

# NINETEENTH-CENTURY ORTHODOXY

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## I.

Gentlemen of the Foreign Affairs Society and Distinguished Guests,

It is a great honor to be asked to speak to you today on the threshold of a new century. It is also a pleasure to continue as a student of the Constitution after my retirement from the Court. Only nine years ago, we marked the centennial of our Court, but these nine years have seen events of great importance, many of which President McKinley reviewed in yesterday's address.

You seek my views on the constitutional power of the federal government over foreign affairs in relation to the reserved powers of the states. And you wish to examine the relations among the three branches of our government regarding the same subject.

As you know, the Court at the dawn of the century assumed the power to overrule Congress when it exceeds its powers under the Constitution.<sup>1</sup> Of course, the great Chief Justice had to stretch the Judiciary Act and Article III quite a bit. But it was masterful to beard the politicians when they could do no more than complain. The very same decision asserted our authority to hold presidents themselves to account.

However, we have used this power with the greatest circumspection. In foreign affairs law, the Court has yet to overturn a treaty or statute or presidential action for invading the reserved powers of the states. In the field of foreign affairs, we have stood up for federalism; we have sustained federal power. We have never found a president to have overreached his constitutional authority in foreign affairs.

Of course, there are limits, and the Court has the power to enforce them. As Justice Story's great treatise said, "The power 'to make treaties' . . . cannot be construed to authorize a destruction of other powers given in the same instrument."<sup>2</sup>

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1. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

2. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED

Judge Cooley stated, "No legislative body can delegate to another department of the government . . . the power . . . to make laws."<sup>3</sup> The opinions of the Court, including some of my own modest efforts, have often reminded the political branches of these boundaries to their authorities.

Our century's record of judicial review is centered on property. It was again Chief Justice Marshall who launched the Court on its vigilant task of protecting property against popular passions<sup>4</sup>—just what President Madison had in mind with his eloquent warning about factions.<sup>5</sup>

Over the century, we have most often exercised our power over Congress in the cause of property rights. In *Dred Scott v. Sandford*,<sup>6</sup> we denounced federal confiscation of property. After the War and the amendments, that doesn't seem to be our proudest moment. In the *Civil Rights Cases*,<sup>7</sup> we protected the property rights of owners of theaters, restaurants, and inns. Just four years ago, we capped the century by scuttling the dire threat to property rights posed by the demon of a federal income tax.<sup>8</sup> It has been a great century for property rights.

We have looked after property rights in the field of foreign affairs as well. *Dred Scott* rejected a treaty claim.<sup>9</sup> In 1836, we stopped federal bureaucrats who were trying to take property from the City of New Orleans based on a treaty claim.<sup>10</sup>

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STATES § 777, at 552-53 (abr. 1833).

3. THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 111 (3d ed. 1898).

4. *See, e.g.*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

5. *See* THE FEDERALIST NO. 10 (James Madison) (Jacob Cooke ed., 1961).

6. 60 U.S. (19 How.) 393 (1857).

7. 109 U.S. 3 (1883).

8. *See* *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

9. 60 U.S. (19 How.) at 524-25 (Catron, J., concurring) (rejecting Article III of the Louisiana Purchase Treaty providing for rights of citizens for all "inhabitants of the ceded territory").

10. *See* *New Orleans v. United States*, 35 U.S. (10 Pet.) 662 (1836). This was our first recognition of the rule of property that states rather than the federal government are constitutional heirs to sovereign ownership of the beds and banks of navigable waterways, while the federal government has regulatory power over navigation. The ownership rule was more fully developed in *Pollard v. Hagen*, 44 U.S. (3 How.) 212 (1845). The problem was how to address purported exercises of federal power in a territory. The Court evolved the rule that such acts would be strictly construed against alienation of beds and banks, but transfers sufficiently clear could be sustained. *See* *Shively v. Bowlby*, 152 U.S. 1 (1894). The federal claim in *New Orleans* arose after statehood and did not involve any purported federal transfer in a federal territory. It was thus an easy case under the *Pollard* rule.

