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

[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.

view tends to see congressional-executive agreements very much as interchangeable with treaties, although the acceptance of such agreements and their frequency have been of recent vintage, dating from the 1940s.[219] Whether or not actually treaties are interchangeable with congressional-executive agreements, it would appear that the Article II treaty route is generally followed for matters with a high political and national profile, such as human rights, arms control, diplomatic and consular questions, and maritime, shipping, and aviation issues.[220] Trade, tariffs, and like foreign commercial matters generally fall under executive agreements.[221]

The specific question whether the Constitution mandates a treaty or allows an executive agreement for any given matter is likely a political question reserved for the political branches, and not suitable for judicial examination. Judging by *Made in the USA Fdtn v US,*[222] the Constitution allocates the relevant powers in such a general and broad way, without any tangible, identifiable limits, that the courts would be hard pressed to find any clear, justiciable standards articulated in the Constitution prescribing how international agreements ought to be implemented in the US legal system. There would be a substantial risk that the courts would be seen to be over-reaching their position under the separation of powers by imposing such a procedure.[223] In part, that would require a non-judicial, policy evaluation as the importance or status of a particular international compact. In part, that reflected the ordinary situation in foreign relations, and was reflected in the broad grant of power to the executive branch in conducting the foreign policy of the US. Moreover, the importance of the agreement in question here, the North American Free Trade Agreement, to national interests, of an economic and foreign policy nature, mandated the courts exercise prudence and defer to the better-placed executive and legislative branches. In the result, the constitutional challenge to NAFTA as being invalidly approved and implemented as a congressional-executive agreement instead of an Article II treaty subject to Senate consent, was held a non-justiciable political question.

As a political question—and thus one reserved primarily for academic contest—this might seem to render the interchangeability issue irrelevant in law to the separation of powers and the domestic legal effect of international treaties. But first appearances can be deceiving. To the contrary, the interchangeability issue

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[219] Ackerman and Golove 1995, detailing the historical growth and gradual constitutional acceptance of congressional-executive agreements; Yoo 2001, p. 765ff; and see also e.g., Koh 1986, p. 1195; Jackson 1967, p. 253; McDougal and Lans 1945 (Borchard 1945 *contra*).

[220] Hathaway 2008, pp. 1270–1271, Yoo 2001, pp. 825–826. Hathaway suggests that treaties have rarely exceeded Congress' Article I jurisdiction and thus taking issue with Yoo 2001, p. 800ff, and joining the constitutional debate on interchangeability with, *inter alia*, Yoo 2001, Tribe 1995; Ackerman and Golove 1995, and Spiro 2001.

[221] Following Hathaway 2008, Yoo 2001, and Golove and Ackerman 1995.

[222] *Made in the USA Fdtn v US* 242 F 3rd 1300 (2001) (11th Cir.).

[223] See also *Japan Whaling Assoc v American Cetacean Soc* 478 US 221 (1986), *Goldwater v Carter* 444 US 996 (1979) (per Rehnquist CJ).

actually highlights the central role played by national constitutions in delimiting powers over international relations; that is, for the inside out. Put another way, the academic discussion on the problems posed (or solved) by interchangeability do not concern the international character of all those compacts. Nor is the problem one of the President's power to enter such agreements binding in international law, as part and parcel of his control of US foreign policy and relations.[224] Rather, the problems concern the constitutional authority by which any obligations, rights,- makes clear, any and duties arising therefrom might have force of domestic US law. In separation of powers terms, the question is the *situs*, the location of valid and legitimate law-making power.

