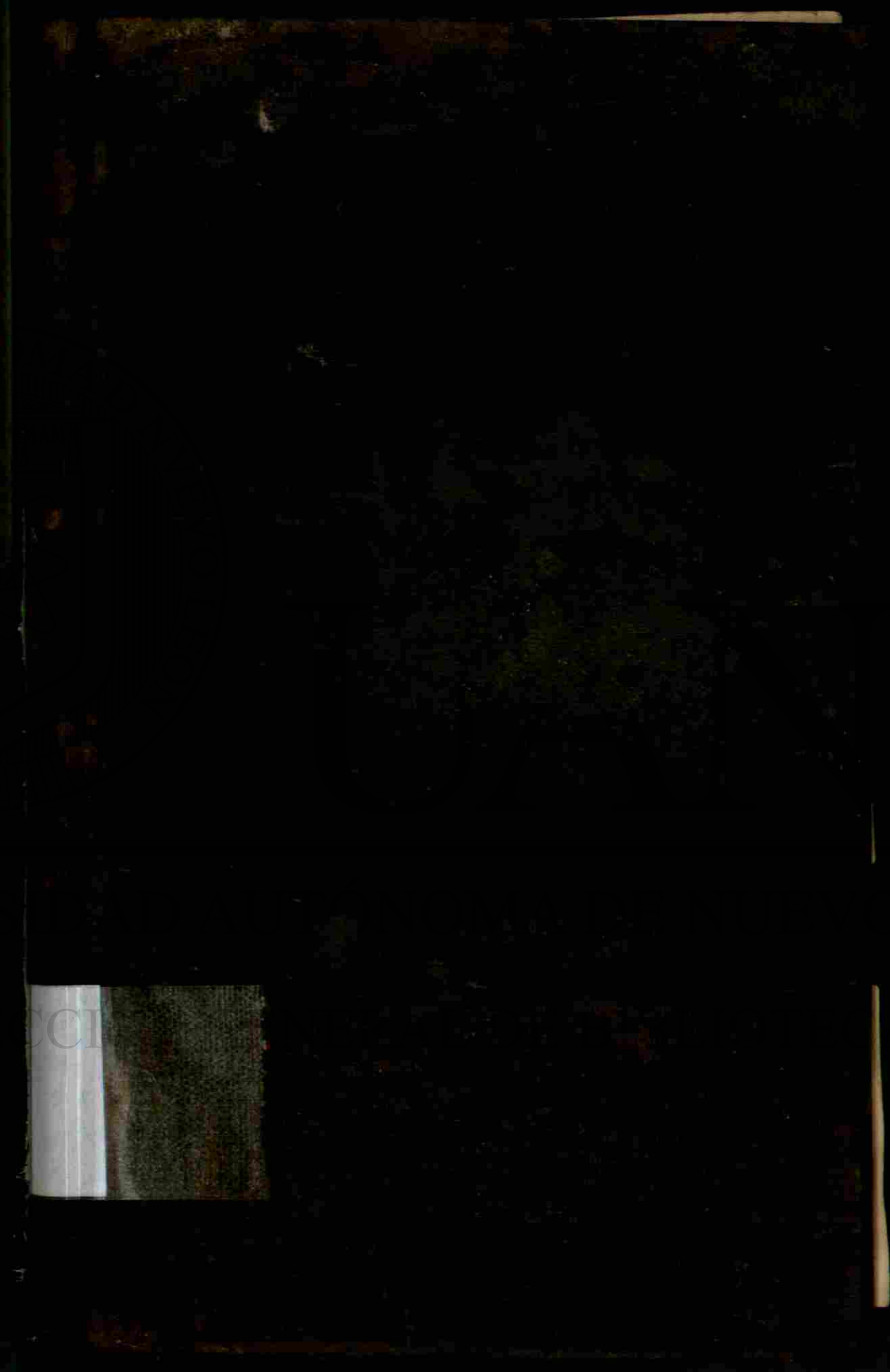

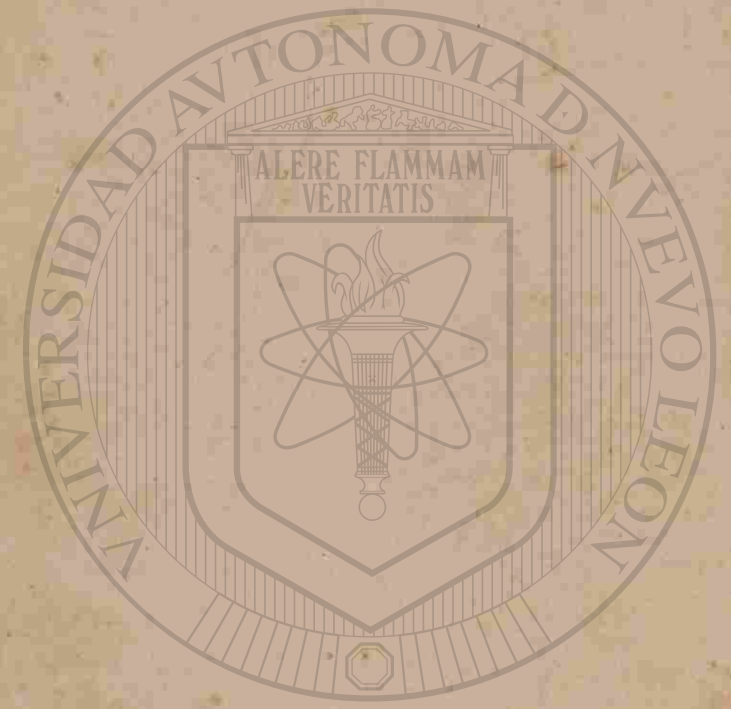

THE CONSTITUTION OF THE UNITED STATES.

A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION.

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The Power Over Commerce.

§ 250. The commerce power is contained in these words: "To regulate commerce with foreign nations and among the several States, and with the Indian tribes."[1]

Blackstone[2] speaks of the English power over commerce in this language: "The power over all the coast, over navigable rivers and havens, the power of erecting beacons, light-houses and sea-marks, and of regulating importations and exportations, and prohibiting the incoming and outgoing of persons, are all parts of the royal prerogative." The exercise of this great prerogative was from time to time attempted before the Revolution of 1688 by laying duties upon imports. It was argued that as the king in regulating trade might exclude it, he could lay a tax or duty on its admission. Mr. Hallam gives an interesting account of the struggle in his Constitutional History.[3] In the reign of James I. a case arose in which the issue was made upon the royal prerogative.[4] When the Articles of Confederation were adopted, the power to regulate commerce was reserved to each State, except that Congress had power to make commercial treaties and to regulate trade with the Indians. The authors of the *Federalist* indicate the dreadful condition in which this left the States of the Confederation. Each State competed with every other for advantages in the trade with

[1] Const. U. S., Art. I, sec. 8, clause 3.
[2] Blackstone's Commentaries, Bk. 1, pp. 264–66.
[3] Hallam's Constitutional History, ch. 6.
[4] 2 Howell's State Trials, 407.

foreign countries, and the inimical regulations of commerce by European countries, and especially by Great Britain, made a general public sentiment in favor of uniform regulations of commerce.[1]

§ 251. We have already seen in the history of the adoption of the Constitution, *ante*, that the statesmen of the Confederation era regarded two leading defects in the Articles of Confederation which ought to be remedied. One was in the dependence of the Union upon the States for its needed revenue, and the other in the inability of the States separately to countervail the hostile commercial regulations of foreign powers as to our trade and navigation by any uniform system. These two defects are always kept separate.

On February 3, 1781, Congress asked the States for power to levy a duty on imports to pay the public debt, but rejected a proposal made for power over commerce.[2] On the 18th of April, 1783, Congress again asked to be invested with the power to levy duties for revenue only.[3] Virginia in December, 1783,[4] looking to the British Orders in Council, which restricted all our trade to British bottoms, proposed to give Congress power to counteract this system by retaliatory regulations. On the 20th of April, 1784,[5] a very limited power to this end was proposed for fifteen years. In all this there was no suggestion of a power to lay duties, but only regulations as to vessels engaged in the carrying trade.[6] These movements show more favor to the grant of the commercial than of the taxing power, and that the two were never conjoined, but were always distinct. This distinction between the commerce power and the revenue power is asserted with great force in the resolutions of the Continental Congress, October 14, 1774.[7]

On the 28th of March, 1785, Maryland and Virginia, sister States upon the Potomac and Chesapeake, and friendly rivals

[1] Federalist, No. XI.
[2] 7 Journal of Congress, 20, 21.
[3] 8 Journal of Congress, 139.
[4] Henning's Statutes, 1, 313; Id., 12. 50.
[5] 9 Journal of Congress, 132–33.
[6] 10 Journal of Congress, 89, 246; 11 id. 31, 168, 188, 190; Elliott's Debates, 144 *et seq.*
[7] 1 Journal of Congress, 28.

for the trade which passed to and from the ocean through Capes Charles and Henry, met at Mount Vernon to agree upon a common system of regulations for their mutual interests. The two States made a compact regulating the commerce between them, and in the matters which united and divided them. It is instructive to see what were regarded by these two States as regulations of commerce. Provision was made for light-houses, buoys, etc., at points agreed upon by each, and stipulations made by each for respecting the "commercial regulations of the other, and for the navigation of their several waters by the vessels of the other." It was this compact which suggested a convention to regulate American commerce and the commerce of all the States. For why should not, it was reasoned, all the States concur in common regulations for the foreign trade of each and all, as well as to the interstate trade.

Mr. Madison offered resolutions to appoint commissioners from Virginia to meet other commissioners at the celebrated "Annapolis Convention." The resolution looked only to navigation and duties on vessels.

§ 252. In the Federal Convention the clause in reference to commerce was, in Mr. Pinckney's plan, the second clause of the sixth article, the first clause of which was the taxation provision.[1] In Mr. Patterson's and Mr. Randolph's plan the commerce clause and the taxing clause were kept distinct.[2] In the final adoption the distinction between these two clauses was most marked by their separation, the power to borrow money being interposed between them. This separation was at the basis of the contention of the colonies with the Parliament. They denied the power of Parliament to tax, but admitted the power to regulate commerce. The commerce clause was adopted *nem. con.*[3] In the Pinckney plan the power to regulate commerce was granted with this modification: "All laws regulating commerce shall require the assent of two-thirds of the members present in each House."[4] If this

[1] Madison Papers, 740.
[2] Id. 730, 863–66.
[3] Id. 1343.
[4] Id. 747.

provision had remained, it is obvious that a regulation of commerce could not have included the imposition of a duty, for that required only a majority to pass it; for thus, under cover of the revenue power, all commerce might have been regulated by a majority vote, and two-thirds were required. It could not have been supposed that Congress would have repeated the fraud of the king before the English Revolution, or the grievous wrong of the Parliament before our own, in usurping a power of taxation under the pretext of regulating commerce. It is true that the two-thirds requisition was stricken out as a part of the compromise, to which reference has been made *ante*, on the 29th of August, near the close of the convention;[1] but that cannot affect the point already made, that the framers of the Constitution held the commerce power and the tax power entirely distinct and separate, and that the commerce power did not include the tax power.

§ 253. What then does the power to regulate commerce mean?

First. It does not mean the power to levy duties upon foreign imports, for the reasons already given; and these reasons are sustained by this additional observation: Suppose the Constitution had granted the power to regulate commerce, and had not granted the power to tax, could Congress have taxed under the power to regulate commerce? Or, *e contra*, if the power to tax had been granted, but that to regulate commerce had been denied, could Congress, under the power to tax, have regulated commerce? But the Constitution explains itself. It declares, "no preference shall be given by any regulation of commerce *or* revenue to the ports of one State over those of another,"[2] showing the distinction made between the regulation of commerce and the regulation of revenue.

This view is sustained by the highest judicial authority. *Gibbons v. Ogden*[3] decided that the power to regulate com-

[1] Id. 1456.
[2] Const. U. S., Art. I, sec. 9, clause 6.
[3] 9 Wheat. 1, 201.

merce was wholly distinct from, and not inclusive of, the power to lay duties or taxes. And in the *Passenger Cases*[1] Chief Justice Taney and Mr. Justice Miller stated the same principle; and Justice Miller, in a much later case, takes the same view.[2]

Reference may be made, in addition, to the practice of the Congress of the Confederation under Article IX, which gave power to Congress to regulate trade, and to manage all affairs with the Indians, not inhabitants of any of the States. In the execution of this power Congress passed an ordinance which prohibited all trade with Indians except by citizens of the United States, and by them only under a license. Thus the prohibition and restriction of this trade were regarded as regulations as to trade; but no tax or duty was imposed except a license fee from the trader, and a bond was required for a fair observance of the regulations of Congress. Congress thus interpreted the power to regulate commerce with the Indians as a power to prohibit or license it, and to prohibit and restrict the travel of persons into the Indian Territory, but with no claim of power to lay a duty upon such trade or person.[3]

§ 254. *Second.* (*a*) What does commerce mean? It is derived from *com* and *merces*, traffic in things. In the great case of *Gibbons v. Ogden*,[4] this precise meaning is given to the words.

(*b*) It means the incidents and media of traffic and exchange; that is, transportation, navigation, ships, etc., by land and sea.

(*c*) Does it include intercourse of persons in travel? Yes. The word "intercourse" had been added as included within the regulations of commerce. This *transitus* of persons may be either of such as are connected with commerce and things, or of persons traveling with no relation to commerce and things. As to the first, there could be no reason for not

[1] 7 How. 502.
[2] Head-Money Cases, 112 U. S. 595.
[3] 11 Journal of Congress, 126; 12 id. 66.
[4] 9 Wheat. 1.

including them within the term "commerce." For how can regulations of the commerce in things and in the vehicles for the transportation of things be separated from the person in charge of and connected with the things and subjects of commerce? Whether these apply to persons traveling with no relation to commerce and things coming into or going out of the country, or passing from State to State, was much debated in the *Passenger Cases*.[1] Interpreting these words from the environment of those who adopted them, and looking to the exercise of power by Congress under the Confederation to regulate trade with the Indians, we have seen that Congress prohibited persons from going into the Indian Territory as late as 1786 and July, 1787, when the Federal Convention of that year was in session. When this power was extended to trade with foreign nations and between the States, it is natural to presume that it was intended to regulate the intercourse of persons not related to commerce and things. But this is made more clear by reference to the proceedings of the convention themselves.

On the 6th of August, 1787, a draft of a Constitution was reported to the convention by Mr. Rutledge from the Committee of Detail.[2] In article VII, section 4, of that draft, it was provided that "no tax or duty shall be laid by the Legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited."[3] This clause limits the tax power as to such migration or importation of persons, and then denies power to prohibit such migration or importation. The tax or duty laid was aimed at the slave trade, which was permitted to continue until 1808; but the latter words have no reference to the tax power at all. To what, then, could these words refer, except as a limitation on the commerce power, under which alone Congress could have had a pretense for

[1] 7 How. 283.
[2] Madison Papers, 1226.
[3] Id. 1233–34.

the prohibition of the migration or importation of persons. The clause was referred with others to a committee. On the 24th of August, 1787,[1] the clause was reported thus: "The migration or importation of such persons as the several States, now existing, shall think proper to admit shall not be prohibited by the Legislature prior to the year 1800; but a tax or duty may be imposed on such migration or importation at a rate not exceeding the average of the duties laid on imports." Gouverneur Morris remarked on this as a power to tax free men migrated or imported. George Mason replied: "The provision as it stands was necessary for the case of convicts, in order to prevent the introduction of them."[2] The latter clause was then amended, *nem. con.*, so as to read: "But a tax or duty may be imposed on such *importation*, not exceeding ten dollars for each person." A tax or duty was imposed on the person imported as a slave, but the migration of free persons might be prohibited after 1800. These proceedings show that the power to tax slaves and not free men was granted, and the power to prohibit the migration of free persons as well as slave importation was granted by clear implication; the implication of power to prohibit the migration of free persons being under the power to regulate commerce, and to prohibit commerce in slaves after the date stated. This makes the commercial power reach to the prohibition of the migration of persons and the importation of things. These views are confirmed by many cases.[3] So that it seems to be the clear meaning of the Constitution that the words "to regulate commerce" include the regulation of migration of persons irrespective of their relations to things in commerce.

(*d*) By later cases the power has been extended to embrace contracts as to things in commerce, as correspondence by

[1] Id. 1415.
[2] Id. 1429–30.
[3] People v. Compagnie Générale Transatlantique, 107 U. S. 59–62; Head-Money Cases, 112 id. 580, 591; Mobile v. Kimball, 102 id. 691, 702; Nishimura Ekiu v. United States, 142 id. 651; Giozza v. Tiernan, 148 id. 657.

telegraph, etc. These telegraphs were long since invented, but as they were new means of commerce of persons and things, the power embraces commerce through those means as it had done through the old and superseded means. The power is not changed by the increase of its domain by reason of the advance of scientific investigation.[1] In regulating commerce, therefore, Congress regulates traffic in things, vehicles of transport and things *in transitu*, but not the things themselves. Before and after the *transitus* they are beyond this power of regulation. The production and use of things in the *terminus a quo* and the *terminus ad quem* are not subjects of the commercial power, but of the law of the State or country from which and to which they are transported.[2]

(*e*) "Regulate" — what is its meaning? Does it mean to create commerce? No; it presupposes the existence of commerce to be regulated. Does the power to regulate include the power to prohibit by embargo? This power to prohibit is inferable from the clause already quoted.[3] The commerce power is by that clause extended to prohibition, and only limited as to the particular subjects mentioned in that article after a certain year. The question arose in 1807 and 1812 under the Embargo Act. It was resorted to as a means of protecting our ships from English and French cruisers, by keeping them within our ports when unable to protect them on the high seas. It embraced vessel, cargo, exports, etc., which were not taxable under the Constitution, which forbade taxes or duties on exports,[4] but an embargo was laid on them as a means to their protection. The environment of the convention made it understood by the use of those words, similar to the British prohibitory rules prior to the Revolution, and the prohibition on Indian trade under the

[1] Mobile v. Kimball, 102 U. S. 690; W. U. Tel. Co. v. Alabama, 132 id. 472.

[2] Brown v. Maryland, 12 Wheat. 419; Waring v. Mayor, 8 Wall. 110; In re Nagle, 135 U. S. 1; Royall v. Virginia, 116 id. 572; Nashville v. Alabama, 128 id. 100.

[3] Const. U. S., Art. I, sec. 9, clause 1.

[4] Id., clause 6.

Confederation in the power to regulate trade, and the reasoning given in the public State papers for the embargo lead to the same conclusion.[1] These embargoes were laid on ships, and also on exports in time of peace, although there was no power to lay a tax or duty on exports. That again distinguishes between taxation and the commercial power.

§ **255.** *Third.* The power to regulate commerce involves the power to pass navigation laws as to coastwise and foreign vessels, prescribing the vessels as vehicles for things in commerce in which they may be carried. Thus from an early date the government under the Constitution has discriminated as to domestic interstate commerce between foreign and home bottoms, and has given a monopoly to the latter in interstate commerce, and an advantage in foreign commerce to home bottoms over foreign bottoms. It is obvious from the history of the adoption of this clause that this power was intended to be included within the words "to regulate commerce." The words "commerce" and "navigation" were used interchangeably in the various propositions made in the convention in reference to the form this clause should assume.[2]

Laws referring to registration of vessels, regulations for the carrying of passengers, rules as to inspection of vessels to insure safety, etc., are within this power; also a duty on the head of an immigrant to provide a fund for the support of paupers among them; so of interstate telegraph messages. (See *Head-Money Cases*, overruling the *Passenger Cases*.[3]) This will suffice as to regulations of foreign commerce.

[1] Report of Mr. Jefferson in 1793, Am. St. Papers, 432; Resolution of Mr. Madison in the House of Representatives, 1793; Message of President Jefferson, 6 Am. St. Papers, 57; Letter of Secretary Madison, 7 Am. St. Papers, 25; Report to Congress, Id. 75, and the Proclamation of President Madison, Id. 213.

[2] Ch. VI.

[3] Head-Money Cases, 112 U. S. 580; State Freight Tax Case, 15 Wall. 232; Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1; Telegraph Co. v. Texas, 105 id. 460; Ratterman v. W. U. Tel. Co., 127 id. 411; Bank of North America v. Cooper, 137 id. 472.

But does the power so extensive in its reach as to foreign commerce have the same interpretation as to interstate commerce? A negative answer must be given to this question. The considerations which justify this conclusion are too important to be omitted.

(*a*) Under the Articles of Confederation the States could interdict trade *inter se*. The grant of power to Congress to regulate interstate commerce was with the purpose not to transfer this power of interdicting interstate trade to Congress, but to leave interstate commerce free, as the Constitution intended, in order to form a more perfect union. Could the Constitution have intended to destroy the freedom of interstate trade by Congressional power, when it took it from the States and vested it in Congress in order to prevent such destruction? In the case of *Railroad Co. v. Richmond*,[1] Mr. Justice Field, speaking of this purpose in language which authorized the preceding statement, distinctly says: "The power to regulate commerce among the several States was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating State legislation; it was never intended that the power should be so exercised as to interfere with private contracts not designed at the time they were made to create impediments to such intercourse." Again, he says: It was "designed to remove trammels upon transportation between different States which had previously existed, and to prevent the creation of such trammels in future." And in speaking of the acts of Congress called in question, he says: "They were intended to reach trammels interposed by State enactment or by existing laws of Congress."

(*b*) If it is objected that the phrase to "regulate commerce" may mean the same power in reference to interstate trade as it does as to foreign trade, the answer is very easy. These regulations of commerce of either kind may be made by law, if the law be necessary and proper to carry the power into execution.[2] A law that is necessary and proper to protect

[1] 19 Wall. 584.

[2] Const. U. S., Art. I, sec. 8.

our vessels and the property engaged in foreign commerce against foreign enemies would not be necessary or proper as to interstate trade in a union between friendly States united under the Constitution. The word "proper" means, says Judge Story, in the clause cited by Chief Justice Chase,[1] "*bona fide* appropriate." He says it is at once admonitory and directory. Can it be "*bona fide* and appropriate," in the exercise of a power which is delegated to make a "more perfect union" between the States, to pass a law which would disunite the States by antagonistic commercial relations between them? Can it be appropriate to the end of "domestic tranquillity" to sow the seed of controversy and rivalry between them in their trade *inter se?*

When we look at all powers vested in Congress as trust powers to be used for the States as beneficiaries and as members of one family of commonwealths, so to be used as to promote union and not disunion; to establish harmony and peace and not discord and hostility between the States, it must be inevitably predicted that the courts will never hold any law of Congress, which prohibits, restricts or ties interstate commerce, to be either necessary or proper as a regulation of commerce, but they must hold it to be a perversion of its trust power to the subversion of the fundamental principles of the Constitution. The power to regulate foreign and interstate commerce was given in the same terms *diverso intuitu*. In the first, to protect all against the machinations of foreign enemies; in the second, to protect and promote the free and unobstructed movement of men and things between the States in the family of the Union.

(*c*) Congress is forbidden to tax or lay duties on articles exported from any State.[2] It is true that the Supreme Court has confined the word "export" in this clause to exports to a foreign country.[3] But it is hardly a matter of doubt that this construction is intended to apply to interstate *transitus*

[1] Knox v. Lee, 12 Wall. 573.

[2] Const. U. S., Art. I, sec. 9, clause 5.

[3] Cooley v. Board of Wardens, 12 How. 299; Pace v. Burgess, 92 U. S. 372; Turpin v. Burgess, 117 id. 504.

as well as to foreign exportation. For the article, if dutiable or taxable as a subject of interstate commerce, might thus, in the absence of evidence as to its ultimate destination to a foreign country, escape the protection intended to be given the State product by this clause of the Constitution. Besides, unless such prohibition is made universal, it would come into conflict with that clause of the Constitution which prohibits Congress, by any regulation of commerce or revenue, to give preference to the ports of one State over those of another; and if made universal would, in the language of Judge Marshall's canon of interpretation, be not "within the scope of the Constitution;" and if not prohibited in terms would not "consist with the letter and spirit of the Constitution." Such a power was never intended to be granted, because it would be utterly at war with all the purposes for which the Constitution was adopted.

(*d*) But there is another general clause of the Constitution which is clearly a denial of any such power by Congress. It declares that "Citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[1] In considering the meaning of this clause we must anticipate what would, in some respects, be more appropriately discussed hereafter. It will be perceived that this is a declaration of the personal right of every citizen, and belongs to him as such. No Federal or State law gives it to him; he holds it by the higher title of the Constitution itself. If, therefore, any regulations of commerce should invade the right conferred by this article, it would be, under Judge Marshall's canon, prohibited to Congress by the Constitution. It is a personal right which neither Congress nor a State can impair. It gives to a citizen in any State a passport to every other, and confers upon him the privileges and immunities which attach to the citizen of that other. The broad scope of this clause can be obtained from the history of its adoption. Under the Articles of Confederation, which brought the States and the people of the States into close and intimate

[1] Art. IV, sec. 2.

relations, which were intended to be more close and more intimate under the more perfect union formed by the Constitution, it was incorporated in the following words:[1] "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant; provided also, that no imposition, duties or restriction shall be laid by any State on the property of the United States, or either of them.

"If any person guilty of, or charged with treason, felony or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense."

"Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State."

Mr. Madison, in the *Federalist*,[2] refers to this fourth article of Confederation, and indicates very clearly that the words "privileges and immunities" written in this clause of the Constitution were deemed sufficient to include all the specific privileges of trade, etc., which were embodied in the fourth article of Confederation. This article of the Constitution was proposed in Mr. Pinckney's first plan in the words of the present clause of the Constitution;[3] and was reported

[1] Articles of Confederation, Art. IV.

[2] No. XLII.

[3] Madison Papers, 745.

in the same form from the Committee of Detail,[1] and by the Committee of Style,[2] and was finally incorporated into the Constitution without change. That this clause of the Constitution was intended to be a condensed statement of all the particulars mentioned in the Articles of Confederation cannot be doubted. If so, the right of the people of each State to have free ingress and egress to and from every other State, and to enjoy therein all privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, with the power of removal of the property of a citizen in one State to any other State of which the owner might be an inhabitant, is undoubted. Mr. Justice Washington, in *Corfield v. Coryell*,[3] defines these words "privileges and immunities" in language which has been accepted with judicial approval ever since. He says they are intended to embrace rights fundamental in their nature, such as belong of right to the citizen of any free government; to secure "protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety," etc. This definition was approved by Chief Justice Taney in the *Passenger Cases*,[4] by the court, speaking by Justice Field, in *Paul v. Virginia*,[5] and by the decision of the Supreme Court, through Mr. Justice Miller, in the *Slaughter-House Cases*,[6] citing the case of *Ward v. Maryland*.[7]

§ 256. Mr. Justice Miller, in the *Slaughter-House Cases*, *supra*, says distinctly that the purpose of the fourth article of the Confederation and of the clause of the Constitution is the same; "and that the privileges and immunities intended are the same in each." In the Articles of Confederation "we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase." He further declares that these privi-

[1] Id. 1240.
[2] Id. 1558.
[3] 4 Wash. Cir. Ct. Rep. 371.
[4] 7 How. 413.
[5] 8 Wall. 180.
[6] 16 Wall. 36.
[7] 12 Wall. 410.

leges and immunities were those within the province of the State itself where the privileges and immunities were claimed; that the "entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government." It is therefore obvious that this right conferred by the Constitution upon the citizens of each State included free ingress and regress of persons and property and the like, and put them beyond the reach of the power of the States, and, *a fortiori*, beyond the power of the Federal government. The power, therefore, of Congress to tax or prohibit interstate commerce, including the intercourse of persons, did not exist in Congress or in the States. Congress may regulate such commerce so as to promote it and secure its safety, but cannot forbid it or tax it.

In a dissenting opinion in *Stoutenburgh v. Hennick*,[1] Mr. Justice Miller relies upon this construction of the clause as to the rights of a citizen as being a limitation upon the power of the States to tax drummers.

These considerations conclusively show that the power to regulate interstate commerce is not commensurate with the power of Congress to regulate foreign commerce; and while it may prohibit the *transitus* of persons from foreign countries into the United States as a whole, and prohibit commerce in things by embargo, yet no such power is vested in Congress as to interstate commerce. A confirmation of this conclusion might be derived from the requirement of uniformity of duties, imposts and excises;[2] and from the prohibition upon Congress of making any regulation of commerce which would give preference to the ports of one State over those of another. The whole Constitution, in all of its parts, looks to the security of free trade in persons and goods between the States of the Union, and by this clause prohibits either Congress or the States to interfere with this freedom of intercourse and trade.

[1] 129 U. S. 141.
[2] Const. U. S., Art. I, sec. 8, clause 1.

§ 257. A great question may now be considered. The clause as to foreign and interstate commerce reaches the objects which are subjects also of reserved State powers. When these interlock, or the powers of Congress and of the States are exercised over the same object, where is the line of demarcation? In the leading case of *Gibbons v. Ogden*,[1] Chief Justice Marshall addresses himself to this question, and in construing the words "commerce among the several States," he says: "It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary."[2] Hence it follows that interstate commerce in things and persons relate to the *transitus* of such things and persons where the termini are in different States. Where they are in the same State the power of Congress to regulate them does not attach. It may be remarked that the power of Congress is not to regulate persons and things, but merely commerce in them. *Quoad* commerce, traffic, intercourse, etc., Congress has clear power as to things and persons; when not *in transitu* the States have a clear reserved power. Before things or persons become articles of commerce, interstate or foreign, State power is supreme. But while they are articles of such commerce, Congress has power to exclude State action.[3]

States, by their reserved power, legislate as to things and persons; Congress only regulates interstate and foreign commerce in things or persons. The boundary line between these two is in theory clear; in practice, sometimes confused. The courts have to find the location of this line in cases which arise, and must keep up the fence between them.

[1] 9 Wheat. 1, 199.

[2] The Daniel Ball, 10 Wall. 557; Hall v. De Cuir, 105 U. S. 485; Telegraph Co. v. Texas, 105 id. 460.

[3] Mugler v. Kansas, 123 U. S. 623; Bowman v. Railroad Co., 125 id. 478; Rhodes v. Iowa, 170 id. 412; Vance v. Vandercook Co., id. 438; Schollenberger v. Pennsylvania, 171 id. 1; Collins v. New Hampshire, id. 30.

Chief Justice Marshall, in *Gibbons v. Ogden*, *supra*, referring to inspection laws, used this expression: "They act upon the subject before it becomes an article of foreign commerce or of commerce among the States, and prepare it for that purpose. They form a portion of that *immense mass* of legislation which embraces everything within the territory of a State not surrendered to a general government,—all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the State and those which respect turnpike roads, ferries, etc., are component parts of this mass."[1]

He further says: "In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other."

He then goes on to say that when the States pass quarantine laws, the constitutionality of which has never been denied, they do not exercise the power to regulate commerce. Congress may seem to trench upon the quarantine power of the States; hence the early laws of Congress which he refers to and justifies. Congress has directed its officers to aid in the execution of these quarantine laws, and has sometimes made provision for it in aid of those of the States.

§ 258. These illustrations will serve the general purpose of indicating the mode in which Congress and State powers operating on the same objects may sometimes seem to be in conflict. The cases which will illustrate this more particularly will be presently referred to. The prime distinction

[1] Gibbons v. Ogden, 9 Wheat. 203.

recognized in the leading case of *Gibbons v. Ogden* and the subsequent case of *Brown v. Maryland*[1] shows that Congress has no power over things or persons except as subjects of foreign or interstate traffic or intercourse. When the thing or person is not in such commerce, Congress has no power over it. Therefore, until the thing or person has this commercial quality, the Congressional power does not attach, and the State power is complete. When it assumes the commercial quality the Congressional power is exclusive.

From this we may deduce two canons:

1st. Commercial power, to be necessary and proper while regulating commerce in its normal condition, must so regulate as not to destroy the essential reserved rights of the States. It is neither necessary nor proper for it so to do, but both unnecessary and improper. By analogy, the taxing power of Congress is so limited as not to allow a tax on the salary of a State judge.[2]

2d. As long as the person or thing is in commercial *transitu* the State cannot touch it, because it is under the regulations of Congress, and the State must so exercise its power in respect to these as not to interfere with the essential right of Congress to regulate commerce. But before *transitus* has once begun, or having begun has ceased, Congressional power does not attach and the State power is exclusive.

§ 259. These general principles may now be illustrated, and the distinctions better defined, by reference to the decisions of the courts upon cases which have arisen.

The case of *Gibbons v. Ogden*[3] arose out of the grant by the legislature of New York to Livingston & Fulton of the exclusive navigation of all the waters within the jurisdiction of that State, with boats propelled by fire or steam, for a term of years, and authorized the chancellor to restrain by injunction any person from navigating those waters with such boats. Livingston & Fulton assigned their right to Ogden to navigate the waters between places in New Jersey and the city of New York. Gibbons had two steamers employed in running between New York and Elizabethtown in New Jersey, in violation of the exclusive privilege owned through assignment by Ogden. Ogden's bill prayed an injunction to restrain Gibbons from using the said boats in navigating the waters in New York. Gibbons answered that the said boats were duly enrolled and licensed under the laws of the United States, and claiming, in virtue of such licenses, the right to navigate the waters between New Jersey and the city of New York. The chancellor perpetuated the injunction. His decree was affirmed in the Court of Errors of New York, and was carried to the Supreme Court of the United States by writ of error. The point at issue in this case was whether the State of New York had the right to grant the exclusive privilege of navigation with steamboats to Livingston & Fulton over the waters which lay between a point in New York and a point in New Jersey. The court held that as to commerce on such waters between two points in the same State the grant was in the reserved power of the State; but where it controlled navigation between a place in New Jersey and a place in New York, it was interstate commerce, and not subject to be controlled by the State, but under the exclusive jurisdiction of the Federal government. The court held that the Congressional power to regulate commerce was exclusive of any concurrent power in the State when Congress exercised its power, however it might be as to State regulations in the absence of actual exercise of power by Congress. It was held that the inspection laws, though related to the commercial power, were disconnected with it, and when exercised by the States did not conflict with the Congressional power; that the quarantine laws of the States were not in conflict with the Congressional power; and that where the State was in the exercise of these reserved powers, it must so exercise them as not to conflict with the proper regulations of commerce by Congress. In the case for judgment the contention was between the right of the State to regu-

[1] 12 Wheat. 419.
[2] Collector v. Day, 11 Wall. 113.
[3] 9 Wheat. 1.

late commerce and navigation between New York and a point in New Jersey and the power of Congress exercised in licensing Gibbons in the use of his steamers between the same points. This was a clear contest between Congress and a State in a matter of the regulation of commerce. Therefore, even conceding that the State might so regulate commerce if Congress did not undertake to do so, yet, when Congress did do so, the question was, whose regulation was supreme? Upon such an issue the decision was inevitable that, as a law of Congress made in pursuance of the Constitution was the supreme law of the land, this law of Congress must be paramount to the law of the State.[1] Of course the case is very different where the commercial regulation by Congress comes into conflict with the jurisdiction of the State as to the health and life of its people, etc. A vessel proposes to enter a harbor of a State under Congressional commercial regulations; and the State, to protect its people from disease, quarantines it. These two powers seem to conflict, but they do not, except as both operate upon the movement of the vessel, though from different sources of power. The vessel is subject to two powers which are entirely different, but not in conflict. The State does not check a rightful object of commerce. It merely erects a bar against disease. Congress regulates the rightful object of commerce, under color of which it cannot authorize wrongful commerce. It cannot introduce disease, but may a rightful subject of commerce. The two powers are made to consist by restraining the State, under color of quarantine, from regulating rightful commerce, and restraining Congress, under color of commerce, from regulating the unlawful importation of disease.

Chief Justice Marshall says in this case: "It is no objection to the existence of distinct, substantive powers that in their application they bear upon the same subject. The same bale of goods . . . that may be the subject of commercial regulation may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no

[1] Const. U. S., Art. VI, clause 2.

more intended as regulations on commerce than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action, and while frankly exercised they can produce no serious collision."

§ 260. The delicate boundary line between the Congressional and State power may be drawn by the judiciary upon the principle that the State may not *mala fide*, under color of its reserved power, impinge on the commercial power of Congress; and Congress may not, under color of its granted power, impinge on the reserved power of the State. *Bona fides* is required on both sides. This *bona fides* is equivalent to the word "frankly" in the quotation above from the Chief Justice.[1] Each must use its distinct power in such a way as not to trench on the power of the other. Where the judiciary find that a State uses its reserved power as a pretext to regulate commerce, or that Congress under the commerce power invades the reserved jurisdiction of the State, it shall so adjust it in both cases as to maintain the supreme law of the land over Congress and the States. Hence the early laws of Congress regulating commerce respected the quarantine laws of the State, and aided their maintenance, and did not obstruct them. And this because a law to regulate commerce was neither necessary nor proper, but the contrary, when it introduced into the State disease and death, physical or moral, contrary to the State quarantine.

Another illustrative case is that of *Brown v. State of Maryland*,[2] which was this: Maryland required an importer to pay a license tax to her before he should be permitted to sell a package of imported goods. The importer was indicted by the Maryland court for having imported and sold a package of foreign goods without taking out a license under the Maryland law. The importer demurred, and there

[1] See in accord, Peete v. Morgan, 19 Wall. 581; Steamship Co. v. Louisiana Board of Health, 118 U. S. 455; United States v. E. C. Knight Co., 156 id. 1; St. Anthony Falls Water Power Co. v. St. Paul Water Commissioners, 168 id. 349.

[2] 12 Wheat. 419.

was judgment against him on the demurrer for the penalty prescribed by the act. It was contended that the act of the State violated two provisions of the Federal Constitution: the one forbidding the State, without the consent of Congress, from laying any imposts or duties on imports or exports,[1] and the other the clause which gives to Congress the power to regulate commerce with foreign nations. The Chief Justice held that the judgment under the law of Maryland conflicted with that provision of the Constitution just quoted. He held that a tax on the sale of an article imported only for sale was a tax on the article itself; and that, therefore, this tax was a duty laid by the State on an import. He said that it was in conflict with the power to regulate commerce, because when Congress allowed the importation, that would avail nothing if it did not authorize the sale of the thing imported. This was as essential an element as the importation itself, and must be considered a component part of the power to regulate commerce.