And in the same term as *Dred Scott*, we upheld property rights of the State of Louisiana against a claim of retroactive impairment by treaty.<sup>11</sup> All three decisions were reached by careful interpretation of the treaties to respect property rights. Yet if a treaty plainly sought to take property without just compensation, I do not hesitate to say that the Court would strike it down.

In our vigilance over property rights, we play no favorites between state and national governments. When states tried to grab Tory property after the Revolution, or Swiss property in the 1870s, we upheld treaty rights against them.<sup>12</sup> These treaties are crucial to the reciprocal property rights of our citizens abroad.

When states tried to ignore or abridge the treaty rights of Indian nations to control their retained lands, we ruled against the states. We held that Indian nations within our borders have the national capacity to make treaties that are valid under the Treaty Clause.<sup>13</sup> Indian treaties have equal dignity with foreign treaties in domestic law. In our leading judgment in 1832, we held that “[t]he Cherokee nation . . . is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force.”<sup>14</sup> The supremacy of treaties is firmly established.

Property aside, we have largely left foreign affairs to the President and Congress, where they belong. On more than one occasion, we have sustained unreviewable presidential power to recognize foreign governments.<sup>15</sup> We reached the same conclusion for Indian nations within our borders.<sup>16</sup>

As this Society well knows, we have adopted the rule that the laws of the United States be interpreted to harmonize with the law of nations whenever possible.<sup>17</sup> A related rule calls for

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11. See *Prevost v. Greneaux*, 60 U.S. (19 How.) 1 (1856).

12. See *Hauenstein v. Lynham*, 100 U.S. 483 (1879); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *Martin* and other judgments sustaining the Treaty of Paris against state law were the first instances in which the Court sustained federal power under a treaty that could not have been sustained under other delegated powers.

13. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

14. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

15. See, e.g., *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829).

16. See *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865).

17. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

federal statutes to be interpreted to harmonize with prior treaties, both international and Indian.<sup>18</sup> But when federal law is clearly inconsistent, it prevails over the law of nations.<sup>19</sup> And on numerous occasions, we have sustained the power of Congress to override prior treaties.<sup>20</sup> These rules protect rights under treaties and the law of nations against inadvertent overruling by Congress, but they respect political authority to make the ultimate decision on questions of policy that do not invade constitutional rights.

You have asked about the power of presidents to make agreements with foreign nations that are not called treaties and, therefore, not submitted to the Senate for ratification. To my knowledge, no such agreement has been challenged in a case before our Court. Agreements were made by President Washington and most every chief executive since.<sup>21</sup> The practice is now well established and seems necessary in proper circumstances. Agreements about where to stable horses at our embassies should not require the attention of the Senate.

The most frequent subject has been agreements to settle our citizens' claims against foreign governments.<sup>22</sup> These are obviously beneficial. I should note that no president has sought to make an agreement that conflicts with an act of Congress or that invades the reserved powers of the states or the property rights of citizens. Each of these would pose a serious question about the validity of a presidential order.

Much of the President's power over foreign affairs is exercised under statutory authority from Congress. This is particularly true in the vital field of trade and commerce. Just seven years ago, our Court faced the first challenge to this practice that accused Congress of having yielded its legislative power to the President in contravention of the rule against excessive delegation articulated by Judge Cooley.<sup>23</sup> We sustained

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18. See *Frost v. Wenie*, 157 U.S. 46, 60 (1895) (Indian); *Chew Heong v. United States*, 112 U.S. 536, 541 (1884) (international).

19. See *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815).

20. See *The Head Money Cases*, 112 U.S. 580 (1884); *The Cherokee Tobacco Cases*, 78 U.S. (11 Wall.) 616, 620-21 (1871).

21. See *Watts v. United States*, 1 Wash. Terr. 288, 294 (1870).

22. See XI Exec. J. 142 (1859); S. EXEC. DOC. NO. 36-10, at 472 (1859).

23. See *Field v. Clark*, 143 U.S. 649 (1892); *supra* note 3 and accompanying text.

the statute, as we had a similar law in 1813.<sup>24</sup> These statutes, and many others like them from as early as 1794,<sup>25</sup> properly left the execution of a law to the President; they did not give him the power to make law.

