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WORLD RULE OF LAW: NEXT STEPS BY INDIVIDUAL STATES

by Wallace McClure*

I

The Notre Dame Symposium on Next Steps to Extend the Rule of Law was held on the morrow of an address by the President of the United States delivered before the American Newspaper Publishers' Association in which he recalled some remarks of Francis Bacon about inventions that were already transforming the world three hundred and fifty years ago, among them the mariners' compass and the printing press. Links between nations, first forged by the compass, he recognized, had "made us all citizens of the world, the hopes and threats of one becoming the hopes and threats of us all." These words carried forward the eloquent appeal in his Inaugural for "a new world of law, where the strong are just and the weak secure and the peace preserved." In the light of such words of optimistic confidence, the Symposium could proceed buoyantly and with hope.

The words were overshadowed by deeds. It had just been disclosed that public officials of the United States, in defiance of the legal obligations of the United Nations Charter, various treaties, and the common law of mankind, not to mention enactments of their own national legislature, had participated in acts of violence, including the threat and use of force, against another member of the United Nations.

Never was there a day more appropriate for the most solemn rededication to achieving the rule of law in the world community. The obvious next step is the recapture, if possible, of the lost status that has been sacrificed on the unholy altar of unbridled cynicism and illegal use of power.

II

A striking passage in one of Professor F. S. C. Northrop's recent books tells us that the demonstration that a theory of law which bases legal obligation on assent can never justify the application of law to dissenters holds as much for criminal law in the domestic field as it does for dissenters in the international arena. Hence, were this positivistic theory of legal obligation correct, domestic law which sends murderers to the electric chair without asking them whether they assent to the court's jurisdiction should not exist. A domestic law in which the individual reserves the right to decide whether the court has jurisdiction would place the private citizen in the same position in which nations now stand with regard to international law.1

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The Eichmann trial could not have been held except with the defendant's consent.

Without undertaking to evaluate this critique of certain phases of legal positivism, or inquiring whether the mystical concept of the social contract applies to the traditional subjects of international law — states — as it was supposed to apply to the human beings of a pre-state era, one would seem to be justified in recognizing the sharpness of this thrust. Its applicability in reverse to the discussion of another "next step" by the people of the United States to extend the rule of law is clear-cut. That they should immediately repeal the self-judging reservation to their acceptance of the jurisdiction of the World Court is the confirmed conclusion of a very large proportion of international lawyers and of the national bar and has the official support of the preceding Administration and of the party in power at Washington. Emphatic endorsement of the repeal of this reservation is a point second to none in this presentation.

III

But there is a further "next step," within the ability of the people of the United States and of other peoples acting singly to achieve, that is closely associated with this repeal and which is by no means remotely affected by the theory of "consent," though its achievement is not dependent, any more than is the repeal of the reservation just mentioned, upon the abandonment of that theory. This "next step" involves, however, clear recognition that international law — or, as seems the more appropriate term today, world law — is law in the same compulsive sense as the national branches of the law, law based upon the will of the community, in this instance the world community, to which the members of the community are legally bound to conform. It also involves the clear recognition of the higher level, hence controlling authority, of the law of nations over the laws of individual nations. This recognition is so essential, (indeed it is the sine qua non), to world rule of law, that it must be included among required "next steps" even if long travail may prove necessary to its attainment. It is, whatever road-blocks encumber its path, the main subject of this present effort.

James Wilson, outstanding leader in achieving the ratification of the Constitution of 1787, subsequently a justice of the Supreme Court of the United States, reflected the international jurisprudence of the philosophers most respected in his day when he asserted, in his essay, "On the Law of Nations:"  

It is a truth certain in the law of nature that he who has made a promise to another has given to that other a perfect right to demand the performance of the promise. Nations and the representatives of nations, therefore, ought to preserve inviolably their treaties and engagements: by not preserving them they subject themselves to all the consequences of violating the perfect right of those to whom they were made. This great truth is generally acknowledged;

3 The 1960 Democratic platform says: "The United States' adherence to the World Court contains a so-called 'self-judging' reservation which, in effect, permits us to prevent a Court decision in any case in which we are involved. The Democratic Party proposes its repeal." Pamphlet, Los Angeles, 1960, p. 18.

but too frequently an irreligious disregard is shown to it in the
conduct of princes and states.

Such its author conceived to be the mandate of the law of nature.

