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THE JUDICIAL PROCESS OF TREATY INTERPRETATION
IN THE UNITED STATES SUPREME COURT

John Selden Tennant*

WHEN the Federal Union was substituted for the loose confederation which had preceded it, one of the most impelling reasons for the change was the need for a united international front, which could only be achieved by further concentration in a central government of the power to deal with foreign nations. A necessary part of this general plan was the treaty-making power, taken from the states by Article I, Section 10 of the Constitution, and lodged in the President and the Senate by Article II, Section II.

Experience had shown, however, that if it were left to the states to execute treaties, the grant of authority to negotiate would be largely nullified by inertia or active opposition, and that, in consequence, the foreign relations of the United States would be in constant turmoil. To prevent this undesirable situation, a striking innovation was introduced into our frame of government. By Article VI it was declared, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." By Article III, Section 2, it was further declared, "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority."

A consideration of the nature of the responsibility thus placed upon the courts, and particularly upon the United States Supreme Court as final arbiter, and the manner in which that Court, through the process of treaty interpretation, has discharged it, is the purpose of this paper.

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1 See The Federalist, particularly nos. 3 and 42.

2 See The Federalist, particularly no. 22. For a brief résumé of the situation prior to and under the Articles of Confederation, see Crandall, Treaties, 2d ed., chs. 2 and 3 (1916).
THE NATURE OF THE PROBLEM

The first questions presented in the Supreme Court in consequence of the quoted provisions of the Constitution were as to the extent of this grant of power to the judiciary. In other words, what effect did the Constitution give to treaty provisions \textit{per se} when in conflict with the rules of municipal law covering fields into which treaties might intrude? Most of these questions have been answered by the Court, and the decisions may be summarized briefly.

A treaty which deals with, or which in any way may affect, private rights is effective as a rule of law unless by its terms, or by necessary implication from them, its effect is made dependent upon enforcing legislation. It necessarily follows that the resulting rule of law overrules all unwritten law. The language of the Constitution leaves no room for doubt that such treaty-law is superior to and overrules all state law, whenever enacted, in conflict with it. As the Constitution apparently places treaties and acts of Congress on an equal plane, the Court has held that both are of equal efficacy and that the last in point of time prevails.

No case has ever presented the question of a treaty in conflict with the Constitution, but numerous dicta have conceded the possibility of such conflict and have suggested that a treaty which was clearly in contravention of the Constitution would not be given effect by the Court.

The result of the constitutional grant, thus interpreted, is to transfer to the courts, and particularly to the Supreme Court, the problems of treaty-enforcement. These problems are primarily political in their nature, and in most countries devolve upon the executive or legisla-
While this proposition is probably too clear to be controverted, it may be fortified by a quotation from Oppenheim:

"It must be specially observed that the binding force of a treaty concerns the contracting States only and not their subjects. If treaties contain stipulations with regard to rights and duties of the subjects of the contracting States, their courts, officials and the like, these States must take such steps as are necessary, according to their Municipal Law, to make these stipulations binding upon their subjects, courts, officials, and the like."

This general rule, as well as our departure from it, was recognized by the Supreme Court, speaking through Chief Justice Marshall in the early case of *Foster v. Neilson*.

It will be obvious that the enforcement of treaties within a nation, involving as it does the integration of a rule derived from international sources into an already complete body of national or municipal law, must entail decisions on matters of policy, since conflicting influ-
ences will often be present. The most important consideration, of course, to any body empowered to execute a treaty, is the duty to keep faith with the other contracting nation. If the power is in the legislature, that body will be impelled by this consideration to enact liberal laws which will be certain to carry out the obligations assumed by the state; if in the courts, judges will be constrained to give liberal application to the language of the treaty. This aspect was well expressed by Mr. Justice Story, in referring to "the interpretation of a treaty, which we are bound to observe with the most scrupulous good faith, and which our government could not violate without disgrace, and which this court could not disregard without betraying its duty." 11

On the other hand, a factor which may often influence the treaty-enforcing agency is a regard for national jurisprudence—the pre-existing structure of law, principles of justice, or internal policy. This factor may lead a legislature, if it be the agency concerned, to refuse to enact enforcing legislation, or to repeal laws originally designed to enforce a treaty; or a court, more limited in the means available, may attain a similar result, in a lesser degree, through narrow interpretation.

As has been pointed out, in our system of government, these questions in large measure devolve upon the Supreme Court. 12 The remainder of this paper will be devoted to showing the manner in which these two aspects of treaty-enforcement, the international, and the national, 13 have been manifested in the processes of treaty-interpretation.