It is necessary to distinguish between congressional legislation implementing a treaty and legislation approving and implementing a treaty or international compact in the domestic guise of a congressional-executive agreement. When Congress instructs or allows the President to conclude agreements with foreign powers, or it approves one already concluded, it must ground its powers in its ordinary legislative domain as prescribed by the Constitution.[225] These powers are located primarily in Article I §8. There it has no general or inherent powers over foreign relations, but only specific powers relating to import and export tariffs, foreign trade, piracy, "offences against the law of nations",[226] immigration, to declaring war, and to governing and regulating the military. Article VI §3 also invests the Congress with the power to admit new states and dispose of the property and territory of the US. Pursuant to the Tenth Amendment, "The 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." It follows that an Act of Congress authorising or approving a congressional-executive agreement is in theory at least always open to challenge as unconstitutional. The result of such a decision would be to deny the agreement domestic effect, whatever its currency in the international legal order. No court has addressed directly nor ruled on the issue. Moreover, it is also highly unlikely that such a contest would arise because it would entail that the congressional-executive agreement somehow was not discernibly based upon one of those Article 1 §8 classes of legislative power and did not have any colourable connection to presidential foreign relations. What is more usual and commonplace, however, is disputing whether such an Act preempts any state legislation touching upon the same subject matter. Nevertheless, as *Curtiss–Wright v US* makes clear, any congressional authorisation for the President may still be open to some scrutiny for unlawful delegation of legislative power.[227]

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[224] Yoo 2001, p. 813ff suggests that interchangeability may weaken the President's foreign relations powers by giving more initiative and control to Congress.

[225] Hence e.g., *Fong Yue Ting v US* 149 US 698 (1893) 711, 713.

[226] Taken up e.g., most notably in the Alien Tort Claims Act and Torture Victims' Claims Act.

[227] 299 US 304 (1936). On the extent and limits of delegation, see e.g., *Loving v US* 517 US 748 (1996).

On the other hand, an Act of Congress implementing a treaty is not understood to be limited by Article I §8 as is other ordinary congressional legislation. Its constitutional authorisation nevertheless does derive from Article I §8, specifically cl.18, to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof." This has been interpreted generously, providing that such legislation at least be "plainly adapted" for achieving a constitutionally valid objective (*in fine*, the execution of a ratified Article II treaty).[228]

> … The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in § 8 of article I. of the Constitution as all others vested in the government of the United States, or in any department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power.
>
> … It is quite sufficient in this case to adjudge, as we now do, that it was competent for Congress, by legislation, to enforce or give efficacy to the provisions of the treaty made by the United States and Spain with respect to the island of Cuba and its people.[229]

Henkin explains it in terms of the constitutional attribution of powers.[230] That is, the limits and restrictions imposed upon Congress under Article I §8 arise because the Constitution delegates particular jurisdiction otherwise held by the several states in national matters. By contrast, the treaty power "is authority to make national policy (regardless of substantive content) by international means and process for an international purpose."[231] Hence Congress was within its constitutional remit to enact legislation implementing a US–Canada treaty regulating treatment of migratory birds, without breaching the tenth Amendment (states' rights and powers) and unduly infringing any state jurisdiction over hunting and property: *Missouri v Holland*.[232] (Although earlier congressional legislation attempting the same ends had been struck down as unconstitutional, that legislation was not based on any treaty.) The several states had but independent, transitory interests in the migratory birds, and the significant interests involved ("a national interest of very nearly the first magnitude"[233]) could only be protected by national and international action.

Now having thus set the basic position so broadly, the exercise becomes not so much justifying congressional power to enact implementing legislation, but rather identifying valid and legitimate constitutional grounds to delimit that power. The subject matter over which the treaty power extends is nowhere limited by the Constitution. Any issue of mutual concern to sovereign states may be the topic of

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[228] Per Marshall J in *McCulloch v Maryland* 17 US 316 (1819).

[229] *Neely v Henkel* 180 US 109 (1901) 121, 122 (per Harlan J).

[230] Henkin 1997, p. 191.

[231] Whether or not shades of Sutherland J in *Curtiss Wright v US* and the Kelsen tincture of the extra-constitutional hypothesis may lurk here, is a matter for another day.

[232] *Missouri v Holland* 252 US 416 (1920).