John Jay, soon to be the first Chief Justice of the United States, wrote in
*The Federalist*: ⁵

They who make laws may without doubt amend or repeal them,
and it will not be disputed that they who make treaties may alter
or cancel them; but still let us not forget that treaties are made
not by one only of the contracting parties but by both; and con-
sequently that, as the consent of both was essential to their forma-
tion at first, so must it ever afterwards be to alter or cancel them.

Such its author conceived to be the mandate of the law of nations.

James Kent, brilliant early-day commentator and jurist, writing after the
Constitution of 1787 had come into force, held that all acts of the treaty-
making power ⁶ "[B]ecome of absolute efficacy, because they are the supreme
law of the land." ⁷ He added: ⁸ "If a treaty be the law of the land, it is as
much obligatory upon Congress as upon any other branch of the government,
or upon the people at large. . . . The House of Representatives are not above
the law."

Such the author of Kent's Commentaries conceived to be the law of the
national Constitution.

Citations like these build up firm justification for the conclusion of a great
present-day scholar and publicist that, according to the theory most generally
held by the founding statesmen of the United States, "International Law . . .
imposes certain limits . . . on the freedom of action of members of the Family
of Nations. . . . Such limits are . . . essential ingredients of each nation's
sovereignty—sovereignty, in short, exists *within* International Law and the
international order, not outside and above them. . . ." ⁹

The President of the American Society of International Law, in his ad-
dress ¹⁰ to the annual meeting, delivered two days before the symposium on
next steps, laid emphasis upon the need—a very real need—to seek earnestly
to make the United States constitutional system understood throughout the
world. The comment is appropriate that an even greater need persists that the
Constitution be understood by the people of the United States themselves and
that to this end the meaning of its words be subjected to timely re-examination.
In the light of the foregoing statements and philosophy, one wonders what the
Constitution-makers of 1787 meant when they wrote into the instrument they
were fashioning the resounding paragraph: ¹¹

This Constitution, and the Laws of the United States which
shall be made in Pursuance thereof; and all Treaties made, or
which shall be made, under the Authority of the United States,
shall be the supreme Law of the Land; and the Judges in every

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⁵ *The Federalist* No. 64, at 487 (Hamilton ed. 1866).
⁶ U. S. Const. art. II, § 2; art. VI.
⁷ 1 Kent, Commentaries 155 (1st ed. 1826).
⁸ Id. at 268.
⁹ Corwin, *The Constitution and World Organization* 3 (1944). Professor Corwin
does not support this theory.
¹⁰ Charles E. Martin. To be published in ASIL Proceedings.
¹¹ U. S. Const. art. VI.
State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

and what the American Law Institute means by its proposed Restatement of the "Foreign Relations Law" of the United States which asserts the following norms:

1. An Act of Congress enacted subsequent to an international agreement of the United States and found to be inconsistent with it supersedes the agreement as domestic law in the United States provided the purpose of Congress to supersedes such agreement is clearly expressed.

2. The superseding of the agreement as domestic law of the United States by subsequent Act of Congress does not affect the international obligation of the United States.12

Because of the constitutional and international law aspects of the foregoing proposition, and because of the clear-cut inconsistency of paragraph (1) with what the Constitution-makers apparently believed to be a fundamental rule of international law as well as with the seemingly most reasonable construction of the Constitution of the United States, its discussion seems the natural starting point in an argument upholding the doctrines of the early statesmen of the United States and so preparing the way for the long step forward toward the rule of law that would result from wholehearted recognition that treaties are inviolable and cannot be affected by any congressional act purporting to govern their domestic impact any more than their international obligation. The relationship between treaties and statutes is, of course, the same as that of world law in general and all national law, but the present discussion will be confined to the former relationship as the presently most urgent and illustrative sector of the problem as a whole.

In its "comment" accompanying the proposed Restatement, the ALI says: "Because treaties and Acts of Congress are given equal weight by the Constitution as domestic law, Congress has the authority to override the effect of a treaty as domestic law by a subsequent act."13

It is hardly to be supposed that when Jay wrote the above-quoted passage for The Federalist, he thought that the Constitution, the adoption of which he was urging, invested in the Congress the authority to override the effect of a treaty as "domestic law" or under any other guise. Indeed, his immediately following words were: "The proposed Constitution . . . has not in the least extended the obligation of treaties. 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." The future Chief Justice was

12 Restatement, Foreign Relations Law (Tent. Draft No. 3, 1959) p. 122. The passage quoted was read into the record of the Third Summer Conference on International Law by Joseph M. Sweeney of NYU, when Mr. Sweeney was asked to comment on a statement of the present author. Proceedings 159 (Cornell Law School, 1960).

