THE EXTENT OF THE TREATY MAKING POWER
OF THE PRESIDENT AND SENATE OF THE
UNITED STATES.

II.
VALIDITY OF A TREATY WHICH UNDERTAKES TO EXER-
CISE A POWER PROHIBITED TO THE FEDERAL GOVERN-
MENT.

Some powers are by the constitution forbidden to the
United States expressly—"No title of nobility shall be
granted by the United States." Others are forbidden by
implication, as by Art. I., § 2, cl. 1, providing; "The House
of Representatives shall be composed of members chosen
* * * by the people of the several states." Of those
expressly forbidden, some are forbidden in general terms,
as in Art. VI., § 3, providing; "no religious test shall ever
be required as a qualification to any office or public trust
under the United States." Others are forbidden specially
to one department of the federal government: "Congress
shall make no law respecting an establishment of religion."
Nothing is, in terms, forbidden to the treaty-making power.
Is the treaty-making power then limited by any of these
prohibitory provisions. First, as to those powers expressly
forbidden in general terms to the federal government.
There are several of these. Art. VII., § 3, provides: "* * *
No religious test shall ever be required as a qualification
to any office or public trust under the United States." Art.
I., § 9, cl. 7, provides: "No title of nobility shall be
granted by the United States;" Art. II., § 3, cl. 2, "No
attainder of treason shall work corruption of blood;" Art.
V.; "* * * No state, without its consent, shall be de-
prived of its equal suffrage in the Senate." The second
amendment reads: "* * * The right of the people to
keep and bear arms shall not be infringed;" amendment

1Art. I., § 9, cl. 7.
(528)
three; "No soldier shall, in time of peace, be quartered in any house without the consent of the owner * * *;" amendment four; "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. * * *" The fifth amendment provides: "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury, except * * * nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."
The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. * * *"
The seventh amendment preserves the right of trial by jury in civil causes; and the eighth reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." The fifteenth amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude." The federal government is forbidden to do these things; may the President and Senate by a treaty do them?

But some powers are, in terms, forbidden only to some particular department of the federal government, as Congress. Art. I., § 9, cl. i, provides that "the migration or importation of such persons (slaves) * * * shall not be prohibited by Congress prior to the year eighteen hundred and eight." Amendment one, that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press. The power to do these things being forbidden, in terms, only to Congress, can they be done by the treaty-making power, or is the treaty-making power limited by them?

Congress can make no laws abridging the freedom of
speech, or of the press. Can the President and Senate make a valid treaty with Germany providing that no newspaper in the United States shall print anything derogatory to the Kaiser or his government? If so, one of two consequences would follow, either the treaty would be valid and effective only when Congress passed the necessary legislation to make it so, or it would be the supreme law of the land without legislation. If the first supposition be correct then since Congress is forbidden in terms by the constitution to make any such law, the treaty would not be a treaty as that term is used in the constitution, for it could never "be the supreme law of the land." That is, the President and Senate cannot make such a treaty. If the second supposition be correct, then the President must, on a breach of the treaty, execute it himself by preferring an indictment against the offender, alleging the crime of breach of the treaty. But this view would give the President and Senate the power by treaty to create criminal offenses and prescribe the punishment therefor, a power which, when it exists at all in the federal government, is vested in Congress, and which has never yet been claimed for the treaty-making power.

Congress was forbidden to prohibit the importation of slaves prior to the year eighteen hundred and eight. This provision was much debated in the constitutional convention and the provision for forbidding the prohibition of importation was strenuously insisted on. So careful were the delegates from some of the states to guard against such prohibition of importation, and so willing were a majority of the states to guarantee the prohibition of importation, that in the article providing for amendments to the constitution, (Art. V.) the only limitation put on amendments was that "no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article," and that no state, without its consent, shall be deprived of its equal suffrage in the Senate. Now, the first clause in the ninth section of the first article is the one forbidding Congress to prohibit the im-
portation of slaves. If then the argument that the treaty power is limited only by general prohibitions and not by limitations imposed, in terms, only on Congress, be sound, it would follow that the framers of the constitution intended to vest in the President and two-thirds of the Senate power to do, by agreement with some petty African chief, that which they not only forbade to the President, a majority of the Senate and a majority of the House, but that which could not even be done by an amendment to the constitution itself though every state then in the union agreed thereto. Such a conclusion, it is submitted, is impossible. If further illustration be necessary to show that no distinction was intended to be made between the rights or powers reserved in terms against Congress and those reserved in general terms, it is furnished by a consideration and comparison of Art. VII., § 3, and the first amendment. Art. VII., § 3, provides: "No religious test shall ever be required as a qualification to any office or public trust under the United States." The prohibition here is general. The first amendment states that "Congress shall make no law respecting an establishment of religion. * * *" If the treaty power is limited by the former because the prohibition is expressed in general terms, but not by the latter because it appears in terms to be directed against Congress, then we must reach the conclusion that the President and Senate have power to impose a state religion on the people of the United States; but, having done so, they have no power to do the comparatively insignificant thing of requiring of the officers of the government an oath of conformity to that religion.

The first eight amendments, with the exception of the first, embody express restrictions on the power of all departments of the federal government, as distinguished from restrictions on the powers of Congress, and hence are admitted by all to be limitations on the treaty-making power. In these amendments the powers forbidden are expressly

2In some of these amendments the prohibition of power is ex-
enumerated—"The right of the people to bear arms shall not be infringed;" "no soldier shall in time of peace be quartered in any house without the consent of the owner * * *," etc.

The abuse of certain powers by the mother country was fresh in the minds of the people when these amendments were adopted, and these powers they determined not to surrender to this new government, hence we find them reserving from that government the power to make unreasonable searches and seizures, to issue warrants except upon probable cause, supported by oath, etc. Many of the colonists had fled from an established church, therefore the power to establish a state religion was denied to the federal government. Certain rights had been iterated and reiterated in English history as fundamental to liberty, hence we find the people incorporating in this new Bill of Rights provisions from the English Bill of Rights of 1668, and from the Petition of Right, such are the provisions for the right of petition, the right to bear arms, the prohibition against the quartering of soldiers and against excessive bail, fines and cruel and unusual punishment. It was practically impossible, however, in a constitution, intended to form a general framework of government, to enumerate all that great body pressed by the use of the correlative term "right," as "the right of the people to keep and bear arms shall not be infringed;" in others the prohibition of power is expressed directly: "No soldier shall, in time of peace, be quartered in any house," etc. The Supreme Court, however, has made no distinction on the language used, but have held that these amendments were limitations on federal power. In Fox v. Ohio, 5 How. 434, the court says these amendments "were * * * designed * * * exclusively as restrictions upon the federal power." In Barron v. Baltimore, 7 Pet. 243, Marshall, C. J., said: "Each state established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are materially, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.
of powers they desired to reserve,\(^3\) so having set out those that were uppermost in all men's minds at the time, the remainder were reserved in the general language of the ninth and tenth amendments: "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people," and "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." By the comprehensive language of these amendments the people obtained the same result that would have been obtained by enumerating every right and power they had not surrendered in other parts of the constitution.