We have more often faced the question of presidential lawmaking in domestic cases. Over the century, presidents have been given or have assumed very broad powers over the public lands, Indian affairs, and governance of the territories.<sup>26</sup> These are all fields of exclusively federal competence, and it is largely for Congress to decide how they should be governed.

Your most provocative question asks about possible uses of foreign affairs powers very different from those customarily undertaken by our government. My answer invokes Justice Story.<sup>27</sup> All powers of the government must be exercised with proper respect to other powers defined by the Constitution. A treaty cannot amend the Constitution. This is a principle well understood by the political branches. No president has abused his foreign affairs powers. There are well-understood subjects appropriate for presidential authority over foreign affairs, and every president has respected those limits. Your question imagines a future president who will not. I have no doubt that our Court will be equal to that challenge should it arise.

As we look ahead to the twentieth century, there are very few storm clouds over the law of foreign affairs. Our government faces significant challenges to deal with Hawaii and with the territories acquired in the recent war with Spain. Some problems may reach our Court. Otherwise the foreign affairs powers of our government are clearly defined and understood. They have served the nation well for the century past, and I am confident they will enjoy continuing utility in the twentieth century.

Thank you.

## II.

Professor Ted White's marvelously thorough review of for-

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24. See *Field*, 143 U.S. at 680-92 (citing *The Brig Aurora*, 11 U.S. (7 Cranch) 382 (1813)).

25. See *id.* at 683-84.

26. See, e.g., *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 380-81 (1867); 17 Op. Att'y Gen. 258 (1882).

27. See STORY, *supra* note 2.

foreign affairs constitutionalism,<sup>28</sup> like his previous writings, has much to teach us. His review of the scholarship of the early part of this century is particularly interesting.

My fictional speaker of 1899 would surely have rejected the claim attributed to Justice Sutherland that we may look to extra-constitutional sources for the foreign relations power.<sup>29</sup> The semi-fiction of popular consent to the Constitution does not extend to any basic law beyond its boundaries. "Congress and the President, like the courts, possess no power not derived from the Constitution."<sup>30</sup> As Justice Story said, the task is to determine from within the Constitution the extent of the treaty power and, by extension, every other aspect of foreign relations powers.<sup>31</sup>

Professor White makes the case that a nineteenth-century orthodoxy of shared federal and state power over foreign affairs evolved to a 1940s norm of exclusively federal, and mostly executive, power.<sup>32</sup> This orderly formulation can be questioned at both ends. The Court's assertions of exclusive power in the federal government and the Executive were made most strongly by the Roosevelt Court of the 1940s, at the height of the New Deal. Like other verities of that period, they have been qualified and excepted in the decades since.<sup>33</sup> A number of papers at this conference explore this point.

My remarks focus on the contrast between nineteenth-century orthodoxy and New Deal revisionism. My thesis is that the constitutional rules of the two periods are less sharply in conflict than Professor White's paper suggests, as the review by my 1899 speaker demonstrates.

### A. *The Treaty Power*

There is a strong basis in Supreme Court dicta and scholarly argument to support the claim of a sharp change of foreign

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28. G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999).

29. *See id.* at 6, 46-76.

30. *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (Stone, C.J.).

31. *See* STORY, *supra* note 2.

32. *See generally* White, *supra* note 28. With different ends in mind, Curt Bradley states the same contrast. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 422-33 (1997).

33. *See* Bradley, *supra* note 32, at 433-50.

affairs doctrine between 1890 and 1940, as Professor White thoroughly documents. But when we examine judgments and practices, the differences blur considerably. Despite many dicta asserting federalism limits on the treaty power, no nineteenth-century judgment known to me overturned a treaty on federalism grounds.<sup>34</sup> Federalism influenced treaty interpretation by nineteenth-century judges,<sup>35</sup> and it was less important to interpretations by the 1940s Court. But that is a pretty mild doctrinal shift.

