over its Territories, but not within the terms of the third article of the Constitution, which we have been considering. The judges of these courts, therefore, do not hold offices during good behavior, but are appointed by the President and are removable like other officers. The practice, pleading and procedure are left by Congress to be regulated by the Territorial legislatures.[1]

[1] American Ins. Co. v. Canter, 1 Pet. 511; Clinton v. Englebrecht, 13 Wall. 434; Hornbuckle v. Toombs, 18 id. 648.

CHAPTER XIV.

LIMITATIONS ON THE POWERS OF THE STATES.

§ 386. In the tenth amendment of the Constitution, which is in fact but an expression of what is involved by implication in the original Constitution, it is provided: "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." This draws the line of demarcation between the powers delegated to the United States and the powers reserved to the States for the people. The language of the clause would indicate that all powers are reserved to the States, or the people, except two classes: First, those delegated to the United States by the Constitution; and second, those prohibited to the States.

We have already considered the extent of the powers delegated to the United States by the Constitution, and the express limitations upon those powers as well as those which were implied from the nature of the Constitution, and found that those so delegated or implied are not reserved to the States. We come now to consider another class of powers, not reserved to the States or to the people, and that class is those which are prohibited to the States. Two remarks are proper in this connection. First, except for these express prohibitions, the States would hold them as reserved under the terms of the tenth amendment. Second, all of these prohibitions are based on the principle that in the nature of our Union, the powers prohibited to the States should be vested exclusively in the common government, and that their exercise by the States would be inconsistent with the intercommunication of citizen rights, intended to be conserved by the establishment of the Union. The application of these remarks to each limitation will appear in the consideration of

them. These limitations are of two classes: absolute and qualified. We will consider first the absolute limitations. These are to be found in article I, section 10, clause 1 of the Constitution. The language of the first limitation is: "No State shall enter into any treaty, alliance, or confederation." It would seem from this express limitation that, but for its being inserted, the States might enter into a treaty, alliance, or confederation. Why is it so expressed? It is obvious that the exercise of such a power by the State would be contrary to the nature of the Union, or produce friction with it. If a State might make a treaty with a foreign power, the mutual obligation of such treaty would involve the Union in a defense of the State against unjust enforcement of the treaty, or in offensive operations against a foreign power to enforce the treaty. This would give to each State by its separate will a power to involve all the States in war, which might result from the infraction of the treaty by either of the parties. Such a result would be contrary to the just relations of the States *inter se*. The treaty-making power between the United States and foreign nations was given, as we have seen, to the President and Senate as representing all. The relations of each State, therefore, to foreign powers was fully met by this power to make treaties between the United States and foreign countries. To make peace and avert conflict, it was the wise policy of the Constitution to give the exclusive treaty-making power to the President and Senate as representing all the United States, and to exclude any one State from entering into any such international obligation.

An alliance between any State and a foreign power for offense or defense would obviously be inconsistent with the Federal alliance between the States of the Union. It is therefore necessary and wise to prevent any one State from involving the United States in any separate alliance that it might desire to make with a foreign power. The same remark is *a fortiori* applicable to the prohibition of confederation by any State with a foreign power. Confederation would involve political relations established by the Constitution of the Union. To this prohibition both of the preliminary remarks are applicable. The framers of the Constitution saw that, if not prohibited, each State might enter into treaty, alliance, or confederation with a foreign power, despite the grant of the power to the President and Senate to make treaties. It was wise, if not essential, therefore, to prohibit any such action by the State. The wisdom of the prohibition need not be further vindicated.

No State "grant letters of marque and reprisal." The nature of this power which was granted to Congress[1] has been already considered. Such letters may be issued in peace and in war; but in either case it is the forcible vindication of right by the government that issues them. To allow each State separately to do this might bring on collisions with the privateers of the States and foreign countries which would involve all in war. It is wise and essential, therefore, while granting the power to Congress to do this, that the power should be exclusive of any such power in a State, lest the State, by its separate action, should involve all the rest in war; and yet it will be observed that the prohibition involves the implication that the State might have issued its own letters of marque and reprisal if it had not been prohibited.

