approved in advance or afterwards by Act of Congress.[169] congressional-executive agreements far outstrip treaties in number.[170] Because the process does involve enacting legislation, it has invited close juridical attention to the constitutional allocation of legislative powers between the state and federal levels. More specifically, the concern is whether Congress is unduly and unconstitutionally encroaching upon the legislative domain of the states by way of the foreign affairs power; that is, whether it is achieving indirectly what it may not do directly, constitutionally.[171] The US Supreme Court has generally favoured the federal position, deferring to a broadly conceived understanding of what foreign relations powers encompass.[172] Moreover it is unclear whether a distinction in approach is perceptible or feasible between congressional authorisation *ex ante*, requiring a narrower, more focussed constitutional grounding in the division of powers, and such authorisation *ex post* through or including subsequent legislation, allowing for a more generous appreciation though the treaty power and the presidential foreign relations power. It is also by way of this Article I legislative process in ordinary that Congress may implement treaties deemed executory. And of course, it is within Congress' power to enact statutes which incorporate general international law, such as treaties, customary international law, the "law of nations", the "laws of war", without specific compacts or international law rules in mind.[173]

Following from the understanding of the presidential foreign affairs powers and the *Youngstown* framework, the third port of entry to the US domestic legal system occurs without active congressional approval. Where the President concludes an executive agreement with a foreign power, but without the benefit of direct statutory authorisation (*ex post* or *ex ante*), courts have been willing nonetheless to give it legal effect providing that there is a colourable constitutional basis for presidential action, and a demonstrable, established record of congressional acquiescence to that practice. These "presidential executive agreements" or "sole executive agreements" have a long-established presence in US political history,

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[169] Reisenfeld and Abbott 1991, p. 636 (co-extensive with Treaty Power). Instead of by specific statute, Congress may approve and implement a treaty by joint resolution, which resolution has constitutionally the same effect as an Act of Congress.

[170] See Hathaway 2008 (and suggesting why presenting international compacts as such agreements rather than treaties may be generally preferred by the executive branch); Ackerman and Golove 1995 (accord).

[171] Franck et al. 2007.

[172] Hence, e.g., *Ex parte Cooper* 143 US 472 (1892); *Missouri v Holland* 252 US 416 (1920); *Curtiss–Wright v US* 299 US 304 (1936); *US v Belmont* 301 US 324 (1937); *US v Pink* 315 US 203 (1942); *Dames & Moore v Regan* 53 US 462 (1994); *Crosby v National Foreign Trade Council* 530 US 363 (2000), and *American Ins Corp v Garamendi* 539 US 396 (2003). See generally, White 1999; Ackerman and Golove 1995. Nonetheless arguments for greater states' rights do continually arise: see, e.g., Rosenkranz 2005, Vazquez 2008a, b.

[173] For example, the Uniform Code of Military Justice (*Reid v Covert* 354 US 1 (1957) and *Hamdan v Rumsfeld* 548 US 557 (2006)), tariff statutes (*Whitney v Robertson* 124 US 190 (1888) and *Altman v US*), anti–discrimination legislation (*Weinberger v Rossi*) or the Alien Tort–Claims Statute.

appearing as early as 1799.[174] These types of international agreements usually and predominantly address the mutual settlement and compromise of claims between the nationals of each state party in the process of re-establishing peace after a period of tension or conflict, in order to prevent a multiplicity and flood of domestic litigation. They have a well-established and widespread usage in the international affairs among all states. From the separation of powers optic, sole executive agreements represent potentially a significant measure of presidential legislative power. By attaching the latter criterion of established congressional acquiescence, it is arguable that the courts have included a check and balance thereto, by allowing Congress to retain some measure of supervision. Without evidence of such acquiescence, or in the face of explicit congressional rejection or acts inconsistent with the presidential practice, it is highly unlikely that a presidential executive agreement could confer rights or impose duties enforceable by the courts.[175]

As an observation preliminary to a more considered assessment of the three, the Constitution stands as the portal by which international treaty norms are introduced into the US domestic legal system. That is, the courts take their direction for the rule of recognition from the constitutional attribution of legislative power. Neither the legal character of an instrument in the institutional order, nor its purpose and object are determinative of its character and effect nationally, nor any inherent quality as "law". An international instrument must first pass through the appropriate constitutional portal to be recognised as having legal force. Moreover, the United States situation, despite its professed desire to distance itself from strict UK dualism,[176] continues nevertheless particular central features of that dualism: the participation of the legislative branch, to be precise. The constitutional portals validate an international legal norm as a national legal one in function of the legislative department. The transformation or transposition from the international to the national legal order requires some form of active consent from the Senate or the Congress as a whole, or at the very least, the proven implied consent of Congress. That such consent forms an indispensable condition precedent shows, I would suggest, just how deeply rooted the understanding is that "law" originates out of a particular constitutional order, reflecting a particular political and social settlement, and that the validity and legitimacy of law are based on local social criteria and aspirational moralities.