The powers reserved by the tenth amendment are the correlatives of the rights reserved in the first nine amendments, and are co-extensive with them. Whatever rights the people retained from the federal government, the states or the people by the tenth amendment reserved their original power over as against the federal government. It was decided as early as 1833, and reiterated in subsequent decisions of the Supreme Court, that these nine amendments were restrictions on the powers of the federal government, not on the states; that the states can still "infringe the right of the people to bear arms" or can quarter soldiers in times of peace," or do any of the other things prohibited in the first nine amendments. *Barron v. Baltimore*, 7 Pet., p. 247, per Marshall, C. J.; *Spies v. People* (1887), 123 U. S. 131. It was for this reason that, though the *fifth* amendment provided that no person should "be deprived of life, liberty or property without due process of law," it was necessary, in order to afford the same protection to a person against the action of a state, to provide, as was done in the fourteenth amendment: "Nor shall any *state* deprive any person of life, liberty or property, without due process of law." That is, the powers to do the

\(^3\)Indeed, those who were opposed to the adoption of any amendments at that time used the argument that in such a constitution there was no place for any enumeration of reserved rights.
enumerated things forbidden to the federal government in the first nine amendments, are powers which, originally inhering in the states, were reserved to the states or to the people.

If the ninth amendment had provided that the enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people from Congress, and if the tenth amendment had said: The powers not delegated to Congress by this constitution, nor prohibited to the states, are reserved to the states respectively, or to the people, the rights and powers reserved by these amendments would come within the class of powers which some have supposed were reserved only from congressional action. Since, however, the ninth amendment reserves the rights generally, and the tenth reads: "The powers not delegated to the United States, etc., are reserved to the states," etc. These rights and powers come within the class forbidden to all departments of the federal government. A class of powers which it is admitted by all cannot be exercised by the treaty-making power.

But it is said that since the clause of the constitution vesting the treaty-making power in the President and Senate is unlimited, and the tenth amendment to the constitution does not in terms refer to it, no limitation in favor of the rights reserved by that amendment can be implied.

If this argument is sound then, since there is nothing in that part of the constitution creating the Senate, the House, or the Supreme Court that refers restrictively to the treaty-making power, and that power is on its face unlimited, it may by treaty abolish these departments of the government. There is nothing in the constitutional provision that Senators shall be chosen by the legislature of the respective states (itself a reserved power which the states may or may not exercise as they see fit, but which the federal government cannot deprive them of) that, in terms, limits the treaty-making power. If the argument advanced is sound then this provision is subject to the treaty-power. Since the same is true of the provision that the President shall
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be a natural born citizen, that Congress shall have power
to regulate interstate and foreign commerce, etc., accord-
ing to the argument the President and Senate are not lim-
ited in making treaties by these provisions. We have seen,
however, that all writers agree that these provisions are a
limitation on the treaty-making power, though on their
face they contain no reference to it and though that power
is on its face unlimited. This power, it is admitted, can-
not be used to change the Constitution. Is it not so used
if it should seek to infringe "the right of the people to keep
and bear arms," to quarter soldiers in any house without
the consent of the owner, in times of peace; to violate "the
right of the people to be secure-in their persons, houses,
papers and effects;" to hold any person "to answer for a
capital or otherwise infamous crime, unless on a present-
ment or indictment of a grand jury," or subject any person
for "the same offence to be twice put in jeopardy of life
or limb;" or compel a person "in any criminal case to be
a witness against himself; or prevent the accused from en-
joying "the right to a speedy and public trial, by an im-
partial jury of the state and district wherein the crime shall
have been committed," all of which things the constitution
says the federal government shall not do, but which, by
virtue of its reserved powers, the state governments are at
perfect liberty to do so far as any restraining power in the
federal government is concerned.

Story gives as the reason why the President and Senate
cannot make a treaty to change the organization of the
government, or annihilate its sovereignty, or to overturn
its republican form, that a power given by the constitution
cannot be construed to authorize a destruction of other
powers given in the same instrument.

If one or more of the powers given by the states or the
people to the federal government in the constitution cannot
be destroyed by another power given in the same instru-
ment, it must, a fortiori, be true that a power or powers
reserved by these same states or people in that instrument,
as was done in the tenth amendment, cannot be destroyed
by a power given.
The argument drawn from the fact that, because the treaty-making power is, on its face, unlimited, the people intended it to be unlimited with regard to the powers reserved in the tenth amendment, would apply equally to make it unlimited as to the other provisions of the constitution in regard to which all agree with Story in saying it is not unlimited.

If the rights and powers reserved in the ninth and tenth amendments are not reserved against the treaty-making power but only against legislation, then the states and the people have been so foolish as to protect themselves from all three departments of the federal government—since the concurrence of the House, the Senate and the President are necessary to legislation—while at the same time surrendering their most vital powers of self-government to two of the same three departments of the same government. That is, they really protected themselves from the House of Representatives only, the very department of the government they least need protection against, since normally it is the most responsive to their will. It is submitted that such an intention cannot be imputed to the framers of the constitution.

In connection with the question of the intention of the framers of the constitution, the effect of the view that the tenth amendment is not a limitation on the treaty power is worthy of consideration. In the case of an ordinary treaty, such as a treaty of commerce, if it should appear that the treaty is harmful, it can be rendered of no effect by an act of Congress, passed by two-thirds of the House and Senate, without the concurrence of the President. 4

If, however, a treaty were made which affected the reserved rights of the states, it is, to say the least, doubtful if such a treaty could be abrogated at all without the consent of the President, for Congress having no power to pass a law, affecting the reserved rights of the states, could

4 It has been often held that a subsequent act of Congress inconsistent with a treaty repeals the treaty. The Cherokee Tobacco, 11 Wall. 616.
enact no law either in affirmance or derogation of the treaty.

Another result would be that it would be possible by a treaty to confer on aliens in this country greater rights than our own citizens have. In the recent excitement over the Japanese treaty it was claimed by some that the treaty with Japan gave the Japanese, residing in San Francisco, the right to attend the public schools, and that California could pass no law to abridge that right unless the law included all aliens.⁵

Now it has been decided that a state may pass a law requiring negroes to attend separate schools,⁶ on the ground that the power to pass such laws was reserved by the tenth amendment. If the treaty power then is not limited by the tenth amendment aliens can be given greater rights by treaty than our own citizens can ever obtain in their own country.