No State "shall coin money." Under the Articles of Confederation, the States, as well as Congress, had the right to coin money, but Congress had the power to regulate the value thereof. It was clearly intended, not only to grant to Congress the power to coin money,[2] but to make this power exclusive by forbidding the States to do so, which would otherwise have been imputed. In considering heretofore the power of Congress to coin money and regulate its value, we have pointed out the important relations of the medium of exchange thereby provided for in its relations to commerce among the States, and to the intimate and allied relations of citizenship in the several States. Coin of uniform value,

[1] Const. U. S., Art. I, sec. 8, clause 11. [2] Id., Art. I, sec. 8, clause 5.

for the whole Union, is essential to the freedom of trade which the Constitution proposed to establish between these United Commonwealths. This is to be done by the exclusive grant of this power to Congress and prohibition of it to the States.

§ 387. The next clause provided that no State "shall emit bills of credit." By the Articles of Confederation, Congress had the power to emit bills of credit, and there was no prohibition of this power to the States. The disastrous effects which resulted from the emission of bills of credit by the Congress of the Confederation as well as by the various States, flooding the avenues of commerce with irredeemable and valueless paper money, made the convention of 1787, as we have seen, strike out the power proposed to be given expressly to Congress to emit bills of credit under the power to borrow money; yet the implication of this power of emitting bills was held not to involve the power to make such bills issued by Congress a legal tender in the payment of debts, but the Constitution intended to cut out by the roots the power of the States to flood the Union with their paper money. This prohibition did not forbid the State to issue paper obligations, bonds, notes, or coupons attached to bonds for payment of interest, etc., and such were not intended to be inhibited. The meaning, therefore, of the term "bills of credit" came to be a question of importance in the early cases in the Supreme Court. In *Craig v. Missouri*[1] the Supreme Court held that any obligation by which the State engages to pay money at a future day, and intended to circulate as money, whether they were made by the State a legal tender or not, were unconstitutional. The term "bills of credit" was in that case, and in the later case of *Briscoe v. Bank of Kentucky*,[2] held to include all classes of paper issued by the sovereign power, pledging its faith, and intended to circulate as money. The emission of such obligations with such pledge of credit, in the absence of such intention, makes the instrument not a bill of credit under this prohibition.

[1] 4 Pet. 410.

[2] 11 Pet. 257.

The court further decided that, while the States cannot emit notes to circulate as money, they may incorporate banks with the power to issue bank-notes to circulate as money. These are the notes of the bank, not of the State, and unless the State's credit is pledged to the redemption of these bank-notes, such bank-notes will be constitutional, and will not be bills of credit emitted by the State within the terms of this prohibition; and it was afterwards conceded that, though the State was a stockholder, and the only stockholder, it was held to be the note of the bank and not of the State.[1] While, therefore, certificates issued by the State of Missouri were held to be bills of credit and void, because intended to circulate as money,[2] the coupons on bonds of the State of Virginia, issued to its creditors, were not held to be bills of credit within the meaning of this prohibition, because, though negotiable and receivable for taxes, they were not intended to circulate as money.[3]

The next provision is that no State "shall make anything but gold and silver coin a tender in payment of debts." This is a very important provision. Upon it several points may be made. Reading it with the fifth clause of the eighth section of the first article, which gives power to Congress "to coin money, regulate the value thereof, and of foreign coin," etc., it is obvious that the power of Congress to coin money enables it to coin gold and silver coin for the purpose of being used as a medium in payment of debts. The clause would then be as if it read, "Congress shall have the power to coin gold and silver coins, and no State shall make any but these a tender in the payment of debts." Second, taken in connection with the immediately preceding clause, by which the States are prohibited from emitting bills of credit, it is obvious the Constitution contemplated, as the medium of exchange, gold and silver coins struck by Congress, excluding all power of

[1] Darrington v. The State Bank of Alabama, 13 How. 12.

