Robert Jackson declared that "presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."<sup>62</sup> Justice Jackson went on to categorize the possible scenarios of presidential actions and congressional practice:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said to personify the federal sovereignty.
2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.
3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his

---

<sup>60</sup> Glennon, *op. cit.*, note 21, at 23.

<sup>61</sup> The case was about an injunction filed against President Truman for his decision to seize steel mills and operate them under federal control, with the aim of averting a declared strike during the Korean War, without seeking congressional authorization. The Youngstown Court, overruling the complaint petitioned by the workers' union, held that "the indispensability of steel as a component of substantially all weapons ... led the President to believe that the proposed work stoppage would immediately jeopardize our national defense and that governmental seizure of the steel mills was necessary in order to assure the continued availability of steel." *The Steel Seizure Case*, 343 U.S. 579, at 583 (1952). However, the Supreme Court reversed, basing its opinion on constitutional grounds.

<sup>62</sup> *Ibid.*, at 635.

own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject.<sup>63</sup>

The major lesson to be drawn from Justice's Jackson's analysis is how one goes about examining the Constitution's allocation of presidential powers and evaluating the weight congressional will bears upon them. The Supreme Court, by deeming President Truman's action an unconstitutional usurpation of legislative authority, rescinded any suggestions that the Chief Executive enjoys an "inherent" and unconstrained leeway in acting domestically as he wishes, even in times of national crisis, and brought to the fore "the Congressional check and balance," as a constitutional barrier to the ill-conceived presidential discretion over treaty-making powers.<sup>64</sup>

Despite the explicit jurisprudential antithesis to the arguments, put forward by the advocates of unrestricted executive powers over treaty-making, submissions in support of such presidential authority have been persistently made. Notably, they are intended to serve as the groundwork for the legality of executive agreements and their reasoning is purportedly founded on constitutional and historical paradigms combined with consistent executive practice. It is to the dissection of these propositions that we now turn.

---

<sup>63</sup> *Ibid.*, at 635-638.

<sup>64</sup> An important element of the litigation, unexpectedly neglected by the scholarship, is that it was not an Act of Congress that bound President Truman's hands, but the *inaction* of Congress. Congressional silence, thus, became an "operative fact," understood as disallowing the President the authority in question. On the issue of congressional silence as "operative fact," see Lawrence Tribe, *Constitutional Choices*, Harvard University Press, Cambridge, Mass., 1985, at 29-44.

### 3. AUTHORIZATION GROUNDS OF CONGRESSIONAL-EXECUTIVE AGREEMENTS<sup>65</sup>

An invitation for reconsidering the authority of constitutional prescriptions is a serious one and it is usually made in solemnity: it is formulated after deliberations have taken place within constitutionally established *fora*, addressed to the public through the proper communication channels these *fora* possess, and accompanied with formal exegeses, whose spherical contour aspires to create a categorical argument, a strong candidate for stamina. With the image of an omnipotent US President in mind and a new type of international agreement to gain, the proponents of the legality of the congressional-executive agreements based their arguments on three pillars: the *interchangeability* theory, which posits that treaties and congressional-executive agreements are indistinguishable instruments of creating international obligations; the firm conviction that a *popular mandate*, which emerged upon the senatorial rejection of the Versailles Treaty, put in question both the democratic originality of the Treaty Clause and its propriety to meet the demands of an increasingly interconnected world; and, finally, the *pragmatic reassessment* and the final disposal of the Senate's "advice and consent" constitutional requirement, which conditions the treaty-making authority of the executive branch upon senatorial check.

#### 3.1 The Interchangeability Theory Reassessed

The essential premise the *interchangeability* argument whirls around is that congressional-executive agreements can be perfect substitutes for treaties.<sup>66</sup> The

---

<sup>65</sup> The reader should be advised that, in the analysis that follows, an effort has been made to distinguish the two types of agreement under examination, namely congressional-executive and sole-executive agreements. The distinction is important for the economy of this work. It is also necessary because the unwarranted use of both agreements as synonymous has itself compounded the conundrums raised by their legal substance. A few explanatory words are worth mentioning. Scholars, as McDougal and Lans for instance, by using the generic term "executive agreements" as including both types (see M. McDougal and A. Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," 54 *Yale Law Journal*, Part I, pp. 181-351; part II, pp. 534-615, 1945, at 194-195, 216-217, 226, and *passim*), attempt to transpose to congressional-executive the broader, albeit controversial, areas of operation of sole-executive agreements. Such enterprise is hazardous and misleading, for the authors, playing on different appellations, draw the treaty-making powers with hazy lines.

notion was introduced to legal scholarship in the 1940s,<sup>67</sup> when the “New Deal” constitutional revolution modernists began an all-out war against those conservative wings of the American legislature whose isolationist predispositions raised constitutional barriers to any international commitments and it soon monopolized the interest of constitutional lawyers’ analyses.<sup>68</sup>

The adherers of *interchangeability* asserted that congressional-executive agreements were simpler to conclude, for a mere bicameral majority of both Houses sufficed for that purpose. Conversely, the formal treaty-making route, requiring the consent of the two-thirds of the Senate, was but an archaic formality,<sup>69</sup> unable to come up to the new-fangled international rôle the United States was expected to play. Vital to the sustainability of their assertion was the construction of a rich historical pedigree of precedents, where international agreements had been entered into by interbranch collaboration outside the scope of the Treaty Clause, namely between both Houses of Congress and the President.<sup>70</sup> Such a pedigree would make the *interchangeability* argument look more like a logical inference from a well-established executive practice than an atmospheric event altering the architecture of the constitutional design.<sup>71</sup> Significantly, in their rush to reach their preordained results, the supporters of the interchangeable usage of treaties and congressional-

---

<sup>66</sup> B. Ackerman and D. Golove, “Is NAFTA Constitutional?,” 108 *Harvard Law Review*, pp. 799- 929, 1995, at 806; McDougal and Lans, *ibid.*, at 195-196. Professors Ackerman and Golove, albeit fervent vindicators of the presidential discretion to enter into international agreements with mere bicameral majorities, dismissed the efforts of their predecessors to prove their equality to treaties, on the grounds that the precedents they put forward bore no resemblance to the congressional-executive agreements that had been concluded by the Presidents after World War II.

<sup>67</sup> The term was first used by McClure. See W. McClure, *International Executive Agreements: Democratic Procedure Under the Constitution of the United States*, Columbia University Press, New York, 1941, at 32.

<sup>68</sup> The leading New Deal writings include: Edward E. Corwin, *The Constitution and World Organization; The President: Office and Powers: History and Analysis of Practice and Opinion*, W. McClure, *ibid.*; M. McDougal and A. Lans, *op. cit.*, note 65; Q. Wright, *op. cit.*, note 6.

<sup>69</sup> According to McDougal and Lans, the treaty-making power is nothing more than a “vermiform appendix” which in the course of time will be dispensed with as worthless. McDougal and Lans, *op. cit.*, note 65, at 535.

<sup>70</sup> Ackerman and Golove, *op. cit.*, note 66, at 807.

<sup>71</sup> It seems that exaggeration was not unknown to the advocates of congressional-executive agreements: “... hundreds of precedents confirmed by interpretations of Supreme Court Justices, Presidents, and Congressmen, and extending throughout the 150 years of our national history ... sustain the use of Congressional-Executive and Presidential agreements as alternatives to ‘treaties’ ... .” McDougal and Lans, *op. cit.*, note 65, at 212.

executive agreements did not pause to ask themselves: when consisted of out of place precedents, *stemmata quid faciunt?*

By definition, any claim for *interchangeability* shall above all come up to the conventional meaning ascribed to the term, which, in the matter under discussion, presupposes that two normative constructions of a dissimilar typology can be used interchangeably only if they produce the same result.<sup>72</sup> Surprisingly, from the impressively vast list of the “look-alikes” the New Dealers drafted,<sup>73</sup> this elementary condition was markedly ignored.<sup>74</sup> Indeed, as Edwin Borchard noticed, the structural discrepancies of the two instruments are responsible themselves for producing diverse results.<sup>75</sup> His remarks, based on the scheme “different typology-different outcomes,” shed light on the fallacies the *interchangeability* theory suffers from and some of them are examined presently in juxtaposition to the submitted, both historical and jurisprudential, precedential records.

With regard to the *scope* of the two types of agreements, *Missouri v. Holland*<sup>76</sup> established that a treaty may dispose of *any* issue, properly the subject of negotia-

---

<sup>72</sup> Concerns involving the exoteric [constitutional] ramifications this result engenders will be examined in a subsequent chapter of this writing. At present, our aim is to explore the esoteric or structural differences between the two types of agreements as witnessed in the proposed historical precedents.

<sup>73</sup> Professor McClure, for instance, dedicated 165 pages of this writing, piling dissimilar cases on top of one another, considering that such an extended list would leave his argument unchallenged. McClure, *op. cit.*, note 67, at 35-190.

<sup>74</sup> Borchard, *A Reply, op. cit.*, note 21, at 627-659.

<sup>75</sup> *Ibid.*

<sup>76</sup> See *Missouri v. Holland*, 252 U.S. 416 (1920). In 1913 Congress enacted legislation [First Migratory Bird Act] in an effort to control the killing of migratory birds. Two individuals were brought to justice for violating the Act's restrictive regulations. The defendants protested against the Statute on alleged constitutional deficiencies, as it was not within the enumerated powers of Congress to regulate such issues but within states' legislatures. Two lower federal Courts sustained their submissions [*United States v. Shauver*, 214 Fed. 154 (1914); *United States v. McCullagh*, 221 Fed. 288 (1915)] for, judges had trouble considering migratory birds' flight as 'commerce'. Both cases were brought on appeal to the Supreme Court. Three judges were absent and the Court stood divided 3 to 3. Justice White held the cases undecided until they were adjudicated upon by a full bench. In 1916 the federal government concluded a Treaty with Canada, “whereupon the legislation could be enacted again and rest for its constitutional justification upon the implementation of a treaty.” In 1918 a second Migratory Bird Act was passed whose constitutionality became again subject of judicial test. In this second round of the adjudication of the case, Chief Justice Holmes, in sustaining the Act, communicated his ideas by holding that “[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could. ...” [*Missouri v. Holland*, 252 U.S. 416, at 433]. For the case, see Henkin, *op. cit.*, note 21, at 76, 78, 144, 146-147; Ackerman and Golove, *op. cit.*, note 66, at 843-844, 856-857; Borchard, *A Reply, op. cit.*, note 21, at 630-634; Tribe, *Constitutional Law, op. cit.*, note 23, at 227-228.

tion with another nation. Accordingly, its spectrum cannot be constrained by Article I of the Constitution, which delimits the array of the legislative powers of Congress. Reversibly, the reach of the congressional legislative authority is confined to the enumerated powers the Upper and the Lower Houses legislating in unison possess, and it can, by no means, mount to the level of authorizing agreements whose subjects involve traditional treaty-making provinces such as naturalization, extradition, peace and friendship, neutrality statuses, guaranty of independence, and other issues.<sup>77</sup> It follows that the results obtained from the interchangeable usage of the two types of agreement are significantly different, on account of their dissimilar territory of operation.<sup>78</sup>

The proponents of *interchangeability* attempted to qualify *proclamation statutes* and *ex ante* congressional *authorizations* as treaties, to no avail. The first category involves the enforcement of ordinary congressional commercial legislation upon a presidential *finding* [*proclamation statute*] that the trading conditions prescribed therein have been satisfied. However, their limited character, which can be paralleled only to those of a mere fact-finding inquiry, and their scope, essentially restrained to serve as inputs for the readjustment of tariff-systems, do not lend themselves for their qualification as treaties.<sup>79</sup> The category of *ex ante authoriza-*

---

<sup>77</sup> "Congress can hardly "authorize" what it cannot ratify." Borchard, *A Reply*, *op. cit.*, note 21, at 632. Importantly, Borchard turned his argument also to the Chief Executive's duty not to succumb to the intriguing option proposed by McDougal and Lans (McDougal and Lans, *op. cit.*, note 65, at 187, 324) of submitting to Congress an agreement, properly the subject of treaty. *Ibid.*

<sup>78</sup> Borchard, *A Reply*, *op. cit.*, note 21, at 630. McDougal and Lans wrote: "What is completely certain is that the Powers of the Congress can be superadded to those of the President, and that the two sets of powers taken together are plenary." McDougal and Lans, *op. cit.*, note 65, at 246; Ackerman and Golove, *op. cit.*, note 66, at 920. Yet, geometrical depiction of the constitutional powers renders this assertion problematic. If we hypothesize that the two sets of power represent two spheres in the solid of foreign policy-making then the fact that both of them are limited by constitutional construction invites us to conclude that they do not coincide, but that there are many points of tangency and that a portion of each sphere is contained in the other. To advocate that both sets of power taken together are plenary presumes that there are no powers left, which by virtue of constitutional prescription is not true, for treaty-making power is neither lodged in Congress nor in the executive exclusively. Had these powers been plenary, the two spheres would be completely tangential. In the same solid, two spheres cannot at the same time intersect and be completely tangent. Accordingly, the limited powers of Congress married to those, equally constrained by Senatorial advice and consent, of the Executive can, in no way, add up to the plenary power of both Congress and the President to conclude agreements of the dignity of treaties, as McDougal and Lans contended for.

<sup>79</sup> Ackerman and Golove, *op. cit.*, note 66, at 821-824. The *McKinley Tariff* commercial statute of 1890, which provided certain guidelines according to which a foreign state's commercial policy would not

tions includes motions where Congress empowered the President to enter into agreements under *precise* conditions. A good example is the *Dingley Tariff Act* of 1897, where Congress afforded the President with the power to negotiate trade agreements with a view to obtaining “reciprocal and equivalent concessions” on *certain* commodities.<sup>80</sup> Their inferior legal standing, as compared to treaties, is manifest from their limited scope and the confined negotiating space in which they could range.<sup>81</sup>

The jurisprudential import of *Missouri v. Holland* drives us to the second distinction between treaties and congressional-executive agreements. Treaties possess superior *legislative power*. In his landmark opinion, Justice Holmes stated the argument of the state of Missouri and disposed of it, suggesting that a treaty is the unique law-making instrument the federal government possesses and it can do what an Act of Congress alone cannot: if a valid treaty has been concluded, Congress has the authority, under the Necessary and Proper Clause,<sup>82</sup> to pass implementing legislation otherwise offending the Tenth Amendment.<sup>83</sup> The Chief Justice, thus, established a taxonomy where statutes were classified second, after the treaties.<sup>84</sup>

---

be seen as discriminatory against American products, is a telling example of the proclamation statutes' limited character. Nonetheless, this kind of commercial statutes was afforded with a great precedential value.

<sup>80</sup> *Ibid.*, at 824-825.

<sup>81</sup> In the same category of *ex ante authorizations*, those who protest for the *interchangeability* between treaties and congressional-executive agreements, include the congressional mandate to the President to permit the Postmaster General's entry into agreements with foreign nations for the initiation of mail services. Indeed, in *Cotzhausen v. Nazro* U.S. 215 (1882) the Supreme Court held that the postal conventions have equal standing with treaties as the law of the land. However, when Solicitor General William Howard was faced with the question of designating these types of agreements, he candidly recognized them as constitutional anomalies because: “[The] ordinary rule of construction would make the grant of power [in the Treaty Clause] exclusive.” Quoted in Ackerman and Golove, *op. cit.*, note 66, at 826. It has been suggested that in *Cotzhausen* the Court was principally influenced by the convenience those kinds of agreements offer and not by the constitutional objections they generated. Borchard, *A Reply, op. cit.*, note 21, at 645.

<sup>82</sup> U.S. Const. art. I, §, 8, cl. 18. [The Congress shall have Power] “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing, Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”.

