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MUST THE HOUSE CONSENT TO CESSION OF THE PANAMA CANAL?

Raoul Berger†

INTRODUCTION

It is truly remarkable that for 189 years the courts had not squarely faced an important constitutional accommodation between the treaty power and the article IV provision "Congress shall have Power to dispose of . . . Territory or other Property belonging to the United States."¹ Now the Court of Appeals for the District of Columbia Circuit, splitting two to one with Judge George MacKinnon vigorously dissenting, has concluded in *Edwards v. Carter*,² that disposition of the Panama Canal by treaty did not require assent by the House of Representatives, a joint branch of "Congress."

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¹ U.S. Const. art. IV, § 3, cl. 2.

² 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978). An earlier decision by the same court, *Rousseau v. Brown*, 21 App. D.C. 73 (1903), with implications to the contrary, is discussed in note 116 and accompanying text *infra*.

The *Edwards* majority stated:

The District Court did not reach the merits of this controversy; rather, it dismissed the complaint for lack of jurisdiction after concluding that appellants [sixty members of the House of Representatives] lacked standing because they had failed to demonstrate injury in fact from the President's invocation of the treaty process.

580 F.2d at 1056. See *Edwards v. Carter*, 445 F. Supp. 1279 (D.D.C.), *aff'd*, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978). The majority skipped over the jurisdictional issue because remand would have been the likely result; they reached the merits largely because "this controversy present[s] a pure question of law, with no need of a hearing for fact development, because these merits are so clearly against the parties asserting jurisdiction." 580 F.2d at 1056-57.

Justice Frankfurter rooted the standing doctrine in constitutional compulsions. See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 150-59 (1951) (concurring opinion); *Coleman v. Miller*, 307 U.S. 433, 460-70 (1939) (dissenting opinion). Although 1

The issue, clouded by political passions during the Senate debates on ratification, is indeed momentous. A "national treasure beyond compare," to borrow from Judge MacKinnon,³ is being given to Panama over the opposition of the majority of the people.⁴ Because *Edwards* sets a precedent that tremendously diminishes the role of the House in preserving the national domain, and, by its reasoning, also invites the President to displace congressional article I, section 8 powers heretofore deemed exclusive, it demands the closest scrutiny. The majority draws comfort from the testimony of an array of administration and former State Department officials,⁵ but matters of such fundamental, far-reaching importance must be settled by resort to first principles, not by a count of noses.⁶ Judicial authority, Chief Justice Taney declared, should "depend altogether on the force of the

differ with that view (see Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement*, 78 YALE L.J. 816 (1969)), the Court, in *Flast v. Cohen*, 392 U.S. 83 (1968), derived its emphasis on "a personal stake in the outcome" (*id.* at 101) from the "Article III limitations on federal court jurisdiction" (*id.*). Apparently that remains the law; the federal courts "have consistently held that Article III of the Constitution prevents judicial determination of any case in which the plaintiff has no interest at stake." K.C. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* 524 (1976). See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 37-46 (1976); *United States v. Richardson*, 418 U.S. 166, 171-75 (1974). If "standing" goes to the jurisdiction (see *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 197 (1956)), *quaere* whether it may be waived for a "pure question of law."

³ *Edwards v. Carter*, 580 F.2d at 1100 (dissenting opinion).

⁴ Hedrick Smith referred to "the lopsided antitreaty sentiment in public opinion polls last fall." N.Y. Times, Apr. 20, 1978, at 1, col. 1. See *id.*, Apr. 14, 1978, at 10, col. 6. Recently, Smith reported that five liberal Democratic Senators who "had supported the administration on the Panama Canal Treaties" were defeated. *Id.*, Nov. 9, 1978, at 1, col. 5.

⁵ See 580 F.2d at 1057 n.4. The majority also relies on the Senate Foreign Relations Committee Report (see SENATE COMM. ON FOREIGN RELATIONS, PANAMA CANAL TREATIES, S. EXEC. REP. NO. 95-12, 95th Cong., 2d Sess. (1978) [hereinafter cited as SENATE FOREIGN RELATIONS REPORT]), which swallowed the party line hook, line, and sinker. As Judge MacKinnon observed, "[i]t is not surprising that those promoting the present treaty also decide that they have power to accomplish the result they seek. It is ever thus with usurped authority." 580 F.2d at 1069 n.10 (dissenting opinion). See the remark of Lord Chief Justice Denman quoted in text accompanying note 184 *infra*.

⁶ A great British scholar, W.S. McKechnie, faced by contrary opinions of respected scholars, declared: "[T]he truth of historical questions does not depend on the counting of votes or the weight of authority" but on the historical record. W.S. MCKECHNIE, *MAGNA CARTA* 135 (1905).

In *Thorlow v. Massachusetts (License Cases)*, 46 U.S. (5 How.) 504 (1847), Justice Daniel stated: "[I]n matters involving the meaning and integrity of the constitution, I never can consent that the text of that instrument shall be overlaid and smothered by the glosses of essay-writers, lecturers, and commentators. Nor will I abide the decisions of judges, believed by me to be invasions of the great *lex legum*." *Id.* at 612 (separate opinion). For citations to similar expressions by Chief Justice Burger, Justice Douglas, and Justice Frankfurter, see R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 297 n.57 (1977).

reasoning by which it is supported.”⁷ So tested, the certitude of the majority opinion is in inverse proportion to its reasoning.

My thesis is not, as the *Edwards* majority imputed to me, “that the President and Senate cannot exercise under the treaty power any power granted to Congress,”⁸ but rather that a treaty disposing of United States territory or property is subject to the assent of Congress, including the House.⁹ In other words, the President and Senate are authorized to enter into such treaties, but the treaties should be made subject to the consent of Congress, as has often been the case. This, as will appear, was the view of Madison and the House from the beginning. Preliminarily, it needs to be noted that the issue of “sovereignty” over the Canal Zone may be put aside because article IV applies to “property” of the United States as well as “territory.” The right “in perpetuity [of] the use, occupation and control” of the Canal Zone, conferred by the Treaty of 1903,¹⁰ is itself “property” akin to a 99-year lease. It was not disputed that the recent Panama Treaty would convey “property belonging to the United States,”¹¹ and, with Judge MacKinnon,¹² I consider that it is beyond serious argument.

⁷ *Smith v. Turner (Passenger Cases)*, 48 U.S. (7 How.) 283, 470 (1849) (dissenting opinion).

⁸ 580 F.2d at 1057 n.4.

⁹ Dean Louis Pollak, who is among the “authorities” cited by the majority to buttress its views (*see id.*), had written: “The thrust of Mr. Berger’s statement was that the cession to the Republic of Panama . . . cannot constitutionally be effectuated by treaty, but only by statute” (124 CONG. REC. S729 (daily ed. Jan. 30, 1978)). In my reply, I “disclaim[ed] the version of the issue that had been attributed to me, namely that the Panama cession ‘cannot be effectuated by treaty, but only by statute.’ My objection is to a ‘self-executing’ treaty because article IV of the Constitution requires Congress’ consent to the disposition.” *Id.* at S1414 (daily ed. Feb. 7, 1978).

¹⁰ Isthmian Canal Convention, Nov. 18, 1903, United States-Panama, art. II, 33 Stat. 2234, T.S. No. 431.

¹¹ *See* 580 F.2d at 1057 n.3; *id.* at 1080 (dissenting opinion). Professor John Norton Moore, formerly Counselor on International Law to the Department of State, Chairman of the National Security Council Interagency Task Force on the Law of the Sea, and United States Ambassador to the Third United Nations Conference on the Law of the Sea, stated that the “core” of the “dispute” between the United States and Panama “has been the question of residual or ‘titular’ sovereignty over the Zone left in doubt by the language of Article III of the 1903 treaty.” *Panama Canal Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st & 2d Sess., pt. 4, at 90 (1977-78) [hereinafter cited as *Senate Foreign Relations Hearings*]. *See* Moore, *Perspective*, 30 Va. L. Weekly, Feb. 17, 1978, at 2, Col. 3.

¹² *See* 580 F.2d at 1080 n.17 (dissenting opinion). Judge MacKinnon notes that the transfer of real property

includes the entire Panama Railroad, which the United States purchased as authorized by Congress . . . and all the other real property that the United States purchased from the individual owners of the land, including the property and other interests of the French Canal Company for which the U.S. paid \$40 million.

The *Edwards* majority begins its interpretive analysis with the statement that article IV recites "that 'The Congress shall have Power . . .,' not that only the Congress shall have power."¹³ The "only" is implicit under established rules of construction. The Supreme Court has often held that "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."¹⁴ And it has held that "[g]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."¹⁵ The specific power to "dispose" prevails over the general treaty-making power. The majority's omission to notice such traditional canons of construction smacks of disdain, whereas the Supreme Court had concluded that article IV "implies an exclusion of all other authority over the property which could interfere with this right."¹⁶

Id. An itemized breakdown of the United States property interests and their costs is set forth in STAFF OF THE SUBCOMM. ON THE PANAMA CANAL OF THE HOUSE COMM. ON MERCHANT MARINE AND FISHERIES, 95TH CONG., 2d. SESS., REPORT ON THE CONSTITUTIONAL ROLE OF THE CONGRESS IN THE DISPOSAL OF U.S. PROPERTY IN THE CANAL ZONE 4-5 (Comm. Print 1978). The purchased lands total 647 square miles. *Id.* at 4.

¹³ 580 F.2d at 1057. Judge MacKinnon points out that article IV evidences an intent to restrict the power to dispose of territory or property and this was the only place such intent is addressed. Had the convention intended to authorize the disposition of property as an incident of the treaty power, it would have been very easy to do so by merely inserting before the semi-colon in Art. IV, § 3, cl. 2: "(which may also be disposed of by treaty)."

Id. at 1078 (dissenting opinion).

¹⁴ *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). See *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 471 (1959).

¹⁵ *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). See *City of Tulsa v. Southwestern Bell Tel. Co.*, 75 F.2d 343, 351 (10th Cir. 1935). The point was made during the debate on the Jay Treaty in 1796 by Brent:

[T]he Treaty-making power is delegated as a general power, while to Congress specific powers are granted. The rational and admitted rule of construction in these cases is, that specific power restrains general powers; and here, then, the general Treaty power must be restrained by the specific powers of Congress.

5 ANNALS OF CONG. 576 (1796).

Judge MacKinnon calls attention to the recent opinion of his court in *Lodge 1858, Am. Fed'n of Gov't Employees v. Webb*, 580 F.2d 496 (D.C. Cir. 1978), which stated: "The established rule is that if there exists a conflict in the provisions of the same act, the last provision in point of arrangement must control." *Id.* at 510, quoted in *Edwards v. Carter*, 580 F.2d 1055, 1079 n.16 (D.C. Cir.) (dissenting opinion), cert. denied, 436 U.S. 907 (1978). And the Court of Appeals for the Second Circuit has held that "a construction which leaves to each element of the statute a function in some way different from the others" is preferable to one which causes one section to overlap with another. *United States v. Dinerstein*, 362 F.2d 852, 855-56 (2d Cir. 1966). Such rules were not designed to be applied at judicial whim.

¹⁶ *Wisconsin Cent. R.R. v. Price County*, 133 U.S. 496, 504 (1890) (emphasis added).

In the absence of evidence of the Framers' intent, a matter to which I shall recur, such rules are the established index of construction, and are constantly applied by the courts. They were among the presuppositions of the Founders,¹⁷ reflecting a profound distrust of judicial discretion.¹⁸ Hamilton averred: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."¹⁹ In the First Congress, which contained numerous Framers and Ratifiers, Representatives Egbert Benson and Alexander White invoked the "*expressio unius*" rule.²⁰ Other relevant canons of construction were cited in the 1796 debate on the Jay Treaty.²¹ Justice Story emphasized that such rules provide a "fixed standard" for interpretation,²² without which the "fixed Constitution," so dear to the Founders,²³ would

¹⁷ Judge Edmund Pendleton of the Virginia Court of Appeals and presiding officer of the Virginia Ratification Convention, had "recourse to the old English canons of statutory construction The resort to the accepted rules of statutory interpretation to settle the intent and meaning of constitutional provisions was . . . a method used by courts elsewhere in the Confederation." J. GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 128 (P. Freund ed. 1971).

¹⁸ See R. BERGER, *supra* note 6, at 306-08. In the 1796 debate on the Jay Treaty, Chauncey Goodrich observed "how attentively Judges, in construing written instruments and statutes, regarded the expressions, and how little latitude they allowed to their inventive faculties, or their own fancies about policy or expediency." 5 ANNALS OF CONG. 719 (1796). The judiciary, it was said in Trustees of Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58, 88 (1805), "have no discretionary powers enabling them to judge of the propriety or impropriety of laws."

¹⁹ THE FEDERALIST No. 78, at 510 (Mod Lib. ed. 1937).

²⁰ Benson observed: "[I]t cannot be rationally intended that all offices should be held during good behaviour, because the Constitution has declared one office [the judicial] to be held by this tenure." 1 ANNALS OF CONG. 505 (Gales & Seaton eds. 1789) (print bearing running title "History of Congress"). For White, see *id.* at 517.