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[174] See e.g., *Dames & Moore* 453 US 654 (1981) 681ff (Rehnquist CJ); Prakash and Ramsey 2001, and Henkin 1997, p 215ff.

[175] Thus, in *Medellin v Texas* 552 US 491 (2008), putting the presidential memorandum urging states to comply with the 2004 ICJ *Avena* judgment outside any constitutional justification and legal effect. In *Goldwater v Carter* 444 US 996 (1979), the net legal effect of a claimed unilateral presidential power to terminate treaties approved by Congress was left undecided.

[176] See e.g., Vazquez 2008c, pp. 615–616.

3.4.2 Article II Treaties, Senate Ratification and Internal Effect

It would not be amiss, particularly if an adherent to the "originalist" school of US constitutional interpretation, to construe the Article II Treaty Power as contemplating in the advising and consenting role of the Senate its active participation in initiating, negotiating and drafting prospective treaties, rather than merely approving them after the fact.[177] But the George Washington presidency soon established, from 1789 onwards, the actual and current practice in the US, which is that the Senate reviews and consents to treaties negotiated and concluded by the President.[178] That practice was already firmly entrenched by 1816, with the result that a 1973 attempt to re-establish a more active advisory role expired in the face of the long-accepted constitutional situation. Acknowledging as much, the Senate has nonetheless managed to retain—or recapture, as the case may be—some of that effective authority over the content of treaties through a robust use of resolutions for consent. It does not limit itself to a simple "aye" or "nay", nor is it reluctant to decline consent, or signal its displeasure.[179] (Such forthright conduct stands in stark contrast with the passivity of the French National Assembly, and the reserve of the Netherlands Estates General, as described in the sections below.) The Senate will grant its consent upon certain specified conditions concerning any aspect of the treaty, including its scope and effect to its import and ramifications. The President is free to accept or reject these conditions. If accepted, he may proceed to the ratification phase fulfilling those conditions along the way. It is conventional US practice to provide the other treaty party a formal statement of the Senate's substantive terms and conditions underpinning US ratification of the proposed treaty.[180] If rejected, he may seek to renegotiate the treaty in line with the Senate's conditions, allow the treaty to lapse, or resubmit after a time it to a more accommodating chamber.[181] Likewise, the President is also free not to lay a treaty before the Senate, given an inclement political climate, and await more favourable times.[182]

The nature of these Senate imposed conditions varies, and it is in their intended legal effect that controversy arises. The types of conditions may bear different

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[177] Hathaway 2008, pp. 1276–1286 (and citing Bestor 1979, and Rakove 1984. See generally Golove 2000.

[178] Noted in Hathaway 2008, Bradley 2008 and see Trimble and Weiss 1991, p. 647; Reisenfeld and Abbott 1991, p. 579ff (details of the technical steps of the consent process leading to ratification).

[179] Consider the example given in Aust 2007, pp. 134–135, regarding a grudging consent given to the Fish Stocks Agreement 1995 2167 UNTS 3 (No. 37924).

[180] Glennon 1983, pp. 259–260.

[181] E.g., the Hague Protocol to the Warsaw Convention: see *Avero Belgium v American Airlines* 423 F (3rd) 73.

