merce.[1] The power to build railroads for postal and military purposes will be hereafter considered.

§ 268. We come now to commerce with the Indian tribes. These tribes are held to be *quasi*-foreign nations, but are really domestic dependent nations, and trade with them is regulated by license or by prohibition. It is sufficient to refer to the cases.[2]

Power of Naturalization.

§ 269. In the Articles of Confederation, article IV, there was a provision which gave the privileges and immunities of free citizens in the several States to the *free inhabitants* of each; and to the people of each State right of free ingress and egress to and from any other State, etc. (See Article in Appendix.)

Mr. Madison, in the *Federalist*,[3] calls attention to the three terms used in this article, to wit: "free inhabtants," "free citizens," and "people," and then proceeds to give reasons why this clause gave place to the clause in the Constitution, article IV, section 2, to which we have sufficiently referred; and why it became important under this clause for the intercommunication of the privileges and immunities of the citizens of each State to the citizens of the several States; and why it was important to substitute for the dissimilar rules of naturalization under the Confederation the uniform rule under the Constitution. This power in the Constitution is vested in Congress by these words: "To establish a uniform rule of naturalization."[4]

It is obvious that as the citizens of each State are to be entitled to all privileges and immunities of citizens in the several States, that each State is interested in the mode in which every other State creates the status of citizenship of foreigners or others; and therefore that citizenship which

[1] Madison Papers, 1585, 1586.

[2] Cherokee Nation v. Georgia, 5 Pet. 1; Worcester v. Georgia, 6 id. 515; United States v. Holliday, 3 Wall. 407; United States v. Forty-three Gallons of Whiskey, 108 id. 491; Choctaw Nation v. United States, 119 id. 1; United States v. Rodgers, 4 How. 567.

[3] No. XLII.

[4] Const. U. S., Art. I, sec. 8, clause 4.

embraces such privileges and immunities would best be secured in every State in the Union by leaving its determination to the common consent of all. This is one of the powers which is exclusive, when in exercise by Congress, of any such power in the States; and as to foreigners would seem to be exclusive whether in exercise by Congress or not.

In the *Federalist*[1] Mr. Hamilton lays down the rule that where the Constitution "granted an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*," the power of Congress would be exclusive of that of the States. And he gives as an instance this very clause, of which he says: "This must necessarily be exclusive; because if each State had power to prescribe a distinct rule there could be no uniform rule." But despite this exclusiveness of power, the right of suffrage may be given by any State to aliens. The naturalization power does not include the suffrage power, which is exclusively reserved to the State.[2]

It has been decided[3] that an Indian is not a citizen of the United States under the fourteenth amendment of the Constitution, unless naturalized, though he may sever his tribal relations. He belongs to a domestic dependent nation, as we have seen, and cannot be introduced into citizenship of any State of the Union but by the power of Congressional naturalization. It is needless to specify these various rules. A reference to the statutes is sufficient.[4] (*a*)

Power Over Bankruptcy.

§ 270. The second part of the fourth clause of article I, section 8, of the Constitution runs in these words: "To establish uniform rules on the subject of bankruptcies throughout the United States." Correlated to this power of Congress is the prohibition of power on the States contained in a subsequent section[5] in these words: "No State

[1] No. XXXII.

[2] Cooley on the Constitution, pp. 77, 78.

[3] Elk v. Wilkins, 112 U. S. 94.

[4] R. S. of U. S., §§ 2165–2174.

[5] Const. U. S., Art. I, sec. 10, clause 1.

(*a*) By Statute (49th Congress) as of February 8th, 1887, the doctrine of the case cited, *supra*, has been changed.

shall . . . pass any law impairing the obligation of contracts."