²¹ Albert Gallatin stated: "The different clauses of the Constitution must be so construed as to be rendered consistent, and to be reconciled one with the other; and that construction must be rejected which would destroy any of them." 5 ANNALS OF CONG. 738 (1796). For similar expressions by Page, see *id.* at 561. The influential *Federal Farmer* was later quoted to the same effect. *Id.* at 581 (remarks of Rep. Brent). For a similar expression by Jefferson in 1791, see 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 363 (1911).

²² 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 399, at 383 (Boston 1833).

²³ Samuel Adams, writing under the pseudonym "Candidus," stated: "Vatel tells us plainly and without hesitation, that 'the supreme legislative cannot change the constitution, . . . 'that they ought to consider the *fundamental* laws as sacred' And he gives a reason for it solid and weighty; for, says he, 'the constitution of the state ought to be *fixed*.'" Letter from Candidus (S. Adams) to Boston Gazette (Jan. 25, 1772) (emphasis in original), *reprinted* in 2 WRITINGS OF SAMUEL ADAMS 322, 325 (H. Cushing ed. 1906). "[T]he constitution is fixed . . . [the legislative] cannot change the constitution without destroying its own foundation." Letter from the Massachusetts House to the Earl of Shelburne (Jan. 15,

be forever unfixed. A further guide to construction is furnished by *Pierson v. Ray*.²⁴ There the Court declared with respect to the common-law immunity of judges from suits arising from acts performed in their official capacity: "We do not believe that this settled principle of law was abolished by § 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. . . . [W]e presume that Congress would have specifically so provided had it wished to abolish the doctrine."²⁵ Thus the all-inclusive phrase "every person" was held inapplicable to a judge's common-law immunity in the absence of a specific provision. That unwritten immunity stands no higher than the express "Congress shall have power" in the absence of specific provision in the treaty power for depriving Congress of the disposal power.

I

THE LEGISLATIVE HISTORY

"The debates over the treaty clause . . ." in the several conventions, *Edwards v. Carter* holds, "directly demonstrate the Framers' intent to permit the disposition of United States property by treaty without House approval."²⁶ That was not the view of one of the leading advocates of the Panama Treaty, who was cited by the majority.²⁷ Professor John Norton Moore, formerly a high State Department official, stated in the Senate hearings that proponents of an "exclusive" reading of article IV have shown "the lack of definitive evidence as to the framers' intent."²⁸ In fact, the evidence cuts against the majority's view.

All that was under discussion in the Federal Convention treaty-clause debates was performance of the Senate's "advice and

1768), reprinted in 1 H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 65, 65 (8th ed. 1968).

The concept of the written constitution is that it defines the authority of government and its limits, that government is the creature of the constitution and cannot do what it does not authorize and must not do what it forbids. *A priori*, such a constitution could have only a fixed and unchanging meaning, if it were to fulfill its function. For changed conditions, the instrument itself made provision for amendment which, in accordance with the concept of a written constitution, was expected to be the only form of change

P. KURLAND, WATERGATE AND THE CONSTITUTION 7 (1978).

²⁴ 386 U.S. 547 (1967).

²⁵ *Id.* at 554-55.

²⁶ 580 F.2d at 1059-60. At another point, the majority states that history "clearly demonstrates the Framers' intention to allow disposition of the United States property through self-executing treaty." *Id.* at 1058 n.7.

²⁷ *Id.* at 1057 n.4.

²⁸ *Senate Foreign Relations Hearings, supra* note 11, pt. 4, at 94.

consent" function, without a hint of desire to curtail the powers of the House under article IV. The proceedings in the Convention have been well summarized by Judge MacKinnon.²⁹ When the provision under discussion on September 7 was that "no Treaty shall be made without the consent of two thirds of the Members present,"³⁰ the words "(except Treaties of Peace)" were added on Madison's motion.³¹ The exception would have enabled a majority of those present to ratify a peace treaty. Thereupon, a motion was made to add, "But no Treaty of peace shall be entered into, whereby the United States shall be deprived of any of their present territory or rights without the concurrence of two thirds of the members of the Senate present."³² As Judge MacKinnon points out, this amendment came to naught by virtue of adjournment, and was not offered again.³³ Elbridge Gerry urged

that in treaties of peace a greater rather than less proportion of votes was necessary, than in other treaties. In Treaties of peace the dearest interests will be at stake, as the fisheries, territories &c. In treaties of peace also there is more danger to the extremities of the Continent, of being sacrificed, than on any other occasions.³⁴

Manifestly, the "extremities" refer to areas subject to "boundary disputes" which, as will appear, are *sui generis*, and do not really involve cessions of territory belonging to the United States.³⁵ Notwithstanding, Madison's "exception" was again approved by a vote of eight to three.³⁶ Williamson and Spaight then "moved 'that no Treaty of Peace affecting Territorial rights shd be made without the concurrence of two thirds of the (members of the Senate present),'"³⁷ seeking thereby to exclude treaties of peace "affecting territorial rights" from Madison's majority-vote "exception." A note added to Madison's records recites: "The subject was then debated, but the motion does not appear to have been made."³⁸ On the following day, Roger Sherman spoke against "leaving the rights, established by the Treaty of Peace, to the Senate, & moved to annex a 'proviso that no such rights

²⁹ See 580 F.2d at 1089-90 (dissenting opinion).

³⁰ 2 M. FARRAND, *supra* note 21, at 495.

³¹ *Id.* at 533, 540.

³² *Id.* at 534.

³³ 580 F.2d at 1089 (dissenting opinion).

³⁴ 2 M. FARRAND, *supra* note 21, at 541.

³⁵ See notes 188-97 and accompanying text *infra*.

³⁶ 2 M. FARRAND, *supra* note 21, at 541.

³⁷ *Id.* at 543.

³⁸ 4 *id.* at 58 (rev. ed. 1937).

shd be ceded without the sanction of the Legislature,'"³⁹—again a reference to boundary disputes. Neither Williamson, Spaight, nor Sherman took notice of the article IV “Congress shall . . . dispose,” and it is a strained construction that would read their abortive motions and remarks as evidence of a legislative intent to block House participation in a cession. Then too, the Convention’s overnight reversal of its approval of Madison’s “exception”⁴⁰ testifies to the fluidity of its views and argues against giving the foregoing remarks undue significance.

The narrow compass of such remarks is illustrated by one of Attorney General Bell’s references in the Senate hearings—a letter from the aforesaid Hugh Williamson, written to Madison some nine months after the close of the Convention, to recall “a Proviso in the new Sistem which was inserted for the express purpose of preventing a *majority* of the Senate . . . from giving up the Mississippi. It is provided that two thirds of the Members present in the senate shall be required to concur in making Treaties.”⁴¹ Williamson feared that General Wilkinson might be led to give up “the Navigation of the Mississippi,”⁴² and observed that “the Navigation of the Mississippi . . . was not to be risqued in the Hands of a meer Majority.”⁴³ This letter indicates that Williamson and Spaight were concerned with *claims* to rights of navigation rather than a cession of territory.⁴⁴ Nor was that issue the sole motivation for insistence on a two-thirds requirement. George Mason explained in the Virginia Ratification Convention that, because of their concern about the Newfoundland fisheries, “[t]he eastern states . . . agreed at length, that treaties should require the consent of two-thirds of the members present in the senate.”⁴⁵ Such diverse motives counsel against reading the several “two-thirds” remarks as evidence of an intention to diminish the role of the House under article IV. It needs also to be borne in mind that

³⁹ 2 *id.* at 548.

⁴⁰ *Id.* at 548-49.

⁴¹ 3 *id.* at 306-07 (emphasis added), *quoted in Senate Foreign Relations Hearings, supra* note 11, pt. 1, at 210 (statement of Att’y Gen. Bell).

⁴² *Id.* at 306.

⁴³ *Id.* at 307.

⁴⁴ The Supreme Court has explained that the Louisiana Purchase (later in time) “arose primarily from the fixed policy of Spain to exclude all foreign commerce from the Mississippi. This restriction became intolerable to the large number of immigrants who were leaving the Eastern States to settle in the fertile valley.” *Downes v. Bidwell*, 182 U.S. 244, 251-52 (1901).

⁴⁵ 3 M. FARRAND, *supra* note 21, at 335. Gerry, too, had adverted to protection of the fisheries. *See* text accompanying note 34 *supra*.

references to territorial cessions in the Federal Convention were in the context of treaties of peace,⁴⁶ which, as Hamilton later stated, were commonly concerned with “restitutions or cessions of territory,”⁴⁷ possibly under force majeure. It may well be asked whether any thought was given to cessions under any other circumstances.

From the final, independent clause of article IV, section 3, clause 2—“nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State”—the *Edwards* majority deduces that “the property clause was intended to delineate the role to be played by the central government in the disposition of Western lands . . . to preserve both federal claims and conflicting state claims to certain portions of the Western lands.”⁴⁸ That clause has no reference to unilateral disposition by Congress but rather to *judicial* settlement of those claims.⁴⁹ Hamilton wrote that article IV extends to property of the United States “where the title is not disputed by a foreign power,”⁵⁰ obviously a formulation more comprehensive than the majority’s. The all-inclusive language of article IV is not to be limited to Western lands in the absence of a clear intent to do so. In any event, the Supreme Court has not acted on the majority’s narrow view but, for example, has invoked article IV to sustain Congress’ cession of submerged coastal lands to Texas,⁵¹ and to decide that the *President* may not dispose of the federal domain without congressional authorization.⁵²

The *Edwards* majority seeks confirmation in remarks by William Grayson in the Virginia Ratification Convention, rejecting Governor Randolph’s assurance that article IV protected against “dismemberment” of the United States.⁵³ Article IV, Grayson insisted,

⁴⁶ See text accompanying notes 34, 37 & 39 *supra*.

⁴⁷ Hamilton, *The Defence No. XXXVII* (Camillus) (New York Jan. 6, 1796), reprinted in 20 PAPERS OF ALEXANDER HAMILTON 13, 18 (H. Syrett ed. 1974). Letters of Camillus were written in defense of the Jay Treaty.

⁴⁸ 580 F.2d at 1059.

⁴⁹ When Luther Martin moved to amend the clause by adding, “But all such claims may be examined into & decided upon by the supreme Court of the U— States” (2 M. FARRAND, *supra* note 20, at 466), Gouverneur Morris replied: “[T]his is unnecessary, as all suits to which the U.S.— are parties—are already to be decided by the Supreme Court” (*id.*).

⁵⁰ Hamilton, *The Defence No. XXXVII* (Camillus) (New York Jan. 6, 1796), reprinted in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 47, at 13, 21.

⁵¹ See *Alabama v. Texas*, 347 U.S. 272 (1954).

⁵² *Wisconsin Cent. R.R. v. Price County*, 133 U.S. 496 (1890).

⁵³ 580 F.2d at 1059 n.9.

related solely to the back lands claimed by the United States, and different states. This clause was inserted for the purpose of enabling congress to dispose of and make all needful rules and regulations respecting the territory, or other property, belonging to the United States, and to ascertain clearly that the claims of particular states respecting territory, should not be prejudiced by the alteration of government; but be on the same footing as before. That it could not be construed to be a limitation of the power of making treaties. Its sole intention was to obviate all the doubts and disputes which existed under the confederation concerning the western territory, and other places in controversy in the United States.⁵⁴

On Grayson's view, Congress has no power to dispose of property which does not concern "the western territory and other places in controversy in the United States"—such as surplus military materiel in the far Pacific after World War II—thus elevating the treaty power, which the administration at most claims is a "concurrent power," to a post of exclusive preeminence! The majority overlooked that Grayson was an *opponent* who sought throughout to block adoption of the Constitution by a parade of horrors—such as an unlimited treaty power—and that, from Jefferson onwards, such utterances have been given no weight in ascertaining the legislative intention.⁵⁵

Grayson insisted that "[i]t ought to be expressly provided, that no dismemberment should take place without the consent of the legislature," that is "three-fourths of the members of both houses of congress."⁵⁶ But Madison, the chief architect of the Constitution and leader in the fight for its adoption in the Virginia Convention, had earlier stated that "[t]he power of making treaties does not involve a right of dismembering the union,"⁵⁷ and he later added, "I do not think the whole legislative authority

⁵⁴ 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 462 (2d ed. Washington, D.C. 1836), quoted in part in *Edwards v. Carter*, 580 F.2d 1055, 1059 n.9 (D.C. Cir.), cert. denied, 436 U.S. 907 (1978).

⁵⁵ Jefferson looked for the "meaning" of the Constitution to the "explanations of those who advocated, not those who opposed it." 4 J. ELLIOT, *supra* note 54, at 460 (remarks of Mr. Rutledge). For similar remarks of Gallatin, see *id.* at 446. In the Jay Treaty debate, Edward Livingston said: "[T]he framers and friends to the Constitution construed it in the manner that we do; whilst its enemies endeavored to render it odious and unpopular, by endeavoring to fix on it the contrary construction." 5 ANNALS OF CONG. 635 (1796). As said by the Supreme Court, "[a]n unsuccessful minority cannot put words into the mouths of the majority." *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 288 (1956). See *Ernst & Ernst v. Hochfelder*, 485 U.S. 185, 204 n.24 (1976); *NLRB v. Thompson Prods., Inc.*, 141 F.2d 794, 798 (9th Cir. 1944).

⁵⁶ 3 J. ELLIOT, *supra* note 54, at 554.