[233] *Missouri v Holland*, 435, per Holmes J.

treaty negotiations, whether it pertains directly to current or pending interstate relations, or to matters internal to a state, and thus only indirectly or remotely connected to international affairs. Indeed, as was argued in Chap. 2, modern international law has shifted its orientation from the external to the internal, widening the catchment basin of what may be said to bear upon peace and security among nations. Moreover, the *Missouri v Holland* doctrine establishes that the treaty power may validly bypass federalism concerns, the separation of legislative jurisdiction between the national government and the several states. Added to this is the wide discretion and scope allowed to the President's foreign affairs powers, without any express limits on what actions or negotiations the President may undertake "in the national interest". Accordingly it is entirely possible to conceive of circumstances in which the President commits the US to obligations, institutions and procedures which may be decidedly opposed to or ran against the current democratic, federal and republican constitutional settlement. No extensive thought exercise is required, for example, to imagine the constitutional debates arising from a proposal to create a treaty-based construct in the Americas similar to the EU.[234]

Accordingly, both courts and commentators have searched for valid and legitimate restrictions on what ends and effects a treaty may import. The touchstone is the Constitution. Absent any express proscriptions, the courts have understood it nonetheless to set implied boundaries on the scope of the foreign affairs powers as exercised by the President with the Senate, or Congress as a whole. "The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or its departments, and those arising from the nature of the government itself and that of the States. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent."[235] "[N]o agreement with a foreign nation can confer power on Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[236] Likewise, commentators

[234] Like considerations are found in Ackerman and Golove 1995, and were raised in the 1994 Senate hearings concerning approval of the WTO Agreement in the Uruguay Round of GATT: see Tribe 1995, p. 1226ff.

[235] *De Geofroy v Riggs* 133 US 258 (1890), 267 per Field J. See also *Asakura v Seattle* 265 US 332 (1924) 341.

[236] *Reid v Covert* 354 US 1 (1957), 16, 17 [footnote omitted], per Black J. Strictly speaking, the ruling in *Reid v Covert* addresses the supremacy of constitutionally guaranteed rights over legislative or executive action. It holds that an international instrument cannot excuse or justify a breach by the legislative or executive branches of those rights. At issue are US civil and political rights, and the relationship between state and citizen. Subsequent decisions have relied on it for that point: see e.g., *American Ins. Assoc. v Garamendi* 539 US 396 (2003) 417; *Boos v Barry* 485 US 312 (1988); *Totes—Isotoner v US* 594 F 3rd 1346 (Fed Cir. 2010); *Made in the USA Fdn v US,* 242 F 3rd 1300 (2001 11th Cir), and *Fund for Animals v Kempthorne* 472 F 3rd 872 (DC Cir 2006). The case is most often cited in relation to military law and prosecutions.

such as Henkin, have also followed that point.[237] Important here is the dualist perspective, grounded in or arising from a national constitution. The exercise of foreign affairs powers presumes valid and legitimate constitutional authorisation, which controls that exercise both in terms of the source of the power, and its limits or bounds as well. Hence the constitutional foundation logically precedes any concrete exercise of the foreign affairs powers. The primacy of the Constitution thus creates a divide between the domestic plane and the international plane.

The debate in the US over sole executive agreements "shows no differently.[238] This type of agreement demonstrates Presidential law-making power in its barest, most stark form. In the exercise of the constitutionally-conferred foreign affairs powers, the President may enter with another sovereign power an agreement which compromises the property rights of nationals of both countries. Pursuant to that agreement, whether concluded by exchange of diplomatic notes or otherwise, the President (federal government) will issue such further regulations or take such further steps to see the agreement performed, as for example laying claim to the subject property or seeking to enjoin particular state law or court proceedings. The international agreement is not ratified by the Senate, nor ostensibly based on any Congressional enactment. Hence both the international facet, the entering into the agreement, and the domestic facet, the further steps to enforce the agreement's rights and obligations, arise without any explicit Congressional (Legislative Branch) supervision or authority. Recalling the *Youngstown Steel v Sawyer* trifecta, the validity and legitimacy of acts must have their foundation in the President's independent constitutional powers, or in the explicit or tacit consent of the Congress. That is, the courts will recognise and enforce this exercise of Presidential law-making authority only with a warrant of the necessary and sufficient constitutional provenance.