<sup>83</sup> *Missouri v. Holland*, 252 U.S. 416, at 432-433 (1920). The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

<sup>84</sup> Holmes' dictum, that federal treaty-making could overcome the “invisible radiation[s] from the general terms of the 10<sup>th</sup> amendment,” [*Missouri v. Holland*, 252 U.S. 416, 434 (1920)] gave rise to the inference that a vast area of matters, previously falling into the ambit of states' control, could henceforth be federally controlled by means of an underlying treaty. [Borchard mentions, *inter alia*,

Given *Missouri*, the proponents of *interchangeability* were now confronted with a stark challenge: how could congressional-executive agreements defeat the powers reserved to the states by the Tenth Amendment, and so, share in the prime position in Justice Holmes's hierarchy? Relying heavily on a set of extraneous precedents, allegedly established between 1933-1934,<sup>85</sup> and one state court decision,<sup>86</sup> they advanced the proposition that the proliferating use of congressional-executive agreements, both in number and subject-matter,<sup>87</sup> had rendered *Missouri* unimportant. Their justification, however, exclusively imbued with political rhetoric, stopped short of addressing the legal question *Missouri* begs. Self-fulfilling prophecies of the kind that the 1930s was a time of 'constitutional transformation' resulting from dire economic necessities<sup>88</sup> left much to be wished for. In particular, they

---

states' authority over regulating their natural resources and producing social legislation. Borchard, *A Reply, op. cit.*, note 21, at 633]. Such an overwhelming support to the federal government provoked orchestrated efforts aiming at overruling *Missouri v. Holland*. The Bricker Amendment would have provided that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty." "Congress, then, would have no power to enact pursuant to a treaty what it could not enact apart from treaty, thus effectively cutting the treaty power down to the size of congressional power." Henkin, *op. cit.*, note 21, at 147.

<sup>85</sup> These precedents include the Silver and Wheat Agreements of 1933 and the currency "stabilization agreements" under the Gold Reserve Act of 1934. McClure, *op. cit.*, note 67, at 161-171.

<sup>86</sup> In *Wickard v. Filburn* the Court construed Congress's commerce powers as unlimited ("mechanical application" of categorical distinctions between state activities and those that are "in their nature national" is "no longer feasible" (317 U.S. 111, at 124 (1942)). Twisting reality with imagination, the New Deal lawyers developed the false impression that since from that time the two types of agreements were of a broad thematic, they could be given an equal legal status. Although quite skeptical about the ability of a single court-ruling to alter ripe constitutional standards, we are forced to remark once again that the *Wickard v. Filburn* Court construed broadly commercial powers which do not constitute but part of the treaties' area of operation.

<sup>87</sup> Henkin, *op. cit.*, note 21, at 147; Ackerman and Golove, *op. cit.*, note 66, at 857. However, attentive examination of the submitted precedents drives home the interchangeability doctrine. Although the increasing number of congressional-executive agreements can be historically sustained, their horizontal expansive character is groundless. That the Reciprocal Trade Agreements Act of 1934 authorized the President to change tariff rates by the means of executive agreements of a triennial validity says nothing about their purported capacity to dispose of the various matters of formal treaty-making. What is more, voices against the grant of commercial authority to the President were, indeed, heard and they were on solid grounds in protesting against the power of President to reduce or increase rates by as much as fifty percent.

<sup>88</sup> Ackerman and Golove, *op. cit.*, note 66, at 845. President Roosevelt's message to Congress, requesting authorization to enter into executive commercial agreements with foreign nations, illustrates best the political, but not legal, concerns echoed in the White House and Congress. Consider the following passage of it:

"If the American Government is not in a position to make fair offers for fair opportunities, its trade will be superseded. If it is not in a position at a given moment rapidly to alter the terms on which it is willing to deal with other countries, it cannot adequately protect its trade against discriminations and against bargains injurious to its interests. Furthermore, a

failed to demonstrate both the emergence of an all-inclusive formula for congressional-executive agreements and that the latter were equal in legal standing to treaties. The only element seen as supporting their political, but not legal, arguments is a senatorial observation that “[t]rade agreements should not be subjected to the cumbersome treaty-making procedure,”<sup>89</sup> but this assertion does not provide any insight on how both qualifications can be convincingly contended for.<sup>90</sup>

That treaties enjoy a higher legal standing, as compared to other types of agreements, is easily deduced from the principles governing their *repealability*. Even though Congress can for *domestic* reasons repeal a treaty by statute,<sup>91</sup> it does not

---

promise to which prompt effect cannot be give is not an inducement which can pass current at par in commercial negotiations. For this reason any smaller degree of authority in the hands of the Executive would be ineffective. The executive branches of virtually all other important trading countries already possess some such power.”

See, Franklin D. Roosevelt, “Message from the President of the United States Transmitting a Request to Authorize the Executive to Enter into Executive Commercial Agreements with Foreign Nations,” *House of Representatives Document*, No. 273, 73<sup>rd</sup> Cong., 2<sup>nd</sup> Session, at 2, 1934. It is one thing to claim for additional powers in exercising constitutionally derived duties, justified by momentous exigencies. It is quite another to suggest that the grant of such leeway is tantamount to constitutional transformation. In our view, constitutional transformation – if such a notion exists in the legal atlas- without amendments requires a good portion of extra-judicial imagination and an incognizant audience to be argued for.

<sup>89</sup> See *Extending Reciprocal Trade Agreement Act: Hearings Before the Senate Finance Committee*, 75<sup>th</sup> Congress, 1<sup>st</sup> Session 75, 1937, at 3.

<sup>90</sup> Professors Ackerman and Golove characterized it as a Senate’s “act of self-denial,” opening the way for the interchangeability argument. However, in the stream of global economic change, a decision of the Senate to facilitate commercial treaty-making processes can hardly be seen as a conscious abolition of its role in treaty-making.

<sup>91</sup> The suggestion was repudiated by state officials ever since the constitutional beginnings of the US. John Jay, participating in a constitutional debate, said: “... treaties are made, not by only one of the contracting parties, but by both; and consequently ... as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them. ... . They are just as binding, and just as far beyond the lawful reach of legislative acts now, as they will be at any future period, or under any form of government.” See 64 *The Federalist* (Lodge, Cabot Henry ed., 1891), G.P. Putnam’s Sons, New York, 1891, at 405. The gradual departure from this initial understanding commenced with *Foster & Elam v. Neilson* [27 US 253 (1829)] and was completed by the mistaken decision in *Taylor v. Morton* [23 F. Cas. 784, C.C.D. Mass. (1855)], where a lower court had to decide on a recovery of money paid by the plaintiffs to the collector of customs for the importation of hemp from Russia. The tax rate, according to the Tariff Act of 1832, was 40 dollars per ton, but the applicants sought to establish that it was the commercial treaty of 1832 with that State, and, in particular, its most-favored-nation clause forbidding a more than 25 dollars per ton duty charge, that should have been applied to the transaction. The core question for the Court was the following: If an Act of Congress should levy a duty on imports, which an existing commercial treaty declares shall not be levied, such that the treaty is in conflict with the act, does the former or the latter give the rule of decision in a judicial tribunal of the United States, in a case to which one rule or the other must be applied? The Court, finding that the Supremacy Clause does not afford any kind of superiority to either Acts or Treaties, adopted the “last in time” rule and evaded the plaintiffs’ allegations of the inconsistency between the Act and the trea-

imply that the United States can derogate from its international obligations stemming from that treaty. "Its repeal merely means that one societal agent, the courts, are bound by the last expression of the legislative will; but the societal agent who represents the United States in foreign relations, the Executive, must give satisfaction to the foreign nation in the form of an indemnity or other amends."<sup>92</sup>

On the contrary, executive agreements, at the time when the New Deal "modernists" set out their endeavor to prove their equality to treaties, could be easily repealed, with the ensuing embarrassment for US officeholders who had concluded them being the sole pejorative effect.<sup>93</sup> The Law of Treaties had not yet pronounced executive agreements as legal instruments creating binding obligations. Hence, the nascent notion of state responsibility in regard to the breach of international 'obligations' deriving from such instruments had not yet been developed as a constraining element in either interstate contractual relations, or in the legal culture of the international order. Departures from commonly agreed *pacta* were criticized on merely moral grounds. Therefore, the unilateral denunciation of agreed terms envi-

---

ty. See, Pitman B. Potter, "Relative Authority of International and National Law in the United States," 19 *Am. J. Int. L.*, 1925, pp. 315-326, at 317-320. However, as Professor Hyde suggested, "[i]t must be clear that while an American court may deem itself obliged to sustain an act of Congress, however inconsistent with the terms of an existing treaty, its action in so doing serves to lessen in no degree the contractual obligation of the United States with respect to the other party or parties to the agreement." C. Hyde, *International Law Chiefly as Interpreted and Applied in the United States*, Little, Brown and co., Boston, 1945<sup>2</sup>, at 1465.

<sup>92</sup> Borchard, *A Reply*, *op. cit.*, note 21, at 638. McDougal and Lans suggested that Congress has "the power to abrogate treaties by joint resolution of both houses" and discard, thereby, the international obligations imposed on the US (McDougal and Lans, *op. cit.*, note 65, at 241). But compare the following statement of the United States Secretary of State with McDougal and Lans's allegations: "... if a government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals. It has been constantly maintained and also admitted by the Government of the United States that a government cannot appeal to its municipal regulations as an answer to demands for the fulfillment of international duties. Such regulations may either exceed or fall short of the requirements of international law and in either case that law furnished the test of the nation's liability and not its own municipal rules ... ." *Digest of International Law*, (Moore, John Bassett ed.), Government Printing Office, Washington D.C., 1906, at 235; quoted in Borchard, *A Reply*, *op. cit.*, note 21, at 638, note 85. The authors' assertion is categorically opposed to the universally accepted principle of *pacta sunt servanda* and blatantly disregards the relevant provisions of treaty-texts envisioning their durability. Likewise, not only can it induce international embarrassment for the Chief executive, who is the "sole negotiator" with foreign states, but can put into question the credibility of the US as an equal partner in the international community.

<sup>93</sup> Borchard, *ibid.*, at 639. The author, writing in 1945, rightly argued that there is no such thing as a "binding executive agreement." The word "binding" is a misnomer.

sioned in executive agreements was routinely pronounced, when they ceased to suit the interests of one of the two parties.<sup>94</sup>

Further evidence of the inferior status of congressional-executive agreements with regard to their repealability may be found in the fact that, even though such agreements entered into by one President were binding upon his successor, upon a notice of the latter, they could unilaterally be terminated.<sup>95</sup> Therefore, adherence to their terms was not prompted by a legal duty but by their suitability to the national interests. Such an option to cancel or to remain bound by legal obligations at will is not available in treaty law.<sup>96</sup>

Furthermore, pursuant to the Supremacy Clause, treaties are the *supreme law of the land*.<sup>97</sup> Privileging agreements, which are unknown to the Constitution, over treaties and advocating the omnipotence of the former in displacing the exalted legislative *situs* the latter type of agreement occupies, constitutes a serious “topological error” in the constitutional design. As it will be shown, American case law has been emphatically consistent in discerning the two types of agreements and debates, which have arisen, have tended to confirm the standard view.

---

<sup>94</sup> The *McKinley Tariff* of 1890 is a telling example. In denouncing its application between the US and Brazil, Secretary of State, Walter Gresham communicated to the Brazilian Minister that “[t]he Constitution of the United States, like the constitution of Brazil, points out the way in which treaties may be made and the faith of the nation duly pledged. In the United States, treaties are made by the President, by and with the advice and consent of the Senate; in Brazil they are made by the President, subject to the approval of the Congress. Of such provisions in each other’s constitutions governments are assumed to take notice ... In view of these well-known principles of law and matters of fact, it can not be supposed that it was intended, by the simple exchange of notes on January 31, 1891, to bind our Governments by a treaty. ... .” Reprinted in *Digest of International Law* (Hackworth, Green Haywood ed.), Government Printing Office, Washington D.C., 1945, at 429. Equally, Secretary of State, Huntington Wilson, in repealing the Dingley Tariff agreement with France, wrote: “I have the honor to remind you that these commercial agreements, not being treaties in the constitutional sense, ... in the absence of enabling legislation by Congress, have been terminated ipso facto.” Quoted in Ackerman and Golove, *op. cit.*, note 66, at 825.

<sup>95</sup> “Executive agreements ... entered into under one President continue to remain in force under his successors unless and until ... notice of a desire to terminate is given by one side or the other.” Department of State’s opinion, quoted in Borchard, *A Reply, op. cit.*, note 21, at 640.

<sup>96</sup> McDougal and Lans reached the opposite conclusion. They argued that a newly elected President can terminate a treaty at any time together with its internal status as the law of the land. (McDougal and Lans, *op. cit.*, note 65, at 338 and 346, note 173). Manifestly, the authors err. A President capable of terminating a treaty still in force or ending its supreme standing over inconsistent state law is a President who, in real and not chameleonic terms, nullifies the binding effect of that treaty. Such enterprise is legally unfounded for treaties can be terminated only as their terms provide.

<sup>97</sup> Article VI, clause 2 of the US Constitution.

*B. Altman & Co. v. United States*<sup>98</sup> involved the constitutionality of the Collector of Customs's interpretation of the regulations provided by an *ex ante authorization* under the *Dingley* Tariff system. The Supreme Court was faced with the question whether it was competent to adjudicate the appeal in the light of its rather restricted jurisdictional statute, which refers only to "treaties." The Court, in reading the jurisdictional term broadly, stated:

"While it may be true that this commercial agreement ... was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between the representatives of two sovereign nations [United States and France], and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries ... ."<sup>99</sup>

McDougal and Lans sought to read the Court's position as vindicating the *interchangeability* argument,<sup>100</sup> but the explicit refusal of the Court to extol the agreement as of the same "dignity"<sup>101</sup> as a treaty dismisses their claim at once.<sup>102</sup>

As to the postal "conventions" cases, their distinct historical mark in US case law has been utterly justified on the ground of the difficulty they generated with regard to their classification among the types of agreements mentioned in the constitutional text.<sup>103</sup> It has been suggested that these kinds of "administrative" agreements were nothing more than allocation of congressional powers to the Postmaster General and the President to regulate postal services through arrangements with other nations.<sup>104</sup> The agreements reached, as they had been concluded for merely administrative purposes, hardly provide any insight on the debate over the equality or not of congressional-executive agreements to treaties.

Tariff agreements had been always initiated upon a presidential finding that a US trade-partner has violated tariff standards set in Tariff Acts. The constitutionality of the congressional statutes authorizing the President to proclaim deviations

---

<sup>98</sup> *B. Altman & Co. v. United States*, 244 U.S. 583 (1912).

<sup>99</sup> *Ibid.*, at 601.

<sup>100</sup> McDougal and Lans, *op. cit.*, note 65, at 273-277.

<sup>101</sup> *B. Altman & Co. v. United States*, 244 U.S. 583, at 601 (1912).

<sup>102</sup> Borchart, *A Reply*, *op. cit.*, note 21, at 644; Ackerman and Golove, *op. cit.*, note 66, at 831.

<sup>103</sup> See *supra*, note 82.