⁵⁷ *Id.* at 458.

have this power.”⁵⁸ Were the Canal Zone a territory of the United States instead of an area occupied under a grant of use and occupancy in perpetuity—which some might view as a technical distinction⁵⁹—Madison’s statement indicates that an amendment would be required to cede the Canal Zone to Panama. For present purposes, it suffices that Francis Corbin, an advocate of the Constitution responding to Grayson’s charge that Congress could “give the Mississippi also by treaty”⁶⁰ (at that time there was no more than a shadowy claim to navigational rights), said that for a surrender of the Mississippi “the consent of the House of Representatives would be requisite.”⁶¹ He did not tie this to article IV, but Governor Randolph had done so, adding that “[w]hen the constitution marks out the powers to be exercised by particular departments, I say no innovation can take place.”⁶²

The *Edwards* majority correctly states “[t]hat the two-thirds voting requirement did not affect the scope of the treaty power, but only made ratification of treaties more difficult,”⁶³ as might with equal justice be said of its effect on article IV. But the majority cites, as evidence of “the broad interpretation given Article 11, § 2 at the time of its inception,”⁶⁴ an amendment proposed by the Virginia Convention:

[N]o treaty, ceding . . . the territorial rights or claims of the United States . . . shall be made, but in cases of the most urgent and extreme necessity, nor shall any such treaty be *ratified* without the concurrence of three-fourths of the whole number of the members of both houses respectively.⁶⁵

⁵⁸ *Id.* at 470. In the Jay Treaty debates, Gallatin stated:

[I]t was agreed by all the writers on the subject, (and he quoted *Vattel*, book i, ch. 21,) that even where the Legislative and Treaty-making powers were united in the same hands, it did not follow that the conductor of the nation had a power to dismember or alienate the territory of the nation, unless he had received from them not only the power of making Treaties, not only general Legislative powers, but also either the express power of alienating, or . . . an . . . unlimited, and despotic authority over the nation.

5 ANNALS OF CONG. 727 (1796).

⁵⁹ With reference to the Canal Zone, the Court declared: “It is hypercritical to contend that the title of the United States is imperfect, and that the territory described does not belong to this Nation, because of the omission of some of the technical terms used in ordinary conveyances of real estate.” *Wilson v. Shaw*, 204 U.S. 24, 33 (1907).

⁶⁰ 3 J. ELLIOT, *supra* note 54, at 462.

⁶¹ *Id.* at 467.

⁶² *Id.* at 461.

⁶³ 580 F.2d at 1060.

⁶⁴ *Id.*

⁶⁵ 3 J. ELLIOT, *supra* note 54, at 594-95 (emphasis added), *quoted in* *Edwards v. Carter*, 580 F.2d 1055, 1060 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978). Several states proposed amendments to the Constitution. “In no state was there any considerable discussion of

This drastically upped the requisite two-thirds of Senate members present to three-fourths of the members of both Houses, and to my mind it represents a renewal of the struggle for House participation in the *ratification* of such treaties. To go beyond this to infer that the House could, by use of treaties, be excluded from an article IV disposition of property is to overlook that the Virginia Convention likewise recommended that "the legislative, executive, and judicial powers of government should be separate and distinct,"⁶⁶ and that the right to challenge jurors should not be restrained.⁶⁷ The Virginia Convention had been assured by John Marshall, Edmund Pendleton and Governor Randolph that the words "trial by jury" embraced all its attributes, such as the right to challenge jurors.⁶⁸ Obviously, these abortive recommendations do not prove that separation of powers therefore is not a fundamental principle of the Constitution, or that the Constitution does not guarantee the right to challenge jurors. Rather, they should be regarded, as Luther Martin explained his rejected insistence on a specific provision for judicial arbitrament of conflicting federal-state territorial claims,⁶⁹ as attempts "to remove all doubts on [these points]."⁷⁰ When *implicit* rights are not thus negated, how much stronger is the case for giving effect to the *express* article IV grant to Congress despite such proposals.

It needs also to be borne in mind that the House was excluded from treaty-making because, as Roger Sherman stated in the Convention, "the necessity of secrecy in the case of treaties forbade a reference of them to the whole Legislature"⁷¹—large bodies being thought incapable of preserving secrecy. This circumstance, said James Wilson, "formed the only objection"⁷² to inclusion of the House, and a similar explanation was made in the several ratification conventions.⁷³ Once, however, a treaty is de-

these amendments by its convention. They were usually prepared by a committee, the report of which was subsequently adopted in a perfunctory manner; for it was recognized that it was only a recommendation." R. MOTT, *DUE PROCESS OF LAW* 152-53 (1926) (footnote omitted).

⁶⁶ 3 J. ELLIOT, *supra* note 54, at 592.

⁶⁷ *Id.* at 595.

⁶⁸ *Id.* at 507 (Marshall), 497 (Pendleton), 431, 545 (Randolph).

⁶⁹ See note 49 *supra*.

⁷⁰ 2 M. FARRAND, *supra* note 21, at 466.

⁷¹ *Id.* at 538.

⁷² *Id.*

⁷³ In the South Carolina Convention, Pierce Butler and C.C. Pinckney, delegates to the Federal Convention, so explained (see 4 J. ELLIOT, *supra* note 54, at 272); in the Virginia Convention, Francis Corbin (3 *id.* at 466).

bated and ratified by the Senate, the necessity for secrecy, and therefore, the reason for further exclusion of the House, is at an end. At that point, James Wilson's assurance to the Pennsylvania Ratification Convention has special significance: "[T]he house of representatives possess no active part in making treaties, yet their legislative authority will be found to have strong restraining influence upon both president and senate."⁷⁴ As said by James Iredell in the North Carolina Convention, "it would be very improper if the senate had authority to prevent the house of representatives from protecting the people."⁷⁵ To the contrary, he stated: "Our representatives may at any time compel the senate to agree to a reasonable measure, by withholding supplies [money] till the measure is consented to."⁷⁶ In sum, it was one thing to insist that, in the performance of its own function, the Senate should act by a two-thirds vote, and something else again to court the wrath of those who placed their faith in the more democratic House and were already displeased with the exclusion of the House from treaty-making by further reducing its role under article IV. There is not the faintest intimation in the constitutional history of an intention to do so.

When the *Edwards* majority relies on the failure of the "effort at the Constitutional Convention to introduce House *participation* in *ratification* of treaties,"⁷⁷ it fails to distinguish between the treaty-making process, from which the House is excluded, and the necessity of subsequent action by the House, which takes a treaty out of the self-executing category. That distinction was drawn in 1796 by the House during the debate on the Jay Treaty, in the shape of a resolution adopted by a vote of fifty-seven to thirty-five:⁷⁸

[T]he House of Representatives do not claim any agency in making Treaties; but, that when a Treaty stipulates regulations on any of the subjects submitted by the Constitution to the power of Congress, it must depend, for its execution, as to such stipulations, on a law or laws to be passed by Congress.⁷⁹

⁷⁴ 2 *id.* at 469. This remark was cited with approval in the Jay Treaty debates by William Findley (5 ANNALS OF CONG. 592 (1796)), Albert Gallatin (*id.* at 737), and Madison (*id.* at 775).

⁷⁵ 4 J. ELLIOT, *supra* note 54, at 145.

⁷⁶ *Id.* at 142.

⁷⁷ 580 F.2d at 1060 (emphasis added).

⁷⁸ 5 ANNALS OF CONG. 782 (1796).

⁷⁹ *Id.* at 771.

As Madison explained, such construction "left with the PRESIDENT and Senate the power of making Treaties, but required at the same time the Legislative sanction and cooperation, in those cases where the Constitution had given *express and specific powers* to the Legislature."⁸⁰ That distinction was also drawn by John Marshall, who had been a member of the Virginia Ratification Convention, then engaged in defending the Jay Treaty. The question raised, wrote his biographer, Albert Beveridge, was whether "an international compact requiring an appropriation of money . . . could be made without the concurrence of the House as well as the Senate."⁸¹ Marshall argued that it was "'more in the spirit of the Constitution' for the National House to refuse support after ratification than to have a treaty 'stifled in embryo' by the House passing upon it before ratification."⁸²

The debate on the Jay Treaty, as Madison stated, "was the first time the Treaty-making power had come under formal and accurate discussion."⁸³ It was wide-ranging and acute, and, in the end, proponents of the House function prevailed by a thumping majority. So far as the House is entitled to construe its own powers, their views represent the legislative history.

Washington had kept the Jay Treaty under wraps for four months "before he could bring himself to submit it to the Senate";⁸⁴ it blew up a "storm of popular protest."⁸⁵ Jefferson called it "an execrable thing,"⁸⁶ and, like the Panama Treaty, it was embroiled in heated controversy. The issue was whether the House was entitled to certain documents at the ratification stage. Washington refused to supply them on the ground that the House was not a party to treatymaking, and stated in passing that when it was proposed in the Convention "'that no Treaty should be binding on the United States which was not ratified by a law,'"

⁸⁰ *Id.* at 493 (emphasis added). See *id.* at 774. As Albert Gallatin stated: The power of the House "was not an active and operative power of making and repealing Treaties . . . it was only a negative, a restraining power on those subjects over which Congress had the right to legislate." *Id.* at 745.

⁸¹ 2 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 134 (1916).

⁸² *Id.* at 135. Robert Goodloe Harper, with Marshall, a protagonist of the Jay Treaty, said: "We all admitted here that Congress may refuse to execute a Treaty, but we contend that it has nothing to do with making the Treaty." 5 *ANNALS OF CONG.* 752 (1796).

⁸³ *Id.* at 781.

⁸⁴ S. BEMIS, *JAY'S TREATY* at xiii (1923).

⁸⁵ 2 P. SMITH, *JOHN ADAMS* 874 (1962).

⁸⁶ Letter from Thomas Jefferson to Edward Rutledge (Nov. 30, 1795), reprinted in 7 *WRITINGS OF THOMAS JEFFERSON* 39, 40 (P. Ford ed. 1898).

the "proposition was explicitly rejected."⁸⁷ Madison politely remarked that "he had no recollection of it";⁸⁸ and, in fact, Washington was mistaken. The Journal of the Convention to which he cited contains no such entry;⁸⁹ perhaps he had reference to Roger Sherman's above-quoted remark.⁹⁰ But Sherman made no formal motion and, therefore, it did not come to a vote; what was approved immediately thereafter was the deletion of Madison's "exception" of peace treaties from a two-thirds vote. Madison, not Washington, was the architect of the Constitution; he and the decided majority of the House stood fast for their role "where Legislative objects are embraced by Treaties."⁹¹ Madison justly maintained that

if the Treaty power alone could perform any one act for which the authority of Congress is required by the Constitution, it may perform every act for which the authority of that part of the Government is required. Congress have power to regulate trade, to declare war, to raise armies, to levy, to borrow, and appropriate money, &c. If, by Treaty, therefore, as paramount to the Legislative power, the PRESIDENT and Senate can regulate trade, they can also declare war, they can raise armies to carry on war, and they can procure money to support armies. These powers, however different in their nature or importance, are on the same footing in the Constitution, and must share the same fate.⁹²

By the same token, the President may by treaty "constitute Tribunals inferior to the supreme Court,"⁹³ "provide and maintain a Navy,"⁹⁴ and "provide for calling forth the Militia to execute the Laws of the Union."⁹⁵ All are subsumed in article 1, section 8 under "The Congress shall have power." The Framers, I suggest, would have been aghast at the notion that a foreign power could participate in the ordering of such internal matters.

Madison likewise pointed out that

[t]he specific powers, as vested in Congress by the Constitution, are qualified by sundry exceptions, deemed of great importance

⁸⁷ 5 ANNALS OF CONG. 761 (1796).

⁸⁸ *Id.* at 776.

⁸⁹ *See id.* at 533-34, 544.

⁹⁰ *See* text accompanying note 39 *supra*.

⁹¹ 3 M. FARRAND, *supra* note 21, at 548.

⁹² 5 ANNALS OF CONG. 490 (1796).

⁹³ U.S. CONST. art I, § 8, cl. 9.

⁹⁴ *Id.* cl. 13.

⁹⁵ *Id.* cl. 15.

to the safe exercise of them Now, if the Legislative powers, specifically vested in Congress, are to be no limitation or check to the Treaty power, it was evident that the exceptions to those powers, could be no limitation or check to the Treaty power.⁹⁶

As Abraham Baldwin, who also had been a delegate to the Constitutional Convention, stated, the treaty-making branch would "stand distinguished as an indefinite, uncontrolled branch of the Government, the extent of whose powers was to be known only by its own acts."⁹⁷ He "believed he might say with safety that it was at least a mode of taking away the Legislative powers of the Federal Government that had not before been much contemplated."⁹⁸ Albert Gallatin, who was to become a brilliant Secretary of the Treasury, chimed in that this "truly novel doctrine"⁹⁹ could prostrate "the sacred principle that the people could not be bound without the consent of their immediate Representatives,"¹⁰⁰ a breach spectacularly illustrated by the transfer of the Panama Canal without the participation of the House.

