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THE TREATY POWER AND FAMILY LAW

Jerome J. Curtis, Jr.*

Several commentators have urged the treaty power as the basis for federal promulgation of uniform domestic relations laws. Professor Curtis in this Article analyzes the limitations on the treaty power in the area of domestic relations. It is the position of Professor Curtis that limitations imposed by the tenth amendment, as well as those inherent in the constitutional grant of the treaty power, itself, preclude any federal preemption in this area.

I. INTRODUCTION

THE promulgation and enforcement of laws regulating the family have long been considered to be the exclusive concern of the individual states.¹ With the exception of the restrictions imposed by the fourteenth amendment,² the federal government has never assumed affirmative responsibilities over such matters.³ Rather, each state has

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¹ In explaining the affirmative vote of the United States in support of the United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the United States' representative said:

In my country under our Constitution, marriage traditionally has been a subject within the competence of the respective state governments. Legislation in force in our various state jurisdictions is in conformity with the principles of the Marriage Convention In view of our Constitutional system my Government, in considering ratification of the Convention, will do so with the understanding that the ratification by the United States will be regarded as constituting a recognition and not an impairment of the constitutional rights of the respective states of the United States to regulate marriages within their jurisdictions.

U.N. Doc. A/PV 1167, at 33-35 (1962). This is reproduced in Schwelb, *Marriage and Human Rights*, 12 AM. J. COMP. L. 337, 358 (1963).

² See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding the imposition of court costs upon indigents seeking divorce in state courts unconstitutional); *Levy v. Louisiana*, 391 U.S. 68 (1968) (holding unconstitutional a state statute barring an illegitimate child from recovering for the wrongful death of his mother when legitimate children were permitted to recover); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding state miscegenation statute unconstitutional).

³ Federal courts have even made an exception to the diversity jurisdiction statute, 28 U.S.C. § 1332 (1970), and have denied diversity jurisdiction over domestic relations cases. This exception was first developed when the diversity statute granted jurisdiction of "suits of a civil nature, at common law or in equity." Act of March 3, 1911, ch. 231, § 24, 36 Stat. 1091. It was thought that domestic relations cases, being matters which would have been heard in the ecclesiastical courts, did not fit this description. C. WRIGHT, *FEDERAL COURTS* § 25, at 84 (2d ed. 1970). The 1948 Judicial Code, Act of June 25, 1948, ch.

been left free to determine the conditions under which persons within its borders may marry, divorce, adopt children, or perform any other

646, § 1332, 62 Stat. 930, substituted the term "civil action" for the phrase used in the older statute, but the exception has persisted. Today the exception may be more rationally defended on the ground that this is an area of the law in which states have an especially strong interest and great competence in dealing.

The exception originated in dictum in *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1859). There the Court held that a wife could sue on the basis of diversity in a federal court in Wisconsin to enforce the decree of a New York state court that granted her a divorce and alimony; but it added:

We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to a divorce *a vinculo*, or to one from bed and board. *Id.* In another sweeping statement the Supreme Court later said, "the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890). For another early statement of the states' exclusive jurisdiction over domestic relations cases, see *Maynard v. Hill*, 125 U.S. 90 (1888) (stating marriage is an institution of society, regulated and controlled by public authority and divorce statutes were within the competency of state legislatures).

Thus, the federal courts have not entertained actions involving questions of matrimonial status and have also not heard "domestic relations" cases involving only property rights. *E.g.*, *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930) (state court had jurisdiction of an action for divorce against the consul of a foreign country though normally federal courts under 28 U.S.C. § 1351 have exclusive jurisdiction of actions against consuls); *Morris v. Morris*, 273 F.2d 678 (7th Cir. 1960) (where wife had not obtained entry of judgment by New York courts for accrued and unpaid separation decree installments, federal court was not required to give full faith and credit to decree and lacked jurisdiction to enforce payments); *Ostrom v. Ostrom*, 231 F.2d 193 (9th Cir. 1955) (no power for federal court to compel husband to comply with terms of interlocutory divorce decree entered by California state court); *Blank v. Blank*, 320 F. Supp. 1389 (W.D. Pa. 1971) (divorce action by Pennsylvania resident against Pennsylvania resident not properly removable to federal court); *Druen v. Druen*, 247 F. Supp. 754 (D. Colo. 1965) (case not removable to federal court where plaintiff sought divorce, alimony and declaratory and injunctive relief relating to realty); *Bercovitch v. Tanburn*, 103 F. Supp. 62 (S.D.N.Y. 1952) (no federal court jurisdiction for Canadian mother-in-law to recover money expended for necessities allegedly provided to defendant's wife); *Linscott v. Linscott*, 98 F. Supp. 802 (S.D. Iowa 1951) (no federal court jurisdiction to revoke separation agreement entered into by parties as husband and wife).

The federal courts have also refused to hear child custody cases. *E.g.*, *In re Burrus*, 136 U.S. 586, 593-94 (1890) (federal court order granting habeas corpus to obtain custody of a child was absolutely void and could be disregarded with impunity). *Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968) (no jurisdiction of case involving paternity and child support); *In re Freiberg*, 262 F. Supp. 482 (E.D. La. 1967) (action by husband seeking adoption under Louisiana statutes of wife's two minor children born of prior marriage was not removable to federal court on ground of diversity of citizenship); *Brandtscheit v. Britton*, 239 F. Supp. 652 (N.D. Cal. 1965) (federal court declined to exercise jurisdiction in action by foreign citizen against citizen of California to establish paternity and to provide support for an illegitimate child).

One of the few instances of affirmative federal legislation in family law matters is 22

essentially familial act. Thus, while a citizen of Nevada may be permitted a divorce upon the showing of incompatibility,⁴ another state may provide much more restrictive grounds.⁵ However, several commentators,⁶ who desire uniform domestic relations laws, have proposed the treaty power⁷ as a way to preempt the area; and they point to the participation of the United States in international efforts to formulate uniform domestic relations laws.⁸ This Article examines the attempts to involve the United States in these efforts and reviews the constitutional bases for the proposed involvement.

II. POTENTIAL OBLIGATIONS OF THE UNITED STATES UNDER INTERNATIONAL LAW

The United States Constitution makes federal statutes and treaties the supreme law of the land insofar as they comport with the requirements of the Constitution itself.⁹ Accordingly, under the supremacy

U.S.C. § 1172 (1970), which authorizes United States' consuls abroad to perform marriages if the parties are competent to marry under the laws of the District of Columbia. The constitutionality of this statute apparently has never been tested.

⁴ NEV. REV. STAT. § 125.010 (1968); accord, e.g., ALASKA STAT. § 09.55.110 (1962); N.M. STAT. ANN. § 22-7-1 (1953); OKLA. STAT. ANN. tit. 12, § 1271 (1961).

⁵ New York, for example, limited the grounds for divorce to adultery until 1966 when the legislature began to increase the number of grounds. Compare N.Y. DOM. REL. LAW § 170 (McKinney 1964) with N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1972). Massachusetts limits the grounds for divorce to adultery, utter desertion for two consecutive years, impotency, gross and confirmed habits of intoxication caused by voluntary use of liquor or drugs, cruel and abusive treatment, and gross or wanton and cruel failure to provide support. MASS. GEN. LAWS ANN. ch. 208, § 1 (1972). For a statute listing twelve common grounds for divorce, see GA. CODE ANN. § 30-102 (Supp. 1971).

⁶ E.g., Dorsey, *Subject-Matter Limitations on the Treaty Power*, 4 INT'L LAW. 209 (1970); Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012 (1968); Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959); Mosler, *The Protection of Human Rights by International Legal Procedures*, 52 GEO. L.J. 800 (1964); Nadelmann, *The United States Joins the Hague Conference on Private International Law*, 30 LAW & CONTEMP. PROB. 291 (1965).

⁷ U.S. CONST. art. II, § 2, cl. 2 provides: "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

⁸ See Henkin, *The Constitution, Treaties, and International Human Rights*, *supra* note 6; Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, *supra* note 6.

⁹ U.S. CONST. art. VI provides in part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land." Since this language does not indicate directly that treaties must conform with the Constitution while statutes are explicitly required to do so, one might argue that there are no constitutional limitations upon the treaty power. The view that treaties are

clause, a lawful exercise of the treaty power by the federal government will vitiate any state law in conflict with the treaty.¹⁰ In view of the supremacy of treaties and of the fact that the potential machinery already exists within the international community for fashioning changes in family laws, it is not surprising that many scholars have advanced the treaty power as the appropriate vehicle for imposing federal standards upon state family laws. The Hague Conference on Private International Law, which has been functioning for seventy-nine years, currently includes the United States among its twenty-three member nations.¹¹ The

not subject to the same constitutional limitations as are statutes finds support in the supremacy clause itself, and in an ambiguous suggestion by Justice Holmes in *Missouri v. Holland*, 252 U.S. 416, 433 (1920). Justice Holmes said:

Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention.

Id. Fortunately, some doubt has been cast on the propriety of such an interpretation in *Reid v. Covert*, 354 U.S. 1 (1957). Justice Black, speaking for the Court, noted by way of dicta that treaties, like laws, must be made "in pursuance of" the Constitution and that no agreement with a foreign nation can confer power on the Congress, or on any other branch of the Government, which is free from the restraints of the Constitution There is nothing in this language [the supremacy clause] which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution.

. . . The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

Id. at 16-17.

Perhaps the best known statement of the implied limitation on the treaty power is that made by Justice Field in *Geofroy v. Riggs*, 133 U.S. 258 (1890):

The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country.

Id. at 267.