THE INTERNATIONAL ASPECT—THE DOCTRINE OF UBERRIMA FIDES

Unquestionably, the duty of upholding the plighted faith of the United States has been the foremost consideration in the Supreme Court, and has been reflected in the language of the opinions of the

11 The Amiable Isabella, 6 Wheat. (U. S.) 168 (1821).
12 Certain exceptions to this statement should be noted. The treaty-making power retains the power to terminate treaties. Charlton v. Kelly, 229 U. S. 447, 33 Sup. Ct. 945 (1912). Congress may nullify a treaty in so far as it operates in the field of national legislation, as was pointed out above. Furthermore, the treaty-making power determines some questions of policy. See Hayden, "The States' Rights Doctrine and the Treaty-Making Power," 2 Am. Hist. Rev. 566 (1916). However, treaties are usually framed in such general language that their application to particular cases is not often determined necessarily by their language. As most of the cases which will be discussed clearly illustrate this point, we need not elaborate here.
13 The distinctions, international and national, are adopted only as a matter of convenience. Their use is not intended to suggest that the writer believes International Law, as such, to have any compelling force in a national court.
Court on many occasions. A few quotations will serve to indicate the general approach to questions of treaty interpretation induced by this aspect. A treaty, said Mr. Justice Brown in a leading case, "should be interpreted in a spirit of uberrima fides, and in a manner to carry out its manifest purpose." 14 Continuing, he quoted from the Commentaries of Chancellor Kent, "Treaties of every kind are to receive a fair and liberal interpretation according to the intention of the contracting parties, and are to be kept with the most scrupulous good faith." 15 In another case Mr. Justice Swayne announced the doctrine that "Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. Such is the settled rule in this court." 16

The full force of this doctrine has most clearly appeared when no important reason for restricting the words of the treaty was present. In Tucker v. Alexandroff, 17 such a case was presented to the Court. A treaty with Russia provided for the assistance of local authorities in securing the arrest and return of deserters from "ships of war and merchant vessels." Alexandroff, a conscript in the Russian Naval Service, was sent to this country as part of a detail to man a cruiser under construction for his government in Philadelphia. After the ship was launched, but before it had been completed or accepted by the Russian government, and before the crew had been placed aboard it, Alexandroff deserted and went to New York. Having been arrested at the request of the Russian consul, he petitioned for a writ of habeas corpus. The case was ultimately carried to the Supreme Court, where the question was whether, under the terms of the treaty, the petitioner was a deserter from a ship of war.

15 I Kent, Commentaries 174 (1826).
17 "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."
It was argued on his behalf that the cruiser could not properly be considered a ship of war until completed, nor a Russian ship until accepted by that government; and that, in any event, Alexandroff was not a deserter from the ship, but merely from the naval service, since he had never set foot on the vessel, nor signed the ship's articles or roll. The Court swept away these objections, holding that the case clearly came within the expressed purpose of the treaty, and therefore that good faith required a liberal interpretation of the language used in order to reach the result contemplated by the agreement.

In the case of *Hauenstein v. Lynham*, a treaty between the United States and Switzerland gave citizens of each country the right to inherit real estate in the other, to hold it if the local laws permitted, and otherwise to sell the property and withdraw the proceeds within such time as the local laws permitted. Claimants, citizens of Switzerland, were the heirs of a Swiss resident of Virginia who died there owning real property within the state. The laws of Virginia applicable to the case permitted the sale of the property only within the time prescribed by the treaty. The escheator claimed that since no specific time was mentioned in the compact with Switzerland the claimants were not entitled to the property at all and that it reverted to the state. His position was upheld in the Virginia courts. In giving the opinion of the Supreme Court reversing this holding, Mr. Justice Swayne refused assent to this logical but illiberal view. Referring to an earlier treaty with Switzerland in which a definite three-year limit was prescribed, he argued that the later agreement could not have been intended to leave the right granted at the mercy of the states to concede or refuse, but must have contemplated that some time would be allowed; and if the local law set no time, the intention of the treaty was to allow a reasonable time. This interpretation was placed upon the principle, in the language which has been previously quoted, that a construction of a treaty liberal to rights claimed is always preferable to a restrictive one.

A similar treaty with France was the basis of a claim which came before the Court in *Geofroy v. Riggs*. The treaty granted to French

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18 100 U. S. 483 (1879), involving a treaty with Switzerland. 11 Stat. 587 (1850).
19 9 Stat. 902 (1847).
21 133 U. S. 258, 10 Sup. Ct. 295 (1889), involving a treaty with France. 10 Stat. 992 (1853).
citizens in "all the states of the union," where the laws permitted aliens to hold real property, certain additional rights including that of inheriting such property. As the property in dispute lay in the District of Columbia, the question was whether this territorial division was included in the word "states" as used in the treaty. Although the Court had held federal territories and districts not within the term "states" in many other cases, Mr. Justice Field pointed out that to follow that rule in this case would place the government of the United States in the very embarrassing position of having granted concessions in the states, where its authority was limited, and refusing similar concessions in a political division where its control was absolute. Such a construction the Court felt to be incompatible with the rule of interpretation announced in Hauenstein v. Lynham, and accordingly it was held that "states" referred to all political communities within the sovereignty of the United States.

It will be noticed that in this case, while the liberal construction adopted by the Court resulted in a derogation of local law, it was avowedly the object of the treaty to change local rules in general in precisely this manner and the decision was a liberal extension merely of the territorial operation of the treaty, rather than of substantive rights granted by it.

Just as uberrima fides often requires a liberal view of rights granted by the United States, a restricted view of rights acquired by a treaty often results from an observance of "the most scrupulous good faith." In United States v. Rauscher, the problem was presented in this form. Rauscher was extradited from England for the offense of murder under a treaty with Great Britain and was tried and convicted in a United States circuit court in New York under an indictment charging him with cruel and unusual punishment, an offense not included within the treaty provisions. The question in the Supreme Court was whether the treaty prevented the trial of the accused for an offense other than that for which he had been extradited. It was argued on behalf of the prosecution that since the treaty contained no express limitation on the right of the demanding nation in this respect, the accused was liable, once within the jurisdiction, to be put on trial for any crime with which he was charged, just as though he had been arrested within the state.