[2] Craig v. The State of Missouri, 4 Pet. 410, 432; Burns v. Missouri, 8 id. 40.

[3] Virginia Coupon Cases, 114 U. S. 269.

the States to coin money of their own or to emit bills of credit. Third, several of the preceding powers, as we have seen, are correlated to powers granted to the Congress, with which the exercise of the same by the States would be inconsistent. That is not the case with this clause, for there is no power given to Congress, nor a hint of a power in Congress, to make anything a tender in the payment of debts. Indeed this clause of prohibition to the States indicates that, but for its being inserted in the Constitution, it would have been left to the States, as a reserved power, to make anything they pleased a tender in the payment of debts. If there is anything which is within the language of the reserved powers of the States, it would be the regulation of the relations of debtor and creditor in the private concerns of society. It was therefore essential that such a prohibition upon the power of the State should be inserted. This prohibition, therefore, gives no warrant for the assumption of a power by Congress to make anything a tender in the payment of debts except gold and silver coin. If the power within this clause of prohibition had been clearly reserved to the States without such prohibition, it would be wholly illogical to infer that the prohibition of such a power was to be equivalent to a grant of the prohibited power to the United States. Under the tenth amendment of the Constitution the powers not delegated to the United States, if not prohibited to the States, are reserved by that amendment to the States or to the people. It would be an unwarranted perversion of this article to hold that the powers not delegated to the United States, but prohibited to the States, are to be regarded, because not reserved to the States, as delegated to the United States. It would therefore seem to be a sound interpretation of these kindred clauses of the Constitution, that while Congress was to be the instrument for putting the stamp of currency upon coins of gold and silver, in order to create a circulating medium, the States were forbidden to make anything but these coins a tender in the payment of debts, and no power was delegated to the United States to do so; and therefore, as a medium for the solution of debts

between man and man, the Constitution intended that the gold and silver coin, stamped by Congress, as well as foreign coins, whose value, like that of the domestic coin, is to be regulated by Congress, was to be the only medium for the payment of debts under the system established by the Constitution.

Another remark on this and the preceding clause will be applicable. The bills of credit which a State might desire to emit, or the thing which a State might make a tender in payment of debts, would only have been applicable to the people of the particular State itself. It would have been somewhat out of place for the Constitution to have forbidden the State to exercise these powers, but looking to the freedom of interstate commerce, and of the intercourse between the citizens of the different States, and to the unification of the business of the whole Union, without regard to State boundaries, all of which was contemplated by the Constitution to be free among the States as if they were not separated by State boundary lines. It would be very important that, as far as contractual relations were created between the citizens of different States, the citizen of every other State should be assured that no invidious policy by any one State should shake the credit which was given to the terms of any contract. The provision was therefore made to prevent any State from impairing the integrity of contractual obligations by making anything except gold and silver coin, issued by Congress, the medium for the solution of debts. In this aspect the prohibition is essential to the assurance of confidence intended to be established in the dealings between citizens of the different States.

The next clause provides that no State shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." We need say nothing more on the subject of bills of attainder and *ex post facto* laws than has already been said in discussing a like prohibition on Congress in clause 3 of section 9 of article I of the Constitution. What was said on that subject may be here referred to without any further

comment.[1] The important cases on this subject may be noted.[2] This prohibition upon the State was not so much designed to defend the citizen of that State from the power of his own Commonwealth as it was to protect the citizens of other States who might be subject to criminal prosecution in a State other than their own. It was to protect these and all from the tyranny of such laws as are mentioned. But the third clause, which forbids any law impairing the obligation of contracts, is one of great importance. The power of this prohibition was, as has already been stated, to maintain the integrity of contracts between citizens of different States and portions of the Union. If any State could, at its will, impair the obligation of a contract between its own citizen and the citizens of other States, it would be a fatal impediment to interstate commerce and Federal intercourse. A careful analysis of this important provision and a reference to the cases in which its interpretation has come before the Supreme and other courts will now be attempted. The meaning of the word "law" embraces not only an ordinary act of legislation, but the Constitution of a State, which is held to be a law within the meaning of this clause because it is the supreme law passed by a State; hence, if the Constitution of a State, by its operations, directly or indirectly impair the obligation of private contracts, it would be void under this provision of the Constitution of the United States.[3]