Insolvency is inability to pay by reason of failure of assets. Bankruptcy is insolvency evidenced by certain acts. The creditor of an insolvent debtor may subject his assets to the payment of his debts, but if the debts be not paid the liability continues; and the liability for the contract debt cannot be discharged by the law of a State. In England, from which our laws are derived, and in other countries of the world, the condition of bankruptcy, which substantially involves insolvency, arose as a matter of history from the contingencies and failures of commerce and trade. It became the policy of commercial countries deeply interested in commercial enterprises, which added wealth and power to the nation, to release merchant traders from liability for debts incurred in their bold ventures, by a surrender of all their assets for the satisfaction, as far as they would go, of the debts of the bankrupt. It was held that the public had been interested in the great enterprises, and that the losses should not be visited too heavily upon the trader, who was the victim of misfortune. It was a part of the public policy, therefore, upon a full surrender of all his property, to release the bankrupt from prior liabilities and leave him free to enter upon a new field of enterprise.[1]

As the citizens of each State were entitled to all the privileges and immunities of the citizens of the several States, the framers of the Constitution considered it a proper corollary from the power vested in Congress over foreign and interstate commerce that this bankruptcy principle should be vested in the common government of the Union, to prevent the States from establishing diverse rules of bankruptcy, which would affect differently the creditors and debtors throughout the country. To give to the common government the regulation of this subject of bankruptcy, by uniform rules, would, while denying to the States the power to impair the obligation of contracts, vest in Congress the power to impair the obligation of such contracts under a uniform

[1] Cooley on the Constitution, pp. 78, 79.

rule of bankruptcy. It does not follow, therefore, that, except by uniform bankrupt laws, Congress can impair the obligation of contracts any more than can any State. A State cannot, because prohibited; Congress cannot, because the power is not delegated. Indeed, the grant of qualified power to affect the obligation of contracts by a uniform law of bankruptcy seems to exclude Congress from the unlimited power to impair such contracts. (See *ante*, p. 508 *et seq.*, the discussion of the legal tender question.)

In the adjustment of the powers of the States and of Congress in respect to the insolvent and bankrupt laws, there has arisen much learned controversy among the judges of the Supreme Court. It has been decided that a State may, by law, discharge the person of a debtor upon his surrender to his creditors of all his property. (The old *ca. sa.* law, under which the debtor's person was subject to imprisonment, is now everywhere abolished.) But it was decided at the same time that a State, while discharging the person of the debtor, could not discharge the debt or his obligation to pay it, because that would be a violation of the clause of the Constitution we have cited.[1] It has also been held that a State may absolve the future acquisitions of the debtor on such surrender of all his property to the claims of his judgment creditors. The creditor has forced the debtor to this surrender, and he must submit to the condition which the law allows to him of absolution of future acquisitions upon the surrender of his all.

But *quære* as to this. For the obligation of the debtor includes not only what he then has, but what he may thereafter acquire.[2] The leading cases on this subject are *Sturgis v. Crowninshield* and *Ogden v. Saunders*.[3] Without going into an analysis of these decisions, it will be sufficient to say that they have been explained in *Boyle v. Zacharie*,[4] and followed and sanctioned in later cases.[5]

[1] Const. U. S., Art. I, sec. 10.
[2] Satterlee v. Matthewson, 2 Pet. 380.
[3] 4 Wheat. 122; 12 id. 213
[4] 6 Pet. 348.
[5] Cook v. Moffatt, 5 How. 295;

§ 271. A summary of the results of these decisions will be now stated.

1st. The power of Congress to pass bankrupt laws is not exclusive of State power to do so; but when Congress passes such laws they are paramount to all State laws. The power in exercise is exclusive; when dormant it is not; but no bankrupt law of a State which is thus reserved to it when Congress does not exercise the bankrupt power can in any case impair the obligation of a contract. It may have a bankrupt system for the subjection of all the debtor's property to the payment of all his debts according to some uniform rule, so as not to discharge the obligation of the contract of the bankrupt with any of his creditors.