The Chief Justice, determining when the power of the State over the article which is the subject of importation begins, so as to be subject to taxation and the like, says: "When the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plain a duty on imports to escape the prohibition in the Constitution." And again: "If he sells them, or otherwise mixes them with the general property of the State by breaking up his packages and traveling with them as an itinerant peddler," they become liable to taxation. When it does this, "the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the

[1] Const. U. S., Art. I, sec. 10, clause 2.

common mass, and the law may treat them as it finds them." And he goes on to say that in the case of gunpowder, or of infectious or unsound articles, the State has a right to require them to be removed, under its reserved power to preserve the health and safety of its people. The Chief Justice also holds that inspection laws by the States are not touched by this decision.[1]

§ **261.** The article when inspected is not yet an export. The State has a right to inspect its own product, even when it may be intended for export; and that this is a reserved power of the State further appears from the language of the Constitution itself.[2]

In the *License Cases*[3] and the *Passenger Cases*,[4] these questions were much discussed, but with very contrary opinions, which have been adjusted by later decisions. The question of the demarcation between the power of the State and the commercial power of Congress has arisen in many cases in respect to the migration of persons. We have seen that the migration of persons is under the commerce power. What can the State do in reference to persons migrating who are physically or morally diseased? In *New York v. Miln*,[5] the State of New York inflicted a punishment upon the master of a vessel arriving from a foreign port who neglected to report an account of his passengers. The court (Story, J., dissenting) held that the law was not a regulation of commerce, but of police, and was not in conflict with the Constitution.

In the cases of *Henderson et al. v. Mayor of New York* and *People v. Compagnie, etc.*,[6] the question arose whether a State had the reserved power, as a matter of police, to obstruct the migration of criminals, lewd women, paupers and diseased persons. The court decided against the constitutionality of the law, but because the law obstructed the migration of all

[1] Gibbons v. Ogden, 9 Wheat. 1; Turner v. Maryland, 107 U. S. 38; Puryear v. Commonwealth, 5 Wall. 475; Waring v. Mayor, 8 id. 110.
[2] Art. I, sec. 10, clause 2.
[3] 5 How. 504.
[4] 7 How. 283.
[5] 11 Pet. 153.
[6] 92 U. S. 259, 275; 107 id. 59.

persons and not the objectionable ones only; the doctrine being held that the State could obstruct such as are above mentioned, but could not obstruct all merely because some might be in the objectionable list. This is due, despite the commercial power of Congress, to State power to protect itself against such persons coming into its borders, and does not obstruct legal commerce or the migration of unobjectionable persons, but only of those who would be injurious to society. And it is held that a State may make port regulations to prevent collision of vessels, and for the safety of passengers and freight thereon, and to facilitate the delivery thereof, but cannot tax the receiving and landing of such.[1]

A like question has arisen as to diseased cattle passing from State to State. In *Railroad Co. v. Husen*[2] the court decided a law of Missouri unconstitutional which prohibited the driving of all Texas cattle through the State; but in emphatic language declared that a State may enact health laws to protect life, liberty, health or property within its borders, and to prevent the entrance of persons or animals who are diseased.[3] But these laws must be absolutely necessary for the purpose. In *Kimmish v. Ball*[4] the court approved the language in 95 U. S. 472, *supra*, and declared that State laws aimed to prevent diseased cattle from coming into a State are valid, but that they must be *bona fide* for safety and protection.

And in a late case in 141 U. S. 60,[5] it was held that this police power for safety is not in conflict with the interstate commerce power, but where *bona fide* for safety is substantially under the reserved power of the States.[6] The same doctrine is maintained in *Brimmer v. Rebman*,[7] it being held that a meat law of Virginia was unconstitutional because, in assuming to protect itself against diseased meat from another State brought into its borders, it excluded all meat

[1] Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.
[2] 95 U. S. 465; Missouri, K. & T. R. R. Co. v. Haber, 169 U. S. 613.
[3] 95 U. S. 472.
[4] 129 U. S. 217.
[5] Crutcher v. Kentucky.
[6] Plumley v. Massachusetts, 155 U. S. 461.
[7] 138 U. S. 78.

from other States. And in a similar case, as to flour (141 U. S. 62[1]), it was held that while a State might exclude bad flour, yet it could not, by indiscriminate exclusion, keep out the good. The first was internal polity; the second was a regulation of commerce. To the same effect was a recent decision of the Supreme Court upholding a law of the State of Georgia forbidding the running of freight trains on Sunday.[2]

The same question has arisen as to State laws taxing peddlers, in *Welton v. Missouri*.[3] In this case a tax on a peddler for goods from other States was held unconstitutional because aimed at goods brought from another State, which was really a tax on interstate commerce in those goods, and a violation of the rights of citizenship under the clause already commented on.[4] But in the late case of *Emert v. Missouri*,[5] the Supreme Court, upon a very careful and elaborate report of the cases, held a statute of Missouri requiring peddlers of goods to take out and pay for a license, and making no discrimination between the Missouri products and those of other States, was not, as to goods previously sent to them by manufacturers in other States, repugnant to the power of Congress to regulate commerce among the States. This case is important because it shows that a tax on goods after they have been imported from another into the State where they are taxed is not unconstitutional, because the taxation is upon the goods after they have ceased to be subjects of commerce. They have doffed the character of subjects of interstate commerce and have donned the character of property within a State. This is in accordance with the case of *Brown v. Maryland*, *supra*. This case approves *Machine Co. v. Gage*,[6] and the decisions in *Brown v. Houston*,[7] *Robbins v. Shelby Taxing District*,[8] and *Brennan's Case*.[9]

The same doctrine is maintained in reference to drum-

[1] Crutcher v. Kentucky.
[2] Hennington v. Georgia, 163 U. S. 299; Norfolk & Western R. R. Co. v. Commonwealth, 93 Va. 749.
[3] 91 U. S. 275.
[4] Const. U. S., Art. IV, sec. 2.
[5] 156 U. S. 296.
[6] 100 U. S. 676.
[7] 114 U. S. 622.
[8] 120 U. S. 489.
[9] 153 U. S. 189.

mers. The drummer in one State is not taxed in another;[1] and this was also held in a late case where a tax was laid on a domestic drummer.[2] It is held in a strong dissenting opinion by Chief Justice Waite in these cases, two judges concurring with him, that if the tax on the drummer is the same as on the foreign drummer, the reserved right of the State to tax business within its borders made this a legitimate exercise of the tax power without the purpose to interfere with interstate commerce as to the goods represented by the drummer of the other State.

The agent of an interstate line of railway is not taxable as such by a State. The tax is held to interfere with the freedom of interstate traffic and intercourse.[3] Nor can the privilege of keeping an office be taxed or interfered with.[4] Nor can a State tax telegraphic messages interstate, and a tax on the receipts from such messages is unconstitutional.[5] And a tax on all the receipts without discrimination is held to be unlawful; and so as to a tax upon freight where there was no discrimination as to the receipts from freight, but a tax was laid upon all receipts without discrimination.[6] In all these cases it will be seen that Congress regulates in the interest of a free commerce against State discrimination. And so where the tax is specifically upon interstate receipts it is not constitutional.[7]

§ 262. These doctrines have lately been affirmed in the case of *Postal Telegraph Co. v. Adams*, and *Railroad Co. v. Pennsylvania*.[8] So a State law requiring the posting of

[1] Robbins v. Shelby County Taxing District, 120 U. S. 489.

[2] Leloup v. Port of Mobile, 127 U. S. 640; Asher v. Texas, 128 id. 129; Stoutenburgh v. Hennick, 129 id. 141.

[3] McCall v. California, 136 U. S. 104.

[4] Lyng v. Michigan, 135 U. S. 161.

[5] W. U. Tel. Co. v. Alabama, etc., 132 U. S. 472.

[6] Case of The State Freight Tax, 15 Wall. 232; Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1; Tel. Co. v. Texas, 105 id. 460; W. U. Tel. Co. v. Massachusetts, 125 id. 530; Ratterman v. W. U. Tel. Co., 127 id. 411. See also N. Y., L. Erie & W. R. R. v. Pennsylvania, 158 id. 431; Pacific Exp. Co. v. Siebert, 142 id. 339; Postal Tel. Cable Co. v. Charleston, 153 id. 692.

[7] Case of State Freight Tax, 15 Wall. 232, 284; Telegraph Co. v. Texas, 105 U. S. 460; Maine v. Grand Trunk R. R. Co., 142 id. 217.

[8] 155 U. S. 688; 158 id. 431.

the rates, etc., of a railroad engaged in interstate commerce is held a constitutional exercise of police power.[1] This accords with the case of *New York v. Miln*, *supra*. A law forbidding the employment of a color-blind locomotive engineer on a railroad engaged in interstate commerce was also held constitutional.[2] So a State may tax a railroad for transporting between two points in the same State, though the *transitus* may be through part of another State; it is one *transitus* between termini in one State.[3] A State may tax an interstate railroad on its receipts in proportion to the length of its road in that State. Such tax is not on interstate commerce, but upon the receipts of its own railroad within its own limits, ascertained in the proper way.

The State may tax the property of a railroad created by Congress, but cannot tax its operations.[4] So a State may regulate any local business by a foreign corporation, but not any commercial business by it with other States. It may regulate the speed of trains running into cities; and may forbid gunpowder being carried except in a way consistent with safety.[5] A State may tax a ship engaged in foreign or interstate commerce as property, but not on its tonnage. The first is police power; the last commercial.[6] A State may tax and license ferry-boats enrolled in the United States; but may not tax their tonnage.[7]

A State tax on an interstate bill of lading is void.[8] So a town, a State municipality, may build wharves, regulate wharf rates, and forbid landing except at wharves. These are police regulations, not commercial. These are for safety,

[1] Railroad Co. v. Fuller, 17 Wall. 560.

[2] Nashville, etc. R. R. v. Alabama, 128 U. S. 96.

[3] Lehigh Valley R. R. v. Pennsylvania, 145 U. S. 192.

[4] Railroad Co. v. Peniston, 18 Wall. 5.

[5] Crutcher v. Kentucky, 141 U. S. 47; Brown v. Maryland, 12 Wheat. 443; License Cases, 5 How. 576; Hooper v. California, 155 U. S. 648.

[6] State Tonnage Cases, 12 Wall. 204.

[7] Ferry Co. v. St. Louis, 107 U. S. 365.

[8] Woodruff v. Parham, 8 Wall. 123.

not for obstruction; but the regulation must not discriminate against vessels of other States.[1]

State laws which are *bona fide* aimed at the safety of commerce, and are not obstructive of it, and are not opposed to the laws of Congress regulating commerce, are held to be constitutional. They are for the safety of commerce, and not for its regulation.[2] And State laws providing for buoys, etc., as facilities to commerce and not obstructive of it are constitutional.[3] It is held that a State may regulate the use of elevators, warehouses, etc., used for internal, and even for interstate, trade, and allow charges for the use thereof, not discriminating against other States. This is a police, not a commercial, regulation, unless Congress acts upon it, when it will be held that its law is paramount to that of the State.

§ 263. It will be proper now to consider the recent conflict between State and Federal power in reference to the traffic in liquor. Some of the States have, for preserving the health of the people, limited the importation of liquor into the State, and the question has arisen how far such legislation conflicts with the interstate commerce power of Congress. The case of *Mugler v. Kansas*[4] arose out of a law of Kansas prohibiting the manufacture of intoxicating liquor within the State to be sold for general use as a beverage; and declaring that any still kept and maintained for the manufacture of such liquor should be abated as a common nuisance, and that the offenders should be tried upon indictment. Nothing in the laws of Kansas, as far as the record shows, forbade the manufacture of such liquor to be exported to other States. It was held not only that such legislation did not violate any other of the provisions of the Constitution or its amendments, the fourteenth included, but there

[1] Packet v. Keokuk, 95 U. S. 80; Packet Co. v. St. Louis, 100 id. 423; Packet Co. v. Catlettsburg, 105 id. 559; Pittsburg Coal Co. v. Louisiana, 156 id. 590.

[2] Steamship Co. v. Joliffe, 2 Wall. 459; Cooley v. Board of Wardens, 12 How. 299; Wilson v. McNamee, 102 U. S. 572.

[3] Ward v. Maryland, 12 Wall. 418; Guy v. Baltimore, 100 id. 434; Mobile v. Kimball, 102 id. 691; Pittsburg, etc. Co. v. Louisiana, 156 id. 590.

[4] 123 U. S. 623.

was nothing to show that it operated at all upon commerce in such articles with foreign nations or among the States. The law was sustained. It was held a lawful exercise of the police power in respect to the well-being of its people. The court referred to the language of the judges in the *License Cases*,[1] and a number of others.

In *Bowman v. Railroad Co.*,[2] the court discusses an act passed by Iowa forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, unless furnished with an official certificate from a State official permitting it to be done. Bowman offered for shipment to the defendant railway company five thousand barrels of beer, to be shipped from Chicago, Ill., to Marshalltown, in the State of Iowa. The defendant company filed a special plea excusing its refusal to accept the beer for shipment as above stated, because the law of Iowa forbade it. To this plea a demurrer was entered by the plaintiff. The Supreme Court held that the plea was bad, because it forbade interstate commerce in the article; that the law of Iowa could not be deemed an inspection law nor a quarantine law, because the quarantine power does not allow a State at its mere will to declare that an article manufactured in another State is not to be regarded as property by the legislative declaration of the State to which the article is consigned. If a quarantine power involved the right to determine what were proper objects, then it might really forbid all, and thus nullify the commercial power altogether. To this opinion of the court there was strong dissent of three judges, who held that the police power to protect a people from the use of such liquors could not be overborne by the commercial power of Congress.

In the case of *Kidd v. Pearson*[3] the question assumed another form. Iowa passed a law allowing the manufacture of liquors within the State for mechanical, medicinal, culi-

[1] 5 How. 504; Bartemeyer v. Iowa, 18 Wall. 129; Beer Co. v. Massachusetts, 97 U. S. 25; Foster v. Kansas, 122 id. 201; Gibbons v. Ogden, 9 Wheat. 1.

[2] 125 U. S. 465.

[3] 128 U. S. 1.

nary and sacramental purposes, but no other,— not even for transportation beyond the limits of the State; and punished by fine and imprisonment every person violating the statute. The defendant in this case answered that all his manufactured liquors were for exportation, and were sold outside of the State of Iowa. The court decided that the liquor was manufactured by Kidd for none of the four specified purposes named in the act, but for exportation, and this did not amount to the creation of such property in the liquor as to make it a subject of commerce. Liquor so manufactured was by the law of the State condemned as no property at all. That law operated in the State of Iowa before the effort to export. The question then was, did the liquor ever become the subject of the commercial power? It was condemned as no property before it started on its *transitus*. The commerce power, therefore, never operated upon it. The law of Iowa was upheld; it being held that the power of Congress could not invest the article with the quality of property so as to be subject to the commercial power when the State had declared it should have no such quality.

In *Giozza v. Tiernan*,[1] it was also held that the commercial power must not be so used as to destroy the essential reserved right of a State; and that when the *transitus* has not begun, or having begun has ceased, the Congressional power does not attach, and the State power is exclusive. It is only when the article is in commercial *transitus* that the State cannot touch it. When is liquor under the commercial power *in transitu?* When delivered at the terminus *a quo*. Does it cease to be under this power when delivered to the consignee at the terminus *ad quem?* The answer is in the negative.

Following *Brown v. Maryland*,[2] the Supreme Court, in *Leisy v. Hardin*,[3] held that the article was not subject to State power upon its arrival at the terminus *ad quem*, if sold by the consignee in the original package, unbroken and unopened; that the importation was not complete until the consignee had either broken the package or sold it. In this case there was still a strong dissent of three judges. This decision rests upon the cases already cited.[1] Where the package is broken by the importer or the unbroken package is sold by him, the *transitus* is complete and the property passes under State power; but it seems if the consignee chooses to transport the unbroken package to another State he may do so. Congress has recently passed a law to conform its regulations of commerce to these State laws as to the importation of liquor. This, as in the quarantine cases already referred to, divorces the commercial power and the State police power. Such a law is held constitutional as a proper defense of the reserved power of the State.

[1] 148 U. S. 657.
[2] 12 Wheat. 443.
[3] 135 U. S. 100. See Pittsburg Coal Co. v. Bates, 156 id. 577, and Schollenberger v. Pennsylvania, 171 id. 1.

The late case of *Plumley v. Massachusetts*[2] decides that the commerce power does not preclude a State from passing laws preventing the sale of articles brought into the State from another, if intended to prevent the people from being cheated in the purchase of such articles by their deceptive appearance, and is a strong assertion of the police power of the State, when properly exercised, against any conflicting provisions under the power to regulate commerce.

The case of *Coe v. Erroll*[3] is very valuable for the illustration of these distinctions. In this case logs were cut and hauled from a place in New Hampshire to Erroll in the same State, for the purpose of transporting them by water from Erroll to a place in the State of Maine. The intent to transport did not withdraw them from State jurisdiction, and it was held that New Hampshire could still tax them. When started from Erroll to Maine they are *in transitu* interstate, and no longer subject to State jurisdiction, but are under the commercial power until the *transitus* is ended; and though the *transitus* be from State A to State C, through State B, they are not taxable by B, for they are

[1] Pervear v. Commonwealth, 5 Wall. 479; Waring v. Mayor, 8 id. 110.
[2] 155 U. S. 461.
[3] 116 U. S. 517.

subjects of interstate commerce. But if the logs or other property be taxed more than other like articles because to be transported, the tax is unconstitutional, for it is a tax in effect on the transport, and not on the property. Nor does the *transitus* begin while the property is being conveyed by dray or the like to the depot. The *transitus* does not begin until delivery is made at the depot of the interstate railroad.[1]

§ 264. A question of great importance has been discussed, whether the Congressional power over commerce excludes the exercise of the power to regulate commerce by the States.[2] It is obvious that the existence of the power when not exercised does not in all cases preclude the exercise of it by the States.[3] Suppose Congress should refuse to provide lighthouses, buoys, etc., or to remove obstructions in rivers or harbors, can a State do so? And by analogy as to postal matters, if Congress refused to establish a postal system, would the States be precluded? The cases already cited in reference to these matters decide this question.[4]

Take another class of cases. May not a State erect a bridge over a navigable river? The answer is obvious. A bridge is a part of the internal polity of the State, and may be erected if it does not obstruct commerce. If it obstructs commerce, *pro tanto* it is forbidden, as in that event it would be a regulation of commerce. But in itself it is not. Hence a bridge across the Ohio river is not necessarily a commercial regulation. As a convenience to its people it is a police regulation. If it be a law obstructing commerce it is a commercial regulation. The maxim applies to both governments, *sic utere tuo ut non alienum lædas.* For a State by means of its bridge to obstruct commerce would be to trench on the power of Congress; for Congress to abate the bridge as a nuisance when it was not obstructive of commerce would be

[1] The Daniel Ball, 10 Wall. 557; Coe v. Erroll, *supra.*

[2] Federalist, No. XXII.

[3] Mobile v. Kimball, 102 U. S. 691.

[4] Ward v. Maryland, 12 Wall. 418; Cook v. Pennsylvania, 97 U. S. 566; Guy v. Baltimore, 100 id. 434; Mobile v. Kimball, 102 id. 691; Pittsburg Coal, etc. Co. v. Louisiana, 156 id. 590.

for Congress to invade the reserved power of the State. This question arose in the *Wheeling Bridge Case.*[1] In that case the bridge was abated because it obstructed commerce; not because, in itself, it was a regulation of commerce. A bridge, therefore, is legal until Congress forbids. Hence, now, Congress grants the right to a State to build a bridge across a navigable river, and the bridge is built in the exercise of a police power inconsistent with the commercial power.[2]

Another class of cases arises where the State law directly infringes on the freedom of interstate or foreign commerce, as in the case of *Brown v. Maryland*, *supra*, and others. The act of the State is political, as by taxation or other interference. The trade to be regulated by Congress is either left free or has some regulations imposed upon it. In the former case, Congress by non-action having left the commerce free, any limitation or restriction upon it by the State would violate the Constitution; and if Congress has made a regulation respecting it, then that regulation, if proper, is paramount to any that is made by the State. The distinction is therefore obvious that a bridge or the like character of internal polity remains good unless in effect it obstructs commerce, but a tax or law forbidding commerce is *per se* a regulation of commerce and is void because of conflict with the commerce clause.[3] Other cases on the subject may be cited.[4]

An illustration of this divisional line between State and Federal power is furnished in the case of patented articles; though patented by the United States, the State may forbid their sale for the safety of its citizens.[5] But Congress cannot forbid the sale where the State does not, for it is for the State to determine under the police power whether it shall

[1] 13 How. 518; 18 id. 421.

[2] Bridge Co. v. United States, 105 U. S. 470; Willamette Iron Bridge Co. v. Hatch, 125 id. 1.

[3] Mobile v. Kimball, 102 U. S. 691.

[4] Willson v. Blackbird Creek Marsh Co., 2 Pet. 250; Cooley v. Board of Wardens, 12 How. 319; Pennsylvania v. Wheeling & Belmont Bridge Co., 18 id. 420; Gilman v. Philadelphia, 3 Wall. 713; Osborne v. Mobile, 16 id. 479; Texas, etc. Ry. Co. v. Interstate, etc. Co., 155 U. S. 585; Monongahela Nav. Co. v. United States, 148 id. 312; Wisconsin v. Duluth, 96 id. 379.

[5] Patterson v. Kentucky, 97 U. S. 501.

or shall not be allowed.[1] So a Congressional license tax cannot prevail against a State law forbidding it. Congress may tax a business, but cannot license it; it is for the State alone to determine this question.[2]

§ 265. Another class of cases may now be referred to — questions arising out of the migration of the Chinese to the United States. The commerce power of Congress has been held applicable, in consistency with the view already stated, that this is a lawful regulation of commerce.[3]

The singular case of *Crandall v. Nevada*[4] arose upon a law of that State imposing a tax on railroad and stage companies for every passenger carried out of the State by them. This was held to be virtually a tax upon the passenger for the privilege of passing through the State. The court was divided upon the question whether this was an exercise of the power to regulate commerce between the States by the State, the majority of the court thinking it was not, but two of the judges holding that it was. The majority of the court put it on the ground of the right of the Federal government to require, and the correlative right of the citizen to have, free transit in ordinary travel throughout the whole country. The case was not argued except for the State of Nevada, and, while the decision may be sustained, it would seem to rest more strongly upon the view already taken as to the clause of the Constitution relating to citizenship and the construction of that clause by Justice Miller in the *Slaughter-House Cases*.[5] Construing this clause in connection with the fourth of the Articles of Confederation, we have seen that it secured absolute freedom of ingress and egress to the citizen of any State into, through and from every other. On this

[1] United States v. De Witt, 9 Wall. 41; Webber v. Virginia, 103 U. S. 346; Plumley v. Massachusetts, 155 id. 461.

[2] License Tax Cases, 5 Wall. 462, 473; Plumley v. Massachusetts, 155 U. S. 461.

[3] Const. U. S., Art. I, sec. 9, clause 1; Chinese Exclusion Case, 130 U. S. 581; Nishimura Ekiu v. United States, 142 id. 651; Chinese Cases, 149 id. 698; Lau Ow Bew v. United States, 144 id. 47; Lem Moon Sing v. United States, 158 id. 539; United States v. Wong Kim Ark, 169 id. 649.

[4] 6 Wall. 35.

[5] Const. U. S., Art. IV, sec. 2.

foundation the State tax is clearly unconstitutional, as would be any tax by Congress upon any such passenger. Mr. Justice Clifford and Chief Justice Chase, in their dissent, express strong doubts as to the possession of any such power by Congress — a doubt which grows into conviction against any such power, because of the article we have referred to.

This power to regulate commerce applies to the District of Columbia and the Territories as well as to the States.[1] This is obvious as to foreign commerce, but is also applicable to commerce between the District or Territories and the States upon the same reasons which were urged by the court in respect to the imposition of the direct tax upon the District and Territories in the case of *Loughborough v. Blake*.[2] And so the power to regulate commerce strictly internal to the District and Territories belongs to Congress under the express provisions of the Constitution.[3] It was under the Congressional power that the Interstate Commerce Bill was passed regulating the rates of railroads and those of other carriers engaged in interstate commerce; by this bill also the commission is constituted to adjudicate all such questions. As all these public carriers, if corporations, held their franchises under the States, their regulation of rates, etc., if they affected the rights of interstate commerce, would be as void as if done by the State under whose authority they were created. And Congress exercised the power to regulate such commerce by controlling the unjust action of public carriers in destroying the freedom of this commerce which the Constitution designed. The Supreme Court has sustained the constitutionality of that act in several cases.[4]

[1] Stoutenburgh v. Hennick, 129 U. S. 141.

[2] 5 Wheat. 517.

[3] Art. I, sec. 8, clause 17; Art. IV, sec. 3, clause 2.

[4] Maine v. Trunk Line, 142 U. S. 217; Interstate Commerce Commission v. B. & O. Ry. Co., 145 id. 263; Gulf, etc. Ry. Co. v. Hefley, 158 id. 98; Richmond & Alleghany R. R. Co. v. R. A. Patterson Tobacco Co., 169 id. 311; United States v. Joint Traffic Ass'n, 171 id. 505: Hopkins v. United States, id. 578; Interstate Commerce Commission v. Alabama Midland R. R. Co., 168 id. 144; Anderson v. United States, id. 604.

§ 266. A remarkable case arose before the Civil War, to which reference may be made.[1] A Virginian shipped from a Virginia port a number of slaves on a steamer bound to the port of New York. He was carrying them to Texas, to which State he had removed. When they reached New York they were being carried from the wharf where the boat landed to another wharf where a Galveston steamer lay, to be placed on the latter to be transported to Texas. While *in transitu* from wharf to wharf they were intercepted, taken from the possession of the owner, and were by *habeas corpus* discharged from his custody, and declared to be free, under the laws of New York prohibiting slavery. The case was carried to the Supreme Court of New York and decided in favor of the slaves, that court affirming the decision of the court below, three judges in favor of affirming and two for reversing. Preparations were made to carry the case by appeal to the Supreme Court of the United States, when the Civil War broke out, which ended the controversy. The constitutional question involved was whether, when the slaves were *in transitu* from Virginia to Texas, the New York law of emancipation operated upon them at all; whether the power of Congress over interstate commerce did not free them from the jurisdiction of New York while *in transitu* from Virginia to Texas. It would seem upon principles settled by the Supreme Court in cases already referred to, that if the vessel upon which they were shipped for Texas had only stopped at New York, and continued from New York to Texas, the journey would have been continuous and the law of New York could not have attached.[2] But the contrary contention was, that the continuous transit from Virginia to Texas was broken at New York by their transit from wharf to wharf to another steamer, and that, therefore, in that interval they became subject to the law of New York.

In *Pullman Car Co. v. Pennsylvania*[3] the State power to

[1] Lemmon Slave Case, 20 N. Y. 562.

[2] Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192; Brown v. Houston, 114 id. 622; Pittsburg, etc. Coal Co. v. Bates, 156 id. 577.

[3] 141 U. S. 18.

tax the plaintiff upon the cars which were constantly in the State of Pennsylvania, upon such proportion of its capital stock as the miles of transit in the State bore to the whole number of miles in all the States over which the cars ran, was held not to violate the commerce power. The dissenting opinions of Judge Bradley and two other judges involve the question considered in the slave case *supra*.

§ 267. In closing this prolonged discussion of this important clause a few additional considerations may be noted.

A State is held in many of the cases to have no power to tax a foreign drummer, nor to forbid a person or corporation freely to engage in interstate commerce, and the reason assigned in the decisions has generally been that a State thus regulates interstate commerce. If this be so, then it would naturally follow that Congress could do these things because it is a regulation of commerce. This seems to the author to be a fallacy as to the ground of decision. For it has been seen that the article of the Constitution in reference to citizenship prevents a State or Congress from taxing or preventing intercourse of persons or *transitus* of property between the States. Both of these the Constitution left free, and they cannot be interfered with by State or Congress. Both are inhibited from the exercise of such power by the clause referred to.[1]

Again, in the case of *Groves v. Slaughter*,[2] the reasoning of the court is to the effect that while each State under its police power could forbid the importation of slaves from other States, Congress could not do so. How could it, by any regulation of commerce, force slavery into a State which repelled and forbade it. This made the police power supreme and paramount to the commerce power. On the same ground Congress cannot, under the interstate commerce clause, force into a State contrary to its law moral or physical disease, or any institution of society which the State may forbid. The internal polity of the latter would be held paramount over any regulation of commerce to the contrary.

Can dynamite or gunpowder, by a regulation of commerce,

[1] Const. U. S., Art. IV, sec. 2.

[2] 15 Pet. 449.

be carried in uncovered cars through any State of the Union? A negative answer is sustained by the whole current of authorities, and by the forcible language of the court in *Crutcher v. Kentucky*,[1] in which Mr. Justice Bradley says: "Disease, pestilence, pauperism are not subjects of commerce. . . . They are not things to be regulated and trafficked in, but to be prevented."

Reference may also be had to a very late decision in the case of *Plumley v. Massachusetts*,[2] in which, after the review of a large number of cases, the court, through Justice Harlan, uses this strong language:

"We are not unmindful of the fact — indeed this court has often had occasion to observe — that the acknowledged power of the States to protect the morals, the health, and safety of their people by appropriate legislation, sometimes touches, in its exercise, the line separating the respective domains of National and State authority. But in view of the complex system of government which exists in this country, 'presenting,' as this court, speaking by Chief Justice Marshall, has said, 'the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous State governments, which retain and exercise all powers not delegated to the Union,' the judiciary of the United States should not strike down a legislative enactment of a State — especially if it has direct connection with the social order, the health, and the morals of the people — unless such legislation plainly and palpably violates some right granted or secured by the National Constitution or encroaches upon the authority delegated to the United States for the attainment of objects of National concern."

The question has been mooted whether Congress can regulate negotiable instruments, interstate and foreign, and whether they constitute commerce within this clause. We have seen that an interstate bill of lading is beyond the power

[1] 141 U. S. 47, 60, 61.

[2] 155 U. S. 461, 479.

of a State to regulate, because such action would be a regulation of commerce.[1] But this is the regulation of an instrument which connects itself with the thing which is *in transitu* interstate or to foreign countries. But could the contract involved in negotiable paper be the subject of regulation by Congress? Upon this there are no decisions, but a negative answer to the question is strongly confirmed by the late case of *Hooper v. California*,[2] citing the opinion in *Paul v. Virginia*[3] and other cases.

Does this power include the improvement of rivers and harbors and the like by Congress? If it be the improvement of waters strictly internal to the State, the answer is in the negative.[4] But where the waters, though within a State, are parts of the water-way between points in that State to other States and to foreign countries, the power to improve them has been asserted with strong reasoning for the constitutionality of its exercise. Without going into this question fully, reference may be made to what has already been said about the regulation of commerce proposed between Virginia and Maryland in 1786, for a system of regulation of commerce between those two States. In this compact stipulations as to light-houses, buoys, etc., at points expressly for the safety of navigation, were held to be regulations of commerce.[5] We may fairly interpret the meaning of the words used in this clause by the meaning attached to them by previous compacts between the States.

Furthermore, it was proposed in the convention that the States should not be restricted in laying tonnage duties for the purpose of clearing harbors and erecting light-houses. It was argued for the rejection of the proposition, and for the adoption of that in the Constitution, that no such duty should be laid by the State without the consent of Congress; that the power to clear harbors, erect light-houses and the like was included in the power of Congress to regulate com-

[1] Woodruff v. Parham, 8 Wall. 123.

[2] 155 U. S. 648.

[3] 8 Wall. 168.

[4] The Daniel Ball, 10 Wall. 557.

[5] 12 Henning's Statutes at Large, 50–55.

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.

ritories are defensible on the ground that Congress had the power of legislation over the Territories, which it did not possess in the States. It is true that Mr. Justice Bradley in one case[1] uttered a *dictum* that Congress can build railroads under the commerce clause. But that question did not arise in the case. The question decided was that a State could not tax a franchise granted by Congress to build a road, this being a grant for postal and military purposes. To this California consented, thus yielding her eminent domain.[2]

The power of Congress to build a railroad, where necessary and proper for postal purposes or for military purposes, must be conceded as necessary and proper to carry out express powers granted to Congress; but it is quite another thing to claim that it has power to build it as a regulation of commerce.[3]

Power Over Copyrights and Patents.

§ 277. "To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries."[4]

This is a new clause in the Constitution, not found in the Articles of Confederation. It will be noted that Congress has not an unlimited power to promote the progress of science and useful arts, but that the terms of the clause limit it to two objects. "By securing for limited times to authors and inventors," etc., it is obvious that in a Union where there was an intercommunication of the privileges and immunities of citizenship, the rights of authors and inventors, but for this article, in their respective States, would be of very little avail, and yet that the use of these writings and inventions would be general throughout the Union. It was natural, therefore, that this power should be given to Congress in order that authors and inventors might be protected in their

[1] California v. Pacific R. R. Co., 127 U. S. 1.

[2] Santa Clara Co. v. Southern Pacific Ry. Co., 118 U. S. 394; Pacific Railroad Removal Cases, 115 id. 1.

[3] But see Luxton v. North River Bridge Co., 153 U. S. 525, and Lake Shore, etc. R. R. Co. v. Ohio, 165 U. S. 365.

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

exclusive right to their works and discoveries by patent and copyright laws. This has been a valuable provision, and has stimulated authorship and invention in this country to an unparalleled extent.

The cases upon this subject are too numerous to mention, but two may be referred to.[1] The late decisions of the court have confined copyrights and patents for inventions to works and inventions involving the intellectual concept of the inventor or author. A lithograph or photograph of an original conception may be copyrighted, but not a mere mechanical copy. The photograph of Oscar Wilde, giving pose, dress, etc., as the original conception of the artist is a subject of copyright, but a photograph or lithograph which is a mere copy of the original conception of another is not a subject of copyright.[2] The patent-right or copyright of an inventor or author does not give the right of use and sale in any State contrary to the police regulations of that State. A law of a State forbidding either is paramount to the patent-right or copyright conferred by Congress.[3] Patent laws have no extraterritorial effect.[4]

Trade-marks are not included within this power; they are not inventions, but merely marks of ownership.[5] Under this power the late international copyright law was passed, by which security in the use of such rights by authors and inventors in foreign countries is guaranteed upon a reciprocal security of use to our authors and inventors in the country to which the privilege is granted.

Power to Establish Inferior Courts, etc.

§ 278. The next clause to which reference will be made is as follows:[6] "To constitute tribunals inferior to the Su-

[1] Wheaton v. Peters, 8 Pet. 591; Wheaton and Donaldson v. Peters and Grigg, Id. 667.

[2] Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53; Banks v. Manchester, 128 id. 244; Callahan v. Myers, Id. 617.

[3] United States v. Dewitt, 9 Wall. 41; Patterson v. Kentucky, 97 U. S. 501; Webber v. Virginia, 103 id. 344; Cooley on the Constitution, 95, 96.

[4] Brown v. Duchesne, 19 How. 183.

[5] Trade-Mark Cases, 100 U. S. 82.

[6] Const. U. S., Art. I, sec. 8, clauses 9, 10.

preme Court; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."

The first branch of this clause may be read in connection with a clause under the judicial power of the Constitution,[1] which reads thus: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." The Constitution itself constitutes but one court and that the Supreme Court. It leaves to Congress the liberty of constituting from time to time, as policy may dictate, all the United States courts inferior to the Supreme Court. And under this power, as we shall hereafter see, Congress has established circuit, district, intermediate appellate courts and court of claims, etc.

The second branch of this clause gives to Congress the power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. Piracy is a "public crime, not against any particular State, but against all States, and the established order of the world." "Piracy is robbery on the sea, or by descent from the sea upon the coast, committed by persons not holding a commission from or at the time pertaining to any established State."[2] "If the robbery be committed within the territorial jurisdiction of any nation it is not strictly piracy, and would be punishable by the sovereign of the territory alone." A pirate is *hostis humani generis;* his crime is not local to a State, but as far as any one country is concerned against the property of its people on the high seas. For this reason the power is conferred on Congress to give equal protection to the property of all the States upon the high seas, and is not left to be defined and punished by the individual States.[3]

The precise nature of this crime needs some legal definition, and hence the power is given to define as well as to punish such piracy. Besides this, felonies may be committed on the high seas,[1] such as murder and the like, and when committed on a vessel of the United States would be properly cognizable by no one State, but by the representative of them all as protector of the vessel on which the crime was committed.

[1] Const. U. S., Art. III, sec. 1.
[2] Dana on Wheaton, note 83.
[3] Cooley on the Constitution, 97, and cases there cited.

§ 279. The last clause gives to Congress like power to define and punish offenses against the law of nations. The wisdom of confiding this power to Congress is manifest. The Federal government is the representative of all the States in their individual relations with other countries. These relations may breed conflicts with other nations. The duty to protect by their armies and navies in case of collision is imposed on the Federal government; vesting in Congress as regards the conduct of war, in the President and the Senate as regards treaties of peace and amity. To have left this power to the individual States would have imposed on the Federal government the defense of each State against foreign invasion in any collision which their separate relations might bring about, thus burdening all with the peril and expense of war for the defense of each in its separate dealings with every other nation in the world.

Some years ago complaint was made by some of our South American neighbors that systematic counterfeiting of their public securities in the commercial marts of the United States was damaging their credit and their capacity to issue their genuine securities in the United States upon which to raise money. It was complained that the United States were, in effect, a harbor for these gangs of counterfeiters, and they asked for some redress or remedy. This resulted in the passage of a law denouncing this practice as an offense against the law of nations, because, under cover of the United States, it was an offense against the rights of other nations. The offense was defined and punishment imposed. In a case before the Supreme Court,[2] a conviction under this law was

[1] Two recent cases may be referred to as showing the scope of the words "high seas." Jones v. United States, 137 U. S. 202; United States v. Rodgers, 150 id. 249.
[2] United States v. Arjona, 120 U. S. 479.

affirmed. The considerations justifying this law and making it constitutional are fully stated in the opinion of the court. See also Report of the Judiciary Committee of the House of Representatives on that subject.[1]

The War Power.