¹⁰ *Missouri v. Holland*, 252 U.S. 416 (1920); *Geofroy v. Riggs*, 133 U.S. 258 (1890); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

¹¹ Statute on the Hague Conference of Private International Law, July 15, 1955, 220 U.N.T.S. 121. The Hague Conference, which met for the first time in 1893 as a result of an initiative of the government of the Netherlands, was transformed into a permanent institution through a charter drawn up at the Seventh Session of the Conference in 1951. The Charter entered into force on July 15, 1955. In accordance with article 2 thereof, admission to membership becomes definitive upon acceptance of the Charter by the State concerned.

avowed objective of the Conference is to foster the unification of the rules of private international law.¹² Characteristic of its efforts in the family law field are its various international conventions on adoptions, divorce, marital separations, and annulments.¹³

A. Convention on Recognition of Foreign Divorce Decrees

One development in the Hague Conference which might pose a threat to the hegemony of the domestic relations powers of the American states is the Conference's Convention on Recognition of Foreign Divorce Decrees which was approved at its 1968 meeting.¹⁴ This Convention would require ratifying nations to recognize and enforce the divorce and separation decrees of other nations¹⁵ even in those instances where no grounds for divorce or separation exist under the law of the reviewing forum or where the choice of law rules of the reviewing forum would otherwise require that the judgment be ignored. In effect, the Convention would enact a full faith and credit rule for the international community.

It is elementary American constitutional law that full faith and credit attaches only to the judgments of sister states, and then only if the rendering forum had jurisdiction.¹⁶ There is nothing in the United

¹² *Id.* at 123. Article 1 of the Charter of the Hague Conference on International Law provides that the Conference will "work for the progressive unification of the rules of private international law."

¹³ See 52 DEP'T STATE BULL. 1339, at 265 (1965). The agenda for the Tenth Session of the Hague Conference on Private International Law listed six major items, four of which concerned draft conventions on the following subjects: (1) recognition and enforcement of foreign judgments; (2) international adoption of children; (3) service abroad of judicial and extrajudicial documents; (4) agreements on the choice of court. The fifth major item dealt with an exploratory questionnaire on status judgments involving divorce, legal separation, and annulment of marriage. The sixth major item was a request for topics to comprise the agenda of future sessions of the Hague Conference.

¹⁴ Hague Convention on the Recognition of Divorces and Legal Separations (1968). This convention is reproduced in Mehren & Nadelmann, *The Hague Conference Convention of June 1, 1970 on Recognition of Foreign Divorce Decrees*, 5 FAM. L.Q. 303, 309-18 (1971).

¹⁵ Article 2 provides in part: "Such divorces and legal separations shall be recognized in all other Contracting States, subject to the remaining terms of this Convention" Hague Convention on the Recognition of Divorces and Legal Separations, art. 2; Mehren & Nadelmann, *supra* note 14, at 309.

¹⁶ The full faith and credit clause of the Constitution, U.S. CONST. art. IV, § 1, as interpreted by the Supreme Court determines the conditions under which the decrees of the courts of one state are to be recognized in other states. The Supreme Court has arrived at the doctrine that full faith and credit will be given divorce decrees only if one of the parties to the action was domiciled at the time of the divorce in the state where the divorce was granted. See *Williams v. North Carolina*, 325 U.S. 226 (1945). See generally *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Southard v. Southard*, 305 F.2d 730 (2d Cir.

States system which compels a state to enforce a judgment obtained in a foreign country—not even where the foreign court possessed jurisdiction. Yet, if the United States were to ratify the Convention and declare that the Convention extends to all its legal systems,¹⁷ the federal government would have assured the world community that the states could and would be compelled to enforce foreign judgments. This assertion of plenary power by the federal government would constitute a marked deviation from the traditional federal role of deference to state autonomy in certain matters. While this novel use of the treaty power is not without its advocates,¹⁸ thus far the United States has been unwilling to depart from the traditional viewpoint.¹⁹

B. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

Perhaps the most innovative proposal to emanate from the Hague Conference is the United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.²⁰ This Convention was opened for signature by the United Nations in 1962, and although the Convention has not yet been ratified by the Senate, the United States is a signatory.²¹

1962); *Colby v. Colby*, 78 Nev. 150, 369 P.2d 1019 (1962); *Kessler v. Fauquier Nat'l Bank*, 195 Va. 1095, 81 S.E.2d 440 (1954).

¹⁷ Article 23 of the Convention provides that if a "Contracting State has more than one legal system in matters of divorce or legal separation, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its legal systems or only to one or more of them . . ." Hague Convention on the Recognition of Divorces and Legal Separations, art. 23; Mehren & Nadelmann, *supra* note 14, at 315. Thus the Convention does defer somewhat to federal systems. This provision, however, does not address itself to the question of whether the United States has the power under its Constitution to prescribe family laws for the states under the treaty power. Two writers have suggested that the United States has the power to negotiate in the international community for the recognition of American divorce decrees but perhaps lacks the power to compel the states to recognize the decrees of foreign nations. Mehren & Nadelmann, *supra* note 14, at 308. See also 8 INT'L LEGAL MATERIALS 785, 797 (1965).

¹⁸ See note 6 *supra*.

¹⁹ The United States representative to the Conference observed that the United States lacked the constitutional authority to compel adherence to a related convention by the states. *Report of the U.S. Delegation to the XIth Session of the Hague Conference on Private International Law*, 8 INT'L LEGAL MATERIALS 785, 787-900 (1969). For a similar observation by the United States representative to the United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962), see note 1 *supra*.

²⁰ United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) [hereinafter cited as U.N. Convention on Marriage]. This convention is reproduced in Schwelb, *supra* note 1, at 382-83.

²¹ Schwelb, *supra* note 1, at 337. Presently international law recognizes that treaties

The principal theme of the Convention is harmless on its surface, but beneath its apparent simplicity lurks a direct assault upon traditional American jurisprudence. Article 1(1) furnishes an apt example of this latent danger. It requires a public affirmation of the free and open consent of the parties prior to the marriage.²² One colorful example of the potential conflict between the domestic law of the states and the dictates of this Convention is the case of the "shotgun wedding."²³ The general American view of such marriages, except for those few instances where the groom is literally marched to the altar at the end of a gun barrel, is that the groom has freely and fully consented to the marriage.²⁴ Thus, the coercion, however great its lack of subtlety,

become binding not upon the signature of the diplomatic agents who negotiated them but upon the subsequent exchange of ratifications by the governments of the nations which are parties to the treaty. Prior to the development of modern constitutional governments it was held that agents delegated to negotiate a treaty must have full power to bind the state. Under a monarchy this was not a difficult hurdle, since the monarch was the ultimate authority of domestic law and his authorization of the agent was therefore conclusive. One other reason for the necessity of an immediate binding effect on states upon the signing of an agreement by a diplomatic agent was the relatively slow speed of communications. Only in the case of acts of bad faith by the authorized agent could the treaty be repudiated by the governments which had signed it. C. FENWICK, *INTERNATIONAL LAW* 434 (3d ed. 1948).

²² Article 1(1) reads:

No marriage shall be legally entered into without the full and free consent of both parties, such consent to be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage of witnesses, as prescribed by law.

U.N. Convention on Marriage, art. 1(1); Schwelb, *supra* note 1, at 383. Cf. The American Convention on Human Rights (1969). This Convention is reproduced in 9 *INT'L LEGAL MATERIALS* 99 (1970). Several members of the Organization of American States, not including the United States, are signatories of this Convention. The American Convention echoes the Hague Convention, in requiring "full and free consent" by the parties to a marriage. *Id.* at 106. Recognizing that federalist nations may encounter difficulties in implementing the American Convention, the draftsmen limited the obligations of ratifying nations to the implementation of the Convention with respect to those subjects over which the central government possesses "legislative and judicial jurisdiction." *Id.* at 109.

²³ "Shotgun wedding" denotes those situations in which the pregnancy of the intended bride has caused third parties to bring strong pressure to bear upon the father to induce him to marry the expectant mother. See generally Wadlington, *Shotgun Marriage by Operation of Law*, 1 GA. L. REV. 183 (1966).

²⁴ H. CLARK, *DOMESTIC RELATIONS* § 2.16, at 99-100 (1968). Like other consensual relationships, a marriage contract may be set aside in an action for annulment where it is shown that either party entered the marriage as a result of duress. The claim of duress is most commonly used by husbands who have been induced to marry by various forms of "persuasion" following the seduction of the wife. However, if the "persuasion" does not take the form of violence or threats of violence there is no duress. For force, restraint, or threats to constitute duress warranting an annulment or divorce, they must be such as to overcome the will and bring about a marriage to which consent would not otherwise have been given. See *Stakelum v. Terral*, 126 So. 2d 689 (La. App. 1961) (annulment de-

receives no legal recognition as a ground for annulment.²⁵ However a number of other countries consider coercion sufficient grounds for annulment.²⁶ Arguably, then if the Convention establishes enforceable domestic rules, the international understanding of the provisions of the Convention would control, with the result that no state would be permitted to deny an annulment where a "shotgun wedding" has taken place.

There are other instances of potential conflict. For example, the Convention expressly provides that marriage shall be lawful only where the marriage contract is accompanied by a specified quantum of solemnity. In particular, the parties must manifest their consent to their union before both a competent authority and witnesses.²⁷ As one commentator has observed, the formalities contained in article 1 of the United Nations Convention are "indispensable to combat the 'institutions and practices' the abolition of which the Convention is intended to bring about."²⁸ The same writer has forecast difficulty in implementing the Convention because of the "continued recognition of so-called common-law marriages in some jurisdictions of the United States."²⁹ But countervailing public policies in many American states—especially the policy against bastardy—demand a mode of marriage without formal solemnization. As late as 1922, common-law marriages were recognized in more than half of the states.³⁰ At the present time only fourteen states retain the practice.³¹ Presumably those states which have retained

nied to husband who had allegedly been forced to give his consent by threats of bodily violence or death); *Cannon v. Cannon*, 7 Tenn. App. 19 (1928) (action for annulment allowed when threats made by defendant's father). For a critical discussion of this rule, see Wadlington, *Shotgun Marriage by Operation of Law*, *supra* note 23. For a broad treatment of the subject of duress in the marital context, see Kingsley, *Duress as a Ground for Annulment of Marriage*, 33 S. CAL. L. REV. 1 (1959).

