

MISSOURI v. HOLLAND IN  
HISTORICAL PERSPECTIVE

In April 1920 the Supreme Court rejected state claims based on the Tenth Amendment and upheld federal legislation which implemented a treaty to protect migratory birds. *Missouri v. Holland*<sup>1</sup> has since become, in the words of Professor Henkin, "perhaps the most famous and most discussed case in the constitutional law of foreign affairs."<sup>2</sup> Foreshadowed by debate prior to the decision, the dispute over *Holland* grew especially heated in the 1950s and has never entirely subsided. Some critics have read the Holmes opinion as creating a license for unlimited federal authority through the treaty power; more favorable commentators have argued that the decision did no more than ratify existing law.<sup>3</sup> By examining

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<sup>1</sup> 252 U.S. 416 (1920).

<sup>2</sup> HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 144 (1972) [hereafter HENKIN].

<sup>3</sup> For the early controversy, see Boyd, *The Expanding Treaty Power*, in A.A.L.S., SELECTED ESSAYS ON CONSTITUTIONAL LAW 410, 422-28 (1938); Note, 33 HARV. L. REV. 281 (1919); Note, 8 CALIF. L. REV. 177 (1920); Note, 20 COLUM. L. REV. 692 (1920); Note, 29 YALE L. J. 445 (1920) (all supporting the position taken by the Court in *Holland*); Thompson, *State Sovereignty and the Treaty-Making Power*, 11 CALIF. L. REV. 242, 247-51 (1923); Black, *Missouri v. Holland—A Judicial Milepost on the Road to Absolutism*, 25 ILL. L. REV. 911 (1931); Note, 6 CORN. L.Q. 91 (1920); Note, 68 U. PA. L. REV. 160 (1920) (all adversely critical). Professor Corwin noted *Holland's* significance without overt approval, in *Constitutional Law in 1919-1920*, II, 15 AM. POL. SCI. REV. 52, 52-54 (1920), but had earlier supplied his imprimatur to similar arguments in NATIONAL SUPREMACY: TREATY POWER v. STATE POWER (1913). Professor T. R. Powell likewise withheld open expression of judgment but seemed to think that the

*Holland* in historical context and by assessing its impact on subsequent constitutional law, this article seeks to shed some additional light on its meaning and on its capacity for raising controversy.

## I. THE DEVELOPMENT OF FEDERAL MIGRATORY BIRD LEGISLATION

The active effort in Congress to gain federal protection for migratory birds dates to a bill introduced in 1904. Each succeeding Congress saw one or more similar bills introduced, until, on 3 March 1913, a measure passed both houses as an amendment to the Department of Agriculture Appropriation Act and received President Taft's signature.<sup>4</sup> State and national conservation organizations, progressive sportsmen's associations, state game officials, and members of the federal Department of Agriculture had backed the legislation. These groups feared for the birds' survival in the face of large-scale shooting not only of game birds but of such insectivorous birds as the robin, particularly during the spring breeding season. State protective legislation existed, but "strong temptation pressing upon every State to secure its full share of edible game birds during the spring and fall migrations . . . rendered harmonious and effective State supervision impossible."<sup>5</sup> Moreover, testimony established that the endangered birds destroyed insects which otherwise would damage millions of dollars of crops each year.<sup>6</sup>

Professing agreement with its objectives, opponents of federal legislation mainly disputed its constitutionality. Migratory bird protection not only exceeded the federal government's delegated powers, they contended; it also clearly fell within the police power reserved to the states.<sup>7</sup>

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decision opened the way to constitutional amendment via treaties. See Powell, *Constitutional Law in 1919-1920*, 19 MICH. L. REV. 1, 11-13 (1920).

For the debate of the 1950s, see notes 219-31 *infra* and accompanying text.

The present legal status of the *Holland* case is set out in HENKIN 137-48, 383-96.

<sup>4</sup> See Palmer, *Memorandum concerning the Movement in Favor of Federal Protection*, in PROTECTION OF MIGRATORY AND INSECTIVOROUS GAME BIRDS OF THE UNITED STATES, H.R. REP. NO. 680, 62d Cong., 2d Sess. 4-5 (1912); 49 CONG. REC. 4799 (1914); 37 STAT. 828, 847.

<sup>5</sup> S. REP. NO. 675, 62d Cong., 2d Sess., 1 (1912).

<sup>6</sup> See *id.*, *passim*; H.R. REP. NO. 680, note 4 *supra*, *passim*; H.R. REP. NO. 1424, 62d Cong., 3d Sess. *passim* (1913); Pearson, *The Federal Government to Protect Migratory Birds*, 24 CRAFTSMAN 395 (1913); Gladden, *Federal Protection for Migratory Birds*, 62 OUTING 345 (1913); *Weeks-McLean Law*, 15 BIRD LORE 137 (1913).

<sup>7</sup> See 48 CONG. REC. 8547-49 (Rep. Mondell, 1 July 1912); 49 *id.* at 2725-27, 4330, 4337-39 (Reps. Mondell, Bartlett, Cox, 7, 28 Feb. 1913). *Cf. id.* at 1493 (Sen. Reed, 14 Jan. 1913). See also citations in note 16 *infra* for similar constitutional attacks on appropriations for bird protection after the legislation passed.

The opposition's certainty in these regards was not matched by the advocates of protection. Senator George McLean, the sponsor of the bill which passed in 1913, was so unsure at first whether the legislation could stand on its own that he introduced a constitutional amendment to validate it. Later reversing himself on the need for an amendment, he still could not cite a specific constitutional clause to which the proposed legislation could be tied. Instead, he theorized that the national government held "implied attributes of sovereignty" with respect to those objects which the states acting alone could not achieve.<sup>8</sup> But this was a weak support in view of the Supreme Court's decision in *Kansas v. Colorado*, where Justice Brewer, writing for the Court, had explained:<sup>9</sup>

The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and *all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States.*

McLean's exposition was otherwise dubious. It rested partly on a strained interpretation of several cases which had held that the states, acting in their sovereign capacities, were trustees for their citizens of animals *ferae naturae* within their boundaries. In these, the Court had in effect reserved decision on the extent of state power in the face of positive federal action.<sup>10</sup> To make his point, McLean equated such reservations with specific holdings favorable to federal power.<sup>11</sup> He also relied on an article by Senator George Sutherland in which the future Justice strove to show that dual federalism in domestic affairs and plenary national power in foreign affairs could constitutionally coexist.<sup>12</sup> By selective quotation, McLean portrayed Sutherland as arguing for plenary national

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<sup>8</sup> See 47 CONG. REC. 2564 (28 June 1911); 49 *id.* at 1489-94 (14 Jan. 1913). *Cf. id.* at 4331-32 (Rep. Lamb, 28 Feb. 1913).

<sup>9</sup> *Kansas v. Colorado*, 206 U.S. 46, 90 (1907). (Emphasis added.)

<sup>10</sup> See *Manchester v. Massachusetts*, 139 U.S. 240, 264-66 (1891); *Geer v. Connecticut*, 161 U.S. 519, 528 (1896); *The Abby Dodge*, 223 U.S. 166, 173-75 (1912) (all mentioned by Sen. McLean, 49 CONG. REC. 1490).

<sup>11</sup> See 49 CONG. REC. 1490 (14 Jan. 1913). Indeed, the opposition read the case law quite differently. See *id.* at 4337 (Rep. Sisson, 28 Feb. 1913).

<sup>12</sup> See INTERNAL AND EXTERNAL POWERS OF THE NATIONAL GOVERNMENT, S. DOC. NO. 417, 61st Cong., 2d Sess. *passim* (1910), also printed in 191 NORTH AM. REV. 373 (1910).

power in both arenas, whenever the states were severally incompetent.<sup>13</sup> All told, the frankness of another supporter of protective legislation was much in order: "I do not know whether [the bill] is constitutional," he allowed, "but I do know that it is eternally right and in the end right will prevail."<sup>14</sup>

Passage of the Migratory Bird Act on 3 March 1913 failed to end the constitutional dispute. Even as some enforcement and evidently much voluntary compliance had a salutary effect on the bird population,<sup>15</sup> constitutional doubts figured in attacks on appropriations for continued enforcement.<sup>16</sup> Significantly, the Department of Agriculture, which held responsibility for enforcement, showed little eagerness for a court test of the legislation.<sup>17</sup> And when prosecutions did occur, two federal courts handed down decisions ad-

<sup>13</sup> See 49 CONG. REC. 1491.

<sup>14</sup> *Id.* at 4332 (Rep. Weeks, 28 Feb. 1913). The favorable House and Senate Reports on the bird protection bill further illustrate the uncertain grounds on which the legislation rested in the eyes of its proponents. While the House Report pictured the "interstate bird" as being in interstate commerce, it also included an admission from a supporter of bird protection that doubts about the bill's constitutionality plagued some who were "strongly in favor of [its] purpose." H.R. REP. NO. 680, note 4 *supra*, at 2, 4-5. The Senate Report found support in the allegedly (but dubiously) analogous "power of the Federal Government to regulate by treaty the taking of migratory seals and fish," which of course overlooked the fact that no bird treaty yet existed. S. REP. NO. 675, note 5 *supra*, at 2.

<sup>15</sup> See the ANNUAL REPORTS OF THE DEPARTMENT OF AGRICULTURE: For 1915, at 246 (1916); for 1916, at 251-52 (1917); for 1917, at 265 (1918); for 1918, at 273-74 (1919).

<sup>16</sup> See 51 CONG. REC. 8349-58, 8423-54 (Senate, 9, 12 May 1914); 53 *id.* at 6763-70, 6804-06 (House, 24, 25 April 1916); *id.* at 10682-98 (Senate, 10 July 1916); 54 *id.* at 968-70 (House, 6 Jan. 1917). Not all opponents of the law, however, opposed appropriations to enforce it. One argued: "If this law had been rigidly enforced, there would have been not three judicial decisions against its constitutionality, but a score. . . . Of course, the Supreme Court will overturn this law when the court reaches it; and the surest way to have the law pronounced unconstitutional, the most certain and effective way to arouse public sentiment against the effort to extend Federal police power throughout the country, is to enforce the law. Therefore I am in favor of the appropriation." 53 *id.* at 6804-05 (Rep. Mondell, 25 April 1916). For a background, from a Progressive perspective, on the drive against bird protection after the 1913 law was enacted, see Phillips, *The Missouri Campaign: How the Middle West Has Organized to Defeat the Federal Migratory Bird Law*, 69 OUTING 77 (1916).

<sup>17</sup> "The prosecution of cases arising under the law is under the jurisdiction of the Department of Justice. So far no case has been presented to this department [*i.e.*, Agriculture] which our solicitor has deemed it advisable to present to the Department of Justice." Letter from Secretary of Agriculture David F. Houston to Senator Robinson, 24 April 1914. 51 CONG. REC. 8350-51 (1914). "As to the matter of testing the law, I personally have no desire to press the matter. The only question is whether it can be kept out of the courts. There is pressure on the Department of Justice to have the law tested." Letter from Houston to Senator McLean, 23 April 1914. *Id.* at 8355. See generally *id.* at 8350-55, 8450-53 (Senate debates of 9, 12 May 1914, discussing the government's reticence over a court test of the 1913 law).

verse to the Act,<sup>18</sup> with these in turn giving new ammunition to its congressional opponents.<sup>19</sup>

Faced by these doubts and attacks, the birds' defenders called for a bird protection treaty with other North American nations. Indeed, the day the Senate passed the 1913 protection bill, Senator McLean had guardedly questioned whether "Congress can in the absence of a treaty exercise control over migratory birds or fishes."<sup>20</sup> Senator Elihu Root proceeded to introduce a resolution recommending negotiation of a treaty.<sup>21</sup> He remarked that "it may be that under the treaty-making power a situation can be created in which the Government of the United States will have constitutional authority to deal with this subject."<sup>22</sup> Nothing came of Root's resolution, but in the next session one by McLean passed the Senate.<sup>23</sup>

In the treaty-related discussions during the appropriation debates, and in the debates on implementing the treaty, which was quickly concluded with Great Britain (acting on behalf of Canada) and approved in 1916,<sup>24</sup> two general constitutional positions emerged. One held that bird protection, being a legitimate object of international concern, was a proper subject for a treaty, and that legislation implementing such a treaty was therefore constitutional because the treaty had status as supreme law and because the legis-

<sup>18</sup> *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914); *United States v. McCullagh*, 221 F. 288 (D. Kans. 1915).

<sup>19</sup> See 53 CONG. REC. 6763-69 (House, 24 April 1916); *id.* at 10682-93 (Sen. Reed, 10 July 1916); 54 *id.* at 968 (Rep. Doolittle, 6 Jan. 1917); 55 *id.* at 5547-48 (Sen. Reed, 30 July 1917); 56 *id.* at 7363, 7365 (Reps. Huddleston, Graham, 4 June 1918).

<sup>20</sup> 49 *id.* at 1490 (14 Jan. 1913).

<sup>21</sup> *Id.* at 1494.

<sup>22</sup> Quoted by Sen. Robinson in 51 *id.* at 8349 (9 May 1914). This remark was omitted from the permanent edition of volume 49 of the *Congressional Record*, but from the context of Robinson's use of it, there seems no reason to doubt its accuracy.

Proponents of protection did not see a treaty merely as a means to remedy possible constitutional defects in the 1913 legislation. They also believed that international effort was needed for its real protective benefits. Finley, *Uncle Sam, Guardian of the Game*, 107 OUTLOOK 481, 487 (1914).

<sup>23</sup> 50 CONG. REC. 2339-40 (7 July 1913). Forty years later, John W. Davis, who had been solicitor general from 1913 to 1918 under President Wilson, took credit for having suggested, in a conversation with Secretary of State Robert Lansing, the idea of concluding a treaty in order to establish a constitutionally viable basis for bird protection. See *Report of the Committee on International Law*, N.Y. State Bar Assoc., 30 Jan. 1953, at 60, quoted in *Hearings on S.J. Res. 1 before a Subcommittee of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess. 139 (1955). Clearly, however, the idea antedated not only Lansing's tenure as secretary of state, but also Wilson's presidency. See notes 20-22 *supra* and accompanying text.