In a comprehensive editorial comment Prof. Covey T. Oliver, an associate reporter for the Restatement of Foreign Relations Law, has given valuable insight into the method, objectives, and frame of reference of the restatement effort. "Restatement methodology," he says, "uses source materials to find the law and to detect trends at work toward evolutionary change in the law," and he mentions assessments by restaters of relevant sociological data and competing values. He closes with the hope that, as far as the draft restatement "deals with international law, it deals with it accurately from the standpoint of community consensus and forward-looking trends." 55 Am. J. Int'l. L. 428, 434 (1961).

13 Restatement, supra note 12, at 122.
addressing himself to those elements of public opinion that were averse to treaties being made the supreme law of the land by the Constitution. He upheld the proposition that regardless of the Constitution they were supreme law and that the Constitution did not alter that fact. He could hardly have thought that the Constitutional provision, “all Treaties... shall be the supreme Law of the Land,” did anything to reduce their supremacy. In the early case of Chisholm v. Georgia, Chief Justice Jay specifically declared that “the United States had, by taking a place among the nations of the earth, become amenable to the law of nations”\(^{14}\) — part of which is, of course, *pacta sunt servanda*. Is it logically or legally possible (if so, by what authority?) that a treaty may be bisected or dissolved into *domestic* law and *international* law?

Certainly the Constitution does not specifically accomplish such bisection or dissolution. It makes treaties law so far as the authority of the Constitution is concerned and does not specify or even adumbrate a “domestic” / “international” dichotomy. If a treaty is violated as “domestic” law the plighted faith of the United States is violated just as much as would be true if it were violated as “international” law and, since international law requires that treaties be honored, abrogation of them as domestic law is just as much dishonoring law as is their abrogation as international law. The international law objective of a treaty must often be fulfilled by the enforcement of its intended effect within the national area — a process in which any branch of a national or state government, including courts of law, may necessarily be called upon to participate. To comprehend the bisection concept may be reckoned an intellectual feat of no mean proportions. Somehow one feels as though he were on the verge of schizophrenia when he undertakes it.

The idea was not introduced into the holdings of the federal courts until well on in the nineteenth century. Applied to Article VI it appears to have been a purely judge-made device, product of the climate of the times, conveniently adapted to the support of doctrine that proliferated readily in an era when Austinian positivism, rampant nationalism, and international chaos were ascendant in what was a world community of only the most shadowy texture. An example may assist toward understanding.

The three outstanding cases\(^{15}\) factually relate to the protective tariff or immigration, though to the latter in hardly more than a perfunctory sense. In each instance the judicial relief was sought by private individuals or corporations, usually of United States nationality, against United States revenue officials who had imposed statutory charges considered to be more burdensome than should have been levied under pre-existing treaties providing for national or most-favored-nation treatment. There was no joining in the complaints by the other nation party to the international act in question, or, in the cases involving import duties, by their exporting nationals. The United States courts gave little or no consideration to the question whether the treaties were contravened, in effect holding contravention to be irrelevant since the act of Congress would in any event prevail as the later enactment of domestic law. International

\(^{14}\) 2 U.S. (2 Dall.) 419, 473 (1793).
\(^{15}\) Whitney v. Robertson, 124 U.S. 190 (1888); Head Money Cases, 112 U.S. 580 (1884); Taylor v. Morton, 67 U.S. 481 (1855).
obligation was left, as one supreme court justice expressed it, to diplomatic “negotiations and reclamations . . . which may in the end be enforced by actual war.” He added that “with all this” the “judicial courts have nothing to do.”

The cases rather impressively illustrate, however, the utter arbitrariness of undertaking to assert a separability of “international” elements from “domestic” elements. In two of them the statute imposed duties on imports of goods; in the third (combining three cases) the statute imposed head taxes on immigrants, payable by the transportation company affording them passage. The treaties were probably not contravened by the statutes under which the duties were levied. If there was no contravention, consideration of the effects of contravention was hardly appropriate. But, assuming that the statutory duties imposed did violate the treaties, this violation of “domestic” law from which the private individuals (usually United States nationals) sought judicial relief was precisely the violation against which the co-enactor of the treaty—the other nation, party—might appropriately seek the enforcement of the treaty as international law. Relief for its exporters or carriers was the relief it would seek for itself, its whole object in entering into the treaty being to encourage commerce between the two countries for the private benefit of its nationals engaged in exporting and shipping and the public benefit resulting therefrom because of this stimulation of private enterprise. In order and only in order that exemption from duties or the absence of discriminatory duties might induce persons domiciled or expecting to be domiciled in the United States to purchase goods or services from their exporters or carriers did other nations become parties to such treaties.