It is usual to give the citizens of a nation, by treaty, the rights of citizens of the most favored nation, it is not unusual to give them, at least in some particulars, the same rights as the citizens of the country extending the rights; but to ask that they be given greater rights than the citizens of that country are themselves entitled to, smacks of conquest more than of comity.

It has been contended, however, recently, by Mr. Elihu Root,⁷ that the tenth amendment does not limit the treaty-making power, indeed that there are no express limitations on it, and that “there can be no question of state rights, because the Constitution itself, in the most explicit terms, has precluded the existence of any such question.” Mr. Root arrives at this conclusion from the fact that the treaty-making power is vested in the federal government, that the states are forbidden to make treaties and that the Constitution provides that treaties shall be the supreme law of

⁵ The treaty having guaranteed Japanese residents the same rights as to residence as were enjoyed by the most favored nation.


⁷ 1 Am. Jour. of Int. Law, 273.
the land. Although he does not say categorically, that the treaty-making power is likewise not limited by the first nine amendments, that would seem to be included in his statement: "Although there are no express limitations upon the treaty-making power granted to the national government, there are certain implied limitations arising from the nature of our government and from other provisions of the Constitution," for as has been shown, the powers forbidden to the United States, in the nine amendments, are powers reserved to the states. If, as he admits, there are limitations arising "from the nature of our government" it is difficult to see why there can be no question of state rights, for certainly nothing is more characteristic of the "nature of our government" than the existence of the state rights reserved in the first ten amendments. As he also says that there are limitations arising "from other provisions of the Constitution"—though there are no other provisions expressly limiting the treaty power—it is difficult to see why, since the first ten amendments are "provisions of the Constitution" and, as has been shown, contain as express and as unlimited prohibition against action by the federal government as any other provisions of the Constitution, these amendments—which embody state rights—are not to be included in these "other provisions of the Constitution". The very language of the Supreme Court, in Geofroy v. Riggs, which Mr. Root quotes in maintenance of his position, would seem to include the first ten amendments among the provisions of the Constitution which limit the treaty power. Says the Court: "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."

Certainly the first ten amendments are "restraints which are found in that instrument against the action of the

* P. 279.

* Italics; the writer's.
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If no question of state rights can arise in connection with the treaty-power then the President and the Senate can by a treaty deprive a state of one or both of its Senators; for the right to be represented by two Senators is a state right, a right which a state may relinquish, but which Article V of the Constitution says it shall not be deprived of without its consent.

Mr. Root in his argument seems to the writer strangely to misconceive the question. His argument as the writer understands it is this: The question of the reserved powers of the states, as to legislation, may arise because legislative power by the Constitution is distributed; upon some subjects Congress has authority, upon other subjects the state legislature has authority, so the question may arise as to judicial power for the same reason—in some cases the federal courts, and in others the state courts, have jurisdiction; the same thing is true of the executive power, and therefore the question of state rights may arise in relation thereto—"However, the treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation, acting in direct relation to and representative of every citizen in every state"—hence no question of the reserved powers of the states can arise in connection with the exercise of the treaty-making power. This argument indeed proves that the states did not reserve the power to make treaties and hence have no such power even in the exercise of their reserved powers. But it fails to prove that the federal government in the exercise of its undoubted treaty-making power is not limited by those restrictions which the first ten amendments have placed on the power of the federal government. It proves that the federal

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10 Spies v. People, 123 U. S. 131.
11 The authorities he cites are dealt with later in this article.
12 Though they may, with the consent of Congress, enter into agreements or compacts with foreign nations.
power to make treaties is exclusive, but it does not prove that it is unlimited, or that it is not limited by the tenth amendment. The present writer has endeavored to show, not that the states reserved a general power to make treaties, but that they did expressly reserve from the action of the federal government, other powers, of which they cannot be deprived by that government, whether it attempts the deprivation by legislative, executive or treaty-making action.

It is said, however, that the question whether the tenth amendment is a limitation on the treaty-making power or not, is no longer an open one since it has been already decided by the Supreme Court of the United States.

The cases cited as authority for this most sweeping and important proposition are Ware v. Hylton,13 Fairfax v. Hunter,14 Chirac v. Chirac,15 Orr v. Hodgson,16 Hughes v. Edwards,17 Carneal v. Banks,18 and Hauenstein v. Lynham.19

In Ware v. Hylton20 it was decided that a law of Virginia, passed in 1777, which provided that any citizen of Virginia, owing money to a subject of Great Britain, might pay the same into the loan office of the state and be discharged of the debts, was abrogated by the treaty of 1783 between the United States and England. This treaty provided that the creditors of either of the contracting parties should meet with no lawful impediment to the recovery of all debts theretofore contracted.

It is submitted that this case is no authority for the broad proposition that the treaty-making power is not limited by the reserved rights of the states. In the first place the treaty in question was entered into by the Continental Con-

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13 3 Dall. 199 (1796).
14 7 Cranch. 603 (1812).
15 2 Wheat. 215 (1817).
16 4 Wheat. 453 (1819).
17 9 Wheat. 489 (1824).
18 10 Wheat. 181 (1825).
19 100 U. S. 483 (1879).
20 Supra.
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The method of entering into a treaty under the confederation differed from that under the Constitution. Under the confederation each state was entitled to only one vote in Congress and Congress could make no treaty without the consent of nine states. As there were thirteen states in the Confederation, this meant that the assent of three-fourths of all the states was necessary to the making of a treaty. Under the present Constitution a treaty is not so directly the act of a state, and the assent of three-fourths of the states is not necessary. Each state has two Senators and they may not vote in unison; but, more important is the difference that the Constitution does not require the assent of three-fourths or even of two-thirds of the states to the making of a treaty, but only the assent of two-thirds of the Senators present when the treaty is voted on. It might well be then that greater force should be allowed to a treaty negotiated by the states in the Continental Congress where they acted much as independent states in a league, than under the present Constitution where the vote on treaties is not by states at all. 21 The position of the states in the Confederation seems to be referred to by Wilson, J. where he says (p. 281): "The state made the law; the state was a party to the making of the treaty; a law does nothing more than express the will of a nation; a treaty does the same."