For the opposition, Chauncey Goodrich retorted that, on the Madison principle, "[a]ll the objects so often alluded to are entirely withdrawn from the jurisdiction of the Executive. If we adopt the principle we cannot restrain its full operation. There is no middle ground."¹⁰¹ That is equally true of the sweeping claims on behalf of the treaty power, as Madison noted. It is difficult to conclude, however, that the Framers, after carefully enumerating the legislative powers—conferred on the one body that had enjoyed their confidence in the colonial and 1776-1787 periods¹⁰²—would grant unbridled treaty power to the President and Senate to take over those powers by a compact with a foreign nation. Whether it be a declaration of war or the creation of inferior courts, surely the Framers did not intend to share such powers with a foreign nation to the exclusion of the popularly-

⁹⁶ 5 ANNALS OF CONG. 491 (1796). See also the remarks of Samuel Smith, *id.* at 623.

⁹⁷ *Id.* at 536.

⁹⁸ *Id.* at 537. Gallatin said: "The power of making Treaties being granted in an undefined manner, may, if it is understood not to be restrained by the specific Legislative powers of Congress, embrace and supersede every one of them . . . [and thus] restrain the future exercise of legislation upon any subject whatever." *Id.* at 738-39.

⁹⁹ *Id.* at 738.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 723-24.

¹⁰² R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 49-50 (1974). In 1791, James Wilson found it necessary to admonish the American people that it was time to regard the Executive and judges equally with the Legislature as representatives of the people. 1 WORKS OF JAMES WILSON 293 (R. McCloskey ed. 1967).

elected House, the darling of the people. Were the American people constrained to choose between an unlimited treaty power in derogation of the powers of Congress and a comprehensive legislative check on the treaty power, they would, it may confidently be asserted, place their trust in Congress. Like Madison, they would conclude that "that construction ought to be favored which would preserve the mutual control between the Senate and the House of Representatives, rather than that which gave powers to the Senate not controllable by, and paramount over those of the House of Representatives."¹⁰³

Certainly the cession by treaty of territory or property belonging to the United States was beyond the pale. For this we have the unequivocal authority of Hamilton, exponent of the broadest treaty power. In his "Letters of Camillus," written in *défense* of the Jay Treaty, he commented on article IV:

As to the disposal & regulation of the territory and property of the U States, this will be naturally understood of dispositions and regulations purely domestic and where *the title is not disputed by a foreign power*. Where there are interfering claims of foreign powers, as neither will acknowledge the right of the other to decide, TREATY must directly or indirectly adjust the dispute.¹⁰⁴

¹⁰³ 3 M. FARRAND, *supra* note 21, at 374.

¹⁰⁴ Hamilton, *The Defence No. XXXVII* (Camillus) (New York Jan. 6, 1796) (emphasis added), reprinted in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 47, at 13, 21. His remarks were addressed to the contention that the Constitution "is . . . violated in that part, which empowers Congress to dispose of and make all needful rules and regulations respecting the *territory* or other property of the U States, by those provisions of the Treaty which respect the adjustment boundary in the cases of the Rivers St. Croix & Mississippi." *Id.* at 14.

Another remark by Hamilton calls for notice: "Our treaties with several Indian Nations regulate and change the boundaries between them & the U States." Hamilton, *The Defence No. XXXVIII* (Camillus) (New York Jan. 9, 1796), reprinted in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 47, at 22, 31. He cites the treaty with the Northwestern Indians, which relinquishes to the Indians a large tract of land which they had, by preceding treaties, ceded to the United States. *Id.* at 31. Syrett identifies the Treaty of August 3, 1795, 7 Stat. 49, which is reproduced in 2 U.S. DEP'T OF STATE, TERRITORIAL PAPERS OF THE UNITED STATES 525 (C.E. Carter ed. 1934). No cession of property held by the United States is revealed by that treaty. Article 3 recites that the Indians "cede & relinquish forever" all their claims to described lands, and they further "cede to the United States" certain parcels. Article 4 recites that in consideration

of the cessions and relinquishments of lands made in the preceding Article . . . the United States relinquish their claims to all other [described] Indian lands But from this relinquishment by the United States, the following tracts of land, are explicitly excepted. . . . To which several parcels of land so excepted, the said tribes relinquish all the title and claim which they . . . may have.

Title of the United States to the millions upon millions of dollars of property in the Canal Zone that it acquired by purchase is beyond dispute, and its right "in perpetuity [of] the use, occupation and control" of the Canal Zone was expressly conferred by the 1903 Panama Treaty. Some may urge that such "use" was procured by undue influence upon a fledgling nation, but Panama owed its very existence to that grant. As well unravel the sale of Manhattan by the Indians for "sixty guilders' worth of trading truck."¹⁰⁵

II

LEGISLATIVE CONSTRUCTIONS

Down the years, the Madisonian view has won the sanction of the Senate itself. A report in 1816 by the managers for the House on a conference with managers for the Senate concerning a convention to regulate commerce between Great Britain and the United States stated:

[I]t is by no means the intention of the Senate to assert the treaty-making power to be in all cases independent of the legislative authority. So far from it, that they are believed to acknowledge the necessity of legislative enactment to carry into execution all treaties which contain stipulations requiring appropriations, or which might bind the nation to lay taxes, to raise armies, to support navies, to grant subsidies . . . or to *cede territory*; if indeed this power exists in the Government at all. In some or all of these cases, and probably in many others, it is conceived to be admitted, that the legislative body must act, in order to give effect and operation to a treaty . . ."¹⁰⁶

In 1844, the Senate adopted the position that the constitutional method of *regulating duties* was by legislation rather than by treaty. A report of the Senate Foreign Relations Committee recommended rejection of a treaty (the treaty was then laid on the table by a vote of twenty-six to eighteen) on the ground that

Thus, the treaty makes a studied distinction between the cessions by the Indians, and the relinquishment of claims by the United States. As Hamilton said in respect to the Jay Treaty, "[t]his treaty contains the establishment of a boundary line between the parties which, in part, is arbitrary and could not have been predicated upon precise antecedent right." Hamilton, *The Defence No. XXXVIII* (Camillus) (New York Jan. 9, 1796), reprinted in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 47, at 22, 29.

¹⁰⁵ S. MORISON, OXFORD HISTORY OF THE AMERICAN PEOPLE 57 (1965).

¹⁰⁶ 29 ANNALS OF CONG. 1019 (1816) (emphasis added). Madison and Gallatin denied the existence of such a power. See note 58 and accompanying text *supra*.

the Legislature is the department of Government by which commerce should be regulated and the laws of revenue be passed. The Constitution, in terms, communicates the power to regulate commerce and to impose duties to that department. It communicates it, in terms, to no other. . . . [T]he general rule of our system is indisputably that the control of trade and the function of taxing belong, without abridgment or participation, to Congress. . . . [A]s the general rule, the representatives of the people sitting in their legislative capacity . . . may exercise this power more intelligently, more discreetly . . . and may better discern what true policy prescribes and rejects, than is within the competence of the executive department of the Government.¹⁰⁷

In December 1942, Senator Tom Connally, chairman of the Foreign Relations Committee, addressing the argument that the disposition of waterworks and some property of the Panama Railroad should be by treaty, said:

The Constitution itself confers on Congress specific authority to transfer territory or lands belonging to the United States. . . . [I]f we had a formal treaty before us and if it should be ratified, it still would be necessary for the Congress to pass an act vesting in the Republic of Panama the title to the particular tracts of land; because "the Congress" means both bodies. The House of Representatives has a right to a voice as to whether any transfer of real estate or other property shall be made either under treaty or otherwise.¹⁰⁸

A little later he added: "[I]t would be necessary to have congressional action even though there were a treaty. . . . congressional action parting with title to these properties."¹⁰⁹ The position was upheld by a vote of forty to twenty-nine.¹¹⁰

"To hold that the enumerated powers [of Congress] are by implication excluded from the treaty power," the 1978 report of the Senate Foreign Relations Committee stated, "would be to hold that hundreds of self-executing treaties dealing with such subjects as foreign commerce, copyrights, patents, and postal services are

¹⁰⁷ 6 S. EXEC. J. 334 (1887), reprinted in 2 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 999 (1907).

¹⁰⁸ 88 CONG. REC. 9267 (1942).

¹⁰⁹ *Id.* at 9269. The next day, Senator Tunnell stated: "There is no other method or authority to dispose of property of the Nation than that which is reposed in the Congress." *Id.* at 9322. For an example of a State Department submission of a picayune transfer to Panama for authorization by Congress, see note 227 and accompanying text *infra*.

¹¹⁰ 88 CONG. REC. 9329 (1942).

invalid."¹¹¹ But arrangements by the executive department for the reciprocal receipt and delivery of mail were authorized by the Act of February 20, 1792.¹¹² Under later legislation, executive agreements were authorized by which American copyrights and trademarks secured protection abroad in return for protection by the United States of similar rights of foreign origin.¹¹³ When, in 1883, the President entered into an international convention for the reciprocal protection of industrial property,¹¹⁴ Attorney General Miller advised the Secretary of the Interior that this stipulation is "not self-executing, but requires legislation to render it effective."¹¹⁵ His opinion was approved by the Court of Appeals for the District of Columbia Circuit in *Rousseau v. Brown*.¹¹⁶ As the Supreme Court stated in *United States v. Leslie Salt Co.*,¹¹⁷ "against . . . [a] prior longstanding and consistent administrative interpretation . . . [a] more recent *ad hoc* contention as to how the statute should be construed cannot stand."¹¹⁸

The majority in *Edwards v. Carter* draws distinctions where the Founders saw none. Thus it explains that the article I, section 7, clause 1 language—"All Bills for raising Revenue shall originate in the House of Representatives"—is "restrictive" and prohibits "the use of the treaty power to impose taxes."¹¹⁹ "All Bills . . . shall originate" is no more "restrictive" than "Congress shall have Power to dispose." Attorney General Griffin Bell conceded that the Senate and President may not "bypass the power of Congress

¹¹¹ SENATE FOREIGN RELATIONS REPORT, *supra* note 5, at 66. If the conduct was wrong *ab initio*, it cannot be legitimized by repetition. See *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969).

¹¹² Ch. 7, 1 Stat. 239.

¹¹³ S. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT §§ 63-64 (2d ed. 1916).

¹¹⁴ Convention for the Protection of Industrial Property, Mar. 20, 1883, 25 Stat. 1372, T.S. No. 379.

¹¹⁵ 19 OP. ATT'Y GEN. 273, 279 (1889).

¹¹⁶ 21 App. D.C. 73, 76-77 (1903). Two decades later, a patent controversy drew into issue the effect of a provision of the 1921 treaty of peace between the United States and Germany (Treaty of Berlin, Aug. 25, 1921, United States-Germany, art. 2, § 5, 42 Stat. 1939, T.S. No. 658); the courts followed *Rousseau* and the opinion of Attorney General Miller in finding the provision not to be self-executing. See *Robertson v. General Elec. Co.*, 32 F.2d 495, 499-502 (4th Cir., *cert. denied*, 280 U.S. 571 (1929)); *In re Stoffregen*, 56 D.C. App. 23, 23-24, *cert. denied*, 269 U.S. 569 (1925). See also *Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39 (1913).

¹¹⁷ 350 U.S. 383 (1956).

¹¹⁸ *Id.* at 396. In *General Elec. Co. v. Robertson*, 21 F.2d 214 (D. Md. 1927), *rev'd*, 32 F.2d 495 (4th Cir.), *cert. denied*, 280 U.S. 571 (1929) where the government strongly urged the view "that a treaty affecting patents is not intended to go into effect until ratified by Congress" (*id.* at 220), the court plaintively commented on the "varying attitude which the government from time to time has assumed" on this issue (*id.* at 221).

¹¹⁹ 580 F.2d at 1058.

and in particular the House of Representatives over the purse-strings."¹²⁰ Why may not one-hundred thousand dollars be "expended" by treaty while a "national treasure beyond compare" may be given away? The Framers were not so irrational as to insist that the President could not *purchase* property without congressional assent, but that once purchased he could give it away. To the contrary, Hamilton conceded that property to which the United States had undisputed title could not be disposed of by treaty.¹²¹ Again, the majority finds in article I, section 9, clause 7—"No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law"—an example of a grant of authority that is by its "very terms, exclusive."¹²² Suppose it read "Money shall be drawn from the Treasury by Appropriations made by Law." Would this be less "restrictive" than "All Bills for raising Revenue shall originate in the House of Representatives"? The majority grudgingly concedes that "[t]he *sui generis* nature of a declaration of war and the unique history indicating the Framers' desire to have both Houses of Congress concur in such a declaration, *may* place it apart from the other congressional powers enumerated in Art. I, § 8 and in Art. IV, § 3, cl. 2."¹²³ To the Founders, who revolted against "taxation without representation," taxation was no less *sui generis* than a declaration of war. And the "unique history" avouched by the majority refers to the "Congress," not to the House; it was not suggested that "both Houses . . . [must] concur in such a declaration" for it was assumed that "Congress" referred to both Houses, as the Constitution provides. The war power, declared James Wilson and Hamilton, was vested in Congress, exactly as are all the other powers conferred by article I, section 8 and article IV, section 2.¹²⁴ The implausibility of the majority's distinctions underlines Madison's statement that if

the PRESIDENT and Senate can regulate trade, they can also declare war, they can raise armies to carry on war, and they can

¹²⁰ *Senate Foreign Relations Hearings, supra* note 11, pt. 1, at 209 (statement of Att'y Gen. Bell).

¹²¹ See note 104 and accompanying text *supra*.

