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THE FOREIGN RELATIONS POWER: AN ANALYSIS OF MR. JUSTICE SUTHERLAND'S THEORY

DAVID M. LEVITAN

"The charm of guessing ancient motives from the records of ancient deeds fascinated me—there is much in the pursuit to appeal to a gambler. . . ."

D. G. Hogarth

Accidents of an Antiquary's Life.

The United States has now joined the other nations of the world in a broad program of international cooperation. Since this country is governed under a written constitution, as interpreted by the courts, examination of the scope of authority of the national government in the field of foreign affairs is appropriate. Questions of constitutional competence have already been raised. The most recent authoritative and complete exposition of the legal scope of the foreign relations power is to be found in Mr. Justice Sutherland's opinion in the case of United States v. Curtiss-Wright Export Corporation. The Curtiss-Wright decision was wholly relied on by Mr. Justice Sutherland in his opinion in the case of United States v. Belmont and by Mr. Justice Douglas in United States v. Pink. It constitutes for the present the official legal view on the external powers of the federal government, and is, therefore, worthy of careful analysis. The analysis of the legal meaning of the opinion in turn suggests an examination of the origin and validity of the theory on which Mr. Justice Sutherland rests his decision—the rationale of the opinion.

An analysis of the decision requires that some attention be given to its significance and merits as a legal pronouncement: What is the prac-

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* This article is part of a study on Recent Developments in the Control of Foreign Affairs, the completion of which has been delayed by the war. The author is indebted to Professor K. N. Llewellyn for critical comments.

† Department of State (on leave). Holder of Post-Doctoral Demobilization Award, Social Science Research Council.

1. See the debates on ratification of UNO charter, re authority of President and/or the United States delegates to the Security Council to commit the use of American troops under article 43. 91 Cong. Rec., July 23-28, 1945, at 8083-8129 esp. 8121, 8156-63.
2. 299 U. S. 304 (1936).
tical effect of the decision? Is it consistent with established interpretation and does it conform to the accepted political philosophy of the state? Of course such an inquiry does not challenge the effectiveness of the decision as existing law. There is no review of a decision of the Supreme Court save by that court itself.

The primary object of this study is to demonstrate the evolution of an opinion and the Court's manner of resort to rationalia in support of its interpretations.

THE THEORY

The Curtiss-Wright case arose out of the President's Embargo Proclamation, May 28, 1934. Earlier on the same day, Congress had passed a joint resolution, which provided:

That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the re-establishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations, and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

In pursuance of this authority the President issued an embargo proclamation prohibiting the sale of arms and munitions of war in the United States to Bolivia and Paraguay. This proclamation was revoked on November 14, 1935. The defendants were indicted in 1936 for conspiring to sell arms to Bolivia.

The main issue before the Supreme Court was: Did this constitute an unconstitutional delegation of authority? Mr. Justice Sutherland, speaking for an all but unanimous court (Justice McReynolds dissenting; Justice Stone not participating) upheld the validity of the joint resolution and the President's proclamation in pursuance thereof.

In its opinion the Court had to differentiate the National Industrial Recovery Act cases in which wide delegation of power had been held unconstitutional. The most satisfactory distinction according to Mr. Justice Sutherland was that the NIRA cases related to internal powers of the government, and the Curtiss-Wright case to external powers. This presented the opportunity for an exosition of the nature and

5. 48 Stat. 1744 (1934).
origin of these two sets of powers. To this task the Justice lent his great ability and learning.

"The two classes of powers are different both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the constitution, and such implied powers—as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as were thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states. . . . That this doctrine applies only to powers which the states had, is self evident. And since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the colonial period those powers were possessed exclusively by and were entirely under the control of the Crown. By the Declaration of Independence 'the Representatives of the United States of America' declared the United (not the several) colonies to be free and independent states, and as such to have 'full Power to levy War, conclude Peace, contract Alliances, establish Commerce and do all other Acts and Things which Independent States may of right do.'

"As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. Rulers come and go; governments and forms of governments change; but sovereignty survives. A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. . . .

"The Union existed even before the Constitution, which was ordained and established among other things to form 'a more perfect Union.' Prior to that event, it is clear that the Union, declared by the Articles of Confederation to be 'perpetual' was the sole possessor of external sovereignty and in the Union it remained without change save in or so far as the Constitution in express terms qualified its exercise. [Citing Story, Commentaries on the Constitution, 8 for confirmation of these views.] . . .

"It results that the investment of the federal government with
the powers of external sovereignty did not depend upon the affirm-
tive grants of the Constitution. The powers to declare and wage
war, to conclude peace, to make treaties, to maintain diplomatic rel-
lations with other sovereignties if they had never been mentioned
in the Constitution, would have been vested in the federal govern-
ment as necessary concomitants of nationality. . . .

"Not only, as we have shown, is the federal power over external
affairs in origin and essential character different from that over in-
ternal affairs, but participation in the exercise of power is signifi-
cantly limited. In this vast external realm with its important, com-
plicated, delicate and manifold problems, the President alone has
the power to speak or listen as a representative of the nation. . . .

"It is important to bear in mind that we are here dealing not
alone with an authority vested in the President by an exertion of
legislative power, but with such an authority plus the very delicate,
plenary and exclusive power of the President as the sole organ of the
federal government in the field of international relations—a power
which does not require as a basis for its exercise an act of congress,
but which, of course, like every other governmental power, must be
exercised in subordination to the applicable provisions of the Con-
stitution." 9

Not long after the Curtiss-Wright case the Court again had an oppor-
tunity in United States v. Belmont to discuss the scope of the foreign
relations power, and especially the role of the President in the exercise
of that power. The case arose as a result of the Litvinoff Assignment—
an Executive Agreement entered into by President Roosevelt and
Mr. Litvinoff—at the time of our recognition of the Union of Soviet
Socialist Republics.10 The immediate question before the Court was
the validity of the USSR's assignment to the United States of assets
located in the United States but which originally belonged to Russian
corporations nationalized by the Russian government. The underlying
constitutional issue raised by the case was the status and validity of
the Executive Agreement.11 Did the agreement occupy as exalted a

cases, see Cowles, Treaties and Constitutional Law (1941) c. XIV; Dickinson, Rec-
ognition Cases, 1925–1930 (1931) 25 Am. J. Int. L. 214; Nebolsine, The Recovery of the For-
eign Assets of Nationalized Russian Corporation (1929) 39 Yale L. J. 1130; Borchard, The
Unrecognised Government in American Courts (1932) 26 Am. J. Int. L. 261; Jaffe, Judicial
Aspects of Foreign Relations (1933).
11. For other aspects of this case, see Jessup, The Litvinov Assignment and the Belmont
Case (1937) 31 Am. J. Int. L. 481. For a discussion of the de facto and de jure issues, see
Borchard, supra note 10; Baty, So-Called "De Facto" Recognition (1921) 31 Yale L. J. 469;
position as a treaty? Could an Executive Agreement override the public policy of a state? 12

With the Curtiss-Wright decision already ceremoniously sealed and enrolled among the definitive expositions of the law, it was now available, with very little dusting off, as precedent. The quotation of a few passages and paraphrasing of others from the Curtiss-Wright case and incidentally perhaps adding unobtrusively a key-word or two made easy Mr. Justice Sutherland’s task in the Belmont case. That the facts which had called forth the Curtiss-Wright decision differed in a very material sense from those in the Belmont case (especially the fact of legislative delegation of authority) and that therefore that decision in a strict sense was not appropriate precedent for the Belmont case did not trouble Mr. Justice Sutherland. After all, the Curtiss-Wright case had also involved the exercise of authority by the President and the Curtiss-Wright case had used broad and ambiguous words which apparently were applicable in the Belmont case. 13 Such is often the manner of the evolution of the law. Nor is it necessarily objectionable.

The theory of the Curtiss-Wright and Belmont decisions may be summarized in the following propositions:

(1) There are a “mass” of functions to be performed by government in any political society.

(2) The authority to perform the “mass” of functions must reside in some governmental agency.

(3) The Constitution of the United States, on the one hand, envisaged a government able to perform all the necessary duties and on the other hand, distributed the power between two units of government agencies—the states and national government.

(4) Only the internal powers were distributed by the Constitution.

(5) External powers were inherited by the National government as

Professor Borchard’s position on the recognition question appears to be the soundest. The refusal to extend recognition may be a wise political move, but whether wise or otherwise, it is a political move with which the courts need not concern themselves at all. It is not for foreign courts to pass ethical judgment on the “goodness” of another government’s acts, Borchard, supra note 10; Moore, The New Isolation (1933) 27 AM. J. INT’L L. 607. For a general discussion of our traditional policy of recognition, see J. B. Moore, PRINCIPLES OF AMERICAN DIPLOMACY (1918); B. H. Williams, AMERICAN DIPLOMACY: POLICIES AND PRACTICE (1936).