Again the decision in Ware v. Hylton that a treaty overrides a state law confiscating debts due foreigners is not a decision that the treaty-making power under the Constitution can be used to deprive a state of any of its reserved

21 This difference is shown by a comparison of the wording of treaties under the Confederation and under the Constitution. The treaty of 1778 with France stated the contracting parties to be "The Most Christian King and the United States of North America, to wit: New Hampshire, Massachusetts Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia." The treaty of 1800 commences: "The Premier Consul of the French Republic in the name of the people of France, and the President of the United States of America, equally desirous," etc.
rights; for while this right of confiscation did exist in Virginia before the present Constitution it was not only not reserved, but is expressly surrendered by the Constitution—in that section providing that no state shall pass any law impairing the obligations of a contract.

Indeed, the very reason the states were so careful to insist on an expression of their reserved rights, in framing the present Constitution, was because, by the new Constitution, they had in general created a more centralized government than existed under the Confederation.

What the case really decides is that any treaty made under the Articles of Confederation and which was valid under the Articles of Confederation, was valid by adoption after the Constitution was adopted.

In *Fairfax v. Hunter*, decided in 1812, Justice Story did indeed say that the treaty of 1794 would have the effect of rendering void the title to land claimed under an act of the legislature of Virginia. All that he said on this point however,—and it is comprised in a few lines of a long opinion,—is dictum, for he had already shown, in ten pages of his opinion, that the acts of the legislature did not, in fact, vest any title to the land in the claimant. The question of the power of the President and Senate to make such a treaty was not argued in this case.

In the case of *Chirac v. Chirac*, the Supreme Court held, that the treaty of 1800 between the United States and France, concerning the devolution of real estate, abrogated a law of Maryland inconsistent with the treaty. The question of the power of the federal government to make such a treaty was not argued by counsel or discussed by the court.

In *Orr v. Hodgson* it was again held, that the treaty of 1783, between England and the United States, overruled a law of Virginia as to the incapacity of aliens to inherit land.

Here again the treaty in question was a treaty negotiated by the Continental Congress, not by the Senate and the President. And again the power of Congress, or of the
President and Senate to make such treaty, does not appear to have been argued by counsel, nor was it discussed by the court.\footnote{Story, J., says: "This subject has been heretofore before us, and although no opinion was then pronounced, it was most deliberately considered. We do not now profess to go at large into the reasoning upon which our present opinion is founded. It would require more leisure than is consistent with other imperious duties." This language does not apply to the question of the power of the federal government to make such treaties, but to the meaning of the language used in the treaty, as appears by the context.}

In *Hughes v. Edwards*, involving a similar question of the right of an alien to own lands, the court merely follows *Harden v. Fisher* [which, in fact, was decided against the claimant under the treaty, on the ground, however, that the claimant had not brought himself within the terms of the treaty] and *Orr v. Hodgson*. Again the question of power was not argued by counsel or examined by court.

*Carneal v. Banks* likewise was a question concerning lands. Alienage was pleaded. While the Court says that the treaty of 1778 would give an alien the right to hold land in Kentucky, this is mere dictum, for the court says there was no proof that the alleged owner (through whom one of the parties claimed) was an alien. And the case is decided on a different point, viz: that the trial court erred in giving a judgment based on a misdescription of the land in controversy when there was no allegation of such misdescription in the pleadings.

*Hauenstein v. Lynham* is the latest case relied on to show that the treaty-making power is not limited by the reserved rights of the states. This case involved the single question of the right of an alien to the proceeds of land in Virginia which had been sold under an inquisition of escheat. The alien claimed by virtue of a treaty between the United States and Switzerland. The Court of Appeals of Virginia gave judgment in favor of the escheator, on the ground that the treaty did not purport to give the alien the right claimed by him. While expressing a doubt as to the power of the federal government to make a treaty concerning land in a state, the court said "* * * we do not express any opin-
ion on this question in this case, because it is not necessary to do so."\(^{22}\)

On appeal the judgment was reversed by the Supreme Court of the United States. The court held that the treaty, properly construed, did give the plaintiff the right claimed by him, and that the federal government was competent to make such treaty. The court cited *Ware v. Hylton*, *Chirac v. Chirac*, *Carneal v. Banks*, *Hughes v. Edwards* and *Orr v. Hodgson*. Strangely enough, though the Court of Appeals of Virginia had expressed serious doubts whether the federal government possessed the power to make the treaty involved, the counsel for the defendant did not argue that question before the Supreme Court. Swayne, J., says: "In the able argument before us, it was insisted upon on one side, and not denied on the other, that, if the treaty applies, its efficacy must necessarily be complete. The only point of contention was one of construction."\(^{24}\)

These cases are the ones relied on—and they are the strongest for the purpose—to prove the general proposition that the reserved rights of the states are subject to the treaty-making power. Of these seven cases two, viz: *Ware v. Hylton* and *Orr v. Hodgson*, are decisions on treaties made by the Continental Congress, and treaties so made may for the reasons given above be distinguished from treaties made by the President and Senate. Two of the remaining five, viz: *Fairfax v. Hunter*, and *Carneal v. Banks*, are of no authority whatever on the question under discussion for they were decided on a point other than the effect of a treaty. *Chirac v. Chirac*, *Hughes v. Edwards* and *Hauenstein v. Lynham*, remain. Of these the second merely following *Orr v. Hodgson*, and a dictum, in *Harden v. Fisher*, decided that a treaty giving aliens the right to own lands, overrode a state law forbidding such ownership. The first decided that a treaty enabling an alien to inherit land abrogated a state law containing conflicting provisions, and the


\(^{24}\) At p. 490. *Italics;* the present writer’s.
last decided that a treaty enabling an alien to withdraw the proceeds of land, which land he was not entitled to hold under the law of the state where the land was situated, was supreme over the law of the state which denied him such right. In none of these cases does it appear that the question of the power of the federal government to make such treaties was argued.\textsuperscript{25}

Admitting that the right to prescribe who shall own real estate in a state, and the right to forbid aliens to sell real estate and enjoy the proceeds are, generally speaking, among the reserved rights of the states, and that these cases establish that the federal government may, by treaty, override state laws on these two subjects,\textsuperscript{26} do these cases prove the general proposition that \textit{all} the reserved rights of the states are subject to the treaty power? or, in the language of Mr. Root, that “so far as the real exercise of the power goes, there can be no question of state rights.” If these cases stood alone, or had generally been regarded as establishing this broad doctrine, then, however dangerous this treaty-making power might seem—and the thousand and one measures of local government now classed under the police power of the states would lie prostrate before it—or however far such surrender of power was from the minds of the framers of the Constitution, it might be admitted, even though the doctrine had been promulgated without adequate argument, that the question was no longer open. Such, however, is far from the fact. In the very case of \textit{Hauenstein v. Lynham} the court was careful to point out that it was laying down no

\textsuperscript{25} Whether counsel opposing the rights claimed under the treaties were so confident that the treaty, even if a valid exercise of power, did not apply to the case in hand, that they did not think it worth while to deny the power, or whether they had no doubt of the power of the federal government and therefore confined themselves to the question of the application of the treaty, of course, does not appear.