§ 388. Contracts are executed and executory. An executed contract is one between two or more parties by which property or other right is transferred or granted from one to the other. An executory contract is an agreement to do or not to do a particular thing. This clause of the Constitution forbids the impairing of either class of contracts. No State can pass a law invalidating or annulling a deed. This was decided in the leading case of *Fletcher v. Peck*,[1] and it forbids a State from impairing the validity of its grant to a private party.[2] It was held that a State cannot impair its own contract to receive coupons on its own bonds, in the payment of taxes due to itself; and a contract by a State to receive certain bank notes in payment of taxes is binding and cannot be impaired;[3] but where the State holds a trust fund for certain purposes, it cannot make a contract for the payment of the interest on such trust funds to itself in such bank notes. Its duty as trustee makes its agreement to receive these bank notes, in the payment of interest on such trust funds, a violation of such trust and a violation of such contract. The contract involved is not impaired in obligation by the State's refusal to receive such notes in payment;[4] and this principle is applied to the constitutional duty to set apart a certain proportion of its taxes for school purposes, as its contract to receive coupons of its bonds in payment of ordinary taxes is not a valid and binding contract in so far as a school fund is concerned.[5] It applies also to a contract between two States; neither State can, by law, impair the obligation of such contract.[6] A law of a State granting swamp land, unsettled or drained, and exempting such land from taxation, is a contract between the State and the holder which the State cannot impair by taxing.[7] Cases sustaining these propositions and kindred ones are without number, and a reference to the latest, in which all are more or less named and reviewed, is all that is necessary.[8]

[1] *Ante*, ch. X.

[2] Ex parte Garland, 4 Wall. 333; Cummings v. Missouri, id. 277.

[3] Fletcher v. Peck, 6 Cr. 88; New Jersey v. Wilson, 7 id. 164; Green v. Biddle, 8 Wheat. 1; Ogden v. Saunders, 12 id. 214; Railroad Co. v. McClure, 10 Wall. 511; County of Moultrie v. Savings Bank, 92 U. S. 631.

§ 389. We come now to the application of this clause to corporation charters. The leading case on this subject is

[1] 6 Cr. 87; Von Hoffman v. City of Quincy, 4 Wall. 549.

[2] New Jersey v. Wilson, 7 Cr. 164; Terrett v. Taylor, 9 id. 43; Coupon Cases, 114 U. S. 269; McGahey v. Virginia, 135 id. 662; Louisiana v. New Orleans, 102 id. 203; Antoni v. Greenhow, 107 id. 769.

[3] Woodruff v. Trapnall, 10 How. 190; Furman v. Nichol, 8 Wall. 44; Keith v. Clark, 97 U. S. 454.

[4] Paup v. Drew, 10 How. 218.

[5] McGahey v. Virginia, 135 U. S. 662.

[6] Green v. Biddle, 8 Wheat. 1, 92.

[7] McGee v. Mathis, 4 Wall. 156.

[8] Thompson v. Missouri, 171 U. S. 380; Thompson v. Utah, 170 id. 343; Hawkes v. New York, id. 189, and cases *supra*.