[182] As was the case with the Torture Convention and ICCPR. See generally Hathaway 2008, p. 1249ff. Hathaway also notes there the political calculations involved in the initial executive department decision whether to proceed as a treaty or as an executive agreement.

names and titles over time, but can be reasonably grouped into three categories according to their substance.[183] The first set, under the general heading of "reservation" mirrors the same term as used in treaty law. Broadly understood, reservations constitute amendments to the mutual legal obligations and relations undertaken by the treaty parties.[184] As such, reservations are conventionally seen as "counter-offers" in the contracts-based analytic model for treaties. They must therefore be communicated to the other party for acceptance, or at least, tacit acquiescence. Difficulties in analysis and legal consequences (in international law) of course begin to arise when the other side objects.[185] In particular, complicating matters further are reservations opposed because they appear incompatible with the object and purpose of the treaty, or conflict with express treaty provisions including those addressing reservations themselves. The VCLT does not prescribe what legal effect these latter reservations, trenching against the treaty, have. At least not explicitly. Implicitly, however, the VCLT might be read to justify ignoring such "invalid" reservations because the VCLT only addresses and gives effect to "valid" reservations.[186] But the situation remains unsettled. Naturally, it remains for the parties themselves to arrange their mutual affairs as they see fit, in light of such reservations and objections.

The second set of Senate conditions, under the general heading of "declarations", also tracks the same terms as used in treaty law, and set out what meaning or interpretation a treaty party gives to a particular treaty term or provision. They represent unilateral statements which do not require or oblige acceptance by the other party, because they are not binding on the other party. Instead, they are primarily (though not exclusively) directed internally, being conventionally and most often produced to align treaty import with domestic law.[187] All things being equal, declarations can be taken up into the interpretation of treaty terms. But the effect of that interpretative position must not be such as to alter the substance of the legal relations and obligations between the treaty parties. For example, a declared understanding of a treaty provision or term may undercut the latter's operation so substantively and hence the legal relations of the parties. If so, then it stands as a reservation. And like reservations, declarations are also susceptible to objection. A large number of Senate conditions fall into this category. Predominant

[183] As do Reisenfeld and Abbott 1991, citing a 1984 Congressional Research Service study. For simplicity, I will only refer to the considered study of Reisenfeld and Abbott.

[184] Using Articles 19–23 VCLT as a touchstone, and see e.g., Aust 2007, p. 131ff and Swaine 2006.

[185] Prior to the VCLT, reservations had to be accepted by all parties to a treaty, else no contract was concluded. This began to change in 1951, following the ICJ advisory opinion, *Reservations to the Genocide Convention* ICJ Reps 1951 involving reservations to that multilateral treaty. The position sketched out there was taken up into the current position given by Articles 19–23 VCLT: Aust 2007, p. 140ff.

[186] Aust 2007, p. 145; Reisenfeld and Abbott 1991 (accord). See also Shaw 2008, pp. 921–925.

[187] Aust, Modern Treaty Law, 127.

among them are the declarations whether a treaty is or is not self-executing, and requires further implementing legislation by Congress.[188]

A third set of justifications, under the general heading of "provisos" identify particular issues of internal law relevant to the terms and implementation of a treaty. They convey various instructions to the President on those points.[189] Because provisos address in principle matters pertinent only to internal, domestic US law and practice, they may or may not be communicated to the other treaty party and be included in the ratification documents. There appears to be no settled practice.[190] Of the three, this category is the most "inward looking". Senate provisos, like declarations, have attracted scrutiny because of their potential to impose indirectly a particular political or legal result which would otherwise be directly unconstitutional.[191] In particular this could involve expanding the Senate's powers regarding treaties (such as mandatory consent to termination), or arrogating sole legislative powers, or restraining or constraining the constitutional powers of the President or of Congress.

The Senate's powers to append conditions obtains within the constitutional framework which not only requires Senate approval on an international instrument to make it binding on the US in international law, but which also transforms that instrument into domestic law under the Supremacy clause. Put briefly, the Senate's power is twofold: (1) to bind the US internationally (with the co-operation of the President) and (2) to create binding law nationally, internally. And it is the second branch which has generated much controversy over the legal effect of Senate conditions. The first branch falls under the regime of international law. The second is a domestic constitutional matter. From the constitutional perspective of the separation of powers, what we have is a legislative power exercised by only one of the two ordinary parliamentary legislative chambers together with the Executive Branch, one that also cuts across the federal division of powers. This is the combined effect of the Treaty Clause of Article II and the Supremacy Clause of Article VI. From the separation of powers optic, clearly no issue arises whether the powers claimed by the Senate are constitutionally well-founded or not. Attempts to reorient broadly or strictly delimit the Senate's constitutional powers—most notably along the lines of the "Bricker amendment"—have met with failure.[192] Instead, disputes over the legal effect of Senate conditions focus on the demands of the Constitution itself and the constitutional order: the distribution and balance of powers across the three organs of government, and between the federal and state levels, and the interaction of international law and national law. Ironically enough then, this debate

[188] See e.g., Bradley 2008, p. 139.