To argue that treaties were divisible into (1) domestic law that the Congress of the United States could repeal and (2) international obligation which other parties might appropriately go to war with the United States to enforce sounds like a throw-back of international relations into ages that were dark indeed. More to the point in the present connection, such argument further emphasizes the amazing and paradoxical character of the notion that a treaty (which is constitutionally declared to be law) is a legal obligation properly enforceable by war and yet simultaneously a rule of law which can be changed at will by one party, in derogation of the rights of parties thereunder. Where was the doctrine of judicial review so proudly asserted by the tribunal over which John Marshall had presided in the early days of the century?

The Constitution, it may appropriately at this point be remembered, explicitly accords to treaties a legal status not inferior to the Constitution itself. Leaving out of consideration their status under world law and as instruments of world law, they are specifically declared, along with the Constitution, to be supreme law so far as the authority of the Constitution extends. As Justice Cushing remarked with respect to the issue before the Supreme Court in the leading case of Ware v. Hylton,16 “The treaty . . . is of equal force with the Constitution. . . .” If the national courts may (as they do) decide between the Constitution and a national legislative act to the extent of nullifying the act, may they not by virtue of essentially equivalent reasoning decide between a

16 3 U.S. (3 Dal.) 199, 284 (1796).
treaty—a rule of world law—and an act of the national legislature to the extent of nullifying such act? Is there anything in the latter proposition less logical, less compelling, less intellectually sound than positions which courts and publicists have actually taken beginning with the beginning days of government under the Constitution?

It is true that “Laws of the United States which shall be made in Pursuance thereof” are likewise statedly supreme law and that the qualifying words have been accounted key words in the justification of holding acts of Congress unconstitutional. But does anyone who has read Chief Justice Marshall’s masterful opinion in *Marbury v. Madison*, 17 so holding, doubt for a moment that, even if these words had been omitted from the Constitution, the decision of the court would have been the same?

Essentially the reason for the holding lies in the nature of the two kinds of law: the Constitution created to be basic, hence in case of conflict superior; ordinary legislation to be only as therein (i.e., by the Constitution) 18 granted, hence inherently inferior. There are no qualifying words with reference to the supreme quality of treaties as law anywhere in the Constitution. Wholly apart from the Constitution, but nowhere contradicted by the Constitution, treaties “made not by one only of the contracting parties but by both” are in their very nature supreme as compared with the unilateral acts of a single nation.

Chief Justice Marshall would not have lowered his logical or his intellectual standards had he had occasion to use such words as these: *That peoples have an original right to bind themselves, for the future government of their relations (in accordance with such principles as shall, in their opinion, most conduce to their happiness) is one of the bases on which political fabric has been erected.* 19 This act of the supreme wills of the covenancing peoples, organized in the community of nations, establishes rules not to be transcended by any one of them without the consent of the other or others. It is a proposition too plain to be contested that an act repugnant to it adopted by one of them acting alone is void; otherwise one may alter the joint enactment by its own individual act, thus imposing its will upon the other or others. If a unilateral national act repugnant to a treaty, the act of two or more nation-states, is void, does it bind the courts and oblige them to give it effect, notwithstanding its invalidity? It is, emphatically, the province and duty of the judicial department, to say what the law is. If two laws conflict with each other, the courts must decide on the operation of each. This is the very essence of judicial duty. 20

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17 5 U.S. (1 Cranch) 137 (1803). Note italicized paraphrase in my next paragraph. See 5 U.S. (1 Cranch) 137, 175-76. Reference to the phrase “in Pursuance thereof” occurs in the final two paragraphs of Marshall’s opinion, after he had, as he apparently thought, proved his point by argument such as the following: Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. 5 U.S. (1 Cranch) 137, 177.