<sup>24</sup> Convention with Great Britain for the Protection of Migratory Birds, 39 STAT. 1702 (1916).

lation violated no constitutional prohibition.<sup>25</sup> Opponents denied that a treaty could validate otherwise unconstitutional legislation, particularly when the legislation trenched on state police powers protected by the Tenth Amendment.<sup>26</sup> But after approval and ratification of the 1916 treaty, the opponents were less certain of their grounds than they had been in attacking legislation unaided by a treaty.<sup>27</sup> This is not surprising, for the advocates of protection on balance now constructed the better argument, having the relevant case law and treatises more clearly on their side.<sup>28</sup>

Legislation implementing the Migratory Bird Treaty of 1916 passed the Senate by voice vote on 30 July 1917 and cleared the House almost a year later, on 6 June 1918, on a 236 to 49 roll call.<sup>29</sup> After minor differences in the two versions were resolved, President Wilson signed the measure into law on 3 July 1918. The act forbade the hunting, killing, or subsequent sale and shipment of the bird species covered by the treaty, except as allowed by regulations to be established by the Secretary of Agriculture.<sup>30</sup> These regulations were quickly issued on 31 July.<sup>31</sup>

<sup>25</sup> See 51 CONG. REC. 8352-53, 8447-49, 8452-54 (Sen. McLean, 9, 12 May 1914); 53 *id.* at 10698-99 (Sen. McLean, 10 July 1916); 56 *id.* at 7361-62, 7367-71, 7377 (Reps. Stedman, Temple, Miller, Small, 4 June 1918); H.R. REP. NO. 243, 65th Cong., 2d Sess. 1-2 (1918). Cf. 54 CONG. REC. 970 (Reps. Platt, Raker, 6 Jan. 1917); 55 *id.* at 4400 (Sens. Lodge, Hitchcock, McLean, 28 June 1917).

<sup>26</sup> See 51 *id.* at 8351-54, 8447-49, 8452-54 (Sens. Robinson, Borah, Reed, Gore, 9, 12 May 1914); 53 *id.* at 10698 (Sen. Reed, 10 July 1916); 54 *id.* at 969 (Rep. Sisson, 6 Jan. 1917); 56 *id.* at 7363-66, 7450-51 (Reps. Tillman, Huddleston, Graham, Mondell, 4, 6 June 1918).

<sup>27</sup> See, e.g., 55 *id.* at 4815 (Sen. Reed, 30 July 1917, admitting that Congress might have some power to legislate "touching the matters named in the treaty"); 54 CONG. REC. APP. 308 (1917). Similarly revealing the opponents' uncertainty was the amendment to the Migratory Bird Treaty Bill unsuccessfully proposed by Rep. Bland: "[T]his act shall not become effective until the provisions of the treaty between the United States and Great Britain covering the question of migratory birds shall have been ratified or approved by the legislatures of all the States of the Union." 56 *id.* at 7460 (6 June 1918).

<sup>28</sup> Compare, e.g., 56 *id.* at 7361-62, 7367-71 (Reps. Stedman, Temple, Miller, 4 June 1918, favoring the bill) with *id.* at 7365-66, 7450-52 (Reps. Graham, Mondell, Huddleston, 4, 6 June 1918, opposing the bill). See also note 27 *supra*. Representative Miller in his comments defending the bill somewhat anticipated the organic view of constitutional development that Holmes was to advance in his opinion in *Holland*. Compare 56 CONG. REC. 7371 with *Holland* at 433; see also note 134 *infra* and accompanying text.

<sup>29</sup> See 55 CONG. REC. 5548 (30 July 1917); 56 *id.* at 7461-62, 8430, 8462 (6, 28, 29 June 1918).

<sup>30</sup> 40 STAT. 755 (1918).

<sup>31</sup> *Report of the Solicitor, October 3, 1919*, in ANNUAL REPORTS OF THE DEPARTMENT OF AGRICULTURE FOR 1919 490 (1920).

## II. THE MIGRATORY BIRD ACT OF 1913 IN THE COURTS

By the time the 1918 law took effect, prosecution under the earlier legislation had virtually halted because of doubts concerning its constitutionality.<sup>32</sup> Although in April 1914 the 1913 act was upheld against a constitutional challenge in one trial court,<sup>33</sup> the next month in another district Judge Trieber ruled against the legislation on a demurrer to an indictment in *United States v. Shauver*,<sup>34</sup> and other adverse rulings followed.<sup>35</sup> Trieber's opinion attracted attention in the continuing constitutional debates in Congress and typified the other opinions.

Approaching the constitutional issue with caution, Trieber stated that a holding of unconstitutionality could come "[o]nly if the question is practically free from real doubt."<sup>36</sup> He also recognized "that the United States . . . possess[ed] what is analogous to the police power, which every sovereign nation possesses, as to its own property."<sup>37</sup> This concession took on importance because the Government initially conceded that the law found no support in the Commerce Clause<sup>38</sup> and instead rested its case on the grant in Art. IV, § 3, that "[t]he Congress shall have power to . . . make all needful rules and regulations respecting the territory or other property belonging to the United States."<sup>39</sup> Trieber refused, however, to accept the claim that even though the Constitution made no affirmative grant, the national government possessed "implied attributes of sovereignty" which allowed it to act "where the state is clearly incompetent to save itself."<sup>40</sup> He bolstered his assertion of vintage

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<sup>32</sup> In its five years of operation by 30 June 1918, game wardens of the Department of Agriculture had reported 1,132 violations of the 1913 act, but prosecution in all but 29 of these had been withheld pending the Supreme Court's disposition of *United States v. Shauver*, 214 F.2d 154 (E.D. Ark. 1914), which is described in the text *infra*, at notes 52-53. See ANNUAL REPORTS OF THE DEPARTMENT OF AGRICULTURE FOR 1918 274 (1919). The growth of this backlog can be traced in the ANNUAL REPORTS for 1915-1917. See also note 17 *supra*.

<sup>33</sup> *United States v. Shaw* (D.S.D., 18 April 1914), unreported but mentioned in *The Federal Migratory-Bird Law in the Courts*, 16 BIRD LORE 322 (1914), and alluded to in *State v. McCullagh*, 96 Kansas 786, 790 (1915).

<sup>34</sup> 214 Fed. 154 (E.D. Ark. 1914).

<sup>35</sup> *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915); *State v. Sawyer*, 113 Maine 458 (1915); *State v. McCullagh*, 96 Kansas 786 (1915). The state court rulings came when defendants raised the federal act as a bar to state prosecution for violation of state game regulations.

<sup>36</sup> 214 Fed. at 156.

<sup>38</sup> *Id.* at 160.

<sup>40</sup> *Id.* at 156-57.

<sup>37</sup> *Ibid.*

<sup>39</sup> *Id.* at 156.

dual federalism with a long excerpt from Justice Brewer's opinion in *Kansas v. Colorado*,<sup>41</sup> which, among other things, remarked that "this is a government of enumerated powers," and that "[t]his natural construction of the original body of the Constitution is made absolutely certain by the tenth amendment."<sup>42</sup>

Trieber's reaffirmation of the Tenth Amendment made constitutionally irrelevant a mere showing that the states severally could not protect the birds.<sup>43</sup> *Shauver* thus turned on whether migratory birds were property of the United States or of the individual states. The long-standing American rule, which had evolved from English law and had been elaborated in the leading case of *Geer v. Connecticut*,<sup>44</sup> was that animals *ferae naturae* were the common property of the people of the individual states, with the states acting as trustees over that property for their citizens. Even after people reduced game to their own possession (as by killing a bird), the resulting personal ownership was qualified by a continuing state interest in its subsequent shipment or disposal.<sup>45</sup> Trieber therefore concluded that Art. IV, § 3, provided no support for the legislation.<sup>46</sup>

Nevertheless, after Trieber observed that government counsel had not argued "that the power to enact such legislation exists under the commerce clause,"<sup>47</sup> the Government advanced a Commerce Clause claim in its motion for rehearing. If it was true, as

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<sup>41</sup> 206 U.S. 46 (1907).

<sup>42</sup> Quoted in 214 Fed. at 157.

<sup>43</sup> Trieber repeated this point, explaining that the expediency of the legislation did not remove the constitutional problems besetting it, because "[i]t is the people alone who can amend the Constitution to grant Congress the power to enact such legislation as they deem necessary." *Id.* at 160. The courts thus had to take the Constitution as they found it. *Ibid.* He distinguished the examples of federal regulation of such objects as interstate lotteries, food and drugs, mailable packages, and prostitution. In those and similar instances, federal involvement had been "upheld under some provision of the Constitution, either that of the Post Office Department, the commerce clause, the taxing power, or some other grant." *Id.* at 159.

<sup>44</sup> 161 U.S. 519 (1896).

<sup>45</sup> See *id.* at 522-34. Justice White's analysis in *Geer* is summarized in *Shauver*, 214 Fed. 157-59, with attention there also to the subsequent conforming cases of *New York ex rel. Silz v. Hesterberg*, 211 U.S. 311 (1908), and *The Abby Dodge*, 223 U.S. 166 (1912).

<sup>46</sup> 214 Fed. at 156-59.

<sup>47</sup> *Id.* at 156. Indeed, according to Judge Trieber's later opinion on the Government's motion for rehearing, rather than simply not advancing a Commerce Clause claim, government counsel had "conceded that the act cannot be sustained under the commerce clause." *Id.* at 160.



Trieber had averred in his original opinion, that a bird while in one state was owned by that state's citizens in their collective capacity, and after passing to another state was likewise owned by the latter's citizens, then the bird was an article in commerce.<sup>48</sup> But this argument similarly failed to impress Trieber. Again quoting from *Geer*, in which a state game regulation had been unsuccessfully attacked as trenching on the federal commerce power, Trieber denied the motion for rehearing.<sup>49</sup>

In the absence of the Government's case file for *Shauver*, which cannot be located,<sup>50</sup> it is difficult to determine accurately how important Trieber's ruling was for the Justice and Agriculture Departments. Yet they must have attached some importance to the defeat: Assistant Attorney General E. Marvin Underwood came from Washington to argue the motion for rehearing.<sup>51</sup> When that failed, the Government appealed on writ of error to the Supreme Court, which heard arguments on 18 October 1915 and assigned the case for reargument during the October 1916 Term.<sup>52</sup>

It seems probable, however, that the Migratory Bird Treaty with Britain, along with the legislation expected to implement it, now entered the Government's calculations, for government counsel first moved to postpone reargument, and eventually to dismiss, which the Court did in January 1919.<sup>53</sup> By this time, the Justice and Agriculture Departments probably concluded they would be

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<sup>48</sup> See Brief for the United States on Motion for Rehearing, quoted at 214 Fed. 160-61. Besides advancing this new argument in its motion for rehearing, the Government reiterated its two claims that the law should be accorded a strong presumption of constitutionality and that the birds in question were property of the United States. Judge Trieber agreed with the first of these, just as he had in his first opinion, and he almost summarily found no reason to change his conclusion respecting the second. *Id.* at 160.

<sup>49</sup> *Id.* at 161.

<sup>50</sup> Letter from Assistant Attorney General Henry E. Peterson, by John L. Murphy, Chief, Government Regulations Section, Department of Justice, to the Author, 23 May 1974, in author's possession. The Department's case file for *Holland* is also missing. *Ibid.*

<sup>51</sup> 214 Fed. at 160.

<sup>52</sup> ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR 1916 42 (1916).

<sup>53</sup> *United States v. Shauver*, 248 U.S. 594 (1919). The Supreme Court's file for *Shauver* (Supreme Court Appellate Case 24323, National Archives, Washington, D.C.) fails to disclose the government's reasons for requesting postponement of reargument. Letter from Mr. M. M. Johnson, Legislative, Judicial, and Fiscal Branch, Civil Archives Division, National Archives and Records Service, to the Author, 11 September 1974, in author's possession.

on firmer ground in arguing for the 1918 act. They may also have wished to avoid an outright defeat in the Supreme Court on the 1913 legislation. Such a defeat would not make the new law any easier to defend.

Support for this construction of the Government's strategy and reasoning may be derived from a review of its brief before the Supreme Court in *Shauver*,<sup>54</sup> this elaborated the Government's two key arguments in District Court, but still lacked persuasiveness. A review of the brief also explains further why the 1913 law failed in the lower courts, and it offers added insight into why the Government in *Holland* placed major emphasis on the sweep of the treaty power and why Justice Holmes in his opinion took the same route.

The first of the Government's arguments in *Shauver* again rested on Art. IV, § 3, giving federal authorities power to regulate United States property. Admitting control over animals *ferae naturae* rested with the sovereign in his capacity as trustee for the animals' collective owners, the Government nevertheless denied that the states severally stood as sovereigns *qua* trustees in relation to game not permanently within any one state. A state, it argued, could not effectively preserve property which resided within its borders for only a portion of the year.<sup>55</sup> Nor could the states act jointly to preserve game through interstate compacts without approval of Congress. Here the Government's brief had a curious twist, in light of the fact that the 1913 legislation lacked a treaty base.<sup>56</sup>

By ratifying the Constitution, the people expressly delegated to the Federal Government the exclusive right to protect wild life by treaties with foreign nations, and at the same time withdrew from the States the right, without the consent of Congress, to make among themselves agreements for such purpose, thus vesting in Congress the ultimate control and protection of same. By thus stripping the States of all power to protect migratory wild life for the greater part of the time, and expressly granting such power to the Federal Government, the people, by necessary implication from these express grants and the nature of the property, changed their trustee and vested

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<sup>54</sup> Not otherwise conveniently available, the Brief for the United States in *Shauver* [hereinafter cited as *Shauver* Brief] appears as Appendix A in Brief for Appellee, *Missouri v. Holland*, 252 U.S. 416 (1920), and also in 55 CONG. REC. 4816-18 (1917). Citations hereinafter for the *Shauver* Brief are to the *Holland* Brief's appendix.

<sup>55</sup> See *Shauver* Brief at 48-52.

<sup>56</sup> *Id.* at 52-53.

the title to all migratory animals *ferae naturae* in the Federal Government in trust for themselves, the people of the United States and the common owners of such animals.

The Government also stressed that ownership of game found its basis in common law, and that no such law respecting migratory animals had ever been declared in the United States, so far as it concerned the federal government's interest.<sup>57</sup> Existing cases either had involved animals resident solely in one state or, to the extent migratory animals were involved, had not raised the issue of their migratory character. In the absence of federal law, the Court had not reached the question of federal control in the face of the states' police powers.<sup>58</sup> The Court was now being asked in a case of first impression to declare in favor of federal ownership.

In short, the 1913 legislation did not seek to establish an independent federal police power, which had been disallowed in *Kansas v. Colorado*, or to trench on the states in the exercise of their police power over game, which had been recognized in *Geer*.<sup>59</sup> It "merely provide[d] 'needful rules and regulations' respecting *property* of the United States within the territory of the several States, a power daily exercised by the Federal Government."<sup>60</sup>

The Government's second line of argument stressed that denial of its position concerning federal ownership of migratory game—that is, affirmation of state ownership—led to the conclusion that such game was in interstate commerce, for when the game crossed state lines, ownership in property was then transferred.<sup>61</sup> Commerce, the Government admitted, was not susceptible to precise definition, but "the mere 'transit' of persons or property, independently of purchase, sale, or exchange, was such intercourse as falls within the meaning of the word 'commerce.'"<sup>62</sup>

Certain problems are apparent in the Government's position in its *Shauver* brief. True, existing cases had not reached the question of federal powers over migratory game, but overall they hardly supported the Government's position. In *Geer v. Connecticut*, for example, Justice White had detailed at length how the sovereign had come to be regarded as trustee for animals *ferae naturae*

<sup>57</sup> *Id.* at 48.

<sup>58</sup> *Id.* at 54–56, citing and quoting especially *The Abby Dodge*, *Geer*, and *Manchester*.