the *Dartmouth College Case*.[1] To understand this class of cases, it may be proper to say that a corporation is an artificial being, invisible, and existing only in contemplation of law. Created by the legislative department, it possesses certain properties which the charter confers upon it, either expressly or by implication. It clothes bodies of men with perpetuity of existence, with certain qualities and capacities for the advancement or promotion of some particular object. It is granted to persons who apply for the charter and who invest their money or engage in a business the powers of which are conferred by the charter. A law granting a charter to persons does not create a corporation until they accept it.[2] The law is a proposal by the government to the persons indicated, which becomes a contract between the government and such persons when, under the law and its provisions, they organize for the corporation purposes. Until then the corporation does not exist. When this is done, the proposal of the government, by the acceptance of the parties, becomes a contract between them.[3] The charter of such a corporation is therefore a contract between the government and the persons who accept; and being such a contract, the government cannot repeal, alter, or in any manner impair the charter without violating this constitutional provision.[4] In the leading case of *Dartmouth College*, *supra*, the Crown of Great Britain in 1751 had granted a charter for that college to certain parties who contributed their funds for its endowment. The terms of the charter fixed its organization and prescribed the powers and functions of the various boards and faculty connected with it. After the Revolution the State of New Hampshire (all the rights and privileges, as well as obligations, of Great Britain, then

[1] 4 Wheat. 518–677.

[2] The King v. Pasmore, 3 T. R. 199, 240.

[3] Commonwealth v. Cambridge, 7 Mass. 160, 184; Smith v. Silver Valley Mining Co., 64 Md. 85; Baltimore & Ohio R. Co. v. Keedy, 75 id. 330; Rex v. Vice-Chancellor, etc., 3 Burr. 1661; Dartmouth College Case, 4 Wheat. 518; Bank of United States v. Dandridge, 12 id. 71; Thaxter v. Williams, 14 Pick. 53.

[4] Cases *supra*.

devolving upon each separate State) undertook to change the charter without the consent of the college. The question came by appeal to the Supreme Court. Chief Justice Marshall, in a learned opinion, explained the doctrine that the college was on a contractual basis between the Crown and the founders, and that the State of New Hampshire, as successor to the Crown, could not change the terms of that valid and binding contract. That case, decided nearly eighty years ago, has been followed by numerous cases in the Federal and in the State courts with almost uniform approbation; and it may be now laid down as the established doctrine that all corporate charters which rest on a contractual basis are unchangeable in every respect by the power of a State.[1]

This perpetuity given to corporate power, placing it beyond the reach of State action by its legislature, if exercised constitutionally, has, in the last century, given rise to a conservative saving in most of the charters of a right of the legislature to repeal, alter and amend at pleasure. When such right is reserved, of course the repeal or amendment of the charter is a part of the contract and may be fully exercised.[2] But as to this a distinction must be made: all rights, privileges and immunities derived directly from the State's charter are those under the reserved powers of the States to repeal and alter;[3] and so every right, franchise or power of the corporation depends for its being upon the grants of the charter.[4] But all rights of property or other rights, acquired by the exercise of its chartered powers, are beyond the reach of the legislative repeal and cannot be divested. The exercise of chartered power in the future is ended by repeal, but the fruits of the exercise of such power before the repealing act cannot be taken away.[5]

[1] Jefferson Branch Bank v. Skelly, 1 Black, 442; Hall v. Wisconsin, 103 U. S. 5; Binghamton Bridge, 3 Wall. 51; New Orleans v. Houston, 119 U. S. 265.

[2] West Wisconsin Ry. Co. v. Board of Supervisors of Trempealeau Co., 93 U. S. 595; Beer Co. v. Massachusetts, 97 id. 25.

[3] Tomlinson v. Jessup, 15 Wall. 454.

[4] Greenwood v. Freight Co., 105 U. S. 13.

[5] Mumma v. Potomac Co., 8 Pet.