18 Opening words of Art. I.

19 The making of treaties is universally recognized as a right appertaining to “sovereignty.”

20 The last three sentences are quoted verbatim from the opinion of the Court in *Marbury v. Madison*, at 176.
In interpreting Article VI of the Constitution of the United States, it can hardly be denied that judicial competence expresses itself more persuasively by looking to the respective inherent qualities of the three categories of law pronounced to be supreme law, when called upon to determine their relative superiority, than by finding two of them equivalent simply by comparison with the third. As Justice Curtis said in his Circuit Court opinion in *Taylor v. Morton*,

"when it became necessary to determine whether an act of congress repugnant to the constitution could be deemed by the judicial power an operative law, the solution of the question was found by *considering the nature and objects of each species of law*." Would it have been any less validly logical to have said, compatibly with international obligation and national honor, "when it becomes necessary to determine whether an act of Congress repugnant to a treaty could be deemed by the judicial power an operative law, the solution of the question must be found by considering the nature and objects of each species of law"?

There is much in the history of the Constitution and in the reasoning underlying the early judgments of the Supreme Court of the United States to substantiate not only the reasonableness of the suggested conclusion but its correctness in the law of the Constitution as pronounced by the highest authority created by the Constitution itself:

It is primary history of the years during which the vital need for a national government, such as it was the destiny of the Constitution to establish, that the safety of the new republic, born of the Revolution, was in dire jeopardy because of treaty violation. Article VI, second paragraph, was adopted for the purpose of putting an end to this peril. The violations were committed by the unruly, headstrong governments of the separate states; but would violation by the Confederation have been any less—nay, would it not have been more—perilous? Is it conceivable that a constitutional convention, having as one of its principal objects the removal of that peril could possibly have written a permit for the new federal government, or any organ thereof, to perpetuate it? The unpalatable historic fact is that the federal government began to violate treaties, as a practice sustained as constitutional by the courts, only after the peril of the defenseless early days had been to a large extent succeeded by a situation which Woodrow Wilson must have had in mind when he inveighed against "too strained or refined a reading of the words of our own promises just because we have power enough to give us leave to read them as we please." What came to pass in the course of a century was indeed an exercise of power. But it was hardly lawful constitutionally.

The terse assertion of the American Law Institute above quoted, that a congressional act of date subsequent to a treaty supersedes the treaty as domestic law if the purpose to supersede is manifest, and its stated assumption that such an act is accorded by the Constitution equal weight with a treaty, may restate what was laid down in nineteenth century Supreme Court holdings, but it is in conflict with earlier decisions and out of line with some of the more recent judicial pronouncements. Associated doctrine and dicta have developed along with the

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1 23 Fed. Cas. 784 (1855) (Emphasis added). This holding, which was affirmed by the Supreme Court, 67 U.S. (2 Black) 481 (1862), is, however, a leading support for the proposition that a treaty can be superseded by act of Congress.

2 51 Cong. Rec. 4346; 5 Hackworth, Digest 164.
split-law notion and have played their part in maintaining national-law supremacy over world law in decisions of United States judicial tribunals, but in the sum total of the Supreme Court’s relevant judgments there are gradually multiplying precedents which offer hope for a less isolationist attitude, a more definable judicial amenability to higher-level law in the future than during the hundred years preceding 1961.

The first decisive test came with *Ware v. Hylton,* in which the Supreme Court of the United States fully sustained the Definitive Treaty of Peace with Great Britain, entered into during the period of the Articles of Confederation, and declined to enforce the domestic legislative act, in this case an act of the legislature of Virginia. The conflict was thus between a state law and an international act. The query at once arises whether the holding is nevertheless valid as a precedent for the supremacy of an international act over an act of the national legislature.

An affirmative answer seems justifiable from the opinion of Justice Wilson who joined the remainder of the Court in overruling Justice Iredell’s decision as Circuit Judge in favor of the defendant debtor in the court below. He held that the treaty was “sufficient to remove every impediment founded on the law of Virginia,” independently of the Constitution of the United States. He asserted that Virginia was “a party to the making of the treaty,” apparently alluding to the separate listing in Article II of Virginia and the other twelve former colonies which were acknowledged to be “free, sovereign and independent States.” Accordingly, if Virginia enacted a law and subsequently became party to a treaty in conflict with it, its position was not different from that of the United States, should conflict be found between an act of Congress and a treaty between the United States and another nation. It follows that Justice Wilson’s opinion may be accounted authority for the inviolability of a treaty by national legislation. In so far as Virginia at the time of the passage of the act of 1777 possessed attributes of independent statehood, *Ware v. Hylton* as a whole seems to constitute a precedent for the supremacy of treaties over Acts of Congress. Future Chief Justice Marshall, counsel for the defendant debtors, had argued with his customary persuasiveness that Virginia was independent from and after July 4, 1776. Justice Cushing’s above-quoted remark equating the treaty with the Constitution