<sup>104</sup> Borchart, *A Reply*, *op. cit.*, note 21, at 645.

from the tariff standards was challenged in *Field v. Clark*.<sup>105</sup> The appellants attempted to prove that the instructions Congress had included in the proclamation provisions of the *McKinley* Tariff Act of 1890 were vague and vested the President with more powers than those Congress possessed and could confer.<sup>106</sup> Strangely, the appellants used the word *treaty* to refer to the tariff agreements pursued under the *McKinley* formula.<sup>107</sup> The question posed to the Court, being solely formulated on delegation arguments, compelled the Justices to adjudicate the case as a judicial check on the constitutionality of the proclamation provisions and bypass the *treaty* issue as parasitic.<sup>108</sup> The Supreme Court upheld the constitutionality of the legislative delegation. Yet, Justice Harlan's exclamation that "[w]hat has been said is equally applicable to the objection that the [proclamation provision] invests the President with treaty making power" was seen by many as supporting the *interchangeability* theory.<sup>109</sup> Nevertheless, the upholding of the constitutionality of the proclamation provisions setting the criteria and allowing the President to make tariff arrangements does not amount to equating them to treaties.<sup>110</sup>

In light of the foregoing analysis, one can conclude that treaties and congressional-executive agreements can by no means be interchangeable instruments for they significantly differ. Even if we take into consideration that contemporary treaty law has equated the two instruments as to the binding effects they produce, essential structural differences between them have remained intact.

### 3.2 CONSTITUTIONAL ARCHITECTURE AND POPULAR MANDATES

The outbreak of World War II provided the New Deal 'modernists' with a unique platform on which to expose their *interchangeability* argument. For, in the welter of global insecurity, attuned voices of congressmen and influential publicists castigated the "two-thirds" rule, which led to the senatorial refusal of the Treaty of

---

<sup>105</sup> *Field v. Clark*, 143 U.S. 649 (1892).

<sup>106</sup> *Ibid.*, at 656-659.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*, at 693.

<sup>109</sup> Ackerman and Golove, *op. cit.*, note 66, at 830.

<sup>110</sup> *Ibid.*

Versailles, on the ground that it prodded the rise of Hitler and the recommencement of bloodshed in the European space.<sup>111</sup> Regrettably, the Upper House's historical performance of its treaty-making powers was reappraised through contemporary rather than temporal lenses. Thus, legal inconsistencies, evidenced in the groundless precedentialism of the *interchangeability* theory, came to meet the paradoxes of ill-equipped historical analysis.<sup>112</sup>

With the obloquy over its rôle in American constitutional life reaching unprecedented heights,<sup>113</sup> the Senate was thrown onto the defensive. The years between 1941 and 1943 witnessed concerted efforts by the New Deal modernists to

---

<sup>111</sup> According to Borchard, the background of the rejection of the Treaty of Versailles and the US participation in the League of Nations after the end of the Great War has been artfully concealed. The peace-treaty, which, to many students of the subject, was but "a declaration of war," was not defeated because of the vagueness of Articles 10 and 16, which enabled foreign states to draw the US to the brink of war for the maintenance of the *status quo*. It was defeated by President Wilson's call on the Democratic Senators to reject Senator Lodge's reservations, which was intended to protect the US interests. See Borchard, *Shall, op. cit.*, note 21, at 637-638 [footnotes omitted]. Herbert Wright, denying Senator Lodge's sole responsibility for the rejection of the Treaty, wrote: "On November 19, 1919, the Lodge resolution of ratification with reservations was rejected by a vote of 39 to 55 and, upon reconsideration, by a vote to 41 to 51; the Underwood resolution of unconditional ratification was rejected by a vote of 38 to 53. On March 19, 1920, the Lodge resolution of ratification with reservations received 49 yeas to 35 nays." With the final approval of the Lodge resolution coming dimly into sight President Wilson insisted on his denial "to leave to the Senate, this second time, full responsibility on the treaty. ... In effect these personal enemies united, for opposite objectives, to kill the treaty." See Herbert Wright, "The Two-Thirds Vote of the Senate in Treaty-Making," 53 *Yale Law Journal*, 1944, 644-650, at 646-647 [footnotes omitted].

<sup>112</sup> The first lesson I was taught as a graduate student of Diplomatic History, was that one shall not make *ex post* hypotheses about historical events. How Hitler's appetite for destruction would have been dispensed with had the Senate voted for the Versailles treaty, or what the geopolitical repercussions for the Eurasian space would have been had Alexander the Great made it back from the Indian subcontinent, are *meta-questions* wholly discarded by seasoned historians, even in a postmodern setting of historical analysis. Up-to-date theories suggest *empathy* as a secure theoretical device of examining historical events. See, Davis Jr, O.L., "In Pursuit of Historical Empathy," in Davis O.L., Yeager E.A. and Foster, S.J. (eds), *Historical Empathy and Perspective Taking in the Social Studies*, Oxford, Rowman & Littlefield, 2001.

<sup>113</sup> Assistant Secretary of State Berle, on the occasion of the pending approval of the famed *St. Lawrence Seaway* agreement with Canada, stated: "In an issue of this size and of this importance, it was hardly fair to place in the hands of the minority of one house the ultimate decision on a measure of very great importance to the entire country. For that reason the agreement form was selected [that of Congressional-Executive agreement], and it is in that form that it is here." Quoted in Ackerman and Golove, *op. cit.*, note 66, at 876. Such provocative statements, anathematizing the "recalcitrant one-third plus one" of the Senate were far beyond the limits of tolerance that the remarkable senatorial legacy could afford. It may be argued that, in a different historico-political context, such provocation would suffice for the Secretary's disavowal, or even, defenestration. But now, with the Senate put on probation, Berle's statement stirred only anemic comments and the opponents of the agreement rejected it because it was curiously grounded on the misleading citation to the annexations of Hawaii and Texas. Ackerman and Golove, *ibid.*, at 875.

reject 'obsolete' constitutional prescriptions, through a general call for "progressive constitutionalism."<sup>114</sup> Unsurprisingly, the abolition of the Treaty Clause's standards was to be the prime objective and the new field of experimentation was the United Nations Relief and Rehabilitation Administration [hereinafter, UNRRA] pending agreement.<sup>115</sup>

However, the conclusion of the UNRRA agreement was a *sui generis* amalgam of executive initiative, congressional 'approval', and senatorial acquiescence, which did not bear the remotest resemblance to a treaty. Ostensibly, "the draft agreement was not intended to impose binding obligations on the part of the United States but to set up the machinery for an international organization to administer relief and rehabilitation providing that contributions of funds should be made by each member government "within the limits of its available resources and subject to the requirements of its constitutional procedure."<sup>116</sup> The common understanding, reached during the negotiations<sup>117</sup> between the Department of State and a special subcommittee of the Senate, provided that the President sign the agreement and then a joint resolution, authorizing the Chief Executive to spend the moneys necessary for US participation in the UNRRA be submitted for approval by Congress.<sup>118</sup>

---

<sup>114</sup> Whether it was "progressive constitutionalism" or "aggressive un-constitutionalism" shall be decided in a subsequent chapter of this paper.

<sup>115</sup> As the tides of war ebbed and the defeat of Hitler became visible, European governments-in exile started considering the formulation of an international relief organization for the liberated areas. The idea was welcomed by the United States, Great Britain, the U.S.S.R., and China and their negotiations' product was finally expressed in a draft agreement for a UNRRA, submitted to the governments of the United Nations and the allied powers alike on June 10, 1943. Domestically, the conclusion of such agreement by the US bore significant weight. Firstly, it would convey to the international community the unequivocal commitment of the Roosevelt administration not to reiterate the isolationist errors of the past and "[brake] the heart of the world," by turning *de nouveau* the back to a collectively devised peace project. Secondly, the formula to be chosen for the conclusion of the agreement would inevitably shed light on the levels the entropy of the power-struggle between Congress and Senate had reached.

<sup>116</sup> Statement submitted by Francis B. Sayre of the Department of State to the House Committee on Foreign Affairs, *Congressional Record*, Vol. 90 (78<sup>th</sup> Cong., 2<sup>nd</sup> Sess.), at 1737 (1944), quoted in Herbert Briggs, "The UNRRA Agreement and Congress," 53 *American Journal of International Law*, 1944, pp. 651-658, at 652.

<sup>117</sup> The negotiations commenced after ranking Republican Senators insisted that any post-war agreement be submitted as a treaty. They were aware of Secretary of State Hull's designs to end the war not through a comprehensive treaty a la Versailles but through executive agreements. Ackerman and Golove, *op. cit.*, note 66, at 877-888.

<sup>118</sup> Senator Arthur Vandenberg, assured by the Assistant Secretary Dean Acheson that the United States would not incur any international obligations upon the conclusion of the agreement, went

The last act of this three-step process included the proposal and deliberation on appropriation bills, with the Appropriation Committees of the House and the Senate opening first the floor and then passing the issue to the House and the Senate.

In light of the three-step process agreed upon, however, the conclusion of the agreement by the United States would produce paradoxical results. To begin with, member governments' contributions, according to its terms,<sup>119</sup> were discretionary upon their own will and affordability. Yet, absent such contributions, the Agreement would be eventually nothing more than mere scratches on a paper. At the same time, a joint resolution by Congress, as it was not intended to appropriate money – it was not an appropriation bill – would not constitute an authorization of membership in the UNRRA.<sup>120</sup> Finally, by virtue of the presidential signature, the United States would become member of the UNRRA, without reservations.<sup>121</sup> The latter would be left to congressional discretion upon approval of the joint resolution, yet they would be of no legal effect under international law, since the agreement would have already been entered into force.<sup>122</sup>

---

along with the Administration suggesting that “the theory upon which the agreement now comes to Congress is that it has ceased to be an executive agreement alone, which in our opinion would have been a gross violation of the proprieties as well as of the law. It has been submitted to Congress for congressional approval and not merely for congressional information.” 90 *Congressional Record*, *op. cit.*, note 116, at 1746. Thus, both the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations would play an active role in determining “the extent to which the United States should participate in the work of the United Nations Relief and Rehabilitation Administration.” *Ibid.*, at 1737.

<sup>119</sup> Article V of the first draft would have provided that “each member government pledges its full support to the Administration, within the limits of its available resources and subject to the requirements of its constitutional procedure, through contributions of funds, materials, equipment, supplies, and services” to carry out the objectives of the UNRRA. After deliberations took place between the State Department and the Senate’s subcommittee, the final text agreed upon by the US and the other 43 states stipulated that “[i]n so far as its appropriate constitutional bodies shall authorize, each member government will [*sic*] contribute to the support of the Administration in order to accomplish the purposes ... [of the UNRRA]. The amount and character of the contributions of each member government under this provision will be determined from time to time by its appropriate constitutional bodies.” Briggs, *op. cit.*, note 116, at 855.

<sup>120</sup> This reading was important for it allowed Senators Connally and Vandenberg to support the agreement. Its stripping of any references requiring that the United States provide funds for the UNRRA programs was critical to their concession that the agreement be submitted in a form different than a treaty and get away with the “advice and consent” requirement.

<sup>121</sup> Briggs, *op. cit.*, note 116, at 655.

<sup>122</sup> International law and the terms of the UNRRA agreement itself do not allow for the reading given by ranking Senators, namely that without congressional approval the agreement produced no binding effects on the US. Senator Taft was right in arguing that if the President “has power to make an executive agreement, then it is an agreement ... which is binding on the United States.” 90 *Congres-*

The UNRRA agreement was finally concluded on November 9, 1943 and, after a few days, a joint resolution was presented before Congress, accompanied with reservations, which have been eloquently characterized by Herbert Briggs as “projection[s] into the international sphere of legislative mistrust of an executive penchant for the expenditure of large sums of money and partially [ ] attempt[s] to control the policies of the international organization.”<sup>123</sup> That the Senators got wind that a novel type of agreement was being created is evident in Senator Taft’s observation: “The Senator [Sen. Vandenberg] suggests that it is a new kind of thing, an Executive-congressional agreement, which may be entered into with foreign nations. ... I never have seen such a field defined, and I think it will be difficult to define it. It is very difficult to define the field in which the President may operate by Executive agreement as opposed to what he may do only by treaty. But if we are now to have a third field in which he may operate by Executive agreement approved by Congress, the whole matter will be quite confused.”<sup>124</sup> In view of these remarks and the clarifications made by Senators Connally and Vandenberg, the UNRRA agreement can be hardly deemed as a self-conscious move on behalf of the Senate towards relinquishing its prerogative in treaty-making. Nonetheless, the *interchangeability* advocates’ belief that an embryonic form of congressional-executive agreement was coming into sight cannot be entirely disregarded.<sup>125</sup> For the political fermentations of the US in the 1940s, the exhortation by the Department of State that each side be left to put its own explanation to what was being created through the UNRRA agreement was a euphemistic one.

---

*sional Record, op. cit.*, note 116, at 1745. Moreover, Article IX of the Agreement stipulated that it “shall enter into force with respect to each signatory on the date when the Agreement is signed by that signatory, unless otherwise specified by such signatory.” In light of the explicit constitutional demand that treaties be made with the advice and consent of the Senate, it is indeed a mystery why the US did not “otherwise specify” the agreement’s entry into force. Notably, fourteen Governments decided to do so and conditioned their entry into agreement upon the reservation that it was subject to ratification or legislative approval. See “First Session of the Council of the United Nations Relief and Rehabilitation Administration: Selected Documents.” Department of State, 53 *Conference Series*, 1944, at 15-20.

<sup>123</sup> Briggs, *op. cit.*, note 116, at 657.

<sup>124</sup> 90 *Congressional Record, op. cit.*, note 116, at 1736.

<sup>125</sup> Ackerman and Golove, *op. cit.*, note 66, at 879.

The significant rôle the UNRRA agreement was to play for the cause of peace was hurriedly put out of mind, for it was the mode under which it was concluded that mattered, as the nation was preparing for elections. Both Republicans and Democrats, sensing the internationalist leaning of the public, became vindicators of a less stringent interpretation of the Treaty Clause,<sup>126</sup> at the expense of the constitutional architecture's integrity. The election returns gave a decisive victory to the Democratic Party, led by Franklin D. Roosevelt, and to the *interchangeability* advocates another unsound argument. Extraneously linking foreign policy objectives and expressed popular beliefs to a false need for constitutional amendment they have found that "rather than reinforcing the constitutional status quo, the elections gave the President and Congress a fresh mandate to go further with their preliminary challenge to the Senate's prerogative. Given the overwhelming shift toward internationalism expressed by both leading candidates and the popular support given to the more internationalist slate, wouldn't the American citizenry support a much bolder challenge to the Senate monopoly?"<sup>127</sup>

The submission is flawed, as it unwarrantedly implies that the electoral body, in voting for the Democratic Party, licensed an impending denunciation of the Treaty Clause by Congress.<sup>128</sup> Yet, what was incontestably conveyed through the elections' results was an ardent call toward the condemnation of war, and the American People, in these harsh times, decided to place their confidence on the party which, in their opinion, would most effectively serve the peace cause.<sup>129</sup> Besides, the oft-quoted line of the Democratic internationalist agenda was that the Administration would "make all necessary and effective agreements and arrangements" for the establishment and preservation of peace.<sup>130</sup> Therefore, since no proposals for the abolition of the Treaty Clause were officially made, the inference that the people by casting their vote to "the more internationalist slate," would support a stripping of

---

<sup>126</sup> See Kirk Porter and Donald Johnson (eds.), *National Party Platforms 1840-1960*, University of Illinois Press, Urbana, 1961, at 403, 408.

<sup>127</sup> Ackerman and Golove, *op. cit.*, note 66, at 885.

<sup>128</sup> Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1284.

<sup>129</sup> See Frederick Schauer, "Deliberating About Deliberation," 90 *Michigan Law Review*, 1992, 1187-1202, at 1196.

<sup>130</sup> K. Porter and D. Johnson, *op. cit.*, note 126, at 403.

the treaty-making prerogative from the Senate is a visionary assumption and not a legal argument.