<sup>59</sup> *Shauver* Brief at 57.

<sup>61</sup> *Id.* at 59–62.

<sup>60</sup> *Ibid.*

<sup>62</sup> *Id.* at 61.

and how, in America, this sovereign authority had vested first in the colonies and then in the states.<sup>63</sup> It “remains in them [the states] at the present day,” he concluded, “in so far as its exercise may not [be] incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.”<sup>64</sup> On its face, perhaps, that formulation left an opening for federal regulation, but in reality it merely returned the question to whether the Constitution affirmatively granted the federal government either express or implied power over game.

On this score, the Government’s federal trusteeship theory was dubious, for it essentially repeated the constitutionally irrelevant claim that since the states severally could not protect game and hence could not act effectively as trustees, there must exist a federal power to do so. Resting on no evidence beyond simple assertion, the theory ignored Justice Brewer’s remark in *Kansas v. Colorado* that where powers of a national nature had not been positively assigned to the federal government, they remained with the people.<sup>65</sup> Despite Justice White’s passing reservation in *Geer* of the question of federal power, the Government theory also ran against White’s actual emphasis in *Geer* on the states as trustees for animals *ferae naturae*.<sup>66</sup> And in the same year White had reiterated this emphasis when, speaking for the Court in *Ward v. Race Horse*,<sup>67</sup> he maintained “the complete power to regulate the killing of game within its borders” was “a necessary incident of . . . [state] authority.” In *Patson v. Pennsylvania*,<sup>68</sup> Justice Holmes had read *Geer* as establishing “the protection of wild life” as a “lawful [state] object” in the face of a claim that certain state regulations worked a deprivation of Fourteenth Amendment rights. Wild game, he

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<sup>63</sup> 161 U.S. at 522–29. As already mentioned, *Geer* was the leading case; it summarized previous developments and was followed in subsequent cases. See e.g., *McCready v. Virginia*, 94 U.S. 391 (1877); notes 45 *supra* and 67–70 *infra*.

<sup>64</sup> 161 U.S. at 528.

<sup>65</sup> 206 U.S. at 90. Although *Hammer v. Dagenhart*, 247 U.S. 251 (1918), had not yet been decided, it is similarly instructive to consider the Government’s argument in *Shauver* in light of the Court’s opinion in *Dagenhart*. See note 111 *infra* and accompanying text; note 139 *infra*.

<sup>66</sup> 161 U.S. at 527–29.

<sup>67</sup> 163 U.S. 504, 510 (1896). Later in the same opinion White reiterated: “The power of all the States to regulate the killing of game within their borders will not be gainsaid.” *Id.* at 514.

<sup>68</sup> 232 U.S. 138, 143 (1914).

said, was something “which the State may preserve for its own citizens if it pleases.”<sup>69</sup> As if to ratify this line of interpretation, White, now the Chief Justice, observed later in the same Term in which *Shauver* was argued that “[i]t is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the state.”<sup>70</sup>

Arguably, too, the Government’s Commerce Clause argument fell before *Geer*. There, as a bar to state prosecution, the defendant had claimed that the birds he had killed and sold out of state had entered interstate commerce. Not so, Justice White had held, finding that “the errors which this argument involves are manifest.”<sup>71</sup> For one thing, personal ownership of such game remained qualified by the state’s authority, under its trusteeship and police powers, to fix conditions on the killing and sale of game to such an extent that “it may well be doubted whether commerce is created” by those acts.<sup>72</sup> For another, even if it were conceded that the acts in question created commerce, “it [did] not follow that such internal commerce became necessarily the subject matter of interstate commerce, and therefore under the control of the Constitution of the United States. The distinction between internal and external commerce and interstate commerce is marked, and has always been recognized by this court.”<sup>73</sup>

Of course, one could question whether White’s remarks about commerce in *Geer* were relevant to the migratory bird legislation of 1913. The game involved in *Geer* had already been killed and

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<sup>69</sup> *Id.* at 145–46. Like Justice White’s argument in *Ward*, Holmes’s narrow argument in *Patsome* was that if a treaty were to confer rights in derogation of a state’s customary and well-established powers of police, it would have to do so explicitly and could not do so by implication.

<sup>70</sup> New York *ex rel.* Kennedy v. Becker, 241 U.S. 556, 562 (1916) (citing *Geer* and *Race Horse*). Though delivered by Chief Justice White, this opinion had been written by Justice Charles Evans Hughes prior to his resignation. *Id.* at 559. The remainder of the statement quoted in the text was: “subject, of course, to any valid exercise of authority under the provisions of the Federal Constitution.” *Id.* at 562. So here again the question of state power in the presence of valid federal regulation was reserved, but, like the Government brief in *Shauver*, see text at note 64 *supra*, at most this too only returned the issue to what constituted valid federal regulation. More specifically, in context, the Court doubtless meant to reserve the question with reference to the exercise of the federal government’s treaty power, for the case involved (and the Court disallowed) an Indian claim that a federal treaty conveying hunting and fishing rights acted as a bar to state prosecution for violations of state game laws. Hence, although the Court had already heard arguments in *Shauver*, it probably was not referring to an exercise of federal authority lacking a treaty base, as in *Shauver*.

<sup>71</sup> 161 U.S. at 530.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Id.* at 530–31.

reduced to personal possession within a particular state. The 1913 law, although regulating the killing of game within individual states, aimed to preserve live birds in their flights across state lines. Yet the Government could not cite a single case in which the item being regulated as interstate commerce had crossed state lines of its own volition and not as a result of its owner's will or act.<sup>74</sup> In seeking to establish "transit" as a sufficient condition to define "commerce," it could only "submit" that self-volition in movement was constitutionally irrelevant.<sup>75</sup>

The remaining constitutional support the Government offered in *Shauver* was the Treaty Clause. The clear implication of the Government's brief was that the existence of the treaty power created an authority to regulate migratory birds independent of the actual conclusion of a treaty on the subject.<sup>76</sup> Yet, however prescient reference to the treaty power was with respect to the 1918 legislation, it provided no base for the 1913 legislation or for any action in the absence of a treaty. The necessity to resort to such sophistry simply underscores the constitutional infirmities which beset the Government's case within the doctrinal climate of the decade.

This critique of the Government's brief is not intended to suggest that no way existed by 1920 to uphold a bird protection law that lacked treaty support.<sup>77</sup> Under the guise of approving commercial regulation and taxation, the Court had already legitimated what in fact constituted federal police power in other areas.<sup>78</sup> The

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<sup>74</sup> See *Shauver* Brief at 61-62.

<sup>75</sup> "Undoubtedly, under *Kelley v. Rhoads*, 188 U.S. 1, the Federal Government could prevent the owner from driving diseased cattle from the quarantined State into the other. It is submitted that the fact that the same cattle cross the quarantine line of their own volition instead of that of their owner does not so change their status as participants in interstate intercourse as to destroy the power of Congress to prevent their crossing the State line." *Id.* at 62. Later, to be sure, the Court held that freely ranging cattle which crossed state lines were in interstate commerce, but this conclusion rested on the argument that movement of the cattle was "made possible by the failure of their owners to restrict their ranging, and [was] due, therefore, to the will of their owners." *Thornton v. United States*, 271 U.S. 414, 425 (1926).

<sup>76</sup> *Shauver* Brief at 52-53.

<sup>77</sup> In 1916, for instance, Professor Corwin entered a vigorous defense of the 1913 act on grounds similar to those advanced by the Government in *Shauver*. Corwin, *Game Protection and the Constitution*, 14 MICH. L. REV. 613 (1916).

<sup>78</sup> See, e.g., *Champion v. Ames*, 188 U.S. 321 (1903) (lotteries); *McCray v. United States*, 195 U.S. 27 (1904) (colored oleomargarine); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (pure food and drugs); *Hoke v. United States*, 227 U.S. 308 (1913) (prostitution).

point instead is that, compared with the ease offered by the treaty route, the task clearly would have been a more difficult one, particularly in view of the willingness in 1918 of a five-man majority to strike down federal child labor legislation which rested on the Commerce Clause.<sup>79</sup>

### III. THE MIGRATORY BIRD TREATY ACT OF 1918: JUDICIAL PRELIMINARIES

The Migratory Bird Treaty Act of 1918, unlike its predecessor, immediately received favorable treatment in the federal district courts. In fact, the first decision, in *United States v. Thompson*,<sup>80</sup> came from Judge Trieber. The Government, evidently attaching considerable importance to the case, was represented in *Thompson* not only by the resident United States attorney but also by an assistant attorney general and by the solicitor of the Department of Agriculture.<sup>81</sup> Trieber reached his finding of constitutionality without noticeably more difficulty than had attended his opposite conclusion in *Shauver*. He at first stressed the wording of the Supremacy Clause: "when referring to treaties, the only limitation is 'which shall be made under the authority of the United States,' omitting the words 'in pursuance of the Constitution.'"<sup>82</sup> Later, though, he recognized other limitations on treaty-making.<sup>83</sup> While a court might therefore hold a treaty void, it should do so only "in a very clear case indeed,"<sup>84</sup> and the treaty with Britain was not such a case, even though it involved a subject otherwise governed by state regulation.<sup>85</sup> The major contrast

<sup>79</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918); Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903, 915 n.24 (1959). Justice Day's opinion for the Court in *Dagenhart* abounds with passages which could as easily have applied to bird regulation devoid of a treaty base. Consider, for example: "[T]he act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend." 247 U.S. at 276. That the situation regarding federal regulation was becoming clouded is further indicated by *United States v. Doremus*, 249 U.S. 86 (1919), in which the Court, per Justice Day, upheld federal narcotics legislation by only a 5-to-4 vote.

<sup>80</sup> 258 Fed. 257 (E.D. Ark. 1919).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Id.* at 258, and see 258-61.

<sup>83</sup> *Id.* at 262, relying especially on *Geofroy v. Riggs*, 133 U.S. 258, 266-67 (1890).

<sup>84</sup> 258 Fed. at 268, quoting Chase, J., in *Ware v. Hylton*, 3 Dall. 199, 237 (1796) (separate opinion).

<sup>85</sup> Compare 258 Fed. at 268 with *id.* at 258-59.

with *Shauver* was that the Tenth Amendment now did not apply. The Constitution specifically granted the treaty power to the federal government and forbade its exercise to the states.<sup>86</sup>

Although supported by opinions differing in emphasis and detail (and shorter as well), subsequent district court decisions were essentially similar.<sup>87</sup> That these later cases were prosecuted by local United States attorneys without assistance on argument from Washington may indicate that the Government itself was confident of their outcome. Relatedly, the Bureau Chief in Agriculture charged with implementing the act claimed that the lower court victories "[had] removed to a large extent the doubt existing in some quarters concerning the validity of the act, and . . . [were] a decided deterrent to those inclined to violate the law."<sup>88</sup> Certainly the statistics on prosecutions and convictions, when compared with the virtual hiatus in enforcement under the 1913 act after the *Shauver* case had come before the Supreme Court, reveal a more active and confident enforcement policy.<sup>89</sup>

The case which eventually confronted the Supreme Court arose in Missouri when two local citizens were indicted for violating the new federal game regulations. This led the state to sue to enjoin further enforcement of the act by the federal game warden, Ray P. Holland. After argument on defendants' demurrers to their indictments and on the Government's motion to dismiss Missouri's bill in equity for an injunction against Holland, Judge Van Valkenburgh overruled the demurrers and dismissed the bill, but not

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<sup>86</sup> *Id.* at 262-67.

<sup>87</sup> *United States v. Samples*, 258 Fed. 479 (W.D. Mo. 1919); *United States v. Selkirk*, 258 Fed. 775 (S.D. Tex. 1919); *United States v. Rockefeller*, 260 Fed. 346 (D. Mont. 1919).

<sup>88</sup> ANNUAL REPORTS OF THE DEPARTMENT OF AGRICULTURE FOR 1919 at 295 (1920).

<sup>89</sup> In the first year of the new law's operation, the Government obtained 110 convictions, and 393 in its second year. For these and similarly revealing figures on enforcement of the 1918 law, see the ANNUAL REPORTS OF THE DEPARTMENT OF AGRICULTURE: For 1918, at 274 (1919); for 1919, at 490-91 (1920); for 1920, at 599-600 (1921). There are minor discrepancies between the Department of Agriculture's statistics and those found in the *Reports of the Attorney General* for these years. I have used Agriculture's figures because they are more detailed. For figures on the 1913 law, see note 32 *supra*. Interestingly, about the time prosecutions under the 1918 law were beginning and the law was being upheld in the lower courts, the Supreme Court in May 1919 sidestepped a final opportunity to rule on the earlier 1913 act. When a South Dakota defendant raised the 1913 law as a bar to state prosecution for violation of state game laws, the State argued, *inter alia*, that the federal law was unconstitutional. The Court, per Justice Brandeis, upheld the defendant's state conviction by finding no conflict between the state and federal acts. *Carey v. South Dakota*, 250 U.S. 118 (1919).



without remarking that the 1918 Act would have been unconstitutional without its treaty base.<sup>90</sup> Missouri then appealed to the Supreme Court and was joined in its attack on the 1918 law by the State of Kansas as *amicus curiae*. The Association for the Protection of the Adirondacks filed an *amicus* brief supporting the legislation.<sup>91</sup>

The Missouri and Kansas briefs anticipated a major criticism of the eventual decision. If an enactment which is otherwise unconstitutional becomes constitutional when passed pursuant to a treaty, the states argued, then for all practical purposes the Constitution can be amended without resort to the formal amendment process.<sup>92</sup> Accordingly, to uphold the Migratory Bird Treaty Act would set the stage for the President and Senate, acting with the assistance of some obliging foreign power (at one point Missouri mentioned Turkey),<sup>93</sup> to invade all internal state affairs, regulate child labor, cede state territory, alter modes of elections, and even force the introduction of opium.<sup>94</sup> Missouri warned that “[w]hen the power of the states over their purely internal affairs is destroyed, the system of government devised by the Constitution is destroyed.”<sup>95</sup>

Maintaining that treaties must be subordinate to the Constitution,<sup>96</sup> both states rejected the notion that the Supremacy Clause freed treaties from the need to conform to the Constitution. The clause admittedly spoke not of treaties made pursuant to the Constitution, but of “[t]reaties made, or which shall be made, under the Authority of the United States.” The two states explained, however, that this phrasing derived only from the necessity in 1787 to validate preexisting treaties.<sup>97</sup> Included in the resulting limitations on treaties were the reservations incorporated in the Tenth

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<sup>90</sup> 258 Fed. 479 (W.D. Mo. 1919). Although conceding that the Migratory Bird Treaty Act of 1918 would have been unconstitutional in the absence of the 1916 treaty, *id.* at 481, and recognizing that treaties inconsistent with the Constitution were invalid, *id.* at 482–83, the judge found that the treaty violated no constitutional provisions and involved a matter of mutual interest between nations. 258 Fed. at 483–85.

<sup>91</sup> 252 U.S. at 430.