[189] Reisenfeld and Abbott 1991, p. 619ff.

[190] Reisenfeld and Abbott 1991, pp. 619–620; and see Glennon 1983, p. 261ff.

[191] See e.g., Henkin 1956, and Henkin 1989 and reiterated in Henkin 1997, p. 1850ff; Reisenfeld and Abbott 1991, pp. 582–584, 621ff.

[192] See the review in Ackerman and Golove 1995, Yoo 1999, 2001.

over the workings of international law in a national legal order orients itself within and from out of a certain national (US) constitutional perspective.

There are some commentators, such as Golove, who reject even the initial framing of the issue in terms of duality.[193] Golove, among others, is quick to emphasise that treaties are contracts, not legislation, and that under an originalist reading of the supremacy clause they were also thus understood by the Founders. Each has a different character, and to conflate them is a "category mistake of the first magnitude". Compacts promote national interests as against other sovereign states, by agreeing "to do or forebear from doing certain acts", whereas legislation relegates the behaviour of those subject to its jurisdiction.[194] Others are less explicit in their conclusions on the duality point. The problem with Golove's approach, however, is that it draws a blind or arid distinction. True, as also recognised by Hamilton, that difference in orientation exists between treaties and legislation.[195] Because of the constitutional provisions, courts have enforced treaty obligations as domestic "supreme law" without problem or concern for their generation in contracts between sovereigns, rather than legislation.[196] Distinguishing between the two sources of rules is not the issue. Instead, the problem is accounting for how and why the US Constitution bridges that difference by providing one House of the Legislative Branch consents.[197] The issue is a full appreciation of the constitutional role and powers of the Senate in a transposition process which is not detailed or spelled out in any readily or easily discernible way in a Constitution clearly concerned with establishing and protecting democratic, republican governance in a federal structure. The duality question does not therefore go to international contracts and national legislation, but rather to the separate processes for generating binding commitments internationally and nationally.

That explains in part why those who would seek greater accessibility and applicability of international law in the US do tend to conflate the two facets of the Senate's power, so that if Senate conditions do not go to the international effect of the treaty, those conditions ought to have no legal effect domestically. Their attention focuses first and foremost upon the (international) law on treaty interpretation, the terms of the treaty itself, reservations, and to a degree, declarations, all as being the relevant rules and matter governing treaty interpretation.[198] They reiterate that reservations or declarations cutting against the substance of a treaty's import and obligations are prohibited, and may justifiably be ignored.[199]

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[193] Golove 2000 (attacking Bradley, and via him, Henkin).

[194] Golove 2000, p. 1093; and see also Vazquez 2008c, pp. 616–628.

[195] Hamilton 1961, pp. 450–451 (Hamilton), and see also p. 394 (Jay).

[196] *US v Rauscher* 119 US 407 (1886).

[197] Some might suggest Jay's reading of the Supremacy Clause, Hamilton 1961, pp. 390–396, as a reply.

[198] See, e.g., Reisenfeld and Abbott 1991, pp. 586ff, 589; and also Damrosch 1991; Golove 2000; as well as informing the work of Rodgers 1999, p. 36ff, and that of Paust 1996.

[199] Reisenfeld and Abbott 1991, p. 589; see also Sloss 2002, Golove 2000 (pursuing an historical argument).

For interpretative declarations, while many will concede that they can validly and legitimately form part of the interpretative materials available to the courts, such declarations are nonbinding, represent only a part of the overall evidence, and as such have questionable persuasive significance.[200] Because the Senate is consenting to a treaty, and it is a treaty, by the explicit language of the Supremacy Clause that is "supreme law", their interim conclusion is that only the text of the treaty, as amended by any permissible reservations, governs as the "supreme law". Declarations and provisos ought to have no determinative legal effect before US courts, especially declarations of "non-self-execution".