12. See United States v. Belmont, 85 F. 2d 542 (C. C. A. 2d, 1936), where the District Court had said (not held) that it would be contra the public policy of New York to give effect to the assignment because it was traceable to confiscation of property and therefore did not recognize the Nationalization Decrees.

successor to the Crown, because there was a national state before there were "independent" states. The Constitution neither granted nor allocated these powers and, therefore, considerations arising either out of specific provisions of the Constitution or the constitutional system generally are inapplicable.

(6) The Constitution established a fixed distribution of internal powers. A stationary line divides the internal powers and duties of the governmental units. Changing conditions cannot effect the original distribution of domestic powers between the states and federal government.

(7) A fluctuating line oscillating with the evolving conditions separates domestic from international functions. The evolution of society may remove a subject from the internal to the external realm, with the consequent removal from the jurisdiction of one governmental unit to that of another. Changing conditions cannot, however, affect the internal distribution of authority.

Thus, the founding fathers' conception of domestic and international problems is not binding today. In any analysis of what constitutes an internal question, and what is a proper subject of international negotiation, the changed world conditions may properly be taken into account. But the framers' conception of local and national is still binding. Hence, doubts as to the sphere of authority into which a problem falls or which governmental agency may properly exercise the function may be readily resolved by referring to the Constitution.14

THE ORIGIN OF THE THEORY

In view of Justice Sutherland's faithful adherence to the conservative block of the bench on domestic questions,15 it is of interest to investigate the development of his radical position regarding the scope of the federal government's authority as to international affairs. The basis for the difference in his approach—the theory of the difference in the origin

14. Professor Patterson has summarized very pointedly the meaning of Mr. Justice Sutherland's opinion in the Curtiss-Wright case as follows:

"(1) That there never were any 'states as such' in this country, (2) that the Continental Congress in issuing the Declaration of Independence assumed authority to separate the colonies from Great Britain and acted on its own initiative as a group of individuals rather than as an instructed agent merely announcing the will of the colonies previously declared in their individual and corporate capacity, and (3) that in external affairs the powers of the national government are not derived from the 'consent of the governed,' and (4) that the President possesses this complete, plenary, and governmental, and, therefore, undelegated sovereignty in foreign affairs, except as to the appointment of foreign representatives and treaty making. . . ." Patterson, In re United States v. Curtiss-Wright Corp. (1944) 22 Tex. L. Rev. 286, 445.

of the two types of powers, internal and external—though emphasized in these cases and already mentioned in a previous decision,16 is to be found in more complete form in his earlier writings. The full import of the recent decisions are realized only if one takes into account his previous expositions on the subject. Moreover the analysis of his earlier writings is of interest because of the light that it throws on the process involved in the formulation of decisions.

Senator Sutherland first outlined his theory of the origin and scope of the powers of the government in an article in 1909. It is especially interesting to compare the language in that article with his subsequent utterances from the bench.17

"Much of the confusion [concerning the true nature of the powers of the government] has resulted from a failure to distinguish between our internal and our external relations. . . .

"It is clear from a consideration of the events leading up to and surrounding the adoption of the Constitution that the primary purpose of the specific enumeration of the powers of the General Government over internal matters was to preclude any encroachment of that Government upon those powers which it was deemed the state governments should exclusively possess. . . . The effect of the enumeration is therefore quite as much to affirm the possession of these unenumerated powers to the several States, as it is to deny them to the General Government. Over its internal affairs the state government possesses every power not delegated to the General Government, or prohibited by the Constitution of the United States or the state constitution. It will therefore be seen that, in this way, every power which any government in the world possesses over its internal affairs, is vested either in the United States or in the several States, unless affirmatively prohibited. . . . Is it not reasonable to conclude that it was likewise within the contemplation of the framers of the Constitution that every necessary and proper power possessed by foreign governments over their external affairs should be exercised by the Government of the United States over our external affairs? . . . They were anxious to keep for the people of each State in the fullest measure their right of local self-government, but there was not shown anywhere a disposition to curtail the power of the National Government in its external relations. On the contrary, there was clearly manifest a desire to make such power, in the words of the Annapolis recommendation, 'adequate to the exigencies of the Union.' The Declaration of Independence asserted it when that great instrument declared that the United Colonies as free and independent States (that is, as United States, not as separate States) 'have full power to levy war, con-

clude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."

"And so national sovereignty inhered in the United States from the beginning. Neither the Colonies nor the States which succeeded them ever separately exercised authority over foreign affairs. Prior to the Revolution the Colonies were independent of each other, but all owed common allegiance to the Crown of Great Britain. They were invested with and exercised in subordination to the Crown certain governmental functions of a purely local and internal character, but so far as foreign relations were concerned the Imperial Government exercised plenary authority. When they severed their connection with Great Britain, they did not do so as separate Colonies, but as the United States of America, and they declared not the several Colonies, but the United Colonies to be free and independent States—not New York or Georgia, or South Carolina severally—but all the Colonies in their united and collective capacity. This declaration was an assertion of and constituted the first step toward nationality. . . . These powers [over external affairs] were never delegated by the States; they were never possessed by the States, and the States could not delegate something which they did not have. . . .

". . . Congress has from time to time . . . passed laws that by no reasoning can be justified under any or all of the express powers by virtue of any implication to be drawn therefrom. Some of these acts have been passed upon by the Supreme Court, while others have never been considered by that tribunal. Members of the Court have from time to time broadly announced the doctrine that the General Government is one of enumerated powers, and can exercise no authority not expressed or implied in the written words of the Constitution, yet some of the decisions can be logically justified only upon the theory that the Government possesses certain powers which result from the fact that it's a National Government and the only Government capable of exercising the powers in question. . . .

"Here then [referring to Jones v. United States] is at least one case where the Supreme Court has sustained Congress in exercising a power not expressly granted by the Constitution, nor capable of being inferred from any one of the express powers, nor from any group of them, nor from all combined. Manifestly the act of Congress was a naked usurpation unless it could be justified upon the ground that the Government of the United States possesses certain sovereign powers resulting from the National status. In other words, the act was extra-constitutional. Was it on that account necessarily un-constitutional? The Court said not."

Mr. Sutherland, then, concludes:

"The American people, in whom all sovereign authority ulti-
mately resides, have provided as the instrument for the practical expression of this authority a complete governmental system, consisting of the General Government and the state governments, and in this system has vested every power necessary to accomplish the constitutionally declared ends of the government. Because of the dual character of the agency which exercises the domestic sovereignty of the people the line between the state and federal powers has been carefully drawn and must be rigidly observed, but whether upon one side of the line or the other plenary governmental power adequate to every exigency will be found. Over external matters, however, no residuary powers do or can exist in the several States, and from the necessity of the case all necessary authority must be found in the National Government, such authority being expressly conferred or implied from one or more of the express powers, or from all of them combined, or resulting from the very fact of nationality as inherently inseparable therefrom.”

Soon after Mr. Sutherland’s retirement from the Senate he was to have another opportunity to outline his theory. He was invited to deliver a series of lectures on the George Blumenthal Foundation at Columbia University. He chose as his theme the general subject, “Constitutional Power and World Affairs.” In this series Mr. Sutherland elaborated upon his previous exposition. The basic thesis, that there is an underlying difference in the origin and nature of the internal and external powers is reiterated throughout the discussion. A few quotations will suffice to show Mr. Sutherland’s consistency on the subject.

“Heretofore, these powers [referring to the external powers] have seemed remote and have received relatively scant general consideration. Our attention has been chiefly absorbed by matters exclusively our own. Suddenly, however, we found ourselves in the midst of a struggle involving the fate of humanity, and the era of national isolation was at an end. The powers of the national government over external affairs, all at once, therefore have assumed new and increased importance, in the light of which, a re-examination of their nature and extent is not only pertinent but may, sooner or later, become highly necessary; for it is certain that hereafter, whether desired or desirable, we shall be obliged to occupy a larger place in the affairs of the world, to participate to a far greater degree in world policies and lend substantial and increased assistance toward the solution of world problems. . . . Inevitably, we shall be called upon to deal, not only with some of the old questions from a different point of view, but with many new questions which the framers of the Constitution foresaw dimly, or foresaw not at all.

“In this new and extended relationship, we shall probably be

18. Id. at 1-4, 7, 8, 12.
The material from Mr. Justice Sutherland’s opinions and writing has been quoted at length in order to give the reader an idea of identity between his writing and formal opinions. Not only is there a consistency as to ideas, but in fact quotation of language. Few men indeed are in the happy position of being able to give their writings and speeches the status of the law. It is an interesting manifestation of the process by which law can evolve that Mr. Justice Sutherland even restated the issue in the Curtiss-Wright decision—perhaps an opportunity to state his viewpoint. The issue as stated by the lower courts and by counsel was whether the delegation met the standards for a valid delegation of legislative authority. Mr. Justice Sutherland restated the question: Do the limitations as to delegations of authority apply at all in the case of matters within the field of foreign affairs? Moreover, indeed a strange doctrine for Mr. Sutherland to espouse!  