In refusing assent to this argument and denying the propriety of

the proceeding below, the Court said that, while the stipulations of
the treaty primarily imposed obligations upon the asylum state, it
could not be understood that the "fugitive passes into the hands of the
country which charges him with the offense, free from all the positive
requirements and just implications of the treaty under which the trans­
fer of his person takes place." The Court then held that a fair inter­
pretation of the treaty imposed an obligation to keep within the limits
of the claim made upon application for extradition, and that an exercise
of the jurisdiction here claimed could not take place without "bad
faith to the country which permitted his extradition." The opinion
proceeded, "No such view of solemn public treaties between great
nations of the earth can be sustained by a tribunal called upon to give
judicial construction to them." 23

A somewhat similar situation existed in the case of Johnson v.
Browne. 24 A later extradition treaty with Great Britain expressly
prohibited the trial of a person extradited under the treaty for any
offense other than that for which he was surrendered, and in another
section prohibited trial or punishment for political offenses. Browne
was convicted of conspiracy to defraud the government, skipped bail
and was later found in Canada. The Canadian authorities having
refused extradition for this crime on the ground that it was not within
the treaty, the surrender of the fugitive was secured on another charge.
When brought to this country, Browne was immediately imprisoned
in accordance with his previous conviction and sentence.

Upon habeas corpus proceedings, counsel for the government
argued that the prohibition of the treaty was only as to trial for another
offense, not as to punishment under a previous conviction, and sup­
ported their argument by a comparison of the two portions of the
treaty outlined above. Admitting the absence of express language
in the treaty and agreeing that ordinarily the construction of separate
parts of a written instrument would follow the line of reasoning pro­
posed by counsel, the Court felt that usual rules were inapplicable to
the interpretation of a treaty. It was then held that the "manifest
scope and object" of the treaty was to prevent the action which had
been taken in this case and the discharge of the petitioner was ordered.

In this brief picture no attempt has been made to discuss all the
applications of the doctrine of uberrima fides. We have indicated

24 205 U. S. 309, 27 Sup. Ct. 539 (1907), involving a later treaty with Great
Britain. 26 Stat. 1508 (1889).
merely the leading cases in which the Court has given to treaty provisions an effect not clearly forced by the literal requirements of the language used and has justified the construction adopted on the ground that international good faith required it. The obligations of good faith have taken many forms and have been influential in a variety of situations, some of which may be seen in the cases cited in the note. 25

**THE NATIONAL ASPECT — LIMITATIONS ON THE DOCTRINE OF UBERRIMA FIDES**

Turning now to the second aspect of the problem, it should be noticed that in suggesting the limits which have been placed on the doctrine of *uberrima fides* the writer is not attempting to maintain the position that the Supreme Court has consciously or unconsciously contributed to any actual violation of treaty obligations. There have been many cases in which acts of Congress have been clearly contrary to the provisions of a treaty in force, and in such cases the decisions of the Court have denied rights previously granted by the treaty-making authorities. 26 But, as was pointed out earlier in this discussion, 27 the Constitution reserved to Congress the power to violate our international agreements by legislation abrogating the effect of treaties within the range of its legislative authority. When such a case is presented, the Court has no choice but to sustain the last pronouncement of the political department, although, whenever possible, the Court has construed subsequent enactments so as not to infringe upon the rule prescribed by the treaty. 28

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The problem in Indian Treaties is slightly different. The doctrine of Worcester v. Georgia, 6 Pet. (U. S.) 515 (1832), from which a passage was quoted in note 16, supra, has been followed in Kansas Indians, 5 Wall. (U. S.) 737 (1866); Winters v. United States, 207 U. S. 564, 28 Sup. Ct. 207 (1908); Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1 (1899); United States v. Payne, 264 U. S. 446, 44 Sup. Ct. 352 (1924); Minnesota v. Hitchcock, 185 U. S. 373, 22 Sup. Ct. 650 (1902).


27 Supra, p. 1017 and note 12.

28 Chew Heong v. United States, 112 U. S. 536, 5 Sup. Ct. 255 (1884); United
We are herein concerned, however, with cases where the Court, through its treaty-interpreting power, has limited the effect of treaty provisions out of regard for national considerations. To repeat, we are not attempting to place upon the conscience of the Court violations of international agreements in such situations; rather, our purpose is to show that, due to the generality and ambiguity of the language of treaties, it has often been possible for the Court to give heed to the demands of national jurisprudence in the interpretation of treaties without going contrary in any way to the unequivocal words of the compact, or even to a clearly manifested intention of the parties. Assuming the correctness of this view, it will be obvious that the effect of these countervailing considerations will be manifested less frequently in the language of the Court's opinions than in its actual practice. However, at least one dictum in which the Court verbally takes into account possible limitations on the doctrine of *uberrima fides* may be pointed out. In *Tucker v. Alexandroff*, discussed above, the following language appears in the majority opinion: "they [treaties] should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence."