The argument then shifts to the US Constitution. The historical context suggests that the Supremacy Clause intended to make treaties enforceable as such, in order to advance the international credibility and standing of the fledgling state, and to ensure unquestioned treaty enforcement in the several states.[201] This informs the clear logic of the Constitution. First, the Treaty Clause confers powers regarding the treaty itself, and not internal legislative power. The Senate has no further express legislative or other power to control the domestic status of the treaty, whatever the legislative powers Congress as a whole may exercise in the ordinary course. Any condition which purports to create legal rights and burdens in addition to, or supplementary to the express terms of the treaty runs afoul of the Constitution's attribution of legislative powers to both Houses of Congress under Article I.[202] The next element to the argument is a reiteration of the President's power to execute laws of the US. Because the treaty is the supreme law, it would follow that any Senate condition restraining or constraining the President's discretion would be an unconstitutional limitation on the executive power.[203] Thirdly, while the President and executive department may interpret a treaty in the course of fulfilling the executive power, the last word on treaty interpretation under Article III lies with the national courts, the Supreme Court above all.[204] Finally, the Supremacy Clause states what it gives: law-status to ratified treaties without any further condition.

In summary, the argument runs fairly as follows. The appropriate constitutional and legal position is that the US Constitution confers upon the Senate the power to consent to a treaty, or seek amendments to its terms, or reject it. Once the treaty (with any permissible amendments) is ratified, the Constitution accepts it as "self-executing" and judicially enforceable by its terms as supreme law.[205] There is a presumption by consequence that treaties are always "self-executing" according to their terms.

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[200] Reisenfeld and Abbott 1991, pp. 608–613 (note also Golove 2000).

[201] Thus Golove 2000.

[202] Reisenfeld and Abbott 1991, p. 599.

[203] Reisenfeld and Abbott 1991, p. 582.

[204] Reisenfeld and Abbott 1991, pp. 583–584. By "national courts" I intentionally leave them generally defined, without venturing into the complexity of describing or particularising the various categories of state and federal courts, and their respective jurisdiction and routes of appeal.

[205] Golove 2000 (accord) and Sloss 2007 (accord; comment on *Hamdan v Rumsfeld* 548 US 557 (2006)); yet contra: Vazquez 2007.

Disputes concerning its effect and meaning are for the courts to resolve, relying on the treaty text and other relevant and persuasive interpretative materials. Directions from the Senate as to legal effect or result, in the form of declarations and provisos, are not binding on the courts, nor have determinative or even significant persuasive effect.

These arguments succeed or fail based on the interpretation of the relevant constitution and constitutional order, and not on any considerations of international law. First, claims regarding the "self-executing" nature of a treaty arise out of the particular—national and local—constitutional perspective. Put simply and neatly, if the "self-execution" doctrine were anything but a facet of national law, it would put most Anglo-Saxon states (if not other "dualist" states) in breach of their treaties, which is clearly and certainly not the case in the international legal order. Hence the decided and significant irony of arguing for any international position by reference to national powers and constitution.

Second, denying distinction and duality would be acceptable and practicable if treaties did not purport to confer rights and duties on individuals and officials in the same manner as legislation. If a state, having promised another state to confer or to recognise rights and duties on individuals, takes steps to see it done, surely by the hard fought history of constitutionalism, this constitutes a clear legislative act. A promise to create rights or impose burdens is a promise to make certain laws.[206] It is highly unlikely that the eightienth century US Framers had even the slightest notion of modern "law-making treaties" in mind. They had in mind most likely the treaties adjusting and declaring property rights after the War of Independence, and in the acquisition of further North American territory held and hitherto administered by France, Spain and perhaps the United Kingdom.[207] It makes sense to confirm the property rights declared by those treaties, and ensure their enforceability. In that sense the treaties are agreements that rights acquired under earlier political situations by then applicable law would not be disturbed by the newer circumstances. And in that sense, treaties can be said to be law: declaring that the rights legally held *ante bellum* are fully enforceable in the *post bellum* legal order.[208] But to confer new rights or impose new burdens, is a discrete act of fresh law-making.

Third, the contracts analogy and analysis of treaties may serve as a handy means to explain international relations between state parties. But in no way does that analogy carry through to their internal effect, the relations between government and citizen. These are two distinct operations at work. On the one hand, it is an agreement among nations, with consequences defined by international law. On the other hand, it represents a domestic legislative act with character and consequences defined by the internal legal and constitutional order. Otherwise by that logic, for instance, the courts ought to enforce such breaches of contract against

[206] Not to mention problems with a contracts-based analogy. For example, Anglo–US contracts law (at the very least) does not recognise nor justify imposing burdens or conferring benefits on third parties without their express consent or joinder in the contract.