2d. But a State may, under such a bankrupt law, discharge the obligation of a future contract, but not a pre-existing one, and then only between its own citizens; because such future contract between its own citizens is held to be an obligation made with knowledge of such previously enacted law, and therefore subject to it. And such law cannot discharge a prior contract, though it may discharge the debtor's person; for his person is not part of the contract or its obligation. And so it has been held that a State may repeal a *ca. sa.* law as to prior contracts without impairing the obligation of such contracts, because the imprisonment of the debtor is a violation of his freedom, which cannot be considered to be a part of the essential obligation of the contract.[1]

3d. But such a State bankrupt law, while it may affect *future* contracts between its own citizens, cannot do so as to contracts between its own citizens and those of other States, or between citizens of another State; because such a law, while presumably known to its own citizens when they enter into future contracts, cannot be known to the citizens of another State who may be parties to the contract.

Baldwin v. Hale, 1 Wall. 223; Baldwin v Bank of Newberry, Id. 234; Gilman v. Lockwood, 4 id. 409; Boese v. King, 108 U. S. 379; Brown v. Smart, 145 id. 454; Butler v. Gorely, 146 id. 303.

[1] Beers v. Haughton, 9 Pet. 328.

But even in this case the authorities decide that where any creditor, whether of the State or of another, makes himself a party to and takes a benefit under judicial proceedings conducted according to such law, he will be held bound by it, as assenting thereto, and the debtor under such future contract will be discharged. The whole argument is set forth in the cases above cited.[1]

The bankruptcy system, regulated by the English law, and by all the laws of the United States prior to the Bankrupt Act of 1841, was based upon the rule of the right of a creditor "to throw a debtor into bankruptcy," but had never allowed the debtor to become a bankrupt on his own application. Involuntary bankruptcy was the system prior to that time; since that time in the United States there has existed voluntary as well as involuntary bankruptcy. In an ably argued case in New York,[2] the court decided that the voluntary feature of the bankrupt law of 1841, involving a principle hitherto unknown in the bankrupt laws of other countries or of the United States, was unconstitutional, because not the bankrupt laws within the contemplation of the Constitution. But that case was overruled by the cases in the Supreme Court above cited.

Power to Coin Money, etc.

§ 272. The next clause of the Constitution is: "To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures."[3]

This power is correlated to the prohibition of the States coining money, or making anything but gold and silver coin a tender in payment of debts. By the Articles of Confederation the Congress had the power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States, and of fixing the standard of weights and measures throughout the United States.[4] The present

[1] Brown v. Smart, 145 U. S. 454; Butler v. Gorely, 146 id. 303.

[2] Kunzler v. Kohaus, 5 Hill (N. Y.), 317–27.

[3] Const. U. S., Art. I, sec. 8, clause 5.

[4] Articles of Confederation, Art. IX.

Constitution excludes the power of the States to coin at all, and gives to Congress the coinage of money and the regulation of the value thereof; that is, of its own coin and of foreign coins, and the fixing of the standard.

So much has already been said on the nature of this power[1] that it is only necessary to say that the power to coin money and regulate its value, when connected with the words "and of foreign coin," excludes all idea that this clause relates to paper money at all, or to anything but coined money. The first part of this clause, therefore, provides for the measurement of values in the coined money, which alone the States could allow to be used as legal tender; the latter to the regulation of articles of commerce by the standard of weights and the standard of measurement. These provisions look to the intimate union of the States in trade and commerce, and intercourse among themselves and between them and foreign nations. It is impossible to have the regulation of commerce by the Union without a like regulation of coinage, as the money which is the medium of such commerce and of coinage, weights and measures is essential to all. It is another proof of the wisdom of the men who framed it that the Constitution gave to the common government the complete management of those matters which concerned the business and commerce of the States external to each of them, while it retained to each State the exclusive control of everything that was a part of the internal polity.

Congress under this power has established mints, and made provisions in reference to coinage, and the metric system of weights and measures, the details of which need not be gone into; but a reference to the statutes is all that is necessary.[2]

Power to Punish Counterfeiting.

§ 273. The next clause is in this language: "To provide for the punishment of counterfeiting the securities and current coin of the United States."

[1] Page 508 *et seq.*

[2] R. S. U. S., §§ 3495–3570.