Clearly, the argument was engineered with the object of degrading the Senate's grasp of foreign policy demands and sanctifying that of the people.<sup>131</sup> It has been put in place as an antipode to an alleged major democratic deficit, which privileges policies drawn by political elites and disrespects popular *desiderata*.<sup>132</sup> Nonetheless, if we were to find a merit in this argument and deem adherence to popular wills as the optimal expression of democratic governance, then we would inexorably conclude that the constitutional text is 'democratically' deficient in its entirety. For, "the Framers did not too much favor control by the general mass of the people, only some of whom were voters in the separate states."<sup>133</sup> The Constitution permits the electoral body of each state to put its confidence upon and choose by ballot two individuals as its representatives in the Upper House<sup>134</sup> and this process is at the very essence of representational democracy. The threefold scheme *Polity, Political Representatives, and Governance*<sup>135</sup> was given a certain flow, a determined sequence. Accordingly, a motion bypassing the *Political Representatives* and establishing a linear relationship between *Polity* and *Governance* is constitutionally unfounded, if it does not result from a constitutional amendment.<sup>136</sup> In any case, such a *technology*,<sup>137</sup> even if projected in an amendment draft, does not go unchallenged, since it must have subsequent ratification by the "Legislatures of three fourths of the sever-

---

<sup>131</sup> "The people have made up their minds as to the general kind of foreign policy they want. In elections and by-elections extending over a period of five years, in Congressional resolutions, and in the platforms and speeches of party candidates, a line of policy has been laid down as precisely as the processes of voting and popular expression permit. Firmly, deliberately, and in large majority, the people have said that they want a foreign policy which continues our war-time alliances and which seeks to create upon that foundation both a new general security organization and all the supporting institutions." McDougal and Lans, *op. cit.*, note 65, at 547-548.

<sup>132</sup> Ackerman and Golove, *op. cit.*, note 66, 870-871.

<sup>133</sup> Borchard, *A Reply, op. cit.*, note 21, at 663.

<sup>134</sup> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; ... ." Article [Amendment] XVII of the Constitution of the United States.

<sup>135</sup> Articles I, II, and III of the US Constitution.

<sup>136</sup> Article V of the US Constitution.

<sup>137</sup> We use the term in its Aristotelian definition that reckons *technology* as the application of organized knowledge to practical tasks by ordered systems of peoples.

al States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress[.]”<sup>138</sup>

Moreover, our acceptance that public consensus is capable of nullifying central premises of the constitutional architecture is tantamount to our lamentable reckoning that the constitutive text of the United States has failed its prime objective: to create a governmental scheme concrete enough to withstand the quivering of public assertions “that are not channeled through the mechanisms of legitimate change carefully created by the Constitution itself.”<sup>139</sup>

Continuing the erroneous calculations regarding the public opinion’s rôle in constitutional debates, the House Judiciary Committee [of Congress] proposed in 1944 an amendment providing that “[h]ereafter treaties shall be made by the President by and with the advice and consent of both Houses of Congress.”<sup>140</sup> The report accompanying the Resolution’s draft, being itself an anthology of anti-senatorial rhetoric,<sup>141</sup> failed to show how the proposed legislation would come up with the Framers’ most important concern, namely, how to provide safeguards against unfettered exercise of treaty-making powers on behalf of the Executive. Indeed, “majority vote in the two houses, when they are of the same party as the President, is no check upon him at all.”<sup>142</sup> President Roosevelt, intending to be generous, shelved

---

<sup>138</sup> See Article V of the US Constitution.

<sup>139</sup> Tribe, *Taking Test Seriously*, *op. cit.*, note 4, at 1301.

<sup>140</sup> H.R.L. Res. 320, 78<sup>th</sup> Cong., 2<sup>nd</sup> Sess. (1944).

<sup>141</sup> Telling examples of congressional delusion over a proper reading of the treaty-making records are the lines of argumentation that follow: “The committee does not condemn the agreements as illegal. They were for the most part necessary for the welfare of the country and have subsequently been approved by Congress, but most of them should have been submitted as treaties. This, the committee believes, would have been done if they could have been considered as other legislation [i.e. by bicameral majorities]. This is an unhealthy tendency. It has far-reaching and disastrous possibilities. The maintenance of the two thirds rule instead of working to maintain a great power in the Senate is actually taking that power away from the Senate. Congress should act as a check upon the treaty-making powers of the President, but by maintaining a rule which prevents negotiations which the people desire, the Congress is on the road to eliminating itself from this important function of government.” See H.R. Rep. No 2061, 78<sup>th</sup> Cong., 2<sup>nd</sup> Sess., I (1944). The Report does not speak a word about the Executive’s part of responsibility, especially his failure to submit transparent policy proposals together with other nations that would leave speechless any detractors, and his constitutionally defective submission of international agreements to both Houses of Congress instead of the Senate only.

<sup>142</sup> Borchard, *A Reply*, *op. cit.*, note 21, at 661. The author quotes Representative Fellows’ words: “Treaty ratification must not become a political football to be kicked around by a majority whether that majority be Democrat or Republican. With the two-thirds rule for consent it becomes necessary

both the original and the revised draft of the proposed amending Resolution<sup>143</sup> and aligned himself with those who maintained that, a constitutional amendment, stripping the Senate from its treaty-making rôle, was unnecessary. Avoiding a frontal assault on the senatorial prerogative,<sup>144</sup> President Roosevelt artfully played on the arguments of popular expression and the alleged precedential records. Thus, he submitted the UN Charter as a treaty, but a host of others, such as the Bretton Woods and the Food and Agriculture Organization constitutive agreements, as congressional-executive agreements.<sup>145</sup> With the Damoclean Sword of a probable constitutional amendment swinging over the Senate's head, the Upper House was forced to acquiesce. Remarkably, while it had been viewed as an escape route on the part of the Senate, sensible voices characterized such acquiescence as a 'strategic compromise,'<sup>146</sup> aiming at adjourning the final disposition of the issue for the times to come. The divergence between the two clashing appraisals of the senatorial acquiescence brought again to the fore Janus-faced dilemmas. However, as it is sometimes the case with contradictory suggestions in law, a gap-converging, middle solution, which, in the issue under discussion would permit the conclusion of agreements other than treaties on important foreign policy matters, is not the optimal one, especially since it collides head-on with solid constitutional prescriptions.

---

not only that a majority party concur but that a substantial number of the minority also concur, and thus the treaty represents the desires of both major political parties." 91 "Cong. Rec.," May 1, 1945, at 4009; quoted in Borchard, *ibid.* A complete diagram of the perils lurking in the abolition of the two-thirds rule will be graphed in a subsequent chapter of this paper.

<sup>143</sup> The second draft provided that treaties be approved by majority votes of those present in both Houses. 91 "Cong. Rec.," at 4343 (1945).

<sup>144</sup> It should be noted here that Roosevelt had correctly detected the drawbacks Wilson's partisan policy engendered to the actualization of his international initiatives, and sought to cooperate with rather than alienate ranking Republicans from the negotiations over the post-war agreements. Thus, he appointed them to the US delegations. An open endorsement of the resolution's rationale would incite mistrust and republican 'partisan reflexes' and jeopardize these *ad hoc* "alliances." Ackerman and Golove, *op. cit.*, note 66, at 889-890.

<sup>145</sup> *Ibid.*, at 892.

<sup>146</sup> Professor Tribe rightly argues that "[t]he Senate's acquiescence in 1945 to the House's demand that it be permitted a role in approving major international agreements, and that bicameral approval by simple majorities be used instead of senatorial ratification with supermajorities, represented, on that occasion, not an agreement to *change* Constitution's text or meaning, but rather an apparent willingness to *circumvent* what national leaders still widely saw as its unambiguous command." Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1301 [footnotes omitted, emphasis supplied].

### 3.3 THE TREATY CLAUSE UNDER THE PRAGMATIC PRISM OF “PROGRESSIVE CONSTITUTIONALISM”

To the ‘revisionist’ mind of the *interchangeability* champions, any trend toward international openness and cooperation would, inescapably, dash on the rocks of senatorial prerogative.<sup>147</sup> Consequently, they endeavor to dismiss the “senatorial monopoly” over treaty-making by advancing that a) the Treaty Clause is a “mistake[ ] that ... must be chalked up against the Framers,”<sup>148</sup> who thought of a small sized, select upper chamber, as an indispensable tool of the presidential office in treaty negotiations;<sup>149</sup> b) that the legislative history of the treaty making clause with its supermajority requirements does not provide any categorical conclusions as to the substantial motives behind its formulation, so it should not be given a sacred quality<sup>150</sup> and, c) that a constitutional change bereaving the Senate of its last word on treaty-making can be effected by means outside those provided in the constitutional construction.<sup>151</sup>

As far as the first two suggestions are concerned, examination of the historical records shows that their advocates vacillate considerably. As to the last one, one need not be a student of law to defeat it.

If the Treaty Clause were a drawback of the constitutional architecture, it should be viewed as such from the early national beginnings of the United States and not after more than two centuries of undisturbed constitutional life. Those who cast doubts on the merit of the senatorial performance in treaty making put forward that treaty ratification has entered into the dynamics of the short-sighted partisan rivalries between Republicans and Democrats and has become a “vote of confidence” test for the sitting administration.<sup>152</sup> As an attestation of their admissions,

---

<sup>147</sup> It is remarkable that the assumption emerging throughout their writings is that Senators would sacrifice national interests in order to preserve their institutional prerogative.

<sup>148</sup> Corwin, *op. cit.*, note 68, at 234-235.

<sup>149</sup> *Ibid.*, at 32-33; McDougal and Lans, *op. cit.*, note 65, at 539-540.

<sup>150</sup> Q. Wright, *op. cit.*, note 6, at 341; McDougal and Lans, *op. cit.*, note 65, at 543.

<sup>151</sup> “[S]uch is the ‘infinite variety’ of the Constitution that less formal means have been discovered for mitigating ‘the mistake’ – [whose] full potentialities had not yet been fully realized.” Corwin, *op.cit.*, note 68, at 37-38; McDougal and Lans, *op. cit.*, note 65, at 290.

<sup>152</sup> The argument can hardly be sustained. That senators may turn treaty ratification processes into a convenient oppositional means says nothing about the legal standing of the Treaty Clause. Public

they project the deliberate body's procrastination over treaty ratification aiming at discrediting presidential initiatives.<sup>153</sup> Herbert Wright, writing on the issue in 1944, maintained that "that delay is not of the essence of Senate action on treaties is evidenced by the record of the Senate on a sample dozen important multilateral treaties, which have come before it within the past 35 years."<sup>154</sup> The author based his argument on a table of ratified treaties, which demonstrates that the time required by the Senate to ratify these multilateral treaties ranged from 2 days to 3 months and 9 days.<sup>155</sup> In light of the treaties under examination, Wright concludes that speedy action and not delay on the part of the Senate has been the rule, especially in those treaties where Senators have energetically participated in the negotiating processes.<sup>156</sup>

The second quarter from which the enemies of the Senate venture their assault is that the two-third rule is "undemocratic."<sup>157</sup> The argument posits that a "small fraction of the American people," a "recalcitrant one-third plus one man," shall not be permitted to obstruct policies to which an elected President and majorities in both Houses consent.<sup>158</sup> Yet, democratic experience has shown that extraordinary matters, on account of their very fundamental nature, may be decided upon

---

servants may either venerate their oath or not. In either case the blame or the merit is placed upon the individuals and it can embroil neither the Senate, as a legislative institution, nor the constitutional rules governing its function.

<sup>153</sup> For instance, Senator Claude Pepper, referring to the allegedly defective handling of the Treaty of Versailles by the Senate, submitted that the Senate "held the Treaty of Versailles over eight months, while twenty-six other nations waited for peace and our own Army of Occupation waited for orders to come home." See Claude Pepper, "Peace despite the Filibusters," *New York Times Magazine*, Dec. 12, 1943, at 40; quoted in H. Wright, *op. cit.*, note 111, at 644. However, Senator Pepper flagrantly ignores the fact that President Wilson had kept the draft of the Versailles Treaty in his office denying all requests from friends and foes alike for briefing on the basic peace-project the treaty purported to establish. *Ibid.*, at 647.

<sup>154</sup> *Ibid.*, at 648.

<sup>155</sup> *Ibid.*; quoting the U.S. Dept. of State, "List of Treaties Submitted to the Senate, 1789-1934," Washington, 1925.

<sup>156</sup> *Ibid.*

<sup>157</sup> "In democracy issues must be decided vote for vote. There can never be democratic rule where one vote of 'no' counts for two of 'yes.' That is rule of the minority over the majority, and by no stretch of reasoning can the meaning of democracy be made to embrace such a rule." Senator Pepper, "Peace despite the Filibusters;" quoted in H. Wright, *op. cit.*, note 111, at 644.

<sup>158</sup> Corwin, *op. cit.*, note 68, at 574-582; Ackerman and Golove, *op. cit.*, note 66, at 870-871. The "small fraction of the American people," however, is the members of the Senate, and their deliberation and approval of international agreements pursued by the executive branch is not a discretionary enterprise, but a constitutionally derived devoir or task.

with reinforced majorities and the Framers were well acquainted with this practice.<sup>159</sup> Therefore, they armored Article V on constitutional amendment with a requisite bicameral supermajority [two-thirds], or the same supermajority of the legislatures of the states,<sup>160</sup> while they sought the concurring vote of the three-fourths of the legislatures or conventions of the States for the ratification of amendments.<sup>161</sup> Likewise, whereas ordinary legislation may be passed by a simple majority of both Houses, in the case of a presidential veto, only a supermajority of a two-thirds vote by both Houses can override it.<sup>162</sup> Similarly, in the case of the expulsion of a member of either House, a two-thirds vote is required,<sup>163</sup> while for conviction after impeachment only a two-thirds vote of the Senate suffices.<sup>164</sup>

The two-thirds rule of the Treaty Clause was devised for securing a superior consensus on the eminent commitments the United States was to undertake in the international arena.<sup>165</sup> Its qualitative standing cannot be overruled on quantitative grounds, for in the core of its philosophy lies a demand that state officials shoulder the burden of proof that their international undertakings meet the comprehensive aspirations of the collectivities personified in the Senate. Failure of the executive branch to convince the Senators and promote his political objectives with other nations should be pinned neither to the Senate nor to the constitutional architecture, but to the quality of interstate legal relationships those initiatives wish to establish.

Contrary to the argument that the formulating conditions of the treaty making clause are silent as to the deeper necessities that prompted its inclusion into the constitutional text, the records of the Constitutional Convention and those of the Ratifying Conventions that followed, make plain that the Treaty Clause was adopted after fundamental policy considerations plugged the debates of the state delegations.<sup>166</sup> More specifically, “[t]he extreme jealousy of the little states, and between

---

<sup>159</sup> Herbert Wright, *op. cit.*, note 111, at 644; Borchard, *A Reply, op. cit.*, note 21, at 663.

<sup>160</sup> Article V US Constitution.

<sup>161</sup> *Ibid.*

<sup>162</sup> Art. I, Sect. 7, cl. 2.

<sup>163</sup> Art. I, Sect. 5, cl. 2.

<sup>164</sup> Art. I, Sect. 3, cl. 6

<sup>165</sup> See Franck and Weisband, *op. cit.*, note 23, at 144.