§ 280. The War Power of the United States may be comprehended under the next five clauses of the eighth section of the first article. They involve the following heads: To declare war; to grant letters of marque and reprisal; to make rules concerning captures on land and water; to raise and support armies; to provide and maintain navies; to provide for calling forth the militia; to make rules for the land and naval forces; and to provide for organizing, arming and disciplining the militia, etc. These clauses will be considered in order. The tenth clause gives to Congress the power to declare war.

§ 281. As an original proposition, a declaration of war is necessary to its existence; for by war the citizens of the two belligerent nations are *quasi*-enemies. All other nations must observe neutrality between them, and must recognize the rights of each, by warlike measures, blockade and the like, to put a check upon freedom of trade of the non-belligerent nations with either of those at war. Without some public announcement of this abnormal status between nations once at peace and now at war, great confusion might arise affecting the rights of nations other than the belligerents. In Greece and Rome, and even in the European countries in the Middle Ages, such public declaration was uniformly made, and was regarded as obligatory. But since the middle of the eighteenth century, formal declarations have not been universal and have fallen into disuse. This disuse of the formal declaration arises from the publicity and circulation of intelligence peculiar to modern times. Countries have their ambassadors at the different courts of the world, and in our day steam and cable make it impossible for a nation to engage in war without the world's knowing it.[1] Still, President Woolsey states that the party entering into war is bound to indicate it by some public acts which will be equivalent to a public declaration, such as sending away an ambassador, non-intercourse, and the like. Furthermore, its own people ought to know that they have been made enemies, not friends, of the subjects of the belligerent enemy of their country. Neutrals have a right to know of the state of war, and are not bound to observe the duties of neutrals until notified.[2] The language of the Constitution was obviously adopted with a view to making public the important fact of the status of belligerency between the United States and any other country. But as declarations are merely a mode of notification, the fact of war may speak louder than words; and the language of the Constitution cannot be evaded by a change in the custom of nations which dispenses with a formal declaration, nor can the United States be thrown into war with another power through any other authority than that of Congress. The words "to declare" include the power to make war, with all the incidents of raising armies and navies which the Constitution has confided to Congress. It is well, therefore, to guard against the inference that, because the declaration of war is not now held necessary to constitute the status of belligerency, the President may plunge the country into war without that which is equivalent to a declaration of it by Congress.

The war with Mexico was never openly or in terms declared by the United States, but Congress passed an act the preamble of which read, "Whereas war exists by the act of Mexico," etc., which act was the invasion of the territory of a State; and the United States accepted the state of war as a fact without a formal declaration. But an act of Congress is necessary to create a state of war between the United States and any other country.

[1] Forty-eighth Congress, First Session, H. R. No. 1329.

[1] Woolsey on International Law, 187–92; Hall on International Law, 379–81.

[2] Woolsey on International Law, 193–93.

§ 282. The next clause runs, "to grant letters of marque and reprisal." It is sufficient to say of these words that they may permit the grant of public authority to persons who are not in the regular service of the country to exercise the public power of warring upon and capturing vessels of the enemy upon the high seas; giving rise to the habit of what is known as privateering. The authority of a privateer to exercise this war power is derived from the sovereign authority under which he acts. If he acts otherwise he is liable to the charge of piracy. Thus the policy of privateering, now very much inveighed against, was in the minds of the framers of the Constitution, because it enabled the militia of the seas to supplement the regular naval forces of the United States in conflicts with great naval powers. The issue of these letters is a part of the war power of Congress. It may be well to say that the power to grant these letters is denied to the States, and also the power to engage in war, unless actually invaded, etc. The power "to make rules concerning captures on land and water" vests in Congress the determination of the subjection of the property of an enemy to capture and condemnation. And in an early case[1] it was held that the property of an alien enemy found in the United States could not be condemned as prize without an act of Congress to authorize it. This includes the power, through the establishment of prize courts, to regulate the method in which a capture shall be brought into our hands for adjudication, and the principles upon which it shall be condemned as lawful prize.

§ 283. The next clause grants the power to "raise and support armies." This no doubt means a regular force as distinct from militia, the calling forth of whom is provided for by a distinct clause. No limit is placed upon the size of the army, for the reason so often assigned by the authors of the *Federalist*, that no limit could be assigned to the necessities of the country for defense. But an important limit is put upon the permanency of this army, which recalls the English check upon the power of the Crown as the declarer of war,

[1] The Thomas Gibbsons, 8 Cr. 421

and as the generalissimo of the army. One of these checks is the peculiar form of the bill to raise the army, which gave it the name of the Mutiny bill;[1] there being no similar provision in our Constitution. But the other British check is substantially embodied in this clause in the words, "But no appropriation of money to that use shall be for a longer term than two years." In England the term is one year. It was made two years by our Constitution because the term of service of the House of Representatives is two years. The forbidding of an appropriation for the support of an army for a longer period than two years makes it impossible for the President to use that army beyond that term for any illicit purpose, without the renewal of the appropriation by the two houses of Congress. It is a most potent check upon the abuse of power by the President as commander-in-chief, and was within the view of the framers of the Constitution, as appears from the strong statement of Mr. Hamilton in the *Federalist*,[2] which is worthy of insertion here: "The legislature of the United States will be *obliged* by this provision, once at least in every two years, to deliberate upon the propriety of keeping a military force on foot; to come to a new resolution on the point; and to declare their sense of the matter, by a formal vote in the face of their constituents. They are not at *liberty* to vest in the executive department permanent funds for the support of an army; if they were even incautious enough to be willing to repose in it so improper a confidence." This being so, it is in the power of Congress to condition the grant of money for the support of the army upon terms which will secure its non-use by the President, even during the two years, for any purpose hostile to the liberty of the people.

A question arose under the Conscription Act passed by the Confederate Congress during the late war, whether it was competent for that Congress by conscription substantially to exhaust the material out of which the militia was composed. It was objected that this would make a standing army composed of the whole of the militia of the country,

[1] Ch. IV. [2] No. XXVI.

and would leave to the States no armed force to resist its power. The Court of Appeals of Virginia decided there was, and could be in reason, no limitation put upon the size of the army which was to be raised, and that the objection to the law was not good.[1]

§ 284. The next clause is, "To provide and maintain a navy." It will be seen that the two years' limit on appropriations for this purpose is omitted. A navy on the seas cannot be used, as an army on the land may be, for the destruction of liberty. The words used as to these two forces are different. The words "to raise and support armies" have not the idea of permanency in them, because there is the intimation that the army may be raised only when a contingency arises making it necessary. It involves the idea of raising it when needed, and supporting it while needed; but let it disband under the two years' limit if there be no need for it. But there is, in the words "to provide and maintain a navy," a very significant intimation of its permanency in maintaining it, that is, holding it in the hand. It is according to the genius of our Constitution, then, that while standing armies are to be avoided, the maintenance of a navy is to be favored.

The next clause, "To make rules for the government and regulation of the land and naval forces," vests in Congress, and not in the Executive, the framing of the rules and articles of war; for the government and control of the citizens who may be in the land and naval forces and for regulating their conduct. In this clause we may see the jealousy of executive power, and the favor to the representatives of the people, lest the rules and articles of war might be unduly severe and tyrannical.

§ 285. The next clause provides for calling forth the militia, and executing the laws of the Union, suppressing insurrection, and repelling invasion. This authorizes Congress alone to make provision for putting the militia of the country under the command of the President for the purpose named in the clause, and this is made more clear by reference to a subsequent provision: "The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States." The call is to be made under the provisions of an act of Congress. By an act passed in 1795 Congress gave power to the President to call out the militia for certain purposes, and by subsequent acts in 1807 power was given to him to be exercised whenever he should deem it necessary for the purposes stated in the Constitution; and the Supreme Court has decided that this executive discretion in making the call could not be judicially questioned.[1]

[1] Burroughs v. Peyton, 16 Gratt. (Va.) 470. As to enlistments, see In re Morrisey, 137 U. S. 157.

It is perhaps proper that as the duty devolves on the President to see that the laws are faithfully executed, Congress should vest in him the power to call out the militia whenever he deems it necessary in order to execute the laws of the Union. His recent action in the city of Chicago has had judicial sanction in the *Debs Case*.[2] The power to suppress insurrection by a call upon the militia applies only to insurrections against the authority of the United States, for the reason that as to any insurrection against State authority a distinct provision is made.[3] The power to call forth the militia to repel invasion grows out of the duty of the United States to protect each of them against invasion.[4]

Power Over the Militia.

§ 286. Congress is authorized "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions."[5]

This clause requires careful consideration. Under the Confederation, Congress, as we have seen, had no power to raise revenue, but was dependent on the States; and while

[1] Houston v. Moore, 5 Wheat. 1; Martin v. Mott, 12 id. 19.
[2] In re Debs, 158 U. S. 564.
[3] Const. U. S., Art. IV, sec. 4.
[4] Id., Art. IV, sec. 4.
[5] Id., Art. I, sec. 8, clause 15.

it had power to "build and equip a navy," it had no power to raise land forces, and could only make requisitions upon each State for its quota in proportion to the number of white inhabitants in such State, which requisitions should be binding; and thereupon the legislature of each State should appoint the regimental officers, raise the men, etc., who should then march to the place appointed by the United States in Congress assembled. Under this clause of the Confederation the States had the power only to appoint *regimental* officers in the Continental army so raised. The general officers were appointed by the United States. This did not touch the militia at all, the control of this force being left exclusively to the States. The Constitution of the United States, as we have seen, gave to Congress an independent power to raise an army and provide a navy; and it is interesting to observe that under the Confederation the power to build a navy was granted to Congress, while the power to raise armies is denied.

And furthermore, the power to appoint all naval officers was granted to Congress, and the power to appoint regimental officers in its own army was denied, leaving only a power to appoint general officers. Along with the power granted in the Constitution to raise armies and provide a navy, the power to appoint all officers of the standing army and navy was conferred upon the Federal government. This cured the vice of the Confederation by vesting in Congress a power independent of the State to raise the standing land and naval forces of the United States. Along with this we may note the prohibitions on State power. It is provided: "No State shall, without the consent of Congress . . . keep troops or ships of war in time of peace . . . or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."[1] This prohibition upon the States, it will be observed, only provided against the States keeping a standing army or vessels of war, but did not apply to the militia; and the prohibition related only

[1] Const. U. S., Art. I, sec. 10, clause 3.

to a time of peace; so that the State is left free to keep troops or ships of war in time of war. And furthermore, a State may not engage in war, unless actually invaded, or in imminent danger. That is to say, while not permitted to declare an offensive war, it is not precluded from engaging in war when actually invaded or in imminent danger. The militia of each State, while liable to call under the power of Congress, is subject entirely to the State control, except as modified by the clause now under consideration.

But the jealousy of the States, while according independent power to Congress as to the regular army and navy, guarded their own control over the militia force by the fifteenth clause, special attention to which is now directed.

By reference to the sixteenth clause it may be seen that the precise power given to Congress over the militia is in these words: "To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." (See also fourteenth clause, *supra*, and article II, section 2, clause 1, of the Constitution, and the fifth amendment to the Constitution.) The power of Congress to govern the militia is excluded, unless they are employed in the service of the United States, which leaves to Congress nothing but the power to provide for organizing, arming and disciplining the militia. This power, as appears from the debates, looked to the organization of the militia into divisions, regiments and the like, and to furnishing arms, which had always been done, and to establishing rules by which recruits were to be disciplined, involving tactics and the like. No control over the militia was given to the Federal government, except when that government might call them into its service for the purpose stated in the fifteenth clause. The latter part of the clause under consideration was confined to the reservation to the respective States in respect to the militia. That reservation is in these words: "The appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." The appointment of the officers

means all officers, general and regimental; so that the organization prescribed under the first part of the clause is to be put into effect by the State's appointment of the officers prescribed by Congress for the organization. The power to train the militia according to the discipline prescribed by Congress is exclusively reserved to the States. So that whenever the militia, as such, are called into the service of the United States, they come as a State organization, all of whose officers are commissioned by the State and hold under its authority.

§ 287. It is proper to add that the President is the commander-in-chief of this militia when called into actual service, and by implication is to be governed by the rules and articles of war for the regular forces by the terms of the fifth amendment. In confirmation of these views, a brief reference to the history of this clause in the debates of the convention may now be made.

In Mr. Pinckney's plan the power was to be given to Congress to pass laws for arming, organizing, and disciplining the militia.[1] In the report of the Committee of Detail that clause was left out, and the power to call forth the militia was alone retained. Later in the session Mr. Mason proposed that Congress should have the power "to regulate the militia." Subsequently Mr. Mason again proposed to give power for the regulation and discipline of the militia, reserving to the States the appointment of officers. Mr. Ellsworth strongly objected against taking the authority over the militia from the States, "whose consequence would pine away to nothing after such a sacrifice of power." Dickinson said: "We are come now to a most important matter, that of the sword. . . . The States never would, nor ought to, give up all authority over the militia." Sherman objected to the States' giving up on this point. Gerry said to surrender on this point would put upon the plan "as black a mark as was seen on Cain."[2] The question was referred to the Grand Committee. The committee on August 21st reported the clause as it now reads in the Constitution, except that the words "to provide" are in the Constitution where the words "to make laws" were in the report.[1] On the 23d of August Mr. Sherman moved to strike out of the clause the last words, "and authority of training," etc. Ellsworth objected, and Sherman withdrew the motion. Mr. Madison moved to amend the clause so as to give to the States the appointment only of officers under the rank of general officers. Sherman and Gerry warmly opposed this. On the motion, there were ayes three States, noes eight States, Virginia dissenting from Mr. Madison's motion. The clause was then adopted as it now stands.[2] So that the power of appointing officers, reserved to the States, included general as well as regimental officers. The adoption of this clause in the form it now assumes is therefore a matter of great consideration, and was regarded as a matter of essential importance. The effect of it has already been remarked upon in a former part of this work. But the action of the framers of the Constitution in the reservation of this exclusive command of the militia to the States, subject to the provisional arrangement for organizing, arming and disciplining vested in Congress, gave rise to two articles in the *Federalist*, one by Madison and the other by Hamilton, which demonstrate that it was the purpose of the Constitution to give to the States a reserved military force with which they might by warlike resistance oppose the usurpation of power by the Federal government. Mr. Hamilton says:[3] "But in a Confederacy, the people, without exaggeration, may be said to be entirely the masters of their own fate. . . . It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority. Projects of usurpation cannot be masked under pretenses so likely to escape the penetration of select bodies of men as of the people at large. The legislatures

[1] Madison Papers, 740. [2] Id. 1361–64.

[1] Id. 1378.
[2] Id. 1402, 1408.
[3] Federalist, No. XXVIII.

will have better means of information; they can discover the danger at a distance; and possessing all the organs of civil power and the confidence of the people, they can at once adopt a regular plan of opposition, in which they can combine all the resources of the community. They can readily communicate with each other in the different States, and unite their common forces for the protection of their common liberty.

"The great extent of the country is a further security. We have already experienced its utility against the attacks of a foreign enemy. And it would have precisely the same effect against the enterprises of ambitious rulers in the national councils. If the Federal army should be able to quell the resistance of one State, the distant States would have it in their power to make head with fresh forces. The advantages obtained in one place must be abandoned to subdue the opposition in others; and the moment the part which had been reduced to submission was left to itself, its efforts would be renewed and its resistance revive. . . . When will the time arrive that the Federal government can raise and maintain an army capable of erecting a despotism over the great body of the people of an immense empire, who are in a situation, through the medium of their State governments, to take measures for their own defense, with all the celerity, regularity and system of independent nations? The apprehension may be considered as a disease, for which there can be found no cure in the resources of argument and reasoning."

Mr. Madison adopts the same course of reasoning, and, after estimating the probable size of the standing army of the United States, says:[1] "To these would be opposed a militia amounting to nearly half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia

[1] Id., No. XLVI.

thus circumstanced could ever be conquered by such a proportion of regular troops."

These statements of two great writers, members of the Federal Convention, urging the ratification of the Constitution by the people of the States, are conclusive evidence to show that the power over their militia is reserved to the States, in order, in an exigency created by Federal usurpation, that with arms in hand they might defend their liberties against the power of the Federal government, and under the direction of their own State authorities. These clauses thus considered may be regarded as constituting the war power.

§ 288. The war power has been a fruitful source of adjudication since 1861 in respect to the events and consequences of the memorable civil war. The solution of the litigated question as a scientific problem rests at last upon the determination of the fundamental question as to the validity of the act of secession of the Southern States of the Union. If it was a constitutional act, two countries were created by it, which by the results of the war have been re-knit into one. Or was it an attempted revolution, which if successful would have made two countries, but which, having failed, is to be construed as an unlawful attempt to overthrow the original government?

The author will venture elsewhere in this work to state his own views on this subject. For the present he will consider the judicial decisions based upon the Federal theory of the war between the States, which involves the denial of the right of secession, the legal existence of the Confederate States, and recognizes the Union as restored upon the overthrow of an illegal insurrection against its authority. This restoration, even if not *de jure*, may be conceded to be *de facto;* and we may in a treatise of this kind take the adjudications of the restored Union as a judicial statement of the law of the country, without regard to the contrary views, which can have, in the result, no effect in any political sense, however interesting they may be regarded in the historic discussion of the subject.

Assuming then that the restored Union is rightful, and especially because of the new amendments adopted by the formal methods provided by the Constitution, we will proceed to consider the war power under the light of the decisions of the Supreme Court, with such candid criticism upon them as shall be proper from their standpoint as to the historic questions involved, putting out of view what may be characterized as the secessionist views of the Southern States in their withdrawal from the Union in 1861.

The leading cases upon this subject are the *Prize Cases*.[1] The question involved was, whether or not certain vessels were liable to capture for violating the blockade proclaimed by the President of the United States before the recognition of a state of war between the United States government and the Confederate States by an act of Congress. The court, five judges concurring and four dissenting, held that the civil war between the United States and the Confederate States gave to the United States the same rights and powers that they could exercise in a foreign war, and that they had the right *jure belli* to institute a blockade of any ports in possession of the Confederacy; that the proclamation of the President was conclusive evidence that a state of war existed, which authorized a recourse to blockade. The dissenting judges held that until the act of Congress recognized the existence of war, the power to blockade the ports of the Confederacy did not arise and could not be instituted by the President under his power as commander-in-chief. All the judges concurred in holding the act of Congress valid, and the blockade a legal means of conducting a civil war; and all agreed that the so-called insurrection of the Southern States had assumed the proportion of a civil war, which existed in constitutional contemplation after it was recognized by the act of Congress on the 13th of July, 1861; and that the President did not possess the power to declare war or to recognize its existence and then order a blockade. The point at issue between the judges of the court was, whether or not the status of war

[1] 2 Black, 635.

could be created in any other way than by Congressional recognition, whether the war was foreign or civil. The majority held it could, and went so far as to hold that the proclamation of blockade was at once a constitutional institution of the status of war, and the exercise of a power resulting from that status. It may be conceded that the President as commander-in-chief may institute a blockade as an act of war, but whether he can declare or institute war is a different question. That is for Congress.

It may be noted that to blockade a port of a State of the Union is a clear violation of the Constitution, even by act of Congress. It violates the clause which declares, "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."[1] But it is claimed that it could be done under the war power. The Confederate States, being a *quasi*-foreign State, were held to be subject to blockade, and not subject to the above clause in reference to preference, etc. It would seem to be a great stretch of power to suppose that the President could do this without an act of Congress, when he had no power either to regulate commerce or to declare war.

§ 289. It may be stated as a result of the decisions of the Supreme Court, to use the language of Chief Justice Waite in the case of *Lamar v. Brown*,[2] that "It is quite true that the United States, during the late war, occupied a peculiar position. They were, to borrow the language of one of the counsel for the plaintiff, both 'belligerent and constitutional sovereign'; but, for the enforcement of their constitutional rights against armed insurrection, they had all the powers of the most favored belligerent. They could act both as belligerent and sovereign. As belligerent, they might enforce their authority by capture; and, as sovereign, they might recall their revolted subjects to allegiance by pardon, and restoration to all rights, civil as well as political. All this they might do when, where, and as they chose." Chief

[1] Art. I, sec. 9, clause 5.

[2] 92 U. S. 195.

Justice Waite, in the case of *Texas v. White*,[1] said: "The ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation of law. The obligations of the State as a member of the Union, and of every citizen of the State as a citizen of the United States, remained perfect and unimpaired. It certainly follows that the State did not cease to be a State, nor her citizens to be citizens of the Union. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation. Our conclusion, therefore, is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred."[2]

These cases placed the citizen of the Confederate States in a double relation to the government of the Union. He was recognized as a rebel to its authority, but at the same time as a public enemy to his country. For civil, criminal and municipal purposes they were citizens; for confiscation of property they were not entitled to due process of law, being public enemies. All the rules of public war applied to their condition. Their property might be seized by the most rigorous laws of war; they might be subjected to the forfeiture of their property, as if convicted traitors, without trial or conviction. The punishment for treason might be inflicted in the forfeiture of their property because they were guilty of treason as citizens and they were divested of the rights of trial guarantied by the Constitution because they were public enemies.

It is obvious that, if either theory be adopted as the correct one, the results must be absolutely inconsistent. It was only by treating them in the double aspect of public enemies, sub-

[1] 7 Wall. 726.

[2] *Accord:* White v. Hart, 13 Wall. 646; Keith v. Clark, 97 U. S. 454

ject to the most rigorous laws of war, now disused, however, and as guilty of treason to their country, that the penalty to which they were subjected could be held to be properly inflicted. If the Confederate was not out of the Union, how could his property be forfeited without trial and conviction of treason? But confiscation without trial or conviction was held constitutional.

In *Miller v. United States*,[1] the stocks owned by Miller in railroads and other corporations were libeled in behalf of the United States and his property confiscated, he having been a resident of Virginia during the war. He did not appear, nor did any one for him; but it was proved *ex parte* that he was an adherent of the Confederacy. The judgment of confiscation was sustained by the Supreme Court, Justices Field and Clifford dissenting. The court held that so much of the acts as were in the exercise of the war powers of the government were not subject to the fifth and sixth amendments of the Constitution, which required indictment by grand jury and trial by petit jury before confiscation; that they were not to be considered as the exercise by the government of its municipal power; and that in the war of the rebellion the United States had belligerent as well as sovereign rights. They had a right, therefore, to confiscate the property of public enemies wherever found, and also the right to punish offenses against their sovereignty. They might be treated as public enemies or as rebellious citizens. So in the case of *Mrs. Alexander's Cotton*,[2] the property of Mrs. Alexander was seized and confiscated, because of her residence in rebel territory, under the Captured and Abandoned Property Act.

By the act of July 17, 1862,[3] and of August 6, 1861,[4] Congress provided for the confiscation of property used for insurrectionary purposes and for the confiscation and sale of the property of rebels. In *Miller v. United States*, *supra*, these laws were held to be constitutional.

[1] 11 Wall. 268.

[2] 2 Wall. 404.

[3] 12 Statutes at Large, 319.

[4] Id. 589.

Contemporaneously with the act of July 17, 1862, a joint resolution was passed, at the instance of President Lincoln, providing that a forfeiture of the real estate of the offender should not extend beyond his natural life, because contrary to article III, section 3, clause 2, of the Constitution, which provided that no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted. This resolution was held in *Wallach v. Van Ryswick*[1] to leave the estate in remainder after the death of the offender to pass to his heirs, and that the joint resolution qualified the act of July 17, 1862, but did not defeat it. Wallach conveyed a lot in fee simple to the purchaser at the confiscation sale in 1866, and the court held that the deed did not convey the remainder in fee.

In the case of *Railroad Co. v. Bosworth*,[2] the court decided that despite the condemnation decreed under the said act, such a right in the remainder was vested in Bosworth that he could dispose of it after receiving a full pardon from the President. This case was different from *Wallach v. Van Ryswick*, because of the fact that Wallach in that case had made a deed *before pardon*, which was ineffectual to convey any right against the claim of his heirs. In the latter case the conveyance was made after pardon, which wiped out his offense and all of its consequences, and restored the title to him in fee simple. But in *Jenkins v. Collard*[3] the deed was made before pardon, but with a covenant of seisin, and a warranty against the lawful claims of all persons whomsoever. The court held that the warranty estopped the heirs of the grantor from claiming against his deed.

In the case of *United States v. Dunnington*,[4] the doctrine was affirmed that under the act of July 17, 1862, and the joint resolution aforesaid, the forfeiture operated upon the life estate of the offender, the fee remaining in him after the confiscation, but without power of alienation until his disability was removed; and that the deed, as in *Jenkins v. Collard*, made prior to pardon, with warranty against the claim of the heirs, was operative against the heirs after the disability was removed by pardon.

[1] 92 U. S. 202.
[2] 133 U. S. 92.
[3] 145 U. S. 546.
[4] 146 U. S. 338.

Another class of property was seized during the war under the name of "captured and abandoned property," which was seized and sold under proceedings defined by the act of March 12, 1863,[1] and the proceeds paid into the treasury and held in trust for the owners who proved loyalty before the Court of Claims. In the case of *United States v. Klein*[2] the court held that this act did not confiscate or absolutely divest the title of the original owner, even though disloyal. The government constituted itself a trustee for those who were lawfully entitled to it, and it was held that a pardon wiped out guilt and all its consequences.[3] After pardon a disloyal person could recover the fund in the treasury as if he had been originally loyal.[4]

§ 290. These various acts of Congress which forfeited the property of disloyal citizens of the United States, except in the single case of the forfeiture of real estate, which was qualified by the joint resolution referred to so as only to operate for the life of the offender, were all effected by *ex parte* proceedings against the owners, either as belligerent citizens of the public enemy, or as citizens of the United States subject to the penalty of forfeiture without trial under the Constitution of the United States. And while the condemned person was subjected to the forfeiture of realty only, according to the terms of the Constitution, the forfeiture of all other property was without any such qualification, being absolute forfeiture without trial or conviction. These acts were decided to be constitutional by the Supreme Court, and without any dissent. Without controverting these judg-

[1] 12 Statutes at Large, 820.
[2] 13 Wall. 128.
[3] Ex parte Garland, 4 Wall. 380; Railroad Co. v. Bosworth, 133 U. S. 103; Jenkins v. Collard, 145 id. 546.
[4] Carroll v. United States, 13 Wall. 141; Pargoud v. United States, Id. 156.

ments of the court, it may be questioned whether they would be held to apply in ordinary insurrections, or in any case of insurrection which did not assume the form of a powerful and well-established *de facto* government ruling exclusively within its territorial boundaries.

Another class of questions may be noticed as of great interest. All acts of the government of the Confederacy in aid thereof, as the issue of notes, bonds and the like, and acts of sequestration against citizens of the loyal States, were held to be absolutely null and void;[1] and all acts of any State of the Confederacy in aid of the rebellion as above mentioned were also held to be null and void.

But acts affecting merely the private rights of persons living in the Confederacy, as marriage, divorce, proceedings in courts, judgments, and laws for the order and peace of society, by the several States of the Confederacy, were held to be valid. Thus, in *Thorington v. Smith*[2] the court decreed the specific performance of a contract for the sale of land in Confederate notes. This results from the fact that the seceded States were still States, Bodies-politic, and not out of the Union.[3] The acts of the Confederate States courts were held to be nullities, but not the decisions of the courts of the Confederate States individually.[4] A law which allowed notes for money to be solvable in Confederate money was held valid, and the notes could be recovered on for the scaled value in real money;[5] but it was held that a law which allowed the recovery of the real value of the article sold, and not its scaled price, impaired the original contract, and was void under article I, section 10, clause 1, of the Constitution.

[1] United States v. Insurance Cos., 22 Wall. 99; Stevens v. Griffith, 111 U. S. 48.

[2] 8 Wall. 11. *Accord:* Chase, C. J., in Evans v. Richmond, Chase's Dec. 551.

[3] White v. Cannon, 6 Wall. 443; Texas v. White, 7 Wall. 700; Keith v. Clark, 97 U. S. 454; Coleman v. Tennessee, Id. 509.

[4] United States v. Insurance Cos., 22 Wall. 99; Stevens v. Griffith, 111 U. S. 48.

[5] Gavinzel v. Crump, 22 Wall. 308; Stewart v. Salamon, 94 U. S. 434; Bissell v. Heyward, 96 id. 580.

During the Civil War there were gross violations of the constitutional rights of northern citizens by the military power under the sanction of the President, when citizens were held to trial by court-martial for what were called acts of disloyalty or rebellion.

In *Vallandigham's Case*[1] the prisoner was tried by a military commission at Cincinnati, Ohio, for an offense declared and defined by a military officer, among other things for the habit of declaring his sympathies with the enemy. For this latter offense and for uttering disloyal sentiments he was arraigned and tried. The prisoner plead to the jurisdiction, and asked to be allowed to call witnesses, which he did. He was convicted and sentenced to close confinement in a prison of the United States, there to be kept during the war. This was confirmed by the commanding general. The President commuted the sentence to an order of banishment beyond the military lines of the United States. The prisoner applied for a *certiorari* before the Supreme Court of the United States. He claimed the right of trial by jury, and further claimed that the conviction was wrong because the offense charged was not known to the law of the land. The court decided that it had no jurisdiction to issue a *certiorari*, and therefore denied the writ, and the sentence was enforced.

In *Milligan's Case*[2] the prisoner was tried by a military commission and sentenced to death. He was a citizen of the United States, and the alleged crime was committed in Indiana. After the war he sued out a writ of *habeas corpus* before the Supreme Court of the United States, which discharged him, five of the judges holding that Congress had no power to subject him to such trial, and four of them, while holding that Congress had such power, decided it had not exercised it by law.

The Civil War closed, as far as hostilities were concerned, in 1865. The armies of the South surrendered in the spring and early summer of 1865. The Union was restored. The State of Virginia, whose restored government under Gov-

[1] 1 Wall. 243.

[2] 4 Wall. 2.

ernor Pierpont was recognized by the government of the United States, took possession of the executive government in Richmond. The Court of Appeals and the Legislature under the Constitution of Virginia assembled and performed their respective duties; but the Supreme Court of the United States, in a number of cases, has referred to the question as to when the war should be held to have closed. In *The Protector*[1] it was decided that the war began in different States at different dates, and was closed by the different proclamations of the President. In that case it was held that it closed in Virginia and other States, including Alabama, by the proclamation of April 2, 1866, and in other States, embracing Texas, as late as August 20, 1866, and that the war had begun in the different States by the two proclamations of President Lincoln in April, 1861. Thus by the power of the President the war was not closed until about a year after hostilities had ceased.[2].

§ 291. In 1867 Congress passed the Reconstruction Acts, by which the government of the State of Virginia, already recognized as the legal government of Virginia by the Federal authorities, with the governments of all the other States, was superseded as not being republican according to the Constitution. Under this sweeping act the seceded States were governed by military officers of the army, and parties were arrested and tried by military commissions. The Supreme Court of Virginia and other courts were succeeded and displaced by judges appointed by military authority.

Generals Ord and Gilham ordered the arrest for trial under the alleged authority of the Reconstruction Acts of a certain McCardle, on charges of disturbing the public peace, inciting to insurrection, libel, and impeding reconstruction. McCardle sued out a writ of *habeas corpus* before a Circuit Court of the United States, which adjudged the petitioner to be remanded to the custody of General Gilham, and from that judgment he appealed to the Supreme Court of the United

[1] 12 Wall. 700.

[2] The Protector, 9 Wall. 687.

States. The Supreme Court affirmed its jurisdiction upon the appeal from the decision of the Circuit Court and refused to dismiss the appeal. The case was held for consideration upon its merits, but by an act passed in March, 1868, Congress repealed the former act under which the Supreme Court had asserted jurisdiction in the case on appeal. Upon argument the court decided that its previous jurisdiction on appeal in this case had been taken away by the said act of Congress, and thereupon McCardle's case was dismissed for want of jurisdiction, and the decision of the court below operated to remand him to the custody of the military. The validity of the Reconstruction Acts was never passed upon by the Supreme Court in any case, and the result was that the military power was in full force in all the seceding States until the year 1870.

The author feels justified in stating that the Reconstruction Acts would never have been sanctioned by the Supreme Court if a case which brought the question before it for adjudication had arisen. The unlimited military power of the President under those acts subjected the Southern citizen to trial, in time of peace, without a jury, before military commissions, and the proclamation that the war had closed in 1866 made the Reconstruction Acts of 1867 unconstitutional. The restoration of the Union made it unconstitutional to charge any citizen of the South with crime or subject him to trial, except according to due process of law by indictment, presentment or other criminal proceeding in the civil courts of the country, and by a trial by a jury of his peers before such court.[1]

Power Over the Seat of Government.

§ 292. The next clause for consideration is that which gives power to Congress[2] "To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States; and to exercise like authority over all

[1] Const. U. S., 5th and 6th Amendments.

[2] Art. I, sec. 8, clause 17.

places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

It will be noted that the language is that Congress shall exercise exclusive power, not absolute. The limitations upon the power of Congress, express and implied, fully apply. Congress has power, subject to these limitations, to exercise all legislation proper within the District of Columbia. States legislate under their reserved powers exclusively within the States; but the territories ceded under this clause to the United States are subject to the exclusive legislation of Congress. It is further to be noted, that while Congress may acquire this territory for governmental purposes and the like, it has no power to exercise exclusive legislation until such territory is acquired as a matter of title to land, and is ceded by the States in which it lies as to all jurisdiction.[1]

Congress may buy property, or condemn it for public use, under the fifth amendment of the Constitution, and when acquired for Federal use it is exempt from State taxation. But Congress cannot have exclusive jurisdiction for legislation except by cession from the State where the land lies.[2] In the case referred to in 135 U. S. Reports, the government had built a fort within the Territory of Kansas, and held it as being a part of that Territory, subject to its control. After the admission of Kansas into the Union, the question arose whether Congress had jurisdiction to legislate within the limits of this fort. The Supreme Court decided that upon the admission of Kansas the jurisdiction to legislate had passed to the State, and that Congress had never acquired the right to legislate except by the consent of the new State as to this fort so established by Congress prior to its admission.

§ 293. The nature and extent of this power over the District of Columbia may now be considered. The language of the clause is, "over such district as shall be acquired by

[1] People v. Godfrey, 17 Johns. 225; Fort Beavenworth R. R. Co. v. Lowe, 114 U. S. 538; Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641.

[2] Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 538.

Congress, with the consent of the State, for a 'seat of government.'" Congress did so acquire the District with the consent of the States of Maryland and Virginia.[1] The District is its habitat, its home.

Under the next clause of the Constitution Congress has power to pass all laws necessary and proper to carry into effect the powers granted by the seventeenth clause. It therefore has the power to do what is necessary and proper to fit the District as the home of the government of the Union. Its power to do so is exclusive, because all State power over it is surrendered. Hence Congress may do within the District what a State may do for a like purpose within its territory, namely, all things necessary for keeping it well fitted for a seat of government. A large part of Washington, its streets, etc., belong to the government. To make the city a suitable home for the government, it may lay out parks, erect buildings for government use, place fitting adornments, statues, pictures, etc., and may further incorporate banks and other institutions by municipal law, as a State may do within its own territory; may establish asylums for its poor, for its blind and deaf, and may establish schools and colleges for the benefit of the people of the District, just as a State may do for the use of its own people. The limitation upon the power of Congress to do this is, that the purposes in view must be necessary and proper for its own use and for that of the people of the District.[2]

Furthermore, as Washington is a seat of government for all the States of the Union, it should be kept for their equal benefit. It is the seat of government to which citizens from all the States may come, and to which the members of Congress and the officers of the government are required and entitled to come. For this reason it was a mooted question, and one never decided, but held with great tenacity by many, that their family institutions and servants (slaves in the old time) could be brought by officers, senators and representa-

[1] Cohens v. Virginia, 6 Wheat. 264, 424.

[2] District of Columbia Commissioners v. B. & P. R. R. Co., 114 U. S. 453.

tives from their respective States for their use while residing in the District of Columbia.

Congress after the formation of the District perpetuated the laws of Virginia and Maryland in the parts respectively ceded by those States. Thus Maryland had before the District was formed a law forbidding slaves to be brought into it from any other State. It was held that this inhibition against slaves being brought into Maryland applied to that part of the District, and that a slave was freed by removing from the Virginia to the Maryland part of the District.[1] A citizen of the District is not a citizen of a State within the jurisdictional power of the courts of the United States,[2] and a citizen of the District loses some of the civil as well as the political capacities which belong to the citizens of the States. The same jurisdictional and exclusive power, where ceded by the States, belongs to Congress over forts, and other places acquired for necessary buildings, etc.

The Co-efficient Power.

§ 294. The words used in this clause, that Congress shall have power "to make all laws, which shall be necessary and proper,"[3] etc., have been already so fully explained, as to powers which may be implied as necessary and proper, that they need not be especially referred to here.[4]

Congress shall have power to make all laws which shall be necessary and proper to carry into effect, 1st, "the foregoing powers;" that is, those already enumerated in this article, and especially in this section. It seems proper to call this the co-efficient power, because it is a power which, in conjunction with the enumerated powers, is essential to make them efficient. Like an algebraic co-efficient, it may therefore be termed a co-efficient power. The laws necessary to collect revenue, to borrow money, to regulate commerce, to

[1] Rhodes v. Bell, 2 How. 397.

[2] Const. U. S., Art. III, sec. 2; Hepburn v. Ellzey, 2 Cr. 445; Barney v. Baltimore, 6 Wall. 280.

[3] Art. I, sec. 8, clause 18.

[4] Federalist, No. XXXIII; Cooley on the Constitution, 91, 97, and *ante*, on Canons of Construction.

establish postoffices, and the like, are passed in the exercise of this co-efficient power, because the power in its abstraction, without some such legislative machinery, would not be effectual. These words apply by fair construction not only to the strictly foregoing powers, but to all the powers vested in Congress, and which may be regarded as the foregoing, because the first clause of the first article vests in Congress all legislative powers "herein granted."

2d. The co-efficient power to make necessary and proper laws applies to all powers "vested by this Constitution in the government of the United States;" 3d, "or in any department;" 4th, "or officer thereof;" that, is of the United States. This makes this co-efficient power very comprehensive. This device of legislative machinery for carrying into execution legislative power is not in the same way given to the government of the United States as a government, nor to the judicial or executive department of the United States nor to any officer thereof.