¹²² 580 F.2d at 1058.

¹²³ *Id.* at 1058 n.7 (emphasis added).

¹²⁴ R. BERGER, *supra* note 102, at 61, 67. And despite the "unique history" of the "declaration of war clause," a succession of Presidents and the State Department have insisted that 125 self-serving presidential "precedents" authorized the President to commit the nation to war without a congressional declaration of war, first in Korea, then in Vietnam. See *id.* at 75-88. Why should the State Department's "cession" precedents enjoy a higher status than the now discredited presidential warmaking "precedents"?

procure money to support armies. These powers, however different in their nature or importance, are all on the same footing in the Constitution, and must share the same fate.¹²⁵

III

THE CASES

As the majority in *Edwards v. Carter* noted, "none of the actual holdings in these cases addressed the precise issue before us—whether the property clause prohibits the transfer of United States property to foreign nations through self-executing treaties."¹²⁶ But there is a line of cases that categorically declares the power conferred by article IV to be "exclusive." So *Sioux Tribe of Indians v. United States*¹²⁷ holds that "the Constitution places the authority to dispose of public lands exclusively in Congress";¹²⁸ and *Wisconsin Central Railroad v. Price County*¹²⁹ declares that article IV "implies an exclusion of all other authority over the property which could interfere with this right."¹³⁰ Such utterances are thrust aside by the majority as "dicta."¹³¹ Dicta, however, are statements not necessary to the decision,¹³² whereas in *Wisconsin Central Railroad*, for example, the "implied exclusion" was the basis of the decision that state authority over federal lands is subordinate to that of Congress.¹³³ Next, the majority argues that such "dicta" are confined to showing "a lack of any constitutional basis for exercise of authority by individual states over United

¹²⁵ 5 ANNALS OF CONG. 490 (1796).

¹²⁶ 580 F.2d at 1061.

¹²⁷ 316 U.S. 317 (1942).

¹²⁸ *Id.* at 326.

¹²⁹ 133 U.S. 496 (1890).

¹³⁰ *Id.* at 504.

¹³¹ 580 F.2d at 1061.

¹³² Where a matter was "not really in question . . . what was said of it cannot control here where the very point is presented for decision." *Union Tank Line Co. v. Wright*, 249 U.S. 275, 286 (1919).

¹³³ *Wisconsin Central Railroad*, the *Edwards* majority states, decided that "United States property is not subject to state taxation since enforcement of such a tax might result in states, instead of Congress, controlling the disposition of federal property contrary to Art. IV, § 3, cl. 2." 580 F.2d at 1061 n.18. A later and similar utterance by the Court—"The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation'" (*Alabama v. Texas*, 347 U.S. 272, 273 (1954) (quoting *United States v. Mideast Oil Co.*, 236 U.S. 459, 474 (1915)))—is thrust aside by the majority because the "salient" question "was whether Congress could grant to individual states inalienable title to and ownership of certain resources under submerged marginal ocean lands" (580 F.2d at 1061 n.18). That these cases do not examine the treaty power does not impeach the "exclusivity" principle on which the decisions are grounded.

States property.”¹³⁴ But by the majority’s own version, *Sioux Tribe* “held that the *President* could not by *Executive Order* dispose of public lands without congressional authorization,”¹³⁵ thus negating the majority’s “confinement” of article IV to state-federal relations and laying down that the power of Congress is “exclusive” as *against the President*, thereby formulating a *principle* that can embrace his treaty power. Such decisions are consistent with the general principle earlier expressed by Justice Story: “The power of congress over the public territory is clearly exclusive and universal; and their legislation is subject to no control; but is absolute, and unlimited, unless so far as it is affected by stipulations in the cessions”¹³⁶ By “cessions” I take it that Story had reference to cessions *to* the United States since he had earlier written of foreign cessions by treaty.¹³⁷ For him, therefore, the treaty power in no way limited the “absolute and unlimited” power of Congress to “dispose” *unless* a particular treaty so stipulated with respect to territory ceded to the United States, as did an earlier Spanish treaty¹³⁸ by “reserving” individual parcels from the cession. Story was the only Justice in our history to examine every portion of the Constitution with great care and to publish a massive commentary that stands as a landmark of constitutional exegesis. His studied conclusion carries great weight and, in truth, reflects traditional canons of construction.

A. *The Indian Treaty Cases*

Faithfully following in the path of the administration’s arguments, the *Edwards* majority employs a double standard—dismissing unfavorable pronouncements that were necessary for decision while reading undeniable dicta as Holy Writ. What it regards as the “leading case on the power to convey such [government] land by self-executing treaty”¹³⁹ is *Holden v. Joy*,¹⁴⁰ the sheerest dictum, for the Court itself, as Attorney General Bell

¹³⁴ 580 F.2d at 1061.

¹³⁵ *Id.* at 1061 n.18 (first emphasis added).

¹³⁶ 3 J. STORY, *supra* note 22, § 1322, at 198.

¹³⁷ *Id.* §§ 1277-83.

¹³⁸ See Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, United States-Spain, art. VIII, 8 Stat. 252, T.S. No. 327, construed in *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). The Supreme Court also addressed such a “reservation” (see Treaty with the Chipewewa Indians, Oct. 2, 1863, art. IX, 13 Stat. 667) in *Jones v. Meehan*, 175 U.S. 1 (1899). See notes 154-55 and accompanying text *infra*.

¹³⁹ 580 F.2d at 1062.

¹⁴⁰ 84 U.S. (17 Wall.) 211 (1872).

noted, "conceded that the question was immaterial in the case at bar because Congress had actually implemented and ratified that particular treaty."¹⁴¹ "[S]ubsequent ratification," it needs to be remembered, "is equivalent to original authority."¹⁴² *Holden* involved one of a series of Indian treaties which arose out of the national^o policy of opening up Indian lands for settlement by exchanging for them territory farther west. Thus Congress, by the Act of May 28, 1830,¹⁴³ authorized the exchange of western lands for the Indians' eastern lands in connection with their removal to lands west of the Mississippi.¹⁴⁴ The Treaty of December 29, 1835,¹⁴⁵ which made such an exchange, somewhat exceeded the statutory authorization,¹⁴⁶ but Congress soon appropriated \$4,500,000 to carry out the treaty,¹⁴⁷ and thereby, as Judge MacKinnon noted, "had in effect ratified" the ultra vires transfer to the Indians.¹⁴⁸ It is against this background that the *Holden* Court stated:

[S]till it is insisted that the President and Senate, in concluding [a treaty for the transfer of property], could not lawfully covenant that a patent should issue to convey lands which belonged to the United States On the contrary, there are many authorities where it is held that a treaty may convey to a grantee good title to such lands without an act of Congress conferring it¹⁴⁹

Seldom in the annals of the Court have citations to "authorities" been so far afield, as I discovered when I examined them¹⁵⁰ and as Judge MacKinnon more abundantly demonstrates.¹⁵¹ Half of the citations are wholly irrelevant and the other half involve "reserves" from the cessions made by the Indians to which title did not, therefore, pass to the United States. And the *Holden* Court itself added that "it is not necessary to de-

¹⁴¹ *Senate Foreign Relations Hearings, supra* note 11, pt. 1, at 207. See *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 247 (1872). The *Edwards* majority agrees that "the Court found it unnecessary to rest its decision on this constitutional basis." 580 F.2d at 1062.

¹⁴² *Wilson v. Shaw*, 204 U.S. 24, 32 (1907).

¹⁴³ Ch. 148, 4 Stat. 411.

¹⁴⁴ See 84 U.S. (17 Wall.) at 237-38.

¹⁴⁵ Treaty with the Cherokee Indians, Dec. 29, 1835, 7 Stat. 478.

¹⁴⁶ 84 U.S. (17 Wall.) at 239-40. See Act of May 28, 1830, ch. 148, 4 Stat. 411.

¹⁴⁷ 84 U.S. (17 Wall.) at 247. See Act of July 2, 1836, ch. 267, 5 Stat. 73.

¹⁴⁸ 580 F.2d at 1092 (dissenting opinion).

¹⁴⁹ 84 U.S. (17 Wall.) at 247.

¹⁵⁰ See Appendix.

¹⁵¹ 580 F.2d at 1092-94 & n.37 (dissenting opinion).

cide the question in this case" as the provisions of the treaty "have been repeatedly recognized by Congress as valid."¹⁵² Such is the dictum that the majority exalts to the status of a "principle." With Chief Judge Cardozo, one exclaims, "I own that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta."¹⁵³

Next the majority invokes *Jones v. Meehan*,¹⁵⁴ where the treaty provided: "[T]here shall be set apart from the tract hereby ceded [to the United States by the Indians] a reservation of (640) six hundred and forty acres near the mouth of Thief River for the chief Moose Dung"¹⁵⁵ The issue was what kind of title he took. Light on the nature of that title had been cast by Chief Justice Marshall: "It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, *charged* with this right of possession, and to the exclusive power of *acquiring* that right"¹⁵⁶—what Marshall at another point described as "the exclusive right to purchase from the Indians."¹⁵⁷ As *Holden v. Joy* later held, discovery "gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell."¹⁵⁸ A word about the mechanics of these "reserves." The Supreme Court noted that the Indian tribes "held their respective lands and territories each in common, the individuals of each tribe . . . holding . . . in common with each other, and there being among them no separate property in the soil."¹⁵⁹ Consequently, "the usual mode adopted by the Indians for granting lands to individuals, has been to reserve them in a treaty"¹⁶⁰ In an Opinion of the Attorney General, Roger Taney held that

[t]hese reservations are excepted out of the grant made by the treaty, and did not therefore pass by it: consequently, the title

¹⁵² 84 U.S. (17 Wall.) at 247.

¹⁵³ B. CARDOZO, NATURE OF THE JUDICIAL PROCESS 29 (1921).

¹⁵⁴ 175 U.S. 1 (1889), *discussed in* *Edwards v. Carter*, 580 F.2d 1055, 1062 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978).

¹⁵⁵ Treaty with the Chippewa Indians, Oct. 2, 1863, art. IX, 13 Stat. 667, *quoted in* *Jones v. Meehan*, 175 U.S. 1, 4 (1899).

¹⁵⁶ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 603 (1823) (emphasis added).

¹⁵⁷ *Id.* at 585.

¹⁵⁸ 84 U.S. (17 Wall.) at 244. Compare the view of the Supreme Court that use and occupation of the Panama Canal amounted to title, set out in note 59 *supra*.

¹⁵⁹ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 549-50 (1823).

¹⁶⁰ *Id.* at 598.

remains as it was before the treaty; that is to say, the lands reserved are still held under the original Indian title.¹⁶¹

The *Edwards* majority states that "*Jones v. Meehan* discussed and rejected as irreconcilable with later Supreme Court opinions the contrary views expressed by Attorney General Taney."¹⁶² This is only partially true. The Court in *Meehan* quoted from *Doe v. Wilson*:¹⁶³

The reservees took by the treaty, directly from the nation, the Indian title The treaty itself converted the reserved sections into individual property. . . . [A]s a part of the consideration for the cession, certain individuals of the nation had conferred on them [by the tribe] portions of the land, to which the *United States title was* either added or promised to be added [I]t is manifest that sales of reserved sections were contemplated, as the lands ceded were forthwith to be surveyed, sold and inhabited by a white population, among whom the Indians could not remain.¹⁶⁴

It is against this background that the Court stated: "Taney's opinion . . . that the treaty rather confirmed the Indian right than granted a new title, can hardly be reconciled with the later judgments of the court"¹⁶⁵—the reason being that the United States had "added" its "right of purchase" to the Indians' right of occupancy in order to insure that white purchasers from Indians would obtain title, not merely the Indians' right of possession. Without such title, the government's purpose to displace the Indians by white settlers would have been aborted.

This "addition" leads the *Edwards* majority to conclude that the treaties "clearly disposed of United States property interests,"¹⁶⁶ and to rely on the *Meehan* statement that "good title to parts of the lands of an Indian tribe may be granted to individu-

¹⁶¹ 2 OP. ATT'Y GEN. 587, 588 (1833), quoted in *Jones v. Meehan*, 175 U.S. 1, 12 (1899).

¹⁶² 580 F.2d at 1062 n.19.

¹⁶³ 64 U.S. (23 How.) 457 (1860).

¹⁶⁴ 175 U.S. at 15-16 (quoting *Doe v. Wilson*, 64 U.S. (23 How.) 457, 463-64 (1860) (emphasis added)). The continued validity of Taney's statement that land "reserved" to individual Indians does not pass to the United States may be gathered from *Francis v. Francis*, 203 U.S. 233 (1906), which quotes *Jones v. Meehan* for the proposition that when a treaty makes "a reservation . . . of a specified number of sections of land . . . the treaty itself converts the reserved land into individual property." *Id.* at 238 (quoting *Jones v. Meehan*, 175 U.S. 1, 21 (1899)).

¹⁶⁵ 175 U.S. at 13-14.