[207] Following Golove 2000, 2010.

[208] See e.g., *Quebec Act 1774* regarding French property and civil rights in place at the time of the British conquest.

governments, without regard to the political questions doctrine or state immunity. Yet a local court does not sit in judgment of the acts of two states. Nor does a breach of the one constitute necessarily a breach of the other. Nothing in the Golove position—apart from his interpretation of the Constitution—inherently prevents a treaty from having a dual character, one effective for international relations, and a separate one for the internal.[209] There is a boundary between the external perspective and the internal one, grounded in the constitutional order.

For their part, the US courts have generally accepted the dual nature of treaties as international compacts and as national legislation. Their constitutional duty is to interpret and apply the law, pursuant to Article III. What stands as law is determined by the constitutional allocation of law-making powers. They have therefore also duly accepted and enforced conditions imposed by the Senate regarding the implementation of a treaty in the domestic legal order. In terms of the separation of powers, the courts have acknowledged in the "advice and consent" power of the Treaty Clause a twofold role for the Senate. First, the Senate exercises with the President a limited, domestic oriented law-making power when it consents without condition to a treaty, "self-executing" by its terms. Second, if and when the Senate consents upon condition of further steps by Congress, it is deferring or remitting the question of internal effect to the full constitutionally established legislative branch. It is hardly aggrandising its powers to the detriment of the other branches. To the contrary, it is compromising or reducing its own law-making powers in favour of the legislative organ. It is not a delegation power: the Senate is not delegating its power of consent, entailing ratification and other international law matter, but an implied power to make domestic law rules. Seen from another angle, it is no delegation of its power to consent to the ratification of an international instrument if that consent should also require the participation of the constitutionally prescribed legislative organ for domestic implementation of that instrument. Domestic implementation is a wholly internal matter not affecting the international status of the instrument in question.[210]

In this long-established line of precedents, there are but three cases which are cited as examples of the courts declining to give effect to Senate qualifications on the domestic status of treaty provisions: *New York Indians v US*; *The Diamond Rings (Fourteen Diamond Rings v US)*, and *Power Auth of NY v Federal Power Comm*.[211]

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[209] Hence Bradley 2008 as a persuasive response to Golove 2000.

[210] It is the established position of the USSC that international law recognises, absent more, the domestic rules of a state as governing the implementation of treaties: *Breard v Green* 523 US 1352 (1998) 375–6 (Vienna Convention on Consular Relations subject by its terms to domestic procedural rules) citing as well *VW AG v Schlunk* 486 US 694 (1998) 700 (1965 Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters not displacing state rules on service of court documents), and *Soc Nat Ind Aero v US Dist Ct Sthrn Dist Iowa* (482) US 522 (1987) 539 (1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters by its terms and US ratification instruments not displacing US rules of evidence); see also *Sanchez–Llamas v Oregon* 548 US 331 (2006) (confirming and following *Breard* on the VCCR).

[211] *New York Indians v US* 170 US 1 (1898); *The Diamond Rings* 183 US 176 (1901); *Power Auth of NY v Federal Power Comm* 247 F 2nd 538 (1957 DC Cir.).

New York Indians v US concerns domestic arrangements with Indian tribes. This is of course distinguishable on the grounds that such treaties are not within the purview of international law. The last case, *Power Auth of NY v Federal Power Comm*, is distinguishable on the technical grounds that it was vacated and dismissed as moot: it is not a viable, standing precedent in substance.[212] Be that as it may, both *New York Indians* and *The Diamond Rings* are quickly disposed of in substance. In the former, a failure to communicate and seek agreement to certain additional US terms under a treaty which affected rights and obligations of the Indian tribes could not be enforced against those tribes, especially where they had undertaken performance of the treaty based on its original terms. In other words, reservations to a treaty not consented to by the other party are of no effect. Hardly a landmark decision or one undermining the Senate's law-making treaty power. In the latter, a joint House and Senate resolution (passed by ordinary majority) attempting to impose after the fact, *ex post*, a particular construction on a treaty or introduce material interpretative conditions into the Senate consent resolution after due ratification is without legal significance and not binding on the courts. In other words, there is no backdoor or indirect means of dealing with the treaty power under the Constitution: the Senate must introduce its qualifications in due order at the appropriate time, or Congress must pass explicit and constitutionally valid legislation on the matter.