20. Id. at 26-7; see also 21, 36-8, 44-7, 55, 116-9, 156. His statement regarding the exercise of the treaty power is more of the same.

"In no instance was the treaty-making power ever exercised, or this essential attribute of sovereignty ever possessed, by any state separately. Governments come and go—hereditary rulers give place to elected rulers—allegiance changes—but sovereignty is immortal. It is never in suspension searching for a possessor. . . . When, therefore, sovereignty over the American colonies ceased to exist in the British Crown, it immediately passed to the States, not severally but in their united and corporate capacity, where it has ever since remained, being exercised, in turn, by the several governmental agencies which were constituted by the general authority. The treaty-making power then, like the war-making powers, has always been vested in the Nation, and exercised by national instrumentalities. The provisions respecting it in the Constitution, in so far as the respective powers of the states and the Nation are concerned, are purely declarative, and; in so far as the general government is concerned, are confirmative rather than creative. In accordance with the principles already discussed this power would have passed to the general government instituted by the Constitution, as the lineal successor of the preceding national agencies, in the absence of prohibitions or otherwise clearly evinced intention to the contrary. . . . The treaty-making power is not, therefore, one of the powers delegated or surrendered by the several states, since it was never theirs to relinquish. It is an original acquisition of the people of the United States in their national capacity, part and parcel of the general and exclusive sovereignty of the Nation over all external affairs. . . ." Id. at 117-8.

And, with the zeal of a prophet he pleads:

"We must cease to measure the authority of the general government only by what the Constitution affirmatively grants, and consider it also in the light of what the Constitution permits from failure to deny." Id. at 172.

21. Mr. Justice Sutherland shows similar consistency in his views as to the domestic powers of the government. For example, in a speech before the American Bar Association, shortly before ascending to the bench, he outlined his position as to the constitutionality of National Child Labor legislation under the Commerce power. Sutherland, Private Rights and Government Control (1917) REPORT OF THE 40TH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 197, 212-4.
the effect of the delegation was not in a foreign country, and so there was not, as Mr. Justice Sutherland would have it, a question involving the constitutionality of the exercise of the foreign relations power. Since the proclamation operated in the United States it could have been disposed of as an exercise of the commerce power.\footnote{Quarles, The Federal Government: As to Foreign Affairs. Are Its Powers Inherent as Distinguished from Delegated? (1944) 32 Geo. L. J. 375, 378. (It should be noted that once the issue in Curtiss-Wright re executive authority is stated as broadly as that, then his answer becomes applicable in the Belmont case).}

The development of the "inherent powers" doctrine is more understandable when Mr. Justice Sutherland is considered as an individual, not a judge, in his determination of cases before the Court. His personal opinions, beliefs, habits, prejudices, cherished theories, inarticulate premises, and so forth, are reflected in his opinions.\footnote{See especially Cardozo, The Nature of the Judicial Process (1932), also, The Growth of the Law (1924); J. C. Gray, The Nature and Sources of the Law (1909); Hughes, The Supreme Court of the United States (1928); Frank, Law and the Modern Mind (1930); Holmes, The Common Law (1881), Collected Legal Papers (1921); Pound, An Introduction to the Philosophy of Law (1922).} Recently, the question of the extent to which judicial utterances are influenced by the convictions of the justices has been the subject of national debate.\footnote{The Supreme Court "Packing" fight of 1937.}

Opinions have varied from one extreme to the other. Some have insisted that judicial utterances are in fact only "justice incarnate"; that some sort of "plenary inspiration" descends upon the members of the court constituting the majority in promulgating the law. Montesquieu stated this theory as follows: "The judges of the nation are only the mouths that pronounce the words of the law, inanimate beings, who can moderate neither its force nor its vigor."\footnote{Esprit des Lois, XI, c. vi; see also Chief Justice Marshall in Osborne v. Bank of the United States, 9 Wheat. 735, 866 (U. S. 1824).} This may be called the "objective" theory or the analytical school; Professor Cohen has labelled it "the phonographic theory of the judicial function."\footnote{See Frank, op. cit. supra note 23, c. XIII, also p. 33 for quotation from Cohen.}

Opposed to this school is the view that decisions bear the influence of the judge's personal idiosyncracies and petty habits.\footnote{For a discussion of the influence of the judge's personality on decisions, see Frank, op. cit. supra note 23, c. XII.} In a word, the drives which affect other people in their work affect the judge too. This theory stated in more moderate terms is that judges are human and that the "great tides and currents which engulf the rest of men, do not turn aside in their course and pass the judges by;"\footnote{See Franks, op. cit. supra note 28 at 171. See also Holmes' dissenting opinions in Lochner v. New York, 198} or "that decisions of the courts on economic and social questions depend upon their [the judges'] economic and social philosophy."\footnote{Cardozo, The Nature of the Judicial Process (1932) 170.} This has been
referred to as the "subjective" or "sociological" theory of jurisprudence.

The adoption of the latter, realistic approach towards Justice Sutherland's opinions will not, it is hoped, disturb those who have been accustomed to view the utterance of the Supreme Court as divinely inspired, or as sections of the Constitution in animate form. Nevertheless, a careful check indicates that the whole theory and a great amount of its phraseology had become engraved on Mr. Sutherland's mind before he joined the Court, waiting for the opportunity to be made the law of the land. The circumstances show that he had pre-formed opinions on the subject and that when he spoke in the Curtiss-Wright decision, he did little to reexamine his long cherished ideas. Nor is there anything disturbing about this. It is only to be expected, and even to be hoped, that justices should give expression to carefully thought out ideas. The view that the mere appointment to the court has an ablutionary effect, causing men to lose all their individuality and become mere instruments through which justice speaks, lacks all elements of realism. And though Mr. Justice Sutherland has given his approval to just that sort of an analysis of the judicial process it certainly cannot be said that his ascent to the bench freed him from his earlier conceptions.

VALIDITY OF THE THEORY

Mr. Justice Sutherland's theory of the scope of the external powers based on his analysis of its origin has been outlined. It has also been shown that on the basis of the decisions in the Curtiss-Wright and Belmont cases the Supreme Court has built a whole edifice as to the nature of the foreign relations power, especially as to the role of the President. It remains now to examine validity of the theory.

U. S. 45, 74 (1905) and Hammer v. Dagenhart, 247 U. S. 251, 277 (1918), as to the influence of "inarticulate major premises" on judicial opinion. For excellent studies of the influence of prevailing political and economic theories on decisions see Haines, THE REVIVAL OF NATURAL LAW CONCEPTS (1930) and Wright, AMERICAN INTERPRETATION OF NATURAL LAW (1931). For a discussion of the influence of value judgments on administrative officials, see Levitan, The Neutrality of the Public Service (1942) 2 PUB. ADM. REV. 311 and Political Ends and Administrative Means (1943) 3 PUB. ADM. REV. 353.

30. The fact that Mr. Justice Paterson had suggested the same theory does not affect the validity of the analysis. The fact is that Mr. Justice Sutherland when called upon to decide the issue simply quoted his earlier writings—apparently with little de novo research. See Penhallow v. Doane, 3 Dall. 54 (U. S. 1795).

31. See Mr. Justice Roberts' opinion for the majority in United States v. Butler, 297 U. S. 1 (1936), where Mr. Justice Sutherland was joined as part of the majority.


33. It should be stated that the writer is not primarily a constitutional historian. His
Mr. Justice Sutherland's theory, in its most rudimentary form, is that the states of the American revolution never possessed external sovereignty; that the treaty-making power, an attribute of sovereignty, has always been possessed by a national organ, to the exclusion of the states; and that the states never conducted any foreign relations. Had Mr. Justice Sutherland limited himself to the usual platitudes about national sovereignty, there would have been no occasion for this inquiry. The ambiguity of the terms bars any attempt at refutation. But fortunately Justice Sutherland places his reliance upon historical facts rather than on glittering generalities. It is the correctness of the historical data that is challenged. The long and bitter historical controversy over state sovereignty, which culminated in the Civil War, obscured the historical facts surrounding the question "whether there was an American national state in the Revolution, and whether Congress or the State governments exercised the sovereign power." 34

It is now proposed to turn once again from the gloss to the text. The question whether the external powers were always lodged in a national agency can be answered accurately only after an examination of documents setting forth the powers and instructions of the representatives to the central agency—the first and second Continental Congresses; the acts performed by the central agency; the powers of the states as incorporated in their organic laws, and finally, an examination of the extent of state participation in external affairs. Also, in analyzing the meaning of documents and evaluating the significance of statements made during this period, and in thinking about Mr. Justice

interest in the field is chiefly a by-product of work in public law. Also the ensuing discussion is limited to an examination of only one aspect of the Sutherland theory—the origin of the powers. I have already touched on the "executive authority" aspect in previous articles. See material cited in note 32 supra.