¹⁶⁶ 580 F.2d at 1062.

als . . . without any act of Congress.”¹⁶⁷ No act of Congress was needed, in my judgment, because Congress, within a year after Taney’s opinion, had departed from its prohibition of “purchases or leases from ‘any Indian’” and adopted the Act of June 30, 1834,¹⁶⁸ from which *Meehan* inferred that thenceforth there would not be “any general restriction upon the alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States.”¹⁶⁹ This statutory permission to alienate Indian lands may be read as a tacit consent to the addition by the United States of its “right of purchase” to the Indians’ right to possess in order not to perpetrate a fraud on white purchasers. It was an implementation of the settled policy to move the Indians westward; such “additions” are hardly to be compared to the disposal of the Panama Canal.

B. *Miscellaneous Citations*

No discussion of the cases would be complete without reference to two cited on behalf of the administration but discreetly jettisoned by the majority, presumably because their irrelevance was too obvious. Their transparent irrelevance should have cautioned the majority that argumentation which grasps at such straws betrays a shaky scaffolding. Herbert J. Hansell, Legal Advisor to the State Department, cited *Missouri v. Holland*¹⁷⁰ in support of “[t]he power to dispose of public land . . . by treaty.”¹⁷¹ That case arose out of a challenge by Missouri to legislation executing a convention with Great Britain for the protection of migratory birds that annually traversed parts of the United States and Canada.¹⁷² Justice Holmes, addressing the argument that the convention infringed powers reserved to the states by the tenth amendment, stated: “Wild birds are not in possession of anyone; and possession is the beginning of ownership. The whole

¹⁶⁷ 175 U.S. at 10, *quoted in* *Edwards v. Carter*, 580 F.2d 1055, 1062 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978).

¹⁶⁸ Ch. 161, § 12, 4 Stat. 729.

¹⁶⁹ 175 U.S. at 13.

¹⁷⁰ 252 U.S. 416 (1920).

¹⁷¹ *Panama Canal Treaty: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess., pt. 2, at 5 (1977) (testimony of Herbert J. Hansell) [hereinafter cited as *Senate Judiciary Hearings*].

¹⁷² *See* *Migratory Bird Treaty Act*, ch. 128, 40 Stat. 755 (1918). The convention called for such legislation. *See* *Convention on Migratory Birds*, Dec. 8, 1916, United States-Great Britain, art. VIII, 39 Stat. 1702, T.S. No. 628.

foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away."¹⁷³ Consequently, the state could assert no "title" in migratory birds, nor, on the same reasoning, could the United States. The case is therefore utterly irrelevant to the power by treaty to dispose of property belonging to the United States.

*Geofroy v. Riggs*¹⁷⁴ was cited by Dean Louis Pollak,¹⁷⁵ whom the majority in *Edwards v. Carter* included in its list of "authorities in agreement" with the conclusion of the Senate Foreign Relations Committee.¹⁷⁶ *Geofroy* held that a Frenchman could inherit property in the District of Columbia under a convention providing for reciprocal rights of inheritance by citizens of the signators.¹⁷⁷ Dean Pollak considers that

Geofroy v. Riggs is a particularly strong illustration of the capacity of treaties to regulate matters delegated to Congress: That case applied a treaty to rights of inheritance in the District of Columbia, notwithstanding that Article I, § 8(17) confers on Congress the power of "exclusive legislation in all cases whatsoever" relating to the District.¹⁷⁸

Inheritance of *private* property sheds no light on the power to dispose of government property by treaty. Moreover, the 1853 convention conferred the right only in states "whose existing laws permit it"¹⁷⁹ (the Court held the District of Columbia a state for purposes of the treaty¹⁸⁰), and although the Act of March 3, 1887¹⁸¹ forbade ownership of land in the District to aliens, it excepted the disposition of lands "secured by existing treaties,"¹⁸² which the Court held included realty "acquired by inheri-

¹⁷³ 252 U.S. at 434.

¹⁷⁴ 133 U.S. 258 (1890).

¹⁷⁵ 124 CONG. REC. S729 (daily ed. Jan. 30, 1978).

¹⁷⁶ 580 F.2d at 1057 n.4.

¹⁷⁷ Consular Convention with France, Feb. 23, 1853, United States-France, 10 Stat. 992, T.S. No. 92, *quoted in* *Geofroy v. Riggs*, 133 U.S. 258, 268 (1890).

¹⁷⁸ 124 CONG. REC. S732 n.6 (daily ed. Jan. 30, 1978).

¹⁷⁹ Consular Convention with France, Feb. 23, 1853, United States-France, art. VII, 10 Stat. 992, T.S. No. 92.

¹⁸⁰ 133 U.S. at 268-69.

¹⁸¹ Ch. 340, 24 Stat. 476, *cited in* *Geofroy v. Riggs*, 133 U.S. 258, 272 (1890).

¹⁸² The Act prohibited alien ownership of land in the District of Columbia, "Provided, That the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries." *Id.* § 1.

tance.”¹⁸³ Thus the convention did not pretend to override local law to the contrary; in fact, Congress had consented to application of the convention.

IV

TREATY “PRECEDENTS”

The “precedents” cited by the administration and adopted by the *Edwards* majority should be measured by Lord Chief Justice Denman’s observation that “[t]he practice of a ruling power in the State is but a feeble proof of its legality.”¹⁸⁴ One need only to recall the “precedents” summoned by the State Department to justify presidential warmaking in Korea and in Vietnam to be skeptical of such self-serving actions.¹⁸⁵ The “vast majority” of those precedents, said Edward Corwin, “involved fights with pirates, landings of small naval contingents on barbarous or semi-barbarous coasts” to protect stranded Americans, and the like.¹⁸⁶ From these the State Department conjured a presidential power single-handed to commit the nation to war. The cited treaties are little better precedents for the disposition by treaty of undeniable property of the United States.

A. *The Boundary Treaties*

The majority dismisses as irrelevant the fact that “many previous treaties couched in self-executing terms . . . [dealt] with boundary issues.”¹⁸⁷ It finds it “exceedingly difficult to understand why the constitutionality of utilization of the treaty process should depend on whether the nation to which the land is conveyed has previously ‘claimed’ such land.”¹⁸⁸ The “difficulty” arises from the assumption that “land is conveyed”—from a failure to distinguish between a “claim” and ownership. One can “claim” the moon. When two nations lay claim to the same territory, neither may unilaterally “dispose” of it. The conflicting

¹⁸³ 133 U.S. at 272.

¹⁸⁴ *Stockdale v. Hansard*, 112 Eng. Rep. 1112, 1171 (Q.B. 1839).

¹⁸⁵ See Wormuth, *The Vietnam War: The President versus the Constitution*, in 2 THE VIETNAM WAR AND INTERNATIONAL LAW 711 (R. Falk ed. 1969).

¹⁸⁶ Corwin, *The President's Powers*, 124 NEW REPUBLIC, Jan. 29, 1951, at 15, 16, reprinted in THE PRESIDENT: ROLES AND POWERS 360, 361 (D. Haight & L. Johnston eds. 1965). See R. BERGER, *supra* note 102, at 75-86.

¹⁸⁷ 580 F.2d at 1063.

¹⁸⁸ *Id.* at 1064 n.23.

claims must be settled by a compromise—a treaty for mutual surrender of inflated claims in return for undisputed title to a lesser area. Only then is it possible to determine who has what. A happy example—the Spanish claim to the Far West—is instanced by Judge MacKinnon, who draws the proper conclusion:

Since . . . Spain claimed the western lands to the 42d parallel, the fact of their claim, based as it was on the recognized right of discovery, some minimal exploration in the most far reaching regions and very minor settlement, when that claim is recognized in a treaty by the United States it is almost impossible to conclude in view of our negligible exploration or settlement of the fringes of the Spanish claim that the United States was actually disposing of territory or property belonging to it. What rights we did possess in the eastern area flowed from the Louisiana Purchase from France of what had originally been territory claimed by Spain.¹⁸⁹

Another example is the dispute relating to the boundary between Maine and Canada, finally settled by the Webster-Ashburton Treaty of 1842.¹⁹⁰ Samuel Eliot Morison recounts that “[o]nly a scant 200 miles of the easternmost section, from the Bay of Fundy north, had been determined.”¹⁹¹ A joint commission “was unable to discover what the treaty of 1783 meant by the ‘highlands between the St. Lawrence and the Atlantic Ocean,’ ”¹⁹²—a boundary landmark—and when the matter was referred to the King of the Netherlands for arbitrament, he too pleaded “inability to locate non-existent highlands.”¹⁹³ This was a dispute about unknown boundaries in a vast uncharted wilderness.

What mystifies the *Edwards* majority was clear enough to Hamilton, Justice Story and others. Hamilton drew the line between dispositions where “the title is not disputed” and which therefore constitute “property” governed by article IV, and cases where a dispute necessitates adjustment by treaty.¹⁹⁴ Recognition of that distinction is exhibited by the correspondence between Governor Edward Everett of Massachusetts and Justice Story re-

¹⁸⁹ *Id.* at 1083 n.23 (dissenting opinion).

¹⁹⁰ Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, T.S. No. 119.

¹⁹¹ See S. MORISON, *supra* note 105, at 407.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ See note 104 and accompanying text *supra*.

specting the Northeastern boundary that, in Everett's words, presented "a question not of ceding an admitted portion of the territory of Maine, but of ascertaining the boundary between the British territory and ours."¹⁹⁵ Story concurred, writing that "in a case of contested boundary, there is no pretence to say that an ascertainment of the true boundary involves the question of cession."¹⁹⁶ Others have since joined in that opinion.¹⁹⁷

B. *Treaties Cited By Edwards v. Carter*

A number of treaties are cited by the *Edwards* majority "which cede land or other property assertedly owned by the United States."¹⁹⁸ They are drawn from a list contained in the report of the Senate Foreign Relations Committee, and "supplied by [the] Department of State," of instances "in which property belonging to the United States Government has, according to the Executive Branch, been transferred by treaty."¹⁹⁹ The Committee was betrayed by its reliance on the executive branch, as its citation to the 1971 treaty with Honduras respecting the Swan Islands²⁰⁰ speedily discloses. In its 1972 report on this treaty the Committee stated:

The Swan Islands are rock keys located in the Caribbean about 98 miles off the coast of Honduras. The islands have no intrinsic value and the largest of the two islands is only two miles long and one-half mile wide. The only U.S. interest in these

¹⁹⁵ Letter from Governor Everett to Justice Story (Apr. 14, 1838), *reprinted in* 2 LIFE AND LETTERS OF JOSEPH STORY 286, 287 (W. Story ed. 1851).

¹⁹⁶ Letter from Justice Story to Governor Everett (Apr. 17, 1838), *reprinted in* 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 195, at 287, 288.

¹⁹⁷ "A treaty for the determination of a disputed line operates not as a treaty of cession, but of recognition." S. CRANDALL, *supra* note 113, § 99, at 226. Willoughby states:

In several treaties in settlement of boundary disputes areas previously claimed by the United States as its own have been surrendered to foreign powers. These, however, can scarcely be considered as instances of the alienation of portions of its own territory, for the fact that the treaties were assented to by the United States is in itself evidence that it was conceded that the claim that the areas in question belonged to the United States was unfounded. There has been no instance in which territory, indisputably belonging to the United States, has been alienated to another power.

1 W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES § 317, at 572 (2d ed. 1929).

¹⁹⁸ 580 F.2d at 1063.

¹⁹⁹ SENATE FOREIGN RELATIONS REPORT, *supra* note 5, at 68.

²⁰⁰ Treaty on the Swan Islands, Nov. 22, 1971, United States-Honduras, 23 U.S.T. 2630, T.I.A.S. No. 7453.

islands is the operation and maintenance of a meteorological observation and telecommunications facility and an air navigation beacon. The islands are populated by approximately six Americans²⁰¹

Some precedent for the multibillion dollar Panama transfer! To do the *Edwards* majority justice, it made no mention of the Swan Island Treaty. But the four treaties it does cite²⁰² stand little better.

1. *The Webster-Ashburton Treaty of 1842*²⁰³

The Treaty of 1842 requires no further discussion.²⁰⁴ The Treaty of 1846²⁰⁵ itself recited that there was "doubt and uncertainty . . . respecting the sovereignty and government of . . . the northwest coast of America, lying westward of the Rocky or Stony Mountains,"²⁰⁶ a classic settlement of a boundary dispute.

2. *The Spanish Treaty of February 22, 1819*²⁰⁷

This treaty, ratified on February 19, 1821, had congressional consent on the heels of ratification in the form of the Act of March 3, 1821²⁰⁸—legislation to execute the treaty—so that it is reasonable to infer that they were simultaneously prepared. The parties "determined to settle and terminate all their differences and *pretensions*, by a Treaty . . . [to] designate, with precision, the limits of their respective bordering territories in North America."²⁰⁹ They agreed upon a boundary west of the Mississippi and reciprocally ceded their "claims and pretensions" on either side of the boundary to each other.²¹⁰ A portion of the boundary referred to the source of the Arkansas River, and, as Judge MacKinnon points out, "[t]he treaty indicated that the par-

²⁰¹ S. EXEC. REP. NO. 92-94, 92d Cong., 2d Sess. 1 (1972).

²⁰² 580 F.2d at 1063 & n.21.

²⁰³ Aug. 9, 1842, United States-Great Britain, 8 Stat. 572, T.S. No. 119.

²⁰⁴ See notes 190-93 and accompanying text *supra*.

²⁰⁵ July 17, 1846, United States-Great Britain, 9 Stat. 869, T.S. No. 120.

²⁰⁶ *Id.* Preamble.