(a) **Fundamental Principles and National Policy**

Where the construction of a treaty urged upon the Court would contravene established principles of law or justice, there has been evidenced an inclination to refuse such a construction for one more in keeping with the usual concepts of our jurisprudence. In the case of *Ubeda v. Zialcita*, an appeal from the Philippine Islands, the plaintiff sought to enjoin the use of a trademark alleged to infringe one registered by him under the Spanish law in force at the time of the cession to the United States. The lower courts had denied relief on the ground that plaintiff's trademark in turn imitated an earlier trademark of another competitor. Claiming that, regardless of this fact, the registration of his trademark gave him priority under Spanish law,
plaintiff appealed to the Supreme Court on the ground that his right was protected by article I 3 of the treaty with Spain which provided that, "The rights of property secured by copyrights and patents . . . shall continue to be respected." The Court held that this provision could not have been intended to protect a claim which was contrary to "common morality and fairness," and that the usual equitable doctrine of clean hands applied.32

Another case arising under the same treaty was Sanchez v. United States.33 The office of court solicitor in Porto Rico having been abolished by the United States authorities, plaintiff, a holder of such office, which was transferable in perpetuity, brought suit against the United States in the Court of Claims, contending that he had been deprived of a valuable property right, in contravention of the treaty of cession which provided that property or legal rights of private individuals were not to be impaired. When his claim was denied he appealed to the Supreme Court. That Court also refused relief, holding that the word "property" in the treaty must have been intended to refer to ordinary private property, not to "public or quasi-public stations, the function and duties of which it is the province of the government to regulate or control for the welfare of the people." "It is inconceivable," said Mr. Justice Harlan, "that the United States . . . intended to recognize . . . the salability of such positions in perpetuity, or to so restrict its sovereign authority that it could not, consistently with the treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions."34

The same general consideration may be seen in a slightly different aspect in a group of cases involving an interpretation of the most favored nation clauses of commercial treaties. The European view of the effect of such a clause was that whenever a concession was granted to a foreign nation a right to the same concession accrued to any nation to which the granting state had guaranteed the rights of the most favored nation. The American view, consistently maintained by the State Department, was in accord so far as concerned concessions freely made, but where concessions were given in exchange for reciprocal or other rights received, our government's position was that the most favored nation clauses in other treaties became operative, if at

all, only upon the offering and acceptance of the same consideration. 35

In Whitney v. Robertson 36 the problem came before the Court. A treaty with the Hawaiian Islands 37 provided that sugar and other articles, the produce of the Islands, might be imported into the United States free of duty; and certain manufactured articles exported from the United States were to be admitted into the Islands free of duty. The plaintiffs claimed that imports of sugar from Santo Domingo became entitled to this same exemption under a treaty with the Dominican Republic 38 stipulating for no higher duties on goods exported from one country to the other than was payable on similar articles imported from any other foreign nation. Since the language of the treaty was unconditional in form, the Court was unable to limit the effect of the grant by literal interpretation as it had done in the earlier case of Bartram v. Robertson, 39 where the American view had been expressly incorporated into the treaty relied upon. It was held, however, that the case was unchanged by the absence of specific limitations since the purpose and scope of the treaty was held to be only to prevent "unfair discrimination."

Two factors were probably decisive of the case. The construction insisted upon by the political department was doubtless of great weight. Furthermore, if the exemption became the right of Santo Domingo automatically, without reciprocal exemption of American products, any attempts on the part of the United States to secure such reciprocity would be likely to meet with failure and the treaty-making power would be restricted. The language of the Court's opinion reflected this reasoning, the conclusion of the discussion of the treaty question reading as follows: "It would require the clearest language to justify a conclusion that our government intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests." 40

The same two factors entered into the problem in Sullivan v.

36 124 U. S. 190, 8 Sup. Ct. 456 (1888).
37 19 Stat. 625 (1875).
38 15 Stat. 473 (1867).
40 124 U. S. 190, 193, 8 Sup. Ct. 456, 458 (1888). See also, for the effect of national policy, Yee Won v. White, 256 U. S. 399, 41 Sup. Ct. 504 (1920); The Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 61 (1903).
A treaty with Great Britain granted reciprocal rights with respect to the inheritance of property in each nation by citizens of the other. By its terms the agreement was not to apply to property in British colonies unless notice of their adherence was given. The plaintiff claimed an interest in an estate in Kansas through devise from the decedent's sister, a British citizen resident in Canada, which had not adhered to the treaty. Her claim having been denied by the state courts because her devisor was an alien and therefore incapable of inheriting property under the laws of Kansas, she appealed to the Supreme Court on the ground that the treaty abrogated the local rule. In that Court it was argued on her behalf that, since the treaty in terms applied to all British citizens, to limit its operation in this case because the British heir resided in a colony which had not adhered would be a violation of good faith.

The Solicitor-General appeared for the United States and introduced a communication from the State Department in which it was stated that the Secretary of State had taken an opposite view in diplomatic negotiations with the British government relative to this case. The effect of this message appears in the following language in the opinion of the Court: "While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight."