\textsuperscript{26} Even if the same effect were given to treaties made by the Continental Congress, as to treaties made under the constitution. \textit{Ware v. Hylton} would be obsolete now, because the confiscation attempted by the state law in that case is now expressly forbidden to the states by the federal constitution. Art. I., § 10.
general doctrine. Says the court: "The only point of contention was one of construction. There are doubtless limitations of this power as there are of all others arising under such instruments; but this is not the proper occasion to consider the subject. It is not the habit of this court, in dealing with constitutional questions, to go beyond the limits of what is required by the exigencies of the case in hand. What we have said is sufficient for the purposes of this opinion."

That the cases above considered, from *Ware v. Hylton* to *Carneal v. Banks*, were not regarded by the Supreme Court, itself, as authority for the general proposition—that the treaty-power could be used to deprive the states of their reserved rights, is made clear by the utterances of the judges of that court in subsequent cases.

*Carneal v. Banks* was decided in 1825. In 1840, in *Holmes v. Jennison*, Mr. Justice Baldwin, discussing the grant of the treaty-making power, says: "Every state has acknowledged power to pass, and enforce quarantine, health and inspection laws to prevent the introduction of disease, pestilence, or unwholesome provisions; such laws interfere with no powers of Congress or treaty stipulations; they relate to internal police, and are subjects of domestic regulation within each state, over which no authority can be exercised by any power under the Constitution, save by requiring the consent of Congress to the imposition of duties on exports or imports, and their payment into the treasury of the United States." And on page 619: "Whenever internal police is the object, the power is excepted from every grant and reserved to the states."

In 1847 the question of the power of a state to pass a law conflicting with a treaty was before the Supreme Court of the United States in the *License Cases*.

In these cases certain laws of Massachusetts, Rhode Island and New Hampshire, requiring a license to sell liquor
were attacked, on the ground, *inter alia*, of being in conflict with certain treaties made between the United States and France and Holland.

There is nothing in the opinion, of any of the judges who delivered opinions in this case, to show that they considered the question of the treaty-making power as affecting the reserved rights of the states, or of the people, as settled by the previous cases. On the contrary, those cases were not relied on by the eminent counsel, Messrs. Webster, Choate and Hallett, who argued for the supremacy of the treaties, nor referred to by the judges. The judgment of the court was unanimous in upholding the validity of the state laws. Six judges delivered opinions. Three of these did not discuss the question of the effect of the treaties. Three did, and though they thought the treaty did not apply, they each held that even if it were applicable, it would be ineffectual, as being beyond the power of the federal government. Daniel, J., says: "A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a state or of any citizen of a state."$^{29}$

Woodbury, J., says: "Call them by whatever name, if they are necessary to the well being and independence of all communities, they remain among the reserved rights of the states, no express grant of them to the general government having been either proper, or apparently embraced in the Constitution."$^{30}$

Grier, J., says: "The powers which relate to merely municipal regulations or what may more properly be called internal police, are not surrendered by the state."$^{31}$

McLean, J., discussing the general division of power between the federal and state governments, says: "A state regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal mater-

$^{2}$ P. 613.
$^{29}$ P. 627.
$^{31}$ P. 631.
ters which relate to its moral and political welfare. Over these subjects the federal government has no power." 82

No dissent from these views is expressed by any of the other judges, but there is much in the general discussion by those judges of the relative powers of the federal and state governments to show that they entertained the same views. It would seem plain from this case that whatever else may have been thought of the cases of *Ware v. Hylton*, *Fairfax v. Hunter*, *Chirac v. Chirac*, *Orr v. Hodgson*, *Hughes v. Edwards* and *Carneal v. Banks*, they were not regarded, either by the bar or the bench, as authority for the general doctrine they are now said to establish and affirm.

Two years later the *Passenger Cases* 53 came before the Supreme Court. In these cases acts of the legislatures of New York and Massachusetts were attacked on the ground, *inter alia*, (1) that they were unconstitutional, as attempts to regulate foreign commerce; and (2) that they were void because in conflict with certain treaties made between the United States and England.

Five of the nine judges who decided these cases decided that the state statutes were void as attempts to regulate commerce. The other four judges held the acts constitutional. The majority having disposed of the cases on this ground, it was unnecessary for them to decide whether the acts were in conflict with the treaties, and if so, whether they would be void also for that reason or not. Two of this majority, McLean and McKinley, do not express any opinion on this point. The other three, Wayne, Catron and Grier, discuss the question whether, admitting that the state laws were in conflict with the treaty, they would nevertheless be valid as an exercise of the reserved police power of the states. They held that the acts in question were regulations of commerce and therefore were an attempted exercise of a power vested in the federal government, and not an exercise of the police power which the states had re-

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82 P. 588.
83 7 How. 283.
served. But it is clear, from the opinions of these three judges, that they considered that the rights reserved to the states, by the tenth amendment, were not subject to the treaty-making power.4

All of the four dissenting judges put themselves on record as of the opinion that the reserved rights of the states are not subject to infringement by the treaty-making power; and that any treaty violating these rights is void. Daniel, J., says: (506-507.) "The law of New York has been; further assailed in argument as being an infraction of the fourteenth article of the treaty of amity and commerce negoti-

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"Wayne, J., in discussing the exclusiveness of the power of the federal government to regulate commerce places such regulation by treaty and by Congress on the same footing, and gives the federal government no more power under the treaty clause than under the commerce clause. At the same time he admits that Congress has no power to interfere with the reserved rights of the states, even though they effect commerce. He says (p. 418): "It seems to me, when such regulations of commerce as may be made by treaty are considered in connection with that clause in the constitution giving to Congress the power to regulate it by legislation, and also in connection with the restraints upon the states in the tenth section of the first article of the constitution, in respect to treaties and commerce, that the states have parted with all power over commerce, except the regulation of their internal trade." The remainder of his opinion shows he does not consider that the states gave to the federal government any greater power in commercial matters under the treaty section than under the clause giving to Congress the power to regulate commerce. In answering the argument that these state statutes were valid as within the police power of the states, he never hints at the answer that would be the obvious one if he believed that the police powers were subject to the treaty power, viz: that, admitting that these statutes were made in the exercise of the police power, they were void because in conflict with existing treaties; but on the contrary, admits that under the police power many rights are reserved to the states. On page 425 he says: "The states have also reserved the police right to turn off from their territories paupers, vagabonds, and fugitives from justice. But they have not reserved the use of taxation universally as the means to accomplish that object, as they had it before they became the United States. Having surrendered to the United States the sovereign police powers over commerce, to be exercised by Congress or the treaty-making power, it is necessarily a part of the power of the United States to determine who shall come to and reside in the United States for the purposes of trade, independently of every other condition of admittance which the states may attempt to impose upon such persons. When it is done in either way, the United States, of course, subject the foreigner to the laws of the United States, and cannot exempt him from the internal power of police of the states in any particular in which it is not constitutionally in conflict with the laws of the United States."
ated between Great Britain and the United States * * *
and the second clause of the sixth article of the Constitution,
having declared the Constitution and laws of the United
states, made in pursuance thereof, and treaties made under
the authority of the United States, to be the supreme law
of the land, the laws of New York, being in derogation of
the fourteenth article of the treaty of 1794, are unconsti-
tutional and void * * *. Admitting this fourteenth article
of the treaty to be in full force, and that it purported to take
from the state of New York the right to tax aliens coming
and commorant within her territory, it would be certainly
incompetent for such a purpose, because there is not, and
never could have been, any right in any other agent than
her own government to bind her by such a stipulation."