34. In the preparation of this part the writer made extensive use of Professor Small's study, The Beginnings of American Nationality in (1890) HOPKINS STUDIES IN HISTORICAL AND POLITICAL SCIENCE, and Van Tyne, Sovereignty in the American Revolution: An Historical Study (1907) 12 AM. HIST. REV. 529. These two articles will hereafter be cited simply as Small and Van Tyne. See also MCLAUGHLIN, CONSTITUTIONAL HISTORY (1935), especially 83, 134–5; C. H. BUTLER, THE TREATY-MAKING POWER OF THE UNITED STATES (1902), especially 235–94; 2 HAYNES, THE SENATE OF THE UNITED STATES (1938), 572–5; The Declaration of Independence, 1 Cyclopaedia of Political Science, Political Economy, and Of The Political Economy of the United States; State Sovereignty, id. in Vol. 3; Scott, Treaty Making Under the Authority of the United States (1934) 28 PROCEEDINGS AMERICAN SOCIETY OF INTERNATIONAL LAW 2. (The article will hereafter be cited simply as Scott). For the traditional exposition see G. T. CURTIS, CONSTITUTIONAL HISTORY OF THE UNITED STATES (1889) cc. I-XV; Von Holst, The Constitutional and Political History of the United States (1899); and authorities cited by Van Tyne at 529, 539. See also Patterson, supra note 14. Though the main work on this article was completed before the publication of Professor Patterson's articles, the final draft was checked against Professor Patterson's study. Happily, we are in agreement with regard to Mr. Justice Sutherland's exposition of history. No attempt has been made to add specific references on the basis of Professor Patterson's or Mr. Quarles' articles.
Sutherland's theory, it is well to bear in mind that it was the heyday of Lockian philosophy in America;\textsuperscript{35} that if any proposition had general acceptance, it was that the people were sovereign and that all authority stemmed from them. There is, therefore, an insuperable objection on theoretical grounds to the acceptance of the Sutherland thesis. Government just was not thought to have any "hip-pocket" unaccountable powers. But did the people really operate on the basis of their belief that those exercising authority had to derive their power by delegations? Or, was the theory of limited authority, in this case of the central body, a mere theory brooding somewhere in the sky? The following paragraphs aim to make clear the nature of the limitations imposed upon the central body and its agents and it is fair to say that the agents of that day believed as much in the binding effect of the delegations as those doing the delegating. Therefore the statements of the delegations are a fair measure of the authority that they believed they had and would normally exercise.

The Colonies in 1774. The first point of significance is that the colonies, while under English rule, were free and independent of each other. These colonies constituted thirteen distinct corporations, and all attempts at unity had failed.\textsuperscript{36} There is no disagreement that this attitude of distinctness prevailed at least until the period of the Continental Congress.\textsuperscript{37} Hence, it is to be determined to what extent this attitude was modified in the succeeding period.

Sovereignty in the First Continental Congress. Was the First Continental Congress a \textit{de facto} and \textit{de jure} sovereign power by virtue of original authority derived from the people?\textsuperscript{38} An examination of the instructions of the various delegations reveals that it was not. They were:

"\ldots to devise, consult, and to adopt measures as may have the most likely tendency \ldots to restore that peace, harmony, & mutual confidence.\ldots"\textsuperscript{39}

\begin{thebibliography}{99}

\bibitem{35} \textsc{Merriam}, A History of American Political Theories (1903), especially c. II; \textsc{Carpenter}, The Development of American Political Thought (1930); \textsc{Dunning}, A History of Political Theories (1920), c. III; \textsc{Gettell}, History of American Political Thought (1928), c. IV, and bibliography at 117-8; \textsc{Goebel}, Constitutional History and Constitutional Law (1938) 38 Col. L. Rev. 551, 571-3.

\bibitem{36} Small, at 14-5. Though sight should not be lost of the fact that various colonies were for a long time joined under a single executive (Pennsylvania and Delaware, New York and New Jersey, North and South Carolina, New Hampshire and Massachusetts) this fact does not contradict the meaning in the text, if taken in a more general sense. All attempts at general unity failed—and each was a separate colony.

\bibitem{37} Small at 15-6.

\bibitem{38} 1 \textsc{Story}, Commentaries on the Constitution of the United States (4th ed. 1873) 140.

\bibitem{39} 1 \textsc{Ford}, Journals of the Continental Congress, 1774–1789 (1904–1914) 15 (New Hampshire). Hereinafter cited as \textsc{Journals of Congress}.

\end{thebibliography}
“... to consult upon the present states of the Colonies ... and to deliberate and determine upon wise and proper measures, to be by them recommended to all the Colonies, for ... the restoration of union & harmony between Great Britain and the Colonies, most ardentely desired by all good men.45

“... to consult and advise on proper measures for advancing the best good of the Colonies, and such conferences, from time to time, to report to this house [Connecticut legislature].” 41

The tenor of these instructions permeates the others.42 Only North Carolina invested the delegates “with such powers as may make any acts done by them, or consent given in behalf of this province obligatory in honour upon every inhabitant hereof. ...” 43 The delegates were invariably sent to find, through joint consultation, the best path by which the “peace and harmony” could be reestablished. On the basis of an analysis of the journals of the Congress, Professor Small concludes, that “there was nothing administrative or governmental about the organization of that body.” 44 Its proceedings were limited “to statements of grievances and appeals for relief.” 45 If, then, it be established that the first Continental Congress was not exercising the sovereign power, what may be said about the Second Congress?

**Sovereignty in the Second Continental Congress.** While the delegates’ instructions manifest a much clearer definition of purpose, there is a definite lack of evidence of any change of view as to the nature of the central organization.46 Even then three of these delegations were merely to represent, to attend, meet, and report;47 two to join, consult, and advise;48 six to concert and agree or determine upon;49 while Georgia’s delegates were to do, transact, join and concur with the several delegates.50 These various means were to be used, still for the purpose of “fostering harmony,” or “accommodating the unhappy differences.” 51 And though eight of the colonies sent new instructions

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40. Id. at 15–6 (Massachusetts-Bay).
41. Id. at 17–8 (Connecticut).
42. For a more extensive list of quotations see Small at 18–22 and 2 Journals of Congress 15–30.
43. 1 Journals of Congress 30.
44. Small at 23. For a similar conclusion see Van Tyne at 530.
45. Van Tyne at 530.
46. Small at 45.
47. New Jersey, Pennsylvania and Virginia.
49. Massachusetts, South Carolina, New Hampshire, Maryland, Delaware and New York.
50. Van Tyne at 531.
51. For a full statement of the instructions, see 2 Journals of Congress, Credentials of Delegates; also quoted by Small at 45–8.
before January 1776,\textsuperscript{52} no change of attitude is perceivable.\textsuperscript{53} With the instructions in mind, let us examine briefly the acts of this Congress.

Mr. Justice Story says: "The Congress of 1775 accordingly assumed at once the exercise of some of the highest functions of sovereignty," \textsuperscript{54} listing the raising of a national army and navy, raising money, emitting bills of credit, contracting debts upon the national account, and authorizing captures and condemnation of prizes. While the Congress did all this it is essential to remember that in so doing the delegates exceeded the letter of their instructions. Even though they violated the letter of the instruction an examination of the debates reveals that they were definitely conscious of their advisory capacity; that they had a singular realization that the Congress owed its establishment to the critical conditions, and that with the passing of these conditions the Congress would be dissolved; and that the chief reason for its creation was to make the colonial plea more effective and thereby "restore harmony" with Great Britain more rapidly. They did not view themselves as members of a \textit{de facto} or \textit{de jure} government. The statements of the Congress are the best evidence of its intentions. "We have not raised armies with ambitious designs of separating from Great Britain, and establishing independent states." \textsuperscript{55} Earlier in the same declaration: "We assure them (our friends and fellow-subjects in any part of the empire) that we mean not to dissolve that union... which we sincerely wish to see restored." \textsuperscript{56} Unless one attributes the highest degree of hypocrisy to these testimonials one cannot possibly view the actions of the Congress as the acts of a sovereign government. Taking up arms in defense of their rights as Englishmen to force the repeal of obnoxious measures, and remaining loyal to the Crown and Empire were not incompatible. Indeed, the Puritans of the previous century, even in beheading Charles I, continued to profess their loyalty as subjects, to the Crown—though not to a tyrannical occupant of it. But a desire for an American national state and the idea of loyalty to the Crown were incompatible.\textsuperscript{57} One is forced to agree that "if Congress was doing seemingly sovereign acts, it was merely in the capacity of a party committee leading a rebellious faction in the empire in the attempt to force the

\textsuperscript{52} Delaware, Maryland, New Hampshire, North Carolina, Massachusetts, Connecticut and Pennsylvania.

\textsuperscript{53} Only Maryland and Connecticut changed their instructions, Maryland removing the clause "And this Province bind themselves to execute..." and Connecticut making "Defense, Security, and preservation of the Rights" the objects to be attained. 2 JOURNALS OF CONGRESS 245, 3 JOURNALS OF CONGRESS 441, 4 JOURNALS OF CONGRESS 57-8.