²⁰⁷ Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, United States-Spain, 8 Stat. 252, T.S. No. 327. See note 189 and accompanying text *supra*. The Supreme Court addressed this treaty in *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

²⁰⁸ Ch. 39, 3 Stat. 637.

²⁰⁹ Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, United States-Spain, Preamble, 8 Stat. 252, T.S. No. 327 (emphasis added).

²¹⁰ *Id.* art. 111.

ties did not know the precise source of the Arkansas River and, particularly in the mountain areas, neither nation was sufficiently familiar with much of the areas traversed by the newly drawn boundary lines to know precisely what was accomplished."²¹¹ Again grandiose "claims" to a primeval terra incognita which, to borrow from Governor Edward Everett, presented "a question not of ceding an admitted portion" of the United States, "but of ascertaining the boundary between the [Spanish] territory and ours."²¹²

3. *The Japanese Treaty of June 17, 1971*²¹³

This treaty provided for the "reversion" of the Ryukyu and Daito Islands to Japan, that is, "the return to Japan of administrative rights over these islands."²¹⁴ By article III of the 1951 Treaty of Peace with Japan,²¹⁵ the United States, pending its proposal "to the United Nations to place [the islands] under its trusteeship system,"²¹⁶ received the right to exercise "all and any powers of administration, legislation and jurisdiction over the territory and inhabitants of these islands."²¹⁷ And it was these rights that were relinquished by the 1971 treaty.²¹⁸ While Japan renounced in article II of the 1951 treaty "all right, title and claim" to various territories,²¹⁹ it made no such renunciation with respect to the Ryukyu and Daito Islands, confirming that the United States obtained only powers of "administration and legislation." Quoting the Legal Advisor of the State Department that

²¹¹ 580 F.2d at 1097 (dissenting opinion). Compare Hamilton's reference to "the establishment of a boundary line . . . which, in part, is arbitrary and could not have been predicated upon precise antecedent right." Hamilton, *The Defence No. XXXVIII* (Camillus) (New York Jan. 9, 1796), reprinted in 20 PAPERS OF ALEXANDER HAMILTON, *supra* note 47, at 22, 29.

²¹² Letter from Governor Everett to Justice Story (Apr. 14, 1838), reprinted in 2 LIFE AND LETTERS OF JOSEPH STORY, *supra* note 195, at 286, 287, quoted in text accompanying note 195 *supra*.

²¹³ Agreement Concerning the Ryukyu Islands and Daito Islands, June 17, 1971, United States-Japan, 23 U.S.T. 446, T.I.A.S. No. 7314.

²¹⁴ Presidential Proclamation, May 4, 1972, 23 U.S.T. 446, T.I.A.S. No. 7314.

²¹⁵ Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, T.I.A.S. No. 2490, 136 U.N.T.S. 45.

²¹⁶ *Id.* art. III.

²¹⁷ *Id.*

²¹⁸ Agreement Concerning the Ryukyu Islands and Daito Islands, June 17, 1971, United States-Japan, art. 1, 23 U.S.T. 446, T.I.A.S. No. 7314.

²¹⁹ Treaty of Peace with Japan, Sept. 8, 1951, art. II, 3 U.S.T. 3169, T.I.A.S. No. 2490, 136 U.N.T.S. 45.

“sovereignty over the Ryukyu . . . Islands remains in Japan,”²²⁰ a district court held that there had been no cession.²²¹ The Fourth Circuit quoted a statement by Ambassador John Foster Dulles, a delegate to the Japanese Peace Conference, that the 1951 Treaty of Peace sought “to permit Japan to retain residual sovereignty”²²² over these islands, and it held that the treaty did not make “the island a part of the United States.”²²³ No support for a cession of United States property by self-executing treaty can be derived from this citation.

4. *The Panama Treaty of January 24, 1955*²²⁴

The *Edwards* majority states that the Panama Treaty of 1955

transferred certain property (a strip of water and other sites within the Canal Zone) to Panama without concurring legislation by the Congress, while transfer of other property (owned by the United States but within the jurisdiction of Panama) was, under the terms of the treaty itself, dependent upon concurring legislation by the Congress. The decision to cast some but not all of the articles of conveyance in non-self-executing form was a policy choice; it was not required by the Constitution.²²⁵

The majority’s “policy choice” removes into the realm of discretion what hitherto has been considered by the Senate itself as a constitutional requirement, as when it endorsed Senator Tom Connally’s insistence in 1942 that “it would be necessary to have congressional action even though there were a treaty.”²²⁶ Consider a prior “policy choice.” In 1932 the State Department sought an authorization from Congress to transfer some realty in the Canal Zone to Panama so that the United States might build a legation thereon in compliance with international law.²²⁷ As

²²⁰ *United States v. Ushi Shiroma*, 123 F. Supp. 145, 149 (D. Hawaii 1954).

²²¹ *Id.* at 148.

²²² *Burna v. United States*, 240 F.2d 720, 721 (4th Cir. 1957).

²²³ *Id.* Judge MacKinnon observed that some surplus property may have been transferred under enactments authorizing the disposition of foreign excess property (*see, e.g.*, 40 U.S.C. §§ 511-512 (1976)). 580 F.2d at 1098 (dissenting opinion).

²²⁴ Treaty of Mutual Understanding and Cooperation, Jan. 25, 1955, United States-Panama, 6 U.S.T. 2273, T.I.A.S. No. 3297.

²²⁵ 580 F.2d at 1063.

²²⁶ 88 CONG. REC. 9269 (1942). *See* notes 108-10 and accompanying text *supra*.

²²⁷ In the course of the debate in the House on a bill “to authorize the modification of the boundary line between the Panama Canal Zone and the Republic of Panama” (75 CONG. REC. 4652 (1932) (remarks of Rep. Linthicum)), Representative West remarked:

Judge MacKinnon points out, the administration "considered it to be necessary to obtain prior specific congressional authorization even for a *minor* disposition."²²⁸

To recur to the 1955 treaty, article V repeatedly provides that the several agreements are "subject to the enactment of legislation by the Congress."²²⁹ No such provision is contained in articles VI and VII, but these, as Judge MacKinnon stressed, only related to minor boundary matters: "[R]ectification of boundaries is a distinct matter from the disposition of the staggering amount of property in question here."²³⁰ "[T]here comes a point," said Alexander Bickel, "when a difference of degree achieves the magnitude of a difference in kind."²³¹ Rather than to view the applicability of article IV of the Constitution to be subject to the State Department's whimsical "policy choice,"²³² it is preferable to consider that the Department correctly conformed in article V of the 1955 Treaty to the prior practice of 1932 and 1942, and properly treated the minor boundary rectification as requiring no consent because it did not constitute a cession.²³³ Let congressional acquiescence in *de minimis* dispositions be assumed, even so Congress may not abdicate its powers,²³⁴ and a fortiori, it cannot

[T]here is a site within the Panama Canal Zone that is desirable as a site for the American legation. It is difficult, however, to have an American legation built upon territory that is technically within the jurisdiction of the United States. The purpose of this bill, therefore, is to take this parcel of land . . . and transfer it, technically, to the jurisdiction of the Republic of Panama. We regain jurisdiction because of the building there of an American legation.

(*id.* at 4653). The authorization is contained in the Act of May 3, 1932, ch. 162, 47 Stat. 145.

²²⁸ 580 F.2d at 1084 (dissenting opinion) (emphasis in original). Such "policy choices" recall the bitter remark of Senator J. William Fulbright, Chairman of the Senate Foreign Relations Committee, that the State Department "submit[s] many agreements dealing with the most trivial matters as treaties" but considers that "something that is as important as the stationing of troops and the payment of millions of dollars . . . is proper for an executive agreement." *War Powers Legislation: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 529 (1971) [hereinafter cited as *War Powers Hearings*].

²²⁹ Treaty of Mutual Understanding and Cooperation, Jan. 25, 1955, United States-Panama, art. V, 6 U.S.T. 2273, T.I.A.S. No. 3297.

²³⁰ 580 F.2d at 1083 (dissenting opinion).

²³¹ *War Powers Hearings*, *supra* note 228, at 552 (statement of Alexander B. Bickel, Professor of Law, Yale University).

²³² See note 225 and accompanying text *supra*.

²³³ There is no need to dissect the other treaties cited by the majority on the maxim *falsus in uno, falsus in omnibus*. See *Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 339 (1822) (Story, J.).

²³⁴ *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935).

lose them by disuse.²³⁵ Finally, whatever the scope of presidential practice to establish the meaning of amorphous grants to *him*, he cannot go so far as to curtail by his practice express grants of power to Congress. As said by Justice Frankfurter, even “[d]eeply imbedded traditional ways of conducting government cannot supplant the Constitution”;²³⁶ they cannot supplant “very specific provisions.”²³⁷

CONCLUSION

The exclusion of the House from the disposition of the Panama Canal constitutes a serious breach of constitutional boundaries in response to political pressures—fear that the treaty would be blocked in the House.²³⁸ It is the essence of constitu-

²³⁵ Cf. *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950) (investigatory powers of FTC not lost by disuse). In the Jay Treaty debates of 1796, Representative Havens “laid it down as an incontrovertible maxim, that neither of the branches of the Government could, rightfully or constitutionally, divest itself of any powers . . . by a neglect to exercise those powers that were granted to it by the Constitution.” 5 ANNALS OF CONG. 486 (1796).

²³⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (concurring opinion).

²³⁷ *United States v. Lovett*, 328 U.S. 303, 321 (1946) (concurring opinion, Frankfurter, J.).

²³⁸ Senator Orrin Hatch remarked: “I believe if you came to the House of Representatives right now and asked the Members to approve legislation authorizing the giveaway of the Panama Canal, you would not get a majority vote right now. That may be the reason for the approach that is being taken by the administration.” *Senate Judiciary Hearings*, *supra* note 171, pt. 2, at 10. Logrolling and arm-twisting by the administration in the Senate was reported in the press. See *Canal Pact Support Still Short of Goal*, N.Y. Times, March 15, 1978, at A6, col. 1; Reston, *The Voting Trade-Offs*, N.Y. Times, Sept. 21, 1977, at A19, col. 1.

In an article written for the *Virginia Law Weekly* following a symposium on the Panama Canal Treaty held at the University of Virginia, Professor John Norton Moore, moderator of a panel on article IV, directed attention to the fact that

constitutional law and practice permits international agreements to be constitutionally approved pursuant to Executive-Congressional agreement procedures as well as the treaty power. . . . In this case the dispute concerning whether such a procedure is constitutionally required at least adds further support to a majority vote of both Houses as a constitutionally permissible modality.

Moore, *supra* note 11, at 4, col. 6 (emphasis added). During the same panel, his fellow ex-State Department official, Professor Covey Oliver, “expressed his hope that *in the future* more use would be made of ‘Congressional-Executive Agreements’ and less of treaties.” *Symposium Considers Treaties: Speakers Weigh Pros, Cons*, 30 Va. L. Weekly, Feb. 17, 1978, at 4, col. 1 (emphasis added) [hereinafter cited as *Symposium*]. That concept was floated by Professor Myres McDougal in 1944 to forestall a repetition of obstruction to world union by a “wilful,” “undemocratic” Senate minority—such as blocked our adherence to the League of Nations under the leadership of Henry Cabot Lodge—by substituting approval by a “majority” of both Houses. McDougal & Lans, *Treaties and Congressional-Executive Agreements or Executive Agreements: Interchangeable Instruments of National Policy* (pts. 1-2), 54 YALE L.J. 181, 534 (1945). Oliver prudently commended such agreements “in the future.”

tional government and of our constitutional system that no agent of the people may overleap the bounds of delegated power nor encroach on powers granted to another branch. Those boundaries are not to be warped on pleas of political necessity.²³⁹ One recalls Justice Holmes' aphorism that "[g]reat cases like hard cases make bad law," and arise because "some accident of immediate overwhelming interest . . . appeals to the feelings and distorts the judgment."²⁴⁰

At best, the scope of the treaty power is ambiguous whereas "Congress shall have power to dispose" is unequivocal. The burden of proving that those plain terms mean something other than they say, that is, that they must be read as "The President and Senate shall have power to dispose," rests on proponents of that reading, not the less because they would read those words into the treaty-making power.²⁴¹ They have not sustained that burden; in fact, the proof runs against them as is confirmed by the fact that the Supreme Court, in keeping with established canons of construction, repeatedly has laid down as a *principle* that article IV confers an *exclusive* power on Congress, a principle not vitiated by the few loose dicta upon which the *Edwards* majority relies. It is confirmed by Hamilton's recognition, in the midst of the Jay Treaty struggle, that the disposition of property to which title is not disputed by a foreign country is governed by article IV. It is confirmed by the Senate's own constructions in 1816, 1844, and 1942.

Why not for the Panama Treaty? If a "majority" of both Houses is so admirable, on what ground was one House altogether excluded in the teeth of article IV? The answer is that the State Department veers with the political winds; it is the particular result that dictates the choice. The State Department has circumvented the constitutional requirement of Senate consent to a treaty by casting international agreements in the form of executive agreements, as if "the obligation to secure Senate approval is dissolved" by "calling an agreement an executive agreement rather than a treaty." Kurland, *The Impotence of Reticence*, 1968 DUKE L.J. 619, 626. For discussion of the illegitimacy of executive agreements, see R. BERGER, *supra* note 102, at 140-62. Now the State Department has made the Senate an accomplice in circumventing the exercise by the House of its powers.