<sup>166</sup> Slonim, *op. cit.*, note 44, at 436.

the commercial and non-importing states, produced the necessity of giving an equality of suffrage to the Senate. The same causes made it indispensable to give to the senators, as representatives of states, the power of making or rather ratifying, treaties ... . The small states would not consent to confederate without an equal voice in the formation of treaties. Without the equality, they apprehended that their interest would be neglected or sacrificed in negotiations. This difficulty could not be got over ... . [Because] of the inflexibility of the little states in this point ... became necessary to give them an absolute equality in making treaties.”<sup>167</sup>

To the constitutional historians, the confrontation over the adoption of the Treaty Clause is a historical narration of many protagonists with different wants: small states struggling for their economic fundamentals, large states seeking to retain their power, “nationalists” wishing for relative state autonomy, and “federalists” dreaming of hammering out a one state – one voice nation. With the opening of the Constitutional Convention on August 23, 1787, a clear intent on behalf of the smaller states that the Senate be afforded with exclusive treaty-making powers had already been recorded.<sup>168</sup> Thus, the Committee of Detail was asked to deliberate on the relevant provision, which reads as follows: “The Senate of the U.S. shall have power to make treaties, and to appoint ambassadors. ...”<sup>169</sup>

The various positions that led to the illustrious compromise between the four groups of interest and the final adoption of the two-thirds rule over treaty-making were reeled off when John Mason suggested that “[a]s treaties are to be the Laws of the Land & commercial Treaties may be so framed as to be partially injurious, there seems to be some necessity for the same Security upon this Subject as in the 6<sup>th</sup> Section of the 6<sup>th</sup> Article [contemplating a two-thirds majority for the adoption of navi-

---

<sup>167</sup> Remarks of William Davie, delegate to the North Carolina Ratifying Convention, in *The Records of the Federal Convention of 1787* [hereinafter *Records*], (Farrand, Max, ed), vols. I-IV, Yale University Press, New Haven, 1937, at 348. It should be noted at this point that neither the Virginia nor the New Jersey Plan that preceded the Constitutional Convention, had provided for any change in the congressionally-centered treaty-making procedures envisioned in Article IX of Confederation.

<sup>168</sup> The proposal was drafted as a corollary to the adoption of the principle of equal State representation in a select upper House in the “Connecticut Compromise.” 2 *Records, op. cit.*, note 167, at 143, 155, 169.

<sup>169</sup> 3 *Records, op. cit.*, note 167, at 392. The final version of the Article was reformulated to the effect that the presidential office undertakes a role in treaty-making. See *supra*, at 13 § 1.

gation laws in both Houses of Congress].”<sup>170</sup> Mason’s proposal was mirroring the principal fear of the Southern States that the North would, by simple majorities, adopt legislation confining the shipment of import or export goods to American ships only, benefiting the commercial and shipbuilding States of the North.<sup>171</sup> Such a motion would, inevitably, trouble the exporting capacity of the South and lead to the increase of the price of the imported goods.<sup>172</sup> Hence, to the southern eyes, an expansion of the two-third bicameral supermajority governing the navigation laws to treaties or to commercial treaties, at least, was vital for the safeguarding of their sectional interests.

Along with deciding on requisite majorities for treaties and navigation laws, the Convention had to wrestle with two other issues, namely, the importation of slaves and taxes on exports.<sup>173</sup> The hopes voiced by the representatives that the three items become a compromising package deal were realized. The South conceded to abolishing its claims over a two-third majority for navigation laws, winning, in exchange, a twelve-year continuation of the right to import slaves and an elimination of the imposition of export taxes proposal.<sup>174</sup> According to Solomon Slonim, “the treaty clause was affected directly by this overall compromise, and may well have been one of the elements of it.”<sup>175</sup> For, in light of the foregoing review and Mason’s account of the tradeoffs, both the Eastern fishery and the Southern states

---

<sup>170</sup> *Ibid.*, at 348. The comment was revealed by M. Farrand. See Slonim, *op. cit.*, note 44, at 440, quoting M. Farrand, *The Framing of the Constitution of the United States*, Yale University Press, New Haven, 1913, at 131.

<sup>171</sup> Slonim, *op. cit.*, note 44, at 442.

<sup>172</sup> *Ibid.*

<sup>173</sup> 2 *Records*, *op. cit.*, note 167, at 400 *et seq.*

<sup>174</sup> The description of this compromise is well illustrated in George Mason’s testimony at the Virginia Ratifying Convention: “With respect to commerce and navigation ... I will give you, to the best of my recollection, the history of that affair. This business was discussed at Philadelphia for four months ... and I assert, that eight states out of twelve, for more that three months, voted for requiring two-thirds of the members present in each house to pass commercial and navigation laws. True it is, that afterwards it was carried by a majority, as it stands. If I am right, there was a great majority, for requiring two-thirds of the states in this business, till a compromise took place between the northern and southern states; the northern states agreeing to the temporary importation of slaves, and the southern states conceding, in return, that navigation and commercial laws should be on the footing on which they now stand. ... the Newfoundland fisheries will require that kind of security which we are now in want of: The eastern states therefore agreed at length, that treaties should require the consent or two-thirds of the members present in the senate.” 3 *Records*, *op. cit.*, note 167, at 334-335.

<sup>175</sup> Slonim, *op. cit.*, note 44, at 442.

aligned with each other upon realizing that their interests concurred and gained a two-third majority for the conclusion of treaties.<sup>176</sup> The ultimate form of the treaty clause was finally delivered to the plenum and voted for with surprising unanimity.

Consequently, one should conclude that the lodging of treaty-making powers in the Senate with a two-third requisite majority was not a ground-free constitutional choice, but a cautiously designed one with a view to securing equality among states.<sup>177</sup>

The third arrow of the “progressive constitutionalism” theory, namely the argument for an extra-constitutional solution to the alleged incompetence of the Senate to meet actual international demands, is primarily based on what has been generally characterized as “exceptional moments of American constitutionalism.” It has been recently presented anew by Professor Ackerman in his contribution to the book *Responding to Imperfection*, entitled “Higher Lawmaking,” and purports to establish that extraordinary events, which occurred in the course of American constitutional life, should be deemed as alternative modes of constitutional amendment.<sup>178</sup>

---

<sup>176</sup> Ibid.; See also R. Earl McClendon, “Origin of the Two-Thirds Rule in Senate Action upon Treaties,” 36 *The American Historical Review*, 1931, pp. 768-772. The author gives an instructive account of how the navigation of the Mississippi river and the protection of the Newfoundland fisheries prompted the inclusion of the treaty-clause into the constitutional text.

<sup>177</sup> McDougal and Lans argued that even if narrow-minded antagonisms between the northern and southern states were determinative at the Founding and, eventually, prompted the Senatorial check on treaty making, they have now ceased to monopolize US political life, since global interconnectedness has placed parochialism on the back burner [McDougal and Lans, *op. cit.*, note 65, at 547-548. See also Ackerman and Golove, *op. cit.*, note 66, at 871]. Thus, a sharing between Congress and the President in treaty-making, emerging as a necessary concomitant of post-war international changes, would serve the nation better than the senatorially-based constitutional design. Their views were recently seconded by a work on the issue edited by the Harvard Law Review association. It posits that trends of globalization toward cultural and political homogenization have led to mutual transgressions between the international and municipal legal provinces and eroded the Framers’ categorical distinction between treaty-making and national law-making authority, to the extent that Congress, being the principal legislative body of the United States, should now shoulder, together with the President, the treaty-making authority [see The Harvard Law Review Association, “Restructuring the Modern Treaty Power” (hereinafter, *Harvard-Restructuring Treaty Power*), 114 *Harvard Law Review*, 2001, pp. 2478-2501, at 2485]. Nonetheless, both accounts are defective in that they attempt to interpret constitutional inscriptions with external machinery. Louis Henkin should now be advised that law is not politics, but *international* politics. Significantly, Professor Borchard suggests that “it is a well-known fact that many rules of law survive the disappearance of their originating reason.” Borchard, *Shall, op. cit.*, note 21, at 639.

<sup>178</sup> See B. Ackerman, “Higher Lawmaking,” in *Responding to Imperfection – The Theory and Practice of Constitutional Amendment*, (Levinson, Sanford ed.), Princeton University Press, 1995, pp. 63-87.

The first episode of such gravity was the adoption of the current Constitution at the Constitutional Convention of 1787, which, to Professor Ackerman, runs against the amendment provision of the Articles of Confederation.<sup>179</sup> This “unconventional” but legitimate manner of constitutional change, the argument goes, can serve as a valid paradigm, allowing for amendments outside Article V, if need be.<sup>180</sup>

A decision to uphold Professor Ackerman’s submission and challenge Article V’s exclusivity would beg the question of whether it is the law that the Constitution cannot be changed without subsequent approval by the legislatures of, or conventions in, three-fourths of the states. “The answer requires us to step outside of the system” and ask ourselves “[t]o what extent does the polity, the ultimate determiner of the Constitution, give the Constitution the power to limit its own change?”<sup>181</sup> One could reply: to the extent that adherence to the present constitutional text in its entirety has been witnessed for more than two centuries. With that respect, the Constitution supersedes, in comparative terms, the Articles of Confederation in that the latter were *entirely* rejected by “a bloodless revolution.” Inasmuch as a revolution of such *magnitude* has not manifested itself compels us to conclude that the architecture of the present Constitution, along with its amending provisions, is well-established in the legal consciousness of the American polity.<sup>182</sup>

It is more than evident that Professor Ackerman, to his merit, looks to history whenever he seeks additional justification for his arguments. Analogizing present with past is old news in the legal field with the judicial usage of the notion of *legal precedent* being a first-class proof. Yet, what has escaped Professor Ackerman’s consideration is that drawing analogies in the legal enterprise presupposes our commitment to a point-by-point comparison between the structural characteristics of the cases or circumstances to be analogized with. As such, it significantly differs

---

<sup>179</sup> *Ibid.*, at 68-69. Professor Ackerman claims that Article VII [on ratification] of the 1787 Constitution, which stipulates that “the Conventions of nine States shall be sufficient for the Establishment of this Constitution” disregards explicit requirements of the Articles of Confederation, and in particular, Article XIII demand that any change of the Articles be approved by the legislative bodies of all 13 states.

<sup>180</sup> It should be reiterated here that Article V of the US Constitution provides the exclusive way for its amendment.

<sup>181</sup> See Rogers and Molzon, *op. cit.*, note 2, at 1006 [footnotes omitted].

<sup>182</sup> *Ibid.*

from the analogies drawn in *logic*, for instance, where mere resemblances imply probable further similarity. With this distinction in mind, one should not hesitate to discard Professor Ackerman's argument, for he tries to project to the twentieth century's constitutional order the extraordinary episodes of the constitution's framing and adoption, as legitimizing a "less fundamental constitutional change."<sup>183</sup> Professor Tribe is on solid grounds when he alarms us that "[i]f one *were* to defend the notion that the Constitution may be amended outside Article V, it would be far more defensible to argue that such process might in truly extraordinary circumstances be *legitimate* (based perhaps on "first principles" of natural law, or on international law principles of sovereignty) even if they are not *constitutional* (consistent with constitutional text and structure)."<sup>184</sup>

In a similar vein, Professor Ackerman has asserted that since the national body politic struggled for and, finally, curbed the southern states' obstinacy over the ratification of the Fourteenth Amendment<sup>185</sup> during the Reconstruction era, a popular process of "higher lawmaking," disregarding the will of states, has grown into law, allowing for amendment outside the procedures of Article V.<sup>186</sup> With regard to this argument, the author has expressed himself as follows:

[B]oth the substance of the Fourteenth Amendment and the process through which it was enacted are grounded on the very same point: that We the People of the United States were now a nation that could express itself politically on fundamental matters independently of the will of the individual states.<sup>187</sup>

That the People of the United States or people, in general, can express themselves politically is an accomplishment reflecting civil societies of higher political quality and a *conditio sine qua non* for democracy alike. That political representatives bank on their People's political will in order to leap out of the constitutive text of their society is a peril for democracy. Visibly, the two clashing premises combined cannot be regarded as creating a valid paradigm for lawmaking, for there is a

---

<sup>183</sup> Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1290.

<sup>184</sup> *Ibid.*, at 1291-1292 [footnotes omitted].

<sup>185</sup> See Article XIV of the US Constitution.

<sup>186</sup> Ackerman, *Higher Lawmaking*, *op. cit.*, note 178, at 72-80.

<sup>187</sup> *Ibid.*, at 78.

“constitutional” chasm in between, which shall not be bridged, as Professor Ackerman suggests, with extra-constitutional theoretical devices but with the amending procedures which are provided in the constitutional text. Such a gap-converging proposition that Professor Ackerman offers, would be a constitutional anomaly,<sup>188</sup> of the ilk of those political *leaders*<sup>189</sup> from time immemorial were intrigued to sanctify, usually under the pretext of acting for the sake of or, in the name of their People.

In continuance of his unwarranted suggestions, Professor Ackerman breaks away from the “boundary” episodes that, admittedly, left their distinct print on American constitutionalism, and tries other provinces where no nation-defining moments but Supreme Court’s shifts in constitutional understanding and changes in governance purportedly bear the same weight as constitutional amendments.<sup>190</sup> In particular, he asserts that the New Deal economic regulations, vesting the Federal Government with broader economic legislation powers, and the Supreme Court’s jurisprudence validating the new trend,<sup>191</sup> are *de facto* equivalents to constitutional amendments outside the Article V construction.<sup>192</sup> However, such changes in the economic regulations hardly fit in the framework of a conventionally understood constitutional amendment, for they at best represent practical adaptations of an existing legal provision, namely Article I of the Constitution, enumerating Congress’s

---

<sup>188</sup> Robert Lipkin wrote: “though the Fourteenth Amendment was ratified in an atypical manner, it would be foolish to canonize this event by making it an exemplar of future informal amendments. Nothing should follow from these extraordinary circumstances, certainly not a change in the procedure for Amending the Constitution.” Robert J. Lipkin, “Can American Constitutional Law Be Post-modern?” 42 *Buff. L. Rev.*, 1994, pp. 317-403, at 352, note 102;

<sup>189</sup> The term is used euphemistically; the term *demagogues* would be best-suited to describe political actors of this quality.

<sup>190</sup> Ackerman, *Higher Lawmaking*, *op. cit.*, note 178, at 82. Professor Tribe commented on this argument as follows: “But not all that glitters is constitutional gold: it is a category error of the first magnitude to treat every truly significant shift in our nation’s approach to governance as if it were or should have been an amendment to the Constitution.” Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1296.

<sup>191</sup> In *NLRB v. Jones & Laughlin*, 301 U.S. 1, 34-41 (1937), the Supreme Court returned to a broader vision of the Commerce Clause, and in *West Coast Hotel Co. v. Parrish*, 300 U.S., at 391-393 (1937), it waived the restrictions on the permissibility of government infringements on freedom of contract, established in *Lochner v. New York*, 198 U.S. 45, at 53 (1905). The decisions, according to Professor Ackerman, constitute “the functional equivalent of formal constitutional amendments.” Ackerman, *Higher Lawmaking*, *op. cit.*, note 178, at 82.

<sup>192</sup> *Ibid.*

commercial legislative powers.<sup>193</sup> Nor is there any urging to receive the Supreme Court's new jurisprudential input as something more than a "matter of legitimate if controversial interpretation."<sup>194</sup>

As a final point, the same Professor treats the proliferating use of congressional-executive agreements in 1945 as another epochal event of our constitutional understanding, akin to those of 1787, the 1860s, and 1937.<sup>195</sup> It will be recalled, the jockeying for power among the President, the House, and the Senate in the 1940s brought about a senatorial acquiescence, which "allowed" the President to conclude certain agreements by simple majorities of both Houses.<sup>196</sup> It should be borne in mind, though, that the House had acknowledged that the pending agreements of the time should be advanced according to either the treaty-making standards, or the standards set up by a constitutional amendment to the Treaty Clause.<sup>197</sup> For that reason, Congress had elaborated a draft for an amendment, which was finally left aside, as the Roosevelt Administration detoured from a visible confrontation with the Senate for reasons of political expediency. Once more, Professor Ackerman qualifies paradigms of disregard for the constitutional text as momentous indications of a constitutional change in the making.