The *NY Power Authority* case gives a moment's pause.[213] A 2–1 majority refused to enforce a Senate reservation to a 1950 US–Canada treaty over the shared use of Niagara River water because the terms applied entirely to a domestic question internal to the US constitutional order.[214] That is, it reserved for and until an Act of Congress the right to develop the US share of the river waters. The reservation had been nevertheless communicated to Canada and agreed to on that basis in the ratification instruments. The reservation did not make the treaty executory, in the sense of suspending its international operation until such an Act were passed. Moreover, and as agreed among the parties, it lacked any direct, "obvious connection to matters of international concern". Properly understood, it was merely an expression of domestic policy, which took it out of the constitutionally accepted ambit of the treaty power and foreign affairs jurisdiction. The dissent of Bastian J highlights an important difference in approach. Whereas the majority relied on treaty law to interpret and inform the Senate's constitutional treaty power, Bastian J starts from constitutional text and law to determine the

[212] vacated and remanded with instructions to dismiss as moot: *American Pub Power Assoc v Power Authority* of *NY* 355 US 64 (1957).

[213] See the attempt to rehabilitate the case in Reisenfeld and Abbott 1991; *Igartua De La Rosa v US*417 F 3rd 145 (1st Cir. 2005) (Puerto Rico) in dissent of Torruella J, p. 159ff; and the cogent arguments against the trial decision (yet upheld by the CA) of Henkin 1956 (Bradley 2008 agreeing; Restatement of the Law Third 1987 also accepting).

[214] *Power Auth of NY v Federal Power Comm* 247 F 2nd 538 (1957 DC Cir.) (Edgerton CJ and Bazelon J; Bastian J dissenting) 541–543.

scope of the Senate's treaty powers and interpret the reservation.[215] And he thus emphasises the point throughout that Senate conditions, in the past accepted to determine domestic implementation of a treaty, do not need to affect the international implementation of the treaty to be valid. But given the US Supreme Court ruling, the matter is at its highest left undetermined.

Hence the *NY Power Authority* case, rather than serving as substantive authority for any constitutional or other legal proposition, highlights two significant points. First, and in accordance with the observations of Damrosch, no US court has determined directly and authoritatively the scope and validity—constitutional and otherwise—of Senate treaty qualifications.[216] How the courts may respond, in particular whether they seek refuge behind the political questions doctrine, is quite obviously uncertain and thus uncomfortably speculative.[217] Second, and considering the Senate's treaty powers in general, the divergence in approach signals in the separation of powers optic that the question of the domestic application of international law norms given by treaty provisions is not a matter of some innate normative character of international law or a dialectic between national and international, but rather a question whose origin and solution arises out of the national, constitutional situs of the power to make law. The key concern for the courts is to ensure that the Senate and President do not arrogate legislative power at the expense of the Congress, and likewise, that Congress not aggrandise itself at the expense of the states. In all these and related facets, the US Constitution remains the ultimate and determinative touchstone of principle and authority.

3.4.3 Treaties, Executive Agreements, and the Allocation of Legislative Power

The Constitution does not limit nor mandate what matters may be subject to treaty arrangement under Article II, or otherwise by executive agreement. Insofar as within the power of the US to choose, the decision rests entirely with the executive branch (in particular the State Department), and depends upon a series of factors within the discretion of the government, including past practice, international preference, pre-emption concerns and the attitude of Congress.[218] The current

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[215] *Power Auth of NY v Federal Power Comm,* 546–549. The influence of the arguments in Henkin 1956 (as a target) is perceptible.

[216] Damrosch 1991, p. 527.

[217] A challenge to the President's termination of a US–Taiwan treaty without Congressional fiat was left undecided as not ripe for review, with 4 of 9 Justices rejecting it as a political question; Brennan J alone dissenting, confirming the President's power: *Goldwater v Carter* 444 US 996 (1970). See also *Ex parte Cooper* 143 US 472 (1892) (suggesting that determination of US–Canada boundary relating to a treaty likely a political question); *Jones v US* 137 US 202 (1890) (determination of extent of US sovereignty a political question); *Terlinden v Ames* 184 US 270 (1902) (powers of foreign state organ to transfer territory a political question).

[218] Hathaway 2008, pp. 1249–1252.