These last three divisions have no self-sufficient power. The powers vested in them need co-efficient machinery to carry them into effect, if the Constitution does not give them power by their own action to carry their granted powers into effect. If powers are to be implied, or if action is to be taken by any of them, they must look to the legislative department to devise the methods and machinery by which it is to be done. This view of this clause was taken with great power and clearness by Mr. Webster and Mr. Calhoun sixty years ago in the discussion of the exclusiveness of the legislative authority in making efficient the executive power without action on the part of the executive; and the decisions of the judiciary department have always maintained that its jurisdiction, the limits upon it, and the mode of exercising it, must be determined by a rigorous construction of the law vesting the jurisdiction, etc., and not upon inferential or implied powers of the courts themselves. This makes the government not only the government of the Constitution as to the delegation of powers, but a government of laws as to the

means necessary and proper for carrying these powers in the several departments into full execution.

Having thus examined with care and fullness the enumerated powers of this eighth section, it is proper now to consider some other powers vested by the Constitution in Congress in other clauses than this particular section.

Power to Admit New States.

§ 295. "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress."[1]

A sketch of the condition of things in respect to matters in this section will not be out of place. An immense western domain belonging chiefly to Virginia, but in respect to which there were claims by other States, stretched to the west of the Alleghanies. Virginia, during the Revolution, had, by the genius and valor of George Rogers Clarke and his men, not only secured Kentucky on the south of the Ohio, but planted the flag of Virginia on the British posts in what is now the State of Illinois, and captured the Governor of that region and his command and sent them prisoners to Richmond. Great uneasiness had existed among many of the States after peace at the possession of this immense territory by the Commonwealth of Virginia. Accordingly, in 1784, in accordance with an act passed by her General Assembly October 20, 1783, she conveyed the whole of that territory to the United States, in Congress assembled, upon condition that it was to be laid out into five States. The deed was executed on March 1, 1784.[2] During the session of the Federal Convention on the 13th of July, 1787, the Congress of the Confederation, after debate, adopted an ordinance for the government of the territory of the United States northwest of the

[1] Art. IV, sec. 3, clause 1.

[2] 9 Journal of Congress, 47–51.

river Ohio.[1] It was adopted with but one dissentient, Mr. Yates of New York, and by the unanimous vote of eight States, Virginia being unanimous and included among the eight.

In that celebrated ordinance, six articles were inserted to be considered as articles of compact between the original thirteen States and the people of the said territory, to remain forever unalterable, unless by common consent. In the sixth of these articles was a clause which forbade slavery in said territory, and provided for the surrender of fugitive slaves escaping into the same from any one of the original States.

The fifth article provided for forming from said territory not less than three nor more than five States, and the boundaries of the States were to be fixed by the articles "as soon as Virginia shall alter her act of cession to consent to the same." And further, the said fifth article provided that any of said States might form a permanent Constitution and State government, provided the Constitution and government was republican, and "conformed to the principles contained in said articles;" one of which articles so mentioned, the sixth, had a provision prohibiting slavery. Thus it appears that the distinct consent of Virginia, as the grantor in the deed of 1784 to this territory, was requisite, not only to the change of boundaries proposed, but also to the clause prohibiting slavery.

The General Assembly of Virginia, on the 30th of December, 1788, reciting that the Congress of the United States had declared the following as one of the articles of compact between the original States and the people of the States of said territory, recited the fifth article, before referred to, and consented to the said article of compact, and ratified and confirmed it against anything to the contrary in the original deed of cession; and thus ratified and confirmed the provision so as to ratify the articles of compact for the admission of such new States, when their government and Constitution should be republican and in *conformity to the principles contained in these articles;* that is, in the

[1] 12 Journal of Congress, 58–63.

sixth fundamental article in the Ordinance of 1787. History shows that the States represented in the Congress of the Confederation, at the instance of Mr. Carrington, a prominent Virginia member, put into the Ordinance of 1787 the clause prohibiting slavery, not so much as an act of Congress, but as a fundamental compact between the States who were represented in Congress in respect to the new States to be formed out of the northwestern Virginia territory. In so far as it was an act of Congress it claimed no validity, unless Virginia, the grantor of the territory, consented. Virginia did in terms consent, and with her own hand put upon the Northwest Territory and the States created out of it the character of free States, in which slavery was never to exist.

This transaction not only estops the other States to deny the exclusive and paramount title of Virginia, but estops all others and Virginia to deny that by her own sovereign act as owner of the territory she consented that it should be free territory forever thereafter. It will be found from the learned opinion of Chief Justice Taney in *Dred Scott v. Sanford*,[1] concurred in by Justices Wayne, Grier, Daniel, Campbell and Catron, in all six judges out of nine, that these historical views are fully sustained, though it does not bring out the point, so necessary, of Virginia's consent to the prohibition clause of the articles, and of her unqualified consent to it as a condition of the change proposed. The act was not an act of Congress under the Articles of Confederation, but an act of the several States, Virginia consenting, to the establishment of this ordinance.

§ 296. It will be noted that the ordinance was passed during the sessions of the convention. On the 18th of August, 1787, up to which time no provision in respect to the territory of the United States having yet found a place in the proposed Constitution, Mr. Madison proposed to give Congress power "to dispose of the unappropriated lands of the United States," and "to institute temporary governments for new States arising therein." This was referred to a committee, and offered in the report of the Committee of Style on the 12th of September very much in the form finally adopted in the Constitution. At the final adoption of the Constitution, the territory ceded by Virginia belonged as common property to the Confederated States. The grant of power in the clause of the Constitution under consideration was designed, therefore, to empower Congress to dispose of, and make rules and regulations respecting, this territory. The joint beneficial ownership of the States would be held in the hands of Congress, under constitutional grant. The whole language of this article was obviously framed to meet the case of the territory of the United States acquired as aforesaid, and this seems to have been the idea of Congress in the passage of the act of August 7, 1789.

[1] 19 How. 393.

The meaning of these clauses may now be considered. The deed of Virginia looking to the sale of these public lands, and also to the formation of new States to be admitted into the Union, and the Ordinance of 1787, point directly to these conclusions:

1st. That the sale of the lands for revenue purposes, and needful rules and regulations respecting the management thereof, as well as property other than this, should be provided for by Congress.

2d. That as the territory belongs in terms to the United States, and Congress has the power to dispose of and make rules and regulations concerning it, this power must be directed to the interests of the co-owners.

3d. That as Congress is vested only with a trust power to manage said territory for the benefit of the co-owners, all legislation concerning it must be directed to that purpose.

Some interesting questions have been raised in our history, and, while practically settled in the affirmative, it is proper to consider the constitutional grounds on which they have been settled.

§ 297. Can the United States acquire new territory under this Constitution? The affirmative is sustained by a number of considerations.

(*a*) Each State remaining by itself would have had the

power to acquire by treaty, or conquest or cession. It would seem reasonable, therefore, when all confided their several powers over foreign relations to the Confederated Congress by treaty, war and the like, the implication would be natural that it could acquire by treaty or conquest. The settlement of boundaries would involve this as an incident, even if it was not expressly given.

(*b*) The Congress of the Confederation without any express power did acquire large territory from the States, and the final ratification of the articles by Maryland was conditioned on the cession of her territory by Virginia.

(*c*) The eleventh article provided for the admission of Canada into the Union, and for any other colony, if agreed to by nine States. The Constitution itself by this clause sanctioned the previous power of acquisition, and could not be held to disaffirm the same power to the new government against the treaty-making power so vested in the present government, and without restriction. The power to acquire by treaty was the usual use of the treaty-making power, and without a negation would at least give ground to believe that such was the purpose of its framers.

(*d*) The history of the clause is very instructive upon this point. Mr. Randolph's proposition was that States "lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise," etc., might be admitted.[1] In Pinckney's plan there was a general power to admit new States into the Union on the same terms with the original States.[2] Randolph's proposition, after discussion, was not changed, and the admission of new States was limited to those "arising within the limits of the United States." After further discussion this clause in Randolph's plan retained the previous form.[3] And Rutledge, from the Committee of Detail, reported to the convention the same form for the clause. This article was reported and discussed on August 30th, when various amendments were proposed, several of which were

[1] Madison Papers, 734.
[2] Id. 745.
[3] Id. 1224.

directed, as Mr. Madison reports, to saving to Vermont the right of admission, though it was claimed to be a part of New York. Vermont had never been a part of the Confederation. Mr. Martin then proposed a substitute under which new States might be erected within, as well as without, the territory claimed by the several States, or either of them. Mr. Morris's proposition then took this form: "New States may be admitted by the Legislature into the Union; but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States, without the consent of the legislature of such State, as well as of the general Legislature." This was intended to embrace the case of Vermont, because she had been already formed into a State; and so it stood.[1] The Committee of Style reported the amended plan, only modified by striking out the word "hereafter" after the words "new States," as being unnecessary;[2] and so the clause was finally adopted. It is clear, therefore, that after very earnest debate, the limitation of new members to be admitted to the Union to those framed out of territory within the limits of the United States was stricken out, leaving it without limit for the admission of States out of what ever territory remained.

(*e*) The correspondence of that day, and even the debates of the convention, show that the navigation of the Mississippi, which was not within our borders, except "*ad medium filum aquæ*," was a matter to which the founders of the Constitution looked with great interest.[3] It is hardly conceivable that the framers of the Constitution excluded the States from the navigation of the Mississippi, especially as its mouth was in the hands of the enemy.

(*f*) Another question concerned the scope of the power as to the needful rules and disposition which are prescribed in the clause. Territory is not only landed property, but its chief use to the people who own it is as a domain for colonization. This is obvious from the language of the deed of

[1] Id. 1460–65.
[2] Id. 1558.
[3] Id. 1446, 1525.

cession by Virginia, and from the purpose to form States of the Union out of such territory.

§ **298.** Again, we have seen that pending the session of the convention, in July, 1787, the Confederation Congress passed the Ordinance of 1787, which showed what was deemed necessary not only in the disposition of the property, but in the organization of the territory for settlement and colonization. This trust as to the land as property, and as the seat of civilized life, was intended by this clause to be the disposition and regulation of the territory prescribed in this clause. The view is strengthened by the associated clause as to new States. Congress was to admit new States formed out of this very territory, for which the ordinance had been passed. Congress, as the trustee for the States, may dispose of the property as a common fund for the United States, as provided for in Virginia's deed of cession. But it must do more; it must so rule the territory as a domain for colonization by all the States, who are co-owners, as to enable them to form civil Bodies-politic, self-sufficient and autonomous, to enter into the Union as free States and co-equal members. Congress could exercise a double power: that of regulating the property and that of aiding the communities who had bought and settled upon it, to organize Bodies-politic for the government of their society. Scattered over this territory, how can the embryo societies organize themselves without the superintending aid of those to whom the territory belongs? Can any one State do this? That would be to exclude the power of others equally entitled. Can all do this as separate distinct States undertaking to do it together? That is impracticable. Who must do it? The organ, the trustee of the States under the power granted to them by the Constitution. And by the terms of this clause, as the mere property right does not reach the case, then the right and duty of admitting these communities, when completely organized as States, into the Union, makes the duty of Congress to control them by its governmental power an inevitable inference. If this were not done, the temporary

squatters upon the territory would have to improvise an organization, and regulate the affairs of the territory according to their own will. This course of reasoning has led to a conclusion which has had the largest judicial sanction. The power of Congress to govern the Territories of the United States, whether or not based on the same course of reasoning in all cases, has been adopted as an undoubted conclusion.[1] This being so, what limitation may be admitted upon the power of Congress in the government of this common territory held by Congress in trust for all the States equally? It belongs to the United States; Congress is a trustee to manage it for these equal partners.

§ **299.** This question was adjudicated upon the fullest consideration in the great case of *Dred Scott v. Sanford.* Congress, by the Missouri Compromise Act, enacted that in no part of the territory of the United States acquired by the Louisiana treaty of 1803 should slavery be permitted north of the line of latitude 36° 30′; but that south of that line

[1] Green v. Biddle, 8 Wheat. 1; American Ins. Co. v. Canter, 1 Pet. 511; United States v. Gratiot, 14 id. 526; United States v. Rogers, 4 How. 567; Fleming v. Page, 9 id. 603; Cross v. Harrison, 16 id. 164; Dred Scott Case, 19 id. 393; Jackson v. Steamboat Magnolia, 20 id. 330; Beall v. New Mexico, 16 Wall. 535; Ferris v. Higley, 20 id. 375; National Bank v. County of Yankton, 101 U. S. 129; Mormon Church Case, 136 id. 1; Cope v. Cope, 137 id. 682; Report on Polygamy, H. of R. 2568, 49th Cong., 1st Sess.

These pages were written in the fall of 1895, and therefore before the burning question of territorial expansion, as involved in the acquisition of Cuba, Puerto Rico and the Philippine Islands by the United States, and the questions of citizenship, statehood, etc., incident thereto, had arisen. In addition to those cited by the author, the following authorities confirmatory of those cited may be consulted with interest: Murphy v. Ramsey, 114 U. S. 44; McAllister v. United States, 141 id. 174–188; Thompson v. Utah, 170 id. 346; In re Sah Quah, 31 Fed. Rep. 329; Jones v. United States, 137 U. S. 202; Loughborough v. Blake, 5 Wheat. 317; Reynolds v. United States, 98 U. S. 145; Callan v. Wilson, 127 id. 540; Ex parte Bollman, 4 Cranch, 75; Shively v. Bowlby, 152 U. S. 48; United States v. Wong Kim Ark, 169 id. 705; Boyd v. Thayer, 143 id. 135; Wong Wing v. United States, 163 id. 228; American Publishing Co. v. Fisher, 166 id. 464; Springville v. Thomas, id. 707.—[Editor.

citizens from all the States, without limitation, should be allowed to colonize and settle. The court held that this French territory was not within the operation of the clause of the Constitution, because not then acquired, and that the peculiar form of the clause under consideration was adapted to the territory which had been acquired from Virginia and the other States; but that where territory was acquired by a treaty of the United States with a foreign power, the trust which devolved upon Congress in the regulation of that territory was measured by the fact that the territory was acquired by the common treasure and enterprise, and perhaps the blood, of the people of all the States; and that it was not competent for Congress to deny to any part of the Union, or to any State in the Union, the equal right of colonization upon such acquired territory. This was the opinion of the court, concurred in by Justices Wayne, Grier, Daniel, Campbell and Catron. Justice Nelson concurred in the judgment of the court, but on another ground. The decision went a step further, and held that Congress could not confer upon the Territories, and that the settlers in the Territories could not assume for themselves, the power to do what the court decided Congress had no power to do. It may be well to add that the power to dispose of territory has been considered, and perhaps fairly, broad enough to justify grants to any States for their public buildings, colleges and schools. These consist with the trust confided to Congress, because they sustain the communities in which all the States are interested, and for which Congress is trustee; but the words do not include the power of Congress to grant lands for personal or corporate benefit.

New States; of What Constituted, and How Admitted.

§ 300. What has already been said will leave little to be added under this head.

The first question is: Can a State not formed of territory originally within the limits of the Union be admitted? We have seen that the territory may be acquired and the State

be formed out of it; but can an independent State already formed be admitted into the Union? The answer is clear.

(*a*) The terms are unrestricted. What right have we to restrict them by interpretation?

(*b*) The Confederation provided for the admission of Canada and other colonies. Why presume less power under the more extended terms of the Constitution?

(*c*) We have seen that the first draft limited the States to be admitted to existing territory, but was advisedly changed.

(*d*) The case of Vermont is very interesting. It was a State free, sovereign and independent during the whole Revolution. Its territory was claimed by New York and New Hampshire, but it asserted its independence of any. The Constitution provides: "But no new State shall be formed or erected within the jurisdiction of any other State . . . without the consent of the legislatures of the States concerned, as well as of the Congress." Had Vermont been held to be a part of New York, she could not have been admitted without the consent of New York. But it will be seen, by reference to the debate in the convention,[1] that the purpose was to admit Vermont on its own motion without the consent of New York, and as no part of that State. If it was no part of New York, then it was a free and independent State, and not included in the territory within the limits of any of the States. Vermont was therefore admitted into the Union as a free, sovereign and independent State, and not as formed out of any other State. As the framers of the Constitution provided for such action, it is obviously intended to allow new States not formed out of the territory within the limits of the United States to be admitted into the Union. Vermont, therefore, is a clear precedent for the admission of Texas, which had established its independence, and was admitted into the Union, though not formed out of the territory belonging to any State in the Union. These views led to the acquisition of the Louisiana territory and of the Mexican territory, and to the admission of Vermont and Texas as independent commonwealths.

[1] Madison Papers, 1459–63.

Again the question arises: Is a new State so admitted different in its relations to the Union from the other States? Here also the answer is clear.

(*a*) The Ordinance of 1787 and the cession of Virginia provided that new States to be created should be the same in all respects as those previously existing, and the Constitution sanctioned and acted upon that ordinance.

(*b*) Each new State came into the Union as a co-pactor with the others and as a co-delegator of powers to the United States under the Constitution. The tenth amendment has as pertinent application to the last State, Utah, as to Virginia.

(*c*) This was settled by judicial decisions before and since the civil war.[1]

Another point to be noted is the inviolable integrity of a State as to its own territory. Its consent is absolutely necessary in order to its partition or the merger of itself with any other. New States are too apt to feel that they have been *protegés* of the government of the United States, and that they stand in a less independent relation to the Federal government than the older States. This is natural, but is a very erroneous view. They emerge from the wardship to which they have been subject, and enter the Union by which they become subject to the Constitution of the Union, just as the other States and their people. Such a feeling has been induced in many cases by the fact of the passage of an enabling act by Congress prior to the meeting of the convention of the new State, at which a Constitution is adopted and application for admission into the Union is made. But it is interesting to note as a fact that the States of Arkansas, Michigan, Minnesota, Oregon, Idaho and Wyoming were

[1] Before the war: Permoli v. New Orleans, 3 How. 589; Benner v. Porter, 9 id. 235; Atkinson v. Cummins, id. 479; McNulty v. Batty, 10 id. 72; Doe v. Beebe, 13 id. 25; Cross v. Harrison, 16 id. 164; Withers v. Buckley, 20 id. 84. After the war: Texas v. White, 7 Wall. 700; Webber v. Harbor Com'rs, 18 id. 57; United States v. Fox, 94 U. S. 315; Pound v. Turck, 95 id. 459; Huse v. Glover, 119 id. 543; Cardwell v. American Bridge Co., 113 id. 205; St. Louis v. Myers, id. 566; Sands v. Manistee River Mfg. Co., 123 id. 288; Willamette Iron Bridge Co. v. Hatch, 125 id. 1.

admitted under an act of a convention of each of them without an enabling act by Congress.

The Territories have usually been governed by an act to establish and organize a government. This has been done in the case of many of them separately, and in the Compromise of 1850 and of the Kansas-Nebraska act of 1853–54, general provisions were made which affected the government of each of the Territories. The usual form of government included the three departments; the Governor, judges, and other leading officers being appointed by the President with the advice of the Senate, and the powers of legislation being vested in the suffragans of the territory prescribed by the organic act. As the infant State matured, developed and increased in population, the usual plan was to authorize its legislature to call a convention of the people of the territory, who should adopt a constitution as preliminary to admission into the Union. As Congress by the fourth section of the fourth article of the Constitution was required to guarantee to every State a republican form of government, and as the readiness to assume the position of a State in the Union on the part of the people of the territory usually makes it the duty of Congress to admit such State into the Union, only predicating that its Constitution shall be republican in form, the usual mode has been that when the young State has adopted its Constitution, its authorities should apply for admission into the Union, whereupon Congress, upon inspection and finding it to be republican in form, passes the necessary act for that purpose.

As already stated, this more formal method has not been uniformly adopted by the peoples of the Territories, but in many cases, having adopted a Constitution in a manner acceptable to themselves, they have been recognized as organized States, and admitted into the Union without difficulty.

§ 301. The question has arisen whether Congress can, upon any other ground than lack of a republican form of government, refuse admission to a State formed out of territory of the United States.

That it may do so practically is undoubted; but can it be justified in keeping a territory without representation and sub-

ject to the authority of the government, unless upon grounds which the Constitution makes an objection to its admission? We have seen that the decisions have been uniform that a State admitted into the Union stands in its relations to the government of the Union in no respect different from those which obtain between the old and original States. The authorities are conclusive upon this point.

But another phase of the question has arisen. Can Congress refuse admission to a State on a ground not in the Constitution, or admit a State upon conditions which will deny it powers, privileges or rights which by reservation are secured to the old States of the Union under the Constitution? Can Congress impose such a condition upon a new State as will abridge its powers if it enters the Union upon such condition? It would seem that such a proposition is utterly untenable. The States have confided to the Congress as their agent the admission of a State into the Union under the Constitution. Can this constitutional authority in Congress be construed to vest Congress as an agent with power to impose other conditions upon the new member which the Constitution had not prescribed; and if so, does the new State enter the Union shorn of its power *pro tanto* by the agent authorized to open its doors to the new commonwealth without any such condition? And is the State any the less a State than its sisters in consequence of Congress having divested it of those qualities enjoyed by the other members of the Union? This would make the Union one of unequal members — unequal in the essential qualities which constitute the States of the Union. Judge Story[1] discusses fully the historic Missouri restriction. Congress proposed that Missouri, as a condition of her admission to the Union, should prohibit slavery, and the learned author says the final result of the vote admitting the State "seems to establish the rightful authority of Congress to impose such a restriction." This opinion of Judge Story was afterwards reversed by the Supreme Court in *Dred Scott v. Sanford*, *supra*. Whether this restrictive clause was constitutional may be thus tested. It would be conceded by the

[1] Story on the Constitution, 1315.

learned author that Congress at that time could not abolish slavery in Missouri. Could he maintain that after the State was admitted, with the restriction imposed, Congress could enforce its restriction by abolishing slavery in Missouri? If such an act by Congress would invade the reserved rights of the State of Missouri, as it would unquestionably have invaded that of Virginia, how could Congress have obtained the power to enforce that restriction by the abolition of slavery in Missouri as a granted power under the Constitution of the United States? The better opinion would clearly be that Congress could not impose as an obligation upon a State at the time of its admission into the Union such a restriction as it had no original power to exact or enforce. In the absence of such power, to use the power to admit or exclude as the means of enforcing an unconstitutional power would scarcely find an advocate.

Judge Cooley[1] has mentioned a number of instances of these conditions attached to acts for the admission of States. These were chiefly made since the civil war, and were efforts to condition the admission of the senators and representatives from the seceded States into the halls of Congress to which they were legally elected, upon the submission by those States to political conditions which did not apply to the Northern States. This took a step in advance of admitting a State to the Union upon conditions. For States already in the Union it imposed the condition of a new Constitution to them, and their submission to it, as the only ground upon which they would be admitted to representation in a government of which they were an integral part. This was also done as to the State of Nebraska, just then admitted into the Union. Of course it is undeniable that each State enters the Union subject to the conditions which are involved in the provisions of the Federal Constitution, but to none other. Therefore Judge Cooley, with cautious moderation, expresses a doubt about the validity of all these Congressional efforts at putting the States of the Union into a Union upon a different Constitution.

[1] Cooley's Constitutional Law, pp. 192–195.

§ **302.** A clause is found in the section under consideration in these words: "And nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State." This clause has ceased to be of any consequence, as the claims referred to have been long since settled. It had reference to certain vacant lands claimed by the United States as ceded to them by the treaty of peace with Great Britain.[1] Mr. Madison briefly refers to this in the *Federalist*.[2] Whatever the claims were, they appear to have been adjusted, and have left nothing for the clause to operate upon.

Power to Punish Treason.

§ **303.** It will be proper in considering this clause[3] to preface its discussion by a consideration of the English law of treason. In the early history of England the crime of treason was very indefinite in its limitations. "If the crime of treason be indeterminate," says Montesquieu, "this alone is sufficient to make any government degenerate into arbitrary power."[4] In early times great latitude was left to the judges to determine what was treason or what not, whereby these tools of tyrannical princes had opportunity to create an abundance of constructive treasons. To prevent the evils of these constructive treasons, the act of 24 Edward III., chapter 2, was passed defining the crime of treason. That statute provided that "When a man doth compass or imagine the death of our Lord the King," etc., which was the first branch of the definition; the second related to assaults upon the chastity of the king's wife, or the king's eldest unmarried daughter, or the wife of the king's eldest son and heir. These we need not notice, as they have no analogy to our system. The third species of treason was, "If a man do levy war against our lord the King, in his realm." And the fourth was, "If a man by adhering to the King's enemies in his realm, giving them aid and comfort in the realm or elsewhere."[5]

[1] Madison Papers, 1463–66.
[2] No. XLII.
[3] Const. U. S., Art. III, sec. 3.
[4] Spirit of Laws, book 12, ch. 7.
[5] 9 State Trials.

This statute placed a great check on the courts in the abuses which had arisen in trials for treason. In the trial of Algernon Sydney, the illustrious prisoner was convicted upon the evidence of papers found in his closet, which were really merely expressions of speculative opinions. Blackstone, Stephen concurring, says the king "here intended is the king in person, without any respect to his title." For it is held that a king *de facto* and not *de jure*, or, in other words, a usurper that had got possession of the throne, was king within the meaning of the statute, as there was a temporary allegiance due to him for his administration of the government and the security and protection of property. Treasons committed against Henry VI. were punished under Edward IV., though the line of Lancaster had been declared usurpers by act of Parliament; and the most rightful heir of the crown, who had never had plenary possession of the throne, was not a king, within the statute, against whom treason could be committed.

The statute of 1 Henry VIII., chapter 1, which was declaratory of the common law, pronounced all subjects excused from any penalty or forfeiture who had obeyed a king *de facto*. This was the opinion of Hawkins, but the true distinction, according to Blackstone, seems to be that the statute of Henry did not commend but excused the obedience paid to the king *de facto* in opposition to the king *de jure;* and this for the reason stated, that the subject is an imperfect judge of the title, and can only decide upon the *de facto* possession of power and not upon the *de jure* title,[1] which was the English law at the time the Federal Convention sat.

In Pinckney's plan[2] a provision was inserted on the subject of treason, which, upon reference to the Committee of Detail, was reported by that committee in this form: Treason against the United States "shall consist only in levying war against the United States, or any of them, or in adhering to their enemies." This definition of treason was the subject of earnest debate on the 20th of August.[3] This

[1] Stephen's Blackstone, 234–36.
[2] Madison Papers, 741.
[3] Id. 1370–77.

clause was first changed by striking out the words, "or any of them," after the words "United States." This was agreed to *nem. con.* This defined treason as a crime against the United States, leaving to the States the definition of the crime against themselves respectively. Upon the idea that the Constitution had only to provide for treason against the United States, the words "against the United States" were reinstated after the word "treason." The word "or" was substituted for "and" before "adhering to the enemies," and the words "giving aid and comfort" after the word "adhering," because found in the act of Edward III.

Except in immaterial particulars the clause as finally adopted followed, as Mr. Mason said, the statute of Edward III. The purpose of the act of 24 Edward III., we have seen, was to put a check upon constructive treasons by an exact definition of the crime, and that this was the purpose of the Constitution appears from the debate already referred to, and from the language of Mr. Madison in No. 43 of the *Federalist*, quoted with emphatic approval by Judge Story.[1] The language of the *Federalist* thus sanctioned was that "New-fangled and artificial treasons have been the great engines by which violent factions . . . have usually wreaked their alternate malignity on each other." And the "Convention," says Judge Story,[2] "deemed it necessary to interpose an impassable barrier against arbitrary constructions, either by the courts or by Congress, upon the crime of treason. . . . In so doing they have adopted the very words of the statute of treason of Edward III.; and thus by implication, in order to cut off at once all chances of arbitrary constructions, they have recognized the well-settled interpretation of these phrases in the interpretation of criminal law which has prevailed for ages."[3]

§ 304. A brief analysis of the clause will now be made.

(*a*) It defines only treason against the United States. Treason against a State is left to its own definition; and

[1] Story on the Constitution, 1791–1793.

[2] Id. 1799.

[3] In accord: Blackstone's Commentaries, 81–84; Cooley on the Constitution, 287–88.

lest any should doubt whether this was intended, a reference to the subsequent clauses will remove it. Article IV, section 2, clause 2, provides: "A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State," shall be surrendered as a fugitive from justice and "be removed to the State having jurisdiction of the crime." This clearly refers to a treason against a State, of which it alone could have jurisdiction.

(*b*) The treason referred to is against the United States, as "united under this Constitution."

(*c*) It consists of either of two offenses: levying war against *them*, or adhering to *their* enemies, giving them aid and comfort. Either of these could constitute the offense. It is levying war. A mere conspiracy by force to subvert the established government is not treason, but there must be an actual levying of war. The only cases calling for the interpretation of this clause which have come before the Supreme Court have been *Ex parte Bollman*[1] and *United States v. Burr*.[2]

In the first case the Chief Justice said, to constitute this crime, "War must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the act of levying war cannot have been committed." Again he says: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war."

[1] 4 Cr. 126.

[2] Id. 469.

What is "adhering to their enemies, giving them aid and comfort?"

Both branches of this part of the definition were in the act of Edward III., and both were inserted in the Constitution in order to make the crime more definite, mere adherence not being enough, unless the adherence gave aid and comfort to the enemy. Such aid and comfort are given when the accused furnishes supplies to the enemy, gives them information, and the like.[1] "By enemies are to be understood the subjects of foreign powers with whom we are at open war, and does not apply to rebels; for a rebel is not an enemy within the meaning of this statute."[2] In *United States v. Prior*[3] it was held that coming peaceably from an enemy's ship to procure provisions for him was not treason.

(*d*) No person shall be convicted of treason "unless on the testimony of two witnesses to the same overt act, or on confession in open court." This provision was drafted from British jurisprudence. Confessions of the accused may be ground for a conviction, but these must be strictly guarded. If taken by private persons and reported by them, it is a most suspicious form of testimony, because liable to be obtained by artful promises or menaces, and to be reported without accuracy, and incapable of being discovered or corrected by negative evidence.[4] Therefore a confession to convict a man must be in open court, where, with no extraneous influences of fear or hope, he may confess with no possibility of misrepresentation.[5] If the accused does not make confession in open court, then he can only be convicted on the testimony of two witnesses, not to distinct and independent circumstances which in their concurrence might prove guilt, but two witnesses, each of whom shall support the other as to the same overt or open act of treason, and

[1] 4 Blackstone's Commentaries, 276.

[2] 1 Stephen's Blackstone, 242; Foster, 216, 219; Hawk. P. C., Book 1, ch. 17, sec. 28. *Accord:* Mr. Dana for the United States, Chase's Decisions, 98, citing United States v. Chenoweth, 1 West. L. Mo. 165.

[3] 3 Wash. C. C. 234.

[4] Story's Commentaries, 1796; 4 Blackstone's Commentaries, 356–57.

[5] Wharton's State Trials, 634.

these witnesses must be credible.[1] The discussion of these parts of the clause by Chief Justice Marshall is worthy of diligent study.

§ **305.** The second clause of this section provides for the power of Congress in respect to the offense. The definition of the crime is constitutional. Congress cannot touch or change it. The mode of conviction is fixed by the Constitution; over this Congress has no power. The Constitution intended to place these points beyond the reach of legislative power. The mode of indictment is fixed by the fifth article of the amendment, and is beyond the reach of the power of Congress. The mode of trial, the place, and the rights of the prisoner on trial, in respect to information as to the accusation, to be confronted with the witnesses against him, to compulsory process for his own witnesses, and to the assistance of counsel, are fixed beyond legislative control by article VI of the amendments, and by article III, section 2, clause 3, of the Constitution.

What, then, can Congress do in respect to this crime of treason? That is provided for by the succeeding clause. "The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

This gives to Congress only the power to declare the punishment for treason. But in this it is precisely and strictly limited, so that no conviction of treason shall work corruption of blood — that is, obstruct inheritance; "or of forfeiture" — that is, of an estate except during the life of the person attainted. Thus a person may be punished for treason, but the consequence of it shall not affect the inheritable quality of his blood, or forfeit his property except during his life. This, as we shall see, is a radical change from the English law. This last provision limits forfeiture to the life of the person attainted, and was adopted in England by the statute of 3 and 4 Edward IV., chapter 106. This view of this important clause has very striking reference to what has been said

[1] Ex parte Bollman; United States v. Burr, *supra*.

supra as to the proceeding for confiscation of the property of southern citizens *jure belli*, and under the act of July 17, 1862, in connection with the joint resolution suggested by President Lincoln limiting the judgment of forfeiture in such *ex parte* proceedings to the life of the offender. It is not improper to suggest that in respect to that important branch of this clause of the Constitution there was no provision which protected against the forfeiture which by the Constitution could result only from conviction, but a provision which would have prevented conviction until there was an indictment, trial by jury and conviction upon the testimony, as provided in this clause.

In the case of the act for seizing the captured and abandoned property of southern citizens, the allegation of disloyalty, without proof or trial, or conviction, was directly contrary to the spirit and letter of this clause of the Constitution. How the property could be forfeited *in toto*, without any of these, is a question difficult of solution, in view of the monitory language of the *Federalist* and of the eminent Judge Story, holding that this clause was intended to obstruct the invention of constructive treasons by the courts or by Congress.

Cases already referred to are pertinent at this point as to the effect of the forfeiture of the estate of an offender for his life only, and as to the effect of such forfeiture upon the remainder in fee, which this clause clearly shows to be exempt from forfeiture, and should pass to the heirs. In a number of cases this question was discussed by the Supreme Court.[1] In a late case, *Railroad Co. v. Bosworth*,[2] the question was discussed with great acuteness by Mr. Justice Bradley, delivering the unanimous opinion of the court. He said, speaking of the act of July 17, 1862,[3] and the joint resolution passed contemporaneously, limiting the confiscation to the life estate of the offender: "It would seem to follow as a

[1] Bigelow v. Forrest, 9 Wall. 339, Day v. Micou, 18 id. 156; Wallach v. Van Riswick, 92 U. S. 202; Pike v. Wassall, 94 id. 711; French v. Wade, 102 id. 133; Shields v. Schiff, 124 id. 351.

[2] 133 U. S. 92.

[3] 12 Statutes at Large, 589.

logical consequence from the decision in *Avegno v. Schmidt* (113 U. S. 293), and *Shields v. Schiff* (*supra*), that after the confiscation of the property the naked fee (or the naked ownership, as denominated in the civil law), subject, for the life-time of the offender, to the interest or usufruct of the purchaser at the confiscation sale, remained in the offender himself; otherwise how could his heirs take it from him by inheritance? But by reason of his disability to dispose of or touch it, or affect it in any manner whatsoever, it remained as before stated, a mere dead estate, or in a condition of suspended animation. We think that this is, on the whole, the most reasonable view.

"There is no corruption of blood; the offender can transmit by descent; his heirs take from him by descent. Why, then, is it not most rational to conclude that the dormant and suspended fee has continued in him?

"Now, if the disabilities which prevented such person from exercising any power over this suspended fee, or naked property, be removed by a pardon or amnesty — so removed as to restore him to all his rights, privileges and immunities, as if he had never offended, except as to those things which have become vested in other persons,— why does it not restore him to the control of his property so far as the same has never been forfeited, or has never become vested in another person? In our judgment it does restore him to such control."

The subsequent cases of *Jenkins v. Collard*[1] and *United States v. Dunnington*[2] sanction the decision in *Bosworth's Case*. The result, therefore, is this: On a conviction of treason and on a confiscation proceeding under the above act the result is the same; that is, 1st, the forfeiture of the life estate of the offender, and its absolute alienation from his control by a sale under the procedure; 2d, the estate in remainder remains in him, but is in a condition of suspended animation, in which he is absolutely disabled from all power of alienation thereof, but with the estate in him in such condition as to descend from him to his heirs at law; and this because the

[1] 145 U. S. 546.

[2] 146 U. S. 338.

Constitution provides there shall be no corruption of blood; 3d, that upon his death the estate in remainder passes from him by descent to his heirs at law; 4th, but as the estate is in him with no power of alienation while living by reason of his attainder of treason, a pardon during his life re-vests him with the *jus disponendi* attached to his title in remainder, and therefore, if after pardon he disposes of the fee, such disposition binds his heirs, and even if before pardon he disposes of it with covenants of seisin and warranty against all persons whatsoever, such alienation will bind his heirs.[1]

Power Over Public Acts, Records, etc.

§ 306. Among the prime objects of the more perfect union among the States was to establish such relations between the citizens of the several States as would bring them into closer contact as regards business, commerce, intercourse and the like; the Constitution reserving to each State the local authority to manage its own internal polity according to its exclusive will. We have seen how much was sought to be accomplished by the powers given to Congress as to a common revenue, regulation of commerce with foreign nations and interstate, a common postal system, and army and navy for the common defense, uniform regulations for naturalization, coinage laws, and the like. The framers looked further to such regulations and relations between the citizens of the different States, and such relations of compact between the States as to the business of the people, as would make them one instead of many as to these important subjects.

The first of these to which attention will be called[2] was in reference to the use that in each State it might be desired to make of the public acts, records and judicial proceedings of the several States, how these should be proved, and what should be the effect of them when proved in the States other than that in which they originated. The States agreed to

[1] See also United States v. Klein, 13 Wall. 128; Jenkins v. Collard, 145 U. S. 546, *supra*.

[2] Const. U. S., Art. IV, sec. 1.

facilitate all these matters in order to the easy transaction of business.

In the fourth article of the Confederation it was provided that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." It is obvious that this rested solely on compact, without any provision for making it effectual, independent of the will of each State. Accordingly in the convention Mr. Pinckney proposed an article very similar to the clause just referred to.[1] In the report of the Committee of Detail it was substantially reported in the same form.[2] Subsequently in the convention it was proposed to provide for the execution of judgments of one State in another under regulations by Congress. Objection was made to this, and the matter was referred.[3]

The committee reported a clause,[4] which was enlarged so as to allow the Legislature, by general laws, to "prescribe the manner in which such acts, records and proceedings shall be proved, and the effect which judgments obtained in one State shall have in another;" and then the clause was adopted substantially as it now appears. This removed the embarrassment which exists between different countries as to the effect of such public acts and judgments, giving no force except a *prima facie* one at most to any judgment of a foreign country when sued on here; leaving the defendant the right of every defense he had to the original cause of action, and is a pledge of each State that the judicial proceedings and other public acts of a sister State should be conclusive of any proceedings thereon in the State where it was instituted. The clause as finally adopted was in these words: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

[1] Madison Papers, 745.