The Court also took account of the fact that, if the construction urged by the plaintiff were adopted, the effect would be to give all citizens of Canada the rights of the treaty without any corresponding rights accruing to citizens of the United States with respect to property in Canada. This inequitable result, it was felt, could not have been

41 254 U. S. 433, 41 Sup. Ct. 158 (1921), involving a treaty with Great Britain. 31 Stat. 1939 (1899).
42 254 U. S. 433, 442, 41 Sup. Ct. 158, 162 (1921). Previous executive construction was influential in bringing about a liberal construction in Charlton v. Kelly, 229 U. S. 447, 33 Sup. Ct. 945 (1912), where it was held that the extradition treaty with Italy (15 Stat. 629 (1868)) authorized the return to Italy for prosecution of an American citizen. It appears from the opinion that the State Department had insisted upon this construction of several treaties of this kind. Other cases in which this factor was important are In re Ross, 140 U. S. 453, 11 Sup. Ct. 897 (1891); Libby v. Clark, 118 U. S. 250, 6 Sup. Ct. 1045 (1886); United States v. Reynes, 9 How. (U. S.) 126 (1850).
contemplated by the negotiators, and the Court adopted the more restricted interpretation.

Where the effect of a liberal construction contended for would be to give an alien rights and powers in excess of those permitted native citizens, it is natural that the claim would meet with little sympathy in a national court of justice. In *Todok v. Union State Bank* the facts were that Knudson, a citizen of Norway, had established a homestead in Nebraska and had later conveyed it to grantors of the defendant. His wife, who had not joined in the conveyance, claimed an undivided one-half interest under the laws of Nebraska. The state court conceded the invalidity of the deed under the homestead law, but held that it was overruled by the treaty with Norway, which provided that Norwegian citizens in the United States might “freely dispose of their goods and effects, whether by testament, donation, or otherwise, in favor of such persons as they think proper,” and that the deed was valid.

Mr. Chief Justice Hughes, in giving the opinion of the Supreme Court upon appeal from this decision, remarked that the construction of the state court “would appear to place an alien owner of a homestead in Nebraska on a better footing than that of a citizen of the State.” Continuing with the proposition that treaties of amity are broadly designed to prevent unjust discriminations in one country against citizens of the other, he concluded that this agreement could not have been intended to permit aliens to transfer property without regard for reasonable formal regulations, imposed on aliens and citizens alike. He held, therefore, that the local law was not overruled by the treaty stipulations.

(b) Important State Interests

Many of the treaties which the United States has negotiated with foreign nations have invaded intentionally the domain of state law and thereby limited the power of the states to deal with persons and property within their jurisdiction. Obviously, the mere fact that, in our constitutional system, the matters dealt with are ordinarily under the control of the states, and not of the national government which has concluded the treaty, does not relieve the treaty-enforcing agency

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48 281 U. S. 449, 50 Sup. Ct. 363 (1930), involving a treaty with Norway. 8 Stat. 60 (1783).
of the duty to observe good faith. On the other hand, there are certain powers of the states which are so important to their interests that the Supreme Court will be loath to hold them abrogated by a treaty unless in unmistakable terms.

The largest group of treaties which have come into conflict with state law are those dealing with alien ownership and inheritance of property. We have recorded instances in which such treaties have been applied liberally and others in which considerations of justice and national policy have led to a narrower view. The case of Petersen v. Iowa may now be analyzed to show how an important state interest, the power to deal with its own citizens and their property, may influence the process of interpretation.

The facts of this case were that a native of Denmark, naturalized in the United States, died in Iowa leaving property there which she had devised to relatives who were subjects and residents of Denmark. In the settlement of the estate the administrator credited himself with the higher rate of tax imposed by the state law on legacies to nonresident aliens. The legatees opposed this charge on the ground that the law violated a treaty with Denmark which provided that, "The United States and his Danish majesty mutually agree, that no higher or other duties, charges or taxes of any kind, shall be levied in the territories or dominions of either party, upon any personal property, money or effects, of their respective citizens or subjects, on the removal of the same from their territories or dominions, reciprocally, either upon the inheritance of such property, money, or effects, or otherwise, than are or shall be payable in each State, upon the same, when removed by a citizen or subject of such State respectively." The case having been decided in favor of the right of the state in the Iowa courts, the alien legatees appealed to the Supreme Court.

Manifestly the whole object of the provision was to protect Danish subjects, removing property, from the imposition of discriminating taxes. On the face of it the treaty seems broad enough to cover all possible discriminations and thus to protect Danish citizens in the position of heirs or legatees as well as when the original owners of the property. The Court held, however, that the treaty had no

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application to the case of property originally owned by a citizen of
the taxing authority even though devised to a Danish subject. The
Court relies heavily upon the earlier case of Frederickson v. Louisi-
amo, in which a like result was reached on similar facts under a treaty
with Würtemburg. That treaty by express language was limited in
its operation to one set of facts, namely, where a tax was imposed
on the succession of an alien to the property of an alien. The treaty
in the Petersen case clearly goes beyond that single situation and
might well have been held applicable to the facts therein presented.
When it is considered that in other treaties the United States has
granted beyond a doubt the right claimed under the Danish treaty,
it will be seen that the Court's apparent conclusion that the govern-
ment could not have intended to abrogate the states' power in this
respect is not beyond question, and that the Court's desire to guard
the right of a state to deal as it saw fit with its citizens and their
property was probably a decisive factor.