But as Henkin observes, "The power to make such agreements remains vast and undefined, and its constitutional foundations remain uncertain."[239] The uncertainties arise from a peculiar conceptual awkwardness in the transformation or internalisation of the President's external powers into the domestic setting. The fundamentals are simple and, more or less, uncontested. Operating within an entirely domestic scenario, the separation of powers divides law-making powers vertically between the federal and the state levels, and divides general sovereign powers horizontally among the Legislative, Executive, and Judicial Departments. Yet on the international plane, as is ordinarily understood, the President is taken to represent the undifferentiated sovereign and legislative power of the US. The same position (absent federalism concerns) obtains in the UK, for example. But for Justice Sutherland in *US v Belmont*, the broad and generous deference accorded the President's

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[237] Henkin 1956 and Henkin 1997, p. 190ff. See also Tribe 1995 (discussing the Bretton Woods Agreement).

[238] See, e.g., Krutz and Peake 2009 (and works cited therein); Bradley 2007; Henkin 1997, p. 219ff; Denning and Ramsey 2004; Prakash and Ramsey 2001; and Bradley and Flaherty 2004.

[239] Henkin 1997, p. 219. And see also the like views (and criticisms in) of White 1999, pp. 132–133, and *passim*.

exercise of foreign affairs powers was also constitutionally reflected and internalised when producing from an executive agreement domestically active rights and obligations.[240] The external powers of the US may be exercised without regard to state law or policy; those state laws, policies and constitutions are irrelevant and can form no obstacle to the effective operation of foreign affairs and treaties. While treaties *per se* require Senate approval for internal effect, other forms of international compact do not, such as executive agreements. Tying the two ends of the string together, Sutherland J transfers the power over foreign affairs internally, and in effect would trumps the internal distribution of legislative and federal power.

US v Pink pursues the same course, buttressing the expansion of executive jurisdiction internally, based upon externally concluded commitments.[241] Like *US v Belmont*, the decision originated out of a mass of New York property rights litigation concerning Soviet nationalisation decrees and US recognition of the Soviet government in the Litvinov Agreement, together with the settlement of claims between nationals of both countries. Under the Litvinov Agreement (an exchange of diplomatic notes), the USSR assigned to the US all amounts due to the Soviet government from US nationals. In *Belmont,* the US claimed funds held in a NY bank on behalf of Russian depositors, subject to a Soviet nationalisation decree and the Litvinov agreement. In *Pink*, the US claimed on the basis of the Agreement the surplus assets of a nonactive Russian insurance company (also nationalised), after distribution to domestic claimants and before distribution to foreign claim holders. New York law provided for a scheme of distribution, and would likely have constitutional precedence but for the international facet. The Court allowed the US claim, the majority accepting the reasoning of *Belmont.* Moreover, any issue of enforcing foreign expropriation decrees/constitutional rights of compensation was skirted by framing the case as a dispute between the US, in place of the USSR, and foreign creditors.

This free-form constitutional interpretation was first tempered in *Youngstown Steel v Sawyer*. Most importantly the Court strove to set such presidential powers on clearer constitutional footing, as already discussed. It also rejected any (remote) linkage drawn between the interim nationalisation order and the foreign policy arguments connected to the ongoing Korean War efforts. Further constitutional attention came in *Dames Moore v Regan*.[242] As part of the resolution of the Iranian Hostage Crisis, and national emergency, the US entered an agreement with Iran which effectively transferred US actions and rights of action to Iranian-owned (financial) assets in the US to an international claims tribunal, and prevented any action, attachment, or other remedy outside that claims process. President Carter made (and President Reagan confirmed) Executive Orders to that effect. While the Presidents' actions to collect and order the transfer of Iranian assets was justifiable as

[240] *US v Belmont* 301 US 324 (1937) 330–333, relying on *Curtiss–Wright v US* 299 US 304 (1936) and *Missouri v Hollan*d 252 US 416 (1920).