<sup>92</sup> Brief for Appellant, esp. at 41–42, 63–73; Brief for Kansas at 29–37; *cf. id.* at 25–29, 37–71.

<sup>93</sup> Brief for Appellant at 63.

<sup>94</sup> Brief for Appellant at 63, 73; Brief for Kansas at 28–29.

<sup>95</sup> Brief for Appellant at 64.

<sup>96</sup> *Id.* at 43–59, 78–86; Brief for Kansas at 37–77.

<sup>97</sup> Brief for Appellant at 83–84; Brief for Kansas at 31–32.

Amendment.<sup>98</sup> One of the powers thereby reserved to the states, in both their trusteeship and police capacities, was the regulation of game.<sup>99</sup>

Like the opinions in the favorable decisions below, the Government in its brief on behalf of Holland found the Tenth Amendment "wholly irrelevant" where treaties were involved.<sup>100</sup> The power to make treaties had been expressly granted to federal authorities by the Constitution and hence was not reserved.<sup>101</sup> It agreed that treaties were subject to prohibitions found in the Constitution, but failed to enumerate those prohibitions and merely contended that no prohibition barred a treaty dealing with a subject of mutual interest and proper negotiation between nations.<sup>102</sup> Although conceding dual federalism characterized domestic federal-state relationships, the brief explained that "when we come to deal with national questions affecting the interests not only of our own country but of other countries as well, we confront a different situation."<sup>103</sup> This position, the Government noted,<sup>104</sup> was consistent with the Court's earlier ruling in *Geer*, which legitimated state regulation only "in so far as its exercise may not be incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution."<sup>105</sup>

The issue thus became whether bird protection was a proper subject of international negotiation. It would "not admit of doubt," argued the Government, that protection was "a matter of very great importance to both countries."<sup>106</sup> In fact, because the birds crossed international borders, such protection was only possible through a treaty.<sup>107</sup> To illustrate the importance of the birds, the brief included data on their economic value in preserving crops and forests from insects.<sup>108</sup>

<sup>98</sup> Brief for Appellant at 56-59; Brief for Kansas at 13, 40-45.

<sup>99</sup> Brief for Appellant at 30-44, 64-73; Brief for Kansas at 9-13, 57-59.

<sup>100</sup> Brief for Appellee at 18.

<sup>103</sup> *Id.* at 13-14.

<sup>101</sup> *Id.* at 8-14, 24-27.

<sup>104</sup> *Id.* at 30-31.

<sup>102</sup> *Id.* at 33-34, 36-41.

<sup>105</sup> 161 U.S. at 528, quoted *id.* at 31. Whether the Court in *Geer* specifically meant the exercise by the federal government of its treaty power is problematic, but in at least one more recent case, when it entered a similar reservation, the Court probably did specifically have in mind possible exercise of the treaty power. *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 562 (1916). See notes 69 and 70 *supra* and accompanying text.

<sup>106</sup> Brief for Appellee at 42.

<sup>107</sup> *Id.* at 42-43.

<sup>108</sup> *Id.* at 63-79 (Appendix B).

The Government also contended that the legislation of 1918 was valid even in the absence of a treaty.<sup>109</sup> However, it elaborated this point merely by including its earlier *Shauver* brief as an appendix,<sup>110</sup> which may suggest the Government suspected—and not without cause—that such an argument would likely have but marginal, if any, effect on the Court.<sup>111</sup> The Association for the Protection of the Adirondacks nevertheless gave the point greater emphasis, plus a new dimension. Perhaps recognizing that federal title to migratory birds was difficult, if not impossible, to establish, the Association massed a plethora of facts to demonstrate how birds were necessary to the preservation of national forests.<sup>112</sup> Federal bird regulation was therefore a necessary and proper means of regulating objects—that is, the forests—which were themselves undeniably federal property within the meaning of Art. IV, § 3.<sup>113</sup> Of course, this argument reinforced as well the Government's contention that the birds constituted a substantial national interest.

#### IV. JUSTICE HOLMES'S OPINION FOR THE COURT: AN EXPLICATION

The effort to put the federal government in the business of protecting migratory birds now squarely faced its final constitutional test. In outline, the Court's opinion, written by Justice Holmes, is simple enough. Quickly conceding Missouri's standing to sue,<sup>114</sup> Holmes narrowed the issue to "whether the treaty and statute are void as an interference with the rights reserved to the States."<sup>115</sup> He next explored possible tests for determining the constitutional validity of treaties and pursuant statutes, concluding that they must involve matters of national interest and must not contravene specific constitutional prohibitions.<sup>116</sup> Finally, he applied these tests to the challenged treaty and statute and held them con-

<sup>109</sup> *Id.* at 7–8.

<sup>110</sup> *Id.* at 47–62 (Appendix A).

<sup>111</sup> It should be recalled in this connection that the lower court in *Holland* had remarked that the 1918 law would have been unconstitutional without its treaty base. Perhaps also contributing to the Government's deemphasis of the non-treaty arguments was the Court's recent surprising and highly unexpected invalidation of the 1916 Child Labor Law in *Hammer v. Dagenhart*. On the surprised reactions to *Dagenhart*, see WOOD, *CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW* 169–70 (1968).

<sup>112</sup> See Brief for Association for the Protection of the Adirondacks *passim*.

<sup>113</sup> *Id.* at 11–28.

<sup>115</sup> *Id.* at 432.

<sup>114</sup> 252 U.S. at 431.

<sup>116</sup> *Id.* at 432–35.

stitutional.<sup>117</sup> Only Justices Van Devanter and Pitney dissented, and without opinion.<sup>118</sup> But to argue that the majority opinion is a model of clarity would be to fly in the face of a half-century of dispute over its meaning. A close reading reveals the complexities of Holmes's handiwork.

Holmes focused his analysis on the treaty and not on the statute implementing it, for "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."<sup>119</sup> Such a focus gave a nearly irrebuttable presumption of constitutionality to the challenged legislation. To be sure, the Tenth Amendment reserved to the states or the people those powers not delegated to the United States, but the Constitution expressly delegated the power to make treaties and declared that "treaties made under the authority of the United States, along with the Constitution and laws of the United States, made in pursuance thereof," were the supreme law of the land.<sup>120</sup> With such a foundation, the decision no longer turned on whether the substantive power to be exercised by a treaty and pursuant statute had itself been delegated. "The language of the Constitution as to the supremacy of treaties being general," Holmes declared, "the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed."<sup>121</sup>

He thereupon explored the possible limits to a valid treaty. "One such limit," he wrote, "is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do."<sup>122</sup> But whether or not the district courts had been correct in striking down the 1913 bird protection law as an invasion of the reserved powers of the states,<sup>123</sup> this limit ran afoul of the text of the Constitution by which "[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."<sup>124</sup> That textual distinction led Holmes into the comment probably most responsible for the later criticism of *Missouri v. Holland*: "It is open to question

<sup>117</sup> *Id.* at 434–35.

<sup>118</sup> *Id.* at 432.

<sup>121</sup> *Ibid.*

<sup>118</sup> *Id.* at 435.

<sup>120</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> See *id.* at 432–33. Holmes cited *Shauver* and *McCullagh*.

<sup>124</sup> 252 U.S. at 433.

whether the authority of the United States means more than the formal acts prescribed to make the convention."<sup>125</sup> By itself, this statement suggested that any treaty, when duly made, approved, and ratified, held status as supreme law, other constitutional provisions notwithstanding.

Holmes, however, had only raised a question. Although the question contained far-reaching implications, he promptly limited their reach by recognizing that limitations to the treaty power did exist.<sup>126</sup> Yet a distinction remained between treaties and legislation unaided by treaties, for the limitations to treaties "must be ascertained in a different way."<sup>127</sup> This, of course, was but a restatement of the view that while the federal government held no general power of legislation, it did hold a general treaty power. So Holmes to this point had rejected the argument that the alleged unconstitutionality of the Migratory Bird Act of 1913 doomed the 1918 act. He still faced the task of specifying the limits to the treaty power.

Perhaps taking his cue from the Government's argument, Holmes did not initially specify the outer limits of valid treaties, but instead offered, at least by implication, a threshold test which can be labeled the "national interest test." A constitutionally valid treaty, he implied, must deal with a national concern. His precise wording was this:<sup>128</sup>

It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.

But this formulation left open whether, in order to be appropriate objects for the treaty power, such matters of "sharpest exigency for the national well being"—that is, matters of national concern—need be susceptible only to actual international action for their solution. The passage can be read thus, or it can be read as defending the exercise of the treaty power for the primary purpose of

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<sup>125</sup> *Ibid.*

<sup>126</sup> "We do not mean to imply that there are no qualifications to the treaty-making power." *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> *Ibid.*

dealing with matters of national concern susceptible to domestic solution but which are constitutionally beyond the unaided legislative power of Congress.<sup>129</sup>

His next sentence hinted that Holmes had in mind the second of these alternatives. Referring to *Andrews v. Andrews*,<sup>130</sup> which he had just cited and quoted, he wrote: "What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act."<sup>131</sup> In other words, because "a power which must belong to and somewhere reside in every civilized government" *had* to exist somewhere in American government, a treaty followed by a statute could serve to clothe the national government with needed plenary power that the Constitution otherwise failed to grant. That he thought a requirement for actual international action was not a requisite to valid exercise of the treaty power follows also from Holmes's later affirmation that even if state action would suffice, this would not withdraw the subject of bird protection from the treaty power.<sup>132</sup>

If such was Holmes's intended meaning, it was arguably dictum. He not only concluded that in reality state action was insufficient; he seems to have accepted the Government's argument that national action by itself was similarly insufficient and thus a truly international effort was in fact required.<sup>133</sup> Accordingly, he had no need to decide whether a matter not requiring international action, and not within the federal government's delegated powers, might still be confided in it by a treaty with some willing foreign power.

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<sup>129</sup> For the view that the second alternative was Holmes's intended meaning, see, e.g., Nicholson, *The Federal Spending Power*, 9 TEMPLE L.Q. 3, 5 n.10 (1934).

<sup>130</sup> 188 U.S. 14 (1903). At issue there was whether a fraudulently obtained South Dakota divorce, which had not been challenged in South Dakota, must be recognized in Massachusetts pursuant to the Full Faith and Credit Clause of Art. IV, § 1. The Court, per Justice White, held that to require recognition would emasculate Massachusetts's control over an important area of internal police and thereby effectively destroy a power which must exist "in every civilized government." *Id.* at 32-33.

<sup>131</sup> 252 U.S. at 433.

<sup>132</sup> *Id.* at 435. Because Holmes denied that state incompetency was necessary in order to commit a subject to the treaty power, I believe that Professor Powell was mistaken in writing, in his critique of *Holland*, that "[t]he fact that the states are individually incompetent to deal with the subject matter seems to be regarded as important [in establishing the existence of a national interest for treaty purposes]." Powell, note 3 *supra*, at 12.

<sup>133</sup> 252 U.S. at 435.

In any event, to lay the basis for his eventual conclusion that the Migratory Bird Treaty concerned a matter of national interest, Holmes had to establish that the category "national interest" was not a fixed, unchanging one. (One can imagine him anticipating the objection that the founding fathers would hardly have thought bird protection a significant enough problem to warrant a treaty.)<sup>134</sup> He argued:<sup>135</sup>

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Besides conjuring up young Captain Holmes, thrice wounded in the Civil War, this language unambiguously displayed the Constitution as a flexible, dynamic instrument. It led, however, to a superficially more cryptic comment about the Tenth Amendment. "The only question," wrote Holmes, "is whether it [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment."<sup>136</sup> Finally there came the sentence relating Holmes's comment about an organic constitution to Missouri's Tenth Amendment claim: "We must consider what this country has become in deciding what that Amendment has reserved."<sup>137</sup>

These last comments—about "invisible radiation" and the need to consider what the country has become—were phrased and positioned so that taking them out of context is easy.<sup>138</sup> This has

<sup>134</sup> During debate on the Migratory Bird Treaty Bill, one of its congressional supporters had anticipated such an argument and had proceeded to counter it with an argument similar in many respects to the one developed by Holmes at this point in *Holland*. 56 CONG. REC. 7371 (Rep. Miller, 4 June 1918).

<sup>135</sup> 252 U.S. at 433.

<sup>136</sup> *Id.* at 433–34.

<sup>137</sup> *Id.* at 434.

<sup>138</sup> Although Holmes had sufficient warrant to refer to the Tenth Amendment's "invisible radiation," the phrase greatly disturbed those who saw the Amendment as a most concrete and highly visible bulwark of the federal system, and this probably contributed to their focusing narrowly on the phrase as derogatory of the Amendment itself. See, e.g., Appellant's Petition for Rehearing at 9. Moreover, Holmes's remark that "[w]e must consider what this country has become in deciding what that amendment has reserved" was separated by most of a fairly long paragraph from the main body of his related comments about matters involving an expansible national interest, with which *treaties* could deal. 252 U.S. at 433–34.

further contributed to the controversy surrounding the opinion, because, out of context, the remarks surely conflict with the restrictive gloss Justice Brewer had put on the Tenth Amendment in *Kansas v. Colorado*, a gloss comparable to that put on it by the opponents of the earlier bird protection act of 1913, by Missouri in the instant case, and so recently by the Court in *Hammer v. Dagenhart*. Whether Holmes, a dissenter in *Dagenhart*<sup>139</sup> and a master of the English language, deliberately phrased and positioned the remarks to achieve this appearance of conflict makes for intriguing speculation. Yet they must not be read as part of a general gloss on the Amendment. Indeed, had the 1920 Court so understood them, one suspects Holmes's opinion would have failed to command the 7 to 2 majority it did. They instead must be read more narrowly as part of an explication of the role of the Amendment in treaty adjudication.

For Holmes was still exploring the limits to valid treaties. Particularly, he was ruling on Missouri's Tenth Amendment claim. With this in mind, a sorting out of Holmes's thoughts reveals the following line of reasoning: Matters of national interest, and certainly those requiring international action for their solution, fall within the treaty power, a power which is expressly granted to the federal government, expressly denied to the states, and thus clearly excepted from the Tenth Amendment's restrictions. Because the category of national interest has grown with the nation, the permissible scope of treaties has likewise grown. This being the case, the growth of the nation has correspondingly and (to adapt Holmes's usage) visibly narrowed the reach of the Tenth Amendment, so far as treaties were involved. To be sure, a reversal of roles occurred in Holmes's argument. Contemporaries more commonly regarded the Tenth Amendment as the restricting, rather than the restricted, constitutional element. Nonetheless, since the Amendment did not visibly restrict treaties, all that remained was to inquire whether it had "some invisible radiation" which did so. Holmes gave no direct answer;<sup>140</sup> to ask the question was to answer it in the negative.

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<sup>139</sup> 247 U.S. at 277. In conjunction with his remarks about the Tenth Amendment in *Holland*, consider, for example, this remark from Holmes's *Dagenhart* dissent: "I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce *and other constitutional powers* could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State." 247 U.S. at 278. (Emphasis added.)

<sup>140</sup> 252 U.S. at 434.