[2] Id. 1240.

[3] Id. 1448.

[4] Id. 1479.

The debates referred to clearly show that the words "the effect thereof" meant the effect of the acts, records and proceedings, and not the effect of the proof, and the decisions of the courts to this effect have been uniform.

The full faith and credit provided for means the same to which they are entitled in the State whose they are. When, therefore, suit is brought in one State upon a judgment entered by the court of another State, and it appears that the law of the State in which it was entered made it conclusive on the defendant, it will be held equally conclusive in the court where suit is brought upon it. No plea will be good against such judgment which would not be good in the court where it was pronounced; but in the State where the suit is brought upon the judgment, as in the State where the judgment is pronounced, it may be shown that the court of the latter had no jurisdiction to enter it. So a release may be pleaded, and the statute of limitations will be available according to the law of the forum where the suit upon it is brought. But the latter State must allow reasonable opportunity to enforce the demand, and not by its act of limitation substantially deny all remedy. The cases on this subject are numerous.[1]

But while constructive service of process by publication will suffice to subject property within the jurisdiction of the court, such service cannot be the foundation of a personal judgment. A personal judgment can only arise from process against the defendant served in the State where the judgment is pronounced; and, *a fortiori*, is not binding in any other State. The latter gives full faith and credit to such judgment in the former by denying it the effect of a personal judgment which it cannot have in the former. Later cases are in accord with those already cited.[2]

[1] Mills v. Duryee, 7 Cr. 481; Nations v. Johnson, 24 How. 195; Hampton v. McConnel, 3 Wheat. 234; Green v. Van Buskirk, 7 Wall. 139; Harris v. Hardeman, 14 How. 334; Cheever v. Wilson, 9 Wall. 108; Galpin v. Page, 18 id. 350; Thompson v. Whitman, id. 457; Christmas v. Russell, 5 id. 290.

[2] Renaud v. Abbott, 116 U. S. 277; Chicago, etc. Ry. Co. v. Wiggins Ferry Co., 119 id. 615; Blount v. Walker, 134 id. 607; Texas Pacific Ry. Co. v. Southern Pacific Ry. Co., 137 id. 48; Carpenter v. Strange, 141 id. 87; Laing v. Rigney, 160 id. 531.

The court may inquire into the jurisdiction of the court rendering the original judgment, and into the facts necessary to give such jurisdiction. Congress has passed a law carrying out the provisions of this clause, and it has been decided that the States may make other regulations not in conflict with these, and allow proof of records in common-law modes.[1]

Privileges and Immunities of Citizens.

§ 307. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."[2] This important clause has already been largely considered. It has been seen that the provisions of the thirty-third Article of the Confederation have been embraced in the condensed terms of this article. Construing it in the light of the authoritative exposition of Mr. Madison in the *Federalist*, *supra*, sanctioned by the decision of the Supreme Court in the *Slaughter-House Cases*, this clause may be regarded as a mutual guaranty by the States of intercommunication of privileges and immunities of citizenship in each of them, and is a constitutional guaranty independent of any power of Congress to pass laws to execute or regulate it. The prior section just considered is based upon interstate compact, with a power in Congress to pass laws to aid in giving it effect; but this is stripped of all power, Federal or State, to impair the right given thereby. A brief analysis of the clause will now be attempted.

In *Corfield v. Coryell*[3] Justice Washington gives an exposition of this clause, which has been adopted as sound in a number of cases to be referred to, and especially in the *Slaughter-House Cases*, *supra*. He says the privileges and immunities of citizens may be comprehended under the following general heads: "Protection by the government; the

[1] Gaines v. Relf, 12 How. 472; White v. Burnley, 20 id. 235.

[2] Const. U. S., Art. IV, sec. 2.

[3] 4 Wash. C. C. 371.

enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of *habeas corpus;* to institute and maintain actions of every kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State, may be mentioned as some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental."

"According to the express words and clear meaning of the clause, no privileges are secured by it but those which pertain to citizenship."[1]

"These are civil rights, not political franchises. Hence, voting, holding office, serving on juries, and the like, are political, not civil, privileges."[2]

A corporation of one State is not a citizen of another within the meaning of this clause. A State may deny to the corporation the privileges accorded to a like corporation of its own.[3] No lawyer admitted to practice in one State has the right under this clause to practice in every other. That is not a privilege of citizenship, but belongs to the internal polity of a State.[4] Louisiana gave certain rights of property by virtue of marriage to its own resident citizens. This did not entitle the citizen of Mississippi to the same privileges.[5]

A State may give exclusive privileges to its people to take

[1] Conner v. Elliott, 18 How. 591; Blake et al. v. McClung et al., 172 U. S. 239.

[2] Slaughter-House Cases, 16 Wall. 36.

[3] Paul v. Virginia, 8 Wall. 165.

[4] Ward v. Maryland, 12 Wall. 418; Chemung Canal Bank v. Lowery, 93 U. S. 72; Hooper v. California, 155 U. S. 648.

[5] Conner v. Elliott, 18 How. 594.

fish in its own waters, and exclude citizens of other States. Its fisheries are its own property; it may give them to its own children and exclude others.[1] We have seen that taxation of a citizen of another State at a higher rate than its own citizen is a violation of this clause.[2]

§ 308. Two other clauses in this connection may be considered. It is well known as a principle of international law that extradition for crime is dependent on contractual obligation. It is not *de jure*, but contractual, or a matter of comity. This was more distinctly so a century ago than now, and was more so then than now as to the extradition of persons held to service or labor, their extradition being merely a matter of comity.

In the fourth Article of Confederation the extradition of criminals was provided for, and the provision of the present Constitution is in almost the same terms; but no provision for the extradition of slaves was incorporated in the Articles of Confederation. The language of the provision was as follows: "If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from Justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense."

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."[3]

We may note that the person to be surrendered must be charged in the demandant State with treason, felony or other crime, and must flee from justice and be found in another State. In such case the interstate compact declares he shall,

[1] McCready v. Virginia, 94 U. S. 391; Manchester v. Massachusetts, 139 id. 241.

[2] Ward v. Maryland, 12 Wall. 418; Guy v. Baltimore, 100 U. S. 434.

[3] Const. U. S., Art. IV, sec. 2 clause 3.

on the demand of the executive of the demandant State, be delivered up by the asylum State to be removed to the demandant State, having jurisdiction of the crime.

In the case of *Kentucky v. Dennison*,[1] the Governor of Ohio refused to surrender a fugitive from Kentucky who was charged in Kentucky with kidnaping a slave. The point was made by the Governor of Ohio that that was not a crime according to the law of Ohio. The same point was made by Governor Seward in 1841, and the extradition of the kidnaper of a slave was distinctly denied. The Supreme Court in the Kentucky and Ohio case held it to be a case over which the court had no jurisdiction, and with which Congress had nothing to do. It depended upon interstate faith, and the claim of Kentucky was dismissed by that court, as the claim of Virginia had been denied by Governor Seward.[2] The act of 1793 was held to be only declaratory, and that the United States had no power to compel the extradition. Congress has passed a later law on the subject.[3] It has been held that the charge against the accused must be in such judicial form as would justify an arrest were it committed in the demandant State.[4]

When the demand is made in due form, it is the duty of the executive of the asylum State to surrender the accused, and he has no moral right to refuse.[5] If he does refuse, the Federal courts have no power to compel obedience.[6] The person surrendered should be held privileged from prosecution on any new charge, until he has had opportunity to return to the State which has surrendered him. It was so decided in *Commonwealth v. Hawes*,[7] with which *United States v. Rauscher*[8] is in accord. But the Supreme Court, in *Lascelles v. Georgia*,[9] held that the accused was entitled to no

[1] 24 How. 66.
[2] See also Holmes v. Jennison, 14 Pet. 540; Taylor v. Taintor, 16 Wall. 366; Ex parte Reggel, 114 U. S. 642; Roberts v. Reilley, 116 id. 80.
[3] R. S. U. S., §§ 5278–79.
[4] People v. Brady, 56 N. Y. 182; Kingsbury's Case, 106 Mass. 223.
[5] Kentucky v. Dennison, *supra*.
[6] Taylor v. Taintor, 16 Wall. 366.
[7] 13 Bush, 697.
[8] 119 U. S. 407.
[9] 148 U. S. 537.

such exemption; that the terms of the Constitution did not confine the jurisdiction of the demandant State over the fugitive to trial for the specific crime for which he was surrendered. But if the asylum State has an unsatisfied demand upon the fugitive, it has a right to satisfy the demand of its own law before surrendering him.[1]

In the case of *Pierce v. Fries*,[2] Pierce, on a requisition of the Governor of Alabama, was arrested in Texas, and sought discharge upon the writ of *habeas corpus*, on the ground of the invalidity of the indictment under the laws of Alabama. The Supreme Court affirmed the decision of the court of Texas, that, the other prerequisites for extradition having been complied with, he should be extradited, leaving to the courts of Alabama to decide upon the sufficiency of the indictment. This not only conformed to the clause of the Constitution in reference to extradition, but gave full faith and credit to the action of the courts of Alabama according to the previous clause already considered.

§ 309. The next clause[3] concerns the surrender of fugitives held to service or labor in one State and escaping into another. This was inserted in the Constitution, no similar clause having been in the Articles of Confederation, as a part of that general compromise to which reference has been made *ante*, involving the commerce power and the ratio of representation in the two Houses, the slave trade, and the exemption of exports from taxation or duty. The terms descriptive of the character of the fugitives are broad enough to include the main class of fugitive slaves as well as persons bound as apprentices, etc., under the laws of a State. It will be perceived that the extradition of fugitives from justice is on demand of the executive authority of the demanding State. The claim for the surrender of the fugitive from service or labor is made by the party to whom it may be due. The clause does not state on whom the demand or claim shall be made. In this demand of executive upon executive the Supreme Court has held, as we have seen, that

[1] Taylor v. Taintor, 16 Wall. 366.
[2] 155 U. S. 311.
[3] Art. IV, sec. 2, clause 2.

the judicial power is not competent to coerce the asylum State to comply with the demand of the demandant State; but in the case of the fugitive from service it is a private claim of the owner for the delivery of his property, who is also a person who may assert his freedom in consequence of any law or regulation of the asylum State. It is obvious, therefore, that this claim and the resistance thereto would generate a suit of some kind before some judicial tribunal. This being so, and the case arising under the Constitution of the United States, would give to the judicial power of the United States jurisdiction of such case, to be regulated by necessary and proper laws to be passed by Congress for making the proceeding effectual.[1] With this view of the Constitution, Congress in 1793 passed the fugitive slave law, which was in operation until it was superseded by the fugitive slave act of 1850.

Both of these acts prescribed the judicial procedure for trying the title of the claimant to the fugitive in a United States forum. The validity of both of these acts was stoutly contested. That of 1793 was considered in the case of *Prigg v. Pennsylvania.*[2] The decision of the court was delivered by Mr. Justice Story. The case was briefly this: Prigg, as the agent of a Maryland owner of a fugitive slave, caused the slave to be arrested, to be removed to the State of Maryland and delivered into the custody of her master. A special verdict found the facts. The court adjudged the accused guilty of the offense; he appealed to the Supreme Court of Pennsylvania, where the judgment was *pro forma* affirmed. From this latter judgment writ of error was brought to the Supreme Court of the United States. The Supreme Court reversed the judgment as unconstitutional and void. Judge Story held that the Constitution vested in the United States government exclusive power to legislate concerning the extradition of fugitive slaves; that the owner of a fugitive slave was clothed with complete power in every State to seize and recapture him whenever he could do so

[1] Const. U. S., Art. III, sec. 2, and Art. I, sec. 8, clause 18.

[2] 16 Pet. 539.

without a breach of the peace. The statute of Pennsylvania of March, 1826, made it a crime to take or carry away any negro with the intent of selling or keeping him as a slave, and punished such act by fine and imprisonment. The decision of the unconstitutionality of the Pennsylvania law was the question involved. The exclusiveness of the power in Congress in respect to the extradition of such fugitives was not involved, and therefore was *dictum*. Chief Justice Taney, and Justices Thompson, Baldwin and Daniel, concurred with the opinion of Story on the unconstitutionality of the law under which conviction was had, but dissented from the opinion expressed that the power of the Federal government was exclusive. Justice McLean concurred with the judgment of the court, and agreed with Justice Story that the power was exclusive in the Federal government to act in respect to such cases; but held that there was a police power in the State to guard and protect its own jurisdiction and the peace of its citizens. The court was unanimous in declaring the act of 1793 constitutional, and the act of Pennsylvania punishing the claimant of the fugitive slave unconstitutional and void.

In the case of *Ableman v. Booth*[1] the question arose thus: Booth was charged with aiding and abetting in Wisconsin the escape of a fugitive slave from the United States marshal who had him in custody under warrant issued by a district judge of the United States under the act of Congress of September, 1850. A collateral question was involved, which, upon the clause we are now considering, it is not necessary to advert to. The court decided that the fugitive slave law of 1850 was, in its provisions, fully authorized by the Constitution of the United States; that the conviction of Booth under one of its provisions for aiding the escape of a fugitive slave was legal and constitutional; and that the judgment of the Supreme Court of Wisconsin discharging Booth from the imprisonment inflicted by the United States court was utterly void and should be reversed. The

[1] 21 How. 506.

court was unanimous in its decision, including Justices McLean, Nelson, Grier and Clifford, who were citizens of Northern States.

The conclusion, however, is not justified that all legislation by the States in aid of the owner of a fugitive slave or punishing the obstruction of a right was unconstitutional. In *Moore v. Illinois*,[1] Moore was indicted under the code of Illinois for harboring a negro slave and preventing the lawful owner from retaking him, etc.; and the court, with one dissentient, affirmed the constitutionality of the Illinois law, and as *dicta* intimated that any legislation of the State to aid and assist the claimant would be valid. It may be added that it is probable from the language of Judge Story in *Prigg v. Pennsylvania* that the power of Congress to pass laws in aid of the extradition of fugitives from justice would be sustained upon like grounds as the laws of 1793 and 1850 were held to be constitutional in respect to fugitive slaves.[2]

Guarantee of Republican Form of Government.

§ 310. This is an important provision which carries into effect the purposes expressed in the original Articles of Confederation, and the objects mentioned in the preamble to the Constitution in these words: "To insure domestic tranquillity, provide for the common defense, . . . and secure the blessings of liberty to ourselves and our posterity." The language of the present clause is as follows: "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence."[3]

The first provision is the guarantee of a republican form of government by the United States to each State. Everywhere in the *Federalist*, and notably in the twenty-first, quoting from Montesquieu, as well as in the forty-third, number,

[1] 14 How. 13.
[2] 16 Pet. 620.
[3] Const. U. S., Art. IV, sec. 4.

the idea is prominently enforced that a union of States, in which the form of government of each is dissimilar from that of each of the others, resulting in a union of dissimilar democracies, would be in its very nature so uncongenial as to present no hope of permanency or harmony in its relations. The whole structure of the Federal system is based on the idea of the popular form of government of each of the members of the Union. The popular suffrage, which is the constituency of the House of Representatives, is derived from it as the constituency of its own legislature. It is very natural then for Mr. Madison to say: "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained."[1]

He thus argues that the Union is a compact between distinct republics, and that the basis of that Union is the identity of type of each of these republics, and a guarantee assured that this type shall be permanent. And he adds: "Governments of dissimilar principles and forms have been found less adapted to a Federal coalition of any sort than those of a kindred nature." And Montesquieu says:[2] "A confederacy is not agreeable to the nature of petty monarchies. . . . The spirit of monarchy is war and enlargement of dominion; the spirit of republics is peace and moderation. These two kinds of government cannot naturally consist in a confederated republic."[3]

This idea was originally proposed in Randolph's plan.[4] At last Mr. Wilson suggested the form that a "republican form of government shall be guaranteed to each State."[5] At one time there was a suggestion that each State should have a re-

[1] Federalist, No. XLIII.
[2] Spirit of Laws, Book 9, chs. 1, 2.
[3] Id.
[4] Madison Papers, 734, 844, 861, 913.
[5] Id. 1141.

publican Constitution. The form adopted was the guarantee of a republican form of government. This left great variety in the Constitution as to suffrage and the like to be protected under a republican form of government. Thus many States had very restricted suffrage, as the freehold suffrage in Virginia. Some of them had universal suffrage. All the slave States excluded slaves from suffrage, and most of them free negroes. Other States, having no slaves, admitted what was substantially universal suffrage. Still the form was popular; though substantially there was great variety. Mr. Madison discusses this clause with condensed force in the *Federalist*,[1] as follows:

"It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alterations in the State governments without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the general government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers. To the second question it may be answered, that if the general government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no farther than to a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guarantied. As long, therefore, as the existing republican forms are continued by the States, they are guarantied by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the Federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

[1] No. XLIII.

§ 311. We start with the assumption, then, that all the forms of government then obtaining in the several States of the Union were republican. The above citation from Mr. Madison shows this. But the fact is patent. Would the States have adopted a Constitution which invited a disturbance of their forms of government upon the instant that the Constitution went into effect? The existence of slavery, where one-third or one-half of the population were slaves, was not inconsistent with a republican *form* of government. Men might say it was inconsistent with the substantial idea of a republic, but still by the internal polity of each State it was republican in form, only those being excluded from the suffrage whom the State deemed unworthy. Nor is a very restricted suffrage inconsistent with a republican form of government. Every form of suffrage involves the idea that only those are excluded who are unfit for it, and a republican form of government does not require the admission of unfit persons to suffrage, in order to its being republican. Hence slaves without votes were admitted as a basis of representation, three-fifths being counted, and this by the Constitution of the United States. That Constitution which recognized all this in the State Constitutions could not deem the status of slavery and the disfranchisement of slaves inconsistent with a republican form of government.

The clause reads: "The United States shall guarantee." What authority then must be the guarantor? By article I, section 8, clause 18, Congress has power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States," etc. The law, therefore, necessary and proper to guarantee a republican form of government must be passed by Congress to carry into execution this duty reposed in the United States. The words "to guarantee to every State in this Union a republican form of government," obviously discriminate the State as a Body-politic from its government, whose form must be republican. A delicate question here arises. If Congress must

guarantee, must it not determine when the occasion arises for its exercise? The word "guarantee" does not mean to form, to establish, to create; it means to warrant, to secure, to protect the State, that is, the Body-politic, in its right to have a republican form of government. It defends the people against the interference of any foreign power, or of any intestine conspiracy against its right as a Body-politic to establish for itself republican forms of government. To allow the guarantor to take the initiative, and, under the pretext of its duty as guarantor, to impose a form of government upon the people of a State, would make this clause, intended for protection, an excuse for destructive invasion. No occasion for the exercise of this important yet dangerous power has ever arisen, except as the result of civil war.

It was assumed as a postulate in *Texas v. White*[1] that this guaranty clause, by the act of secession of the State of Texas, was not applicable, as that State had lost its government and could not be recognized by the court as capable of instituting a suit in the name of the State. It was necessary that the government and the people of the State should be restored to peaceful relations to the United States under the Constitution before such a suit could be prosecuted. The authority to provide for the restoration of the State government was derived from this guarantee clause in the Constitution. When slavery was abolished the new freedmen became part of the people, and it was the State thus constituted which was now entitled to the benefit of the constitutional guarantee. Congress had the choice of means for re-establishing a republican form of government, but these means must be sanctioned by the Constitution.

In accord with this reasoning the reconstruction acts were passed, by which it was declared that no legal State governments existed in the seceded States; and that in order to preserve peace and good order in the States until legal State governments republican in form could be established, they were to be divided into military districts, each of which

[1] 7 Wall. 700.

was assigned to an officer of the army, with a military force to enable him to perform his duties and enforce authority. The officer was authorized to protect persons in their rights, to punish criminals, either through the local civil tribunals or through military commissions which the act authorized. These acts provided that when the people of any of these States had framed a Constitution in conformity with that of the United States, and framed it in a way specified by the statute, and when the State had adopted a certain article of amendment to the Constitution, which article was to become a part of the Constitution, then the State should be admitted to representation in Congress. The court in that case did not pass upon the constitutionality of any provision of the reconstruction laws. The case was decided with three judges dissenting; nor have these laws ever been sanctioned by judicial decision. It is therefore pertinent to observe in respect to them, that they overthrew existing republican forms of government in every State of the Confederacy, and that government in Virginia which Congress and the President had recognized in the act dividing the State of Virginia which had resulted in the admission of West Virginia to the Union; and the government of Virginia thus recognized was put in possession of power at the city of Richmond after the war as the lawful government of Virginia. The reconstruction laws overthrew that government which Congress itself had set up, and substituted a military government with the judicial power subject to its control. Military commissions were inaugurated for the trial of citizens in other States,[1] and conventions were called under regulations for suffrage prescribed by Congress, and new Constitutions were adopted and new forms of government established. It is hardly a question that these laws, which overthrew the form of government established by the State, and refused to restore it as the legitimate form of government, and set up a military despotism in its place, were not a guarantee of a republican form of government to the States, but guaranteed the over-

[1] McCardle's Case, 6 Wall. 318, and 7 id. 506.

throw of all republican forms of government and the adoption of a Constitution against the will of its people and under the dictation of military power.

§ 312. The next clause reads, "The United States . . . shall protect each of them against invasion." This is a carrying out of the offensive and defensive alliance between the States, and requires the United States, through the action of Congress and by force of their armies and navy, to protect each State against invasion. This is the common defense. It makes it improper for the United States, by treaty or otherwise, without the consent of the State, to cede any part of its domain; for how can it be protected when the invasion or permanent possession of any part of the State is permitted by the guarantor?

§ 313. The clause then provides[1] that the United States, "on application of the legislature or of the executive (when the legislature cannot be convened), shall protect each of them against domestic violence." In the case of domestic violence, it is obvious that the United States cannot interfere unless called upon to do so by the legislature, or by the State executive when the legislature cannot be convened. The United States, then, are not to determine what is domestic violence calling for their protection, but that is to be determined by the legislature or executive of the State. It is interesting to note the observations of Mr. Madison on this point. He says:[2] "At first view, it might seem not to square with the republican theory to suppose either that a majority have not the right or that a minority will have the force to subvert a government; and, consequently, that the Federal interposition can never be required but when it would be improper. But theoretic reasoning, in this as in most other cases, must be qualified by the lessons of practice. Why may not illicit combinations for the purpose of violence be formed as well by a majority of a State, especially a small State, as by a majority of a county or a district of the same State; and if the authority of the State ought in the latter case to

[1] Const. U. S., Art. IV, sec. 4. [2] Federalist, No. XLIII.

protect the local magistracy, ought not the Federal authority in the former to support the State authority? . . . Is it true that force and right are necessarily on the same side in republican governments? May not the minor party possess such a superiority of pecuniary resources, of military talents and experience, or of secret succors from foreign powers as will render it superior also in an appeal to the sword? May not a more compact and advantageous position turn the scale on the same side against a superior number so situated as to be less capable of a prompt and collected exertion of its strength? . . . May it not happen, in fine, that the minority of *citizens* may become a majority of *persons* by the accession of alien residents, of a casual concourse of adventurers, or of those whom the Constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some of the States, who, during the calm of regular government, are sunk below the level of men, but who, in the tempestuous scenes of civil violence, may emerge into the human character and give a superiority of strength to any party with which they may associate themselves."

These views show that the United States are bound, on the application of the legislature or executive of a State, to aid in suppressing an insurrection in a State, even though it may have a majority, including alien residents not suffragans, on the side of the opposition to the government. The United States cannot join with the parties to domestic violence, because they are in the majority, to overthrow the government which is guaranteed as a republican government, and to be protected against domestic violence. This would make the United States a factor in domestic quarrels, and not a protector of the government against those who are too strong to be overborne by it. Where there are rival governments and the demand is made by either or both, it has been decided in the case of *Luther v. Borden*,[1] followed

[1] 7 How. 42.

in *Texas v. White*,[1] that when the application is made the President may have the authority to decide which is the legitimate government.

This latter part of this clause was insisted on by the Southern States, because assuring them of the protection of the United States government in case of servile insurrection.[2]

Express Limitations on Federal Power.

§ 314. In the form in which power was delegated to the Congress in the Constitution, there was an implied limitation upon the powers in the fact that all were delegated; and that all not delegated, or prohibited to the States, were reserved to the States respectively, or to the people. But the framers of the Constitution were not content with this. They were wise enough to foresee that power, when left in any degree to implication, would seek to increase itself by inference so as to endanger public liberty.

They proposed, therefore, upon certain essential matters, to provide against this stretch of power through implication, by forbidding the exercise of certain dangerous powers in express terms. A number of these are to be found in article I, section 9; and others were afterwards added in the first ten amendments to the Constitution. There had been a great popular demand for a bill of rights, and after the Constitution was submitted to the judgment of the people of the several States, the cry of patriots throughout the Union was, that a radical defect in the system was in the absence of a declaration of rights, which should be beyond the reach of Federal power. How far this demand was met in the original Constitution we will now proceed to consider.

§ 315. The first clause of the ninth section we need consider no further, as we have already fully considered it under the power as to commerce.

[1] 7 Wall. 700. See also Appendix to Tucker's Blackstone, 367.

[2] 1 Tucker's Blackstone, Appen., 367; Rawle on the Constitution, ch. 32. See also Attorney-General Cushing's Opinion, March 3, 1857, in Yazoo City (postoffice) case.

The second clause is in these words: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion and invasion, the public safety may require it." Let us analyze this clause. There is no other mention of the writ of *habeas corpus* in the Constitution. The underlying principle of this writ, which subjected all arrest or seizure of the person of a free man to judicial arbitrament, was found in the thirty-ninth chapter of Magna Carta; but that which we refer to ordinarily as the Habeas Corpus Act was the 31st of Charles II., chapter 2.[1] The principles of this great act of Charles II. were brought to America by the several colonies, and acts of *habeas corpus* based upon that primeval act, which was itself but a re-enactment of acts more ancient than it, were passed by the several States, for giving to every person imprisoned by whatever authority the right to have the legality of his arrest and imprisonment passed upon by judicial authority. When, therefore, the Constitution declares in this clause that "the privilege of the writ of *habeas corpus* shall not," etc., it necessarily speaks of the writ of *habeas corpus* which obtained in each of the States comprising the Union. It is natural, therefore, as has been settled by decisions, that the writ of *habeas corpus* cannot under this clause be suspended. The privilege may be; the writ never.[2] The form of the clause is a negation of the power to suspend except under certain circumstances, which are mentioned; which is a negative pregnant with affirmation that power to suspend it is only given when those circumstances arise.

§ 316. What Federal authority can suspend this privilege? The answer is distinct: No power but Congress can suspend it; the President cannot.

1st. England, from which we obtain Magna Carta, Habeas Corpus, and the fundamental principles of our bill of rights, has settled this question there. In the thirty-ninth chapter of Magna Carta, it is declared that no free man shall be ar-

[1] Stubbs' Select Charters, Appen., 517.

[2] Ex parte McCardle, 7 Wall. 506.

rested or lose his life or liberty, except by the law of the land or the judgment of his peers. His liberty is protected by law, and cannot be stricken down by royal power. Therefore this principle of English liberty, the law which established *habeas corpus* and protected *liber homo* from any deprivation of liberty, could not be repealed by any other than the power which enacted it; nor could the king repeal temporarily, by suspension, the law enacted by Parliament. This pivotal principle in the English Constitution was the turning point of the English revolution of 1688–89. And the trial of the seven bishops and the verdict in that case was the vindication by the English people of the irrepealability of an English law by the suspending power of an English king. The last of the Stuarts lost the throne by insisting on his power to dispense with a law of the kingdom. In England, therefore, since the revolution of 1688, the king has not sought to exercise the power of dispensing with *habeas corpus*. If he could, English liberty would be dead, because subject to suspension at the will of an English king.

2d. The history of the debates in the convention leads to the same conclusion. In Pinckney's plan, the privilege of the writ was not to be suspended except in cases of rebellion or invasion.[1] Subsequently Mr. Pinckney proposed a clause "that it shall not be suspended by the Legislature, except," etc.[2] Rutledge and Wilson thought suspension should never be allowed. But by a vote of seven to three the clause was adopted in substantially its present form. It was never referred to as subject to suspension except by Congress.

3d. The power of suspension was in the legislative article, and between two clauses, and in a section which related exclusively to legislative power. So, *noscitur a sociis*, was the power to suspend a legislative act of the States only in the legislature.

4th. The power to suspend the privilege of a writ must be in one of the departments. It cannot be that the judiciary

[1] Madison Papers, 741. [2] Id. 1265.

could suspend a writ grantable by a court *ex debito justicii* to a citizen; nor was there any mention in the enumerated powers of the President. Suspension in fact was to repeal *pro tempore*. How could the President repeal permanently or for a time a law of Congress? *A fortiori*, how repeal a right imbedded in the foundation law of the State, and recognized as a constitutional right in this very clause?

5th. In the convention it was distinctly proposed that the President should have the power to suspend a law for a certain term. Ten States vote no without an affirmative vote. The only time that the authority to suspend the privilege of the writ of *habeas corpus* is mentioned is in connection with Congress, and with none other.

Furthermore, as the power is not given to the President in express terms, it would have to be implied as necessary and proper to carry out Presidential powers. But these means which are necessary and proper for this purpose are vested in Congress itself, as we have seen, by the words "to make all laws which shall be necessary and proper for carrying into execution, etc., powers vested by this Constitution . . . in any department or officer thereof."[1]

§ 317. Again, Congress has sole power to declare war and to provide for the suppression of rebellion. The President has neither. This clause prohibits the suspension of the writ, unless when in case of rebellion or invasion the public safety may require it. As Congress is charged with the public safety in cases of rebellion and invasion, it would seem to follow that Congress may have the power to suspend the writ of *habeas corpus* when its exercise would endanger the public safety. Congress alone can determine when the war shall begin, and therefore when the occasion has arisen for its suspension. If the President has power to declare war, as seemed to be held in the *Prize Cases*,[2] and to continue it indefinitely, as was decided by the Supreme Court in reference to the end of the Civil War by the Presidential procla-

[1] Const. U. S., Art. I, sec. 8, clause 18. [2] 2 Black, 635.

mation, then the power of the President to suspend the privilege of the writ of *habeas corpus* would be dependent on his own authority to declare and perpetuate a rebellion at his own pleasure. In this view, how can it be supposed that the framers of the Constitution intended to give this extraordinary authority to destroy human liberty to the President, during a period of war which can never cease by a treaty of peace, except with the consent of the President; or of a civil war, which the courts have decided continues until its cessation is declared by the Presidential proclamation?

6th. Judge Story,[1] speaking of who shall decide whether the exigency has arisen for a suspension, uses this language: "It would seem, as the power was given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether such exigency has arisen must exclusively belong to that body." Judge Tucker[2] says: "In England the benefit of this important writ can only be suspended by authority of the Parliament. . . . In the United States it can be suspended only by the authority of Congress." Mr. Hamilton[3] refers to this clause as being equivalent to an important article in a bill of rights to secure liberty. How feeble would have been his citation of this, if those who demanded a bill of rights had been able to charge that the privilege of the writ of *habeas corpus* was suspensible by the one-man power. The truth is, it may be safely said that no respectable lawyer before the Civil War, nay more, no lawyer, had ever asserted that the privilege of the writ could be suspended by any power except Congress. Mr. Blackstone[4] says: "But the happiness of our Constitution is, that it is not left to the executive power to determine when the danger of the State is so great as to render this measure expedient; for it is the Parliament only or legislative power that, whenever it seems proper, can authorize

[1] Story on the Constitution, 1342.
[2] 1 Tucker's Blackstone, Appen., 292.
[3] Federalist, No. LXXXIV.
[4] Stephen's Blackstone, 151.

the Crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons, without any reason for so doing."

Besides the American authorities already cited, Chief Justice Marshall, in delivering the opinion of the Supreme Court in the case of *Ex parte Bollman*,[1] prefaces what will be quoted by stating that, in the great judiciary act of 1789, Congress secured the liberty of the man by authorizing the issue of this great writ by all the courts, and then adds: "If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws."

§ 318. It is thus seen that, at the time of the adoption of the Constitution, no power in Great Britain could suspend the writ of *habeas corpus* except Parliament. Parliament may suspend the privilege of the writ, or rather authorize the Crown to suspend it, in order that in case of public danger a suspected person may be arrested without the giving of reasons for the arrest or detention. To give to the Crown the power to suspend in order to arrest would be to unite the legislative power with the executive, which, under the maxim of Montesquieu, would be unbridled tyranny.

During Jefferson's administration he recommended to Congress the suspension of the writ of *habeas corpus* during the Burr conspiracy. Congress refused to do so, and the President never assumed the power or pretended to claim it. It is obvious if the President can create the status of civil war, as was decided in the *Prize Cases*,[2] and when this status of war is brought about the President can close it by proclamation, as was decided in a case already cited, then it follows that the President would have power to create the status of war, in order to declare that the public safety required the suspension of *habeas corpus*, and to suspend it by executive act until

[1] 4 Cr. 101.
[2] 2 Black, 635.

he should declare the war at an end. Contrasting this assumption of power for the executive with the power of the Crown in Great Britain, it may well have been said that on such a construction the Constitution would have conferred upon the President "more regal and absolute power over the liberty of the citizen than the people of England have thought it safe to entrust to the Crown; a power which the Queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First."

In *Ex parte John Merryman*,[1] the question arose in 1861 of where the power resides to suspend the privilege of *habeas corpus*. On the 26th of May, 1861, before Congress had met after the outbreak of the Civil War, the President had assumed the power as an executive prerogative to declare that civil war existed, and on the basis of that declaration assumed in May, 1861, not only to suspend the writ of *habeas corpus*, but to confer that authority upon the military commander in the district of Maryland. Merryman was imprisoned in Fort McHenry in the State of Maryland, and filed a petition for *habeas corpus* before Chief Justice Taney to be released from an arrest made on the 20th day of May, and detention by General Cadwalader of his person without warrant from any judicial officer, but upon the general charge of treasonable acts against the government. The Chief Justice issued the writ of *habeas corpus*, directing General Cadwalader to appear and produce the body of John Merryman, and to certify and make known the day and cause of the capture and detention of the said John Merryman, and to submit to and receive whatsoever the said Chief Justice should determine upon concerning him in this behalf, according to law, and to have then and there the said writ.

General Cadwalader made a return declaring that he was duly authorized by the President of the United States to suspend the writ of *habeas corpus* for the public safety, and declined to produce the prisoner. Thereupon the Chief Jus-

[1] Taney's C. C. Rep. 246–65.

tice issued an attachment against General Cadwalader for contempt, and delivered the same to the marshal. The marshal made return that he was unable to serve the attachment upon General Cadwalader by reason of military force. The Chief Justice, in an impressive opinion, decided that the civil process had been subordinated to military power by the action of General Cadwalader under the assumed orders of the President. He decided that the assumed power of the President was contrary to the Constitution of the United States; that the suspension of the writ of *habeas corpus* was a legislative power; that the President, under his duty to take care that the laws be faithfully executed, was bound to uphold and aid the judicial power, and not to oppose and defy it; and, referring to the nature of the British Constitution on this question, and the opinion of Chief Justice Marshall in *Ex parte Bollman*, and to Judge Story's Commentaries, he closes his opinion in this language: "In such a case my duty was too plain to be mistaken. I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him; I shall therefore order all the proceedings in this case, with my opinion, to be filed and recorded in the circuit court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfillment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced."

The President never acted in the matter so as to release Merryman; and the suspension of the privilege of the writ of *habeas corpus* by military force was allowed to have effect at the will of the executive against the judicial mandate of

the venerable Chief Justice of the United States. Thus the only proceeding in our annals up to that time which could be regarded as a precedent for the use of the executive power to suspend this great privilege was in the exertion of the military power of the President to enforce the authority of the military over the civil jurisdiction of the courts; and so the only judicial precedent is the emphatic decision in this case that the only power that could suspend this privilege is in Congress, and not in the President. The tenor of the opinion of the court in *Milligan's Case*[1] sustains the principles of the decision of the Chief Justice in *Merryman's Case.*

§ 319. Another case well calculated to shock the public sentiment of the country in respect to the danger of the military power has occurred. In violation of the fifth amendment to the Constitution, to be hereafter referred to, Mrs. Surratt, a woman, not a soldier in the army of the United States or subject to militia duty, was arrested and tried by a court-martial for the deplorable assassination of President Lincoln, which tribunal, by the fifth amendment, had no jurisdiction in such cases. She was condemned to death. She sued out a petition for the writ of *habeas corpus* to bring under the jurisdiction of the civil courts in the capital of the country the power of the court-martial to condemn her to death. The writ was issued by Mr. Justice Wiley, one of the judges of the District of Columbia. With the precedent of General Cadwalader's defiance of the order of Chief Justice Taney before them, the military disobeyed the order of Mr. Justice Wiley, and this woman, in the shadow of the capitol, under a jurisdiction utterly unconstitutional, and by a military power in defiance of the jurisdiction of the civil courts, was hung. It will be perceived, therefore, that the suspension of the writ of *habeas corpus* screened the unconstitutional jurisdiction of the court-martial from the scrutiny of the civil courts, and under cover of this the military power was left without restraint to work the death of its victim in defiance of the Constitution of the country. This con-

[1] 4 Wall. 2.

struction, therefore, is not only fatal to the liberty but to the life of the citizen, and puts his liberty and life in the hand of the executive.

Several years after hostilities ceased, the trial of McCardle by military power under the provisions of the Reconstruction Acts was attempted to be averted by invoking the benefit of the writ of *habeas corpus.* We have seen how it was attempted to remedy the denial of that writ in obedience to those acts by an appeal to the Supreme Court of the United States, and how the Supreme Court was divested of its jurisdiction upon appeal to grant to McCardle the benefit of its great power to rescue him from the prospect of military trial by the law repealing the clause of the previous act granting it the power to consider the case upon appeal. The history of these unhappy precedents is given only to exhibit the dreadful evils of a departure under any exigency from the sacred provisions of the Constitution of the country, and to note them, we hope, as the only cases in all our future as in all our past history which will endanger the life and liberty of the citizen so fully protected by the noble provisions of the Constitution of the United States.