23 3 U.S. (3 Dall.) 199 (1796). See also Georgia v. Brailsford, 3 U.S. (3 Dall.) 1 (1794).
24 8 Stat. 80 (1783).
25 “An act for sequestering British property, etc.” passed at the session begun at Williamsburg, Oct. 20, 1777. The fact that Article VI, second paragraph, was directed particularly at state violations of treaties may have obscured its application to the federal government; certainly the whole of this provision, which is known as the “supremacy clause” is designed to subordinate state to national power in case of conflict. But it can hardly be supposed that this affects the essential element—prevention of treaty violations.

For an interesting and timely article dealing with the relationship between Canadian provincial law and international law, see La Forest, *May the Provinces Legislate in Violation of International Law?*, 39 CANADIAN BAR REV. 78 (1961).
26 3 U.S. (3 Dall.) 283 (1796).
27 8 Stat. 80 (1793). The provision upon which the creditors’ case was based, Article IV, is as follows: “It is agreed that creditors on either side will meet with no lawful impediment to the recovery of the full value in sterling money of all bona fide debts heretofore contracted.”
itself is, of course, incompatible with national no less than state statutory superiority over—or even equality with—treaties.\textsuperscript{28} Justice Chase’s serious doubt that the Supreme Court possessed power to declare a treaty void\textsuperscript{29} as inconsistent with the Constitution must be viewed as of similar tendency.

The quality of clear precedent for the prevalence of treaties made under authority of the United States over national legislation as well as state results less from occasional bits of argument such as the foregoing than from the general emphasis by the four justices, whose opinions determined the judgment of the Supreme Court, upon the binding quality of treaties as international acts and upon the supremacy of international law. Justice Iredell also gave confirmation in much quotation from Grotius, Vattel, Bynkershoek and other legal philosophers and in an apostrophe as follows:

None can reverence the obligation of treaties more than I do; the peace of mankind, the honor of the human race, the welfare, perhaps, the being of future generations, must in no inconsiderable degree depend on the sacred observance of national conventions. If ever any people, on account of the importance of a treaty, were under additional obligations to observe it, the people of the United States surely are to observe the treaty in question. It gave peace to our country, after a war attended with many calamities. . . . It presented boundless views of future happiness . . .\textsuperscript{30}

Other decisions of the Supreme Court furnish additional precedents for the prevalence of treaties over acts of Congress and against subsequently devised theories, (i.e., the bisection theory and accompanying theories), invented to sustain judicially the subordination of international obligation to national government of force and not of law. A few illustrations of such decisions may appropriately continue the present writing.

The case of \textit{United States v. Robbins}\textsuperscript{31} arose out of the extradition provision of the treaty of 1794 between Great Britain and the United States.\textsuperscript{32} Technically it involved an application to a federal district court for habeas corpus by a person arrested as a fugitive from Great Britain; from the point of view of treaty-statute priority it involved the question whether the court could give effect to a treaty without an intervening legislative enabling act. If such legislation was necessary the legislative branch of the government could to all intents and purposes negate the treaty by inaction, despite the fact that, whether domestic or international, it was constitutionally already the \textit{supreme} “Law of the Land.” Justice Iredell had contended for such legislative implementation in \textit{Ware v. Hylton}, and there has developed in practice and in judicial pronouncement authority for it as prerequisite to enforcement. Certainly the national legislature should do its appropriate part in giving effect to treaties and such part may be the enactment of national law. But the federal courts have effectually opposed and prevented extreme application of such requirement.\textsuperscript{33} In the \textit{Robbins} case the court denied the

\textsuperscript{28} 3 U.S. (3 Dall.) 283 (1796).
\textsuperscript{29} Id. at 237. The Supreme Court has never declared a treaty unconstitutional.
\textsuperscript{30} Id. at 270.
\textsuperscript{31} 27 Fed. Cas 825 (1799).
\textsuperscript{32} 8 Stat. 116.
writ and carried out the law of the treaty on its own authority. Marshall, then a member of the House of Representatives, defended it in so doing.