This is very briefly referred to by Mr. Madison in the *Federalist*. The language of this article is suggestive of the conclusions already reached in reference to its meaning. Mr. Madison says:[1] "The punishment of counterfeiting the public securities as well as the current coin is submitted of course to that authority which is to secure the value of both." The securities of the government are its obligations by bonds, notes, etc. The counterfeiting of these, as a distinct class of offenses from that of counterfeiting the coin, shows that there was no confusion in the minds of the framers of the Constitution. This power is not exclusive. The States may punish the passing of the coin, notes or securities of the United States. Congress may protect its coin and securities against the assaults of the counterfeiter; but the States may protect their people from the personal loss suffered by any one to whom they are passed.[2]

Postal Power.

§ 274. By the Articles of Confederation Congress had the power of "establishing or regulating postoffices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same, as may be requisite to defray the expenses of the said office."[3] Under this power Congress did establish, even before the Articles were adopted, postal arrangements throughout the States. Among the regulations of that period we note the following: Power by Congress to designate the posts by which mails may be carried, and the places through which they shall go; to make arrangements with European packets for conveyance of letters and the like;[4] to prescribe the postage and the money to be received;[5] to authorize the Postmaster-General to carry mail by stage carriages or otherwise, as he may think best; to form postoffices.[6] The Postmaster-

[1] Federalist, No. XLII.

[2] Cooley on the Constitution, 82, 83; Fox v. Ohio, 5 How. 410, 433; United States v. Marigold, 9 id. 560; Moore v. Illinois, 14 id. 13.

[3] Article IX of the Confederation.

[4] 11 Journal of Congress, 154, 155.

[5] Id. 84, 154.

[6] 1 Id. 166.

General was authorized to establish a line of posts and cross-posts as he shall deem best; the profits, if any, to be paid into the treasury, and if not enough, to be made good by the United Colonies;[1] and the mails were regulated, with no power to stop or examine them, except by the Committee of Safety of each colony.[2] And disaffected persons were excluded from any connection with the mails.

After the Articles were adopted an ordinance was passed in 1782 for establishing and regulating the postal department, providing for direct routes and for cross routes where deemed necessary, and postal rates. And the ordinance referred to prohibited the carrying of letters by any others than employees of the department.[3]

The provision in the present Constitution is much more simple. The words used in the Articles of Confederation were "establish and regulate." The only word used in the Constitution is "establish." There is no difficulty in the construction of these words to "establish postoffices," etc., and they seem by clear implication to include not only the offices but the carriage of mail matter from office to office. The first question to be asked is, whether this power is exclusive, and does the grant of the power operate as a prohibition of it on the States? Mr. Hamilton[4] lays down three tests, already referred to, of the exclusiveness of a power granted to Congress. 1st. Where the exclusiveness is expressed in distinct terms; 2d, where the grant is made to Congress coupled with a prohibition of it to the States; and 3d, where the power is given to Congress to establish a uniform rule, which would be defeated by the exercise of like power by the States. This power does not come under either of these three rules. It is not granted with a correlative prohibition to the States, nor is the idea of the term of uniformity expressed in the grant of the power. It would seem, therefore, to be clear that, if the power be not exercised, it may be exercised by the reservation of power in the States. If the power be exercised, however, it is perhaps exclusive to this extent, that the exercise of the power by the State will, if in conflict with the due exercise of it by Congress, be subordinate to the Congressional law. And the Supreme Court, in *Ex parte Jackson*,[1] limited the power of Congress to the point of prohibiting articles which are legitimate mail matter from being carried over postal roads in competition with the postoffice department, but not as forbidding them to be sent by any other means as merchandise. This opinion would seem to leave to the States the exercise of the postal power where it does not compete with and thus interfere with the postal arrangements of the United States. And this view is sustained by the late case of *In re Rapier* and the case of *Horner v. United States*[2] in the same volume. So that it would seem that where the Postoffice Department refuses to carry any postal matter for any reason, the State cannot be prohibited from doing so through other media than the mails. Congress may establish and discontinue postoffices and post roads at will,[3] and the department may change part of a road where it is impassable without changing the route.[4]