\textsuperscript{54} 1 STORY, \textit{op. cit. supra} note 38 at 151-2.

\textsuperscript{55} 2 JOURNALS OF CONGRESS 155, also earlier drafts at 139.

\textsuperscript{56} \textit{Ibid.}, note especially the use of the word "union."

\textsuperscript{57} Van Tyne at 534.
concession of its rights." Nor was the Congress of 1775 exercising any authority over the colonies.

This position remained basically unaltered even after the Declaration of Independence. The Congress remained a convenient center of intelligence and a source of advice which would keep their (the states') forces united. Upon the severance of ties with Great Britain, sovereign and independent states continued to be leagued together for the duration of the fight. In a word, the Congress was a committee of safety having as its basic aim the defeat of Great Britain. At no time was it viewed, nor did it view itself as a governmental organization having legislative authority. It is true that it was in Congress that the Declaration of Independence was adopted. But it is equally true that each delegation had to receive authorization from its colony, and that the decision for independence was based upon the instructions from the colonies. In the debates upon these very resolutions, it was said, "That if the delegates of any particular colony had no power to declare such colony independent, certain they were the others could not declare it for them; the colonies being as yet perfectly independent of each other." If further proof be needed to establish beyond all doubt that the Congress did not deem itself to be possessed of any inherent authority and that the states did not view its acts as binding, the subsequent ratification by the states of the Declaration ought to dispel

58. Ibid.
59. As Small points out in his conclusions as to the nature of the Congress of 1775, "The Congress doubtless exceeded the letter of the instruction received by a portion of its members; but this was not from any misconception of those instructions, nor from any uncertainty about the essentially advisory character even of those of its proceedings which appeared most peremptory. In pointing out to the colonies the direction which their preparations for resistance ought to take, the Congress no more acted upon an imagined authority to command the colonies, than does the lookout at the bow of the ship, when he reports the direction of danger to the officer of the deck. . . . I am unable to find a single evidence, however, that the members ever entertained a doubt about their actual subordination to the colonial assemblies which they represented. . . ."
60. Van Tyne at 535.
61. The Maryland convention very excellently summarized the function of the Congress:
"The best and only proper exercise [of the powers of Congress] . . . can be in adopting the wisest measures of equally securing the right and liberties of each of the United States, which was the principle of their union." 2 SCARF, HISTORY OF MARYLAND (1879) 276, cited in Van Tyne at 535.
62. 6 JOURNALS OF CONGRESS 1088. Notes of the debates furnished to James Madison by Thomas Jefferson in his handwriting as a copy from his original notes.
any such doubts. Mr. Sutherland and others have made much of the wording in the Declaration of Independence, "that these United Colonies are, and of Right, ought to be Free and Independent States: ... and that, as Free and Independent States, they have full power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do." But a careful reading of the states' resolves ratifying the Declaration clearly shows that they deemed themselves individually independent, and that the word "United" means no more than united in their temporary pursuit, with no intention of setting up a permanent union. Richard Henry Lee did introduce on June 7, 1776, together with the resolution for independence, a resolution "that a plan of confederation be prepared and transmitted to the respective Colonies for their consideration and approbation." The record hardly warrants a conclusion that a permanent Union—other than for war purposes was here envisaged. The attitude of the Pennsylvania convention regarding the position of the states in 1776 was representative of the others; and its declarations are illustrative of the meaning then attached to the phrases of the Declaration quoted above.

"We, the Representatives of the freemen of the State of Pennsylvania, in General Convention assembled, taking into our most serious consideration the clear, strong, and cogent reasons given by the honourable Continental Congress for the declaring this, as well as the other United States of America, free and independent, do hereupon resolve, and be it hereby resolved and declared, that we, in behalf of ourselves and our constituents, do unanimously approve of the said Resolution and Declaration of Congress ...; and we do declare before God and the world, that we will support and maintain the freedom and independence of this and the other United States of America. ..." 67

63. Van Tyne at 537.
64. 5 JOURNALS OF CONGRESS 514, wherein the text of the engrossed original in the Department of State is used. See also id. at 515, n. 1.
65. North Carolina and Pennsylvania provided in their constitutions for delegates as "long as it shall be necessary." Van Tyne at 535, n. 5; 2 POORE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES (2d ed. 1878) 1414, 1543.
66. 5 JOURNALS OF CONGRESS 425.
67. 2 FORCE, AMERICAN ARCHIVES (5th series 1851) 10. Also, Resolve of State of Connecticut, in pursuance of the Declaration, "Resolved by this Assembly, That they approve of the Declaration of Independence published by said Congress, and that this Colony is and of right ought to be a free and independent State. ..." At the same time it was enacted, "That the form of civil government in this State shall continue to be as established by Charter received from Charles the Second, ... so far as an adherence to the same will be consistent with an absolute independence of this State. ..." 1 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT (1894) 3. See also Madison's statement in 1782 that the Crown rights as such had not devolved upon Congress, an idea "so extravagant that it could not
An examination of the declarations of the state legislatures, state conventions, and of the leading individuals in the various states reveals a general acceptance of the idea of state sovereignty. Exercise of Sovereignty by States. More definitive proof as to the location of sovereignty during this period is to be found in the provisions of the constitutions and acts of the states. The South Carolina Constitution of 1778, for example states:

"That the governor and commander in chief shall have no power to commence war, or conclude peace, or enter into any final treaty without the consent of the senate and house of representatives." 

Nor need we base our case purely on the statement of powers. It is to be remembered that Mr. Justice Sutherland continually emphasizes that the states never possessed the treaty-making power and never exercised that attribute of sovereignty and, hence, it was impossible for the States to delegate that power to the new central government. The record of events leaves no doubt that treaty-making power was exercised by the States. States and Foreign Affairs. In 1778, Mr. Gerard, in behalf of His most Christian Majesty of France, and Benjamin Franklin, Silas Deane enter into the thought of man." Van Tyne at 538, n. 3, citing NEW YORK HISTORICAL SOCIETY COLLECTIONS (1878) 147.

68. Senator Henry Cabot Lodge, a nationalist of the Theodore Roosevelt school, concludes that "when the thirteen colonies jointly and severally threw off their allegiance to the British Crown and became independent, all the usual rights of sovereignty which they had not before possessed vested, without restriction, in each one of the thirteen States." LODGE, A FIGHTING FRIGATE (1902) 225. See also Ware v. Hylton, 3 Dall. 198, 224 (U. S. 1796) for like statements.

69. It has been well said, "to mere assertions . . . that the state is independent and sovereign we need give little attention, but powers granted in Constitutional conventions and acts of sovereignty done by state governments have greater importance." Van Tyne at 539. For example of assertions of sovereignty see 1 POORE, op. cit. supra note 65 at 257, 958; 2 id. at 1281, cited by Van Tyne at 539, n. 5.

70. 2 POORE at 1625-6. For other examples see Van Tyne at 540, n. 2.

71. Professor Scott, in an article already referred to, submits striking evidence to that effect. It is interesting to note, also, Professor Scott's statement: "that the treaty-making power was known to and exercised by the colonies long before their independence—and indeed before they ever thought of an independent existence—is evident from an examination of colonial records." Among the six examples cited in the article, the treaty between Indian Nations and various American colonies is included. The details of the negotiations are to be found in William Marshall's Journal of the Treaty Held with the Six Nations by the Commissioners of Maryland and other Provinces Held at Lancaster, in Pennsylvania, June, 1744, 7 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY FOR THE YEAR MDCCC (1801) 171. Then, after reviewing a number of examples, Dr. Scott concludes, as regards treaty-making before the Revolution:

"Treaty-making, international congresses, full-powered delegates, bilateral and multilateral concords and agreements, therefore, were all part of the traditional American mode of thinking when on July 4, 1776, the thirteen American Colonies assembled in Philadelphia and addressed their momentous declaration 'to a candid world.' " (Scott, supra note 34 at n. 7).
and Arthur Lee, in behalf of the United States—enumerating the thirteen states, from north to south, signed the now famous Treaty of Amity and Commerce and the Treaty of Alliance. But the states apparently did not deem this treaty binding on them, until they had individually ratified the treaty. The Virginia House of Delegates and the Governor ratified these treaties and the instrument of ratification was delivered to Mr. Gerard by the State's delegation in the Continental Congress. These ratifications were deposited in the Foreign Office of France, and there they may be found to this day. Nor is this the only example of direct participation by states in the conduct of foreign relations and of the exercise by the states in the conduct of foreign relations and of the exercise by the states of "external" powers. Benjamin Franklin writing to the Committee of Foreign Affairs of the Congress, on May 26, 1779, notes:

"I have mentioned above the application of separate States to borrow money in Europe . . . when the general Congress are endeavoring to obtain a loan, these separate attempts interfere and are extremely inconvenient; especially where some of the agents are empowered to offer a higher interest, and some have powers in that respect unlimited. We have likewise lately had applications from three States to this court to be furnished with great quantities of arms, ammunitions, and clothing, or with money upon credit to buy them, and from one State to be supplied with naval stores and ships of war. These agents finding that they had not interest to obtain such grants, have severally applied to me, and seem to think it my duty, as minister for the United States, to support and enforce their particular demand." On another occasion, Franklin, writing to Vergennes, specifically mentions the solicitations by Virginia and Maryland for arms, ammunitions and clothing. He complained that he is even expected by their agents to solicit for them, and "the respective States propose and promise to pay for what is supplied each of them as soon as the war is over." A further examination is convincing that these are not isolated

72. 1 Malloy, Treaties and Conventions, Etc (1910) 468, 479.
73. 4 Doniol, Histoire de la participation de la France à l'établissement des États-Unis d'Amérique. Correspondance diplomatique et documents (1886) 155; Van Tyne at 540; Scott, supra note 34 at 8-9. For an opposite interpretation of these facts, see 1 Butler, The Treaty-Making Power (1902) 264, n. 2.
74. 3 Wharton, The Revolutionary Diplomatic Correspondence of the United States (1889) 192.
75. Id. at 153. See also letter from W. Lee to Governor Jefferson. "His Excellency Governor Henry, was pleased in 1777, with the advice of the Council, to appoint me Agent in France, for the State of Virginia, & in 1788, by the same authority, he sent me a power under the State Seal, to obtain Arms, Artillery, Ammunition, &c, of his most X-tian Majesty. . . ." 1 Palmer, Calendar of Virginia State Papers and Other Manuscripts, 1652-1781, Preserved in the Capitol at Richmond (1875) 328-9.
occurrences nor the aberrations of one particular state. Even Patrick Henry, who was not a Virginian but an American in 1774, had by 1778 apparently undergone something of a change of heart. In the course of the negotiations with Spain for a loan and for Spanish approval of the erection of a fort on the Virginian border, he promised in behalf of Virginia "the Gratitude of this free and independent country, the trade in any or all its valuable productions, and the friendship of its warlike inhabitants." Virginia's diplomatic activities apparently became so extensive as to necessitate the setting up of a special office, a "Clerkship of Foreign Correspondence.

In the preceding paragraphs attention has been devoted primarily to state participation in diplomatic negotiations. But this was not the only external power exercised by the states. That they bought or sought to buy military supplies has already been seen in the letters referred to above, it is logically to be implied that these were to be used to outfit their troops and naval forces. But not only did the several states organize their own forces; they even conducted their own individual campaigns, as is shown by George Rogers Clark's campaign in behalf of Virginia, or the ill-starred descent of the Massachusetts army in 1779 upon the Penobscot forts. In fact "much of the early war in the South was carried on without the aid or advice of Congress." The story is the same as regards the organization of the navies, the laying of embargoes, the opening of ports to the outside world, and in every other phase of war operations. In brief, state exercise of the external powers is to be seen throughout this period.

76. Philip Mazzei was sent with a like commission to Italy. 1 HUNT, THE WRITINGS OF JAMES MADISON (1900) 138, n. 2; A. NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION 1775-1789 (1924) (Hereinafter cited as NEVINS) 658-60, citing besides Virginia and Maryland, South Carolina and Pennsylvania.
77. Library of the State Historical Society of Wisconsin, Clark MSS, LVIII, 103. Cited by Van Tyne at 540; NEVINS at 659.
78. "Whereas it is necessary for the governor and council to be provided with a person learned in the modern languages for assisting them in communication with foreign states. . . . Be it therefore enacted, that a clerkship of foreign correspondence be henceforth established. . . ." 9 HENNING, STATUTES AT LARGE (1821) 467.
79. 9 id. at 552.
80. NEVINS at 660.
81. Van Tyne at 541.
82. PAULLIN, THE NAVY OF THE AMERICAN REVOLUTION, ITS ADMINISTRATION, ITS POLICY, AND ITS ACHIEVEMENTS (1906) cc. XI-XV, 152. See NEVINS at 659: "Nine States . . . organized their own navies, and some States established their own system of privateering." 1 THE PUBLIC RECORDS OF THE STATE OF CONNECTICUT (1894) 18, 63, 71; 9 HENNING, op. cit. supra note 78 at 530 (Virginia Embargo).
83. In 6 JOURNALS OF CONGRESS 1072, Wythe refers to the opening of the ports by the Virginia Convention to all nations except British (including Ireland and West Indies).
84. Van Tyne at 541-3.
85. The material cited has been drawn from the period until the establishment of the Confederation. During the period from 1783-1789 numerous illustrations of state partici-
The evidence here presented has led students of the period to an all but unanimous conclusion as to the nature of the Union, the degree of nationality, and the seat of sovereignty from 1776 to 1789. Allan Nevins, the outstanding student on the American States for the period, concludes:

"In all, the view that the United States in Congress assembled constituted a nation, vested with all the attributes of sovereignty, had much less currency from 1776 to 1787 than might be inferred from the writings of statesmen like Hamilton, Madison, and Washington. The view was very general that Congress was simply a meeting of ambassadors of thirteen independent and sovereign, but leagued nations. . . .

"When individual delegates had any quarrel with Congress as a body, they always fell back upon their diplomatic privileges. . . ." 86

This analysis of the historical data reveals that there has persisted a basic misinterpretation of early American history. It appears that at the root of this misconception lies a failure to distinguish between a consciousness of nationality and a national state. Certain basic forces were at work which contained the germ of nationality, such as laws, mores, geographic position, history and language, but it is an error to confuse this with the idea of the state. 87 That there was a composite organization exercising authority, and that a desire for paramount authority was expressed by many is certainly not to be denied. But a

86. NEVINS at 660 et seq.; 3 HUNT, op. cit. supra note 76 at 181.
87. Van Tyne at 544.
study of the records excludes the acceptance of the conclusion that the composite body was the authority or that the individual states heeded the voice of this body. Its history "forms a record of localism rising superior to itself, to meet the demands of a crisis. That imagination runs riot which turns this magnificent effort into the definitive abdication of localism." 88

It is evident from an examination of the history of the period that Mr. Justice Sutherland's theory that "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America," does not harmonize with the facts. It simply was not so.

It is important that it be noted that the objections thus far raised against Mr. Justice Sutherland's opinion in the Curtis-Wright case has been directed against the stated legal rationale for the decision—his exposition of history and use of that history as the foundation for his conclusions. In this connection it should also be observed that the objections to Mr. Justice Sutherland's theory would be valid even had the various central bodies in the course of their existence assumed the powers as to the control of foreign affairs. Certainly institutions operating in crisis situations may be forced to exercise powers beyond their announced authority. That, however, would not support a conclusion that it was the theory on which the institutions operated. The latter

88. Small at 76. For a further confirmation of the view in the text, see J. B. Scott, THE UNITED STATES OF AMERICA, A STUDY IN INTERNATIONAL ORGANIZATION (1920). See J. B. Scott, The Declaration of Independence, The Articles of Confederation, The Constitution of the United States (1917) iv: "... the States declaring their independence were States in the sense of International Law...." Wriaton, Executive Agents in American Foreign Relations (1929) states at 3-4 that during the Revolution Congress exercised control over foreign relations without specific authority, but the "individual states continued to send men abroad on state business." This is also Professor Bailey's general conclusion. Commenting on President Lincoln's statement in his inaugural address that the founding fathers brought forth a Nation in 1776, Professor Bailey says: "He might better have said that those fathers had brought forth a number of small nations. For during the six troubled years from the close of the Revolution to the establishment of the present government in 1789 the United States consisted of thirteen separate sovereignties each going its own way." Bailey, A Diplomatic History of the American People (1940) 37; J. B. Scott and Hunt, James Madison's Notes of Debates (1918); R. L. Schuyler, The Constitution of the United States, An Historical Survey of Its Formation (1923) 16-17. The Supreme Court has upheld this view. Ware v. Hylton, 3 Dal. 198, 224, 237 (U. S. 1796). Rhode Island v. Massachusetts, 12 Pet. 657, 736 (U. S. 1838). Statement of the California court in People v. Gerke and Clark, 5 Cal. 381, 384 (1855), is also worthy of notice. "Before the compact (organization of the government under the constitution), the states had the power of treaty making as potentially as any power on earth; ... By the compact they expressly granted it to the Federal Government in general terms, and prohibited it to themselves. The General Government must, therefore, hold it as fully as the States held it. ..." It is to be noted that Professor Scott's thesis is in agreement with this view.
can be discerned, it would appear, primarily by analyzing the then pre-
vailing theory of the institution checked against the story of their
actual operations. In terms of these indices there is little to support
Mr. Justice Sutherland's theory. It was not only the predominant
theory of that day that the states were independent entities but the
states also behaved that way.89

SIGNIFICANCE OF THE Curtiss-Wright Case

The most significant aspect of the Curtiss-Wright decision is that it
gave authoritative and respectable status to the doctrine that the na-
tional government possesses powers completely outside of those in any
way assigned to it by the Constitution. Generally speaking, this means
that the doctrine that the United States is a constitutionally limited
federal state applies only to purely domestic matters and that general
limitations arising out of the nature of the American system are not
applicable in the field of foreign affairs. There is even considerable
basis for interpreting the Curtiss-Wright decision to mean that there
are no substantive limitations on the scope of the foreign relations
power; that is, since it is an "extra-constitutional" power, extra-
constitutional acts cannot be un-constitutional. Though Mr. Justice
Sutherland does include a warning that the government could not
exercise the power in manner specifically prohibited by the Constitu-
tion—"a power which . . . like every other governmental power must
be exercised in subordination to the applicable provisions of the Con-
stitution"—this limitation appears to affect only the procedural aspects
of treaty-making. The significance of Mr. Justice Sutherland's inter-
pretation of the nature and scope of the external powers of the national
government is found not so much in its novelty or practicable applica-
tion as in its sharp departure from the accepted canons of constitutional
interpretation and assumptions as to the nature of the American system
of government.