²³⁹ Chief Justice Marshall cautioned that "[t]he peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." Letter from "A Friend of the Constitution" (J. Marshall) to Alexandria Gazette (July 5, 1819), reprinted in JOHN MARSHALL'S DEFENSE OF *MCCULLOUGH v. MARYLAND* 184, 190-91 (G. Gunther ed. 1969).

²⁴⁰ Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (dissenting opinion).

²⁴¹ Moore argues the contrary: "The proponents of the 'exclusive' interpretation have a large burden of persuasion as to why the treaty power is unavailable." Moore, *supra* note 11, at 4, col. 6. This is a bare assertion, unaccompanied by proof of any kind.

Let it be assumed that established canons of construction have no place on constitutional interpretation,²⁴² and that the Supreme Court's reiterated holdings that the article IV power is "exclusive" do not represent considered judgments. Nevertheless grave considerations of policy urge that article IV be given "exclusive" effect. The grant of article IV echoes the "Congress shall have power" of article I, section 8, which is followed by a lengthy string of enumerated powers. As Madison pointed out, "[t]hese powers, however different in their nature or importance, are on the same footing in the Constitution, and must share the same fate."²⁴³ The reasoning of the *Edwards* majority in this respect is even worse than the result, for, with the exception of the war power (*dubitante*), the power to originate revenue bills, and the appropriation power, it invites the President by treaty to exercise all the rest. That invitation collides with the basic considerations that underlie the distribution of powers.

The House of Commons was the cradle of Anglo-American liberties, and, like the English, the Founders put their trust in the popularly-elected branch.²⁴⁴ One need only recall their rejection of Hamilton's proposal for a Senate modelled on the hereditary House of Lords: "Nothing but a permanent [life-tenured] body can check the imprudence of democracy."²⁴⁵ They opted instead for what Albert Gallatin described as "the sacred principle that the people could not be bound without the consent of their immediate Representatives,"²⁴⁶ the House of Representatives. To them, for example, was given the exclusive power of originating revenue bills. The Senate, James Iredell declared, was not authorized "to prevent the house of representatives from protecting the people."²⁴⁷ And the Senate Committee on Foreign Relations acknowledged in 1844 with respect to a treaty *regulating duties*, that

²⁴² Judge MacKinnon notes that "[T]he rules applicable to the construction of a statute also apply to the construction of a Constitution. *Badger v. Hoidale*, 88 F.2d 208, 211 (8th Cir. 1937) . . . , *Davis v. Synhorst*, 225 F. Supp. 689, 691 (S.D. Iowa 1964)." 580 F.2d at 1079 n.16 (dissenting opinion). So they were applied by the Founders from the beginning. See notes 17-21 and accompanying text *supra*.

²⁴³ 5 ANNALS OF CONG. 490 (1796), *quoted in text* accompanying note 92 *supra*.

²⁴⁴ Justice Brandeis referred to the deep-seated conviction of the English and American people that they "must look to representative assemblies for the protection of their liberties." *Myers v. United States*, 272 U.S. 52, 294-95 (1926) (dissenting opinion).

²⁴⁵ 1 M. FARRAND, *supra* note 21, at 299. See *id.* at 288-89.

²⁴⁶ 5 ANNALS OF CONG. 738 (1796), *quoted in text* accompanying note 100 *supra*.

²⁴⁷ 4 J. ELLIOT, *supra* note 54, at 145, *quoted in text* accompanying note 75 *supra*.

the representatives of the people sitting in their legislative capacity . . . may exercise this power more intelligently, more discreetly . . . and may better discern what true policy prescribes and rejects, than is within the competence of the executive department of the Government.²⁴⁸

Over the years the treaty-making power, whether it be with respect to trademarks, patents, postal matters, or tariffs and the like, has been exercised under congressional authorization. To argue that the result of an "exclusive" reading of article IV would be that the treaty-making power "would shrink to nothing,"²⁴⁹ overlooks that, despite those longtime practices, it has flourished lustily; it overlooks that the President's own power is subject to Senate "consent" and is no more "shrunk" thereby than is the joint President-Senate power subject to the consent of Congress. The Constitution, said Madison, "left with the PRESIDENT and Senate the power of making Treaties, but required at the same time the Legislative sanction and co-operation, in those cases where the Constitution had given express and specific powers to the Legislature."²⁵⁰ For 175 years or more the President has pretty consistently acted on that view and obtained consent of Congress for acts that lie within the congressional province, and the treaty power gives no sign that it has been "shrunk" thereby. In fact, grasping for uncontrolled power, the President has displaced the treaty power by resort to executive agreements which evade even the consent of the Senate.²⁵¹

On the President's construction, adopted by the *Edwards* majority, the treaty-making power, as Abraham Baldwin declared,

²⁴⁸ 6 S. EXEC. J. 334 (1887), reprinted in 2 A. HINDS, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 999, quoted in text accompanying note 107 *supra*.

²⁴⁹ Professor Stefan Riesenfeld insisted that "if Berger's analytic framework were correct then the commerce clause would restrict the treaty making power also. Such a result would mean that the treaty-making power 'would shrink to nothing.'" *Symposium, supra* note 238, at 3, col. 6, to 4, col. 1. Riesenfeld was in the employ of the State Department during 1977-1978, chiefly engaged on the article IV problem. One may prefer Madison to Riesenfeld. Compare Justice Jackson's dismissal of "the Commander in Chief thesis as a 'loose appellation' unjustifiably advanced as support for any presidential action, internal or external, involving the use of force, 'the idea being that it vests power to do anything, anywhere, that can be done with an army or navy.'" A. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* 144 (1973) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641-42 (1952) (concurring opinion)). Jackson added: "No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (concurring opinion).

²⁵⁰ 5 ANNALS OF CONG. 493 (1796).

²⁵¹ See R. BERGER, *supra* note 102, at 140-62.

is "an indefinite, uncontrolled branch of the Government, the extent of whose powers was to be known only by its own acts."²⁵² That construction is at war with the Framers' design to give the President few and limited powers,²⁵³ in Madison's words, "to fix the extent of the Executive authority,"²⁵⁴ adding that the Executive power "shd. be confined and defined."²⁵⁵ If we are to make a choice between unlimited presidential power and a fear of "shrinking" the treaty power, let us with Madison choose a construction that "would preserve the mutual control between the Senate and House of Representatives"²⁵⁶ rather than further to aggrandize a presidency that, as Justice Jackson said, is "already so potent . . . at the expense of Congress."²⁵⁷

²⁵² 5 ANNALS OF CONG. 536 (1796), *quoted in text* accompanying note 97 *supra*.

²⁵³ See R. BERGER, *supra* note 102, at 49-59.

²⁵⁴ 1 M. FARRAND, *supra* note 21, at 66.

²⁵⁵ *Id.* at 70. Another delegate to the Federal Convention, Charles Pinckney, reported to South Carolina: "[W]e have defined his powers, and bound them to such limits as will effectually prevent his usurping authorities dangerous to the general welfare . . ." 4 J. ELLIOT, *supra* note 54, at 314-15.

²⁵⁶ 3 M. FARRAND, *supra* note 21, at 374, *quoted in text* accompanying note 103 *supra*.

²⁵⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (concurring opinion) (footnote omitted).

APPENDIX

*Holden v. Joy*²⁵⁸ cited the following cases in support of the proposition that a treaty may convey good title to land owned by the United States without an act of Congress.²⁵⁹

A. "Reserve" Cases

1. *United States v. Brooks*²⁶⁰

In 1835, the Caddo Indians ceded land to the United States by treaty. A supplement to the treaty provided that Grappe's legal representatives and his three sons "shall have their right to the said four leagues of land reserved for them . . . for ever."²⁶¹ The Court held that the treaty, ratified by the Senate, "gave to the Grappes a fee-simple title to all the rights which the Caddoes had in these lands."²⁶²

2. *Doe v. Wilson*²⁶³

The Pottawatomie Nation ceded land to the United States, making reservations to individual Indians as part of the consideration for the cession. "As to these, the Indian title remained as it stood before the treaty was made; and to complete the title to the reserved lands, the United States agreed that they would issue patents to the respective owners."²⁶⁴

3. *Crews v. Burcham*²⁶⁵

This was a cession by an Indian tribe with reserves. "The main and controlling questions involved in this case were before this court in the case of *Doe et al. vs. Wilson* . . . , which arose under a reservation in this treaty" ²⁶⁶

²⁵⁸ 84 U.S. (17 Wall.) 211 (1872), discussed in notes 140-53 and accompanying text *supra*.

²⁵⁹ *Id.* at 247.

²⁶⁰ 51 U.S. (10 How.) 442 (1850).

²⁶¹ *Id.* at 451.

²⁶² *Id.* at 460.

²⁶³ 64 U.S. (23 How.) 457 (1860).

²⁶⁴ *Id.* at 461-62.

²⁶⁵ 66 U.S. (1 Black) 352 (1862).

²⁶⁶ *Id.* at 356 (citation omitted).

4. *Mitchell v. United States*²⁶⁷

Prior to the Spanish cession of Florida to the United States, certain Indian tribes had made a cession to Spain, "reserving to themselves full right and property" in specified lands.²⁶⁸ Examining the title to reserved land of a purchaser from the Indians, the Court held that "by the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully obtained such a right [of property]." ²⁶⁹

5. *The Kansas Indians*²⁷⁰

Under a treaty exchange of lands, certain Indian tribes reserved lands for individual Indians.²⁷¹ The issue, whether such reserved lands were taxable by Kansas, has no bearing on the disposition of property by the United States.

B. *Irrelevant Cases*1. *Meigs v. M'Chung's Lessee*²⁷²

An Indian tribe made a cession to the United States, and, in order to accommodate a United States garrison, provided that "three other square miles are reserved for the particular disposal of the United States on the north bank of the Tennessee, opposite to and *below* the mouth of Highwassee."²⁷³ The issue was whether those three miles were to lay below or above the mouth of the Highwassee.²⁷⁴ The Court gave literal effect to the word "below";²⁷⁵ no disposition of United States property was involved.

2. *Wilson v. Wall*²⁷⁶

A treaty with the Choctaw Indians provided that heads of certain Indian families would receive 640 acres each, with additional acres for each child.²⁷⁷ The issue was whether an Indian

²⁶⁷ 34 U.S. (9 Pet.) 711 (1835).

²⁶⁸ *Id.* at 749.

²⁶⁹ *Id.* at 733.

²⁷⁰ 72 U.S. (5 Wall.) 737 (1867).

²⁷¹ *Id.* at 739, 741.

²⁷² 13 U.S. (9 Cranch) 11 (1815).

²⁷³ *Id.* at 17 (emphasis added).

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 18.

²⁷⁶ 73 U.S. (6 Wall.) 83 (1867).

²⁷⁷ *Id.* at 84.

held the land in trust for his children. One who purchased without notice of the trust resisted the children's claim of constructive trust. Congress had enacted a statute to clarify a part of the treaty; the Court refused to give retroactive effect to the statute, saying "Congress has no constitutional power to settle the rights under treaties except in cases purely political."²⁷⁸ The reason, the Court explained, was that "[t]he construction of them is the peculiar province of the judiciary."²⁷⁹ In other words, interpretation of treaties is for the courts.

3. *American Insurance Co. v. Canter*²⁸⁰

Insurer brought a libel in the District Court of South Carolina to obtain restitution of 356 bales of cotton carried by a ship that was wrecked on the Florida Coast. A Florida territorial court had earlier awarded seventy-six percent salvage to salvors, who sold to Canter.²⁸¹ The issue was whether the territorial court had admiralty jurisdiction; no territorial grant by the United States figures in the case.²⁸²

4. *Worcester v. Georgia*²⁸³

Georgia convicted Worcester, a white missionary, of residing within Indian territory without a state license. The Court held that the Georgia statute was without force in Indian territory.²⁸⁴ The Indian treaty had placed them under the protection of the United States,²⁸⁵ and gave the United States the sole right of "managing all their affairs."²⁸⁶

5. *Foster v. Neilson*²⁸⁷

The case involved grants made in the ceded territory by Spain prior to the treaty, which provided that "those grants shall

²⁷⁸ *Id.* at 89.

²⁷⁹ *Id.*

²⁸⁰ 26 U.S. (1 Pet.) 511 (1828).

²⁸¹ *Id.* at 541.

²⁸² *Id.* at 545-46.

²⁸³ 31 U.S. (6 Pet.) 515 (1832).

²⁸⁴ *Id.* at 561.

²⁸⁵ *Id.* at 551.

²⁸⁶ *Id.* at 553.

²⁸⁷ 27 U.S. (2 Pet.) 253 (1829).

be ratified and confirmed." The Court held that "the ratification and confirmation which are promised must be the act of the legislature,"²⁸⁸ *i.e.*, Congress.

²⁸⁸ *Id.* at 315. Subsequently, *Percheman v. United States*, 32 U.S. (7 Pet.) 51 (1833), held that no ratification was required because the Court discovered that the Spanish counterpart version of the treaty dispensed with all ratification, a fact not known to the *Foster* Court (*id.* at 89). This does not repudiate the *Foster* holding that if ratification is required, it falls to Congress.