²⁵ See C. CLAD, H. HALSTEAD & D. CROCKER, *FAMILY LAW* 131-32 (1964).

The "shotgun marriage" has produced many interesting annulment cases, with most of the courts finding that the bridegroom (usually) was unwilling, but not sufficiently so under particular sets of facts, especially when the fear might have been attributed to possible prosecution rather than the shotgun or other implement of aggression. It is interesting that a failure to take advantage of an opportunity to escape is viewed by the courts as fatal to a claim of force or duress. Mere threats are not usually enough, no matter how imposing the appearance of the outraged relative.

Id.

²⁶ See Schwelb, *supra* note 1, at 352-54.

²⁷ U.N. Convention on Marriage, art. 1(1), which is set out at note 22 *supra*.

²⁸ Schwelb, *supra* note 1, at 354.

²⁹ *Id.*

³⁰ See 1 C. VERNIER, *AMERICAN FAMILY LAWS* § 26, at 106 (1931).

³¹ Common-law marriage is now recognized in Alabama, Colorado, District of Colum-

the common-law marriage have done so for reasons considered sound and would resist the imposition of a contrary rule by the international community.

Another potential point of conflict between the Convention and the domestic law of some states lies in the requirement that "due publicity" precede the wedding ceremony.³² While few states actually provide for banns,³³ many require the passage of a specified period of time between the issuance of a marriage license and the ceremony.³⁴ Although the primary purpose of these waiting periods may be to give the parties time to ponder the seriousness of the proposed union, they also provide a degree of publicity. Whether they require banns or merely a statutory waiting period, most states recognize exemptions from these requirements. There are, for example, state statutes waiving publicity in cases where "physical condition of either applicant requires the marriage to be celebrated without delay,"³⁵ pregnancy,³⁶ or "good and sufficient reason" exists.³⁷ The Convention leaves no room for exemptions of any type. Thus American courts might find themselves precluded from expediting a marriage even in the face of a cause previously thought sufficient to outweigh the need for publicity.³⁸

The adoption of the Convention would do more than merely abrogate conflicting state policies. It would require a radical redefinition

bia, Florida, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina and Texas. Thirty-six states had determined by 1963, either by statute or judicial decision, not to recognize common law marriage. For a detailed discussion of the present status of the doctrine of common-law marriage, see H. CLARE, *DOMESTIC RELATIONS* § 2.4 (1968).

³² U.N. Convention on Marriage, art. 1(1), set out *supra* note 22.

³³ *E.g.*, GA. CODE ANN. §§ 53-209 to 210 (1961) (allowing publication of banns to substitute for the license); ILL. ANN. STAT. Ch. 89, § 4 (Smith-Hurd 1972) (recognizing banns in the context of a Quaker wedding). The ecclesiastical requirement was that banns announcing the impending marriage were required to be published three times in a public place before the marriage was held. See 2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW* 370 (1898) for a general discussion of banns in ecclesiastical law.

³⁴ *E.g.*, LA. REV. STAT. ANN. § 9:203 (1965) (72 hours required between time of issuance of license and performance of marriage ceremony); VT. STAT. ANN. tit. 18, § 5145 (Supp. 1972) (5 day waiting period must elapse after application for license filed by town clerk before solemnization of marriage).

³⁵ CONN. GEN. STATS. ANN. § 46-5d (Supp. 1972).

³⁶ GA. CODE ANN. § 53-202 (Supp. 1971).

³⁷ ANN. IND. STATS. § 44.201(d) (Supp. 1972).

³⁸ Section 204 of the UNIFORM MARRIAGE AND DIVORCE ACT (1970) does not provide for any exceptions to the waiting period possibly because the period it establishes—three days—is relatively short. The complete text of the Uniform Act is contained in M. PAULSEN & W. WADLINGTON, *STATUTORY MATERIALS ON FAMILY LAW* 1-38 (1971).

of the federal role in family affairs, since article 2 requires each signatory to "take legislative action to specify a minimum age for marriage."³⁹ Should such legislation be passed by Congress, the stage would be set for a clash between the federal statute and the varying laws of the individual states.

A final point of potential conflict between the Convention and state autonomy inheres in article 3 of the Convention which provides for registration of all marriages.⁴⁰ Obviously, article 3 cannot be reconciled with the laws of those states which permit common-law marriages. Furthermore, there is no constitutional authority in the federal government which would sanction a federally-imposed requirement that the states create new or maintain present registration systems. A federal registration system would clearly invade the province of the states.⁴¹

Shortly after the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages was approved by the United Nations, the General Assembly adopted the Recommendation of Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages.⁴² This Recommendation was intended to embrace those nations not in a position to ratify the Convention.⁴³ While the Recommendation does not place such heavy responsibilities on ratifying countries as does the Convention, it is less lenient in one respect. The Recommendation stipulates a specific age of fifteen years⁴⁴ under which no person shall have capacity to marry. Since several American states provide that persons may marry at ages below age fifteen,⁴⁵ the Recommen-

³⁹ U.N. Convention on Marriage, art. 2; Schwelb, *supra* note 1, at 383.

⁴⁰ Article 3 provides: "All marriages shall be registered in an appropriate official register by competent authority." U.N. Convention on Marriage, art. 3; Schwelb, *supra* note 1, at 383.

It should also be noted that article 1(2) of the Convention recognizes proxy marriages. It provides that one party may be absent from the wedding if that party has consented in advance before competent authority to the ceremony being held *in absentia*. The transcript of the Conference proceedings, however, indicates that the article was intended to be solely permissive and that no signatory would be obliged to recognize proxy marriages. Thus, the article would not affect those states which do not allow proxy marriages. Schwelb, *supra* note 1, at 365-71.

⁴¹ Cf. *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930); *In re Burrus*, 136 U.S. 586 (1890); *Maynard v. Hill*, 125 U.S. 190 (1888); *Barber v. Barber*, 62 U.S. (21 How.) 582 (1859).

⁴² UNITED NATIONS, *THE UNITED NATIONS AND HUMAN RIGHTS* 27-28 (1968).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ South Carolina provides that the minimum age for marriage is fourteen in the case of females and sixteen with respect to males. S.C. CODE § 20-24 (1962). The South Carolina courts, however, have held that marriages contracted by persons below these ages are not

dition would deprive the states of one of their most jealously guarded prerogatives—the power to determine the capacity of their citizens to marry.

G. The United Nations Charter and the Declaration of Human Rights

At the present time, the United States has not ratified either the Convention or the Recommendation; nor is the Senate currently considering ratification. However, the United States is already a party to one international undertaking which has implications for family law—the United Nations Charter. The United States Supreme Court has intimated that the Charter has the status of a treaty.⁴⁶ Furthermore, at least one state court has relied in part upon the Charter in invalidating a state statute prohibiting interracial marriages.⁴⁷ While the United Nations Charter, itself, may not raise many questions as to the proper distribution of powers over domestic relations in this area, another pronouncement of the United Nations might—the United Nations Dec-

void if they would have been valid at common law. *State v. Ward*, 204 S.C. 210, 28 S.E.2d 785 (1944). By statute in South Carolina, the age requirements may be waived in cases of pregnancy. S.C. CODE § 20-24.5 (Supp. 1970). See also VA. CODE ANN. § 20-48 (1960); GA. CODE ANN. § 53-102 (Supp. 1971).

⁴⁶ *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). The case involved defendant's refusal to bury a Winnebago Indian based on the contract for sale of the burial lot stating, "burial privileges accrue only to members of the Caucasian race." *Id.* at 71. Plaintiff claimed that this provision was void under both the Iowa and United States Constitutions and that recognition of its validity would violate the fourteenth amendment. Additionally, plaintiff claimed the provision to be a violation of the United Nations Charter. The Iowa Supreme Court, although ruling that the clause was unenforceable as a violation of the Constitutions and public policy of Iowa and the United States, held that the clause could be relied on as a defense in an action on the contract and granted defendant's motion to dismiss. The Iowa court likewise held the United Nations Charter irrelevant. *Rice v. Sioux City Cemetery*, 245 Iowa 147, 60 N.W.2d 110 (1953). The Supreme Court affirmed. *Rice v. Sioux City Cemetery*, 348 U.S. 880 (1954). Writ of certiorari was later granted and the earlier Court decision was vacated as a result of Iowa enacting a statute to outlaw defendant's conduct. In discussing the action of the Iowa supreme court, Justice Frankfurter stated:

In addition to the familiar though vexing problems of constitutional law, there was reference in the opinions of the Iowa courts and in the briefs of counsel to the United Nations Charter. The Iowa courts dismissed summarily the claim that some of the general and hortatory language of this *Treaty, which so far as the United States is concerned is itself an exercise of the treaty-making power under the Constitution*, constituted a limitation on the rights of the States and of persons otherwise reserved to them under the Constitution.

349 U.S. at 73 [emphasis added].

⁴⁷ *Perez v. Sharp*, 32 Cal. 2d 711, 732-33, 198 P.2d 17, 29-30 (1948) (Carter, J., concurring). Subsequently, the United States Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967), declared miscegenation laws void under the United States Constitution.

laration of Human Rights. Regardless of the juridical status of the Declaration, it may become the foundation of efforts to thrust the federal government into the role of promulgator and enforcer of family law. If the United States should ever choose to be bound by the Declaration, it may simultaneously become obliged to enact legislation affecting the domestic relations laws of the states.⁴⁸

One example of a potential conflict with state laws is article 16 of the Declaration which states that both parties to a marriage are entitled to "equal rights as to marriage, during marriage, and at its dissolution."⁴⁹ Although there is no authoritative interpretation of this article, it would seem to guarantee each spouse equal control and supervision over property acquired by either during coverture and to give each a right to half of such property upon the termination of the marriage. Such an understanding of the property rights of spouses is common outside the United States⁵⁰ and is consonant with the present law of the eight community property states.⁵¹ In fact, the proposed Uniform Marriage and Divorce Act incorporates a concept of marital property quite similar to that of community property.⁵² While the Uniform Act is something for each state to consider independently, article 16 may someday be advanced by those sympathetic to the Uniform Act as justification for bypassing the state legislatures and implementing the provision at the federal level.