A few illustrations of recent statements by students of American
public law as to the scope of the treaty-making power will reveal that
before the Curtiss-Wright decision there was general agreement that
the national government could enter into international agreements as
to every internationally significant subject.90 A discussion between

89. See The Federalist, Nos. 64, 66, 69, 75; See Goebel, supra note 35 at 572, n. 49.
90. Levitan, Constitutional Developments in the Control of Foreign Affairs: A Quest for
Democratic Control (1945) 7 Journal of Politics 58. The more narrow interpretations were
emphasized by Jefferson, Madison and Calhoun and St. George Tucker. See especially,
Power Under the Constitution of the United States (1915); Q. Wright, The
Control of American Foreign Relations (1922) 130-4; 5 Moore, A Digest of Interna-
tional Law (1906) 156-71; 5 Hackworth, Digest of International Law (1940-44)
5-25, 154 (hereinafter cited as Wright, Moore, and Hackworth).
Charles Henry Butler and Charles Evans Hughes at the 1929 meeting of American Society of International Law is especially pertinent. Mr. Butler, in the course of his paper said:

"A critical examination of the genesis, development, adoption, construction and application in their historical and legal aspects of the various provisions of the Constitution by which the states renounced the treaty-making power for themselves and delegated it to the Federal Government, and especially of Article VI which makes treaties the supreme law of the land, in my opinion, necessarily leads to the conclusion that there are no limitations on the treaty-making power of the United States as to matters otherwise within the exclusive jurisdiction of the States, and which result from the sovereign jurisdiction of the States over such matters." 91

In explanation of his statement that "there are no limitations on the treaty-making power," Mr. Butler continued:

"I do not mean to say that there are no limitations whatever on the treaty-making power of the United States; but I do mean to say that such limitations as may exist are those which exist as to every sovereignty or which are imposed by provisions of the Constitution itself." 92

Mr. Hughes, then president of the society and chairman of the meeting, when asked to comment on what he considered the scope of the treaty-making power, said:

"I think it is perfectly idle to consider that the Supreme Court would ever hold that any treaty made in a constitutional manner in relation to the external concerns of the nation is beyond the power of the sovereignty of the United States or invalid under the Constitution of the United States where no express prohibition of the Constitution has been violated." 93

Mr. Hughes later added:

". . . the nation has the power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the constitution, and I am not aware of any which would in any way detract from the power as I have defined it in connection with our relations with other governments." 94

In the course of the discussion Mr. Hughes sought to establish a criterion as to what constitutes a proper subject of negotiation and what

91. See (1929) 23 PROCEEDINGS AMERICAN SOCIETY OF INTERNATIONAL LAW 177.
92. Id. at 177–8; see Professor T. W. Stimson’s statement, id. at 185–9, for an opposite view, holding that only matters within legislative authority of Congress may be dealt with by treaty.
93. Id. at 194.
94. Id. at 196.
is strictly a domestic question. On the basis of the principle in *Houston, East & West Texas Railway v. United States*, he suggested the rule that the national government may properly regulate by international national agreement any local matter where the local matter becomes so related to international affairs that an international regulation of the field could not fully succeed unless the purely local aspects of the matter were included. While speaking on the subject, Mr. Hughes, took the occasion to clarify a previous remark of his concerning the scope of the treaty-making power. At the 1928 meeting of the society, in the course of his presidential address, referring to the refusal of the American delegation to participate in the codification of Private International Law, he had said:

“In view of our system of government in the United States, with our forty-eight States and our federal government of limited power, the United States could not join in this action . . .”

It was clear that there was a considerable gap between the views expressed at these two meetings. Hence, he inserted the following explanation:

“In so doing [refusing to join the negotiations] it was not necessary to hold that it was beyond the treaty-making power, but it was thought to be inadvisable to attempt to press the treaty-making power in such a novel exercise and that to bring a treaty of that sort to the consideration of the Senate would be a grave mistake.”

Herein lies the real check on the treaty-making power—political advisability. This change of attitude is reflected in the utterances of the courts. The Court of Claims recently stated: “It has been so well established that treaties entered into between Nations are political and not judicial questions and courts cannot declare a treaty fraudulent or non-effective, that it is unnecessary to cite authorities.”

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95. 234 U. S. 342 (1914).
96. Hughes, *The Outlook for Pan-Americanism—Some Observations on the Sixth International Conferences of American States* (1928) 22 PROCEEDINGS AMERICAN SOCIETY OF INTERNATIONAL LAW 1, 12. The constitutional objection referred to in the text is that many of the subjects considered for codification are matters over which, at least in the past have been under state jurisdiction. It should be remembered that the accepted theory in 1928 of the internal powers of the Federal government was that it did not have a general police power therefore no authority to deal with most of the matters covered by private law.
98. Eastern or Emigrant Cherokees and Western or Old Settler Cherokees v. United States, 88 Ct. Cl. 452, 467 (1939). See also, United States v. Reid, 73 F. (2d) 153, 155 (C. C. A. 9th, 1934) where the court said: “It is doubtful if courts have power to declare the plain terms of a treaty void and unenforceable, thus compelling the nation to violate its pledged word, and thus furnishing a causus (sic) bellii to the other contracting power.”
A review of the literature and judicial opinion reveals that during this period (last quarter of a century) the broad interpretation of the treaty-making power has become more generally accepted than ever before in our history. These illustrations can be multiplied many fold. Few would have dissented in 1935 from the proposition that though the treaty-making power does not extend "so far as to authorize what the Constitution forbids" it does extend to all proper subjects of international negotiation. It represented good law and good sense then; it is still good sense. In the light of this already established position we return to the question, what is the significance of the Curtiss-Wright opinion?

Mr. Justice Sutherland's theory of the nature of the foreign relations power represents the most extreme interpretation of the powers of the national government. It is the furthest departure from the theory that United States is a constitutionally limited democracy. It introduces the notion that national government possesses a secret reservoir of unaccountable power. In terms of democratic theory this represents an unfortunate departure from the long accepted and cherished notions as to the nature of the American system. Though the doctrine that this is a government of enumerated powers had already undergone much interpretation and expansion so that the doctrine was in fact little more than a fiction, the basic theory had remained generally undisturbed. The courts and publicists had spoken of "sovereign powers," but the generally accepted view was that every exercise of power by the national government had, in some way, to be traceable to the constitution. Chief Justice Marshall's theory of "implied"

99. See Levitan, Recent Developments in the Control of Foreign Relations under the United States Court (Unpublished Ph.D. dissertation, in University of Chicago Library 1940), esp. cc. II and III. See also, Missouri v. Holland, 252 U. S. 416 (1920) and Asakura v. Seattle, 265 U. S. 332 (1924). For an even broader interpretation of the scope of the treaty-making power, see Potter, Inhibitions Upon the Treaty-Making Power of the United States (1934) 28 AM. J. INT. L. 456; Scott, Treaty-Making Under the Authority of the United States (1934) 28 Proc. Am. Soc. INT. L. 2; both articles are of great interest, for though they start with different hypotheses they arrive at very much the same conclusions. Professor Potter's major premise is that "international law is superior in authority to national constitutional law," and the minor premise, that "the treaty-making power is possessed by the national state by virtue of international, not national, law," it then follows that whatever limitations the treaty-making power may be subject to are as a result of international law. [For international law limitations, see Law of Treaties, Harvard Draft (1935) 29 AM. J. INT. L. (Supp.)]. Professor Scott starts with the view that the American States had the full authority and they turned over that plenary power, which became theirs upon the severance of ties with Great Britain, to the central government at the time of the ratification of the constitution.


101. Chinese Exclusion Case, 130 U. S. 581 (1889); Insular Cases, 182 U. S. 244 (1901); Jones v. United States, 137 U. S. 202, 212 (1890).