Taney, C. J., speaks in equally unequivocal language; he
says35 "If the people of the several states of this Union re-
served to themselves [as he elsewhere holds they did] the
power of expelling from their borders any person, or class
of persons, whom it might deem dangerous to its peace, or
likely to produce a physical or moral evil among its citizens,
then any treaty or law of Congress invading this right, and
authorizing the introduction of any person or description of
persons against the consent of the state, would be an usur-
pation of power which this court could neither recognize nor
enforce." Nelson, J., assents to the conclusion, and on the
reasoning of Taney.36

Justice Woodbury thought that the state laws did not
conflict with the provisions of the treaty since none of these
provisions "profess to exempt their people or their property
from state taxation after they arrive here." "But," he
adds, "If such a stipulation were made by the general gov-
ernment it would be difficult to maintain the doctrine that
by an ordinary treaty it has power to restrict the rights and
powers of the several states any further than the states
have by the constitution authorized, and that this has ever

35 P. 466.
36 P. 518.
been authorized.” From this case it appears that seven out of nine judges of the supreme court (the other two expressing no opinion whatever) considered it beyond question that the tenth amendment was a limitation on the treaty-making power, and that they not only did not consider that the cases from Ware v. Hylton to Carneal v. Banks established the general doctrine now claimed for them, but that on the contrary that they considered such a doctrine untenable.

Forty years after the dictum of Story, J., in Fairfax v. Hunter, a dictum of Chief Justice Taney in delivering the opinion of the court in Prevost v. Grenesaux, shows that the court at that time not only did not consider that the broad doctrine that the people had relinquished all power over their domestic concerns to the treaty-making power, had been settled by Ware v. Hylton, but seems to indicate that even the narrow point actually decided in that case, viz., that the treaty power could divest a vested right, was not considered as settled by that case. The Chief Justice said: “* * * A treaty subsequently made by the United States with France could not divest rights of property already vested in the state, even if the words of the treaty had imported such an intention.” He decides, however, that the words of the treaty did not apply to the case before the court.

As doubt was thrown on the case of Ware v. Hylton in Prevost v. Grenesaux, so three years later it appears by another dictum in Frederickson v. Louisiana, that the court likewise does not regard the actual points decided in Chirac v. Chirac, Orr v. Hodgson, and Hughes v. Edwards, as settled by those cases. Those cases involved a similar question to the case at bar, and the court said in discussing that question: “It has been suggested in the argument of this case, that the government of the United States is incompetent to regulate testamentary dispositions or laws of in-

19 How. 1 (1856).
2 P. 7.
23 How. 445 (1859).
heritance of foreigners, in reference to property within the states. The question is one of great magnitude, but it is not important in the decision of this cause, and we consequently abstain from entering upon its consideration."

From this review of the cases in the Supreme Court of the United States subsequent to *Carneal v. Banks* and prior to *Hauenstein v. Lynham*, it is submitted that not only did the justices of that court not regard those cases as establishing the broad doctrine that the treaty-making power was supreme over the reserved rights of the states, but that on the contrary most of them considered it beyond question that those reserved rights were exempt from interference by the treaty-making power. It has been pointed out that in *Hauenstein v. Lynham* the court was careful to say that its decision was intended to be confined to the facts of the case before it. The court said: "There are doubtless limitations of this power as there are of all others arising under such instruments; but this is not the proper occasion to consider the subject." Field, J., concurred in the opinion in *Hauenstein v. Lynham*, and yet three years later, when sitting in the Circuit Court, we find him saying in *In re Quong Woo*:

"The petitioner is an alien, and under the treaty with China * * * he has, under the pledge of the nation, the right to remain, and follow any of the lawful ordinary trades and pursuits of life, without let or hindrance from the state, or any of its subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws."

"Because the court held that the plaintiff had not brought himself within the terms of the treaty.

* F. 448.

In *U. S. v. Fox*, 94 U. S. 315 (1876), a case involving the validity of a devise to the United States, Field, J., says, speaking for the court: "The title and modes of disposition of real property within the state, whether inter-vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the federal government was created, and would seriously embarrass the landed interests of the state." The court held the devise void as forbidden by the state statutes.

Hauenstein v. Lynham was decided in 1879. In 1880, Sawyer, J., said in a case in which it was contended that a law of California requiring the payment of a fee for leave to disinter a dead body was void, as in conflict with our treaty with China. "It may well be questioned whether the treaty-making power would extend to the protection of practices, under the guise of religious sentiment, deleterious to the public health or morals, or to a subject-matter within the acknowledged police power of the state."

As late as 1893 Simonton, District Judge, does not conceive of the cases beginning with Ware v. Hylton and ending with Hauenstein v. Lynham as having established the doctrine of the supremacy of the treaty-making power over the reserved powers of the states. He say: "The police power is a right reserved by the states, and has not been delegated to the general government. In its lawful exercise the states are absolutely sovereign. Such exercise cannot be affected by any treaty stipulations." It appears then that the Supreme Court has in three cases, Chirac v. Chirac, Hughes v. Edwards and Hauenstein v. Lynham, decided that a treaty made under the constitution enabling aliens to inherit or sell lands in a state of the Union, is supreme over a state law containing provisions conflicting with the treaty; that in these cases the question of the power of the federal government was not argued by counsel nor discussed by the court; that no general principles were laid down by the court from which it can be argued that the court thought that either the rights categorically reserved in the first nine amendments, or those reserved in general language in the ninth and tenth amendments, were subject to the treaty-making power, but, that on the contrary, in the last case, the court was careful to limit their decision to the exact point before the court. It further appears that in every case that has come before the Supreme Court where reserved rights other than those involved in