In a related matter, steps have already been taken to seize upon the purported obligations of the United States under the Universal Declaration and its implementing conventions to thrust the federal government into an area previously left to state regulation. In January 1971, Congressman Ryan of New York introduced a resolution⁵³ in the House of Representatives proposing that the House express its approval

⁴⁸ See note 112 *infra*.

⁴⁹ Covenants on Human Rights art. 16, G.A. Res. 2200, 21 U.N. GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1966).

⁵⁰ See W. DEFUNIAK & M. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* §§ 13-18 (2d ed. 1971).

⁵¹ The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. J. CRIBBET, W. FRITZ & C. JOHNSON, *CASES AND MATERIALS ON PROPERTY* 186 (1960). Under community property laws generally both spouses are entitled to an equal distribution of community property upon divorce or dissolution of the marriage. Cf. CAL. CIV. CODE § 4800 (Supp. 1972).

⁵² See M. PAULSEN & W. WADLINGTON, *STATUTORY MATERIALS ON FAMILY LAW*, *supra* note 38, at 22-23.

⁵³ H.R. Res. 44, 92d Cong., 1st Sess. (1971). This point may be moot since the passage of the proposed U.S. CONST. amend. XXVII, presently subject to ratification by the states.

of the Convention on the Political Rights of Women. This Convention was adopted by the United Nations General Assembly in 1952 to secure to women those rights guaranteed them in several provisions of the Universal Declaration.⁵⁴ "Women's rights" are outside the scope of this Article, but if the traditional power of the states to enact laws under their police powers which discriminate, perhaps reasonably in many cases, against women are questioned on the basis of the Convention on the Political Rights of Women, it is highly probable that the powers of the states to ignore international standards relating to marriage and other domestic relations will likewise be called into question.

D. Convention on Jurisdiction, Applicable Law, and Recognition of Decrees Relating to Adoption

Marriage is not the only matter of family law which has produced interest among those desiring a uniform system of international private law. The Hague Conference has also adopted a Convention on Jurisdiction, Applicable Law, and Recognition of Decrees Relating to Adoptions.⁵⁵ Like marriage, adoption has usually been regarded as a state matter. Yet, this Convention would impose upon the states obligations regarding adoptions which might contravene their present law. The provisions of the Convention stipulate circumstances under which all parties to the Convention must recognize adoptions and revocations and annulments of adoptions granted by the authorities of other contracting nations. The Convention establishes a full faith and credit principle for foreign adoptions.⁵⁶ Thus, if the United States should ratify the Convention, the states would no longer be competent to determine the wisdom of enforcing foreign adoptions. The Convention does recognize the legitimacy of local interest in adoption matters by providing that, notwithstanding other provisions of the Convention, a country might refuse to enforce a foreign judgment if that judgment is "manifestly contrary to its public policy."⁵⁷ This concession to public

⁵⁴ U.N. Convention on the Political Rights of Women (1952). This convention is reproduced in 1 INT'L LAW 597-99 (1967).

⁵⁵ Hague Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption (1964) [hereinafter cited as Hague Convention on Adoption]. This convention is reproduced in 4 INT'L LEGAL MATERIALS 338-41 (1965).

⁵⁶ Article 8 provides in part: "Every adoption governed by the present Convention and granted by an authority having jurisdiction under the first paragraph of article 3 shall be recognized without further formality in all contracting States." Hague Convention on Adoption, art. 8; 4 INT'L LEGAL MATERIALS 339.

⁵⁷ Article 15 provides: "The provisions of the present Convention may be disregarded

policy does not salvage the traditional powers of the states, however, for the public policy intended is that of the ratifying nation, not its political subdivisions. Additionally, the construction of the word, "manifestly," would be determined as a matter of federal or perhaps international law, so that a state would not be free to enforce its public policy without regard to federal or international standards.

This review of efforts in the international community to formulate international private law in the field of family law has not touched upon all such efforts, for the purpose has been merely to illustrate the potential impact of this movement upon the domestic relations law of the United States. Ratification of these international agreements could produce a profound realignment of the powers of the states and the federal government in the regulation of family law matters. There is a fundamental question, however, about the constitutional power of the federal government to ratify these agreements, for it cannot be lightly assumed that the treaty power vests the United States with authority to bind the states in family law matters.

III. CONSTITUTIONAL LIMITATIONS OF THE TREATY POWER

The treaty power is expressly delegated to the federal government by the Constitution.⁵⁸ Scrutinizing the Constitution as the source of this power, one can find no explicit restrictions. Yet, the supremacy clause notwithstanding, it is the thesis of this Article that there are inherent in the Constitution and implicit in the nature of the federal system, restrictions which would invalidate ratification of some of the preceding treaties and other international agreements.⁵⁹

Thomas Jefferson recorded four limitations on the treaty power in his *Manual of Parliamentary Practice*.⁶⁰ Two of these are of primary

in contracting States only when their observance would be manifestly contrary to public policy." Hague Convention on Adoption, art. 15; 4 INT'L LEGAL MATERIALS 339.

⁵⁸ U.S. CONST. art. II, § 2, cl. 2, which is reproduced in note 7 *supra*.

⁵⁹ For discussion of the right of the states to insist upon their constitutional prerogatives notwithstanding a purported renunciation of those prerogatives on their behalf by the federal government under the treaty-making power, see note 112 *infra*.

⁶⁰ Jefferson wrote:

By the Constitution of the United States, this department of legislation is confined to two branches only, of the ordinary legislature: the President originating, and the Senate having a negative. To what subject this power extends has not been defined in detail by the Constitution, nor are we entirely agreed among ourselves. (1) It is admitted that it must concern the foreign nation, party to the contract, or it would be a mere nullity, *res inter alios acta*. (2) By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and cannot be otherwise regulated. (3) It must have meant

relevance to the present inquiry. The first Secretary of State wrote that the power "must have meant to except out . . . the rights reserved to the States,"⁶¹ doubtlessly alluding to the rights reserved to the states under the tenth amendment. While several scholars have suggested that history has discredited Jefferson on this point,⁶² the author suspects that most American lawyers assume intuitively that family law is an exclusively state matter.⁶³ The second relevant limitation on the treaty power asserted by Jefferson was that only matters normally negotiated among nations would be proper subjects of treaties.⁶⁴ The internal domestic concerns of countries seldom become matters for international negotiation. Although cases squarely presenting Jefferson's views have seldom arisen, dicta and occasional holdings in Supreme Court opinions suggest that Jefferson was accurately stating implicit constitutional restrictions on the treaty power.

A. *The Tenth Amendment*

Most basic texts on domestic relations state that federal courts lack jurisdiction to adjudicate questions of family law.⁶⁵ These sources usually cite a handful of old cases as authority for this proposition.⁶⁶ A review of these cases unfortunately discloses that the courts have rarely articulated the bases of their holdings. With an equal lack of

to except out of these *the rights reserved to the States*; for surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way. (4) And also to except those subjects of legislation in which it gave a participation to the House of Representatives. This last exception is denied by some, on the ground that it would leave very little matter for the treaty power to work on. The less the better, say others.

T. JEFFERSON, *MANUAL OF PARLIAMENTARY PRACTICE* (1837), quoted in 5 J. MOORE, *DIGEST OF INTERNATIONAL LAW* 162 (1906).

⁶¹ *Id.*

⁶² *E.g.*, Henkin, *The Constitution, Treaties, and International Human Rights*, *supra* note 6, at 1017 (Jefferson's *Manual* is cited as evidence of its author's "bad guesses").

⁶³ For the views of earlier generations of lawyers, which the present writer believes are no different from those of today's practitioners, see Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 36 (1966): "In addition, under the new federal constitution, regulation of marriage was considered a matter reserved to the individual states in accord with the tenth amendment."

⁶⁴ Item (2) states: "By the general power to make treaties, the Constitution must have intended to comprehend only those objects which are usually regulated by treaty, and cannot be otherwise regulated." T. JEFFERSON, *supra* note 60.

⁶⁵ J. BISHOP, *MARRIAGE, DIVORCE, AND SEPARATION* § 155 (1891); H. CLARK, *DOMESTIC RELATIONS* § 11.1, at 286 (1968); C. WRIGHT, *FEDERAL COURTS* § 25, at 84 (2d ed. 1970).

⁶⁶ *See* note 3 *supra*.

articulated reasoning, the courts have also said that Congress has no authority to enact legislation affecting domestic relations matters.⁶⁷

1. *Judicial Authority*.—Probably the most widely cited case for the proposition that federal courts do not have jurisdiction over divorce matters is *Barber v. Barber*,⁶⁸ decided by the United States Supreme Court in 1859. In this case, a wife, who was a New York resident brought suit in federal court against her ex-husband, who resided in Wisconsin, to recover alimony arrearage under a New York decree. Jurisdiction based on diversity of citizenship was subsequently upheld by the Supreme Court; however, the Court disclaimed altogether any jurisdiction in the federal courts over divorce or for the allowance of alimony either as an original proceeding or as an incident to divorce.⁶⁹ The basis for this holding is apparent from the dissent where it was observed that the English courts at the time of the transplantation of English law to America did not possess jurisdiction over matters of divorce and alimony. Since the authority of the courts of the United States in equity is limited to that of the English Chancellor, it was reasoned, the federal courts also lacked marital jurisdiction.⁷⁰

⁶⁷ See *Spindel v. Spindel*, 283 F. Supp. 797, 804 (E.D.N.Y. 1968) (Weinstein, J.). In this case Judge Weinstein interpreted the now famous dictum in *In re Burrus*, 186 U.S. 586 (1890):

The whole subject of the domestic relations of husband and wife, parent and child belongs to the laws of the United States.