Repeal takes away power, but cannot take away what the power created while it was in being. A tree may be cut down, but its gathered fruit is beyond the power of the axeman to injure. So if a charter be wholly repealed, and while it cannot survive as a corporation, all its property rights or other franchises that may exist may be sold or dedicated to the payment of its debts or divided among its stockholders;[1] and so when the power to alter is exercised, while it cannot continue to act, except under its modified charter, the charter itself is not binding upon the corporators without their consent.[2]

An eleemosynary corporation charter is irrepealable, and not to be impaired except by the consent of the founders; but such corporations on public foundation are subject to the legislative power of repeal and alteration, and this though such corporation has been aided by private contributions. The original public foundation gives character to the funds so contributed; *e contra*, such a corporation on private foundation, though aided by public contributions, is still not subject to legislative repeal or alterations.[3] But where a corporation by its charter is based on State and private subscriptions of stock, this was held to be contractual and irrepealable.[4] Again, a municipal corporation is a subordinate Body-politic. These grew out of the public policy attendant on Roman conquest, and were corporations endowed by imperial Rome, with certain political functions for the particular locality. They were the prototypes of the free cities of the middle ages, which were the defenses of liberty under

281; New Jersey v. Yard, 95 U. S. 104; County of Scotland v. Thomas, 94 id. 682; Sinking Fund Cases, 99 id. 700.

[1] Memphis R. R. Co. v. Commissioners, 112 U. S. 609; Willamette M. Co. v. Bank, 119 id. 191; Shields v. Ohio, 95 id. 319.

[2] Yeaton v. Bank of the Old Dominion, 21 Gratt. 593.

[3] Dartmouth College Case, 4 Wheat. 518; Curran v. Arkansas, 15 How. 304; Mormon Church v. United States, 136 U. S. 1; City of Louisville v. President, etc. of University, 15 B. Mon. 642; Visitors, etc. of St. John's College v. State of Maryland, 15 Md. 330.

[4] Essex Public Road Board v. Skinkle, 140 U. S. 334.

local administration against the despotism of the era. In modern times the government of England and the States of America have created cities and towns with charters in which there is a delegation by the sovereign power to the municipality of certain political functions, with a view to needful local government. Counties, cities and towns are embraced in this class.

These charters are based upon no contract with the people, but created by the political authority for its convenience and for motives of public policy. The relation between the sovereignty and municipality is not contractual, but is one of delegation by a principal to an agent. This grant of political power, therefore, is revocable at the will of the State, because it is not on a contractual basis;[1] and this distinction was maintained in the early leading case of *Dartmouth College;* and Sharswood, J., has said in an important case,[2] with great force, that "a State legislature, being a delegated authority, cannot delegate its legislative power to a municipality by irrevocable grant." Such a contract of alienation would be *ultra vires* and void.[3] A benefit granted to a county by a State is revocable, because a benefit to itself,[4] and the legislature may resume its power in a city at will.[5] It is clear that a State cannot, therefore, alienate, by charter or otherwise, to a municipal corporation its political

[1] Korn v. Mutual Assurance Society of Virginia, 6 Cr. 192; Maryland v. Baltimore & O. R. R. Co., 3 How. 551; East Hartford v. Hartford Bridge Co., 10 id. 511; Butler v. Pennsylvania, 10 id. 402; Trustees, etc., v. Indiana, 14 id. 268; Zabriskie v. Cleveland, etc. R. R. Co., 23 id. 381; Yeaton v. Bank of Old Dominion, 21 Gratt. 604; Laramie Co. v. Albany Co., 92 U. S. 307; Mt. Pleasant v. Beckwith, 100 U. S. 514.

[2] Philadelphia v. Fox, 64 Pa. St. 169.

[3] State Bank of Ohio v. Knoop, 16 How. 369; United States v. Railroad Co., 17 Wall. 322; Yeaton v. Bank of Old Dominion, 21 Gratt. 604; Whiting v. Town of West Point, 88 Va. 905.

[4] Maryland v. B. & O. R. R. Co., 12 Gill & J. 399; s. c., 3 How. 534.

[5] Mayor, etc. v. State ex rel. Board of Police, 15 Md. 376; Bass v. Fontleroy, 11 Tex. 698; Matter of Lands in Town of Flatbush, 60 N. Y. 398; People v. Hurlbut, 24 Mich. 44; United States v. Memphis, 97 U. S. 284; New Orleans v. Clark, 95 id. 644.