Congress has passed an act,[5] amended in 1890,[6] prohibiting the conveyance of obscene matter through the mails. In the cases *supra*, the Supreme Court decided that Congress can regulate the entire postal system of the country, and may designate what shall be carried in the mail and what shall be excluded, and punish the deposit in the office of any such matter as is prohibited by the statutes mentioned. And further decided that the object of Congress was not to interfere with the freedom of the press or any other rights of the people, but to refuse the facilities of the mails for the distribution of matter deemed injurious by Congress to the public morals, but that transmission of such matter so excluded in any other way would not be forbidden. But in *Ex parte*

[1] Id. 166.
[2] 2 Id. 131, 132.
[3] 7 Id. 385.
[4] Federalist, No. XXXII.

[1] 96 U. S. 727.
[2] 143 U. S. 110; Id. 207.
[3] Ware v. United States, 4 Wall. 617.
[4] United States v. Barlow, 132 U. S. 271.
[5] R. S. of U. S., § 3894.
[6] 26 Statutes at Large, 465, ch. 908.

Jackson the court distinguishes between letters and sealed packages which are not open to inspection, and newspapers and the like left open for examination by postmasters; and held that no regulation in reference to personal papers and effects protected against unreasonable searches and seizures could be made except upon warrant issued upon oath or affirmation as is required under the fourth article of the amendments of the Constitution. These decisions give sanction to these laws. But it is fair to express a doubt whether the duty involved in the power of Congress to carry postal matter through the mails can be so regulated by law as to make it necessary and proper to exclude matter from the mails for its moral character, although if it be too bulky for convenient carriage, or if it contain germs of disease, it may be excluded as a regulation necessary and proper to be made by Congress.

To give to Congress the power to refuse to carry mail matter because its moral quality may offend against the sentiment of Congress involves a censorship over letters, postals and newspapers, which draws within the sphere of Congressional legislation that which belongs only to the police power of the States. Sealed letters may be searched on warrant, and unsealed letters and postals may be searched without warrant; and to prohibit the correspondence of the people and the transmission of documents might, by the exercise of this power by Congress, in effect debar the people from the privilege of the mails. This jurisdiction, it is obvious, does not touch the duty of transmission of matter, but touches the moral quality of the matter itself. But if what the States do not condemn as immoral, or what they do condemn by their own press, is to be made criminal by the law of Congress, and this power of Congress through the use of the mails becomes the paramount moral censor for the people of the States who may wish to use the mails, what is to be the effect of the transmission of matter through the mails which the State condemns and Congress sanctions? Can Congress under this power compel the postmaster to deliver

matter morally hurtful to people to whom it is addressed, though the State forbids its admission as a moral pestilence, or as the destroyer of the order and peace of society?

This question has not been decided by the Supreme Court. That court has decided that a private party cannot compel the Postoffice Department to convey any immoral matter through the mail, but the court has never decided that the department can carry that which the State holds to be immoral matter through the mail and deliver it to its citizens. Congress may refuse to touch the matter which it deems offensive or to permit its mails to be polluted thereby; but when it forces the State to receive into its society offensive matter which Congress does not condemn, or may even approve, is it constitutional? The question of physical and moral quarantine arises here, and, as applied to the commercial power of Congress, may be equally applied to the postal power of Congress. To the State, as we have seen, is confided the care of the physical and moral health of its people. This view has been sanctioned by the highest judicial decisions.