The 1899 review also demonstrates that many nineteenth-century judgments held treaties to have preempted state laws. The dispute in *Worcester v. Georgia*<sup>36</sup> related to state authority to punish Worcester and other whites for offenses defined by state laws that challenged Cherokee sovereignty. The limitation on state authority upheld in the case was serious enough to produce a significant political backlash.<sup>37</sup>

On the other hand, when the Court later interpreted Congress's legislative power over Indian affairs, it reached similarly broad conclusions. In *United States v. Kagama*,<sup>38</sup> the Court sustained Congress's power to delegate to the President authority to set aside an Indian reservation within the boundaries of a state by executive order and thus to preempt state law governing homicide by an Indian. Later, the Court reached the same conclusion for homicide by a white man whose victim was Indian.<sup>39</sup>

This shows a parallel progression to *Missouri v. Holland*.<sup>40</sup> A federal power first recognized by treaty was later sustained under the Commerce Clause. Purported treaty exceptionalism became domesticated.

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34. I use "federalism grounds" here in the modern sense to equate with states' rights limits on federal power. The nineteenth-century usage, employed by my fictional speaker of 1899, was the opposite. See, e.g., 1 HAMPTON L. CARSON, *THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY AND ITS CENTENNIAL CELEBRATION* 402 (1891) (referring to Justice Miller as "[a] pronounced Federalist"); 2 *id.* at 503 (referring to a decision sustaining federal authority as "[t]he Zenith of Federalism").

35. See *supra* text accompanying notes 9-11.

36. 31 U.S. 515 (1832).

37. See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 78-84 (1982).

38. 118 U.S. 375 (1886).

39. See *Donnelly v. United States*, 228 U.S. 243 (1913).

40. 252 U.S. 416 (1920).

### B. *Executive Agreements*

Much of Professor White's discourse explains the emergence of executive agreements after 1890 and the Court's decisions to recognize them as valid and capable of preempting state law. It is difficult to contrast his discussion with nineteenth-century practice because there was relatively little of it. And it must be conceded that the caution with which presidents made agreements may reflect their assumption that their power to do so was doubtful.

However, the void was not total. Samuel Crandall's 1904 book included a heading for "Agreements Concluded by the Executive Independently of the Senate."<sup>41</sup> He recited several examples of these types of agreements and asserted that agreements for the settlement of claims of American citizens against a foreign government "are not usually submitted to the Senate," citing fourteen of them.<sup>42</sup> His second edition, published in 1916 and cited by Professor White, expanded this section into a chapter, with many more examples of every sort.<sup>43</sup>

The nineteenth-century Court had not adjudicated any conflict between an executive agreement and state law, so *United States v. Belmont*<sup>44</sup> decided a new question. However, *Belmont* and *United States v. Pink*<sup>45</sup> arose out of an established nineteenth-century practice: the President's exercise of the power to recognize foreign governments.<sup>46</sup> A number of earlier decisions had sustained broad presidential power of recognition, albeit exercised by means other than formal agreement with the country recognized.<sup>47</sup> The Court announced a similar

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41. SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 85-88 (1904); see also John Bassett Moore, *Treaties and Executive Agreements*, 20 POL. SCI. Q. 385 (1905).

42. CRANDALL, *supra* note 41, at 86.

43. See SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 102-20 (2d ed. 1916); see also Moore, *supra* note 41.

44. 301 U.S. 324 (1937). See White, *supra* note 28, at 111-20.

45. 315 U.S. 203 (1942).

46. See *id.*

47. See *supra* note 15 and accompanying text. These were attempts to have the courts second-guess presidential recognitions. What power Congress has to affect the recognition power by legislation has not been tested. Cf. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) (holding that the President may not make an executive agreement in conflict with a prior federal statute not based on recognition).

doctrine for presidential recognition of Indian tribes.<sup>48</sup> This subject thus presents a particularly strong basis for preemption of state law by presidential order. *Dames & Moore v. Regan*<sup>49</sup> is in the same tradition.