A group of cases involving extraordinary rights conferred by state
law, the benefit of which was limited to residents or citizens, shows a
further application of the view taken in the preceding case. In Maior-
ano v. Baltimore and Ohio R. R. plaintiff, a resident of Italy, brought
an action to recover for the negligent homicide of her husband, under
the Pennsylvania Wrongful Death Act. The state court having con-
strued the act not to permit recovery by nonresident aliens, plaintiff
appealed to the Supreme Court, claiming that this ruling denied to
Italian citizens whose relatives were nonresidents the equal "protec-
tion and security for their person" guaranteed by a treaty with Italy.
Admitting that one reason for such statutes was undoubtedly to stimu-
late care for human life, the Court said that it was within the province
of the state court to interpret its statute to have been designed solely
to secure compensation to dependents of the victims of negligence.
Furthermore, even though some measure of protection was actually and
necessarily afforded by the statute and denied to the plaintiff's husband
in this case, the Court held that the protection and security involved
were "so indirect and remote that the contracting powers cannot fairly
be thought to have had them in contemplation."

With reference to the quoted language it may be agreed that the

49 23 How. (U. S.) 445 (1859), involving a treaty with Würtemburg. 8 Stat.
588 (1844).
50 See Geofroy v. Riggs, 133 U. S. 258, 10 Sup. Ct. 295 (1890), supra, p. 1021.
51 213 U. S. 268, 29 Sup. Ct. 424 (1909), involving a treaty with Italy. 17
Stat. 845 (1871).
particular case was probably not in the minds of the negotiators of the treaty. Particular cases very seldom are. However, the language of the treaty was broad enough, if construed with the same degree of liberality displayed in earlier cases, to cover this situation, since the Court conceded the presence of a protective element. In addition, if account is to be taken of what was contemplated when the treaty was negotiated, may it not be argued reasonably that the established doctrine of liberal interpretation might have influenced the draftsmen of the treaty to use general language in reliance upon a broad construction in particular cases which might arise, rather than to cover carefully all conceivable situations? 55

The Italian government protested the interpretation placed upon the treaty in the course of a prolonged correspondence with our government. 54 The State Department considered itself bound by the decision of the Supreme Court and the final result was an amendment of the article of the treaty to provide specifically for the extension of the civil remedy in such cases to Italian subjects wherever resident. 55 This amended treaty was invoked in the case of Liberato v. Royer 56 to reverse a decision of the Pennsylvania court that the Workmen's Compensation Act of that state gave no recovery to Italian heirs of an Italian citizen killed in the state. The amendment turned out to be too specific, and plaintiff's argument that the amendment was intended to remove the discrimination against Italian heirs, whenever rights accrued from injuries resulting in death, was denied by the Supreme Court. Mr. Justice Holmes held that the treaty as amended applied only to cases of death resulting from negligence, and if the local law preserved the right in such cases, discriminations in a statute imposing liability without fault were not within the prohibition of the treaty. 57

As a final example of paramount state interest influencing treaty interpretation, we may look at a group of cases involving, on the one hand, treaty provisions, and on the other, the "police power" of the states. Probably the most striking example of these cases is the one known as the Louisiana Quarantine Case. 58 Authorized by a state law,

53 This argument was advanced by the Italian minister in a protest against the decision. See United States, Foreign Relations, 1910, p. 661.
55 38 Stat. 1669 (1913).
57 In connection with the two cases just discussed, see Heim v. McCall, 239 U. S. 175, 36 Sup. Ct. 78 (1915).
the Louisiana Board of Health prevented the plaintiff's steamer from unloading passengers in New Orleans or adjacent districts, on the ground that the introduction of any persons into this area would tend to increase the spread of an epidemic then raging. Plaintiff sought to recover damages suffered as a result of this action, claiming that the state law was void because in violation of a treaty with Greece which accrued to his benefit under the most favored nation clause of a treaty with France. The article relied upon provided that, when certain conditions had been fulfilled, vessels “shall be subject to no other quarantine than such as may be necessary for the visit of the health officer of the port, after which such vessels shall be allowed immediately to enter and unload their cargoes.”

If this language is considered alone, without any consideration of policy, it would appear that the following words of Mr. Justice Harlan, in his dissenting opinion, were exceedingly apt: “If the law in question . . . be not a violation of the provision of the treaty . . . I am unable to conceive of a state of facts which would constitute a violation of that provision.”

The majority of the Court took account of the emergency which had occasioned the law and the regulation, and of the fact that a denial of the power of the local authorities to deal with such a situation might easily result in untold harm to the state and even to the nation. With this in mind, they proceeded to place on the treaty a restricted interpretation which left the state free to handle problems of this kind. The quarantine regulations covered by the treaty were held to be only those which seek to prevent the introduction of disease into a healthy area, and not those which seek to prevent the introduction of additional “fuel” into an already infected district.

In Patsone v. Pennsylvania the doctrine of the Quarantine case was applied to validate a police measure which directly discriminated against aliens. Patsone, an Italian citizen resident in Pennsylvania, appealed from a conviction for the offense of owning a shotgun in violation of a state law forbidding aliens from shooting any wild bird or animal except in defense of person or property, and “to that end” forbidding the possession of shotguns or rifles. His contention was that the law violated the Constitution and the treaty with Italy which was considered in the Maiorano case. After holding that the classifi-
cation and means adopted to safeguard the state’s interest in the preservation of game were reasonable under the Fourteenth Amendment, the court gave scant attention to the treaty question. The argument that the possession of a gun might be useful or even necessary to protect person or property, which right the treaty guaranteed, was ignored and the treaty was held inoperative to affect the case.62

In this section we have reviewed a number of cases in which the effect of treaty provisions has been reduced to the narrowest scope at all consistent with the language used. We have also pointed out the factors which were seemingly influential in bringing about these results — principles of justice, national policy, and paramount state interests. Probably all of the factors of this nature which have influenced, or may in the future influence the Court have not been delineated; nor have all the variations of those factors which have been mentioned been included in the text;63 but undoubtedly, enough material has been presented to show that considerations arising from municipal jurisprudence have from time to time temporarily displaced uberrima fides as the controlling principle in treaty-interpretation cases. Although we shall not attempt to speculate as to what new factors may arise, the manner in which the Court may be expected to deal with them will be considered in the next section.