One of Chief Justice Marshall's earliest decisions was in the case of United States v. The Schooner "Peggy,"44 involving privateering in the troubled times of the Napoleonic wars. An act of Congress35 had authorized the President to license private armed vessels to "seize and take any armed French vessel... on the high seas" and to enjoy a share of the proceeds of its sale if lawfully condemned by a competent United States court. A few days after the Peggy was so condemned, and pending appeal, a treaty with France36 was signed; it subsequently entered into force providing that "Property captured, and not yet definitively condemned, or which may be captured before the exchange of ratifications,... shall be mutually restored."

The Supreme Court held that to condemn a vessel the restoration of which was directed by a treaty, the law of the land, would be a direct infraction of that law. If, "subsequent to the judgment" in the trial court, "a law [treaty] intervenes and positively changes the rule which governs, the law must be obeyed... ."37

So the treaty in effect set aside a line of action authorized by act of Congress. But such setting aside by a subsequent international act is not inconsistent with the doctrine of treaty-statute equality as domestic law under Article VI of the Constitution and so does not completely fulfill the rule of treaty supremacy.

After numerous decisions in which a later act was held to overrule a treaty,38 the Supreme Court added (1933) the proviso upon which a part of the American Law Institute's above-quoted Restatement is based, namely, that a treaty would not "be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed."

This holding, in line with multiplying presumptions and axioms favorable to the honoring of treaties by the courts, fell far short of recognizing treaty supremacy, but it constitutes a genuine, even if timid, step in that direction.40 Indeed, it may be said

34 5 U.S. (1 Cranch) 103 (1803).
35 1 Stat. 576.
37 The Court intimated the desirability of governmental reimbursement of the losing private litigant (as had one of the justices in Ware v. Hylton).
38 E.g., Whitney v. Robertson, supra note 15.
39 Cook v. United States, 288 U.S. 102 (1933). See also dissenting opinion by Justice Bradley in The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871); Bill Co. v. United States, 104 F.2d 67 (CCPA 1939).
40 That the posteriores doctrine yet maintains, however, is indicated by Tag v. Rogers, 267 F.2d 664 (D.C. Cir. 1959).
41 For a striking commentary on posteriores priores, see Stinson, The Supreme Court and Treaties, 73 U. Pa. L. Rev. 1 (1924), SELECTED ESSAYS ON CONSTITUTIONAL LAW 410-35 (1938):
that, whenever in a contested case the Supreme Court upholds a treaty as opposed to a contradictory national law, the defiance of treaties that characterized the later nineteenth century holdings is to that extent ameliorated and the recognition of the supreme quality of treaty law, unincumbered by perversion of Article VI of the Constitution, may be hoped for more confidently.

Meanwhile, the multiplication of many-party treaties, adopted at parliament-like international assemblies, tended to give to treaty law a new dignity and to make its attempted alteration or failure to enforce by one only of its perhaps scores of enactors all the more absurdly paradoxical.

In *Ex parte Toscano* reliance being had upon the Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, the court, holding that no national intervening act was necessary to its enforcement, remarked that "due process of law" was found in the treaty itself, its execution by the President, and the admitted facts which brought the complaining parties under its operation. Another treaty emanating from the conference of The Hague, 1907, the Convention Respecting the Laws and Customs of War on Land, furnished a rule of law important, indeed decisive, in the World War II case of *The Netherlands v. Federal Reserve Bank of New York.*

The Convention for the Unification of Certain Rules Relating to International Transportation by Air was held in *Garcia v. Pan-American Airways, Inc.* to be not without force and effect in the absence of implementing legislation. In holding void a legislative act of Puerto Rico because in contravention of the General Inter-American Convention for Trade-Mark and Commercial Protection (1929), the Supreme Court, speaking through Chief Justice Hughes, in *Bacardi Corporation of America v. Domenech,* went beyond a mere literal construction to emphasize essential substance: "It is said the object of the treaty is to prevent piracy. That is true, but the argument does not meet the issue. Protection against piracy necessarily presupposes the right to use the marks thus protected." These cases, while not affecting the interpretation of Article VI of the Constitution or specifically developing the relationship between treaties and statutes, are rather obviously influenced by an enlightened attitude toward treaty law that may in due course lead toward a recognition of the priority of that law in a nation member of the world community.