---

<sup>193</sup> Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1295.

<sup>194</sup> *Ibid.*

<sup>195</sup> Ackerman and Golove, *op. cit.*, note 66, at 873, 909-913.

<sup>196</sup> See *supra*, at 38.

<sup>197</sup> Ackerman and Golove, *op. cit.*, note 66, at 889-891.

#### 4. SOLE-EXECUTIVE AGREEMENTS

“The primary objective of American foreign policy is to preserve [the] Constitutional system [of the United States],”<sup>198</sup> but, seen under the endemic persistence of US Presidents to commit their nation to important foreign policy objectives through both congressional and sole-executive agreements, the primary objective of US foreign policy seems to have been primarily ignored. For, it will be recalled, the Constitution provides but one way in which the United States can commit itself internationally, namely through treaty-making.<sup>199</sup>

“The executive agreement,” Franck and Weisband emphasized, “is an undeclared treaty which, like an undeclared war, seeks to avoid paying its Constitutional dues by changing its name.”<sup>200</sup> Circumventing constitutional norms is too much of a serious charge to be left unchallenged. Therefore, Chief Executives and legal advisers have sought to temper its rigors by advancing that the President is authorized to conclude any agreement, since the Constitution allegedly vests him with some unfettered plenary discretion.<sup>201</sup> In the case of sole-executive agreements, this discretion has been associated with his “appointing ambassadors” and “Commander-in-Chief” authority.<sup>202</sup>

The assertion can hardly be squared with the intent of the Framers, both with regard to their perception of *treaties*, as a distinct and exclusive means of creating *fundamental* international obligations for the United States, and the presidential profile their constitutional edifice sought to design.<sup>203</sup> In the analysis that follows,

---

<sup>198</sup> Franck and Weisband, *op. cit.*, note 23, at 146.

<sup>199</sup> U.S. Const. art. II, § 2, cl. 2.

<sup>200</sup> Franck and Weisband, *op. cit.*, note 23, at 141. However, “[s]hould the Constitution really be read to mean that by calling an agreement an executive agreement rather than a treaty, the obligation to secure Senate approval is dissolved?” Kurland, *The Impotence*, *op. cit.*, note 52, at 626.

<sup>201</sup> See *Restatement*, § 303, Comment *e*; Monroe Leigh in U.S. House of Representatives, Committee on International Relations, Subcommittee on International Security, *Hearings*, “Congressional Review of International Agreements,” 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess., June, July 1976, at 164-165; Letter from Monroe Leigh to the Senate Office of Legislative Counsel (Oct. 6, 1975) (State Department Legal Adviser’s Reply Concerning the Constitutionality of the Sinai Accords), *reprinted in* M. Glennon & T. Franck, *1 United States Foreign Relations Law*, 1980, pp. 304-305; See also McClure, *op. cit.*, note 67, at 330, 363, 371; Q. Wright, *op. cit.*, note 6, at 348; McDougal and Lans, *op. cit.*, note 65, at 246.

<sup>202</sup> See U.S. Const. art. II, § 2, cl. 2 and art. II, § 2, cl. 1, respectively.

<sup>203</sup> “The power in question [treaty-making] seems therefore to form a distinct department, and to belong, properly neither to the legislative nor to the executive. The qualities elsewhere detailed as

by using the habitual canvass of equivalent executive practice and Court decisions, we examine sole-executive agreements and the perilous radiations their incremental use reflects on the architecture of constitutional construction.

#### 4.1 A HISTORICAL OVERVIEW OF SOLE-EXECUTIVE AGREEMENTS

From the early days of federal history, Chief Executives were cognizant of the fact that serious commitments should be undertaken through treaties with senatorial advice and consent.<sup>204</sup> Likewise, it soon became evident that, as the sole *representative* and *negotiator* of the United States with other nations, the President would inexorably have to assume *minor* undertakings, through the conclusion of agreements made in his own name, so as to promptly promote national interests and interstate cooperation.<sup>205</sup> Thus, in 1799, President John Adams disposed of a private claim of an American individual against the Netherlands by an agreement which neither had been consented to by Congress nor was submitted to the Senate,<sup>206</sup> while, in 1813, President Madison made possible an exchange and repatriation of prisoners of war, by concluding a sole-executive agreement with Great Britain.<sup>207</sup> Those early initiatives involved ordinary presidential actions which were “impliedly” permitted to the Chief Executive in the exercise of his “Consular” and “Commandeering” powers.<sup>208</sup> Four years later, President Monroe considered himself to be constitutionally competent to act alone in national defense policies and entered into the *Rush-Bagot* Executive Agreement with Great Britain, which lowered the levels of

---

indispensable in the management of foreign negotiations, point out the Executive as the fairest 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.” See A. Hamilton, *The Federalist*, *op. cit.*, note 53, at 505.

<sup>204</sup> “The President of the United States will meet the Senate, in the Senate Chamber, at half past eleven o’clock, to-morrow, to advise with them on the terms of the treaty to be negotiated with the southern Indians.” This was the message sent by President Washington on August 21, 1789 to the Senate, reflecting his unyielding devotion to the spirit and letter of the constitutional norm. Quoted in Charles C. Tansil, “The Treaty-Making Powers of the Senate,” 18 *American Journal of International Law*, 1924, pp. 459- 482, at 464.

<sup>205</sup> Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1256.

<sup>206</sup> Franck and Weisband, *op. cit.*, note 23, at 144.

<sup>207</sup> *Ibid.*, at 145.

<sup>208</sup> U.S. Const. art. II, § 2, cl. 2

military presence on the Great Lakes.<sup>209</sup> However, he soon realized that the matter involved a substantial foreign policy undertaking and, as such, could not be settled in the absence of the Senate. Therefore, he transmitted the text of the agreement to the Upper House for *ex post* deliberation and approval.<sup>210</sup>

Slippage from the standards the constitutional text contemplates became visible in the twentieth century, when Presidents started taking substantive foreign policy initiatives *without* the “advice and consent” of the Senate. Franklin Roosevelt recognized the communist regime in Moscow and settled pending economic claims and counterclaims by signing the *Litvinov* Assignment of 1933.<sup>211</sup> In 1940, the President authorized Secretary of State Cordell Hull to negotiate and conclude a military agreement with Great Britain, effecting an exchange of fifty over-age US destroyers for ninety-nine year leases on British military bases in Bermuda, the Caribbean, and Newfoundland.<sup>212</sup> The post World War II Yalta and Potsdam major geopolitical dispositions, superseding substantially the constitutionally envisioned armistice agreements which the President alone may conclude, were approved by sole-executive agreements, with Roosevelt acting in his capacity as Commander-in-Chief of the US armed and naval forces.<sup>213</sup> On September 23, 1977, President Jimmy Carter initiated a policy of Parallel Unilateral Policy Declarations with the Soviet Union, seeking to renew the Strategic Arms Limitation Treaty (SALT I), which was to expire in October.<sup>214</sup> The motion was legally defective, since the law governing a new round of disarmament negotiations provided that any new agreement must be made “pursuant to the treaty-making power” or “by further affirmative legislation.”<sup>215</sup>

## 4.2 COURT DECISIONS

---

<sup>209</sup> Henkin, *op. cit.*, note 21, at 179.

<sup>210</sup> McClure, *op. cit.*, note 67, at 49; Ackerman and Golove, *op. cit.*, note 66, at 816; Franck and Weisband, *op. cit.*, note 23, at 144; Glennon, *op. cit.* note 21, at 183.

<sup>211</sup> Henkin, *op. cit.*, note 21, at 177-179; Borchard, *A Reply*, *op. cit.*, note 21, at 630-634.

<sup>212</sup> Franck and Weisband, *op. cit.*, note 23, at 145; Henkin, *op. cit.*, note 21, at 180; Ackerman and Golove, *op. cit.*, note 66, at 856.

<sup>213</sup> Senators have characterized the Yalta agreement as “shameful,” “infamous,” and an example of Presidential usurpation of power. Henkin, *op. cit.*, note 21, at 426, note 16.

<sup>214</sup> Franck and Weisband, *op. cit.*, note 23, at 144, 152; Glennon, *op. cit.* note 21, at 165-166.

<sup>215</sup> Franck and Weisband, *op. cit.*, note 23, at 152. See Arms Control and Disarmament Act, PL 87-297, 75 Stat. 631, approved September 26, 1961, Sec. 33, 22 U.S.C. 2573; cited in *ibid.*, at 326.

US Courts have declined to pronounce any executive agreement *ultra vires* on the ground that the Senatorial “advice and consent” requirement had not been met,<sup>216</sup> nor have they provided any guidance on the President’s authority to conclude executive agreements under his own powers.<sup>217</sup> In *Valentine v. United States ex rel. Neidecker*,<sup>218</sup> the Supreme Court denied the President the right to extradite one Neidecker to France, for the Extradition Treaty between the two countries did not establish an *obligation* to do so.<sup>219</sup> Importantly, in *Seery v. United States*,<sup>220</sup> the Court of Claims drew the distinction between sole-executive agreements and prior federal law, by rejecting the enforcement of a claims-settlement agreement which conflicted with an Act of Congress,<sup>221</sup> whereas, in *Dames & Moore v. Reagan*, the Supreme Court upheld the constitutionality of the Iranian Claims-Settlement Agreement because there had been congressional legislation authorizing it.<sup>222</sup>

Courts’ decisions have been unclear with regard to the issue of concurrent powers between Congress and the President. In *United States v. Guy Capps*,<sup>223</sup> Chief Judge Parker of the Court of Appeals for the Fourth Circuit declared invalid an executive agreement with Canada which regulated the importation of Canadian potatoes to the United States on the ground that the Agreement could not prevail over an inconsistent act of Congress.<sup>224</sup> Had Judge Parker limited himself to that conclusion the case would not have been worth of particular mention. Yet, in a subsequent

---

<sup>216</sup> Regrettably, the Eleventh Circuit in *Made in the U.S.A. Foundation v. United States* denied a clarification of the issue by holding that the question of whether an agreement is a treaty requiring senatorial supermajority is a non-justiciable political question. See *Made in the U.S.A. Foundation v. United States*, 242 F.3d 1300, at 1311-1319 (11<sup>th</sup> Cir. 2001).

<sup>217</sup> Henkin, *op. cit.*, note 21, at 179.

<sup>218</sup> *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936).

<sup>219</sup> Glennon, *op. cit.*, note 21, at 178. The treaty envisioned that neither party “shall be bound” to extradite its own nationals. Henkin, *op. cit.*, note 21, at 342, note 18.

<sup>220</sup> *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1995).

<sup>221</sup> “It would be incongruous if the Executive Department alone ... could nullify the Act of Congress.” *Ibid.*, at 607; quoted in Glennon, *op. cit.*, note 21, at 178.

<sup>222</sup> *Dames & Moore v. Reagan*, 453 U.S. 654, at 687 (1981). Professor Glennon argues that the Court “found no need to consider arguments concerning the scope of the President’s plenary powers.” (Glennon, *op. cit.*, note 21, at 179). I believe that Justice Rehnquist’s reference to the absolutism of George III of England and its admonition by the forefathers (*Ibid.*, at 662) offers an indication of what the scope of the President’s plenary powers shall not amount to. See *supra*, note 54.

<sup>223</sup> *United States v. Guy Capps*, 204 F. 2d 655 (4<sup>th</sup> Cir. 1953).

<sup>224</sup> *Ibid.*, at 659.

paragraph of his judgment, the Chief Justice adds that foreign commerce is the Congress's domain and the President shall not be involved with it.<sup>225</sup> A holding that the President has no power to make executive agreements on issues that Congress can legislate would discard as invalid executive agreements regulating foreign commerce. In fact, there would be hardly any such executive agreements at all because "the legislative power of Congress has few and far limits."<sup>226</sup>

In *Consumers Union v. Kissinger*<sup>227</sup> the Court of Appeals deliberated on a case which involved presidential negotiations intended to reduce Japanese steel exports to the United States. The essential element of the litigation was not the clash between congressional and presidential powers, as it has been falsely argued, but the legitimacy of commercial reducing acts taken by the executive in congressional 'legislative' silence.<sup>228</sup> The Court was seized of the question whether the acts under examination mounted to regulations of foreign commerce forbidden by virtue of existing legislation [*i.e.* Trade Acts].<sup>229</sup> Relying on the District Court's finding that such legislative bars were absent, the Court affirmed its decision.<sup>230</sup>

Sole-executive agreements pertaining to the Chief Executive's recognition powers were validated by Supreme Court decisions in *U.S. v. Belmont* and *U.S. v. Pink*.<sup>231</sup> Both involved the constitutionality of the *Litvinov* Assignment,<sup>232</sup> a sole-executive agreement that was made in association with US recognition of the Soviet

---

<sup>225</sup> "The answer is that while the President has certain inherent powers under the Constitution such as the power pertaining to his position as Commander in Chief of Army and Navy and the power necessary to see that the laws are faithfully executed, the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress. ..." *Ibid.*

<sup>226</sup> Henkin, *op. cit.*, note 21, at 181.

<sup>227</sup> *Consumers Union v. Kissinger*, 506 F. 2d 136 (D.C. Cir. 1975).

<sup>228</sup> Glennon, *op. cit.*, note 21, at 179.

<sup>229</sup> *Consumers Union v. Kissinger*, at 138.

<sup>230</sup> *Ibid.*

<sup>231</sup> 301 U.S. 324 (1937) and 315 U.S. 203 (1942), respectively.

<sup>232</sup> With the establishment of the bolshevist regime in 1918, the Soviet government enacted a decree dissolving, terminating, and liquidating the Petrograd Metal Work Corporation, along with other corporations of mainly foreign interests. Their properties and assets [deposit accounts included] were nationalized and appropriated. The motion, seen as injurious to the interests of American investors, generated friction between the two countries with the United States refusing recognition of the Soviet Union. On November 16, 1933 the two countries decided to overcome the impasse by signing the *Litvinov* Assignment, whereby the Soviet Union allotted to the US all the moneys owed to her, so as to compensate American citizens who had lost investments in Russia.

Union by the Roosevelt administration and disposed of outstanding claims and counterclaims from the Bolshevik era between the two countries.

In *U.S. v. Belmont*,<sup>233</sup> the Supreme Court had to pronounce itself on whether the *Litvinov* Assignments could override inconsistent state law or, in other words, whether the agreement enjoyed a status equal to that of treaties. Justice Sutherland argued that “[t]he recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction ...,”<sup>234</sup> and, since they all fell under the powers of the executive branch, they should prevail over state laws.<sup>235</sup> In *U.S. v. Pink*, the Court, citing the *Belmont* precedent, affirmed that “[a] Treaty is a ‘Law of the Land’ under the Supremacy Clause of the Constitution. Such international compacts and agreements as the *Litvinov* Assignment have a similar dignity.”<sup>236</sup>

Under *Belmont*, sole-executive agreements, like treaties, supersede the constituent states’ laws, but according to Borchard, the case was “dangerous and poorly decided because it seems to infer that the President, alone, without legislative support, can change the rights of private property in the United States.”<sup>237</sup> Louis Henkin

---

<sup>233</sup> The amounts assigned to the United States by the *Litvinov* formula included a deposit account of the Petrograd Corporation with one August Belmont, private banker in New York. The latter denied payment of the account to the assignee [US]. The case was brought to the State Court of New York which held that the situs of the bank deposit, being within the State of New York, could hardly be deemed as “intangible property right” within the Soviet territory. Thus, an act toward the confiscation of the bank deposit, as it is in furtherance of the nationalization decree enacted by the Soviet government, would infringe controlling public policy of the State of New York.

<sup>234</sup> *United States v. Belmont*, 301 U.S. 324, at 330 (1937).