A REVIEW OF THE JUDICIAL PROCESS

The cases which we have discussed indicate, it is believed, that two problems are always present in any case involving a treaty provision — treaty-interpretation, the problem of discovering the rule of law prescribed by the treaty; and treaty-enforcement, the problem of integrating this rule into the body of ordinary municipal law. The cases also indicate that the difficulties involved in treaty-enforcement, thus defined, have been solved through treaty-interpretation; and that the course of treaty-interpretation has been influenced by the balancing of the opposing factors involved in treaty-enforcement. In other words, the two are interrelated; if the emphasis is placed upon treaty-


63 Some of the variations of the cases discussed in the text may be seen in the cases cited in the notes to this section.
enforcement, interpretation is seen as the means to a result deemed desirable; if upon treaty-interpretation, treaty-enforcement policy is seen as the guidepost directing interpretation into broad or narrow channels.

In investigating further the process of resolving treaty cases, it is important to notice that the Court has been concerned apparently only with the problem of treaty-interpretation, and that the presence of the equally important task of treaty-enforcement has been indicated largely through the results reached in the cases. Thus, as we have seen, the decision is always couched in terms of what the contracting parties intended by the language used, although in some cases the result can be explained only in terms of the extent to which the Court deems it desirable that municipal law be displaced. Consequently, the normal method of reaching a balance between opposing considerations, that of inclusion and exclusion until a line has been drawn, cannot be followed, at least openly, because the existence of a conflict has not been recognized.

For example, we may speculate as to whether a different result would have been reached in Tucker v. Alexandroff if the State Department had previously taken the position, in diplomatic negotiation with Russia, that the case was not covered by the treaty. This additional fact might have influenced decisively the interpretative process. Nevertheless, if our assumed case arose today, the Tucker case would probably prevent a different result through interpretation, since the additional fact would not justify a distinction in the way of interpretation, even though it might have influenced a narrower construction had it been present when the Court was first called upon to interpret the treaty.

To illustrate further, let us suppose the facts of the Maiorano case without the presence of the state interest—the right to limit extraordinary remedies to citizens and residents. The case arises, we will say, under a federal statute similar to the Pennsylvania act, which has been construed by the Court, previous to the conclusion of the treaty, to give a right to those heirs only who are citizens. Plaintiffs, situated like those in the Maiorano case, now claim that the treaty abrogates the limitation. It is not unlikely that if such a case had been the first to arise under the treaty, the Court would have construed the

provision to cover the situation. However, if the case arose today, the Maiorano case would probably rule, since the factual difference would not furnish legal justification for an interpretative distinction.

How then, we may ask, will the Court reach the result which seems to it desirable in such cases? Will the first case which arises under any particular provision, fixing a liberal or narrow interpretation upon it, determine conclusively the fate of all future cases arising under the provision, regardless of factual variations which might warrant varying results? We may evade the issue, in part, by noting that the type of dilemma we have pictured does not often arise, since the same or identical provisions do not generally come before the Court several times, each time in circumstances different enough to invite a different result. We may answer, for the rest, by pointing out that there is generally some loophole of escape. For example, a case very similar to our variation of the Maiorano facts arose in McGovern v. Philadelphia and Reading R. R. The difference was that the federal statute had not previously been construed, so that the Court was able to uphold the plaintiff's claim by construing the statute to cover the right, without reliance upon the treaty, the existence of which may very likely have influenced its view of the statute.

A comparison of Petersen v. Iowa, discussed above, with the later case of Nielsen v. Johnson, which arose under the same treaty provision and the same tax law, shows another avenue of escape which is often present. In the Petersen case, it will be remembered, the Court held that the treaty with Denmark had no application to the situation where property was devised by a citizen of Iowa to nonresident subjects of Denmark. In the later case, the treaty was relied upon to invalidate the application of the Iowa inheritance tax law to a situation where both the decedent and the heir were Danish subjects. The Iowa court, evidently encouraged by the narrow construction in the Petersen case, construed the treaty to be inapplicable on the ground that the tax was directed against the succession of property, whereas the treaty only covered the removal of property.

The Supreme Court noted that the effect of the construction in the state court was to nullify the treaty entirely, since while modern tax laws no longer tax the removal of property directly, they accomplish the same result by discriminating in rates against nonresident

68 245 U. S. 170, supra, p. 1030.
69 279 U. S. 47, 49 Sup. Ct. 223 (1929).
heirs who would be forced to remove the property to enjoy it. Such a result would clearly have constituted a violation of good faith. Therefore, the Court was inclined to apply the treaty liberally with respect to the kind of tax it protected against; and it was able to do so consistently with the Petersen case, since there the provision had been narrowly construed only with respect to the persons protected by it.