[241] *US v Pink* 315 US 203 (1942) (Douglas J for the majority).

[242] *Dames Moore v Regan* 453 US 654 (1981).

authorised under existing Congressional legislation, the further element of staying claims in US courts was not. The Court was not prepared to extend a blanket authorisation as easily, perhaps, as in *Belmont* and *Pink*. Nonetheless, it did find constitutional justification in the long-standing domestic power to compromise the claims of US citizens against foreign states (a specific power, not a plenary power of claims settlement) and sufficient Congressional complicity in the continuing exercise of that power absent further or express Congressional supervision. Thus a later executive agreement concluded in connection with the reunification of Germany and the settlement of claims against Germany and German businesses for Nazi atrocities, which committed insurance and other claims to an international, multistate body, and by which the US promised to use best efforts to prevent state law and litigation outside this claims process preempted California legislation requiring foreign insurance companies doing business in California to disclose all European policies written during 1920–1945.[243] The California law interfered with the operation and objectives of the President's policy and agreement concerning Holocaust claims settlement. The constitutional force of the executive agreement seemed to present little concern for either the majority or dissent.[244]

While the power of enforcing sole executive agreements within the domestic legal system resisted contraction and diminution, *Dames Moore v Regan* (re)invigorated the requirement for some additional constitutional authorisation reflecting the internal separation of powers. That is, the Constitution maintains a division between the domestic plane and the international plane. Thus in *Medellin v Texas*, the President's role in foreign affairs did not submerge the constitutional first principles given in *Youngstown Steel* and *Dames Moore*.[245] The memorandum instructing state courts to give effect to the ICJ *Avena* (Mexico v US) decision on the VCCR could not source the provenance of its authority in either Congressional acquiescence or approval, nor in a self-executing treaty provision (in conjunction with the Supremacy Clause). Internal rules governed how externally composed rules were to be implemented, a tenet of any dualist system.

3.4.4 Interpretation

Despite the advantage of the Supremacy Clause, the treaty path does not necessarily guarantee judicial enforceability of treaty terms. Assuming that the treaty has passed through one of the three portals to legal validity, the courts will apply it as normatively equivalent to an Act of Congress. Outside of the practical question

[243] *American Ins. Assoc v Garamendi* 539 US 396 (2003).

[244] *American Ins. Assoc v Garamendi*, 414–416; 436–439.

[245] *Medellin v Texas* 552 US 491 (2008), 523–24; 527–29.

how the courts go about interpreting the actual terms of a treaty,[246] there are two immediate consequences flowing from a treaty having domestic effect equivalent to an Act of Congress.

The first is that a treaty will preempt state legislation in conflict with the former, either in its terms or field of operation. Article VI of the Constitution, the "Supremacy Clause", provides:

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

From the Founding onwards, federal courts were quick to emphasise the paramountcy of Article II treaties over inconsistent state laws, and to assert their jurisdiction in rendering final decisions in cases turning upon treaties and the other foreign elements as prescribed in section 2 of Article III.[247] Thus in *Ware v Hylton,* Virginia law could not divest a British creditor of a debt owing by an American, nor bar an action for recovery, contrary to the Treaty of Peace 1783 between the two nations.[248] This pre-emption principle has been consistently applied since then. For example, in a 1940 case, the General Inter-American Trademark Convention 1929, after 1931 ratification by the US, could not be limited or overridden by Puerto Rican legislation: *Bacardi Corp. v Domenech*.[249] And more recently, in claims for injuries or damages suffered in carriage by air,