Id. at 593-94. He stated that "this broad disclaimer refers only to the legislative power of the federal government to lay down substantive rules of law in the domestic relations area, not to the subject matter jurisdiction—the competence—of the federal courts." 283 F. Supp. at 804.

⁶⁸ 62 U.S. (21 How.) 582 (1859) (Wayne, J.).

⁶⁹ Justice Wayne said:

We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.

Id. at 584.

⁷⁰ Justice Daniel stated:

It has been repeatedly ruled by this court that the jurisdiction and practice in the courts of the United States *in equity* are not to be governed by the practice of State courts, but that they are to be apprehended and exercised according to the principles of equity, as distinguished and defined in that country from which we derive our knowledge of those principles . . . Now, it is well known that the court of chancery in England does not take cognizance of the subject of alimony, but that this is one of the subjects within the cognizance of the ecclesiastical court, within whose peculiar jurisdiction marriage and divorce are comprised. Of these matters, the court of chancery in England claims no cognizance. Upon questions of settlement or of contract connected with marriages, the court of chancery will undertake enforcement of such contracts, but does not decree alimony as such, and independently of such contracts.

Since 1859 *Barber* has frequently been cited in support of a constitutional limitation on the jurisdiction of the federal courts in family law cases.⁷¹ This interpretation of the case has recently elicited some comment. In the case of *Spindel v. Spindel*,⁷² the District Court for the Eastern District of New York suggested that *Barber* was simply a construction of the statutes conferring jurisdiction on the federal courts and not of the Constitution itself.⁷³ Jurisdiction in *Spindel* was based on diversity of citizenship. The plaintiff brought a tort action for damages for a fraudulently induced marriage and also sought declaratory judgment that her husband's Mexican "quickie" divorce was void. The defendant, relying on *Barber*, moved to dismiss the complaint for want of jurisdiction and for failure to state a claim upon which relief could be granted. The court pointed out that while earlier cases had denied affirmative relief in family law cases, the instant case simply called for a determination of the validity of an earlier divorce decree.⁷⁴ Discounting the proffered interpretation of *Barber*, the court denied the defense motions and proceeded to adjudicate the claims using the substantive law of the state.⁷⁵ The holding is not really a drastic departure from *Barber* in view of the fact that *Barber* itself recognized the power of a federal court to enforce a decree already obtained from a state court.⁷⁶ Moreover, since the request for declaratory judgment

Id. at 604 (Daniel, J., dissenting). See also *Maynard v. Hill*, 125 U.S. 190, 206 (1888); *Fontain v. Ravenal*, 58 U.S. (17 How.) 369, 392-93 (1855).

⁷¹ E.g., *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930); *De La Rama v. De La Rama*, 201 U.S. 303, 307 (1906); *Simms v. Simms*, 175 U.S. 162, 167 (1899); *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968); *Blank v. Blank*, 320 F. Supp. 1389, 1391 (W.D. Pa. 1971).

⁷² 283 F. Supp. 797 (E.D.N.Y. 1968).

⁷³ The court noted that 28 U.S.C. § 1332 (1970) vests in the federal courts power in diversity cases to hear "civil actions" and that "civil actions" historically denoted matters "of a civil nature at common law or equity." 283 F. Supp. at 802.

⁷⁴ A close reading of *Barber* indicates that the Supreme Court recognized the difference between the power to grant a divorce and the power to decide whether a divorce was valid. It rejected the dissent's position that all aspects of domestic relations were within the exclusive jurisdiction of the state courts and carefully avoided placing a blanket prohibition upon the exercise of federal jurisdiction in this area.

283 F. Supp. at 809.

⁷⁵ The court found the Mexican divorce invalid under New York law. 283 F. Supp. at 813.

⁷⁶ Although disclaiming all jurisdiction in the federal courts to grant divorces or allow alimony, Justice Wayne stated:

We have already shown, by many authorities, that courts of equity have a jurisdiction to interfere to enforce a decree for alimony, and by cases decided by this court; that the jurisdiction of the courts of equity of the United States is the same as that of

was coupled with a claim for damages for fraudulent inducement to marriage, the case may be a mere extension of the doctrine of pendent jurisdiction.⁷⁷

Cases decided since *Spindel* have produced no innovative results. In *Williamson v. Williamson*,⁷⁸ the District Court for the Western District of Oklahoma dismissed an action by a wife against her husband for an order declaring her the owner of half of the couple's community property. In the court's view, a century of unchallenged precedents precluded any federal court from becoming a forum for marital combat.⁷⁹ Thus, the court concluded that domestic relations are the "sacrosanct preserve of the state courts."⁸⁰

In *Buechold v. Ortiz*,⁸¹ a German national brought suit in federal court against a resident of California to establish paternity and obtain support for her child. In holding that the 1956 Treaty of Friendship, Commerce, and Navigation between the United States and Germany did not apply to the case, the court repeated the familiar litany:

[I]t is well established that the federal courts must decline jurisdiction of cases concerning domestic relations when the primary issue concerns the status of parent and child or husband and wife.⁸²

The court distinguished *Spindel* on the basis that it was an attack on the validity of an existing decree rather than a suit to establish status.⁸³

In the case of *Cain v. King*,⁸⁴ a federal court adjudicated a suit

England, whence it is derived. On that score, alone, the jurisdiction of the court in the case before us cannot be successfully denied.

Barber v. Barber, 62 U.S. (21 How.) 582, 592 (1859). See also *Vann v. Vann*, 294 F. Supp. 193 (E.D. Tenn. 1968), where the court refused to dismiss a wife's complaint seeking to declare void a Tennessee divorce decree obtained by her husband. Citing *Spindel*, the court in *Vann* held that where a state judgment has been obtained fraudulently and in derogation of constitutional rights, the federal courts may hear challenges to the validity of the decree.

⁷⁷ Such jurisdiction "exists whenever the state and federal claims 'derive from a common nucleus of operative fact' and are such that a plaintiff 'would ordinarily be expected to try them all in one proceeding.'" *UMW v. Gibbs*, 383 U.S. 715 (1966).

⁷⁸ 306 F. Supp. 516 (W.D. Okla. 1969).

⁷⁹ "There is no dearth of authority. For more than 100 years in this country, marital combatants have sought to make the federal courts their arena. Their attempts have been singularly unsuccessful." *Id.* at 517.

⁸⁰ *Id.*

⁸¹ 401 F.2d 371 (9th Cir. 1968).

⁸² *Id.* at 372.

⁸³ "In reaching our decision we distinguish the recent case of *Spindel v. Spindel* That was an attack on the validity of a Mexican divorce decree rather than a suit to establish status." *Id.* at 374.

⁸⁴ 313 F. Supp. 10 (E.D. La. 1970).

brought by a wife to recover payments due under a settlement agreement incorporated into a state divorce decree. However, the court characterized the suit as a simple contract action brought under the diversity jurisdiction of the federal courts, rather than a domestic relations matter.

It thus appears that despite recent decisions which touch tangentially upon domestic relations, most federal courts have been unwilling to interject themselves into the milieu of family law. On the other hand, the dicta in *Barber* speaks only to the authority of the federal courts; nothing is said about the power of the federal legislature to enact laws affecting domestic relations.

2. *Legislative Authority*.—The most forceful holding on the question of federal power to make laws pertaining to domestic relations, as well as of the power of the federal courts to hear family law matters, is *Ohio ex rel. Popovici v. Agler*.⁸⁵ This case involved a suit against the vice-consul of Rumania for divorce and alimony. The consul's wife brought suit in a state court of Ohio, and the consul objected to the jurisdiction of that court on the ground that the Constitution and the federal judicial code gave the federal courts exclusive jurisdiction over cases involving ambassadors.⁸⁶ In a brief opinion for a unanimous court, Justice Holmes upheld the state court jurisdiction on the basis of his view that the "whole subject" of domestic relations laws belonged to the states.⁸⁷ In support of his decision, Justice Holmes cited as "common understanding" at the time the Constitution was adopted

⁸⁵ 280 U.S. 379 (1930). See also *In re Burrus*, 136 U.S. 586 (1890), where Justice Miller stated:

Obviously, although the statutes of the United States have since enlarged the jurisdiction of the Circuit Courts by declaring that they shall have original jurisdiction, concurrent with the courts of the several States, of all civil suits arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, the difficulty is not removed by this provision, for, as we have already said, the custody and guardianship by the parent of his child does not arise under the Constitution, laws or treaties of the United States and is not dependent on them.

Id. at 595-96.

⁸⁶ U.S. CONST. art. III, § 2, cl. 1, provides in part: "The judicial Power shall extend to all Cases, in Law and Equity, . . . to all Cases affecting Ambassadors, other public Ministers and Consuls . . . the Supreme Court shall have original Jurisdiction."

The Judicial Code, Act of March 3, 1911, ch. 231, § 256, 36 Stat. 1161, corresponds in substance with 28 U.S.C. § 1351 (1970) which provides: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of all actions and proceedings against consuls of foreign states."

⁸⁷ 280 U.S. at 383 (1930).

the fact that familial matters were "reserved to the States."⁸⁸ Justice Holmes was clearly not limiting himself to the language of the statutes which give the federal courts their jurisdiction; he was defining the constitutional limitations of the powers of the federal judiciary and legislature.