Holmes, however, did not stop at that point. Instead, in the midst of his remarks on the organic nature of the Constitution and on the inapplicability of the Tenth Amendment, he observed that the Bird Treaty “d[id] not contravene any prohibitory words to be found in the Constitution.”<sup>141</sup> He thereby implied another and more general test for assessing the constitutional validity of treaties. This, which can be labeled the “no-conflict test,” was perhaps required to square Holmes’s organic conception of the Constitution with the more general American notion of constitutionalism in the sense of limited government. For if national interest were an expansible concept, then, by itself, the national interest test gave the treaty power a potentially unlimited reach. But the no-conflict test set outer limits beyond which not even the growth of national interest could carry the treaty power. In that sense, the no-conflict test was superior to the national interest test.

At the same time, the no-conflict test bolstered the national interest test within those limits, and this was its immediate role within the *Holland* opinion. Even if the states were competent to preserve migratory birds, said Holmes, “the question is [still] whether the United States is forbidden to act.”<sup>142</sup> National interest in birds would not cease to afford constitutional support to the Migratory Bird Treaty even in the face of a showing that the states severally could protect the creatures. National interest became irrelevant only if there was a specific provision barring federal action. Thus emerges the fundamental importance of Holmes’s review of the Tenth Amendment’s relation to treaty adjudication. It aimed at determining whether the Amendment contained restrictions which would set limits on treaties under the no-conflict test.

#### V. JUSTICE HOLMES’S OPINION: AN EVALUATION

Justice Holmes eschewed defending the Migratory Bird Treaty Act of 1918 as a proper regulation of interstate commerce or federal property. This is understandable. While such non-treaty arguments remained available despite their rejection by lower courts in *Shauver* and related cases and while they may have been persuasive to Holmes himself, it is doubtful that they could have carried a majority of the Supreme Court in 1920. Proponents of the 1913 bird protection law had themselves been uncertain of its

<sup>141</sup> *Id.* at 433.

<sup>142</sup> *Id.* at 435.

constitutionality, but saw a treaty as offering a firm foundation. Moreover, the differing responses of the lower courts to the two bird protection laws is instructive. The treaty did make a difference in judicial outcome. In *Holland* itself, the district court had agreed that the 1918 law would have been unconstitutional were it not enacted pursuant to a treaty. Finally, in its brief before the Supreme Court in *Holland*, the Government relegated its non-treaty arguments to an appendix, indicating what several well-placed and interested contemporaries thought would impress the Court.

In operative terms, Holmes approached the testing of treaties far differently than most of his judicial contemporaries would have approached the testing of ordinary legislation. The minimal requirement for any federal action was an express or implied constitutional authorization, and there were also relevant prohibitions to be accommodated. With legislation, both these considerations imposed real limitations. However, because the Constitution gave blanket authorization to the President to make treaties with the advice and consent of the Senate, the only substantial restriction on treaties for Holmes was that they not violate constitutional prohibitions. To be sure, they had to involve matters of national interest, but "national interest" was hardly a narrow category, particularly with Holmes's organic view of the Constitution.

Although Holmes did not review it in his opinion, there was solid judicial precedent for testing treaties by the no-conflict and national interest requirements, even in 1920.<sup>143</sup> The best-known

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<sup>143</sup> See, e.g., *New Orleans v. United States*, 10 Peters 662, 736 (1836); *Doe v. Braden*, 16 How. 635, 657 (1853); *The Cherokee Tobacco*, 11 Wall. 616, 620-21 (1870); *Holden v. Joy*, 17 Wall. 211, 242 (1872); *Geofroy v. Riggs*, 133 U.S. 258, 266-67 (1890); *Downes v. Bidwell*, 182 U.S. 244, 294 (1901) (White, Shiras, and McKenna, JJ., concurring); *id.* at 370 (Fuller, C.J., Harlan, Brewer, and Peckham, JJ., dissenting). For non-judicial comment affirming this point during the two decades preceding, and also roughly contemporaneous with, the *Holland* case, see 1 BUTLER, *THE TREATY-MAKING POWER OF THE UNITED STATES* 349-64 (1902); 1 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* 493-504 (1910); CORWIN, *NATIONAL SUPREMACY: TREATY POWER VS. STATE POWER* (1913); TUCKER, *LIMITATIONS ON THE TREATY-MAKING POWER* 332-40 (1915); SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 141-62 (1919); Wright, *The Constitutionality of Treaties*, 13 AM. J. INT'L L. 242, 252-60 (1919); Boyd, note 3 *supra*, at 414-21. Of these commentators, it is especially noteworthy that even Butler, who sought to document the sweeping scope of the treaty power, recognized limitations to it largely comparable to those stated by Justice Field in *Geofroy v. Riggs*, *supra*, as quoted in text *infra*, at note 144. He nevertheless found discussion of such limitations "necessarily academic" and "practically of little value." 1 BUTLER, *supra*, at 363. For background to the specific issue presented in *Holland*, the best account is CORWIN, *supra*. For recent commentary on the constitutional status of treaties, see HENKIN 137-56, 383-404 nn.33-92.

formulation came from Justice Field, speaking for the Court in *Geofroy v. Riggs*.<sup>144</sup>

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 of its departments, and those arising from the nature of the government itself and of 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. . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

As Professor Henkin has observed, this statement and those like it "assert[ed] the fullness of [the treaty] power rather than restrictions upon it."<sup>145</sup> With the exception of the restriction, probably outmoded by 1920,<sup>146</sup> on ceding state territory, Field specified no well-defined limitations other than the requirement that a treaty not "authorize what the Constitution forbids." And as regards the supremacy of treaties over state constitutions and laws, this had received judicial recognition as early as 1796 in *Ware v. Hylton*,<sup>147</sup> as well as in subsequent cases.<sup>148</sup> (In this instance, Holmes did review the precedents.)<sup>149</sup> In short, Holmes's opinion hardly turned on novel judicial doctrine. Indeed, his approach had been anticipated by the lower court decisions favorable to the 1918 law,<sup>150</sup> and even by that guardian of the Tenth Amendment, Justice Brewer, some eleven years earlier.<sup>151</sup>

<sup>144</sup> 133 U.S. 258, 267 (1890) (dictum).

<sup>145</sup> HENKIN 141.

<sup>146</sup> CORWIN, note 143 *supra*, at 133-34, 190-91.

<sup>147</sup> 3 Dallas 199 (1796).

<sup>148</sup> See cases cited 252 U.S. at 434-35. In 1913, Professor Corwin was able to find only one federal case after the early 1880s in which a state's so-called reserved powers were recognized, and then only in dictum, as a limitation on the federal treaty power. That case was *Cantini v. Tillman*, 54 Fed. 969, 976 (C.C.D. S.C. 1893). See CORWIN, note 143 *supra*, at 195.

<sup>149</sup> 252 U.S. at 434-35.

<sup>150</sup> See cases cited in notes 80 and 87 *supra*.

<sup>151</sup> *Keller v. United States*, 213 U.S. 138, 147 (1909). Here the Court, per Justice Brewer, held unconstitutional, as beyond the delegated powers of the federal govern-

To go beyond an examination of judicial precedent and ask whether *Holland* accorded with the understandings of those who framed and ratified the Constitution might seem to impose an unfair standard. On quick reading, Holmes appeared to rule out recourse to the original understanding when he advanced his organic view of the Constitution. In fact, however, he only said that *Holland* should "be considered . . . *not merely* in [light] of what was said a hundred years ago."<sup>152</sup> In context, he was further arguing not that constitutional tests changed over time, but that the concept of national interest, which was central to one of his constitutional tests, was expansible; and this, he implied at least, was realized by those who called the nation into life.<sup>153</sup> So an examination of the original understanding of treaties is in order.

Consistent with the "plain words" of the document, the consensus in 1787–88 of Federalists and Antifederalists alike was that the Constitution made treaties supreme over state constitutions and laws.<sup>154</sup> In fact, one of the complaints which led to the Federal Convention of 1787 was the inability of the Confederation govern-

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ment, a statutory provision that prohibited the willful and knowing harboring of a female alien within three years of her arrival in the United States for purposes of prostitution. In reviewing possible grounds for upholding the provision, Justice Brewer commented: "By § 2 of Article II of the Constitution, power is given to the President, by and with the advice and consent of the Senate, to make treaties, but there is no suggestion in the record or in the briefs of a treaty with the King of Hungary [of whom the harbored alien was a subject] under which this legislation can be supported." 213 U.S. at 147. Brewer, it should be noted, had written the opinion of the Court in *Kansas v. Colorado*, 206 U.S. 46 (1907), on which opponents of both the 1913 and the 1918 bird protection laws placed so much reliance. Hence the implication of his remark in *Keller* seems particularly significant in illustrating the unexceptional nature of the doctrine Holmes advanced in *Holland*.

<sup>152</sup> 252 U.S. at 433. (Emphasis added.)

<sup>153</sup> *Ibid.*

<sup>154</sup> THE FEDERALIST, No. 64, at 436–37 (Cooke ed., 1961) (John Jay); [James Iredell], *Answers to Mr. Mason's Objections to the New Constitution* . . . , in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES . . . 1787–1788, at 355–56 (Ford ed., 1888) [hereinafter cited as FORD, PAMPHLETS], [David Ramsey], *An Address to the Freemen of South Carolina* . . . , *id.* at 376; *Letters of Luther Martin, IV*, in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES . . . 1787–1788, at 361 (Ford ed., 1892); [Samuel Bryan(?)], *Letters of Centinel*, in PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 580, 582, 610–11 (McMaster & Stone eds., 1888); *Petition of Group Chaired by Blair M'Clenachan to Pennsylvania General Assembly*, *id.* at 564; *Reasons of Dissent of the Minority*, *id.* at 476; 2 ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION . . . IN 1787 . . . , at 506–07 (2d ed. 1888) (James Wilson, Pennsylvania) [hereinafter cited as ELLIOT]; 3 *id.* at 500–14 (various speakers, Virginia). See generally 1 BUTLER, note 143 *supra*, at 341–92; Corwin, note 143 *supra*, at 66–74; CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 53–63 (2d ed. 1916); COWLES, TREATIES AND CONSTITUTIONAL LAW: PROPERTY INTERFERENCES AND DUE PROCESS OF LAW 18–49 (1941).

ment to obtain state compliance with treaty provisions.<sup>155</sup> And *Ware v. Hylton*, besides providing strictly judicial precedent, further evidences the understanding of those close in time to the period of framing and ratification.<sup>156</sup>

The more difficult task is to determine whether Holmes's view of the relation of treaties to the federal Constitution is historically correct. Here, in questioning whether treaties need meet any test other than being properly made, approved, and ratified, Holmes at least superficially ignored the conventional explanation for the wording of the Supremacy Clause. That explanation stresses that the clause was dictated not by a desire on the founders' part to place treaties above the Constitution but by the need to ensure continued validity for treaties made prior to the adoption of the Constitution.<sup>157</sup> Professor Henkin opines that "[p]erhaps Holmes did not know of that suggestion; perhaps he did not accept it."<sup>158</sup> The first possibility is doubtful. Missouri and Kansas advanced the explanation in their briefs before the Court. It is more likely that Holmes either did not accept the explanation or, accepting it, still concluded that treaties were to be held to tests different in practice from those applied to ordinary laws. Which of these alternatives is correct cannot be determined conclusively. The second, is consistent with the history that Holmes probably knew well,<sup>159</sup>

<sup>155</sup> E.g., Farrand, *The Federal Constitution and the Defects of the Confederation*, 2 AM. POL. SCI. REV. 532, 535-36 (1908); see also MARKS, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* 3-15, 151-52 (1973).

<sup>156</sup> "[T]he contemporaries of the constitution have claims to our deference . . . because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people, when it was adopted by them. . . ." *Ogden v. Saunders*, 12 Wheat. 212, 290 (1827) (Johnson, J., separate opinion). The same consideration is pertinent to the following discussion of the ratification debates of 1787-88, the Judiciary Act of 1789, and the Jay Treaty debate.

<sup>157</sup> See, e.g., *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) (Black, J., plurality opinion); RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 66-67 (2d ed. 1829); CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 421 n.17 (1957); SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT* 135-36 (1963); citations in note 97 *supra*. Cf. 1 BUTLER, note 143 *supra*, at 321; CORWIN, note 143 *supra*, at 64; CRANDALL, note 154 *supra*, at 50.

<sup>158</sup> HENKIN, 138.

<sup>159</sup> Consider for example, what Holmes must have reviewed in editing Kent's *Commentaries*, which include this footnote: "The treaty-making power is necessarily and obviously subordinate to the fundamental laws and constitution of the state, and it cannot change the form of the government, or annihilate its constitutional powers." KENT, *COMMENTARIES ON AMERICAN LAW* \*287 n.(a) (Holmes ed. 1873) (quoting Joseph Story). See generally HOWE, *JUSTICE OLIVER WENDELL HOLMES: THE PROVING*

and with the fact that he ultimately did offer constitutional tests for treaties, whereas rejection of the conventional explanation could tend to endow treaties with an extra-constitutional status.

The direct evidence from 1787 in support of the conventional explanation for the wording regarding treaties in the Supremacy Clause, and thus in support of the subordination of treaties to the Constitution, is slim. The phrase "authority of the United States" appeared early in the Philadelphia Convention, on 31 May 1787.<sup>160</sup> Finally, on 23 August, the Convention approved the Supremacy Clause with wording that "all Treaties made under the authority of the U.S. shall be the supreme law."<sup>161</sup> On 25 August, the clause "was reconsidered and after the words 'all treaties made,' were inserted . . . the words 'or which shall be made [.]' This insertion was meant to obviate all doubt concerning the force of treaties preexisting, by making the words 'all treaties made' to refer to them, as the words inserted would refer to future treaties."<sup>162</sup> This passage from Madison's notes hints—but only hints—that "the authority of the United States" was designed to encompass both past and future treaties. It also reveals that the phrase itself did not have a precise enough intension to satisfy the delegates. Aside from this, there is no direct evidence one way or another in the extant records of the Convention to illuminate the status of treaties vis-à-vis the Constitution. What seems likely is that, had the delegates firmly sensed the wording of the Supremacy Clause freed treaties from all constitutional controls save the requirements regarding their

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YEARS, 1870–1822, at 12–23 (1963). Holmes was familiar, too, with the Judiciary Act of 1789, which in § 25, contained implications for the status of treaties under the Constitution.

<sup>160</sup> See 1 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 47 (rev. ed. 1937) (amendment by Benjamin Franklin, 31 May 1787, to the "Virginia Plan") [hereinafter cited as FARRAND]. The phrase also appeared in the provision of the initial draft of the "New Jersey Plan" which evolved into the Supremacy Clause of the finished Constitution. See *id.* at 245 (15 June 1787). The history of the phrase is conveniently summarized in Myers, *Treaty and Law under the Constitution*, 26 DEPT. STATE BULL. 371, 373–76 (1952).

<sup>161</sup> 2 FARRAND, 389.