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[246] Such as referring to the history of negotiations, and giving treaties a more liberal construction than other agreements; see e.g., *Jordan v Tashiro* 278 US 123 (1928); *Nielsen v Johnson* 279 US 47 (1927); *Maximov v US* 373 US 49 (1963); *Sumitomo Shoji America v Avagliano* 457 US 176 (1982) (NY incorp. subsidiary of Japanese parent corp. not a branch or extension of the Japanese parent and exempt from Equal Opportunity legislation (inter alia) under US–Japan commerce treaty); *El Al Israel Airlines v Tsui Yuan Tseng* 525 US 155 (1999); *Air France v Saks* 470 US 392 (1985) *Zicherman v Korean Airlines* 516 US 217 (1996); *Avero Belgium v American Airlines* 423 F (3rd) 73 (Warsaw Convention – damage claims arising out of air travel cases); *VW AG v Schlunk* 486 US 694 (1998). Weighting the constructions preferred by the US government: *Sumitomo Shoji v Avagliano* 457 US 176 (1982); but limited weight to the government's anticipation or receipt of retaliations or protests: *Barclay's Bank v Franchise Tax Bd Calif*. 512 US 298 (1994).

[247] Article III §2 reads: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

[248] *Ware v Hylton* 3 US 199 (1796); see also *Martin ex. p Fairfax v Hunter's Lesse*e 14 US 304 (1816) also arising in Virginia and concerning the 1983 Treaty of Peace; and *Hopkirk v Bell* 7 US 454 (1806).

[249] *Bacardi Corp. v Domenech* 311 US 150 (1940).

the courts have barred domestic actions for damages in cases covered by the Warsaw Convention (as amended).[250] Pre-emption has most often been invoked in cases where state legislation has sought to restrict or limit a non-citizens ability to hold or inherit property, or run a business. While an important subjective factor may be the court's current predilection for stronger states' rights or federal rights, the objective criterion of remains the same: what the treaty actually provides. In *Maiorano v Baltimore & Ohio Rlrd* the Supreme Court read the relevant Italy–US treaty as being executory, and not conferring a private right of action for survivor's benefits by a nonresident.[251] In *Todok v Union State Bank of Harvard*, the Supreme Court construed the relevant 1827 treaty with Norway not to invalidate a dower right under a Nebraska homesteading statute.[252] Reading the general purpose of the treaty as placing property ownership by foreigners and citizens on an equal, non-discriminatory footing, and as expressly allowing the US or its states to make "such laws as they think proper" in that regard, the Court held a benefitting from the advantages given by local law required a foreign property-owner to respect the related special conditions applying to its disposition.[253] In *Asakura v City of Seattle*, a municipal law denying licenses and business standing to foreigners was expressly inconsistent with a 1911 US treaty with Japan, and therefore invalid.[254] Likewise, in *Kolovrat v Oregon*, a state law prohibiting non-resident foreigners from inheriting property had to give way to the express terms of a 1881 treaty with Serbia/Yugoslavia to the contrary.[255]

Beyond the clear cases of state laws abutting against Article II treaties, however, is the more contested field of treaties and executive agreements implemented by Acts of Congress. Because these involve the legislative jurisdiction of Congress, the absence of any specific, express allocation of jurisdiction in the Constitution over the subject matter in question will necessarily trigger questions about the constitutional division of powers between the state and federal levels. This aspect to preemption, the paramountcy of federal statutes over state ones, is complex and extensively analysed in all its facets.[256] We have already encountered it to a degree in *US v Belmont*, *US v Pink, Missouri v Holland* and *American Ins. Assoc v Garamendi* above. If there is a single dividing line separating the various contestants and analytic approaches, it is most likely and simply drawn between those who favour state jurisdiction, and those who favour a more expansive or comprehensive federal jurisdiction. The former tends to favour a functional or

[250] Giving it a generous, liberal construction: *El Al Israel Airlines v Tsui Yuan Tseng* 525 US 155 (1999), *Air France v Saks* 470 US 392 (1985).