<sup>235</sup> According to the Supremacy Clause, treaties supersede inconsistent state laws. The term is meant to include “all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states.” *Ibid.*, 321. The fact that the constitutional construction [Presidential Foreign Affairs Powers – Treaty-Making - Supremacy Clause] gives rise to a broad category of international agreements under the heading treaties made McDougal and Lans to erroneously suggest that a *treaty* and a *sole-executive agreement* are “entirely upon a par.” McDougal and Lans, *op. cit.*, note 65, at 261. However, their assertion seems to overlook the intermediary role of Senatorial advice and consent, as a controlling force in treaty-making.

<sup>236</sup> *U.S. v. Pink*, 315 U.S. 203, at 320 [Justice Douglas concurring].

<sup>237</sup> Borchard, *A Reply, op. cit.*, note 21, at 646. Borchard believes that the Court did not pay due attention to the Fifth Amendment\* and the New York state law prohibiting extraterritorial confiscation of its property.

\* The Fifth Amendment reads as follows: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor

describes more spherically the ensuing repercussions of putting treaties and sole-executive agreements on the same scale by stating that “the Belmont case may reflect doctrine of an earlier Supreme Court age when “the Government,” could do no or little wrong, particularly in foreign affairs.”<sup>238</sup>

### 4.3 CONGRESSIONAL OVERSIGHT OF EXECUTIVE AGREEMENTS<sup>239</sup>

The foregoing high-water mark paradigms of presidential insistence on “going it alone” and many others induced discomfort and skepticism on behalf of the Senate, as the body’s “advice and consent” rôle was patently ignored. Apart from instinctive reflexes to the executive circumvention of the Upper House, Senators excoriated presidential unilateralism as being a purposive policy, artfully engineered to denigrate well-calculated constitutional checks and balances between the legislative and the executive branch.<sup>240</sup> Apparently, Madison’s observation that “the power of treaties is regarded by the Constitution as materially different from mere executive power, and as having more affinity to the legislative than to the executive function”<sup>241</sup> had lost its semantic under the semiotics a more aggressive presidential rôle which it was sought to establish, both in domestic and world affairs.

Unsurprisingly, the House of Representatives did not always share the same concerns with the Senate, since congressional-executive agreements concluded by resolution or statute had bestowed on the Lower House an equal status with the Upper, a grant that House Representatives had been persistently protested for.<sup>242</sup> In

---

shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

<sup>238</sup> Henkin, *op. cit.*, note 21, at 186.

<sup>239</sup> The proposed legislation toward legislative control of executive agreements includes both congressional and sole-executive ones. Accordingly, we will not proceed to their habitual division in this section.

<sup>240</sup> The Foreign Relations Committee of the Senate has noticed that agreements of minor importance, such as disposing of the property status of uninhabited coral reefs or shrimp fishing rights in the Brazilian open sea, have been submitted for Senatorial approval as treaties, while military bases agreements have been entered into by executive action only. Franck and Weisband, *op. cit.*, note 23, at 145 [footnotes omitted].

<sup>241</sup> 6 J. Madison, *Writings*, (Hund, Gaillard ed), New York, D.P. Putnam, New York, 1910, ch. 2, note 12; quoted in Glennon, *op. cit.*, note 21, at 181.

<sup>242</sup> Franck and Weisband, *op. cit.*, note 23, at 149.

view of that, legislative moves designed to put under congressional scrutiny executive agreements were frequently voted down.<sup>243</sup>

Nevertheless, congressional cooperation on controlling international commitments undertaken by executive agreements was finally accomplished. Representatives and Congressmen united, as the debate over the conclusion of executive agreements turned from their frantic proliferating pace to the need for exerting direct control over their content.<sup>244</sup> Hence, Senator Case and Representative Zablocki proposed a bill in 1972 which requires the Secretary of State to “transmit to the Congress the text of any international agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than 60 days thereafter.”<sup>245</sup>

The Case-Zablocki Act was thought to establish an effective surveillance mechanism of executive foreign policy initiatives and an indirect psychological constraint on the presidential proclivity for executive agreements. However, the ambitious expectations of the Case-Zablocki law were terribly turned down in 1976, when the General Accounting Office discovered that thirty-four bilateral agreements with South Korea had been neither recorded, nor approved by the Department of

---

<sup>243</sup> See, for instance, the fate of the Morgan-Zablocki Bill, “which would have required transmittal to the Congress for its review of all executive agreements concerning the establishment, renewal, continuance, or revision of a “national commitment,” with the latter defined as including any agreement or promise (1) regarding the introduction, basing or deployment of US Armed Forces on foreign territory, or (2) regarding the provision to a foreign country, government or people any military training or equipment including component parts and technology, any nuclear technology, or any financial or material resources.” ... “The bill would have required that such agreements enter into force only after a 60-day waiting period from the date of transmittal and, even after 60 days, not take effect if, during that period, both Houses agreed to a concurrent resolution stating their disapproval of the agreement.” The Morgan-Zablocki Bill, H.R. 4438, 94<sup>th</sup> Cong., 1<sup>st</sup> sess., 1976. See *Digest of US Practice*, 1976, at 242 (internal quotation marks, omitted). Senator Clark, sensing the House’s effort toward the *de facto* recognition of executive agreements as acceptable means of undertaking “significant political, military or economic commitments,” submitted a proposal to block funding for carrying them out (S. Res. 486, 94<sup>th</sup> Cong., 2d Sess., July 1, 1976; cited in Franck and Weisband, *op. cit.*, note 23, at 324). As expected, the State Department and the House opposed the resolution.

<sup>244</sup> Franck and Weisband, *ibid.*, at 149. The authors pointedly remark that “[w]hen the President takes a short-cut, the nation can no longer be sure what obligations are being assumed, and foreign nations cannot be sure the obligations will be considered binding by Congress and the people.” *Ibid.*, at 142.

<sup>245</sup> PL 92-403; 86 Stat. 619, August 22, 1972; 1 U.S.C. 112 (Case-Zablocki Act).

State.<sup>246</sup> As those agreements had been concluded by the intelligence services of the two states, an amendment to the Case-Zablocki Act provided that all governmental agencies shall check with the State Department prior to their entering into any international agreement.<sup>247</sup>

Both the Act and its amending provisions fall short of dismissing the central argument, which runs against its supposed benefits, namely that they “give[ ] Congress no power to alter or reject executive commitments to foreign nations.”<sup>248</sup> Likewise, the Act left untouched the presidential “discretion” over proceeding with either a treaty or an executive agreement in pursuing foreign policy objectives. Apparently, the diverging interests of the two Houses of the American legislature count more than any call for return to constitutional normalcy.

---

<sup>246</sup> Franck and Weisband, *op. cit.*, note 23, at 150.

<sup>247</sup> 2 U.S.C. 112b.

<sup>248</sup> Franck and Weisband, *op. cit.*, note 23, at 150.

## 5. INTERPRETING THE CONSTITUTIONAL TEXT

What seems to be an irrefutable premise of comparative epistemology is that the evolution of human knowledge could not have occurred but for the formation and continuous build-up of the canons which regulate its various scientific fields. In the realm of legal intellectualism, flawless systems of law identify themselves by the existence of those norms [*rules*] which form part of their *structure* - a sequence of directives, powers and prohibitions - and those which generate a complex *architecture* in tandem [*meta-rules*]. Accordingly, a constitutional instrument, if seen only as a mere aggregate of prescriptions, loses much of its *gestalt*, for “those fundamental features that define how its components interlock and that identify the basic geometry of their interconnected composition”<sup>249</sup> are manifestly dismissed.

It is the weight of this truth and the perils springing from its oversight that made legal scholars concur that “[a]ny ‘interpretation’ of a constitutional term or provision must at least seriously address the *entire* text out of which a particular fragment has been selected for interpretation, and must at least take seriously the *architecture* of the institutions that the text defines.”<sup>250</sup> This is the supreme principle of constitutional interpretation and the dynamic at work in the analysis that follows.

### 5.1 THE EXCLUSIVITY OF THE TREATY CLAUSE.

The central thesis some constitutional lawyers relied upon in order to justify extra-textual modes of approving major international agreements is that the Treaty Clause of Article II lacks exclusivity language. In particular, they have asserted that Article II does not explicitly state that “He [the President] shall have Power, *only* by

---

<sup>249</sup> Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1236. The thesis that aggregate wholes are equivalent to more than the sum total of their constituents has been consistently argued for in the realm of intellectual inquiry. Karl Popper, arguing on the need for a holistic approach to historical analysis, wrote: “The social group is *more* than the mere sum total of its members, and it is also *more* than the mere sum total of the merely personal relationships existing at any moment between any of its members.” See Karl Popper, *The Poverty of Historicism*, Harper & Row Publishers, New York, 1965, at 17.

<sup>250</sup> Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1233 (emphasis supplied).

and with the advice and consent of the Senate, to make Treaties... .”<sup>251</sup> Accordingly, since the Founders did not wish to intelligibly restrict and condition upon *only* senatorial advice and consent presidential treaty-making powers, treaties could be ratified by both Houses.

The argument is historically baseless. The records of the Federal Convention verify that the full text of the Treaty Clause, which was submitted to the Committee of Style and Arrangement, contained a statement of exclusivity: “The President by and with the advice and consent of the Senate, shall have power to make treaties... . But no Treaty shall be made without the consent of two thirds of the Members present.”<sup>252</sup> In light of the first sentence’s affirmative grant, the Committee held the view that the second sentence’s prohibition would be made in redundancy.<sup>253</sup> Therefore, the elimination of the statement of exclusivity in the explicit form that it had been initially introduced<sup>254</sup> was not intended to signal a shift of the Founders’ views about the senatorial prerogative, but to avoid unnecessary repetition.<sup>255</sup>

In support of this reading of the “exclusivity’s” removal comes the categorical distinction between Treaties and general lawmaking powers, which the Framers took special care to draw. The elaboration of the Treaty Clause in Article II, independently of and right after Article I’s description of congressional legislative powers, reflects the belief that treaties were understood to be a “distinct department”

---

<sup>251</sup> Q. Wright, *op.cit.*, note 6, at 342; Ackerman and Golove, *op. cit.*, note 66, at 811; McDougal and Lans, *op. cit.*, note 65, at 237.

<sup>252</sup> 2 *Records*, *op. cit.*, note 167, at 574.

<sup>253</sup> If only its members could realize what interpretive distortions their “stylish arrangement” would induce!

<sup>254</sup> The subordinate sentence is important, because a “statement” of exclusivity does exist; it is derivable from constitutional construction.

<sup>255</sup> The rejection of Gouverneur Morris’ [Pennsylvania] amendment to avoid binding the United States by any treaty “not ratified by law” (2 *Records*, *op. cit.*, note 167, at 392) points to the same conclusion. His aim was to invite House involvement in the treaty-making and it was initially supported by Wilson and other ‘nationalists’ (Slonim, *op. cit.*, note 44, at 438-439). Such a motion, though, would have deprived Treaties of their self-executing quality. The “self-execution” issue has fed a controversy between those who claim that non self-execution is in conformity with the Framers’ intent (John Yoo, “Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding,” 99 *Columbia Law Review*, 1999, pp. 1955-2094) and those who insist that the clear intention of the Founders was that treaties be self-executing (see Martin S. Flaherty, “History Right?: Historical Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land,” 99 *Columbia Law Review*, 1999, pp. 2095-2153).

from the authority to make laws.<sup>256</sup> “The distinction between international and domestic affairs was thus a crucial conceptual premise of exclusivity.”<sup>257</sup>

Equally important was the conviction that the Senate, representing the more conservative slate of the American legislature, would be more parsimonious in giving its consent to treaties.<sup>258</sup> A restrictive use of treaties, it was thought, would better serve American interests, for the Framers deemed treaties as creating obligations which were binding domestically and impossible to abrogate at will.<sup>259</sup> The qualification of treaties as “supreme law of the land” [Article VI, Supremacy Clause], in fact meant that they were “beyond the lawful reach of legislative acts,” since the legal obligations they created could not be violated or terminated unilaterally.

Furthermore, if constitutional scholarship were to laud the “non-exclusivity” argument, then a hazardous legal enterprise of adding or eliminating “only”s at will would be, equally reasonably, allowed.<sup>260</sup> Hence, one could argue that, as the Treaty Clause does not say “*Only* he [the President] shall have Power ... to make Treaties,” Congress could sit on the negotiating table with other nations and conclude agreements, “provided, of course, that Congress found such negotiation to be a “necessary and proper” means of regulating foreign commerce[.]”<sup>261</sup> Such a reading would contradict the constitutional architecture, both with regard to the delegation doctrine, as it is promulgated in the first three articles of the instrument, and to the distinct quality treaties were intentionally afforded.

## 5.2 A TEST ON THE NON-EXCLUSIVITY ARGUMENT.

---

<sup>256</sup> See *Harvard - Restructuring Treaty Power*, *op. cit.*, note 177, at 2485.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.* Henkin wrote: “They [Constitutional Fathers] were not eager for the United States to conclude treaties lightly or widely, and were disposed to render it difficult to make them.” Henkin, *op. cit.*, note 21, at 129. Indeed, as James Wilson underlined: “With regard to the [Senate’s] power in making treaties, it is of importance, that it should be very seldom exercised.” “The Pennsylvania Convention Debates” (statement of James Wilson), in 2 *The Documentary History of the Ratification of the Constitution*, 1983, at 568; quoted in *Harvard-Restructuring Treaty Power*, *op. cit.*, note 177, at 2486.

<sup>259</sup> Henkin, *op. cit.*, note 21, at 175.

<sup>260</sup> Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1244.

<sup>261</sup> *Ibid.*

A sound norm of constitutional and statutory interpretation provides that *expressio unius est exclusio alterius*. Alexander Hamilton, arguing on the propriety of the applicability of interpretational canons, and, in particular, of the *expressio unius* maxim, declared that:

the rules of legal interpretation are rules of *common sense*, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them is its conformity to the source from which they are derived. ... Is it natural to suppose that a command to do one thing is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done?<sup>262</sup>

Hamilton added that usage of exclusivity canons by courts, in denying already existing powers or powers, which are described in provisions other than the one under interpretation, is at odds with common sense.<sup>263</sup> However, he emphasized that the application of maxims such as *expressio unius est exclusio alterius* is deemed proper, if not necessary, when interpreting provisions that form governmental entities and contour the powers the latter may exercise.<sup>264</sup> Article II, § 2, cl. 2 of the American Constitution, being precisely one of those provisions which, affirmatively, lodges treaty-making legislative authority in the executive branch – with the Senate undertaking a significant rôle therein<sup>265</sup> - belongs to the category of constitutional prescriptions where the expression of one thing is the exclusion of another.

Apparently, those who regard congressional-executive agreements as all-purpose substitutes for treaties have taken the maxim to mean *expressio unius est inclusio alterius*. Under their brand of “progressive constitutionalism” those constitutional scholars comprehend Articles I and II as “independent grants of power,

---

<sup>262</sup> A. Hamilton, 83 *The Federalist*, *op. cit.*, note 53, at 496 (emphasis supplied).

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*, at 496-497. As an example, Hamilton refers to the provisions enumerating [or limiting] the powers of Congress and the jurisdictional spectrum of the federal courts.