The States are not forbidden to suspend the writ of *habeas corpus* by any provision of the Constitution of the United States, and the power of the States to do so is not restricted by the conditions upon its exercise by the Federal power which occur in this clause.[1]

The true view of this important restriction upon Federal power is that the framers of the Constitution felt that occasions might arise of public danger in time of war or civil commotion when the arrest of a person might be proper, though there might be no sufficient proof to establish a treasonable purpose before a civil court. It was obviously a power by arrest and detention to prevent the evil results which would flow from leaving the accused to carry out his designs unrestrained, and to hold him in order to the safety of the country. It was never intended that this detention

[1] Luther v. Borden, 7 How. 42.

should be followed, under cover of the suspension of the privilege of the writ of *habeas corpus*, by prosecution, conviction and punishment, and in the deprivation of his liberty or life. Prevention, not punishment, was the object of this clause. The case cited was an abuse of the suspension of the privilege of the writ of *habeas corpus* by the violation of the fifth amendment of the Constitution in the unconstitutional trial, conviction and punishment of the offender.

Prohibition Against Bills of Attainder.

§ 320. "No bill of attainder or *ex post facto* law shall be passed."[1] The same restriction was imposed upon the States.[2]

We may consider this subject in its application to Congress and to the States. Bills of attainder were not within the judicial power of Parliament. The judicial procedure was by impeachment by the House of Commons and trial by the House of Lords. A bill of attainder was the legislative act of Parliament.[3] These acts of Parliament to attaint particular persons of treason or felony, or to inflict pains and penalties beyond or contrary to the common law, to serve a special purpose, are, to all intents and purposes, new laws made *pro re nata*, and by no means in execution of such as are already in being.[4] These acts charged persons named in the bill with criminal misconduct, convicted them, and adjudged the penalty of death with forfeiture of property. They were passed to reach cases where the evidence of guilt was not sufficient for judicial conviction, and sometimes for obnoxious conduct not made criminal by existing law, and therefore making criminal by after-law what was not criminal when done. The accused was generally denied a hearing. It was the union of legislative and judicial power in the same hands, which, under Montesquieu's maxim, was the "essence of tyranny." The legislature made a deed not criminal at the time done a mortal offense, and sat in judgment upon the accused to carry out by judicial forms what had been enacted by the so-called judges.

[1] Const U. S., Art. I, sec. 9, clause 3.
[2] Id., Art. I, sec. 10, clause 1.
[3] 4 Stephen's Blackstone, 386, and note; May's Practice of Parliament, 484.
[4] 4 Stephen's Blackstone, 379.

Besides these bills of attainder there were bills of pains and penalties, which only differed from the former in that the penalty was less than death. During the Revolutionary period such bills were passed in some of the colonies, one case of which came before the Supreme Court, the case of *Cooper v. Telfair*.[1] That case grew out of a bill of pains and penalties. In New York bills of attainder were passed confiscating the property of offenders, and condemning them to death without hearing and without the form of trial.[2] But these acts of the State were passed before the Constitution went into effect. In the convention of 1787 the clause as to bills of attainder was passed *nem. con.* As to the clause relating to *ex post facto* laws, passed by a vote of seven to three, many members thought that it was unnecessary to insert such a provision, Mr. Ellsworth holding that *ex post facto* laws were void of themselves.[3] The tyrannical character of a bill of attainder has been exposed by a number of writers.[4]

In *Fletcher v. Peck*[5] the Supreme Court said: "A bill of attainder may affect the life of the individual or may confiscate his property, or both." In this clause the power of the legislature over the lives and fortunes of individuals is expressly restricted. This definition includes the technical bill of attainder, as well as the bill of mere pains and penalties, and was so interpreted by Justice Story, *ubi supra*. The question has been very fully considered in two cases, *Ex parte Garland*[6] and *Cummings v. Missouri*.[7]

In *Ex parte Garland* the court defined a bill of attainder as "a legislative act which inflicts punishment without ju-

[1] 4 Dall. 14.
[2] Cooley's Constitutional Law, 284, 285.
[3] Madison Papers, 1399–1401.
[4] Story's Commentaries, 1338, citing Dr. Paley; 1 Tucker's Blackstone, Appen., 292; Rawle on the Constitution, ch. 10; Woodson's Law Lectures, 621–24.
[5] 6 Cr. 138.
[6] 4 Wall. 277.
[7] 4 Wall. 326; Hawkes v. New York, 170 U. S. 189.

dicial trial;" and held in that case that a bill of pains and penalties was within the prohibition of bills of attainder. Garland's case was shortly this: Garland was admitted as an attorney before the Supreme Court in 1860 and duly qualified. He took part in the rebellion. In 1865 he was granted a full pardon upon the strength of an oath which he took and subscribed. He produced his pardon before the court and asked permission to practice. Congress in January, 1865, passed an act that no person should be permitted to practice, or be permitted to appear and be heard, at the bar of the Supreme Court or any other court of the United States, unless he should have first taken and subscribed an oath known as the iron-clad oath, by which he should swear that he had given no aid, etc., to the rebellion. His application was argued by counsel. The court decided that to exclude him from the practice of law in the Federal courts or from any other avocation of life for past conduct was punishment; that the act of Congress of 1865 was a bill of pains and penalties, and as such was forbidden by this clause in respect of bills of attainder, and that the pardon of the President reached the punishment as well as the offense of treason. If granted before conviction, it prevented any penalty attaching consequent on conviction; if granted after conviction, it removed that penalty. The court admitted him to practice.

In *Cummings v. Missouri* the provision of the Constitution of Missouri requiring preachers and teachers, in order to continue in their professions of preaching and teaching, to take an oath equivalent to the iron-clad oath before mentioned, was brought in question. The court held that this clause of the Constitution of the State presumed the guilt of the man and adjudged the deprivation of his right to teach and preach, unless the presumption was removed by the expurgatory oath. They assumed the guilt, and adjudged the punishment conditionally. This amounted to condemnation and punishment *nisi*. This was equivalent to an *ex post facto* law in inflicting a penalty which did not attach to the alleged offense at the time committed, and changed the evidence upon which conviction could have been had, by first assuming the guilt and condemning for it, unless the accused established his innocence by an expurgatory oath. The opinions in these two cases are learned and full, and rest upon the definition of an *ex post facto* law as made by Chief Justice Marshall in *Fletcher v. Peck*, *supra*. He says an *ex post facto* law is one "which renders an act punishable in a manner in which it was not punishable when it was committed." So in *Fletcher v. Peck* the Chief Justice held that the State of Georgia could not take an estate from Fletcher derived from the State itself for any alleged criminal action on the part of its legislature, any more than it could have taken the estate from him through the form of an *ex post facto* law or bill of attainder for any offense of his own.

The State of West Virginia passed an act in September, 1863, providing that where a judgment was rendered against a non-resident in an action in which an attachment issued without personal service or other process in the suit and without his appearance, such defendant had a right, upon returning to the State, to have the proceeding reheard and make a defense. In the case of *Pierce v. Carskadon*[1] a judgment was entered against Pierce under an attachment in December, 1864. He appeared within a year and asked leave to file his petition for a rehearing in the case. It was refused, because it did not conform to the law passed in 1865 requiring it to be accompanied with an oath similar to the iron-clad oath already referred to. The court of appeals of West Virginia affirmed the decision of the lower court. Pierce appealed to the Supreme Court of the United States, because the act of February, 1865, requiring such oath as a condition of the exercise of a civil right was an *ex post facto* law. The Supreme Court reversed the decision upon the authority of *Ex parte Garland* and *Cummings v. Missouri supra*. This clause in reference to bills of attainder and *ex post facto* laws is in accord with all the fundamental prin-

[1] 16 Wall. 234.

ciples of Magna Carta which have been imbedded in the Constitution of the United States by these clauses of prohibition upon Federal as well as upon State power.

§ 321. An *ex post facto* law (out of or by after-made law) requires a little more consideration. It is a retrospective law, but not so in application to civil matters, but as to crimes and criminal matters. Mr. Justice Johnson, in *Satterlee v. Matthewson*,[1] held that the term "*ex post facto*" should be applied to past transactions of a civil as well as of a criminal nature. But these views did not prevail. The addition to the words "bill of attainder, *ex post facto* law" of the words "or law impairing the obligation of contracts"[2] would seem to show that *ex post facto* laws, which would clearly embrace a law impairing the obligation of contracts, must have referred to criminal and not civil matters. A very satisfactory piece of evidence on this point is found in the proceedings of the convention. Mr. King moved a prohibition on the States to interfere in private contracts. Mr. Madison suggested that that was covered by the prohibition as to *ex post facto* laws.[3] The next day Mr. Dickerson mentioned the fact that Blackstone said the terms *ex post facto* related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for that purpose was requisite.[4] The clause in reference to the obligation of contracts was introduced by the Committee of Style, which interpreted the words *ex post facto* as applying only to criminal matters. This was judicially passed upon in the case of *Calder v. Bull*,[5] and the full extent of its meaning was explained by the court. A law was held to be *ex post facto:*

1st. When the act previously committed, and then innocent, was by after law made a crime.

2d. When the after-made law increased the grade of criminality of a previously committed crime, as from misdemeanor to felony.

[1] 2 Pet. 380.
[2] Const. U. S., Art. I, sec. 10.
[3] Madison Papers, 1443–44.
[4] Id. 1450.
[5] 3 Dall. 386.

3d. When the after-made law increased the punishment for a previous offense.

4th. When the after-made law changed the rules of evidence, making less or different testimony necessary to convict, or changed essentially, and not formally merely, the modes of trial.

In the case of *Kring v. Missouri*,[1] a plea of guilty of murder in the second degree, on appeal was reversed and set aside. Kring was subsequently convicted of murder in the first degree. By the law in force when the homicide was committed, a conviction of murder in the second degree was an acquittal of the charge of murder in the first degree. But after the offense, and before the plea of guilty was entered, the law was changed, so that if a judgment on that plea was lawfully set aside, it would not be held an acquittal of the higher crime. It was held that in this case the new law was *ex post facto* and there could not be a new trial for murder in the first degree. Mr. Justice Miller, in delivering the opinion of the court, gave a history of the clause which is interesting and instructive. A majority of the court held, citing *United States v. Hall*,[2] that any law passed after an offense committed, which, "in relation to that offense or its consequences, alters the situation of a party to his disadvantage," is an *ex post facto* law; and, in the language of Denio, J., in *Hartung v. The People*,[3] "no one can be convicted and punished in this country unless according to the law prescribing the punishment by the sovereign authority at the time the offense was committed."

In *Hopt v. Utah*,[4] under a law existing at the time of the commission of the offense, persons convicted of felony, unless pardoned or judgment reversed, were not competent witnesses. By a law passed after the date of the alleged offense such persons were made competent witnesses, and it was held that statutes temporarily enlarging the class of persons so made competent to testify are not *ex post facto*,

[1] 107 U. S. 221.
[2] 2 Wash. C. C. Rep. 366.
[3] 22 N. Y. 95.
[4] 110 U. S. 574.

for they do not alter the degree or lessen the amount or measure of proof necessary to conviction when the crime was committed. This decision was unanimous. But *quære:* Is a law making *baron* and *femme* competent witnesses against each other after crime *ex post facto?* The case just cited might seem to hold the affirmative; but in that case the disability removed affected only the personal credibility. The relations of *baron* and *femme*, so confidential in the status existing at date of crime, ought not to be allowed to be betrayed by after-law on attempted evidence of facts not admissible at the date of the offense.

In the case of *Murphy v. Ramsay*[1] it was held that the deprivation of a bigamist's right to vote under an act passed in 1882 was not an *ex post facto* law. It defines the qualifications for exercising political functions, and does not punish for the offense of bigamy; nor is the divesting of a civil right an *ex post facto* law, for that applies only to criminal matters; nor does it forbid a State to divest rights unless it impairs the obligation of a contract.[2]

The Constitution of West Virginia in 1872 declared that the property of a citizen of the State should not be sold under process issued upon judgment heretofore rendered because of any act done in the prosecution of the war of the rebellion by either of the parties thereto. It was held that when this applied to a judgment founded upon a tort committed as an act of public war, it was not the impairment of the obligation of a contract, because based on tort; and that a bill in equity to set aside such judgment was due process of law, and was in no wise in conflict with the Constitution of the United States.[3]

In *Medley's Case*[4] a State statute, passed after the commission of a murder which adds to the punishment of death, the punishment when the crime was committed, the further pun-

[1] 114 U. S. 15.
[2] Watson v. Mercer, 8 Pet. 88.
[3] Freeland v. Williams, 131 U. S. 405.
[4] 134 U. S. 160; Houston & Texas Central Ry. Co. v. Texas, 170 id. 243.

ishment of solitary confinement until the execution, was as to such convict an *ex post facto* law, and a sentence inflicting both punishments was void. And so in a case where the statute conferred upon the warden the power to fix the day of execution and compelled him to withhold the knowledge of it from the offender, when neither of these provisions was part of the law of the State when the offense was committed. In this case the doctrine stated in *Kring's Case*, *supra*, was affirmed. If, however, the after-law requires the execution to be before sunrise on the day fixed, and within the jail or other inclosure higher than the gallows, thus excluding the view of people outside, and limiting the number who may witness the execution, these are regulations not affecting the rights of the convict, and are not *ex post facto;* and are to be distinguished from *Medley's Case.*

§ 322. The next provision runs, "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."[1] This refers to the previous clause.[2] This subject has been sufficiently discussed under the head of the tax clause,[3] and in the cases there referred to,[4] and also in very recent cases.[5] This clause is the negation of any other mode of levy of direct taxes, except in the manner affirmatively established in a previous clause.[6]

"No tax or duty shall be laid on articles exported from any State."[7] The history of this provision and its importance as a part of the great compromise made in the convention between the navigation and commercial States and the cotton States has been fully given, and need not be repeated here except by this reference. The clause for-

[1] Art. I, sec. 9, clause 4.
[2] Art. I, sec. 2, clause 3.
[3] Art. I, sec. 8, clause 1.
[4] Hylton v. United States, 3 Dall. 171; License Tax Cases, 5 Wall. 462; Springer v. United States, 102 U. S. 586.
[5] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429. Same case reheard, 158 U. S. 601.
[6] Const. U. S., Art. I, sec. 2, clause 3.
[7] Id., Art. I, sec. 9, clause 5.

bids the laying of a duty or tax on articles exported. This applies as far as the word "duty" is concerned to the article as a subject of export when it puts on the character of an export; but lest there might be an evasion of the substantial purpose of the clause by laying a burden upon the article before it assumed the character of an export, the word "tax" was obviously added; and the phrase "on articles exported" was substituted for the simple word "exports," elsewhere used. The whole clause then means that the taxing and duty power of the government should not be laid as a burden on the products of any of the States, which were to be exported. Hence the discussion which arose in the cases previously cited as to the stamp required by law to be placed, as a means of identification, on tobacco which was intended to be exported, in order to prevent its being sold in the domestic market, evading exportation. The question might be raised whether the prohibition applies to articles exported from one State to another, but this has been settled in the negative. It applies to exportation only from any State to a foreign country.[1] Some cases hold a different view, but there is strong reason for believing that it was never intended that articles exported from a State to another should be subject to tax or duty by the State or by Congress.

§ 323. "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State, be obliged to enter, clear, or pay duties in another."[2] The latter part of this clause explains the mode in which preference might be given by a regulation of commerce or revenue to the ports of one State over those of another. Preference between the ports of the same State in this respect was not forbidden; but the commercial and revenue power

[1] Cooley v. Wardens of the Port of Philadelphia, 12 How. 299; Almy v. California, 24 id. 169; Pace v. Burgess, 92 U. S. 372; Turpin v. Burgess, 117 id. 504; Woodruff v. Parham, 8 Wall. 123.

[2] Const. U. S., Art. I, sec. 9, clause 6.

of the Federal government without this prohibition might be used to the great advantage of some States and to the great disadvantage of others.[1]

In *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*,[2] it would seem from the language of Justice Nelson that this prohibition upon the otherwise exclusive power of Congress to establish ports of entry and clearance throughout the Union was restricted so as to require Congress to allow the vessel bound to the port of a State to enter at that port and deliver its cargo, and not to be required to go to a preferred port in another State. But Congress may make preference between the ports of the same State, and requiring a vessel going to a particular point, for instance, to enter or clear and pay duties at that port preferably to any other port of the State.

§ 324. "No money shall be drawn from the treasury, but in consequence of appropriations made by law."[3] This is an important provision, inasmuch as, in connection with the tax-laying power already discussed, it puts under the law-making power — that is, Congress — the power to lay and collect taxes; that is, the power of gathering in the funds necessary for governmental purposes, and gives also to Congress the power to appropriate it; and that between the collection and the appropriation, the money shall be in what was denominated the treasury, from which it cannot be withdrawn by any but by the law-making authority. In the early period of English history the assessment of taxes in the shires was adjusted between the *quasi*-judicial officers of the exchequer and the shire authorities; and the collection of the taxes was very largely under the power of the Crown, although the original idea was that revenue was a grant by the people to the Crown and not an exaction by the Crown from the people. At a later day Parliament insisted that the revenue collected should be under the control of Parliamentary officials, and not of offi-

[1] Packet Co. v. Catlettsburg, 105 U. S. 559.

[2] 18 How. 429.

[3] Const. U. S., Art. I, sec. 9, clause 7.

cers of the Crown, and that they should be held subject to Parliamentary appropriation. The contention between the Crown and Parliament is described by Dr. Stubbs,[1] out of which emerged the practice that taxes should be assessed and collected and held by officers of Parliament, whose accounts of expenditures should be audited under the supervision of Parliament, thus keeping the revenue from the possession or control of the Crown, except when it had been appropriated by acts of Parliament.[2]

At an early period the levy of customs duties was claimed as part of the royal prerogative over commerce; but that was never conceded, and ever since the House of Stuart was expelled from the throne of England it has been abandoned; and the royal prerogative over trade includes no power to lay duties upon exports, the exercise of which is held to be exclusively under the control of Parliament.[3] It is clear that the claim by Parliament of the right to collect revenue and grant it to the Crown is wholly inconsistent with any power in the Crown or its officials to do so free from the supreme control of Parliament. If the King collected and held the revenue under his authority, the Parliamentary power to grant subsidies and appropriate money to the Crown would be a sham. Hence all the machinery, not only for levying but for collecting and keeping the public revenue, is under the supreme control of Parliament. The freedom of grant would be transformed into the enforced exactions of the King if the revenue were, through the machinery of collecting and keeping, directly or indirectly under the royal power, and the device of appropriations for the army for one year only, would cease to be any check upon the prerogative. It is the independent holding of the revenues within Parliamentary hands that effects the divorce of the purse from the

[1] Stubbs' Constitutional History of England, 594 *et seq.*

[2] Id. 598, note 5; Stubbs' Select Charters, 352, 361, 364, 366; Green's History of the English People, 175–177; 2 Stephen's Commentaries, 548, 549.

[3] Hallam's Constitutional History, 183–85.

Crown, and which makes prerogative impotent in its assaults upon liberty. This clause of our Constitution is the embodiment of these principles of English liberty into the fundamental law of the land. While, therefore, the President appoints all the officers of the government, their functions, powers, duties and responsibilities are prescribed by law, and make them independent of the authority of the President. In the first Congress the State Department was established by law, July 27, 1789, and its Secretary was to perform such duties as should be entrusted to him by the President of the United States. This was because the President has confided to him, by the second article of the Constitution, the conduct of foreign affairs. The Secretary of State was subordinate to the constitutional power of the President.

The War Department was established in 1789, and its Secretary was to perform the duties entrusted to him by the President of the United States, as to the land and naval forces, because they belonged to the Executive Department; the President by the Constitution being commander-in-chief of the army and navy of the United States. But in the organization of the Treasury Department we find a remarkable change. The Secretary of the Treasury was to be deemed the head of his department. His duty was to superintend the collection of the revenues, to grant warrants for money from the treasury if appropriated by law, etc. The office of Treasurer was created by the same act, the duties being to receive and keep the money of the United States, and to disburse the same upon warrants drawn by the Secretary, countersigned by the Comptroller, and recorded by the Register of the Treasury, and not otherwise. It is striking evidence of the motives of Congress in this peculiar legislation that the report of the Secretary of the Treasury is made to Congress and not to the President, while the reports of the heads of other departments are all made to the President. The officers of the revenue cutters provided for the collection of customs were deemed officers of customs and not of the navy, as had been suggested by Mr. Secretary

Hamilton. Had they been officers of the navy they would have been under the control of the President; as officers of customs they are under control of the Secretary of the Treasury. This legislation under these constitutional provisions shows that the doors to and from the treasury are under legislative control, and the key is in the hands of Congress. The obstructions to drawing money from the treasury, except through sworn officers, without whose concurrent action the custodian of money in the treasury can never permit it to pass from him, make the appropriation by a law of Congress to be the only pass-key to the vaults of the treasury, as the Constitution intended; and all legislation which Congress is authorized to pass as necessary and proper to carry this important provision into execution must be directed to the point of fencing the contents of the treasury beyond the reach of any other power than the Congress of the United States. The last provision of this clause was fully commented on in the convention: that the people by public reports from time to time should be made aware of the collections of money as well as of its disbursement.

§ 325. The last clause of the ninth section reads as follows: "No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign State."[1]

The first provision as to title of nobility is correlative with the last words of the following section declaring that no State shall grant any title of nobility; and both of these may be taken in connection with the clause[2] already considered requiring the guarantee to every State of a republican form of government. This perfect equality of all of the citizens of the country with no fixed customs or rank of nobility admitted among them, and none capable of being created by the Federal or State authorities, is the exclusion from both branches of our Federal system of the possibility of mon-

[1] Const. U. S., Art. I, sec. 9, clause 8. [2] Art. IV, sec. 4.

archy or aristocracy in the form of government, and the guarantee of republican forms of government to every State in the Union as well as to the government of the Union of the States. The latter part of this clause was intended to exclude everything like foreign influence in the form of express bribery or of gifts, which, though more insidious, are not less hurtful, in respect to any one holding an office of profit of trust under them, that is, the United States. What persons hold offices of profit or trust under the United States has been already considered somewhat when it was found that senators and representatives are not officers of the United States, but delegates and representatives of the several States. But the President, Vice-President and other officers, such as judges, public ministers, the heads of departments, and all subordinate officers, are persons holding offices of profit and trust under the United States. However indelicate, therefore, it may be for members of either House of Congress to accept presents from any foreign State, they are not prohibited from doing so by this clause of the Constitution.

This ninth section of the first article is the prohibition or limitation on the previously delegated powers of Congress, or upon any possible implication of power from the preceding grants of power; but they were not considered enough to meet the loud demand for something more definite in the shape of a bill or declaration of rights. Accordingly Congress, at its first session in March, 1789, passed resolutions proposing amendments to the Constitution, twelve in number, with this preamble: "The conventions of a number of the States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added, and as extending the ground of public confidence in the government will best insure the beneficent ends of its institution." As a matter of historic record it is therefore true that these proposed amendments were intended to prevent misconstruction or

abuse of its powers by the declaratory and restrictive clauses. The first two articles proposed were never ratified.

As limitations upon the powers of the Federal government, it is proper now to consider these amendments, after having considered the original limitations and restrictions imposed in the Constitution itself. That these ten amendments are to be regarded as limitations on the powers of the Federal government, and not upon the powers of the States, has been well settled by a large list of judicial decisions.[1]

[1] Barron v. Mayor and City of Baltimore, 7 Pet. 243; Permoli v. First Municipality of New Orleans, 3 How. 589; Fox v. Ohio, 5 id. 410; Withers v. Buckley, 20 id. 84; Twitchell v. Commonwealth, 7 Wall. 321; Anarchist Cases, 123 U. S. 131; Bradley v. United States, 98 id. 105; Presser v. Illinois, 116 id. 259; Boyd v. United States, id. 616; Eilenbecker v. District Court of Plymouth Co., 134 id. 31.

CHAPTER XI.

FIRST TEN AMENDMENTS.

The First Amendment.

§ 326. The first of the ten amendments is in these words: "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, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The first branch of this article is in respect to religion. Several of the States, and notably Virginia, had in their acts of ratification denied the power of the United States under the original Constitution to prohibit, abridge, restrain or modify the liberty of conscience and of the press, and enjoined the same views in a proposed bill of rights. These various propositions from the States resulted in this and the other amendments proposed in the First Congress. The language used is very comprehensive, not only forbidding a law to establish a religion, but any law respecting the establishment of a religion. This may be considered in connection with article VI, clause 3, of the original Constitution, forbidding the requirement of any religious test as a qualification for public office. Nor is the amendment to be regarded as the concession of a power in Congress as to the matters forbidden in this clause, which conceded power is to be restricted only by the terms of this clause. The ratification of Virginia just referred to excludes this view, and similar language in other ratifications confirms it, and the preamble to the Congressional proposal of these amendments is also conclusive. These were not limitations upon powers granted by the original Constitution, but were inserted, as the Con-

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The first branch of this article is in respect to religion. Several of the States, and notably Virginia, had in their acts of ratification denied the power of the United States under the original Constitution to prohibit, abridge, restrain or modify the liberty of conscience and of the press, and enjoined the same views in a proposed bill of rights. These various propositions from the States resulted in this and the other amendments proposed in the First Congress. The language used is very comprehensive, not only forbidding a law to establish a religion, but any law respecting the establishment of a religion. This may be considered in connection with article VI, clause 3, of the original Constitution, forbidding the requirement of any religious test as a qualification for public office. Nor is the amendment to be regarded as the concession of a power in Congress as to the matters forbidden in this clause, which conceded power is to be restricted only by the terms of this clause. The ratification of Virginia just referred to excludes this view, and similar language in other ratifications confirms it, and the preamble to the Congressional proposal of these amendments is also conclusive. These were not limitations upon powers granted by the original Constitution, but were inserted, as the Con-

gressional preamble expressed it, "in order to prevent misconstruction or abuse of its powers." In 1887 the Mormon act which disestablished the Mormon Church was passed, and its constitutionality was fully sustained in the case of *The Mormon Church v. United States*.[1] Congress had no right to establish the Mormon Church under this amendment, nor could a territorial legislature, deriving all its powers from Congress, do that which Congress could not do. This was the ground taken in Congress. In the original bill it had been proposed to carry on the Mormon Church by the appointment of thirteen persons by the President and Senate to co-operate with the church authorities in its management. This would have been a law respecting the establishment of a religion and a direct union of Church and State. The only alternative was the disestablishment of the church and putting it, as to the free exercise of its religious views, upon the same footing as all other religious societies. All laws giving special privileges to the Mormon Church were repealed by Congress.[2]

What is an abridgment of religious freedom has been a question of recent adjudication. Mr. Jefferson, following the bill of rights of Virginia of June 12, 1776, drawn by George Mason, drew the Act for Religious Freedom adopted December 16, 1785.[3] Its preamble states with nervous energy, fervid eloquence and logical precision the basis of all religious liberty. In that preamble he says: "That to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on the supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty. . . . It is time enough for the rightful purposes of civil government, for its officers to interfere, when principles break out into overt acts against peace and good order."

The civil power may not pass the boundary line which

[1] 136 U. S. 1.

[2] Reports H. of R. Nos. 2568, 2735, 1st Sess. 49th Cong.

[3] Code of Virginia, ch. 63.

divides it from the realm of conscience, but conscience must not break over the same boundary to invade the realm of civil power. As long as religion is a matter of the conscience the civil power must not invade it; but when religious conscience violates the rights of others and disturbs social peace and order it must be restrained within its own domain, and excluded from the civil realm which it may not control. Accordingly the act of Congress of 1882, which punished Mormons for bigamy, was held constitutional because not abridging religious freedom.[1] And this view is vindicable without reference to the fact that it is a mooted question among them whether their creed enjoins polygamy or only permits it.

The next clause forbids the abridgment of the freedom of speech or of the press. By the act of July 14, 1798, Congress passed the celebrated Sedition law, by which *inter alia* it punished with fine and imprisonment as a public crime the writing, printing, uttering or publishing any scandalous and malicious writing against the government of the United States, or either House of Congress or the President, so as to bring them into contempt and disrepute, etc. This produced with its twin measure, the Alien law, such excitement in the country as resulted in the overthrow of the administration of John Adams and the election of Mr. Jefferson. They were the cause of the celebrated resolutions of Virginia and Kentucky in 1798, and of their celebrated vindication in Madison's report of January, 1800. In the discussion of the Sedition law, to which reference may be made,[2] Mr. Madison maintained its unconstitutionality upon the ground of its being an abridgment of the freedom of speech and of the press.

There were some prosecutions under these laws, and their constitutionality was maintained by some judges, but they were never before the Supreme Court for adjudication. The

[1] Reynolds v. United States, 98 U. S. 145; Cannon v. United States, 116 id. 55; Murphy v. Ramsay, 114 id. 15.

[2] Story's Commentaries on the Constitution, secs. 1891–92, and notes.

law of libel, as far as it affects private responsibility to the injured party, was for the States to fix and regulate. Clearly this was outside of the powers of Congress. To abridge the right of the citizen to discuss orally or in writing, and by publication, the public acts of the government and its officers, and the attempt to screen themselves from censure by such a law as the Sedition law, would seem to be too clearly within the prohibition of this clause of the Constitution to need further comment. If that law be constitutional, to what can this amendment, as to the freedom of speech and of the press, look for protection against the powers of Congress? On the law of libel in England, Hallam has a comprehensive statement to which reference may be made.[1] By section 3894 of the Revised Statutes of the United States, a penalty was inflicted upon any person who shall knowingly deposit in the mail any letter or circular concerning lotteries, etc. The case of *Ex parte Jackson* brought up for adjudication the question whether this was not an abridgment of the liberty of the press.[2] The Supreme Court held that Congress could determine what it would carry in the mails and what it would exclude therefrom; that in this case, as in case of obscene literature, which was prohibited access to the mails, it would not furnish the vehicles for carrying such literature.

In a subsequent case, *In re Rapier*,[3] this decision was affirmed, but the court held that the right to transport such excluded matter in any other way would not be forbidden by this law. The case rests simply upon the proprietary right of Congress in the mails. It may be well objected that this interpretation of the Constitution is not consistent with its purpose. If the postal power and duty be conferred as an essential facility for the transmission of written and printed intelligence; if without postal facilities the press of the country, as the medium of information, political and otherwise, be di-

[1] Hallam's Constitutional History of England, ch. 15.

[2] 96 U. S. 727.

[3] 143 U. S. 110. In *accord:* Horner v. United States, 143 U. S. 207.

verted from the mails, and if Congress refrains from the use of this postal power and duty so as to interfere with the publication of newspapers and other printed matter, is it not an abridgment of the freedom of the press, by refraining from the exercise of power, and the non-performance of public duty, just as great as if it absolutely prohibited the transmission? The author, therefore, would consider this question disconnected with an immoral or criminal use of the mails an open question for reconsideration by the court.

The last clause, in reference to the right of the people peaceably to assemble and to petition the government, etc., has not been the subject of adjudication. This does not prevent interference with the riotous assemblages of the people; where there is no riotous conduct the government cannot interfere.

The right of petition for the redress of grievances is secured. There is no provision for action on the part of the person to whom the petition is addressed. It gives no assurance that the prayer of the petition shall be granted, or what consideration shall be given it. It simply protects the petitioners in their right to get up the petition, circulate it for signatures, and have it presented.[1] As to all of this article it will be observed that in terms it is only a limitation on Congressional power.

Second Amendment.

§ 327. The second amendment reads thus: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."

This prohibition indicates that the security of liberty against the tyrannical tendency of government is only to be found in the right of the people to keep and bear arms in resisting the wrongs of government.[2] The case of *Presser*

[1] Bradley v. Heath, 12 Pick. 163; Fairman v. Ives, 5 B. & Ald. 642; Vandezie v. McGregor, 12 Wend. 145; State v. Burnham, 9 N. H. 34.

[2] Federalist, Nos. XXVIII, XLVI.

v. Illinois[1] arose out of an act passed by the State of Illinois prohibiting all bodies of men other than the regularly organized volunteer militia of the State from associating and drilling as such. The Supreme Court held that it did not conflict with this amendment, because the amendment is only a limitation of power on Congress, not on the States.

Third Amendment.

§ 328. "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."

This prohibition finds its original in the Petition of Right of 1628.[2]

Fourth Amendment.

§ 329. The fourth amendment is as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The origin of this amendment may doubtless be found in events that occurred in England about the year 1763. A practice had grown up in the office of the secretaries of the cabinet ever since the Restoration of issuing general warrants, arresting, without naming any persons in particular, printers, publishers and authors of obscene and seditious libels as were particularly specified in the warrant. These practices continued until 1763. They were brought up for adjudication before the King's Bench in *Money v. Leach*,[3] and were adjudged illegal and void for uncertainty. It was held that a warrant must be issued by a magistrate upon the oath of an accuser, stating the name, time, place and nature of the offense with reasonable certainty.[4] In *Boyd v. United*

[1] 116 U. S. 252.
[2] Stubbs' Select Charters, 515–17.
[3] 3 Burr. 1742.
[4] Ex parte Burford, 3 Cr. 447; 9

States[1] a suit was brought for a penalty under the Customs acts. The law provided that the prisoner must produce the invoice in court for the inspection of the government attorney or else be taken to confess the offense. This was held a violation of this amendment. It is equivalent to compulsory production of papers, and it violates a subsequent amendment in compelling the accused to produce evidence against himself.

This case was relied on in the case of *Spies v. United States*,[2] the Anarchist case, where in a State court the papers of the accused had been seized without warrant, contrary to this amendment. The court decided that this amendment did not apply to such a case, but limited only the powers of Congress and not of the States.

Fifth Amendment.

§ 330. The fifth amendment is in these words: "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 in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, 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 first clause of this amendment involves the solution of an important question. The offenses to which the provision refers are in two classes: first, capital; second, otherwise infamous crimes. The first needs no exposition; the second requires the interpretation of what is meant by "infamous crimes." The word "otherwise" shows that a capital crime is infamous; but what is an infamous crime other than a capital crime?

State Trials, 817, Algernon Sydney's Case; Entic v. Carrington, 2 Wilson. 275.
[1] 116 U. S. 616.
[2] 123 U. S. 131.

Two late cases have involved the decision of this question. They decided that any offense was infamous for which the penalty was death or imprisonment in the penitentiary with or without hard labor. The place makes the infamy.[1] It was not decided, but it is a grave question, whether imprisonment in a jail with or without hard labor as the penalty for the offense would not be infamous. Could Congress by merely changing the place with an equal deprivation of liberty make an imprisonment in jail less infamous than imprisonment in the penitentiary. As to this, *ideo quære*. Story intimates that these words mean all offenses above the grade of misdemeanor. The provision against "twice in jeopardy" is a great privilege secured by the common law.[2]

The next question is as to the indictment or presentment of a grand jury. This excludes the prosecution of such offenses by information or otherwise than by presentment and indictment of a grand jury. In *Bain's Case*[3] the grand jury found an indictment for an infamous offense. A demurrer to the indictment was submitted on a formal matter; whereupon the indictment was amended by the court. The trial proceeded and the accused was convicted and sentenced. He obtained a writ of *habeas corpus* from the Supreme Court, which held that the indictment on which he was tried was not the indictment found by the grand jury, hence the conviction was void and the prisoner was discharged.

Again, the exception to this stringent provision is found in "cases arising in the land or naval forces." Construing this clause with the clause "to make rules for the government and regulation of the land and naval forces,"[4] it is obvious that it was intended to leave the trial of those who were in the army or navy to be tried for any such infamous offense according to the rules and regulations of war provided by Congress. The further exception is in cases arising in the

[1] Ex parte Wilson, 114 U. S. 417; Mackin v. United States, 117 id. 348.

[2] 4 Blackstone's Commentaries, 375; Hawk. P. C., Book 2, ch. 35.

[3] 121 U. S. 1; Thompson v. United States, 155 id. 271.

[4] Const. U. S., Art. I, sec. 8, clause 14.

militia when in actual service. Comparing this with the clause "for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions,"[1] and with the clause making the President commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States, it is evident that those who are in the militia when in actual service of the United States are triable by the rules and regulations of war, and are not within the operation of this amendment.

In a late case the question was raised whether the words "in time of war or public danger" should be applied to the words "cases arising in the land or naval forces," or should be confined in their application to the words "or in the militia when in actual service." It was decided by the circuit court of the United States for Virginia against this objection of one in the army or navy to trial otherwise than by presentment and indictment of a grand jury, except "in time of war or public danger." The Supreme Court, upon appeal, decided that those words in time of "war or public danger" applied only to the militia, who could only be called into the actual service of the United States to repel invasions and suppress insurrections, or to enforce the law, and did not apply to, and were disconnected from, the words "cases arising in the land and naval forces."[2]

§ 331. Again, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." These terms were those used in the common law, and include cases that involve liberty, which, indeed, is a part of life, and when taken away is, *pro tanto*, a deprivation of life, and prevents the government from subjecting the accused to a second trial after the previous conviction or acquittal. The power thus forbidden is one of unmitigated evil. If the government might try and try again to convict, the ultimate conviction of the accused would be assured. This does not mean to forbid a second trial where the first

[1] Id., Art. I, sec. 8, clause 16.

[2] Johnson v. Sayre, 158 U. S. 109.

has resulted in a failure of the jury to agree, nor in the case of a faulty indictment, because in neither case is the accused in jeopardy.[1] In *Bain's Case*, *supra*, the accused was tried again because he had not been in jeopardy — that is, tried in the only way in which he could be tried; that is, by a regular indictment.[2]

Again, "Nor shall be compelled in any criminal case to be a witness against himself." In *Boyd v. United States*[3] we have referred to the requirement that a defendant should produce his books, or in the alternative be adjudged to confess his crime, and to the fact that this requirement was held to be repugnant to this clause of the Constitution. This case also decided that the requirement was an offense against the fourth amendment. A very stringent decision was rendered in the case of *Counselman v. Hitchcock*,[4] under the Interstate Commerce Law. An officer of a railroad was compelled to answer a question in respect to the business of his road which he claimed tended to criminate himself. It was argued that there was no criminal case pending, and that therefore the clause did not apply. The court, upon an elaborate review of a number of cases, decided that he was not compelled to give testimony which might lead to a criminal prosecution of himself or to any procedure in which he would be endangered. Congress thereupon passed the act of February, 1893, which authorized the exemption of the party called from prosecution in respect to the subject-matter of his testimony. A very late case involving this question has been decided.[5]

Again, "Nor be deprived of life, liberty or property without due process of law." This prohibition upon the Federal power has been followed by the fourteenth amendment, which prohibits a State from depriving any person of life, liberty or property without due process of law, and comment

[1] United States v. Perez, 9 Wheat. 579.