<sup>162</sup> *Id.* at 417. Professor Henkin correctly observes that the element of the Supremacy Clause which is crucial to its encompassing preexisting treaties is the phrase "made, or which shall be made." HENKIN, 138, 385 n.38. If, however, he means to suggest that retention of "the Authority of the United States" was therefore designed to accomplish other purposes (his text is not entirely clear about his position), I would disagree. Clarity, rather than a studied avoidance of all redundancy, emerges as the object in reformulating the clause on 25 August. See 2 FARRAND, 417; McLaughlin, *The Scope of the Treaty Power in the United States*, 1, 42 MINN. L. REV. 709, 730–31 (1958).

making and approval, then someone would have commented how the clause transgressed American notions of limited government.

Somewhat better evidence comes from the state ratification contests in 1787–88. Here, admittedly, the main concern was the impact treaties would have on state constitutions and laws. As already noted, Federalists and Antifederalists agreed that, consistent with the plain wording of the document, the clause did in fact establish the supremacy of treaties over state constitutions and laws.<sup>163</sup> Even the Antifederalist Federal Farmer, who observed that “[i]t is not said that these treaties shall be made in pursuance of the constitution—nor are there any constitutional bounds set to those who shall make them,”<sup>164</sup> most feared their impact on state law. In context, in fact, the “constitutional bounds” he was concerned with are the bounds necessary to preserve state constitutions and bills of rights. Still, the Federal Farmer’s comment gives an inkling that he saw treaties as paramount to the United States Constitution.<sup>165</sup> The same suggestion emerges from an amendment proposed in Pennsylvania that “neither shall any treaties be valid which are in contradiction to the Constitution of the United States.”<sup>166</sup> But the hint is again weak. The amendment may have reflected anxiety that treaties would have an extra-constitutional status, or it may simply have reflected the common Antifederalist desire to clarify the Constitution.

Running counter to such fears, and presumably better indicators of the Constitution’s design, are several statements by Federalists in the Virginia ratifying convention, where the most extensive debate on treaties occurred. Responding to charges from Patrick Henry, the Federalists pointed primarily to the political check on treaties which the two-thirds rule in the Senate provided.<sup>167</sup> Three

<sup>163</sup> See citations in note 154 *supra*. For an example, apropos *Holland*, of what I believe to be an incorrect reading of the Antifederalists’ concerns respecting treaties and the Supremacy Clause (that is, that they were fearful the Supremacy Clause made treaties supreme over the *federal* Constitution), see Deutsch, *Treaty-Making Clause: A Decision for the People of America*, 37 A.B.A.J. 659, 662 (1951).

<sup>164</sup> *Letters from the Federal Farmer to the Republican* in FORD PAMPHLETS, at 312. The “Federal Farmer,” formerly thought to have been Richard Henry Lee, now appears unidentifiable. See Wood, *The Authorship of the Letters from the Federal Farmer*, 31 WM. & MARY Q. 299 (3d ser. 1974).

<sup>165</sup> See FORD PAMPHLETS, at 312–13. Cf. 4 ELLIOT, 215 (William Lancaster, North Carolina).

<sup>166</sup> PENNSYLVANIA AND THE FEDERAL CONSTITUTION, note 154 *supra*, at 463.

<sup>167</sup> 3 ELLIOT, 499–516. The issue also received less focused attention throughout the Virginia convention.

Federalists went further, however. James Madison denied the treaty power carried the authority to dismember the nation.<sup>168</sup> He also argued that "exercise of the power must be consistent with the object of the delegation," which, in the case of treaties, was "the regulation of intercourse with foreign nations, and is external."<sup>169</sup> Citing the provision of Article IV that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state," Governor Edmund Randolph concurred that the power carried no potential of dismemberment.<sup>170</sup> Moreover, the President and Senate, being subordinate to the Constitution whose creatures they were, could not by treaty alter the functions of the various departments of government.<sup>171</sup> The most restrictive reading came from George Nicholas, who interpreted the requirement that treaties be under "authority of the United States" as meaning "no treaty . . . shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers."<sup>172</sup>

Those Virginia Federalists who discussed the issue thus perceived constitutional limits to treaties beyond the minimal requirement that they be properly made. That they failed to enumerate these limits in detail is not surprising. The problem which set the context for the Virginia debate was the narrow one of the threatened closing of the Mississippi River,<sup>173</sup> which explains the special concern about dismemberment of the nation. Furthermore, in the absence of a well-developed notion that the courts would exercise the power of constitutional review,<sup>174</sup> the question of well-defined limitations, such as might be applied by courts, was unlikely to arise. And, as Madison indicated, future developments would influ-

<sup>168</sup> *Id.* at 500, 514.

<sup>170</sup> *Id.* at 504.

<sup>172</sup> *Id.* at 507.

<sup>169</sup> *Id.* at 514.

<sup>171</sup> *Ibid.*

<sup>173</sup> See e.g., *id.* at 500-02; MARKS, note 155 *supra*, at 197-98; Warren, *The Mississippi River and the Treaty Clause of the Constitution*, 2 GEO. WASH. L. REV. 271, 296-98 (1934); see also Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 613-60 (1974).

<sup>174</sup> Although debate continues over the original understanding of judicial review, Professor Levy has aptly summed up the situation: "The precedents [as of 1787-88] tend not to show that the courts could pass on the constitutionality of the general powers of the legislatures." Levy, *Judicial Review, History, and Democracy: An Introduction*, in JUDICIAL REVIEW AND THE SUPREME COURT 1, 11 (1967). Hence, whatever germs of judicial review were present in the Constitution and in American constitutional thought at this time, I think it safe to conclude that the concept was not sufficiently developed so as to force contemporaries to face comprehensively the question of how courts would test treaties.



ence what objects might come within the scope of the treaty power.<sup>175</sup> In short, the occasion did not demand close attention to specific limitations. What does emerge, however, is (1) the view that treaties would be restricted to foreign objects (but with recognition that this was an expansive category), and (2) the implication, arising in various ways, that treaties could not infringe constitutional guarantees and prohibitions.

Consistent with these comments from the Virginia convention, the Judiciary Act of 1789 also hints that Americans originally concluded that treaties would be subject to constitutional tests. In its crucial § 25, the act provided for appeals to the Supreme Court by writ of error when the highest court of a state had questioned the validity of a treaty.<sup>176</sup> This, unfortunately, indicates nothing about what specific tests the framers of the act thought might be applied to treaties.

The fullest indication of early American conclusions about the constitutional status of treaties comes from a largely neglected aspect of the Jay Treaty debate in the House of Representatives in March and April of 1796.<sup>177</sup> The immediate issue in the debate was whether the House might, consistent with the Constitution's treaty provisions, pass independent judgment on the merits of a treaty in the course of appropriating funds needed to implement it, and thus whether the House could call on the President to provide papers relating to the negotiation of the treaty. (This is the aspect of the debate which has attracted the main attention of constitutional scholars.)<sup>178</sup> Nonetheless, the constitutional status of treaties also received comment, for the Federalists conceded that the House could pass independent judgment on treaties, but in only two instances: (1) where the treaty was, on its face, patently contrary to the nation's interests (in which case impeachment of the Presi-

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<sup>175</sup> 3 ELLIOT, 514–15.

<sup>176</sup> 1 STAT. 73, 85–87, § 25 (1789).

<sup>177</sup> The only study I have found which gives extended attention to the debate's implications for the early understanding regarding constitutional limitations on treaties, as opposed to its implications for the House's role in the treaty process, is BYRD, *TREATIES AND EXECUTIVE AGREEMENTS IN THE UNITED STATES* 35–59 (1960). My conclusions from the debate largely parallel Byrd's. The subject is also briefly discussed in McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* 260–61 (1935).

<sup>178</sup> See, e.g., CORWIN, note 157 *supra*, at 182; HENKIN, 161–62; SCHLESINGER, *THE IMPERIAL PRESIDENCY* 16–17 (1973); BERGER, *EXECUTIVE PRIVILEGE A CONSTITUTIONAL MYTH* 171–79 (1974).

dent was a proper recourse), and (2) where it was contrary to the Constitution.<sup>179</sup>

Of interest here is the latter concession, although like the Judiciary Act of 1789 it does not by itself reveal what tests the Federalists were willing to apply to treaties. Abstractly, they had a range of options. They may only have been conceding that a treaty must be properly made and approved. At the other extreme, they may have been admitting the Republican contention that at least without implementing legislation, a treaty could not infringe on the legislative power shared by the House of Representatives.<sup>180</sup>

While most Federalists did not carefully elaborate what they conceived would constitute an unconstitutional treaty, they clearly rejected the Republican position, but stopped short of simply requiring proper form. The common assumption was given voice by Theophilus Bradbury of Massachusetts, who, after remarking that "no laws inconsistent with that [the Constitution] can be passed, either by the Treaty or Legislative power," said that "the only *other* checks" on the treaty power of the President were the requirement for Senate approval and the possibility of impeachment.<sup>181</sup> So the requirement that a treaty be properly made and approved was in addition to the requirement that it be consistent with the Constitution.

Two other Federalists were more specific. Republican James Madison had charged that the Federalist position would allow treaties to contravene specific prohibitions placed on Congress in the body of the Constitution and in the Bill of Rights.<sup>182</sup> James Hillhouse of Connecticut denied the accusation, commenting that "it is a sound rule of construction, that what is forbidden to be done by all branches of the government conjointly, cannot be done by one or more of them separately."<sup>183</sup> Daniel Buck of Vermont added detail:<sup>184</sup>

<sup>179</sup> For Federalist statements developing various aspects of this position, see 5 ANNALS, cols. 426-27, 430-35, 438-39, 462, 530-32, 551, 593-94, 609-10, 621, 660-62, 671, 684-703, 712, 715-16, 989, 1016, 1160, 1204 (1849) (7 March-27 April 1796). (There are two editions of the *Annals*; all citations herein are to the edition which carries the running head "History of Congress" on *each* page.)

<sup>180</sup> See, e.g., *id.*, cols. 493-94 (Madison, 10 March 1796), 738-43 (Gallatin, 24 March 1796).

<sup>181</sup> *Id.*, col. 551 (14 March 1796) (Emphasis added.)

<sup>182</sup> *Id.*, col. 491 (10 March 1796).

<sup>183</sup> *Id.*, col. 671 (22 March 1796).

<sup>184</sup> *Id.*, cols. 715-16 (24 March 1796).

Is it not agreed by all, that if a Treaty violates the Constitution, it is void in itself? Does not the Constitution particularly point out how the Legislature shall be formed; what shall be the qualifications of its members, and how they shall be elected? Does it not point out, with the same precision, how each other department of Government shall be constituted and organized; and does it not mark out the powers and limits of each? Does it not guaranty to each State its republican form of Government; and is not the right of altering or creating anew the Constitution reserved to the People? Look to the Constitution, and it will be found that the PRESIDENT, Senate, and this House, cannot, with all their combined powers, interfere with the personal security, personal liberty, or private property of the people, unless in raising taxes, and the mode in which this is to be done is directed by the Constitution.

Significantly, Republican William Giles of Virginia had already admitted the Federalists were not contending for an unlimited treaty power, but were qualifying it to the extent that "it is not to be supreme over the head of the Constitution."<sup>185</sup>

Besides agreeing that treaties must not contravene specific prohibitions of the Constitution, Federalists accepted another limit. James Hillhouse put it that a treaty must relate "to objects within the province of the Treaty-making power, a power which is not unlimited. The objects upon which it can operate are understood and well defined." "A treaty," he said, "is a compact entered into by two independent nations, for mutual advantage."<sup>186</sup> The same position was advanced by Theodore Sedgwick of Massachusetts. Of all those Federalists who spoke in the debate, Sedgwick was probably the most extreme advocate of a broad treaty power. For instance, while not actually contradicting his fellows on the point, he did not clearly admit that treaties could not contravene the Constitution.<sup>187</sup> But even he proposed a limited subject matter for treaties when he stated:<sup>188</sup>

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<sup>185</sup> *Id.*, col. 506 (10 March 1796). He added: "[B]ut in every other respect they contend that it shall be unlimited, supreme, undefined." In context, this referred to the Federalist claim that treaties might properly involve the usual objects of international negotiation and that the House had no authority to pass further judgment on their merits after Senate approval had been given. *Id.*, cols. 505-07.

<sup>186</sup> *Id.*, cols. 660, 662 (22 March 1796).

<sup>187</sup> *Id.*, cols. 514-30 (11 March 1796).

<sup>188</sup> *Id.*, col. 516.

The power of treating between independent nations might be classed under the following heads: 1. To compose and adjust differences whether to terminate or to prevent war. 2. To form contracts for mutual security or defence; or to make Treaties, offensive or defensive. 3. To regulate an intercourse for mutual benefit, or to form Treaties of Commerce.

What emerges, then, from the Jay Treaty debate is a consensus. However they differed about the propriety of the House's calling on the President for papers and about the need to engage the House when treaties dealt with subjects ordinarily falling within the legislative realm, Federalists and Republicans saw treaties as subordinate, at minimum, to the Constitution. They agreed that treaties could not contravene its prohibitions and guarantees and could properly encompass only those objects of mutual interest between nations.<sup>189</sup>

Consistent with this consensus, and apropos *Missouri v. Holland*, the Jay Treaty debate also provides the earliest explicit instance I have found of what has become the common explanation of the wording of the Supremacy Clause. Several Federalists explained that the phrase "authority of the United States" was simply a convenient means of encompassing preexisting treaties made by the Continental and Confederation Congresses as well as those made under the Constitution by the President with the approval of the Senate.<sup>190</sup>

The difficulty with Holmes's opinion therefore consists not in its reliance on the treaty power, nor, in the main, in the judicial and historical warrants underlying the tests he proposed for treaties.

<sup>189</sup> Accordingly, it is not surprising to find that a 1796 statute regulating the conveyance of Indian lands used the wording "treaty, or convention, entered into pursuant to the constitution." 1 STAT. 469, 472. (Emphasis added.) On the other hand, the Louisiana Purchase Treaty gave France and Spain commercial advantages in ports of Louisiana which they did not enjoy in other ports of the United States, and the treaty correspondingly made these Louisiana ports more attractive than others to French and Spanish shipping. The advantages continued for a period after Louisiana obtained statehood, in apparent violation of the clause of Art. 1, § 9, that "[n]o Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over that of another." Farrand, *The Commercial Privileges of the Treaty of 1803*, 7 AM. HIST. REV. 494 (1902).

<sup>190</sup> 5 ANNALS, cols. 548 n.† (Bradbury, 14 March 1796), 669 (Hillhouse, 22 March 1796), 721 (Goodrich, 24 March 1796). Cf. *id.*, col. 558 (Page, 15 March 1796). One Republican made explicit the more restrictive reading that was implicit in many other Republican comments: that the "authority of the United States," under which treaties were to be made, comprised not only the Constitution, but also all existing laws. Hence a treaty contrary to existing law would be invalid. *Id.*, col. 578 (Brant, 15 March 1796). Cf. *id.*, cols. 592-93 (Findley, 16 March 1796).