102. Wright at 132; Quarles, The Federal Government: As to Foreign Affairs, Are Its Powers Inherent as Distinguished from Delegated? (1944) 32 Geo. L. J. 375; Patterson, In re
powers, Mr. Hamilton’s and Justice Story’s theory of “resultant” powers, and the more recent interpretation of the “general welfare” clause all had a constitutional foundation—they were deduced from, and relied upon, constitutional grants for their basis, in however a cabalistic fashion. Mr. Justice Sutherland’s pronouncement of the existence of “extra-constitutional” powers—powers which can be “pulled out of the hat” when there arises need for them—is contrary to the predominant judicial interpretation and the accepted theoretical assumptions of the nature of the American system of government. That “there can be no question as to the constitutional unsoundness as well as of the revolutionary character of the theory” of inherent sovereign powers is unassailable. Mr. Justice Sutherland’s opinion, therefore, represents an erroneous—if not dangerous—constitutional exposition.

The ambiguities in the Curtiss-Wright opinion make it difficult to determine which phrases most accurately represent the views of the Court and to evaluate fully its practical significance. On the one hand, it is stated that “the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution.” While, on the other hand, Mr. Justice Sutherland exhorts that this “like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.” In view of Mr. Justice Sutherland’s earlier writings, it is quite clear that he leaned towards the broader interpretation. But that his brethren would have gone along with his “extra-constitutional” theory is quite doubtful. One fact should not be overlooked—that the ambiguities of the opinion do not rule it out as available precedent. As a matter of fact, it has already served as a welcome springboard for decisions upholding much broader exercises of authority. It is this availability as precedent that makes opinions such as this one doubly unfortunate. Were one to assign binding effect to the more sweeping statements on the scope of the external powers, then, it would appear that treaty provisions even violative of substantive phrases of the Constitution, i.e., the bill of rights, or the Fifth Amendment, would be binding on the United States. Such a question arose earlier in our


103. McCulloch v. Maryland, 4 Wheat. 316, 405 (U. S. 1819); 1 HAMILTON, WORKS (Lodge ed. 1885) 184; 3 STORY, COMMENTARIES ON THE CONSTITUTION (1st ed. 1833) 124; Legal Tender Cases, 12 Wall 457 (U. S. 1871). WRIGHT at 132; Patterson, supra note 102 at 297, 460 and passim.

104. WILLoughby, CONSTITUTIONAL LAW (2d student’s ed. 1935) 62.

105. See Goebel, note 35 supra.

106. See Law of Treaties, supra note 99, art. 24; 5 HACKWORTH 153–64. Cowles traces
history, in the case of In re *Dillon*.107 In that case, Secretary of State Marcy stated that: "the Constitution is to prevail over a treaty where the provisions of the one come in conflict with the other. It would be difficult to find a reputable lawyer in this country who would not yield a ready assent to this proposition." 108 This has been the accepted position of the American courts and statesmen, though foreign states have not always acquiesced to this view.109 While some of the language in the *Curtiss-Wright* and *Belmont* cases is broad enough to support the validity of such treaty provisions, the matter is of very little practical significance.

Treaties are made by the President only with the advice and consent of two-thirds of the Senate while purely executive agreements are entered into solely by the President—an elected official, subject to public control, impeachment, etc. For this reason the likelihood that drastic international agreements will be entered by American officials exists only hypothetically in the imagination.

One distinguished student of the development of legal institutions sees more serious and gloomy implications in the *Curtiss-Wright* decision:

"To one familiar with the panoply of procedural devices which the English crown possessed in respect to its prerogative in foreign affairs the learned Justice's manipulation of the political scientists' classification of sovereignty and his averment that external sovereignty passed from the Crown to the Union is fraught with future consequence. It is so because the novel idea that external sovereignty passed from the King to the Union implies a transfer of the common law powers connected therewith, especially since Mr. Justice Sutherland states that 'the powers of external sovereignty do not depend upon affirmative grants of the Constitution.'" 110

Such pessimism seems unwarranted in the light of the Supreme Court's power to overrule or distinguish this decision whenever it so desires. Consequently, we return to the proposition that the only real significance and error of the *Curtiss-Wright* opinion is that it introduces strange and undesirable strains in American constitutional theory.

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107. 7 Fed. Cas. 710, No. 3914 (N. D. Cal. 1854); 5 Moore at 167-8; Wright at 55-6.
108. Mr. Marcy to Mr. Mason, minister to France, Sept. 11, 1854, 15 MS Inst., France, 210 cited in 5 Moore at 167.
109. Wight at 16-18; 5 Moore at 166-71; 5 Hackworth at 153-64; Leitran, Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States (1940) 35 Ill. L. Rev. 365, 380 and passim.
CONCLUSION

It has been shown that Mr. Justice Sutherland's theory is that the national government possesses the foreign relations authority as an "inherited" power. Inherited from whom? Did the national government inherit this power from the Crown via the Continental Congress, or, via the states? Is the national government the direct successor—the power never having resided with the states—to the external powers of the Crown? Or did the external powers fall originally to the states who in turn were deprived of, or gave up, these powers to the national government at the time of the adoption of the Constitution? Assuming that one accepts the latter interpretation of the sequence of successors to the external powers—the question then arises as to the breadth of this bequest. The overwhelming opinion is that the national government was bequeathed in 1787 complete authority over external affairs. No part of this power was reserved to the states in the process of drafting the Constitution: the mere presence of states in our system does not serve as a limitation on the scope of the external powers of the national government. To that extent the decision in the Curtiss-Wright case is in harmony with precedent and with generally accepted principles of Constitutional interpretation.

Though there is this general agreement that the national government does possess complete authority as to external affairs, there is basic disagreement as to how this power accrued to the national government and as to the nature of the power—delegated, inherent, or inherited. Mr. Justice Sutherland justifies this: (1) as an attribute of sovereignty—an "inherent" power; and (2) on the ground that the national government is the direct successor of the Crown "inherited" power. In contrast, Mr. James Brown Scott, while accepting the proposition that the national government has all-embracing authority as to external affairs, traces that authority to the delegation of 1789 when the plenary authority over foreign affairs devolved from the states to the nation.

A review of the political and constitutional ideas prevailing in America at the time of the Revolution and of the Constitutional Convention leaves little room for the acceptance of Mr. Justice Sutherland's "inherent" powers, or, in fact, "extra-constitutional" powers theory. Rather it seems that "the theory upon which and the intent with which our central government was ordained and established were that . . . it was to be a government whose powers were not intrinsic but granted . . ." 111

The disagreement as to the route of succession of the external powers was reflected in our legal literature almost a century and a half ago in

111. Quarles, supra note 102 at 382.
Penhallow v. Doane. Mr. Justice Iredell therein set forth what has been described as the James Brown Scott thesis, while Mr. Justice Paterson expounded the theory subsequently espoused by Mr. Sutherland. It is essential that the reader bear in mind that the acceptances of the Iredell-Scott thesis that the States delegated their foreign affairs power does not necessitate a limiting interpretation of the treaty-making power as a result of the ratification of the Constitution. Professor Corwin has clearly stated that this "theory" is logically adequate if we assume that the states are today devoid of capacity to sustain foreign relationships. Thus, unless it has dropped entirely out of existence, their former authority in foreign affairs must have passed to the national government, and hence be as complete in the latter as by hypothesis it originally was in the former.

Regarding the "inherent" powers doctrine, it is well to add, that though the existence of such powers has sometimes been referred to by the courts and by writers on public law, there is little justification for the perpetuation of such a theory. Its introduction was contrary to the spirit of a written constitution. Whether or not a written constitution is the most desirable basis for a government, as long as we live under such a document there appears little room for a theory of "inherent" powers. Instead a liberal and broad interpretation of such provisions of the Constitution as the general welfare clause is more in harmony with our philosophy that the Constitution limits governmental authority. The argument that the interpretation and reinterpretation of constitutional phrases in the light of modern conditions makes little more than a fiction out of the notion that we are living under the Constitution, will not be denied. Our government should continue to evolve to meet the ever-changing needs of the people within the framework of the general philosophy of a supreme Constitution with some specific prohibitions. The Sutherland doctrine, however, makes shambles out of the very idea of a constitutionally limited government. It destroys even the symbol.

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112. 3 Dall. 54 (U. S. 1795).
113. Id. at 91-95.
114. Id. at 80-81, though Mr. Justice Paterson does not go quite as far as Mr. Justice Sutherland; Goebel, supra note 35 at 571, n. 46. See 1 Farrand, op. cit. supra note 85 at 323.
116. For examples of the constitutional construction recommended in the text see Mr. Justice Cardozo dissenting in Panama Refining Co. v. Ryan, 293 U. S. 388, 440 (1935); Mr. Justice Holmes in Missouri v. Holland, 252 U. S. 416, 433-5 (1920).