[2] Simmons v. United States, 142 U. S. 148. See also Craemer v. Washington State, 168 id. 124.

[3] 116 U. S. 616.

[4] 142 U. S. 547.

[5] Brown v. Walker, 161 U. S. 591.

upon this part of this amendment will be deferred until we reach the fourteenth amendment.

§ **332.** Again, "Nor shall private property be taken for public use without just compensation." This is part of the eminent domain of every government. It is the sovereign power of the Body-politic to subject to public use property rights of private members of the Body-politic upon just compensation. It is in effect the same power which calls a man to give his life or limb or liberty in defense of his country. If his life may be subjected why not his property? This clause refers only to property rights, and limits this sovereign power by two important phrases. It must be taken for public use, and even for this only on just compensation. It includes every right in property of which a citizen may be deprived. A leading case is *Eaton v. Railroad Co.*[1] In that case it was shown that a hill which protected A's land from being flooded by a river intervened. The hill did not belong to A. The railroad company cut through the hill for its road, and through the aperture the flood came upon A's land. *Held*, that it took away his property rights and he must be compensated.[2] A taking which occupies the land of A without taking the fee, or by occupation or condemnation of a part of A's land will injure the residue, would probably be held to be a taking under this clause.[3]

Land taken for one use cannot by a trick be devoted to another use which supersedes the former, without compensation.[4] And where an easement is taken in land, and subsequently the public takes the fee, the owner must have added compensation.[5] In all these cases the judicial proceeding of

[1] 57 N. H. 504.

[2] *Accord:* Wynehamer v. The People, 13 N. Y. 378, 433; Thompson v. Androscoggin River Imp. Co., 54 N. H. 645; Grand Rapids Booming Co. v. Jarvis, 30 Mich. 320.

[3] Tuckahoe Canal Co. v. Tuckahoe & James River R. R. Co., 11 Leigh, 42; Newman v. M. E. R. Co., 118 N. Y. 618; Wilson v. Railroad Co., 59 Ill. 273; Shipley v. B. & O. R. R. Co., 34 Md. 336, cited in 1 Beach on Public Corporations, § 686.

[4] Matter of City of Buffalo, 68 N. Y. 167.

[5] Pierce v. Drew, 136 Mass. 78; Julia Building Ass'n v. Bell Telephone Co., 88 Mo. 258.

condemnation is required, and notice of the proceeding to the owner is essential.[1] Compensation need not be paid before condemnation, in case of a State, or perhaps in case of a municipality; but as to private parties, railroad corporations, etc., it is different. In the latter case the payment must precede or be contemporaneous with the taking. These questions are very elaborately discussed, and the cases upon them, in Dillon on Municipal Corporations,[2] and by Beach on Public Corporations.[3]

The Federal government, under this clause, which recognizes and limits its eminent domain for all purposes related to the necessary and proper execution of its powers in respect to the use, holding and title to the property of the citizen, may take what is necessary and proper for the execution of its powers, but can take only for public use and upon just compensation; and while Congress takes the initiative in this matter, and decides primarily whether it is a public use, it is subject to judicial decision as to whether it is a public use, and in respect to what is just compensation upon a full hearing, to which the owner shall be a party.

The Sixth Amendment.

§ 333. The sixth article of amendment is in these words: "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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." It is appropriate to consider this article in connection with an article in the original Constitution,[4] which reads

[1] Huling v. Kaw Valley Ry. & Imp. Co., 130 U. S. 559.

[2] §§ 991–993.

[3] Vol. I, § 686.

[4] Const. U. S., Art. III, sec. 2, clause 3.

thus: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." The fifth amendment, as has been seen, was directed to the mode in which the party shall be accused, and the way in which the grand jury makes the accusation. This sixth article, and the one considered with it, provide as to the trial of the party under the accusation and the conduct of the criminal prosecution.

1st. There is secured the right to a speedy and public trial. Speedy refers to the necessity of preventing a long imprisonment of an accused party before trial, but does not define the mode in which this speedy trial may be secured. In some of the States, *e. g.*, Virginia, if a party's trial is deferred at the instance of the Commonwealth for longer than three terms of the court, he will be discharged. The trial must not only be speedy but it must be public. This is to bring the power of public opinion to bear against despotic procedure for the conviction of the accused, and to insure a trial where all his rights will be conserved.

Again: By whom shall the trial be had? By an impartial jury. Jury trial has been declared to be the palladium of English liberty; and it is the great security of American liberty. This is subject to the exception provided in the fifth amendment as to cases arising in the army, navy or militia. In all other cases jury trial is secured to the accused.

2d. It must be an impartial jury of the State where the crime was committed. This is by the terms of the article in the original Constitution; but the sixth amendment is more particular. It must not only be a jury of the State, but of the district wherein the crime shall have been committed, which district shall not be a district provided by a law subsequent to the offense, but a district which shall have been previously ascertained by law. This is intended to prevent

the choice of a jury from a district provided by *ex post facto* legislation, and which might thus do great injustice to the accused. Further, upon such trial he must be informed of the nature and cause of the accusation. If the crime is not committed in any State, as felony on the high seas or piracy, then Congress has power, before the offense is committed, to determine the place at which the trial of such criminal shall be held.[1] Upon his trial he must be confronted with the witnesses against him. The Supreme Court decided in *Mattox v. United States*[2] that this clause was not violated by the use upon the second trial for the offense of the copy of the testimony of a dead witness given upon the first trial when the witness was confronted with the accused. To use it upon the second trial was held to give to the accused the full benefit of this provision. Three judges dissented.

3d. The accused shall have compulsory process for obtaining witnesses in his favor. This was to correct a great grievance at the common law, which forbade the accused to exculpate himself by the testimony of any witnesses. The House of Commons soon after the accession of the House of Stuart to the throne had a bill passed which affirmed the right to have process for witnesses for as well as against the accused; and in the seventh of William III. and in the reign of Queen Anne the rule was extended to all cases of treason and felony.[3]

The last clause of this amendment removes another evil practice of the common law which denied the prisoner the assistance of counsel. This denial was based upon the idea that the judge should be counsel for the prisoner — an idea which in practice was a cruel mockery.[4]

[1] Id., Art. III, sec. 2, clause 3.

[2] 156 U. S. 237.

[3] 4 Blackstone's Commentaries, 359, 360; 2 Hale's Pleas of the Crown, 283; 1 Tucker's Blackstone, Appen., 304, 305; Rawle on the Constitution, 129, 130; Story on the Constitution, 1785–86.

[4] Story on the Constitution, sec. 1787; Blackstone's Commentaries, 355, 356; 1 Tucker's Blackstone, Appen., 305; Rawle on the Constitution, *supra*. See Anderson v. Treat, 172 U. S. 24.

It must be confessed that these provisions are rather declarations of rights than well-established securities of liberty. They require to be supplemented by legislative provisions, and by the enlightened administration of justice by an independent judiciary, or sustained by a sound and liberty-loving public sentiment of the people of the country. *Milligan's Case*[1] was one in which these fifth and sixth amendments were set at naught by the legislature and the President, and in which the right of the accused to an accusation by a grand jury and to a trial by an impartial jury of the State and district was upheld by a bare majority of the Supreme Court of the United States.

Mrs. Surratt was unconstitutionally tried by a court-martial against the imperative requirement of these two amendments and hung in sight of the capitol upon a judgment of a court-martial and in defiance of her petition for a *habeas corpus* which the military power resisted. Cases under this sixth amendment are referred to in the note.[2]

In *Twitchell v. Commonwealth*[3] the Supreme Court decided that these two amendments had no application to the States, but only to the Federal government. In *Miller v. United States*[4] it was held that the confiscation acts were not in conflict with the fifth and sixth amendments. The case of *United States v. Cruikshank*[5] discusses the provision as to being informed of the nature and cause of the accusation.

In the case of *Callan v. Wilson*[6] the provision that the trial of all crimes should be by jury was held to mean not only felonies, but misdemeanors involving the deprivation of liberty, and that these provisions are in force in the District of Columbia.

[1] 4 Wall. 2.

[2] Twitchell v. Commonwealth, 7 Wall. 321; Miller v. United States, 11 id. 268; United States v. Cruikshank, 92 U. S. 542; Stanley v. Supervisors of Albany, 121 id. 540; Allis v. United States, 155 id. 117.

[3] 7 Wall. 321.

[4] 11 Wall. 268.

[5] 92 U. S. 542.

[6] 127 U. S. 540.

In the case of *Mattox v. United States*, *supra*, the court held that all these provisions of the amendments are to be interpreted in the light of the law as it existed at the time it was adopted, and as securing to every individual such rights as he possessed previously as a British subject, and as his ancestors had inherited from the days of Magna Carta.

The case of *In re Ross*[1] was a singular decision — that an American citizen in a foreign land may be tried by a consular court situated in the foreign country, established under an act of Congress, and that such citizen may be condemned to death by such court without accusation by indictment of a grand jury, or trial by an impartial jury of the country. The doctrine held by the court was that the Constitution had no operation outside of the United States. It would seem to follow logically that Congress, which derives all of its powers through the Constitution, could not pass a law which would have any operation outside of the United States any more than the Constitution does, and therefore that such law providing for the trial, if a violation of the Constitution, is null and void. The author may therefore suggest the query as to the soundness of this decision.

The Seventh Amendment.

§ 334. The seventh amendment is in these words: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

In the original Constitution (art. III, sec. 2, clause 2) it is provided: "The Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make." It appears from the *Federalist*[2] that great clamor was

[1] 140 U. S. 456.

[2] No. LXXXI.

made against this provision, lest the appellate power of the Supreme Court would set aside the decision on a question of fact by a jury; and in the same book,[1] the apprehension, which was strongly expressed by the opponents of the Constitution, that there was no security in that instrument for the trial by jury of civil cases, though there was as to criminal cases, was met by a very able discussion of the objection. We have seen that these objections to the original Constitution were the occasion of the first ten amendments. It will be seen how this seventh amendment meets this objection which had been made to the original Constitution as to jury trial in civil cases. The clause in reference to the Supreme Court had recognized cases in law and equity as within the judicial power. This obviously referred to the distinctive jurisdiction of the common-law courts and the equity courts existing in England, and which all the thirteen States had adopted as a part of their own system. As the equity system did not recognize jury trial as a part of its machinery, the revision on appeal by the Supreme Court as to law and fact was really the exercise by the appellate jurisdiction, in respect to equity causes, of the power of granting new trials and the like in causes at common law. But this seventh amendment put an end to all criticism upon this point. It provides that in suits at common law (obviously excluding suits in equity), where the value in controversy shall exceed $20, excluding cases below that sum, which might be tried by a civil magistrate, the right of trial by jury shall be preserved. This met the objection that civil juries were not secured as a part of the judicial system of the United States. The amendment goes further, and provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States, supreme or inferior, except according to the rules of the common law; that is, that a verdict may be set aside and a new trial granted, and the practice of the common-law courts as existing prior to the Consti-

[1] No. LXXXIII.

tution should not be set aside by this amendment. This amendment, therefore, clearly allows trials in equity causes without jury, and suits at common law with jury, re-examinable according to the rules of the common law, but not otherwise.

The foregoing question arose in the Supreme Court in the case of *Elmore v. Grymes*,[1] where a peremptory nonsuit against the will of the plaintiff had been ordered in a circuit court. The appellate court reversed the judgment, holding that the plaintiff had a right to have his case submitted to the jury.

In *Parsons v. Bedford*[2] the same doctrine was applied to a judgment in the Louisiana district court, which was rendered according to a civil-law proceeding, and held to be within the meaning of the terms of this amendment "suits at common law," and it was held that the Supreme Court could not re-examine the facts if tried by a jury in the Louisiana district court by the civil-law proceeding.

In *Castle v. Bullard*[3] these cases were approved; and so in *McElrath v. United States*[4] it was held that a suit against the government could be tried in the court of claims without the intervention of a jury. Such suits are not suits at common law within the meaning of the amendment.

In *Baylis v. Insurance Co.*[5] it was held that without a waiver of right of trial by jury a court cannot substitute itself for a jury, pass upon the effect of the evidence and render judgment thereon. This would violate the seventh amendment, which the court has always "guarded with jealousy."[6]

The decision of the court in the above case was distinguished from that of *Randall v. B. & O. R. R. Co.*, in which the court said if the court had directed a verdict for the defendant on the ground that the evidence with all the inferences that the jury could justifiably draw from it was insufficient to support a verdict for the plaintiff, so that such a verdict if returned must be set aside, it would have followed a practice sanctioned by repeated decisions of the court. That would have allowed trial by jury, subject only to be re-examined according to the rules of common law.

[1] 1 Pet. 469. *Accord:* D'Wolf v. Rabaud, Id. 476.
[2] 3 Pet. 433.
[3] 23 How. 172.
[4] 102 U. S. 426.
[5] 113 U. S. 316.
[6] Randall v. B. & O. R. R. Co., 109 U. S. 478.

The question of how far this amendment will allow a judge to express an opinion on the facts to the jury, or direct a verdict according to his opinion, has already been considered by the Supreme Court in several cases, the last of which was the case of *Allis v. United States*,[1] in which the court held that the judge may express his opinion as to the weight of the evidence, and may recall the jury after deliberation for a time to ascertain their difficulties, and to make proper efforts to assist them in their conclusions. That was a criminal case. The same doctrine was strongly asserted in *Simmons v. United States*,[2] where the court (citing *Vicksburg, etc. R. R. Co. v. Putnam*,[3] *United States v. Railroad Co.*,[4] and *Lovejoy v. United States*[5]) says: "It is so well settled, by a long series of decisions of this court, that the judge presiding at a trial, civil or criminal, in any court of the United States, is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinion upon the questions of fact which he submits to their determination," etc.

In *Sparf and Hansen v. United States*[6] it was held that in the courts of the United States the jury in criminal cases are bound to receive the law from the court, and apply it as given by the court, subject to the condition that by a general verdict the court may determine both law and fact upon the issue submitted to them; and while the court may instruct as to the legal presumptions from a given state of

[1] 155 U. S. 123.
[2] 142 U. S. 155.
[3] 118 U. S. 546.
[4] 123 U. S. 113.
[5] 128 U. S. 171.
[6] 156 U. S. 57.

facts, it must not by peremptory instructions require the jury to find the accused guilty of any offense. In *Allison v. United States*[1] the court charged the jury as to the weight to be attributed to the evidence of the accused in his own behalf, and the decision was reversed because of it, citing *Hicks v. United States*.[2] It may be open to serious question whether the latitude allowed to the court in some of the above cases in instructing the jury on the weight of evidence actually given will not lead to great injustice, such as was rectified in the case last cited, but which may be beyond rectification in some cases, and thus the right of trial by jury be destroyed under the strong and dominating instructions of the court.

The Eighth Amendment.

§ 335. The next amendment is in these words: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This amendment was derived from the Bill of Rights of 1689, which reads, "Excessive bail ought not to be required, or excessive fines imposed, nor cruel and unusual punishments inflicted."[3] The explanation of the provision as to excessive bail is found in a previous clause of the Bill of Rights. The purpose of this is obvious. If bail disproportioned to the means of the accused be required, it will result that he will be imprisoned for lack of means, while another's ability to furnish it may avail to release such other person. The rich may go free, the poor must be imprisoned. So on judgment of fine and imprisonment until the fine is paid, the lack of means of the convict to pay the fine might result in his imprisonment, when the man of wealth would avoid imprisonment by the payment of a fine. This, therefore, applies not only to the legislative but to the judicial depart-

[1] 160 U. S. 203.
[2] 150 U. S. 442.
[3] Stubbs' Select Charters, Appen., 525.

ment. The discretion of neither should be so used as to demand excessive bail or to inflict excessive fines. In *Pervear v. Commonwealth*[1] this amendment was held to apply only to the Federal government.

The question has come up to the Supreme Court from State courts in reference to electrocution, as to whether it was not cruel and unusual punishment. The court again decided that this and the kindred amendments were limitations upon Federal power, and not upon State power.[2]

The Ninth Amendment.

§ 336. The ninth amendment is in these words: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

It has been already observed that one of the most serious objections urged against the original Constitution was that it did not contain a bill of rights. Mr. Hamilton, in the *Federalist*,[3] argued with great force that a bill of rights in the Federal Constitution was really out of place, because this Constitution was one to create a government with limited and enumerated powers; that a bill of rights was proper in respect of a government which had unlimited power over the rights of the people under its control; but why should there be a bill of rights in a Constitution where the power was so limited by enumeration as that the power of the government could not touch such rights? He says: "But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to one which has the regulation of every species of personal and private concerns." He further urged that these were dangerous as well as unnecessary. "They

[1] 5 Wall. 475.
[2] In re Wood, 140 U. S. 278; McElvaine v. Brush, 142 id. 155.
[3] No. LXXXIV.

would contain various exceptions to powers not granted; and on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed. I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge, with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the national government."

There were, as we have seen, certain limitations upon the powers of the Federal government in respect to *ex post facto* laws and bills of attainder, to which we have referred already. The inhibition of these certainly furnished an argument that these powers might be implied for Congress had they not been inhibited. In order to exclude any such inference this amendment was adopted, and, in the language of Judge Cooley,[1] "However unfounded such a fear might be, there could be no harm in affirming by this amendment the principle that constitutions are not made to create rights in the people, but in recognition of, and in order to preserve them, and that if any are specially enumerated and specially guarded, it is only because they are peculiarly important or peculiarly exposed to invasion."

This amendment, therefore, was meant to exclude the inference that the Federal government could touch any of the great fundamental rights of the people, because there was no special inhibition of power to the Federal government to

[1] Cooley's Constitutional Law (2d ed.), 34.

invade them. The fact that some are guarded against the power of the government is therefore not to be the basis of an argument that others not so guarded may be invaded by its power. The maxim *Expressio unius exclusio est alterius*, therefore, does not apply to the rights of the people in reference to the powers of the government of the United States. The language of Judge Story in accordance with these views may be quoted. He says:[1] "This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of the *Federalist* on the subject of a general bill of rights."[2]

The Tenth Amendment.

§ 337. The amendment is in these words: "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."

So much has been said as to this clause that but little need be said now. In the Articles of Confederation it was declared that each State retained its sovereignty, freedom and independence and every power, jurisdiction and right which was not by this confederation expressly delegated to the United States in Congress assembled. It is said that in Congress, when this amendment was proposed, the insertion of the word "expressly" before the word "delegated" was proposed as an amendment, and so in the Virginia conven-

[1] Story on the Constitution, sec. 1905.

[2] Federalist, No. LXXXIV; Tucker's Blackstone, Appen., 307, 308, 309.

tion. But the argument that it is impossible to confine a government to the exercise of express powers, and that there must be powers necessarily implied, was sufficient to reject the amendment. And, as we have seen, the adjudications of the courts have uniformly followed this strong language of Judge Story in *Fairfax v. Hunter*,[1] "The government, then, of the United States can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication." See also *Gibbons v. Ogden*,[2] *McCulloch v. Maryland*,[3] and cases cited *ante*. These decisions justify this analysis of this important amendment:

First. The Federal government has no powers but those delegated by the Constitution. It has no inherent powers, but only those derived from the Constitution as expressly delegated or granted by necessary implication.

Second. Those not so delegated, unless prohibited to the States, are reserved to the States respectively, or to the people.

Reservation of powers is the basis of the title of the States or of the people of the States to political powers under the Constitution. They are not secured to the States or to the people by virtue of the Constitution: they are inherent in the people of the States, and unless delegated to the United States, or by their constitutional act prohibited to themselves, they remain with the States respectively and the people. The word "reserved" in the Constitution is synonymous with the word "retained" in the Confederation. This amendment, therefore, differentiates the powers of the United States and the powers of the States. The former are derived by the United States through delegation from the States. The latter, the reserved powers, remain in and are retained by the States, because not delegated or prohibited.

The words "to the States respectively or to the people"

[1] 1 Wheat. 326.
[2] 9 Wheat. 1.
[3] 4 Wheat. 416.

require a word of explanation. At the time of the adoption of the Constitution in 1789 the States were bound by the Articles of Confederation. The several Constitutions had by express grant of the people of the States as separate Bodies-politic vested in the State governments a number of powers, while others not granted to the Congress of the Confederation, or granted to the State governments, were retained by each State. By the Constitution of the United States a number of the powers, *e. g.*, regulation of commerce, laying of duties, imposts, etc., which were under their several Constitutions vested in the State governments, were taken from the State governments and delegated to the United States by the Constitution of 1789. The States intended that all the powers vested by their several Constitutions in the State government should be retained and exercised by that government, except such as by the Constitution vested exclusively in the United States or by contractual agreement were prohibited to the States. The consequence is that it is not only natural, but necessary, that this amendment should declare that the powers not delegated to the United States, and not prohibited to the States, should still remain with the several State governments or with the sovereign people of each State. But, *e converso*, they divested the State governments of the powers given them by the respective State Constitutions, in so far as by the Constitution of 1789 those powers were exclusively delegated to the United States. Cases containing these views might be cited without number.[1]

In the case of *United States v. Cruikshank*,[2] Chief Justice Waite uses this emphatic language: "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people."

This closes the review of the delegated powers of Con-

[1] Collector v. Day, 11 Wall. 113; United States v. Cruikshank, 92 U. S. 549.
[2] 92 U. S. 551.

gress, and the express limitations upon those powers in the original Constitution and in the first ten amendments, all of which, by a series of decisions already cited, apply exclusively to the Federal government, and in no case to the government of the States.[1]

[1] Barron v. Baltimore, 7 Pet. 244; 7 id. 331; The Justices v. Murray, 9 Smith v. Maryland, 18 How. 71; id. 274; Edwards v. Elliott, 21 id. Purvear v. Commonwealth, 5 Wall. 532; Walker v. Sauvinet, 92 U. S. 90. 475; Twitchell v. Commonwealth,

CHAPTER XII.

THE EXECUTIVE DEPARTMENT.

§ 338. In the orderly arrangement of the Constitution we have already seen that the first article applies to the Legislative Department, and the powers delegated to it by the Constitution. This second article applies to the Executive Department, and the powers delegated to the President as the officer in whom the executive power shall be vested. The first article is prefaced with the language, "All legislative powers herein granted shall be vested in a Congress of the United States." The second article is prefaced by the declaration, "The executive power shall be vested in a President of the United States of America."

We will now take up this article, clause by clause, and attempt to expound its meaning. We have already referred to the general purpose of the convention to conform the organism of the Federal government to the familiar canon of Baron Montesquieu, requiring the complete separation of the three departments as an essential security to the liberties of the people. It has also been seen that in the framing of the portions of the Constitution relating to the Legislative Department, it was intended to grant to the Congress of the United States legislative powers alone. It will now be seen on the threshold of the article in respect to the Executive Department that "the executive power shall be vested in a President of the United States of America." Whatever might be considered the powers thereafter granted to the President in any other Constitution or system of government, or however the powers granted in the first article to Congress, or in the third article to the Judicial Department, might be considered under any other system of government than our own, it is obvious that the Con-

gress, and the express limitations upon those powers in the original Constitution and in the first ten amendments, all of which, by a series of decisions already cited, apply exclusively to the Federal government, and in no case to the government of the States.[1]

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stitution intended to vest in the President of the United States the executive power, and none other; and that the powers enumerated in the second article are to be regarded as in the minds of the framers of the Constitution as executive powers, and all others enumerated in the other articles as not executive powers. It has been said that the power to declare war is an executive power, because it is vested in the King of England, who is the executive of that kingdom; but it is certainly not true under the Constitution of the United States that the power to declare war is an executive power, and it is certainly true that it is only a legislative power. This first sentence, therefore, in this article is the key to the whole article.

Again, we think it is clear that the incidental powers which may be necessary and proper to carry into effect the powers vested in the Executive Department by the Constitution are legislative powers, and not executive, because the eighteenth clause of the eighth section of the first article gives to Congress the power — the legislative power — to supply the means necessary and proper for carrying into execution the powers vested in the Executive Department. It would seem indeed that while the express powers vested in the President are not in any degree within the control of the legislative power, yet where an executive power needs co-efficient means for carrying it into execution, those means are not executive powers at all, but are to be supplied by the legislative powers of Congress.

It is provided in section 1, clause 1, of article II, that the President shall hold his office during a term of four years. The office of President is, therefore, a constitutional office. He is by the Constitution an officer of the United States as well as the President. In this respect the President and Vice-President differ from senators and representatives in Congress. The latter, as we have seen, are not officers of the United States at all; they are senators and representatives of the respective States. The two officers mentioned hold their offices during a term of four years. This does not mean that

they shall hold the office or exercise its duties for a period of four years, but the term of office shall be four years; and, therefore, General Washington entered upon the duties and the execution of his office on the 30th of April, 1789; but his second term of office began on the 4th of March, 1793, and not on the 30th of April, 1793.

§ 339. The manner of electing the President and Vice-President is thus prescribed.[1] As we have seen, the President is to be elected primarily by electors. He is not elected by a direct vote of the suffragans of the States. He is elected by the votes of electors, who may be chosen or appointed by the suffragans of the States or otherwise.

Let us see how this is provided for. The electors are to vote for the President, but who are to appoint the electors? "Each State shall appoint." The power of appointment is in the individual State. If it is asked what is the meaning of the word "State," the question is easily answered. It means the State — the Body-politic, as distinct from the government and the departments thereof, because these words are followed by this clause, "in such manner as the legislature thereof" (that is, the legislature of the State) "may direct." The legislative organization is the instrument through which the State as a Body-politic acts in the appointment of electors.

Shall appoint whom? "A number of electors." How many? "Equal to the whole number of senators and representatives to which the State may be entitled in the Congress." A State thus appoints electors equal to the number of senators and representatives that the same State is entitled to in Congress. This sentence makes the States the source, as we have seen, of all legislative and all executive power in the government of the United States. Let it be noted that the basic principle of compromise of the related powers of the States as co-efficient Bodies-politic and as Bodies-politic according to their numbers, which settled the constitution of the Senate and the House of Representatives

[1] Art. II, sec. 1, clause 2.

as branches of the Congress, by giving equality of representation to the States in the Senate and representation according to numerical strength in the House, was carried out in the constitution of the Executive Department by combining in one the dual elements of statehood represented in the two Houses, and making each State potential in the election of the executive by combining its powers as an independent State, and its powers according to numbers.

The clause proceeds, "But no senator or representative, or person holding an office of trust or profit under the United States shall be appointed an elector."[1] This clause is suggestive of what is just above stated, that neither a senator nor representative is a person holding an office of trust or profit under the United States; such hold under the State represented by them, not under the United States. This excludes all members of Congress from having anything to do with the election of President. It makes the President entirely independent of Congress and of its members, and divorces these from any part in the election of the executive. It also excludes all persons in the pay of or in subordination to the United States government from taking part in the election, which is intended to be free from all such influences, and to be controlled only by the free voice of electors appointed by the States in the manner prescribed.

§ 340. What is the significance of "in such manner as the legislature thereof may direct?" If the legislature chooses, may it not direct the appointment to be made by popular vote, or by the legislature, or by one branch of the legislature, or by the Governor? Is there any restriction upon the State or its legislature as to the manner in which the State shall appoint these electors? It would seem not. Until the year 1860, the legislature of South Carolina directed the election of its electors by the legislature itself; and it is further to be noted that the manner of appointment so directed is nowhere to be altered or established by any other instrumentality, as was provided in the case of the

[1] Federalist. No. LXVIII.

time, place and manner of holding elections for senators and representatives.[1] A State may therefore appoint electors or refuse to appoint, and in any manner that it may direct by its legislature, nor is there power which can control or nullify its action.

§ 341. In a former part of this work the nature of the executive functions and of the organization of the Executive Department has been discussed in connection with the consideration of the subject of government. It will therefore not be necessary to say anything upon that subject here. It is only necessary to say that the Executive Department was established without any advisory council or other limitation upon the power of the President; but it is obvious that the vesting of the executive functions in one man without limitation upon his personal will, determined in secret, without debate or public discussion, and with no appeal, was a perilous investiture of power, which naturally made the framers of the Constitution careful about the limitations upon it. The debates in the Constitutional Convention have been reported by Mr. Madison, and may be referred to as instructive upon the purposes of the framers of the Constitution.[2]

Whether the executive should be singular or plural was first debated. The argument in favor of its unity was that it secured energy and responsibility; energy by reason of singleness of determination, and responsibility of the one, which would be divided if the executive be plural. The plan of a single executive was adopted by a vote of seven States to three.[3] The question arose whether there should be a council attached to the Executive Department. It was argued that even the royal executive of Great Britain had a cabinet to advise him. Mr. Randolph, in his eighth resolution, had proposed that the executive and a convenient number of the national judiciary should compose a council of revision.[4]

[1] Art. I, sec. 4, clause 1.
[2] Madison Papers, 762.
[3] Id. 783.
[4] Id. 733.

The use of the judiciary for any such purpose was strongly reprobated by Messrs. Gerry and King, largely on the ground that the judiciary, by reason of their judicial functions, could set aside laws because at variance with the Constitution, and should not therefore take part in their original enactment. This proposition was therefore postponed, by a vote of six States to four,[1] to take up a proposition giving the veto power to the executive.

The mode of the election of the executive was the subject upon which the convention seemed to have been very much at sea. Wilson, of Pennsylvania, suggested an election by the people at large. Sherman was for appointment by the legislature.[2] Randolph's seventh resolution provided for an election by the National Legislature. The term of the office was fixed by a vote of five States to four, and one divided, at seven years.[3] The term of seven years was adopted with a view to ineligibility thereafter, as against a term of three years with re-eligibility. Wilson then proposed that the executive be elected by the qualified voters, who should elect the executive by ballot. This was rejected by a vote of two States to eight, and the election by the National Legislature for a term of seven years was agreed to by a vote of eight States to two. It was then agreed to make the executive ineligible after seven years by a vote of seven States to two, one State divided.

The question of the power of the executive negative then came up. Ten States voted against the absolute negative, and against the suspending negative ten States. The executive negative qualified by the power of each branch of the legislature to overrule it passed *sub silentio*.[5] Mr. Hamilton thought the British model of the executive the best; that the executive, if elected for life, would be elected by the people, and this would therefore be consistent with republican principles.[6] The Committee of Detail, to whom the various

[1] Id. 783–84.
[2] Id. 766.
[3] Id. 767.
[4] Id. 770.
[5] Id. 790.
[6] Id. 911.

propositions were referred, reported in favor of a single executive to be elected by the legislature for a term of seven years, but to be ineligible to re-election, and of conferring on the executive a qualified veto, subject to be overruled by two-thirds of both Houses.[1] The committee adopted the single executive *nem. con.*[2] The proposition to elect by joint ballot instead of by the ballot of each House passed by a vote of seven States to four. A motion to amend by electing by the people instead of by the legislature was defeated by a vote of two States to nine.[3] At this late period of the convention, August 24, Gouverneur Morris strongly opposed the election of the executive by the legislature. So strong were his views against this mode of election that a proposition that the President should be chosen by electors to be selected by the people of the several States failed by a divided vote.[4] But the seed had been sown and bore fruit in the report of the Committee of Eleven on the 4th day of September, in which it was provided that in case of failure to elect by the electors, the Senate, from the five highest on the list, was to choose the President by ballot.[5] In the discussion of this question great opposition to the eventual election of the President by the Senate was manifested. Mr. Williamson suggested that the eventual choice should be made by the legislature, voting by States, and not *per capita*. Sherman suggested and moved that the House of Representatives should have the eventual selection, and not the Senate. This proposition, backed by Mason, was adopted by a vote of ten States to one.[6] This history of the struggles in the Constitutional Convention over the selection and term of the executive is interesting as showing how, in the face of great divergence of opinion, the clause was finally adopted.

During the debates strong opposition was manifested to any monarchical taint in the organization of the Executive Department. The term finally adopted of four years, with

[1] Id. 1223–36.
[2] Id. 1417.
[3] Id. 1417–19.
[4] Id. 1420–21.
[5] Id. 1486.
[6] Id. 1510–12.

re-eligibility, was a substitute for the longer term of seven years with ineligibility. The executive unity which secured energy tending toward autocracy was balanced in the minds of the members of the convention against the short term for the executive and his personal responsibility, which could not be evaded. But great distrust was manifested at clothing the executive with large and dangerous powers; and it will be seen in the examination of future clauses relating to this subject that the powers of the executive are well defined as to extent, and limited in a large degree by their depending upon the co-efficient authority of the legislature for their efficacy.

§ 342. The electors appointed in each State in the manner prescribed by its legislature are to sit in their respective States, and not to meet in one body with electors from other States. This select body in each State (separate and apart from all other like bodies) is intended to voice the independent will of each State.[2] In the lack of quick communication between the different States in the Union, this plan offered a strong hope of independent action by the several States. It is obvious that in our day this expectation would be disappointed by the easy communication between the States, and this disappointment has been increased by the party conventions of the different organizations, whose choice of party candidates, dictated to the electoral college, defeats the whole plan as contemplated by the Constitution. Of this, more will be said hereafter.

The clause proceeds to declare that the meeting of electors in each State (which may be aptly called a college of electors) shall "vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each." This clearly implies that an elector shall vote for any two persons he shall choose, independent of the choice of other electors. It was

[1] Art. II, sec. 1, clause 3. [2] Federalist, No. LXVIII.

contemplated that by this security of personal independence *inter se*, even in each college, a free vote would be obtained from each elector for the man he deemed best fitted for the Presidency.

But suppose the elector voted for two inhabitants of the same State with himself. It would seem the vote would be void, under this clause of the original Constitution, for either might be President. But that result would, perhaps, not now obtain under the twelfth amendment, for the vote is to be for one as President and the other as Vice-President. But the point is in doubt. The clause proceeds: "which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate." This transmission of the certified action of the college to the President of the Senate, at the seat of government, is important if not essential.

The *modus operandi*, under the original clause of the Constitution up to this point, has been changed by the twelfth amendment, which was adopted in 1802. That amendment provides: "The Electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate."

The historic cause for this change was the dangerous condition of things resulting from the election in 1800. Thomas Jefferson and Aaron Burr were voted for by the same political party and had equal votes. Neither, under the then Constitution, being designated as President or Vice-President, the original Constitution declared that when two persons had an equal vote, and each had a majority over all

others, the House of Representatives should choose one of them for President.

In this case the House of Representatives could not elect either Jefferson or Burr. For a long time it was felt that there would be a failure to elect, and thus an *interregnum* occur which might destroy the Union. After some weeks, however, Mr. Jefferson was elected and Burr became Vice-President.

The thoughtful statesmen of that period, in view of the danger in the future from a like contingency, determined to propose the twelfth amendment, which was adopted. As already quoted, each college of electors was to meet and vote for one person as President and another person as Vice-President. In this explanation we must consider the clause in the original Constitution: "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." This clause is thus precisely copied in the twelfth amendment already referred to, and in our later history became a clause of grave and momentous consequence.

§ 343. In the Presidential election of 1876 Mr. Hayes and Mr. Tilden were the candidates for the Presidency. Contests arose in several States between the Hayes and Tilden electors, and the question was critical as to which set in each of them was entitled to be counted. The Senate was composed of a large majority of members favorable to Mr. Hayes, the House of Representatives of those favorable to Mr. Tilden.

There were rival sets of certificates from several of the colleges. They were transmitted to the President of the Senate, who was favorable to Mr. Hayes. The Constitution directed, as above indicated, that "the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted." The question arose, what was the function of opening the certificates in the presence of the House of Representatives, and who shall then count the votes? On the one part it was contended that the President of the Senate was to open the

certificates and count the votes and thus decide the contest. On the other hand, it was insisted with conclusive force that the presence of the two Houses made them controlling supervisors of the acts of the President of the Senate, which was simply ministerial, and that the counting of the votes was to be the act, not of the President of the Senate, but to be the concurrent act of the two Houses, as guardians of the count and as deciders of the result. This view was not only the clear meaning of the wording of the clause, but gained conclusive confirmation from the historic action of the two Houses, upon which the twelfth amendment had placed its sanction by the adoption of the precise words of the original article, which had been three times acted upon by the two Houses in accordance with this view. In none of the previous cases in 1793, 1797 or 1800 had the President of the Senate exercised any but the ministerial function of opening the certificates and laying them before the two Houses. Each House had appointed its one teller (or counter) to count the votes for it, and the result thus ascertained was reported by the tellers concurrently to the President of the Senate, who simply announced the result to the two Houses which had thus been obtained by and through their respective tellers. These precedents were regarded as interpretations of the constitutional language in the original Constitution; and as that language was precisely re-adopted in the twelfth amendment, the precedents were held to be an authentic construction of the language used in the original, and by the Constitution-makers (the States) in ratifying the amendment.

It is perhaps as well to add that the crucial question was this: The two Houses were intended to count the vote and decide upon the count; but when they differ, who shall umpire the difference and decide the count? In this case in 1876, the two Houses would, it was anticipated, widely differ in their conclusions. To meet this imminent difficulty, Congress passed "The Electoral Commission Bill," under which the disputed certificates were considered and decided upon by the Electoral Commission, subject to be set aside by the

concurrent vote of the two Houses. Such a concurrent vote was never obtained in any case, so that the decisions of the tribunal upon the disputed certificates were always unreversed. The result was that all of the disputes were decided by a vote of eight to seven in favor of Hayes and he was declared elected.