<sup>265</sup> Even though we do not mean to break this line of argumentation by submitting hypothetical assumptions, we estimate that, had the Treaty Clause been integrated into the article enumerating the legislative authority of the Senate, the rigors of the controversy over treaty-making would have been significantly diminished.

each of which suffices to justify the creation of international obligations.”<sup>266</sup> Accordingly, Congress is allegedly competent to approve *any* international agreement, which pertains to its lawmaking province, to the same extent as the Chief Executive can create legally binding obligations to the US by concluding treaties with other nations.<sup>267</sup>

The assertion leads to constitutional cacophony if meshed with Article I, section 7, clause 3 [the Veto Override Clause],<sup>268</sup> which authorizes Congress, by a supermajority vote, to render ineffective a presidential objection to *any* congressional action for which a vote of both houses is needed. If we concede to Article I’s reading as permitting Congress to approve all international commercial agreements, “then Article I on its face allows Congress to approve any such international agreement negotiated, say, by a prior President or introduced in Congress at the urging of a foreign nation, *even if the current President objects to that international agreement.*”<sup>269</sup> Plainly, such an offer is of those that the President of the United States, “the sole organ of the nation in its external relations, and its sole representative with foreign nations,” would reject at once.

---

<sup>266</sup> Ackerman and Golove, *op. cit.*, note 66, at 920; McDougal and Lans, *op. cit.*, note 65, at 186-188.

<sup>267</sup> Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1252.

<sup>268</sup> The article provides that “Every Order, Resolution, or Vote, to Which the Concurrence of the Senate and the House of Representatives may be necessary ... shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.”

<sup>269</sup> Tribe, *Taking Text Seriously*, *op. cit.*, note 4, at 1253 (emphasis supplied).

## 6. Epilogue

CREON: "To transgress or twist the law to one's own pleasure, presume to order where one should obey, is sinful, and I will have none of it".

(Sophocles, *The Theban Plays – Antigone*)

American constitutional lawyers and policymakers persistently argue that the Chief Executive's practice to conclude alone, or with bicameral support, executive agreements on important foreign-policy issues is constitutionally unquestionable. As a foundation for their assertion, they cite inconsistent executive practice, distort settled hermeneutical conventions of the US Constitution, and propagate a nebulous theory which posits that popular urgings suffice for the rearrangement of "anachronistic" laws. Yet these submissions contradict fundamental premises of American constitutional design and negate well-grounded interpretive canons. A move toward accepting them is tantamount to violating the constitutive instrument of the United States and turning its democratic rule into an oligarchic one.

American constitutionalism is in a state of crisis.<sup>270</sup> The controversy over the constitutionally amorphous executive agreements has heightened the polemics of an unsettled culture war that segregates the American intellectual society in general and its legal community in particular. At the epicenter of this conflict lies a rivalry between the philosophical trends of modernism and postmodernism. Being the hallmark of Western epistemology and metaphysics, modernism favors *reason, objectivity, and truth*. Postmodernism scoffs at modernist foundations and tenaciously emphasizes the *social* construction of reality, as it searches and sanctifies only those values which are presently *suitable* to American society.<sup>271</sup> Its reflections on the realm of statutory interpretation are summarized in the proposition that "legal doctrines, legal principles, and legal interpretations ... are social constructions" applicable "only to the context within which [they are] asserted."<sup>272</sup>

---

<sup>270</sup> Lipkin, *op. cit.*, note 188, at 321-322.

<sup>271</sup> *Ibid.*, at 321-322.

<sup>272</sup> See Peter C. Schank, "Understanding Postmodern Thought and Its Implications for Statutory Interpretation," 65 *S. Cal. L. Review*, 1992, 2505-2597, at 2510. Even though postmodernism is "anti-foundationalist" in character, it offers a new interpretive paradigm for constitutional transformation

Despite its anti-legalistic allegations and its apostolic mission to reject the constitutive conventions of modern societies, postmodernism is doomed to oblivion for “[w]e inhabit a *nomos* – a normative universe.”<sup>273</sup> Our decision to withdraw to isolation and abandon our normative conventions and interpretive commitments lacks in bravery from the decision to dedicate ourselves in an act of “jurisgenesis” and thus confront the “jurispathic” aspects of our canonistic systems.-

---

and adjudication from an “Olympian perspective.” That makes postmodernism inconsistent with its own premises and many scholars admit that the trend suffers from an identity crisis.

<sup>273</sup> See Robert M. Cover, “The Supreme Court – 1982 Term, Foreword: *Nomos* and Narrative,” 97 *Harvard Law Review*, 1983, 4-68, at 4.

## Bibliography

### I. PRIMARY SOURCES

#### 1. CASE LAW

*Foster & Elam v. Neilson*, 27 US 253 (1829)  
*Taylor v. Morton*, 23 F. Cas. 784 (C.C.D. Mass. 1855)  
*US v. Clarke*, 20 Wall. 92 (1874)  
*Cotzhausen v. Nazro*, U.S. 215 (1882)  
*Field v. Clark*, 143 U.S. 649 (1892)  
*Lochner v. New York*, 198 U.S. 45 (1905)  
*B. Altman & Co. v. United States*, 244 U.S. 583 (1912)  
*Missouri v. Holland*, 252 U.S. 416 (1920)  
*Valentive v. United States ex rel. Neidecker*, 299 U.S. 5 (1936)  
*United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)  
*NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937)  
*United States v. Belmont*, 301 U.S. 324 (1937)  
*U.S. v. Pink*, 315 U.S. 203 (1942)  
*Wickard v. Filburn*, 317 U.S. 111 (1942)  
*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)  
*United States v. Guy Capps*, 204 F. 2d 655 (4<sup>th</sup> Cir. 1953)  
*Wilson v. Girard*, 354 U.S. 524 (1957)  
*Consumers Union v. Kissinger*, 506 F. 2d 136 (D.C. Cir. 1975)  
*Dames & Moore v. Reagan*, 453 U.S. 654 (1981)  
*American Intern. Group v. Islamic Republic of Iran*, 657 F. 2d 430 (D.C Cir. 1981)  
*Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1995)  
*Made in the U.S.A. Foundation v. United States*, 242 F.3d 1300 (11<sup>th</sup> Cir. 2001)  
*United States v. Shauver*, 214 Fed. 154 (1914)  
*United States v. McCullagh*, 221 Fed. 288 (1915)  
*West Coast Hotel Co. v. Parrish*, 300 U.S., 379 (1937)

## 2. OFFICIAL DOCUMENTS AND CONGRESSIONAL HEARINGS

Arms Control and Disarmament Act, PL 87-297, 75 Stat. 631, approved September 26, 1961, Sec. 33, 22 U.S.C. 2573.

*Extending Reciprocal Trade Agreement Act: Hearings Before the Senate Finance Committee*, 75<sup>th</sup> Congress, 1<sup>st</sup> Session 75, 1937.

“First Session of the Council of the United Nations Relief and Rehabilitation Administration: Selected Documents.” Department of State, 53 *Conference Series*, 1944.

Jay Treaty, Nov. 19, 1794, United States-United Kingdom, 8 Stat. 116, T.S. No. 105.

Leigh Monroe in U.S. House of Representatives, Committee on International Relations, Subcommittee on International Security, *Hearings*, “Congressional Review of International Agreements,” 94<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 1976.

Leigh Monroe, “Memorandum of law on the subject of the authority of the President to enter into executive agreements pursuant to his independent constitutional powers”, reprinted in *Digest of United States Practice in International Law*, 1975.

70

---

\_\_\_\_\_, Letter to the Senate Office of Legislative Counsel (Oct. 6, 1975) (State Department Legal Adviser’s Reply Concerning the Constitutionality of the Sinai Accords), reprinted in M. Glennon & T. Franck (eds), *United States Foreign Relations Law: Documents and Sources*, Oceana Publications, New York, 1980.

Roosevelt D. Franklin, “Message from the President of the United States Transmitting a Request to Authorize the Executive to Enter into Executive Commercial Agreements with Foreign Nations,” *House of Representatives Document*, No. 273, 73<sup>rd</sup> Cong., 2<sup>nd</sup> Session, 1934.

Sayre B. Francis, Statement submitted to the House Committee on Foreign Affairs, *Congressional Record*, 78<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 1944.

Sutherland George, “The Internal and External Powers of the National Government”, Senate Doc. No. 417, 61<sup>st</sup> Congr., 2<sup>nd</sup> Sess., 1910.

“Treaties and Other International Agreements: The Role of the United States Senate” (Study prepared by the Congressional Research Service, Library of Congress), Committee Printing, 2001.

## II. SECONDARY SOURCES

### 1. BOOKS

Ackerman Bruce, *We the People: Foundations*, The Belknap Press of University of Harvard Press, Cambridge, Mass. 1993.

Allott Philip, *Eunomia – New Order for a new World*, Oxford University Press, New York, 1990.

Bodenheimer Edgar, *Jurisprudence: The Philosophy and Method of Law*, Harvard University Press, Cambridge, Mass., 1974.

Corwin S. Edward, *The Constitution and World Organization; The President: Office and Powers: History and Analysis of Practice and Opinion*, Princeton University Press, New Jersey, 1944.

Ely John Hart, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press, Cambridge, Mass., 1980.

Farrand Max, *The Framing of the Constitution of the United States*, Yale University Press, New Haven, 1913.

\_\_\_\_\_ (ed.), *Records of the Federal Convention of 1787*, vols. I-IV, Yale University Press, New Haven, 1937.

Franck Thomas and Weisband Edward, *Foreign Policy by Congress*, Oxford University Press, New York, 1979.

Fulbright J. William, *The Arrogance of Power*, Vintage Books, New York, 1966.

Glennon Michael, *Constitutional Diplomacy*, Princeton University Press, New Jersey, 1990.

Hart H.L.A., *The Concept of Law*, Oxford University Press, Oxford, 1961.

Henkin Louis, *Foreign Affairs and the Constitution*, The Foundation Press, New York, 1972.

\_\_\_\_\_, *International Law: Politics and Values*, Martinus Nijhoff Publishers, Boston, 1995.

Hyde Charles Cheney, *International Law Chiefly as Interpreted and Applied in the United States*, Little, Brown and co., Boston, 1945<sup>2</sup>.

McClure Wallace, *International Executive Agreements: Democratic Procedure Under the Constitution of the United States*, Columbia University Press, New York, 1941.

Tribe Lawrence, *Constitutional Choices*, Harvard University Press, Cambridge, Mass., 1985.

\_\_\_\_\_, *American Constitutional Law*, The Foundation Press, New York, 1988<sup>2</sup>.

## 2. CONTRIBUTIONS

Ackerman Bruce, "Higher Lawmaking," in *Responding to Imperfection, The Theory and Practice of Constitutional Amendment*, (Levinson, Sanford ed.), Princeton University Press, New Jersey, 1995.

*Digest of International Law*, (Moore, John Bassett ed.), Government Printing Office, Washington D.C., 1906.

*Digest of International Law* (Hackworth, Green Haywood ed.), Government Printing Office, Washington D.C., 1945.

*Digest of United States Practice in International Law*, (Rovine W. Arthur ed.), Department of State Publication, Washington D.C., 1974.

Hamilton Alexander, *The Federalist Papers / Alexander Hamilton, James Madison and John Jay*, (Cook, J. ed.), The New American Library, New York, 1961.

Jefferson Thomas, *Writings* (Ford, Paul Leicester ed.), G.P. Putnam's Sons, New York, 1895.

Madison James, *Writings*, (Hund, Gaillard ed), New York, D.P. Putnam, New York, 1910.

Porter H. Kirk and Johnson B. Donald (eds.), *National Party Platforms 1840-1960*, University of Illinois Press, Urbana, 1961.

*Restatement [Third] of the Foreign Relations Law of the United States*, American Law Institute Publishers, Washington D.C., 1986.

Wildhaber Luzius, "Executive Agreements," in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. II, 1995.

*Yearbook of the International Law Commission*, vol. II, part I, 1962.

*Yearbook of the International Law Commission*, vol. II, part I, 1965.

### 3. ARTICLES

Ackerman Bruce and Golove David, "Is NAFTA Constitutional?," 108 *Harvard Law Review*, pp. 799- 929, 1995.

Berger Raoul, "The Presidential Monopoly of Foreign Relations," 71 *Michigan Law Review*, pp. 1-58, 1972.

Borchard Edwin, "Shall the Executive Agreement Replace the Treaty?," 53 *American Journal of International Law*, pp. 637-643, 1944.

\_\_\_\_\_, "Treaty and Executive Agreement: A Reply," 54 *Yale Law Journal*, pp. 616-664, 1945.

Briggs Herbert, "The UNRRA Agreement and Congress," 53 *American Journal of International Law*, pp. 651-658, 1944.

Cover M. Robert, "The Supreme Court – 1982 Term, Foreword: *Nomos* and Narrative", 97 *Harvard Law Review*, pp. 4-68, 1983.

Flaherty S. Martin, "History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land," 99 *Columbia Law Review*, pp. 2095-2153, 1999.

Frankfurter Felix and Landis M. James, "The Compact Clause of the Constitution – A Study in Interstate Adjustments," 34 *Yale Law Journal*, pp. 685-758, 1925.

Greenawalt, "The Rule of Recognition and the Constitution," 85 *Michigan Law Review*, pp. 621-671, 1987.

Horvath J. Günther, "The Validity of Executive Agreements – A Casestudy," in 30, *Österereichische Zeitschrift für Öffentliches Recht und Völkerrecht*, pp. 105-131, 1979.

Kurland Philip, "The Impotence of Reticence," 4 *Duke Law Journal*, pp. 619-636, 1968.

\_\_\_\_\_, "The Rise and Fall of the 'Doctrine' of Separation of Powers," 85 *Michigan Law Review*, pp. 592-613, 1986.

Levitan D. M., "The Foreign Relations Power: An analysis of Mr. Justice Sutherland's Theory," 55 *Yale Law Journal*, pp. 467-497, 1946.

Lipkin J. Robert, "Can American Constitutional Law Be Postmodern?" 42 *Buffalo Law Review*, pp. 317-403, 1994.

R. Earl McClendon, "Origin of the Two-Thirds Rule in Senate Action upon Treaties," 36 *The American Historical Review*, pp. 768-772, 1931.

McDougal Myres S. and Lans Asher, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," 54 *Yale Law Journal*, Part I, pp. 181-351, 1945; part II, pp. 534-615, 1945.

Myers P. Denys, "The Names and Scope of Treaties," 51 *American Journal of International Law*, pp. 574-605, 1957.

Pepper Claude, "Peace Despite the Filibusters," *New York Times Magazine*, Dec. 12, 1943.

Potter B. Pitman, "Relative Authority of International and National Law in the United States," 19 *American Journal of International Law*, pp. 315-326, 1925.

Rogers M. John and Molzon E. Robert, "Some Lessons about the Law from Self-Referential Problems in Mathematics," 90 *Michigan Law Review*, pp. 992-1022, 1992.

Schank C. Peter, "Understanding Postmodern Thought and Its Implications for Statutory Interpretation," 65 *S. Cal. L. Review*, pp. 2505-2597, 1992.

Schauer Frederick, "Deliberating About Deliberation," 90 *Michigan Law Review*, 1187-1202, 1992.

Slonim Solomon, "Congressional-Executive Agreements," 14 *Columbia Journal of Transnational Law*, pp. 434-450, 1975.

Tansil C. Charles, "The Treaty-Making Powers of the Senate," 18 *American Journal of International Law*, pp. 459-482, 1924.

Tribe H. Lawrence, "Taking Text and Structure Seriously: Reflections on Free-form Method in Constitutional Interpretation", 108 *Harvard Law Review*, pp. 1221-1303, 1995.

The Harvard Law Review Association, "Restructuring the Modern Treaty Power," 114 *Harvard Law Review*, pp. 2478-2501, 2001.

Wright Herbert, "The Two-Thirds Vote of the Senate in Treaty-Making," 53 *American Journal of International Law*, pp. 643-650, 1944.

Wright Quincy, "The United States and International Agreements," 38 *American Journal of International Law*, pp. 341-355, 1944.

Yoo John, "Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding," 99 *Columbia Law Review*, pp. 1955-2094, 1999.