[251] *Maiorano v Baltimore & Ohio Railrd* 213 US 268 (1909).

[252] *Todok v Union State Bank of Harvard* 281 US 449 (1933).

[253] *Todok v Union State Bank of Harvard*, 455–456.

[254] *Asakura v City of Seattle* 265 US 332 (1924).

[255] *Kolovrat v Oregon* 366 US 187 (1961).

[256] See e.g. (in just the area of pre-emption regarding foreign affairs), Pozo 2006–2007; Denning and Ramsey 2004; Goldsmith 2000; Ackerman and Golove 1995; Golove 2000, p. 1255ff; Bradley and Flaherty 2004; White 1999 (and works cited there at p. 2 n. 1).

effects approach to considering what state level interference might exist. This is represented by *Barclay's Bank v Franchise Tax Bd Calif.*[257] A California statute taxing foreign companies doing business in California on the basis of their worldwide operations did not discriminate nor place undue burdens on foreign commerce and created no actual or functional conflict with federal powers. The latter tends to pursue a structural or domain approach (whether or not any actual conflict exists). This is represented by *Zschernig v Miller.*[258] An Oregon statute prohibiting the inheritance of Oregon property by a non-resident alien unless it were shown that the foreign state would not confiscate that property and would grant US citizens reciprocal rights represented too great an intrusion into foreign affairs, requiring an assessment of political and legal qualities of foreign states. While no federal legislation existed on the matter to ground a direct conflict, it did have a direct impact on foreign affairs and may produce adverse effects for the national government. Be that as it may, this complexity and debate in domestic cases on pre-emption passes into those concerning the federal foreign affairs power. Judging from the nature of the debate, it would appear that the since at least the *interbellum* period, the federal level has benefitted from a significant accretion and expansion to its powers domestically where foreign affairs are concerned.[259]

Second, and more briefly, a treaty carries the character of ordinary federal legislation in the national legal system, without any further precedence or "higher normativity". Like other ordinary federal legislation, a treaty may override prior Acts of Congress just as subsequent Acts may override it. This was established early on with the Head Money Cases.[260] Subject to the condition noted above in *Reid v Covert*, that the Constitution governs the nature and scope of treaties entered into by the federal government, the principle has not been doubted or qualified since. Moreover, the courts are not bound to the interpretation advanced by the government. While not deferring to the government's interpretation, they will nonetheless accord it significant weight in appropriate circumstances.[261]

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[257] *Barclay's Bank v Franchise Tax Bd Calif.* 512 US 298 (1994).

[258] *Zschernig v Miller* 389 US 429 (1968). Yet the Court (and Douglas J also writing the decision of the Court) in *Clark v Allen* 331 US 503 (1947) had upheld a similar statute on the absence of any functional conflict. A variation on this may be "field pre-emption" where federal legislation exists providing a complete regulatory scheme; thus a state cannot interfere with or supplement that legislative arrangement: *Hines v Davidovitz* 312 US 52 (1941) and *Crosby v Nat. Foreign Trade Council* 530 US 363 (2000) (Massachusetts law prohibiting trade with Burma invalid because federal legislation on the same matter existed (passed three months subsequent)). See the analysis in Vazquez 2001.

[259] As White 1999 concludes.

[260] *Edye v Robertson* 112 US 580 (1884); see also *Whitney v Robertson* 124 US 190 (1888); *US v Lee Yen Tai* 185 US 213 (1902); *Reid v Covert* 354 US 1 (1957), 18; and see also *De Geofroy v Riggs* 133 US 258 (1890).

[261] *Kolovrat v Oregon* 366 US 187 (1961); *Sumitomo Shoji v Avagliano* 457 US 176 (1982), and *Barclay's Bank v Franchise Tax Bd Calif.* 512 US 298 (1994).