A more potent force in this same direction may be in process of derivation from the utilization, in connection with the enactment of treaty law, of another provision of the Constitution, usually known as the "necessary and proper" clause of Article I in conjunction with the "supremacy" clause of Article VI. The former stipulates: "The congress shall have Power . . . To 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 any Department or Officer thereof. The final clause undoubtedly includes the "treaty-making power" (President and Senate) created by Article II. It was the basis of the judgment of the Supreme Court in *Missouri v. Holland,* which confirmed constitutional authority to enact such legislation as might be appropriate to give effect to the obligations of a treaty regardless of whether such legislation would be ultra vires for a purpose other than treaty-implementation. The legislative power thus recognized has been used sparingly. The protection of migratory birds which it effectuated has not moved succeeding Congresses to call for treaties protecting human rights upon which to exercise their protective or other enlightened zeal. But the opportunity for achieving, in cooperation, carefully designed policies of treaty law reinforced by domestic legislation assuredly constitutional is one that beckons and which may conceivably be more widely utilized. If the treaty-making power and Congress should so cooperate, the tension between them signalized by congressional violation of treaties might be relegated to the category of it isn't done. Actually in history, including recent history, it has been little done. But national honor and the rule of law cannot tolerate its being done at all.

A significant corollary of the "necessary and proper" clause is the question posited, does the Constitution which clearly authorizes the national legislature to make laws to give effect to international acts confer, among its limited authorizations, power to violate them? Certainly not in the clause itself. Where, then? He who would deny the seeming negative presumption should pinpoint the clause in the Constitution which authorizes treaty violation.

Confronted with the full and complete illegalization by national courts of state enactments violating international acts,* and with the national constitutional mandate forbidding the states to pass any "Law impairing the Obligation of Contracts," what shall be said of the alleged legality of the national acts which do both? Obviously the different attitudes are inconsistent.

In the political crisis referred to in the opening paragraphs of this article, a petition to the President of the United States and the Attorney General, signed by 36 lawyers, included the following passage:

We submit that for our nation unilaterally to repudiate its obligations and the restraints imposed by international law would mean the abandonment of the rule of law. It would leave us in a world containing the most awesome perils without the security of those standards of conduct which all civilized nations now honor. It is to be fervently hoped that all statements by those entrusted with the fate of our nation, and indeed the fate of the whole world in a perilous time, which may be considered threats to depart from our obligations to the international community were spoken in haste and a time of great tension and do not represent the considered judgment of our government.

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48 252 U.S. 416 (1920).
50 U.S. Const. art. I, § 10.
51 Privately printed and distributed, with supporting legal memorandum.
In line with this it may be remarked that the best way to avoid such indiscretions, whether or not spoken in haste, is to maintain the integrity of international acts as a matter of course by the executive, the legislative, and the judicial branches of the United States government.

The essence of the matter, it is submitted, lies in the interpretation of Article VI in the common-sense way by recognizing that the relativity of the Constitution, laws made in pursuance thereof, and treaties, must be found in the nature and purpose of these three categories of law, the sources of their enactment, and the communities to which they relate. Appreciation of such criterion will, it is confidently predicted, cause to cease such perversions as that "treaties... made not by one only of the contracting parties, but by both" may be altered or canceled by only one.52

When the Supreme Court is prepared to supplant its former holdings53 and give to Article VI a meaning consonant with the statesmanship of 1787 and the obvious needs of 1961, it can truly describe the concepts, upon which discarded cases were based, in the overruling words of United States v. Darby,54 as "novel when made and unsupported by any provision of the Constitution."

52 See note 5, supra.
53 For an interesting discussion of what may well be accounted a procedure for facilitating judicial overruling of previous holdings, see Levy, Realist Jurisprudence and Prospective Overruling, 109 U. Pa. L. Rev. 1 (1960), in which the following, descriptive of prospective overruling, is quoted from Justice Cardozo: "The rule that we are asked to apply is out of tune with the life about us. It has been made discordant by the forces that generate a living law. We apply it to this case because the repeal might work hardship to those who have trusted to its existence. We give notice, however, that anyone trusting to it hereafter will do so at his peril." Address by Justice Cardozo before the New York State Bar Association, January 22, 1932. See Great Northern Ry. v. Sunburst Oil Co., 287 U.S. 358 (1932). The procedure of prospective overruling may be a means of conveying judicial condemnation of past holdings even in the absence of a litigation presenting the issues possibly leading to the opposite decision.
54 312 U.S. 100 (1941).