Thus, unlike the *Spindel* interpretation of *Barber, Popovici* clearly defines constitutional issues. The underlying basis of the *Barber-Popovici* line of cases is the strong conviction on the part of the federal bench that the power to deal with domestic relations is reserved to the states under the tenth amendment. Chief Justice Taney's eloquent opinion in *Strader v. Graham*⁸⁹ is expressive of this view. *Strader* involved a suit to recover the value of slaves allegedly spirited outside the country by the defendants. The owner of the slaves was residing with the slaves in Kentucky at the time of their abduction. The defense did not contest the plaintiff's allegations of the basic facts; rather it contended that the slaves were freedmen. The defense pointed out that sometime earlier the plaintiff had taken the slaves with him into Ohio, which, prior to its admission into the Union, had been part of the Northwest Territory. This territory was governed by the Ordinance of 1787 which provided in part that there should be no slavery nor involuntary servitude in the territory except for the punishment of crimes following due conviction.⁹⁰ The defense argued that by operation of the Ordinance the slaves were emancipated when their owner transported them across the Ohio border. The issue before the Court, in its simplest terms, was whether the federally enacted law of Ohio or the law of Kentucky was determinative of the status of the slaves. The Chief Justice held Kentucky law applicable by observing that while the slaves had been taken into Ohio, they voluntarily returned to Kentucky which was, therefore, their domicile. Chief Justice Taney stated: "[E]very State has an undoubted right to determine *status*, or domestic and social condition, of the persons domiciled within its territory."⁹¹ The Chief Justice was unable to find any constitutional mandate for federal intrusion into the law of Kentucky.

Strader clearly holds that the federal government possessed no constitutional authority to deal with domestic relations matters and that the sole authority to do so resided with the states. Of course, the thir-

⁸⁸ *Id.* at 383-84 (1930).

⁸⁹ 51 U.S. (10 How.) 82 (1850).

⁹⁰ *Id.* at 94.

⁹¹ *Id.* at 93.

teenth amendment superseded state laws permitting slavery, but the case has clear implications for more than *status servi*, since the Chief Justice spoke of the unquestioned right of the states to determine status generally. While the thirteenth, fourteenth, and fifteenth amendments have imposed limitations upon the ways in which states may exercise their reserved rights, these amendments have not otherwise ousted the states from areas of law traditionally reserved to them. In fact, several years after the ratification of the fourteenth amendment, a state court relied upon *Strader* in holding that the state of domicile of a married person had plenary power to deal with his marital status.⁹²

Strader, its predecessors,⁹³ and its progeny would be meaningless if the justices who authored the opinions were not convinced that there existed certain subjects over which the federal government has no control. *Strader* expressed this reservation in terms of status. The subsequent case of *Andrews v. Andrews*⁹⁴ made it clear that "marital" status was included. Massachusetts had refused to recognize the divorce which the Andrews had obtained after establishing temporary domicile in South Dakota. The full faith and credit clause was urged as a basis for compelling Massachusetts to recognize the judgment of a sister

⁹² *Hunt v. Hunt*, 72 N.Y. 217 (1878). In recent years there has been considerable pressure on the courts to expand the jurisdictional basis upon which state courts might deal with marital status by shortening the length of residency requirements. *E.g.*, *Wheat v. Wheat*, 229 Ark. 842, 318 S.W.2d 793 (1958) (three months residency was upheld); *Crownover v. Crownover*, 58 N.M. 597, 274 P.2d 127 (1954) (a conclusive statutory presumption of domicile upon showing a residence of one year on a military reservation or base within the state was upheld); *Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807 (1959) (a statute granting divorce jurisdiction where one of the parties had resided on a military reservation in the state for twelve months was upheld); *cf.* *Granville-Smith v. Granville-Smith*, 214 F.2d 820 (3d Cir. 1954), *aff'd*, 349 U.S. 1 (1955); *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953); *appeal dismissed as moot*, 347 U.S. 610 (1954). This jurisdictional expansion by the states in no way compromises the efficacy of *Strader*. Such expansion does not confer new powers upon the federal government; rather it would merely recognize greater jurisdiction in the states. The significance of *Strader* lies in its holding that the states, not the federal government, have the sole authority to deal with questions of status. Federal law was disregarded in *Strader* simply because it dealt with a subject which was not within the competence of the federal legislature.

⁹³ Dicta in earlier Supreme Court cases had laid a solid foundation for *Strader*. In 1840, it was observed that the treaty power could not be exercised in a manner inconsistent with "the nature of our institutions, and the distribution of powers between the general and state governments." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840). In 1847 language to the effect that neither a treaty nor a statute could "arbitrarily cede away any one right of a State" appeared in *The License Cases*, 46 U.S. (5 How.) 504, 613 (1847); and almost identical language appeared in an opinion two years later. *The Passenger Cases*, 48 U.S. (7 How.) 282, 507 (1849).

⁹⁴ 188 U.S. 14 (1903).

state.⁹⁵ Rejecting this claim categorically, Justice White stated that "it is certain that the Constitution of the United States confers no power whatever upon the Government of the United States to regulate marriage in the States or its dissolution."⁹⁶ This same "hands-off" attitude was reiterated recently by Justice Black in *Labine v. Vincent*.⁹⁷ This case upheld the constitutionality of a Louisiana statute which denied the status of sole heir at law to an illegitimate child who had been acknowledged but never legitimized by her father. The Louisiana law was attacked as violative of equal protection and due process. In holding that no such constitutional imperfections were present, Justice Black stated:

[T]he power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State.⁹⁸

For the last 125 years, therefore, it has been the established rule that the regulation of domestic relations is reserved to the states under the tenth amendment. The many cases interpreting the full faith and credit clause of the Constitution as it relates to divorce and related matters attest to the judicially recognized interests of the states in such matters.⁹⁹ The power of the states to supervise and regulate family law has always been jealously guarded by state and federal judges alike.

The tenth amendment, by its own terms, reserves to the states only those powers which have not been delegated to the federal government.¹⁰⁰ Some commentators have argued that since the federal government is expressly empowered to enter treaties then nothing which may be dealt with by treaty is reserved to the states.¹⁰¹ Indeed,

⁹⁵ *Id.* at 18-19.

⁹⁶ *Id.* at 32.

⁹⁷ 401 U.S. 532 (1971).

⁹⁸ *Id.* at 538.

⁹⁹ For a discussion of the full faith and credit clause as it applies to domestic relations, see H. CLARK, DOMESTIC RELATIONS § 11.2, at 287-89 (1968) and note 16 *supra*.

¹⁰⁰ U.S. CONST. amend. X provides: "The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively or to the people."

¹⁰¹ *E.g.*, Hartman, *Federalism as a Limitation on the Treaty Power of the United States, West Germany, and India*, 18 WES. RES. L. REV. 134 (1966). Hartman argues that in the conduct of foreign relations the United States possesses plenary power and is not limited to the expressly delegated powers. He relies principally upon *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936), which held that "the investment

Justice Holmes, the author of *Popovici*, has provided precedent for the proposition that the tenth amendment offers no obstacle to the utilization of this power. Eight years before *Popovici*, Justice Holmes wrote the opinion in *Missouri v. Holland*,¹⁰² a case which presented the Court with a clear clash between the tenth amendment and the treaty power. In that case, Missouri challenged a federal statute passed to implement a treaty between the United States and Great Britain dealing with birds which migrated across the border between the United States and Canada.¹⁰³ Basing its claim upon the tenth amendment as well as its asserted common law title to the birds, Missouri contended that it alone possessed the power to control the killing and sale of these birds. The state argued that the treaty sought to infringe upon the interests of the state—interests which the tenth amendment reserved to Missouri. In upholding the statute, Justice Holmes made some general observations about the nature of the United States Government and of the treaty power. He first noted that the tenth amendment reserves to the states only those powers which are not delegated by the Constitution to the federal government and that the federal government is vested expressly by the Constitution with the power to make treaties. Accordingly, he continued, where the treaty power has been validly exercised, there can be no derogation of any power reserved to the states. Justice Holmes stated that the determination of whether the treaty power had been lawfully exercised must be

of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." Such a position, however, assumes that the grant of the treaty power was a grant of unfettered external sovereignty and ignores the fundamental bases of a federal system. It is one thing to contend that the treaty power is not limited to the expressly delegated powers, and quite another to say that the treaty power knows no restrictions. Although the most ardent advocates of an expansive use of the treaty power concede that powers expressly bestowed on the states by the Constitution cannot be overridden by a treaty, this concession is not enough to preserve the integrity of the federal system. To state an absurd case, but one quite consistent with the view that the treaty power is plenary, the federal government could by agreement with another nation abolish the states almost entirely on the ground that a federalist system is too anachronistic in today's world and that foreign relations would be improved if state lines were ignored. See also Nathanson, *Constitutional Problems Involved in Adherence by the United States to a Convention for the Protection of Human Rights and Fundamental Freedoms*, 50 CORNELL L.Q. 235, 238-39 (1965) (The tenth amendment is dismissed summarily in a brief paragraph entitled "Missouri v. Holland and All That").

¹⁰² 252 U.S. 416 (1920). A prior statute, unsupported by treaty, had been struck down as violative of the tenth amendment. *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914).

¹⁰³ Treaty with Great Britain for Protection of Migratory Birds, August 16, 1916, 39 Stat. 1702, T.S. No. 628.

made in light of the nation's entire history. He then considered the specifics of the case and concluded that "a national interest of very nearly the first magnitude"¹⁰⁴ was involved, for without the federal statute the birds in question might become extinct. According to Justice Holmes, the federal government could not be expected "to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed."¹⁰⁵ Thus, in balancing the federal interest in protecting the birds against the claims of the state of Missouri, he found no violation of the tenth amendment.