Instead, the problem is this: Holmes raised the question whether there were any limits to treaties so as to hint that there were none, and he then buried his actual answer—that is, his proposed limitations—in passages which lacked precision and were far more striking for their general constitutional ideas and aphorisms. As a result, he practically encouraged misinterpretation of the Court's decision. Thus, at one extreme, citing and quoting *Missouri v. Holland*, a California judge commented in 1937 that “[u]nder the present state of the law it may be conceded that it is uncertain whether there is any limitation at all on the treaty-making power of the federal government.”<sup>191</sup> At the other, a congressman alleged in 1974 that the decision supported the proposition “that one . . . limit [to the treaty-making power] is that what an act of Congress could not do unaided, in derogation of the power of the Constitution, a treaty cannot do.”<sup>192</sup>

Now state judges and federal congressmen, while bound to uphold the Constitution, are not always the most astute commentators on it. Yet the intense controversy which raged over *Missouri v. Holland* in the 1950s, during the Bricker Amendment debate, reveals a similar picture. Not only congressmen, who might be accused of political perversity in the episode, but also legal scholars were able to read quite different meanings into the *Migratory Bird* opinion. And some thirty years earlier, even so highly regarded a constitutionalist as Thomas Reed Powell could say of the opinion, in evident disregard of certain of Holmes's comments, that “[i]ts hint that there may be no other test to be applied than whether the treaty has been duly concluded indicates that the court might hold that specific constitutional limitations in favor of individual liberty and property are not applicable to deprivations wrought by treaties.”<sup>193</sup> In fine, the opinion fits the pattern suggested by

<sup>191</sup> *Tokaji v. State Bd. of Equalization*, 20 Cal. App.2d 612, 617 (1937). See *United States v. Reid*, 73 F.2d 153, 155 (9th Cir. 1934). Quite inexplicably, the quoted statement from *Tokaji* was followed by a quotation from *Holland* which included Holmes's comment, “We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way.” 20 Cal. App.2d at 617.

<sup>192</sup> 120 CONG. REC. at S.465 (daily ed. 1974) (Sen. William L. Scott, 28 Jan. 1974, discussing the proposed American adherence to the Genocide Convention).

<sup>193</sup> Powell, *supra* note 3, at 13. Admittedly Professor Powell's next sentence read: “It would be going a step further to extend the same immunity to legislation enforcing treaties.” *Id.* But I fail to see that this addition substantially rectified his interpretation of the limits Holmes placed on treaties. If anything, it compounded the error by ignoring Holmes's evident willingness to judge treaties and legislation implementing them by the same standards. See text *supra*, at note 119.

Justice Frankfurter, surely an admirer of Holmes, when he wrote that Holmes "spoke for the Court, in most instances tersely and often cryptically."<sup>194</sup> Similarly, Justice Brandeis, Holmes's colleague on the bench, might have had *Holland* in mind in remarking that Holmes did not "sufficiently consider the need of others to understand."<sup>195</sup>

## VI. HOLLAND'S IMPACT AND LATTER-DAY SIGNIFICANCE

Did *Missouri v. Holland* have an impact on the law of the Constitution? At one level, obviously yes. In the 1930s and early 1940s, to be sure, courts evidenced a willingness to uphold conservation activities under the Commerce Clause, independent of a treaty base.<sup>196</sup> But in the doctrinal climate of the 1920s and early 1930s, the decision in *Holland* did facilitate federal conservation policy and thus influenced not only law but also America's natural environment. It established the validity of the 1918 Migratory Bird Treaty Act,<sup>197</sup> thereby "first plac[ing] this new policy [of bird protection] on a firm foundation."<sup>198</sup> It also contributed a constitutional base for such further conservation efforts as federal

<sup>194</sup> *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 523 (1958) (dissenting).

<sup>195</sup> Quoted in BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* 226-27 (1957). Regarding Holmes's cryptic style, see Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3, 9-10 & nn.26-33 (1962).

<sup>196</sup> *Bogle v. White*, 61 F.2d 930, 931 (5th Cir. 1932); *Cerritos Gun Club v. Hall*, 96 F.2d 620, 623-28 (9th Cir. 1938); *Bailey v. Holland*, 126 F.2d 317, 321 (4th Cir. 1942). Interestingly, the Court of Appeals in the *Cerritos Gun Club* case took issue with Holmes's contention in *Holland* that title to migratory birds was a dubious concept. Said the Court: "Naturalists and the public at large have learned much about the habits and actual and possible domestication of these migratory fowl since Mr. Justice Holmes wrote [his] opinion." 96 F.2d at 624. As items of property, the birds were thus articles in commerce. *Id.* at 623-27. But cf. *Toomer v. Witsell*, 334 U.S. 385, 401 (1948); *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 421 (1948) (both using *Holland* to support contention that fish are not in the possession of anyone in the ordinary property sense); *Russo v. Reed*, 93 F. Supp. 554, 560 (D. Me. 1950); *Koop v. United States*, 296 F.2d 53, 59 (8th Cir. 1961) (both using *Holland* to support contention that state ownership of wildlife is doubtful).

<sup>197</sup> For cases citing *Holland* in this connection, see *Shouse v. Moore*, 11 F. Supp. 784, 785 (E.D. Ky. 1935); *Cerritos Gun Club v. Hall*, 21 F. Supp. 163, 165 (S.D. Cal. 1936), *aff'd* 96 F.2d 620 (9th Cir. 1938); *Cochrane v. United States*, 92 F.2d 623, 626-27 (7th Cir. 1937); *United States v. Reese*, 27 F. Supp. 833, 836 (W.D. Tenn. 1939); *Lansden v. Hart*, 180 F.2d 679, 683 (7th Cir. 1950); *Bishop v. United States*, 126 F. Supp. 449, 450-51 (Ct. Cl. 1954); *Converse v. United States*, 227 F.2d 749, 750 (6th Cir. 1955).

<sup>198</sup> *United States v. Otley*, 34 F. Supp. 182, 191 (D. Ore. 1940).

wildlife preserves, reforestation projects, and associated state land donations.<sup>199</sup>

At another level, the case's impact is more difficult to assess. Precisely because it accorded with judicial precedent as to the supremacy of treaties over state law, and because it recognized, however cryptically, the commonly accepted limits to treaties, it hardly staked out new ground. It nevertheless fulfilled the prophecy of one commentator ten years earlier "that the *obiter* doctrine that the reserved rights of the States may never be infringed upon by the treaty-making power will sooner or later be frankly repudiated by the Supreme Court."<sup>200</sup> Accordingly, it served as convenient precedent in later cases which drew into issue the supremacy of treaties or executive agreements over state law.<sup>201</sup> Meanwhile, it also bolstered dicta that treaties could not authorize what the Constitution forbade and must involve matters of national interest.<sup>202</sup> Finally, in 1957, Justice Black explained that "nothing in *Missouri v. Holland* . . . is contrary to the position taken here [that treaties must not contravene constitutional guarantees]. There the Court carefully noted that the treaty involved was not inconsistent with any specific provision of the Constitution."<sup>203</sup>

More specifically, Holmes's passage about an organic constitution that takes shape from, and grows with, the nation's history and needs<sup>204</sup> has proved eminently quotable and serviceable. In the

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<sup>199</sup> *United States v. 2,271.29 Acres*, 31 F.2d 617, 621 (W.D. Wis. 1928); *United States v. 546.03 Acres*, 22 F. Supp. 775, 777 (W.D. Pa. 1938); *In re United States*, 28 F. Supp. 758, 763-64 (W.D. N.Y. 1939); *Swan Lake Hunting Club v. United States*, 381 F.2d 238, 242 (5th Cir. 1967).

<sup>200</sup> 1 WILLOUGHBY, note 143 *supra*, at 503. Whether Willoughby himself thought *Holland* fulfilled his prediction is unclear, for he included the same statement at page 569 in his 1929 edition.

<sup>201</sup> *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931); *United States v. Belmont*, 301 U.S. 324, 331-32 (1937); *Amaya v. Stanolind Oil and Gas Co.*, 158 F.2d 554, 556 (5th Cir. 1947); *Power Authority of New York v. F.P.C.*, 247 F.2d 538, 545 (D.C. Cir. 1957) (Bastion, J., dissenting). *Cf.* *United States v. California*, 332 U.S. 19, 45 (1947) (Frankfurter, J., dissenting); *Sohappy v. Smith*, 302 F. Supp. 899, 912 (D. Ore. 1969).

<sup>202</sup> *Asakura v. Seattle*, 265 U.S. 332, 341 (1924); *Amaya v. Stanolind Oil and Gas Co.*, 158 F.2d 554, 556 (5th Cir. 1947); *Power Authority v. Federal Power Commission*, 247 F.2d 538, 542 (D.C. Cir. 1957); *Pierre v. Eastern Air Lines*, 152 F. Supp. 486, 488 (D.N.J. 1957).

<sup>203</sup> *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

<sup>204</sup> 252 U.S. at 433.

*Mortgage Moratorium Case*,<sup>205</sup> this comment, along with Chief Justice Marshall's in *McCulloch v. Maryland* about "a constitution intended to endure for ages to come,"<sup>206</sup> aided Chief Justice Hughes in demonstrating that "[i]t is no answer to say that this public need [for mortgage payment relief] was not apprehended a century ago, or to insist that what the provision of the Constitution [concerning the obligation of contracts] meant to the vision of that day it must mean to the vision of our time."<sup>207</sup> The same passage from Holmes's opinion has been enlisted to support broadened individual protection in the areas of denaturalization,<sup>208</sup> racial discrimination,<sup>209</sup> and malapportionment of voting districts.<sup>210</sup> But *Holland* also carries the contrary potential as illustrated by Justice Frankfurter's use of it in *Dennis*, to the end that the federal government possessed authority, commensurate with national needs, to protect national security.<sup>211</sup> And again emerging on the side of governmental authority over the individual, the case has received mention in lower

<sup>205</sup> *Home Building and Loan Assoc. v. Blaisdell*, 290 U.S. 398 (1934).

<sup>206</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819), quoted more extensively in 290 U.S. at 443.

<sup>207</sup> 290 U.S. at 443. For quotations, in turn, of Hughes's quoting Holmes, see, e.g., *Campbell v. Alleghany Corp.*, 75 F.2d 947, 955 (4th Cir. 1935) (upholding Federal Bankruptcy Act of 1934); *Gomillion v. Lightfoot*, 270 F.2d 594, 604 (5th Cir. 1959) (Brown, J., dissenting, and contending that a gerrymander had occurred, contrary to the spirit of the Constitution). *Rev'd* 364 U.S. 339 (1960) (held to be violation of Fifteenth Amendment). Intriguingly, four years before the *Mortgage Moratorium* case, a federal district judge used the same passage from *Holland* that Hughes quoted, but for the opposite purpose of restricting governmental power. Simply because the Constitution specified an amendment process, the judge argued, its terms could not always be followed literally, for the spirit of the document had to be considered. See *United States v. Sprague*, 44 F.2d 967, 981 (D.N.J. 1930) (holding the Prohibition Amendment unconstitutional), *rev'd* in 282 U.S. 716 (1931).

<sup>208</sup> *Baumgartner v. United States*, 322 U.S. 665, 673 (1944).

<sup>209</sup> *Bell v. Maryland*, 378 U.S. 226, 316-16 (1964) (Goldberg, J., concurring).

<sup>210</sup> *Fortson v. Morris*, 385 U.S. 231, 247-48 (1966) (Fortas, J., dissenting).

<sup>211</sup> *Dennis v. United States*, 341 U.S. 494, 519-20 (1951) (Frankfurter, J., concurring). For other uses of *Holland* to support the proposition that where national action is required, the necessary power will likely be found to exist, see *United States v. American Bond & Mortgage Co.*, 31 F.2d 448, 454 (N.D. Ill. 1929); *In re United States*, 28 F. Supp. 758, 763-64 (W.D. N.Y. 1939). Cf. *Kentucky Whip and Collar Co. v. Illinois Central Railroad Co.*, 12 F. Supp. 37, 42 (W.D. Ky. 1935). Apropos the 1974 impeachment debate, a federal Court of Appeals judge, speaking off the bench, found *Holland* to support the notion that a President has considerable latitude in the exercise of his duties; hence for him to be impeached and convicted for exercising such discretion might provide grounds for Supreme Court review of his conviction. Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435, 485-86 n.218 (1974).



court dicta that even absent other constitutional grounds, federal narcotic drug legislation could be upheld as a necessary and proper means of implementing various drug treaties to which the United States is a party.<sup>212</sup>

Still, Professors Chafee, Sutherland, and Henkin have argued persuasively that the Court's post-1937 acquiescence in federal programs based on the taxation and commerce powers and on the Fourteenth Amendment has deprived *Missouri v. Holland* of much of its earlier significance. Legislation which in the 1920s and early 1930s might only have passed judicial scrutiny were it pursuant to a treaty now could easily stand alone.<sup>213</sup> The obvious example involves regulation of child labor.<sup>214</sup> After the Court twice struck down child labor laws, in 1918 and 1922,<sup>215</sup> some proponents of regulation toyed with the treaty route, seeing no other alternative save the uncertain course of constitutional amendment.<sup>216</sup> (An amendment was sent to the states but received only twenty-eight ratifications.)<sup>217</sup> Then, in 1941, the Court upheld the New Deal's Fair Labor Standards Act, which included child labor provisions, on grounds that Congress had absolute control over commerce.<sup>218</sup> But, somewhat paradoxically, the *Migratory Bird Case* may itself

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<sup>212</sup> *United States v. Eramdjian*, 155 F. Supp. 914, 920 (S.D. Cal. 1957); *United States v. Contrades*, 196 F. Supp. 803, 812 (D. Hawaii 1961); *United States v. Rodriguez-Camacho*, 488 F.2d 1220, 1222 (9th Cir. 1972); *United States v. LaFroschia*, 354 F. Supp. 1338, 1341 (S.D. N.Y. 1973); *United States v. Maiden*, 355 F. Supp. 743, 749 n.5 (D. Conn. 1973). The suggestion appeared earlier, but without reference to *Holland*, in *Stutz v. Bureau of Narcotics*, 56 F. Supp. 810 (N.D. Cal. 1944).

<sup>213</sup> Chafee, *Federal and State Powers under the U.N. Covenant on Human Rights*, 1951 Wis. L. REV. 389, 400-24; Sutherland *Restricting the Treaty Power*, in A.A.L.S. SELECTED ESSAYS ON CONSTITUTIONAL LAW, 1938-1962, at 160, 180 (1963); Henkin, note 79 *supra*, at 913-22; HENKIN, 147.

<sup>214</sup> Wood, note 111 *supra*, *passim*. The drive to enact child labor legislation and to obtain its validation by the Supreme Court contains striking similarities to the movement for protection of migratory birds. The striking dissimilarity, of course, is the ultimate fate of the two efforts in the pre-1937 Court: the birds fared far better than the children, for reasons quite understandable within the doctrinal climate of the day.