The problem was more difficult in three cases involving an interpretation of the words "trade" and "commerce" as used in treaties with Japan and Great Britain. In Asakura v. Seattle, decided in 1924, it was held that the treaty with Japan, providing generally for the right of citizens of that nation to "carry on trade" in this country, permitted a Japanese to engage in the occupation of pawnbroker, despite a Seattle ordinance prohibiting aliens from engaging in that business. Three years later, in Ohio ex rel. Clarke v. Deckebach, the Court held that the treaty with Great Britain which gave merchants and traders of that nation the right to carry on their commerce in the United States did not invalidate a Cincinnati ordinance forbidding the operation of poolrooms by aliens, as applied to relator, a British citizen. The next year Jordan v. Tashiro established the proposition that the business of running a hospital was within the provision of the treaty with Japan referred to above.

70 In the words of Mr. Justice Stone: "That the present discriminatory tax is the substantial equivalent of the droit de detraction is not open to doubt." (p. 57).

71 265 U. S. 332, 44 Sup. Ct. 515 (1924), involving a treaty with Japan. 37 Stat. 1504 (1911). The provision relied upon, so far as is material, reads as follows:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel, and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

72 274 U. S. 392, 47 Sup. Ct. 630 (1927), involving a treaty with Great Britain. 8 Stat. 360 (1827). The provision relied upon, so far as is material, reads as follows:

"The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

The distinctions made in these cases clearly indicate the judicial process. In the Clarke case it was said that, "It would be an extravagant application of the language quoted [from the treaty with Great Britain] to say that it could be extended to include the owner of a place of amusement who does not necessarily buy, sell or exchange merchandise or otherwise participate in commerce." The Asakura case was distinguished on the ground that pawnbroking "necessarily involved the lending of money on the security of merchandise and the sale of merchandise when necessary to realize on the security."

This basis of separating the sheep from the goats — a narrow definition of the word "trade" — did not lead to the result desired in the Jordan case and was discarded in the following language: "While in a narrow and restricted sense the terms 'commerce,' or 'commercial,' and 'trade' may be limited to the purchase and sale or exchange of goods and commodities, they may connote, as well, other occupations and other recognized forms of business enterprise which do not necessarily involve trading in merchandise. And although commerce includes traffic in this narrower sense, for more than a century it has been judicially recognized that in a broad sense it embraces every phase of commercial and business activity and intercourse." The decision was then harmonized with the Clarke case on the ground that the treaty with Japan was broader than the one with Great Britain.

While the difference in the language of the two documents may possibly justify this distinction, it might also be reasonably argued that the provision in the Japanese treaty, written a hundred years after the British treaty was framed, merely shows an improved wording, based on wider experience and modern conceptions, of the same general idea sought to be conveyed by the words of the earlier compact. At any rate, if the Japanese treaty was interpreted liberally, and in accordance with the doctrine of uberrima fides, as the Court intimated it was, it is certain that the same degree of liberality was not extended to the British treaty.

The true reasons for the results reached seem to be that the Court felt that a poolroom was so likely to be, or to become, a public nuisance that local police regulations should be allowed full freedom of action,

77 This was suggested as a possible difference in the Clarke case, but not relied upon.
78 Compare the form of the two provisions, in notes 71 and 72, supra.
while pawnshops, filling a recognized need and not inherently vicious, and hospitals, universally considered a public benefit, need not such strict surveillance. These considerations, however, do not furnish justification for a legal difference, and could not have been offered as the formal bases of the decisions. If the same or identical treaty provisions had been involved in all the cases, the Court would have been hard pressed to reach the results which were evidently thought desirable. As it was, a liberal construction of one provision and a narrow view of another, similar but not identical, furnished the way out.

We may conclude, in brief, that the process is sufficiently elastic, even with the limitations imposed by the method of approach, to permit the Court generally to reach a legal result in harmony with its conclusion on the matter of policy.

To summarize, the enforcement of treaties within a nation necessarily involves the determination of many questions of policy—the balancing, on the one hand, of the demands of international good faith, and on the other, of considerations arising from national or municipal jurisprudence. The determination of these questions, in most countries a legislative or executive function, has in the United States devolved for the most part on the United States Supreme Court under our constitutional division of powers. The resulting problems have been solved by the Court through the processes of treaty-interpretation, and their influence has been manifested by a liberal construction in the majority of cases, in deference to the requirement of good faith, and by a narrow construction in other cases where national considerations were apparently deemed to be of paramount importance. Finally, interpretation, the only judicial means of solving these questions of treaty-enforcement, although by its nature of limited efficacy, has proved adequate to handle satisfactorily the cases which have arisen.79

79 If space permitted, it would be interesting to dwell upon some of the implications of the views herein presented. On many controversial questions among writers on Public International Law this analysis of treaty-interpretation in the Supreme Court would have considerable bearing. For example, the relation of International Law to Municipal Law in certain respects could be made much clearer. Then again, the irrelevance of Supreme Court decisions on treaty matters as guiding authority on treaty adjudication in such international tribunals as the Permanent Court of International Justice could be pointed out. The difference in the problems faced by these two courts has not always been clearly recognized. See Yu, Interpretation of Treaties (1927), for an excellent example of failure to take account of the differences. Within the confines of this paper, however, it is only possible to suggest a few directions in which these views lead.