Since *Missouri v. Holland* it has been suggested that there is nothing reserved to the states under the tenth amendment which cannot be denied them through the treaty power.¹⁰⁶ Such a reading of the case is unwarranted. Justice Holmes did not hold that any exercise of the treaty power could deprive the states of rights otherwise reserved to them. Rather, he limited this effect to valid treaties, and he acknowledged indirectly that the tenth amendment is a material consideration in determining the validity of an exercise of the treaty power:

The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.¹⁰⁷

It is apparent from his language that Justice Holmes did not consider the tenth amendment to be irrelevant simply because the treaty power had been invoked. His balancing of the relative interests of Missouri and of the United States based on his findings of a national interest of the "first magnitude" demonstrates that the case might have been decided differently had the facts involved matters of more direct concern to the state than migratory birds. Domestic relations are certainly of more direct concern to the states than is their title to animals *ferae naturae*. Justice Holmes himself recognized this elementary distinction eight years after *Missouri v. Holland* when he penned the *Popovici*

¹⁰⁴ 252 U.S. at 435.

¹⁰⁵ *Id.* It should also be noted that the birds migrated across an international boundary and that a valid "international concern" was, therefore, present.

¹⁰⁶ See, e.g., Henkin, *The Constitution, Treaties, and International Human Rights*, *supra* note 6; Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, *supra* note 6. However, in both articles, the author primarily emphasizes the growing role of treaties in the international community to support his theory.

¹⁰⁷ 252 U.S. at 433-34.

opinion. Balancing the national interest in the protection of foreign diplomats against a state's interest in the marriage of one of her citizens, he found the latter controlling, and accordingly, upheld the jurisdiction of the courts of Ohio over the divorce action.¹⁰⁸

The patent distinction between *Missouri v. Holland* and *Popovici* is that the latter did not concern the construction of a treaty. It is submitted, however, that constitutional and statutory guarantees of federal forums for foreign diplomats are no less "the supreme law of the land" than are treaties or other international agreements. Clearly Justice Holmes did not intend *Missouri v. Holland* to have the sweeping scope that some latter-day scholars would attribute to it.¹⁰⁹

This comparison of *Missouri v. Holland* and *Popovici* emphasizes that the scope of the treaty power cannot be determined in a given case without consideration of the legitimacy of the inherent interests of the states in the subject-matter of the treaty.¹¹⁰ The traditional interests of the states in regulating family law matters must be given great weight in reaching that determination. These interests have already been recognized by one American representative at an international conference considering international agreements on family law. The United States representative signed the 1962 Convention of Consent to marriage, Minimum Age for Marriage and Registration of Marriages only after stating that while the United States itself could agree to be bound by the Convention, its ratification of the Convention could impose no responsibilities upon the states.¹¹¹ This attempt to limit the participation of the United States in this Convention may not comport with a rule of international law that a nation which has ratified a treaty will not be excused from the performance of its obligations under the treaty merely because it has not observed its own constitutional limitations.¹¹² This rule of international law would render the

¹⁰⁸ Justice Holmes wrote that "the domestic relations of husband and wife and parent and child were matters reserved to the States . . ." *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 384 (1930) [emphasis added]. See notes 85-88 *supra* and accompanying text.

¹⁰⁹ See note 106 *supra*.

¹¹⁰ Cf. *United States v. Pink*, 315 U.S. 203, 230 (1942): "It is, of course, true that even treaties with friendly nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy." Even those who find in *Missouri v. Holland* a negation of the reserved rights of the states where a treaty is present usually balance the respective federal and state interests. Thus, Professor Hartman concludes that "when local matters themselves extend into the affairs of nations so that international cooperation is required, they become proper subjects of treaties." Hartman, *supra* note 101, at 149.

¹¹¹ U.N. Doc. A/PV 1167, at 33-35 (1962). See note 1 *supra* for the text of his statement.

¹¹² See J. HENDRY, *TREATIES AND FEDERAL CONSTITUTIONS* 137-62 (1955). There is a

federal government answerable in the international community for a subsequent failure to enforce the treaty in the states, but it would not remove the constitutional disabilities of the federal government. Yet whatever the rule of international law may be, it cannot confer extra-constitutional powers upon the United States.

B. Proper Subjects For International Agreements

The treaty power is properly exercised only where the subject-matter addressed is one of "international concern."¹¹³ Thus, it cannot be invoked to deal with the purely internal concerns of a nation. This rule, like the limitation placing the reserved powers of the states beyond the reach of treaties, was first articulated by Thomas Jefferson.¹¹⁴ In expressing the opinion that a treaty "must concern the foreign nation, party to the contract, or it would be a mere nullity. . .,"¹¹⁵ Jefferson

continuing debate among students of international law as to the enforceability of treaty obligations assumed by a nation in violation of its internal constitutional law. On the one hand, the monists regard such treaties as unenforceable, holding that internal law is part and parcel of international law. The dualists, on the other hand, argue that international law exists independently of the internal sphere. The United Nations Conference on the Law of Treaties has formulated a middle position, namely, that the treaties are enforceable unless the violation of internal law is "manifest." Kearney, *Internal Limitations on External Commitments—Article 46 of the Treaties Convention*, 4 INT'L LAW. 1, 8 (1969); see *Hague Convention on Adoption*, art. 15 (set out in note 57 *supra*). Since the present Article addresses itself to the enforceability of treaties under the supremacy clause of the Constitution, considerations of the operation of treaties under international law per se are irrelevant.

¹¹³ A clear statement of this limitation relates back to the now famous remarks made in 1929 by Charles Evans Hughes, former Secretary of State and already designated Chief Justice of the United States. Mr. Hughes remarked:

I should not care to voice any opinion as to an implied limitation on the treaty-making power. The Supreme Court has expressed doubt whether there could be any such. That has been expressed in one of its opinions. But if there is a limitation to be implied, I should say it might be found in the *nature* of the treaty making power.

. . . .

It [the treaty-making power] is not a power to be exercised, it may be assumed, with respect to matters that have no relation to international concerns.

. . . .

But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States, then I again say there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.

²³ PROC. AM. SOC'Y INT'L L. 194, 195-96 (1929).

¹¹⁴ T. JEFFERSON, *supra* note 60.

¹¹⁵ *Id.*

was apparently suggesting that only foreign or international affairs could be legitimate subjects of a treaty. He was also asserting that any nation with which the United States attempts to deal by treaty must have some bona fide interest in the subject matter of the treaty. These limitations would preclude, for instance, an attempt by the federal government to resolve purely domestic matters which concern no other nation by concluding a mock treaty.¹¹⁶

Fortunately, the United States has never sought to utilize the treaty power to dispose of a purely domestic concern.¹¹⁷ This disinclination has resulted in a dearth of case law involving the international concern limitation. Proponents of international uniformity of private law have seized upon this fact to argue that since no court has relied upon the international concern requirement to invalidate a treaty, the rule must not exist.¹¹⁸ However, this argument flaunts dicta in the opinions of the Supreme Court.¹¹⁹ Moreover, in most of the cases in which the rule might have been operative, the Court has found matters of international concern so that there has been little opportunity to apply the rule.¹²⁰

¹¹⁶ Professor Henkin, an eloquent advocate of United States ratification of human rights conventions, concedes the impropriety of a mock or sham treaty. Henkin, *"International Concern" and the Treaty Power of the United States*, 63 AM. J. OF INT'L L. 272, 274 (1969).

¹¹⁷ The Supreme Court has never been asked to consider a treaty lacking "'obvious connection with a matter of international concern.'" *Power Authority v. FPC*, 247 F.2d 538, 542 (D.C. Cir. 1957), *vacated as moot sub nom. American Pub. Power Ass'n v. Power Authority*, 355 U.S. 64 (1957).

¹¹⁸ Henkin, *The Constitution, Treaties, and International Human Rights*, *supra* note 6, at 1031-32.

¹¹⁹ See, e.g., *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) ("all subjects that properly pertain to our foreign relations"); *Asakura v. Seattle*, 265 U.S. 332, 341 (1924) ("all proper subjects of negotiation between our government and other nations"); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 243 (1872) ("all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty").

¹²⁰ See, e.g., *Geofroy v. Riggs*, 133 U.S. 258, 266 (1890) ("treaty power of the United States extends to all proper subject of negotiation between our government and the governments of other nations"); *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840) ("power to make treaties . . . was designed to include all those subjects, which, in the ordinary course of nations, had usually been made subjects of negotiation and treaty"); cf. *Missouri v. Holland*, 252 U.S. 416 (1920). In rejecting the state's argument that it had exclusive title to the migratory birds covered by the treaty, the Court in *Missouri v. Holland* upheld the statute enacted pursuant to the treaty and Justice Holmes stated:

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and statute there soon might be no birds for any powers to deal with.

Id. at 435.

For example, in *Geofroy v. Riggs*¹²¹ the right of an alien to inherit property was recognized by treaty, but not by local law. In upholding the treaty, Justice Field made an expressed finding of international concern.¹²² Hence, the treaty satisfied the international concern limitation.

Despite the paucity of direct authority, the international concern limitation has been adopted by the American Law Institute's *Restatement of the Law of American Foreign Relations*.¹²³ However, this rule has been challenged by some modern scholars¹²⁴ who would deem a matter to be of international concern by the mere fact that it was incorporated into a treaty. Thus, one writer has reasoned that "if the status of human rights in the United States are deemed to require regulation in the interest of United States foreign relations, Congress has the power to deal with them."¹²⁵ While the writer was commenting upon the power to conduct foreign relations, his remarks have equal relevance to the treaty power. Certainly human rights could under

¹²¹ 133 U.S. 258 (1890).

¹²² *Id.* at 266-67. He said that treaties extend to "all proper subjects of negotiation between our government and the governments of other nations." *Id.* at 266.

¹²³ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 117 (1965) provides in part:

(1) The United States has the power under the Constitution to make international agreements if

(a) the matter is of international concern, and

(b) the agreement does not contravene any of the limitations of the Constitution applicable to all powers of the United States.