<sup>215</sup> *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

<sup>216</sup> See Boyd, note 3 *supra*, at 429-31; Jackson, *The Tenth Amendment versus the Treaty-Making Power*, 14 VA. L. REV. 331, 332 (1928) (attacking the validity of a child labor treaty); Note, 22 MICH. L. REV. 457 (1924) (defending the validity of a child labor treaty).

<sup>217</sup> CONGRESSIONAL QUARTERLY, GUIDE TO THE CONGRESS OF THE UNITED STATES 287 (1971).

<sup>218</sup> *United States v. Darby*, 312 U.S. 100 (1941).

have aided the judicial transformation which diminished its own importance, for Holmes's opinion arguably bolstered governmental activism.

*Holland's* faded significance did not prevent it from figuring in an attempted constitutional change which, had it succeeded, would have had consequences far beyond anything Holmes and his brethren in 1920 could have imagined they were setting afoot.<sup>219</sup> In 1952, Senator John Bricker introduced an Amendment to the Constitution to limit the treaty power.<sup>220</sup> As reported out of committee in June 1953, the Amendment provided, among other things, that "[a] treaty shall become effective as internal law only through legislation which would be valid in the absence of a treaty."<sup>221</sup>

Although omitted from the version that came within one vote of Senate passage in February 1954,<sup>222</sup> this so-called "which" clause is a clue to part of the reasoning underlying the proposed Amendment. Bricker and others wished to eliminate what they saw as the Court-sanctioned route of amending the Constitution through treaty-making.<sup>223</sup> Highlighting the danger which the Amendment's backers thought needed remedying, Bricker characteristically told

<sup>219</sup> See, e.g., Sutherland, note 213 *supra*, at 173-80.

<sup>220</sup> 98 CONG. REC. 899, 907-08 (1952). For background to the Amendment and the political dimensions of the fight over it, see Sutherland, note 213 *supra*, at 160-73; Schubert, *Politics and the Constitution: The Bricker Amendment during 1953*, 16 J. POL. 257 (1954); EISENHOWER, *THE WHITE HOUSE YEARS: MANDATE FOR CHANGE, 1953-1956*, at 340-48 (Signet ed. 1965); PARMET, *EISENHOWER AND THE AMERICAN CRUSADES* 305-12 (1972).

<sup>221</sup> S. REP. NO. 412, 83d Cong., 1st Sess. 1 (1953). Between 1952 and 1957, the Amendment appeared in several versions. These are reprinted and compared in *Hearings on S.J. Res. 3 before a Subcommittee of the Senate Committee on the Judiciary*, 85th Cong., 1st Sess., foldout facing 373 (1958).

<sup>222</sup> 100 CONG. REC. 2358, 2374-75 (1954).

<sup>223</sup> "This decision [*Holland*] in effect, and really for the first time, opened the way for amending the Constitution of the United States by and through a treaty, because it proclaims that an otherwise unconstitutional law may become constitutional when, as, and if the President negotiates a treaty on the subject and obtains approval of the Senate." Holman, *Treaty Law Making: A Blank Check for Writing a New Constitution*, 36 A.B.A.J. 707, 709 (1950). Holman, a former president of the American Bar Association, was one of the chief instigators of the Bricker Amendment and had been advocating such action for several years. See PARMET, note 220 *supra*, at 306-07. Three years later, another supporter explained: "The 'which clause' . . . would restrict implementing legislation to legislation valid in the absence of a treaty and is imperative because the case of *Missouri v. Holland* . . . made it perfectly clear that the Federal Government may, so long as that decision stands, invade and destroy all reserved powers of the states, arrogate to itself fields of legislative competence within the area of reserved powers where none existed without treaty, and regulate the purely internal concerns of the states, and the affairs of the citizens through the use of the treaty making power." Hatch, *The Treaty-Making Power: "An Extraordinary Power Liable to Abuse"*, 39 A.B.A.J. 808, 809 (1953).

the Senate in January 1954 that Holmes had "suggested that 'under the authority of the United States' might mean 'nothing more than the formal acts required to make the convention.'" He further charged *Holland* had "repudiated" the early dictum "that the treaty power does not extend 'so far as to authorize that the Constitution forbids.'" <sup>224</sup> "One of the premises of that case [*Holland*]," he declared a week later, "is that Congress has unlimited power to legislate in implementation of a treaty."<sup>225</sup> Other supporters of the Amendment elaborated the need to correct the doctrines they alleged Holmes had advanced in legitimating a treaty made, as one article charged, "for the express purpose of conferring on [the federal government] legislative competence in domestic fields where it had none before."<sup>226</sup> For good reason an early student of the Bricker amendment debate labeled *Holland* "the *bête noire* of the [Amendment's] proponents."<sup>227</sup> Opponents correspondingly stressed that *Holland* did not place treaties and consequent legislation above the Constitution.<sup>228</sup>

<sup>224</sup> 100 CONG. REC. 942-43 (28 Jan. 1954). For virtually identical comments from Bricker, see Bricker & Webb, *Treaty Law vs. Domestic Constitutional Law*, 29 NOTRE DAME L. 529, 534-35 (1954).

<sup>225</sup> 100 CONG. REC. 1333 (4 Feb. 1954). This remark would of course have been accurate had Bricker said "in implementation of a *valid* treaty."

<sup>226</sup> Hatch, Finch & Ober, *The Treaty Power and the Constitution: The Case for Amendment*, 40 A.B.A.J. 207, 254 (1954). See Deutsch, *The Need for a Treaty Amendment: A Restatement and a Reply*, 38 A.B.A.J. 735 (1952); Finch, *The Need to Restrain the Treaty-Making Power of the United States within Constitutional Limits*, 48 AM. J. INT'L L. 57, 66-67 (1954); *Hearings on S.J. Res. 130 before a Subcommittee of the Senate Committee on the Judiciary*, 82d Cong., 2d Sess. 36-37 (1952) (statement of Alfred J. Schweppe, Chairman, Committee on Peace and Law through the United Nations of the American Bar Association) [hereinafter cited as *1952 Bricker Hearings*]; *Hearings on S.J. Res. 1 & 43 before a Subcommittee of the Senate Committee on the Judiciary*, 83d Cong., 1st Sess. 817 (1953) (testimony of Clarence Manion, former Dean of College of Law, University of Notre Dame) [hereinafter cited as *1953 Bricker Hearings*]; *Hearings on S.J. Res. 1 before a Subcommittee of the Senate Committee on the Judiciary*, 84th Cong., 1st Sess. 36-37 (1955) (comments of Sen. Dirksen) [hereinafter cited as *1955 Bricker Hearings*]; S. REP. NO. 412, 83d Cong., 1st Sess. *supra* note 224, at 4, 6-7, 14, 16; 100 CONG. REC. 853-54, 1061-62, 1309-10, 1786-87, 2121, 2351 (comments of Sens. Butler of Md., Dirksen, Ferguson, Jenner, and Daniel, 27 Jan., 1, 4, 16, 23, 26 Feb. 1954). By 1955, however, at least some proponents of the Amendment were examining *Holland* more carefully. The majority committee report of that year stated: "Insofar as that decision relates to the first [that is, central] section of this amendment . . . the concern is not with the conclusion reached but rather with the expressions used in the course of the opinion." S. REP. NO. 1716, 84th Cong., 2d Sess. 3 (1956).

<sup>227</sup> Schubert, note 220 *supra*, at 286 n.121.

<sup>228</sup> E.g., Chafee, *Stop Being Terrified of Treaties: Stop Being Scared of the Constitution*, 38 A.B.A.J. 731, 732 (1952); Chafee, *Amending the Constitution to Cripple Treaties*, 12 LA. L. REV. 345, 354-56 (1952); Whitton & Fowler, *Bricker Amendment—Fallacies and Dangers*, 48 AM. J. INT'L L. 23, 30-40 (1954); Mathews, *The Constitutional Power*

The Bricker Amendment did not pass Congress, let alone enter the Constitution. At most, then, *Missouri v. Holland* served only to trigger and help fuel a national debate, although even in this regard its role needs qualifying. While the debate in legal periodicals and in the Senate contained frequent references to the case,<sup>229</sup> *Holland*'s importance pales amidst the complexities of historical causation. Reaction to several World War II agreements, alleged threats posed by the United Nations Human Rights and Genocide Conventions, and the frustrating "police action" in Korea all encouraged the movement for some kind of limitation on treaties and executive agreements.<sup>230</sup> In the absence of Holmes's holding that the Tenth Amendment was no bar to exercise of the treaty power and his easily misinterpreted remarks about other limitations on treaties, the legal and senatorial proponents of an Amendment might have lacked some of their ammunition. Also, the Amendment might have taken a different initial shape, perhaps without the "which" clause.<sup>231</sup> But such possibilities concerning an unsuccessful Amend-

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of the President to Conclude International Agreements, 64 YALE L.J. 345, 377 (1955); Corwin, *Memorandum on Senate Joint Resolution 1 as Reported by the Judiciary Committee, January 11, 1954*, printed in 100 CONG. REC. 859 (1954); 1952 Bricker Hearings 78-80 (testimony of Theodore Pearson of Bar Association of the City of New York); *id.* at 413 (memorandum submitted by Solicitor General Philip B. Perlman); 1953 Bricker Hearings 905-06, 908, 910-12, 924-25 (statement of Attorney General Herbert Brownell); 1955 Bricker Hearings 272-73 (statement of Bethuel M. Webster, former president of the Bar Association of the City of New York); S. REP. NO. 412, note 221 *supra*, at 47 (minority views); S. REP. NO. 1716, note 226 *supra*, at 26-27 (individual views of Sen. Kefauver); 100 CONG. REC. 658-59, 665, 1069-70, 2058-59 (Sen. Wiley, 22 Jan., 1, 19 Feb. 1954). See McLaughlin, *The Scope of the Treaty Power in the United States*, II, 43 MINN. L. REV. 651, 704-08 (1959).

<sup>229</sup> See, e.g., citations in notes 223-28 *supra*. In his memoirs, President Eisenhower also recognized the role of *Holland* in the Bricker Amendment controversy. See EISENHOWER, note 220 *supra*, at 340-41.

<sup>230</sup> See, e.g., Deutsch, note 163 *supra*, at 660-62; 98 CONG. REC. 907-14 (1952) (comments of Sen. Bricker and others on introduction of Bricker Amendment, 7 Feb. 1952); 100 *id.* at 934-37 (speech of Sen. McCarren, 28 Jan. 1954); Lofgren, *Mr. Truman's War: A Debate and Its Aftermath*, 31 REV. POL. 223, 236 (1969); PARMET, note 220 *supra*, at 308-09; THEOHARIS, *THE YALTA MYTHS: AN ISSUE IN U.S. POLITICS, 1945-1955* 105-06 & n.1, 131-33, 180-85 (1970).

<sup>231</sup> For example, Alfred J. Schweppe, chairman of the American Bar Association's Committee on Peace and Law through the United Nations, testified in 1953 that the "which" clause "[was] intended specifically to limit the doctrine of *Missouri v. Holland*." 1953 Bricker Amendment Hearings 56. Similarly, the Majority Report on the Amendment in June 1953 indicated that *Holland* made necessary the "which" clause. S. REP. NO. 412, note 221 *supra*, at 16. But the Report also indicated that the clause was "intended to correct the broad language in *U.S. v. Curtiss-Wright Export Corporation* [299 U.S. 304 (1936)]." *Id.* If the Amendment had passed Congress and then the states by narrow margins, it would be easier to assign a crucial influence to *Holland*.

ment hardly suggest that *Holland* substantially influenced the actual course of events.

## VII. CONCLUSION

This much is unexceptionable: The Supreme Court's doctrinal commitments, *circa* 1910–20, doubtless dictated that if the Court were to uphold federal migratory bird legislation, it would have to do so on grounds other than the federal government's authority over interstate commerce or federal property. Advocates of bird protection suspected this, perhaps as early as 1911. A treaty with Great Britain was subsequently concluded in 1916 and provided a base for new legislation in 1918 to replace the constitutionally questionable Migratory Bird Act of 1913. The strategy of the bird lovers, as well as that of the government in declining to push a test of the 1913 act, bore fruit in 1920. Justice Holmes, speaking for the Court, upheld the 1918 law as a necessary and proper means of implementing the Migratory Bird Treaty. The treaty itself, he argued, was a proper exercise of the treaty power, involving a subject of national concern and contravening no constitutional prohibitions.

Less certain are the reasons for the controversy surrounding *Missouri v. Holland*. Three considerations, however, seem important to its origins. First, the decision validated federal legislation which would arguably have failed had the Court ruled on it in its original form, devoid of a treaty base. This gave superficial plausibility to contention that for practical purposes the Court had held a treaty could amend the Constitution. Second, the result in *Holland* was put into bolder relief by virtue of the narrow play the "old" Court normally allowed to federal activity. Third, Holmes's opinion, while resting on grounds which were well established and historically warranted, failed to explicate those grounds fully and carefully and failed as well to clarify sufficiently the limits to the treaty power.

If these considerations were in fact crucial, then because of his cryptic remarks Holmes must bear some responsibility for the ensuing debate. Yet it should be remembered that he spoke with the approval of the Court. In a broader sense, the Court, but not so much Holmes, bears responsibility for helping to create the doctrinal climate which both forced reliance on the treaty power and put into sharp relief the result accomplished through that reliance.

What remains unexplained is why the controversy should have persisted into the 1950s, by which time the Court's commitments had markedly changed. Viewed objectively, the case now lacked importance as a potential source of domestic federal authority; the post-1937 Court had discerned new bases for expanded federal activity. In the new climate of concern over foreign involvement and enlarged federal authority, politics of course figured prominently in the renewed debate, with Holmes's passages making good targets. In part, too, the proponents of the Bricker Amendment may simply have overlooked how the Court's post-1937 flexibility rendered *Holland* largely redundant.<sup>232</sup> But something deeper may have been at work. The "Golden Age" of the judiciary for *Holland*'s critics in the 1950s was undoubtedly the period from the 1890s to 1937. Yet it was during this period that the Court had decided *Holland*. So, to speculate, reversal of the decision through constitutional amendment promised not only protection from "internationalist" schemes in the post-World War II era; it also promised to close off an avenue of encroachment on state authority and individual liberty which even a future right-headed Court might otherwise again follow.

A similar congeries of fears, frustrations, and yearnings could conceivably revive national interest in the case.<sup>233</sup> More likely, *Missouri v. Holland* will remain interred in the casebooks and history texts—and properly so. What is unlikely is that it will find crucial new applications in the development of the American Constitution.

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<sup>232</sup> HENKIN, 147.

<sup>233</sup> Cf. former Senator Bricker's plea in 1974: "[T]his matter [that is, the danger of treaties and executive agreements overriding the Constitution] is just as important now as it was twenty years ago. It is time for the public interest to be aroused—if the Constitution and the rights it guarantees are to be preserved." Bricker, *Bricker Amendment Still Apt Today*, Los Angeles Times, 10 Feb. 1974, § VI, p. 4, col. 5.