### C. *Legislative Delegations and Executive Orders.*

Nineteenth-century presidents made a number of international agreements under legislative delegation. Professor White and my 1899 speaker comment on *Field v. Clark*,<sup>50</sup> in which the Court upheld a broad congressional delegation of power to the President against the claim of presidential law-making. The doctrine of excessive delegation was more often at issue in domestic law. Here the nineteenth century saw remarkable examples of broad executive power. Beginning at least as early as 1855, presidents issued executive orders withdrawing public lands from sale for such purposes as Indian reservations, military reservations, appendages to military reservations, and bird reserves.<sup>51</sup> By 1910, 252 withdrawals had been made. All this was done without any statutory authority, and every withdrawal contravened a general act of Congress making the land in question available for entry under the homestead or mining laws. In 1909, President Taft made withdrawals expressly to reserve petroleum and coal lands. These actions provoked a challenge, but in *United States v. Midwest Oil Co.*,<sup>52</sup> the Court sustained the power on the basis of congressional acquiescence.

### III.

The picture that emerges is that during the nineteenth century, the Court sustained broad federal foreign affairs powers and broad presidential powers in a number of cases that

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48. See *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866) (indicating "it is the rule of this court to follow the executive and other political departments of the government" on tribal recognition). During the period when presidents made treaties with tribes, each treaty recognized the national character of the tribal party. See COHEN, *supra* note 37, at 62-107.

49. 453 U.S. 654 (1981).

50. 143 U.S. 649 (1892); see White, *supra* note 28, at 15-18, 21; *supra* notes 23-25 and accompanying text; .

51. See, e.g., COHEN, *supra* note 37, at 127-28.

52. 236 U.S. 459 (1915).

supply at least some antecedent support for *Missouri v. Holland*,<sup>53</sup> *Belmont*,<sup>54</sup> and *United States v. Curtiss-Wright Export Corp.*<sup>55</sup> Despite many limiting dicta, the Court did not overturn any presidential or other federal action on constitutional grounds. What changed between 1890 and 1940 were the fields in which these powers were exercised. Subjects familiar to nineteenth-century government, such as comity treaties, Indian affairs, and trade treaties, gave way to unique new issues. But the antecedents were sufficient support to say that the new decisions should not be seen as revolutionary.

I wish to end with a brief comment on the current debate about the extent of foreign affairs powers. Some scholars rely on the same nineteenth-century evidence discussed in the previous sections to support an extremely broad reading of federal foreign affairs powers, albeit not of presidential power. In particular, they claim that *Holland* stands for the lack of any states' rights limits on the treaty power of Congress.<sup>56</sup>

Professor Curtis Bradley has thoroughly challenged these arguments.<sup>57</sup> I add only this, really a summary of one of his points. The broad statements in *Missouri v. Holland*, *Belmont*, *Pink*, and *Curtiss-Wright* were made by justices who assumed traditional uses of the treaty power and reacted to states' rights arguments that they perceived as mistaken in context. The urge to establish precedents leads many judicial opinions into statements of excessive generality. But as soon as the premises are seen to change, a later court will readily distinguish them. In foreign affairs, the premises have changed very much indeed. Treaties and executive agreements now address issues that earlier generations had thought were essentially domestic and thus of central concern to state governments.<sup>58</sup> New Deal self-confidence has faded with experience, as much as the hubris of any prior age. We also have a Court that is less deferential to political judgments at all levels, accustomed to imposing its own view of the distribution of the sovereign

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53. 252 U.S. 416 (1920).

54. *United States v. Belmont*, 301 U.S. 324 (1937).

55. 299 U.S. 304 (1936).

56. See Bradley, *supra* note 32, at 393 nn.14-16 (collecting authorities); see also ELBERT M. BYRD, JR., TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES: THEIR SEPARATE ROLES AND LIMITATIONS 128-29, 146 (1960).

57. See Bradley, *supra* note 32, at 433-61.

58. See *id.* at 396-99.

powers of the nation.

None of this is to say that the Court will or ought to enforce significant federalism or separation of powers limits on Congress or the President in foreign affairs. Modern human rights arguments have powerful appeal and may prevail. But they must do so on their own merits, not based on *ipse dixit* from the Roosevelt era.