§ 275. An interesting opinion was given by Mr. Attorney-General Cushing, March 3, 1857, in which he held and advised the Postoffice Department, then under the control of Postmaster-General Joseph Holt, that where the mails were used as a medium for the transmission of incendiary matter inciting a portion of the people of a State to rebellion, the State had the constitutional power to prevent its reception by its people from the hand of the postmaster. Under this opinion the Postmaster-General acted, and allowed a judicial procedure under State law to determine whether the matter transmitted in the mails was dangerous to the peace and order and safety of society, and on such decision the postmaster was required to deliver the matter to the custody of the State, and its distribution was prohibited for the preservation of the safety of society.[1] The Attorney-General maintained with great ability that in such cases a law of Congress which forbade the operation of the police power

[1] Yazoo City Postoffice, Opinions of Attorney-General, vol. 8, p. 489

of the State in a matter which threatened the State with insurrection was a violation of the constitutional duty, because it incited to an insurrection, which by the Constitution the United States were compelled to suppress.[1]

§ 276. In the latter part of the clause are inserted the words "and post roads." The establishment of postoffices may include the power to create them, if necessary and proper to carry out that power. The same construction applies to the words "post roads." It may involve the construction of roads, if necessary and proper for postal purposes. The practice of the government under the Confederation and under the Constitution has been to designate, and thus give legal sanction and status, to the roads of the States as the postal roads of the government. If there were no roads, they being absolutely necessary to the transmission of mail matter, to make a road under such circumstances would be a fair exercise of power. But to make a road for other purposes and with other intent than for postal purposes, under cover of this power, would be neither necessary nor proper, but a fraud on the Constitution.

It has already been pointed out that the proposition in the convention to grant the power of making canals was after full debate on its merits negatived by the vote of eight States to three.[2] In Pinckney's plan there were two propositions: "to establish postoffices," and further on "to establish post and military roads."[3] The Committee on Detail reported only the proposition to establish postoffices. This would have left the matter substantially as it existed under the Articles of Confederation.[4] Subsequently, on consideration of the clause "to establish postoffices," Mr. Gerry moved to add "and postroads;" carried, six States to five. The provision

[1] Const. U. S., Art. IV, sec. 4. In a speech of the editor, made in the House of Representatives on the 11th of December, 1893 (2d Sess. 53d Cong., Vol. 26, Appen. Pt. I, p. 3 *et seq.*), will be found in full the opinions of Attorney-General Cushing and Postmaster-General Holt, in the Yazoo City Postoffice Case, and that of the author, as Attorney-General of Virginia, in a similar case, as well as other matter bearing on this question.

[2] Madison Papers, 1576–77.

[3] Id. 740.

[4] Id. 1232.

for military roads was left out permanently. The fair construction of the whole clause, therefore, is that as the mails can only be carried on roads upon the land, the power to establish, not make or construct, post roads was intended simply to grant the power to make them if there were none already made, where roads were necessary for postal purposes. This question has been an open one and much debated for nearly a century. We have seen that Mr. Madison was decidedly in the negative on the question; and Mr. Monroe, in his celebrated message of 1823, sustained it, not on the ground of the independent power to make the roads, but on his construction of the power to appropriate money for the general welfare, under which he claimed that, while Congress could not make the roads, it could appropriate money in aid of their construction. The power to build the roads, where not for postal purposes, has therefore never been settled.

The Cumberland road was constructed almost exclusively with the money of the United States under the authority of successive acts of Congress. The States through which it passed authorized the United States to construct the road. The States subsequently took the road under their care, in so far as any part of it was in their domain, upon a contract with the United States upon a surrender of it to them by Congress. The State of Pennsylvania undertook to charge tolls upon the mail carriages passing over the road in that State. The court decided that such tolls were in violation of the contract between the United States and Pennsylvania, under which the State took possession of the road.[1] This case and those cited in the note do not involve at all the constitutionality of the acts of Congress appropriating money for the Cumberland road.

In the *Sinking Fund Cases*[2] the court held that Congress could enforce its contract with the Central Pacific road on its loan to it, irrespective of the constitutionality of the contract. The great transcontinental railways through the Ter-

[1] Searight v. Stokes, 3 How. 151; Neil v. Ohio, Id. 720; Achison v. Huddleson, 12 How. 293.

[2] Union Pacific R. R. Co. v. United States, 99 U. S. 700.