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"In re Wong Yung Quy, 2 Fed. 624 (1880).
EXTENT OF TREATY-MAKING POWER

Chirac v. Chirac, Hughes v. Edwards, and Hauenstein v. Lynham, those judges who have discussed the question have either expressly denied, or have questioned, the power of the federal government by treaty to infringe the reserved rights of the states; and that in discussing the question neither the judges nor counsel have cited Chirac v. Chirac, Hughes v. Edwards, or Hauenstein v. Lynham, as authority for the doctrine that the reserved rights of the states were subject to the treaty-making power. It also appears that while all of the judges who sat in Holmes v. Jennison, the License Cases and the Passenger Cases, did not, in any one of those cases, hold that the reserved rights of the states were exempt from the treaty-making power, yet all of the nine judges, who sat in those cases, did in one of the three hold that the reserved rights were exempt. It is, therefore, submitted, in view of these facts, that the doctrine that the treaty-power is supreme over the reserved rights of the states is by no means established in our jurisprudence.

The issue has been much obscured by the specious plea that it is intolerable that a state should enact laws in conflict with a treaty and by taking away rights guaranteed to foreigners, under such treaty, give just cause of offense to a foreign nation, and even possibly imperil the peace of the whole union. It would seem that if blame is to be awarded it should be visited on the federal government which, having no right to make a treaty interfering with the right of a state to enact laws under its reserved powers, attempts nevertheless to do so. Nor is much sympathy to be wasted on the foreign nation with whom the treaty has been negotiated, when it finds the treaty is of no effect in that regard; it is a perfectly well-established rule of international law that every nation in making a treaty is bound to take notice of the limitations on the power of the other contracting party. If we chose to make a commercial or arbitration treaty with England which does not provide in terms that

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*Since some did not think that question necessarily involved.*
the treaty is subject to the approval of parliament, or a commercial treaty with Spain, before approving legislation had actually been passed, we would have no legal cause of complaint against England if parliament should refuse to pass laws making the treaty effective, or if the Spanish courts should declare the treaty waste paper; for we are presumed to know that such sanction is necessary to make the treaty effective.\(^4\)

So Japan in entering into a treaty with the federal government by which her citizens in California are given the right to attend the public schools of California, is presumed to know that the power to say who shall attend the public schools of that state is a power reserved to the state and not vested in the federal government. It is no more unjust to require foreign nations to know that the federal government cannot barter away the rights of the states than to require them to take notice of the fact that the most solemn treaty can be rendered of no effect, without any notice to such country, by an act of Congress. Yet such is our law, and Congress has more than once taken such action.\(^4\)

It is sometimes said that foreign nations would not make treaties with us if they were subject to state laws. The fact is otherwise. From the days of the Articles of Confederation to the present time our treaties have contained stipulations recognizing state laws and making the rights of foreigners dependent on such laws. In the treaty of 1783 with Great Britain, Art. V. provides: "It is agreed that the Congress shall earnestly recommend it to the legislatures of the respective states, to provide for the restitution of all estates, rights and properties which have been confiscated, belonging to real British subjects." In the treaty of 1853 with France it was provided in section seven: "As to the states of the Union, by whose existing laws aliens are not permitted to hold real estate, the President engages to

\(^4\) II Anson Law and Custom of the Const., 297. Crandall, 205.
\(^4\) Taylor v. Morton, 2 Curtis, 454; Whitney v. Robinson, 124 U. S. 190. The first treaty ratified after the present constitution was adopted, the treaty of 1788 with France was annulled by Congress in 1798.
recommend to them the passage of such laws as may be necessary for the purpose of conferring this right." The fifth article of the treaty of 1850 with Switzerland provides: "The foregoing provisions shall be applicable to real estate situated within the states of the American Union, or within the Cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate." These treaties are still in force.\textsuperscript{18}

So far we have left out of sight clause two, of section ten, of article one, of the Constitution. This clause provides: "No state shall, without the consent of Congress, enter into any agreement or compact with another State or with a foreign power * * *." It is still possible then under the constitution for a single state to enter into foreign relations, and conclude a compact or agreement with a foreign nation, provided it have the consent, not of the treaty-making power of the federal government, but of Congress. The distinction between an "agreement or compact" which a state may enter into with the consent of Congress, and a "treaty, alliance or confederation" which is absolutely forbidden to a state, is nowhere explained in the constitution. Nor do the corresponding provisions in the Articles of Confederation throw much light on the subject.\textsuperscript{19}

\textsuperscript{18} See Compilation of Treaties in Force, 1904.

\textsuperscript{19} One clause in the Articles provided: "No state, without the consent of the United States, in Congress assembled, shall enter into any conference, agreement, or treaty with any king, prince, or state." Another clause read: "No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, &c., specifying accurately the purposes for which the same is to be entered into, and how long it shall continue." It is held in \textit{Green v. Biddle}, 8 Wheat. 1 (1823), that the consent of Congress may be given after the compact or agreement is made; and in \textit{Virginia v. Tennessee}, 148 U. S. 503 (1892), that such consent need not be expressed, but may be implied from subsequent legislation recognizing the agreement. In \textit{Holmes v. Jennison}, 14 Pet. 540 (1840) four of the judges thought the term "agreement" was used in the constitution in its widest signification, and that even a verbal understanding between a state and a foreign power required the assent of Congress. In \textit{Virginia v. Tennessee}, 148 U. S. 503 (1892), it was held that the terms "compact" or "agreement" did not apply to every possible compact or agreement between one state and another.
OF THE PRESIDENT AND SENATE

If the states in entering into the Union had reserved no powers to themselves, but surrendered them all to the federal government, such a reservation of the power to enter into agreements, even with the consent of Congress would have been an anomaly. They did not, however, surrender all power, but reserved a large portion thereof to themselves, hence it was perfectly natural that since they had retained certain powers they should retain the right to enter into agreements with foreign nations in regard to such powers.

If the states, in vesting the treaty-making power in the federal government, had intended to surrender to the treaty-making power all the powers they had reserved against the other departments of the federal government, why should they expressly retain the power to make agreements with foreign countries? If they, in giving the general treaty-making power to the President and Senate, intended to make that power supreme over all their own powers and rights which they had reserved against the executive, legislative and judicial branches of the government, what was left to them concerning which they could enter into any agreement or compact with a foreign nation?

Plainly they could not enter into an agreement concerning those matters which we may call national, of which they had absolutely divested themselves in favor of Congress, the federal judiciary, or the President; what then was left to them to make agreements concerning? Why, the powers they had not surrendered, but had reserved to themselves. But if they had not as against the treaty-making power of the federal government reserved any powers to themselves, there was nothing left to them about which to make agreements. And the question still recurs, did they then reserve a power to make agreements and at the same time strip themselves of that power by not reserving any rights over which they could exercise the power reserved?