¹²⁴ *E.g.*, Dorsey, *supra* note 6, at 227. Professor Dorsey attributes the "international concern" restriction to Charles Evans Hughes' remarks at the 1929 annual meeting of the American Society of International Law in which Hughes expressed the view that there are implied limitations in the nature of the treaty power itself. 23 PROC. AM. SOC'Y INT'L L. 194, 195-96 (1929). These remarks are set out in note 113 *supra*. Professor Henkin minimizes the significance of Hughes' remarks by observing that they were "extemporaneous, perhaps even impromptu, not a carefully prepared statement of constitutional doctrine." Henkin, *The Constitution, Treaties, and International Human Rights*, *supra* note 6, at 1023. Nonetheless, Hughes' remarks have received judicial approval. See *Power Authority v. FPC*, 247 F.2d 538 (D.C. Cir. 1957), *vacated as moot sub nom.* American Pub. Power Ass'n v. Power Authority, 355 U.S. 64 (1957). In *Power Authority*, the court of appeals expressly noted that *Missouri v. Holland*, 252 U.S. 416 (1920), has not defined the constitutional limits of the treaty power. 247 F.2d at 542. See generally Gardner, *A Costly Anachronism*, 53 A.B.A.J. 907 (1967); Henkin, *supra* note 116; Tuttle, *Are the "Human Rights" Conventions Really Objectionable?* 3 INT'L LAW. 385 (1969).

¹²⁵ Henkin, *The Treaty Maker and the Law Makers: The Law of the Land and Foreign Relations*, *supra* note 6, at 922. Professor Henkin also has written: "I am confident that, if the Supreme Court ever faced the question, it would not find any special requirement of 'international concern', if that is interpreted to exclude some subjects from international negotiation by the United States." Henkin, *supra* note 116, at 277.

some circumstances become matters of international concern, but such instances are likely to be extremely rare, especially when they relate to family law matters. If it were ever recognized that any matter incorporated into a treaty would henceforth be considered of international concern, the authority of the federal government to preempt the states from the exercise of their law-making power in any given area of law would be virtually unlimited.

This is not to say, however, that those subjects which traditionally have been regarded as purely domestic concerns can never be dealt with by international agreement. The changing complexion of the world has made it increasingly likely that heretofore internal affairs will have foreign implications. This may be even true—at least occasionally—with respect to matters of family law. Marriages between persons of different nationalities are more common today than in past eras, and nations may well have an interest in protecting their nationals who enter into such marriages. Adoptions and divorces also can involve persons of diverse nationality.¹²⁶ To the extent that a nation acts to protect its own citizens by international agreement, that nation is putting its treaty powers to proper use. Historically, treaties have been used to secure international respect for the rights of citizens of the contracting nations. Concomitantly, a nation which ratifies a treaty designed to protect its citizens has an interest in the subject matter of the treaty, since nations are responsible for the welfare of their nationals and must, therefore, be regarded as interested parties.

Thus, to the extent that its nationals are affected by the terms of a particular treaty, a nation may legitimately view those terms as relating to a matter of international concern. Many of the provisions of the international agreements presently under consideration, however, purport to deal in a sweeping fashion with family law matters. The Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, for example, provides that parties,

¹²⁶ One supporter of the "international concern" limitation bases his belief that human rights generally are improper subjects for a treaty upon the conviction that treaties can be viable only insofar as there is a realistic expectation that they will achieve their objectives. He concludes that unless treaty provisions are sufficiently explicit to confer specific benefits upon the parties, it is unrealistic to expect "effective international cooperative and reciprocal actions" to follow. Dorsey, *supra* note 6, at 227. He argues that "[b]y the test of realism . . . the previously internal matters of political, economic, and social rights of nationals of developed states *inter se* within their own territories remain entirely internal, and are not appropriate subjects for the exercise of the treaty power." *Id.* at 220.

shall not be competent to marry unless they have attained the age of fifteen.¹²⁷ This restriction pertains to every marriage, not merely those between persons of different nationalities. It may be inferred, therefore, that the signatories are not motivated merely by a desire to protect their own citizens from imprudent marriages; rather, they are seeking to establish humane or perhaps merely uniform standards throughout the world. Such motives may well be laudable in themselves, but the fact remains that the contracting nations are attempting to influence transactions in which they have no real interest. The incidence of bi-national marriages is so insignificant that the resolution of problems concerning them ought not to be achieved by the promulgation of a rule which encompasses all marriages. If the international community perceives a need to regulate the bi-national marriage, it should act specifically.¹²⁸

Until a nation demonstrates that it is affected by the internal affairs of another nation, it has no standing to exert an influence upon the internal laws of that other nation. The constitutional history of the United States suggests that the treaty power was never envisioned as a vehicle to give foreign nations a voice in the legislative processes of this country; indeed, few would deny that at the time of the adoption of the Constitution the states were extremely jealous of their prerogatives. While it is true that the Articles of Confederation demonstrated that too much decentralization produces an anemic government, it is equally true that only certain powers were bestowed upon the federal government in the Constitution. Since the founding fathers intended to invest the national government with only a certain quantum of authority, it is unlikely that they meant the treaty power to be plenary. Without restrictions upon the treaty power, there would be no limitations upon the federal government except for those powers expressly denied it in the Constitution. The federal government would be transformed into one of general rather than of delegated authority. In light

¹²⁷ See notes 42-45 *supra* and accompanying text.

¹²⁸ Cf. Annex 1 to the Note Verbale of the Embassy of the United States of America dated August 3, 1959 (concerning the Status of Forces Agreement between the United States and the Federal Republic of Germany), where the United States agreed to assist German authorities in serving process upon American servicemen named in paternity actions and to serve any judgment rendered by a German court in such suits. This supplementary agreement illustrates that with the American military presence in Europe, some family law matters can assume international significance. Note, however, that the agreement does not undertake the enforcement of the German decrees in the United States.

of the motives of the draftsmen of the Constitution, common sense dictates that the treaty power be confined to such matters as are necessary for the functioning of the national government in the international community.¹²⁹ The treaty power was designed to enable the federal government to deal with foreign nations in matters which legitimately affect those nations; it was not intended to subject this country to the whims of other nations over matters which do not affect them. This traditional view of the treaty power explains why the United States has not used the power to dispose of internal concerns. The proposed international agreements relating to family law call for a novel utilization of the treaty power, for they would obligate the United States with respect to matters which do not affect any other nation or nationals of any other nation.

The conditions for marriage in the several states are of little concern to other nations. It should make little difference to the countries which have signed the Convention of Consent to Marriage, Minimum Age for Marriage and Registration of Marriages that some American states make twenty-one the age of consent while others make it eighteen. Nor, indeed, should other nations complain that a few states allow their citizens to marry at fourteen years of age. Perhaps, the sensibilities of the peoples of other nations are offended by the existence of common-law marriages in some of the states of the United States. However, their displeasure surely does not give them the power to join with the federal government in changing those laws. It was to preclude just such intermeddling that Thomas Jefferson stated that a treaty must "concern the other nation" and deal with subjects usually dealt with by treaty.

It is difficult to conceive of an area of the law which is more restricted to the geographical boundaries of a nation than laws relating to domestic relations. Only in rare instances do family law matters

¹²⁹ Cf. *United States v. Pink*, 315 U.S. 203 (1942). It is true that in *Pink* a treaty was held to prevail over an inconsistent state law, but the other party to the treaty, Russia, had a clearly demonstrable interest in the subject matter of the treaty, for the focus of the controversy was the right of Russia to property claims that it had assigned to the United States. Professor Chafee attempts to justify treaties relating solely to internal affairs on the grounds that what happens within one nation may affect affairs in another and that displeasure with another nation's internal policies may prompt one nation to resort to war. Chafee, *Federal and State Powers Under the U.N. Conventions on Human Rights*, 1951 Wis. L. Rev. 389, 468-73 (1951). While such considerations may have limited validity in conjunction with certain international agreements, it is inconceivable that they could assume significance in family law matters. It is difficult to foresee any effect, direct or indirect, that American family law might have upon either the domestic life or the international affairs of another country.

acquire international significance. Thus, in examining the proposed conventions and other agreements relating to family law, it is essential that the interests of the contracting nations in the subject matter of the agreements be explored. If the other countries are simply attempting to compel the United States to adopt family law rules which are acceptable to them but in which they have no interest, the agreement should not be ratified by the United States. On the other hand, the sole fact that the international agreement in question relates to domestic relations does not *ipso facto* remove the subject matter from legitimate international interest. In each instance the competing interests of the several states and the international community should be weighed.

The international concern limitation expounded in this section of this Article must be read in conjunction with the tenth amendment limitation, although it may in some cases be less restrictive than the restraints of the tenth amendment. For example, the recognition of foreign divorce decrees may well be of international concern, but perhaps the enforcement of such decrees is a matter reserved to the states under the tenth amendment, at least as they relate to domiciliaries of the states. The amendment certainly poses a more serious obstacle to the ratification of international agreements concerning domestic relations than does the requirement of international concern. This is primarily because the requirement for international concern has received less attention from the courts due perhaps to the fact that the amendment explicitly reserves certain powers to the states while the requirement for international concern is merely implicit in the Constitution.

IV. CONCLUSION

While the treaty power may be one of the most all-encompassing of the powers conferred upon the United States by the Constitution, it is not without limitations. This Article has explored these limitations in relation to the area of domestic relations. A review of over a century of case law has demonstrated that any attempt to invoke the treaty power as a basis for federal promulgation of family law rules will fail, since only in rare instances could such attempts relate to proper matters of international concern; and, even if international concerns were involved, the interests of the states, as those interests are preserved by the tenth amendment, would undoubtedly outweigh those of the federal government.