The inevitable conclusion would seem to be that the so-called "reserved rights" were reserved against action by the treaty-making power as well as against the other depart-
ments of the federal government, and that agreements or compacts in relation to these reserved rights can be made only by the joint action of the states and Congress.

The only alternative is to say that the power to make treaties by the federal government and the power to make agreements by the states is concurrent. This theory, in regard to the power of the states and Congress, over inter-state and foreign commerce, has been held by the Supreme Court. In the latter case, where the question is which of two distinct parties—a state and the federal government—possess a power, the concurrent theory is tenable. In the case of agreements and treaties likewise, it would be tenable if the question were merely between the states on the one hand and the federal government on the other, i.e., if the states had the power to make agreements without the consent of Congress. Since, however, these agreements require the consent of Congress—the House, the Senate, and the President—it is a question not of a concurrent power between two governments, or even of a concurrent power between two distinct departments of the same government—which under our theory of the separation of powers it is believed does not exist—but it is a question of a power to be exercised concurrently by the President and two-thirds of the Senate and by the same President, a majority of the same Senate, a majority of the House and the legislature of a state.

Other evidence that these powers are not concurrent is the fact that a treaty absolutely requires the consent of the President; the House has no voice in it, and the unanimous vote of the Senate is not sufficient. An agreement between a state and a foreign power, however, does not require the consent of the President. It will be effective if passed by two-thirds of the House and Senate over the veto of the President.

* Art. I. § 7. of the constitution, provides: “Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary shall be presented to the President of the United States; and, before the same shall take effect, shall be approved by him.”
OF THE PRESIDENT AND SENATE

It is submitted that the theory of concurrent powers has no place in a case such as that under discussion.

If the foregoing arguments be sound it would seem that the only reasonable conclusion is that the states and the people in reserving to themselves the powers and rights specifically set out in the first eight amendments, and comprehended in general language in the ninth and tenth, intended to reserve them not only against Congress, which all admit, and which is the most responsive to their immediate will, but against the President and Senate as well, who, while less responsive to the wishes of the people, were chosen as the repository of this power largely because they could act with secrecy and dispatch.\(^5\)

The question whether by the reservation of the power to make agreements, with the consent of Congress, the states intended to deprive the federal government of the power to make treaties concerning their reserved rights, has never been raised in the courts. In *Virginia v. Tennessee*,\(^5\) however, the court, speaking through Mr. Justice Field, in contrasting the federal power to make treaties and the power of the states to make agreements, enumerates as properly falling within the latter power, those things which are among the reserved rights of the states. After saying that a state might enter into an agreement with another state, even without the consent of Congress, to purchase land within its domain belonging to the other state, or to transport goods over a canal owned by such other state, or to drain a malarious district on the border line of the two states, or to provide means to prevent an invasion of pestilence; he proceeds: "Looking at the clause in which the terms "compact" or "agreement" appear, it is evident the


\(^5\)Rule xxxvi, clause 3 of the standing rules of the Senate provides: "All treaties which may be laid before the Senate, and all remarks, votes and proceedings thereon shall also be kept secret, until the Senate shall by their resolution, take off the injunction of secrecy, or unless the same shall be considered in open Executive session." Cran dall, 75.

\(^5\)148 U. S. at page 519.
prohibition is directed to the formation of any combination tending to increase the political power in the states, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries (§ 1403), referring to a previous part of the same section of the constitution in which the clause in question appears, observes that this language "may be more plausibly interpreted from the terms used, 'treaty, alliance, or confederation,' and upon the ground that the sense of each is best known by its association (noscitur a sociis) to apply to treaties of a political character, such as treaties of alliance for purposes of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges;" and that "the latter clause, 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other." And he adds: "In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compacts or agreement might be attended with permanent inconvenience or public mischief."

Arguments for the supremacy of the treaty-making power over the reserved rights of the states, founded on the necessity for such power in case of a disastrous war need not be considered. It is an old maxim that "inter armes leges silent." The maxim is that the laws are "silent," however, not non-existent. It may be found necessary to take action in the prosecution of a war which cannot be justified on constitutional grounds, as was done certainly on one side or the other in our late civil war, but that does not make the action taken constitutional. The argument proves too
much, for the same necessity may exist for changing our present framework of government, or for abolishing the constitution itself, yet it would not be claimed that the treaty-making power has this extent, normally.

If the argument from necessity is permissible it could be proven that the power of Congress likewise has no limitations or that the treaty-making power rests in a majority of the states in arms, not in the President and two-thirds of the Senate, where the constitution places it.

By the English constitution the rights of a British subject cannot be ceded or extinguished by the treaty-making power without the sanction of parliament.⁵³

By Art. LXVIII. of the Belgian constitution a treaty that binds Belgians individually is not effective without the assent of the chambers.⁵⁴

Art. LIX. of the constitution of the Netherlands provides that treaties that contain any provision concerning legal rights may be ratified by the King only after the approval of the States-General.⁵⁵

In Austria the consent of the Reichsrath is necessary to a treaty imposing obligations on individual subjects.⁵⁶

The King of Spain must be authorized by a special law before he can make a treaty that may be binding individually on Spaniards.⁵⁷

The rights reserved by the tenth amendment are usually spoken of as the reserved rights of the states, but they are more than that, they are the reserved rights of the people as well. The amendment reads, "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The reserved rights of the states are valuable because they secure local self-government to the people, and, with the limitations prescribed by the state constitution

⁵³ See Crandall, 159.
⁵⁴ Crandall, 187.
⁵⁵ Crandall, 190.
⁵⁶ Crandall, 209.
⁵⁷ Crandall, 205.
against the action of the state government, secure to the citizens the enjoyment of certain rights which the Anglo-Saxon has always held dear. If these rights are not secure from the treaty-making power, then since a constitutional treaty is superior to a state constitution, the most sacred rights of the people, those they have forbidden Congress, the courts, national and state, and their own legislatures to infringe, are at the mercy of the President and two-thirds of a quorum of the Senate. If this is true then the citizen, of the United States, with all his boasted constitutions, and checks and balances, is less well protected in his fundamental rights than the citizens of most of the monarchies of Europe.58

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58 In view of the fact that this article parallels in some degree an article on the same general subject written by Mr. Charles P. Anderson, and published in vol. i, pt. 2 of the "American Journal of International Law," it seems proper to say that the present writer was unaware of the existence of Mr. Anderson's article until after the present article was in type. It may also be added that the conclusions reached in the present article differ radically from the views expressed by Mr. Anderson.