The constitutionality of the act thus passed by Congress was doubted by many able men, but it settled without convulsion, though not without strong dissent from its conclusions, a controversy which threatened the peace of the country and the integrity of the Union. A later act of Congress has been passed by which such contests may be decided without the intervention of any other tribunals than the concurrent act of the two Houses. One constitutional question may be deemed settled by the act creating the Electoral Commission and the late act just referred to, and that is that the claim of power asserted for the President of the Senate, to which reference has already been made, is without any foundation, and that the authority to count and to decide upon the count is vested by the Constitution in the two Houses of Congress.[1]

§ 344. What number of electoral votes is requisite to the election of a President? Under the original Constitution we have seen that no person was designated as President or Vice-President. Two persons are voted for, and "the person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed." The Constitution did not intend that any one should be President who could not command a majority

[1] The writer refers the reader on this historic subject to the debates in both Houses of Congress in the session of 1876–77; the report of the proceedings of the Electoral Commission, Congressional Record of the 44th Congress, Second Session, volume 5, pt. 4; the speech of Senator Conkling on the Electoral Commission Bill, and to the speech of the author on January 23, 1877, in the House of Representatives, in which will be found a full collation of the precedents, etc., connected with this question, and also the act of Congress. See also House Misc. Docs., No. 13, 2d Sess. 44th Cong., on counting the electoral votes.

of all of the electors appointed, because if a plurality of votes, merely, would make a President, this might be but a small proportion of the whole vote. If two have a majority of all, and have equal votes, the House of Representatives must choose between them, as was done in 1800, when Mr. Jefferson was elected. And now the clause goes on: "and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President."

How shall the House of Representatives elect? The clause provides for this: "But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all of the States shall be necessary to a choice." In the contingency of non-election of the President by the colleges, this election by the House of Representatives has several peculiarities. (*a*) States shall vote, the representation from each State having one and only one vote. (*b*) A quorum to elect must have two-thirds of the States represented by one or more members. (*c*) Of this quorum a majority of all the States is needful for a choice.

In reference to the Vice-President this provision is made: "In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President." It will be seen by this that the Vice-President may be elected when he has the next highest vote to him who is chosen President, although they may not be a majority of all of the electors appointed. This provision caused John Adams to be elected the first Vice-President by a minority of electoral votes. It will be further seen that where there are two who have the next highest vote, but equal votes, then the Senate shall choose the Vice-President from them by ballot.

The twelfth amendment of the Constitution changed in many respects the provisions already referred to in the original Constitution. After providing, as already stated, for a separate vote by the electors for President and Vice-President, and for transmitting and opening these certificates of these votes, and then counting the votes, and that the person having a majority of all of the electors appointed shall be President, the amendment further provides: "and if no person have such majority, then from the persons having the highest numbers, not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President." And then follows the same provision as in the original: "But, in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice." An important provision follows to meet the contingency which had been threatened in the election of 1800, when the House of Representatives failed to choose a President. It is in these words: "And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President." A change is then made in the election of a Vice-President, among those voted for, to fill that office, when the votes are equal or when no one candidate has a majority of the whole number of electors appointed. The provision is as follows: "The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice." This provision prevents any man from being Vice-President by the vote of the electoral colleges unless he has a majority of all of the electoral vote. Some remarks may be added on this extraordinary method of election: First. The primary plan for election is by the electors of the several States, appointed as each by its legislature may prescribe, each State having an electoral force determined on the basis of its co-equality as to statehood and the numbers of its population. Second. A majority of electoral votes, not a plurality, is required to elect; this prevents a minority President as far as the colleges are concerned. Third. If the colleges cannot make this majority, then from the three highest candidates (in the original Constitution it was five) the House of Representatives must choose the President by the representation of each State casting one vote only for the State, and a majority of all of the States may elect the President regardless of their respective numbers. Such a President is chosen by a majority of States, which may contain a decided minority of numbers. Fourth. If the colleges choose no Vice-President, then from the two highest candidates the Senate must choose a Vice-President, who must be the choice of the majority of the body, *i. e.*, of the senators of co-equal States, but this majority of States in the Senate may contain a decided minority of numbers. The last clause of the twelfth amendment makes eligibility to the offices of President and Vice-President precisely the same.

It is obvious from this review of the clause that the Constitution contemplated the selection of a person for the Presidency who should combine a majority of all the electoral representatives of the States meeting, deliberating and choosing, by their separate, distinct and independent action. The value of the selection was expected to be assured by this independence of State action, and this was supposed to be the better assured by a later clause which provides that the date of voting by the electors was to be the same though all acted separately. This secured more distinctly the

action of both colleges from any possible influence from any and all others.

The change which circumstances have wrought in a century is certainly very marked. In effect the two or more great parties of the country, in general convention, decide upon the personality of the President and Vice-President, and the electoral colleges chosen as the representatives of these parties register the choice of the extra-constitutional conventions of these political parties. These conventions are composed of representatives in number corresponding to the numbers in the electoral college; but while analogous to the constitutional plan, in this it reversed all likeness by the union of all the representatives of the State in one body, and by counting Territories as well as States in the representation in the convention. Besides this, members of Congress and office-holders fill these conventions when no one of them could be constitutionally an elector. No wonder the choice now falls so often upon some unheard-of man, and does not always come to one of our most illustrious citizens, the cynosure of all eyes in every section of the Union. No wonder that one may be selected whose merits are only known to party managers.

When we read the words of Hamilton[1] and study the events of this later era we cannot esteem him a prophet, and yet can see his prophecy of the radical change of the constitutional method of election by the extra-constitutional methods of the political parties of the Union. He says: "This process of election affords a moral certainty that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue and little arts of popularity may alone suffice to elevate a man to the first honors of a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States. It will not be too strong to say that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue."

[1] Federalist, No. LXVIII.

§ 345. It is very obvious that the practical operation of this scheme of election of the President is directly opposed to what was contemplated by the framers of the Constitution. Mr. Bryce has well said:[1] "In every American election there are two acts of choice, two periods of contest. The first is the selection of the candidate from within the party by the party; the other is the struggle between the parties for the place." This remark applies to all grades of political offices in the country.

The Constitution designed that a body of select men should choose a person that they esteemed fit for the Presidency. But a party convention of representatives from every State and Territory has done that for them, and public opinion compels them to obey its nomination. The electors were intended to nominate. In practice they merely confirm the nomination of an ultra-constitutional body, composed of material different from the electoral college of the Constitution. Second, the Constitution intended that not only the personal but the political principles of the President should be determined by the separate and independent judgment of the State college of electors, and the convention voted down a proposal that they should hold a general meeting and a union of the electors from all of the States.

The ultra-constitutional method in practice with the parties subordinates the separate colleges to the dictation of the party conventions, not only as to the *personnel*, but the political principles of the candidates. Third, it has come to pass that this ultra-constitutional body is made up of senators and representatives, of office-holders and office-seekers, whose great object is party success, from which they hope

[1] American Commonwealth, vol. 2, p. 142.

to realize the rewards in honors, emoluments and the spoils of victory which are foreshadowed by platforms providing for the collection and disbursement of enormous revenues. Fourth, this desideratum is only to be realized by dictating the unified sentiment of the party convention, in preference to their distinct duties, not only to the colleges of electors, but to all the senators and representatives of the States; thus centralizing the action of the government of the Union through the body which specially relates to the Presidential office, and subordinates all State and district action to its dominating influence. Fifth, the solidity of the vote in the large States in these party conventions, and through the electoral college in the election of President, is giving to the large States a potential influence in deciding the canvass and election of the President, which is unjust to the smaller States, enhancing the pretensions of public men in the large States, makes such men in the small States practically ineligible, and threatens to place a dominating force in the hands of a few large States who may by combination, dangerous to the Union and fatal to the liberties of the people, put the government in the hands of an oligarchy instead of the whole people of the country. If the present system is to be retained, it ought, at least, to be so amended as to divide the power of the large States, by making districts for the Presidential electors. This will break up the solidity of power of the large States; give representation to the minority in each, now easily captured for the election of one who can command a bare majority in a million of votes; will make money less potential, and the temptation to use it less strong; and will decentralize power by multiplying the nuclei of public opinion throughout the whole country.

These suggestions of dangers and their causes, and of changes which may avoid them, are made without expanding them into full exposition, but in the hope of availing something to check evil tendencies and to secure the desired objects of the Constitution.

§ 346. We proceed to the next clause, which leaves to Congress to determine the time of choosing electors, which is to be done as the legislature of a State may prescribe; and the day for the electors to give their votes, which day must be the same throughout the United States. This seems to allow Congress to fix a different time in the States for choosing electors, though the day they vote must be the same. The practice is to make both the same throughout the United States. It has become universal to appoint electors by the vote of the suffragans in the States, which amounts now to nearly fifteen millions.

§ 347. The next clause relates to eligibility to the office of President (the same rules applying to the Vice-President, as we have seen). He must either be a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution. This latter clause was intended to make eligible one who, though not a native, was a citizen at the date of the Constitution, if he had been fourteen years a resident of the United States. It made Hamilton eligible but not Gallatin. Thirty-five years of age is requisite to eligibility.

§ 348. The disability of the President, and what is to be done in case of it, is next considered. (*a*) The twelfth amendment provides when a President is not elected, in case the duty of election devolves on the House of Representatives, then the Vice-President shall act as President, as in the case of the death or the constitutional disability of the President. It is probable that in such case the Vice-President would take the office of President, as the Vice-President does in the other cases referred to, and not merely act as President. (*b*) The President may be removed from office on impeachment.[1] In case of such removal the office devolves upon the Vice-President; that is, he becomes President, and does not merely act as President. (*c*) In case of the death of the President, the Vice-President takes the

[1] Const. U. S., Art. I, sec. 3, clause 7.

office. It has never been discussed how and to whom the President shall resign. Perhaps, as the Houses of Congress confirm his title, they should receive notice of his resignation, and a record be made of it in the State Department,[1] where the President deposits the acts of Congress approved by him. Congress has declared it shall be in writing, subscribed and deposited in the State Department.

In case of "inability to discharge the powers and duties of the said office," the Vice-President shall take it. In case of "inability to discharge the powers and duties of the said office," as well as in case of removal, death and resignation of the President, the office devolves upon the Vice-President. This suggests several curious inquiries, as to what is such inability, and how is it to be ascertained. And if such disability be removed, will the office be restored to the President? No answer is furnished by the express words of the Constitution. A subsequent clause provides for the inability of both President and Vice-President, by authorizing Congress to provide by law to declare what officer shall act as President, and that such officer shall act "until the disability be removed, or a President shall be elected." In this clause the word "disability" is substituted for the word "inability," because the removal of the President by death or resignation cannot be a disability capable of being removed. Hence the word "disability" must have been used as synonymous with "inability." It is probable that the power to remove for inability by impeachment may furnish a method for deciding whether "disability" exists. Can any other mode be conceived. But for insanity as an inability, for example, this method would be clearly proper. Would judgment in such case be for permanent removal, if the insanity ceased? How would its cessation be determined?

It is obvious, unless some such judicial procedure be proper, there is no way in which the President can be elected and

[1] Acts Cong. March 1, 1892, ch. 11.

the Vice-President succeed him. One resort still remains to be considered. The co-efficient clause[1] authorizes Congress "to make all laws necessary and proper for carrying into execution . . . all other powers vested by this Constitution in any officer" of the United States. Congress can therefore by law provide for the mode in which, in case of inability of the President, the Vice-President shall succeed to the office as President.

The "inability" might be adjudicated by a court of the United States as a case arising under the Constitution, and in such manner the President might be removed and the Vice-President succeed to the office. The latter part of this clause provides against "the removal, death, resignation or inability, both of the President and Vice-President," etc., by providing for a law by Congress declaring what officer shall act as President or Vice-President, who shall so act until the disability be removed, or a President shall be elected. Congress in 1792[2] provided that the President *pro tem.* of the Senate should act as President, and if there were none, then the Speaker of the House of Representatives should act as President. By a late law this has been changed, and it would seem on good reason. Neither the President *pro tem.* of the Senate nor the Speaker of the House of Representatives is an officer of the United States. We have already seen that neither a senator nor representative in Congress is such officer.[3] The law of Congress could not deprive a State of either. While either acted as President, could the State elect another? If not, it would be deprived by law of its representation.

A late law of Congress provides for the Secretaries in certain order to act as President in such case. The office of President does not devolve on such officer as it does on the Vice-President, but *virtute officii* the Secretary "acts as President." The office is vacant, but its functions are performed by the officer designated by law. If such Secretary ceases to be such, he can no longer act as President. His holding

[1] Const. U. S., Art. I, sec. 8, clause 18.

[2] Ch. 8.

[3] *Ante*, § 199.

his office as Secretary is his title to act as President. The Constitution says that he is to so act until the disability be removed. How is it to be ascertained that the disability is removed? If it be removed, the Constitution contemplates the President's return to office. His temporary inability suspended his right to exercise his office; his restoration to ability revests his title to hold and exercise it. The language is, "until the disability be removed, or a President shall be elected." This alternative suggests that if the disability be temporary, the disabled President must be restored; if the disability be permanent, a President must be elected to fill out the term of office. All these contingencies are provided for in the power of Congress granted by the co-efficient clause above referred to. Congress has not fully exercised this important power, but may do so by a law to carry these clauses into effect.

§ 349. The compensation of the President is provided for in the next clause. He "shall at stated times receive for his services a compensation." This is very precise. Congress must by law appropriate it, not as a gift, but as compensation for services rendered. Further, this compensation shall not be increased or diminished during the period for which he shall have been elected. Not increased, lest Congress may thus seek to influence the President, or lest he may secure it as a personal favor for official actions; nor diminished, that Congress may not thus constrain the Executive by menaces. Nor shall the President, within the period for which he is elected, "receive any other emolument from the United States or any of them." This precludes all extraneous money influence upon the official action of the President but his regular compensation, fixed before his term begins, and unchangeable during his term.[1]

§ 350. The oath the President must take before entering upon the execution of his office is prescribed in the last clause of this section. In article VI, section 3, the oath prescribed

[1] Federalist, No. LXXIII.

for other officers requires them "to support this Constitution." The oath of the President is very specific and comprehensive: "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States." This is a very emphatic obligation on the President by positive and negative action to keep the Constitution, in all of its integrity, secure from his own violation, and against that of all others in so far as his power can do so; to preserve from his own acts; to protect from outside influence, and to defend against all invasion.

Having thus considered the mode of election of President and Vice-President, one question remains. The term of office was made four years, with an intimation that re-eligibility should attach to these offices. It was clearly so intended; and the absence of limitations makes re-eligibility the fixed principle of the Constitution. And though the first President declined a third term, and the practice has conformed to his action so as almost to have become a settled principle in the public mind, there is nothing in the Constitution nor in the debates of the convention, nor in the *Federalist*, to make an election of a man to more than two terms inadmissible on constitutional grounds. Mr. Hamilton, in an able paper,[1] has stated the reasons for re-eligibility with great force, to which the reader is referred.

Powers and Duties of the President.

§ 351. It has been already said, in accordance with the maxim of Baron Montesquieu, that the powers and duties of the President are executive, as contradistinguished from those which are legislative and judicial. This principle is well defined by the words of the first clause of this article: "The executive power shall be vested in a President of the United States of America." The qualified effect of this,

[1] Federalist, No. LXXII.

arising from the veto power, must, however, be noted. Let us consider these powers and duties in their order.

Article II, section 2, clause 1, is as follows: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual service of the United States." This clause must be read with the clauses in the comprehensive section as to the powers of Congress.[1]

Congress declares war — that is a legislative power; though the Crown declares war in England, yet the power is in its legislature, and not in its executive. Such declaration changes the relations of nations to each other; puts the individuals of each into *quasi*-hostile relations; forbids commerce, and interferes with the life, liberty and property of the people; dispels peace and enacts war. The Constitution gave to the legislative department the sole power to do this tremendous thing, and did not entrust it to the "one-man power" of the President. It discriminated between the law which called forth a new status for the people in their international relations and the conduct of the war. Congress might legislate war, but it is incapable of executing. The executive, with unified will powers, though alone, can well direct the movements of armies and navies. The Crown in England is *generalissimo*. But, as in England, the raising of armies and navies and the money for their support and maintenance are in the hands of the Congress. We have, in considering the English Constitution, pointed out the value of this power secured to the Congress. The commander-in-chief is subordinate to Congress in all respects, and he cannot use his military power to the injury of the country, except with the concurrence and consent of Congress. Besides, he is made commander-in-chief of the militia when called into actual service. How are they to be called into actual service? By the fifteenth clause of the eighth section of article I, Congress has power "to provide for calling forth the militia to execute the laws

[1] Const. U. S., Art. I, sec. 8.

of the Union, suppress insurrections, and repel invasions." This is a provision under which the call may be made. The act of Congress of 1795 and other acts define the cases in which the call may be made by the President. As soon as called, under the act of Congress, the President commands and directs the militia. The implication of authority to regulate and govern the army and navy which might here result from the President being commander-in-chief is negatived by the express power given to Congress "to make rules for the government and regulation of the land and naval forces."[1] The execution of these rules is for the President, but the rules have the legislative character.

The use of the army and navy and of the militia when called for the purposes named above by acts of Congress devolves upon the President in the cases specifically designated in them. It is for Congress to prescribe the purpose of the call for the militia; and while the power of the President to take care that the laws be faithfully executed might seem to give the President power to do so by the use of the army and navy, it may be doubted whether it does not require the exercise by Congress of the all-embracing coefficient power to pass a law as necessary and proper to carry into execution the executive power, to take care that the laws are faithfully executed, by the use of the army and navy. During the war of 1812 it was doubted whether the President could delegate the command of the militia to another officer.[2] But President Washington gave the command of the militia to Governor Lee in 1794, to put down the Pennsylvania insurrection. The President may not, without authority of law, create a new military office and fill it in order to give the command of the militia to such officer.[3]

[1] Art. I, sec. 8, clause 14.

[2] 8 Mass. 548,—a letter from the Governor of Massachusetts to the Justices of the Supreme Judicial Court, and the answer thereto.

[3] Marshall's Life of Washington, ch. 8; Rawle on the Constitution, ch. 20.

In the conduct of troops and command of naval vessels the President has exclusive discretion; but Congress may use the money power, as Parliament uses it in Great Britain, to control the conduct of war in a manner it condemns. But all the operations of war in an enemy's country, by levy of contributions and the like, would seem to revert to the President by virtue of his power as commander-in-chief. To illustrate, suppose war has been declared. The status of war is thus constituted. How can it be stopped when once begun? The President and Senate can make a treaty of peace, but must war continue until the President and Senate agree to the terms of peace? Is there no end to the war except at the will of the President and Senate? No authority can be cited on the question, but the writer thinks a repeal of a law requiring war would be effectual to bring about the status of peace in place of war. Besides this direct method, Congress, by the denial of supplies, as Parliament in England may do, would bring the war easily to an end, though the President might desire to continue it. As commander-in-chief he must personally approve or disapprove of the judgment of courts-martial under the articles of war which require the proceedings to be submitted to him.[1]

§ 352. "He may require the opinion, in writing, of the principal officer in each of the Executive Departments, upon any subject relating to the duties of their respective offices," etc. This is, as Mr. Hamilton says,[2] "mere redundancy, as it would have been inferred necessary without being expressed." It indicates clearly, however, that while the Constitution made the executive a unit, and excluded all idea of an advisory council, it still contemplated that the executive function should be divided between the executive departments with a principal officer at the head of each, who should

[1] United States v. Page, 137 U. S. 673, distinguished from Runkle v. United States, 122 id. 543.

[2] Federalist, No. LXXIV.

be subordinate to the President in all things concerning his duties; and this is clearly inferable from the language used.

"He shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."[1] Under this clause the President may suspend, commute or abrogate penalties. He may commute the death penalty to imprisonment for life, which the convict may accept, and the latter cannot then claim that the pardon is absolute and the condition void.[2] The language is, "to grant pardons," which includes conditional as well as absolute pardons. The term is analogous to that recognized in the English law, and the Supreme Court has agreed that in the use of those terms our Constitution must be construed to have referred to that law. But the convict must accept the commutation. If he does not, the President could not inflict, without judgment of the court, the substituted penalty. His acceptance, therefore, is necessary to the operation of the commuted penalty.[3] The President may grant a pardon before criminal procedure is instituted, and it will operate as well as if granted after a conviction.[4]

The amnesty proclamations of the Presidents since the war embraced large numbers of persons against whom there were no criminal prosecutions instituted, and these amnesty proclamations have been construed as pardons granted before and without trial or conviction. When granted before, it prevents all penalties and disabilities from attaching to the offender and restores him to all of his civil rights. If granted after conviction, it removes all of these penalties and disabilities and restores him to his civil rights. Pardon releases all penalties, including fines and confiscations,[5] and this applies to property confiscated under judicial proceed-

[1] Art. II, sec. 2, clause 1.

[2] Ex parte Wells, 18 How. 307.

[3] United States v. Wilson, 7 Pet. 162.

[4] Ex parte Garland, 4 Wall. 326. *Accord*, Cummings v. Missouri, id. 277.

[5] Osborn v. United States, 91 U. S. 474.

ings; and if the money has not been distributed, all will be restored to the offender, upon pardon, unless by judicial process the title has been vested in another person.[1] Pardon wipes out guilt and all of its consequences as if it had never been. In the eye of the law the offender is as innocent as if he had never committed the offense.[2] In *United States v. Klein*,[3] disloyalty, which forbids the owner to claim captured property, is removed by pardon, and the owner is treated as if he had never been otherwise than loyal. The effect of pardon upon the offender's right to property, saving the reversion to his heirs at law, was fully considered in a number of cases besides the one last cited.[4] These cases have been before explained In the leading case of *United States v. Klein* the Supreme Court decided another important question; namely, that it is not in the power of Congress to qualify the pardoning power of the President, either in respect to the cases in which it may be exercised, or in respect to its consequences. Thus, it is not competent for Congress to say that the effect of the pardon shall not be to restore the property rights of the offender. Thus, rights are restored as the legal consequences of the exercise of the pardoning power by the executive, without any right to qualify the power on the part of the legislative department.

§ **353.** "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."[5] The negative of this clause is in article I, clause 10, "No State shall enter into any treaty," etc. The object of the Constitution, as it had been of the Articles of Confederation, was to give to the general government of the States of the Union the regulation of their relations

[1] Id.

[2] Ex parte Garland, 4 Wall. 380. *Accord*, United States v. Padford, 9 Wall. 542.

[3] 13 Wall. 128.

[4] Wallach v. Van Riswick, 92 U. S. 202; Avegno v. Schmidt, 113 id. 293; Hart v. United States, 118 id. 62; Shields v. Schiff, 124 id. 351; Railroad v. Bosworth, 133 id. 92; Jenkins v. Collard, 145 id. 546; United States v. Dunnington, 146 id. 338.

[5] Art. III, sec. 2, clause 2

with foreign nations. And these two clauses vesting the power of making treaties in the President and Senate, and denying the power to every State, give the exclusive power of making treaties to the President and Senate. It is a striking fact that the body which represents the co-equality of the States should be the advisory and consenting body to any treaty between the States and foreign nations. The President has no power, unless the treaty be made by and with the advice and consent of the Senate.

The nature of the treaty-making power it is now proper to consider. Mr. Hamilton, speaking of this power, says: "Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition; for if we attend carefully to its operation, it will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society, while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all of the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign. The power in question seems therefore to form a distinct department, and to belong, properly, neither to the legislative nor to the executive."[1]

The treaty-making power in England is vested in the Crown; but this does not show that it is in its true nature an executive function. A treaty may be defined to be a

[1] Federalist, No. LXXV.

compact between nation and nation. The treaty, as a contract, is the *nexus* between the two distinct national wills, creating a pact between them. The subject-matter of the treaty and the objects of the contract may require legislation to complete it and to carry into execution what, by treaty, is merely executory. A treaty may be designed to establish peace instead of war. It may relate to the regulation of commerce between the inhabitants of two nations, and as to this, by operating upon individual rights, may partake largely of the legislative function. It may apply to extradition of criminals, which, operating upon the liberty of the individual, is characteristic of legislative power. This object, as all these mentioned, must be the result not of the will of one nation alone, but of the concurrent will of two nations. The power to make the contract is given neither to the legislative nor to the executive department alone, but to a combination of the two, by entrusting it to the President and the Senate. It will be seen that the President has power to make treaties, which seems to give to him the power of negotiation and formulation of the treaty, which shall have no force as such unless it is sanctioned by the advice and consent of the Senate. The word "advice," used in the clause, indicates action by the Senate preliminary to making the treaty. The word "consent" indicates action by the Senate subsequent to the making of the treaty by the President. It is therefore clear that the Senate may advise the President before he has fully acted, or consent to his action after he has formulated the treaty.

The proviso is very important. We have already referred to the fact that the equality of representation of the States in the Congress of the Confederation gave undue power to the small States as to any action which depended upon a majority of their votes. In the Articles of Confederation it is provided that Congress (which has the treaty-making power) should enter into no treaties unless nine States assented to the same — nine States out of the thirteen. Two-thirds of the States, therefore, were required to make the

treaty binding. The same idea was in the minds of the members of the convention, when they required that two-thirds of the senators should advise and consent to a treaty in order to its validity. But it does not require that two-thirds of all of the senators should advise and consent to the treaty, but two-thirds of the senators present.

Why is this? Mr. Hamilton, in the *Federalist*, has given the reason for it in the following words: "If two-thirds of the whole number of members had been required, it would, in many cases, from the non-attendance of a part, amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed is a history of impotence, perplexity and disorder."[1]

§ 354. A grave question has arisen whether the exclusive power of treaty-making, vested in the President and Senate, is unlimited in its operation upon all the objects for which a treaty may provide. Can a treaty by compact with a foreign nation bind all of the departments of our own government as to matters fully confided to them; can it surrender or by agreement nullify the securities for personal liberty engrafted upon the Constitution itself; can it cede to a foreign power a State of the Union or any part of its territory without its consent; can it regulate commerce with foreign nations in spite of the power of Congress to regulate commerce with them; can it provide for the rates of duty to be imposed upon certain articles imported from foreign nations, or admit them free of duty, in the face of the power given to Congress to lay and collect taxes and duties; can a treaty appropriate money from the public treasury and withdraw it without the action of Congress; can a treaty dispose of any part of the territory of the United States, or any of their property, without the consent of Congress, which alone has power to dispose of and make rules and regulations concerning the territory and other property of the United States? These important questions have several

[1] Federalist, No. LXXV.

times arisen for discussion in our history, and upon them authoritative decisions have been made by other departments of the government, which are based upon solid reason and sound principles of constitutional construction.

It cannot be denied that very many of these questions must be answered in the negative, or the consequence would be that, under the treaty-making power, the President and Senate might absorb all the powers of the government. In favor of the extreme claim of power for the President and Senate, it has been urged that a contract between the United States and a foreign nation must be conclusive against all departments of the government, because it is a contract; but the answer to this contention is obvious and conclusive. It involves the *petitio principii*, by assuming that the contract is complete though it trenches upon the power of the other departments of the government, without their consent. And if it be further urged that foreign nations know no party in the contract on the part of the United States except the President and Senate, the answer is equally conclusive that if our Constitution requires the consent of the departments to a treaty of the nature referred to, the foreign nation is bound to take notice of that fact, and cannot claim a completed obligation, in the absence of the consent of the other departments. The maxim upon this subject is familiar: *qui cum alio contrahit vel est, vel debet esse, non ignarus conditionis ejus.* And if it be further urged that this is too refined a doctrine to regulate our delicate relations with foreign powers, the answer is that the treaty-making power of the Crown of Great Britain, where it involves a concession of the clear and absolute power of Parliament, has never been recognized as valid by the English government, and has never been enforced. The Queen may make a treaty to pay ten millions of dollars to the French government, but unless Parliament appropriates the money the treaty will be ineffectual.[1] "It is from the fundamental laws of each State that we must learn where resides

[1] Wharton's International Law, 457; 1 Mahon's History of England, p. 20.

the authority that is capable of contracting with validity in the name of a State."[1]

A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. We may suggest a further limitation: a treaty cannot compel any department of the government to do what the Constitution submits to its exclusive and absolute will. On these questions the true canon of construction, that the treaty-making power, in its seeming absoluteness and unconditional extent, is confronted with equally absolute and unconditioned authority vested in the judiciary. Therefore, neither must be construed as absolute and unconditioned, but each must be construed and conditioned upon the equally clear power vested in the others. For example, Congress has power to lay and collect duties; the President and Senate have power to make and contract with a foreign nation in respect to such duties. Can any other construction be given to these two apparently contradictory powers than that the general power to make treaties must yield to the specific power of Congress to lay and collect all duties; and while the treaty may propose a contract as to duties on articles coming from a foreign nation, such an executory contract cannot be valid and binding unless Congress, which has supreme authority to lay and collect duties, consents to it. If it is then asked, how are you to reconcile these two powers which appear to be antagonistic, the answer is clear. Congress has no capacity to negotiate a treaty with a foreign power. The extent of its membership makes this impracticable. The Constitution, therefore, left the House of Representatives out of all consideration in negotiating treaties. The executory contract between the United States and a foreign nation is therefore confided to the one man who can conduct the negotiations, and to a select body who can advise and consent to the treaty he has negotiated. But this executory contract must depend for its execution

[1] Vattel, Bk. 2, sec. 154.

upon the supreme power vested in Congress "to lay and collect duties." It is therefore a contract not completed, but inchoate, and can only be completed and binding when Congress shall by legislation consent thereto, and lay duties in accordance with the executory contract or treaty. The same reasoning may apply to all of the great powers vested in Congress, such as to "borrow money, regulate commerce, coin money, raise armies and provide a navy, make laws as to naturalization, bankruptcies, and exercise exclusive legislation" in the District of Columbia and Territories of the country. If these are sought by treaty to be regulated by the President and Senate, it can only be done when the Congress vested with these great powers shall give its unconditional consent.

Mr. Madison, in the reports of the convention which he has left to us, used an expression which is significant upon this point. He intimated that in making treaties eventual, that is, complete and final *per se*, the treaty-making power might be independent; but where they referred to matters that were incomplete without legislation, they would be incomplete until that consent was given.[1]

The absurdity of any other construction as to the power to lay taxes, duties and so on is very palpable. We have seen from the Constitution that all bills for raising revenue shall originate in the House of Representatives, to which the Senate may or may not assent, and the President may veto; but if the President and Senate have the power to regulate the system of taxation and revenue by treaty without the consent of Congress, then the House of Representatives, which by the terms of the Constitution is made the originating body for such bills, without whose primal action the President and Senate can have no voice whatever in the matter, is to be excluded from any consent to the terms of the treaty of the President and Senate, who, by the constitutional method, are not entitled to act at all until the House of Representatives has inaugurated a bill.

[1] 3 Madison Papers, 1415.

The reason in the nature of our system which makes the conclusion absolute is that in the balance of power which was ordained by the convention, the House of Representatives was to originate all taxation upon the people. The people at large dreaded the placing of the tax power in the hands of a majority of the States without regard to their size, and insisted that the power should be in the hands of the States according to the numerical proportion of their population. To give the President, with the advice and consent of two-thirds of the senators present, the power to regulate taxation, is to reverse this scheme and destroy the equilibrium of the Constitution. For in 1790 two-thirds of the States containing 1,685,360 people could ratify a treaty against the other third of the States containing a population of 2,166,419; that is to say, that a minority could tax at will the majority. By the census of 1880 two-thirds of the Senate, representing 19,755,532, could regulate taxation against the other third containing a population of 29,615,818; and by the late census of 1890 this disproportion would be greatly increased.

It has been shown in previous parts of this work that the regulation of commerce by a majority vote of the two Houses, instead of requiring two-thirds, was the result of a concession made upon a compromise. But if this regulation of commerce can be made by two-thirds of the States in the Senate, then under the census of 1880 above shown, two-fifths of the population of the country could regulate commerce against the other three-fifths, instead of the original purpose to require a vote of two-thirds to do so.

§ 355. These results demonstrate the fatal disturbance of the equilibrium of the Constitution which would arise from any such construction as would give the President and Senate the right by treaty with a foreign power to regulate the internal concerns of the country. We have had several historic precedents on this subject, to which brief reference may be made. President Washington negotiated Jay's treaty in 1795, in which were general stipulations as to commerce and

duties upon British vessels, etc. It was insisted that this treaty was complete without any consent of the House of Representatives. The House of Representatives resolved by a vote of 63 to 36 that while the House did not claim any agency in making treaties, yet when a treaty stipulated for regulations upon any of the subjects submitted by the Constitution to the power of Congress, it must depend for its execution, as to such stipulations, on a law or laws to be passed by Congress, and it was the constitutional right and duty of the House of Representatives in all such cases to deliberate on the expediency or inexpediency of carrying such a treaty into effect, and to determine and act thereon as in their judgment might be most conducive to the public good.[1]

When the treaty of Ghent was negotiated in 1814, containing stipulations as to duties on articles imported from Great Britain, and as to commerce from that country, Mr. Madison transmitted the treaty and recommended to Congress legislation such as the treaty required, and a bill was passed in conformity therewith. The two Houses were in fierce contention upon the question we have been discussing. Calhoun of South Carolina, William Pinckney of Maryland, supported the views in favor of the treaty-making power, while Lowndes of South Carolina and Randolph of Virginia and others insisted that Congress must consent to it. In 1844 the question was again considered upon what was known as the Zollverein treaty, when the foreign affairs committee of the Senate, through Senator Rufus Choate, their chairman, maintained the principles we have stated above.[2] Without going further into this question we may refer to the various views of learned writers on this subject.[3]

The courts in the cases cited, though holding the fact that a treaty as well as a law is held by the Constitution to be

[1] 1 U. S. Stat. at Large, 459.

[2] Senate Journal, 1st Sess. 28th Cong., Sess. 1843–44, p. 445.

[3] 1 Kent's Com., p. 235; Story's Com., sec. 1502; Foster v. Neilson, 3 Pet. 314; Turner v. American Baptist Union, 5 McLean, C. C. R. 344; Taylor v. Morton, 2 Curtis, C. C. R. 454; Cherokee Tobacco, 11 Wall. 616; Head-Money Cases, 112 U. S. 580.

the supreme law of the land, also hold that a subsequent law of Congress may supersede a prior treaty. That had been decided in *The Cherokee Tobacco*, *supra*, while there is an *obiter dictum* by the court that a treaty may supersede a prior act of Congress. Chief Justice Marshall seems, in *Foster v. Neilson*, *supra*, to accord with the remark of Mr. Madison, above referred to, as to the distinction between an eventual treaty and treaties requiring regulation. In the treaty with the Hawaiian government in 1876, the terms of the treaty required that it should be sanctioned by Congress, though it should go into effect as had like treaties which provided for a similar ratification. On this subject the writer refers to a report of the judiciary committee of the House of Representatives made in March, 1887.[1]

§ 356. One other view may be presented. Treaty is international compact. The root of the word (*tractare*) indicates negotiation between two or more. In itself treaty is a bargain, not law. "It has the force of law, but derives it from the obligations of good faith."[2] No power is given to the President and Senate to effectuate the terms of the treaty by legislation. On the other hand, power is given to Congress by law to carry into execution all the powers vested in other departments, of which the treaty-making power is one. Can the conclusion be reached that the law-making department must then concur in action with the treaty-making power to make the treaty effectual as law to the people, or to execute its terms by needful and proper laws, especially as to those matters which are peculiarly confided to Congress? Can an inference in favor of executive authority be admissible in the face of this expressed delegation of power to Congress to carry the treaty into execution; and can it be held that it is obligatory upon Congress to do all of this, not discretionary, and that Congress must register the will of the President and Senate without power to dissent?

[1] Report No. 4177, H. R. 49th Cong., 2d Sess.

[2] Mr. Hamilton, The Federalist, No. LXXV.

The precedents in our history are quite numerous, and some of them have been already mentioned. Attention may be called to cases where treaties have bargained for the acquisition of territory. We have already seen that Congress has power "to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." But how is the United States to acquire such territory or property? It may be by purchase or cession from a foreign power. The contractual *nexus* between the United States and a foreign nation making cessions or selling territories can be established only by treaty. But when the grant is executed by the treaty, Congress will hold for the United States under the above grant of power, and if the grant be for a money consideration, Congress alone can appropriate the money.

In all of the precedents where money was to be paid, Congress has passed a law to appropriate it, but as to the *transitus* of the title the precedents are peculiar and instructive. The treaty with France for the cession of Louisiana was concluded April 30, 1803, during the recess of Congress. Mr. Jefferson was then President; Congress met October 17, 1803. The Senate ratified the treaty negotiations of the previous April on the 20th of October; it was proclaimed by the President October 21. The President sent a special message to Congress communicating the requisite papers for the purpose of the consideration of Congress in its legislative capacity and for the exercise of its functions which are within the power vested by the Constitution in Congress. "You will observe that some important conditions cannot be carried into execution but with the aid of the Legislature." Congress on the 31st of October passed a law authorizing the President to take charge of the Territory of Louisiana so acquired; thus, as the holder of territory belonging to the United States, giving its sanction to the acquisition of the territory by the treaty aforesaid.[1] In the same way, when the treaty between

[1] 2 U. S. Stat. at Large.

the United States and Spain was made, by which Florida was acquired, Congress passed an act on March 3, 1819, authorizing the President to take possession of Florida according to the terms of the treaty.[1] The celebrated Ashburton treaty for the settlement of the northeastern boundary between Maine and the British possessions in 1842 established the boundary, by which part of the territory claimed by Maine passed to Great Britain, and part of the British territory passed to Maine. In the fifth article of that treaty it was provided that the United States should secure the consent of Maine and of Massachusetts, the mother State of Maine, to the adjustment of the boundary, and would pay over to those States the sum of money agreed to be paid by Great Britain.[2] This shows that Secretary Webster recognized the incapacity of the United States to cede by treaty any part of the territory of a State without its consent, and that the treaty-making power was qualified by the constitutional duty of the United States "to protect each State against invasion."[3] So in the settlement of the boundary of Oregon by the treaty of 1846, and of the boundary between Mexico and the United States after the war by the treaty of Guadalupe-Hidalgo, Congress recognized and sanctioned the treaty by assuming possession and establishing governments over the territory acquired under that treaty.

The acquisition of Alaska in 1867 brought up the question as to the appropriation of the money agreed to be paid for its purchase. Congress passed a bill making an appropriation of money to carry the treaty with Russia into effect. The House of Representatives, however, had taken a stronger position, and on the 14th of July, 1867, by a vote of 113 to 43, it asserted the necessity of the consent of Congress to the said treaty, before the same should have full force and effect. From this proposition the Senate dissented, and the difference of opinion between the two bodies resulted in the act simply appropriating the money to carry the treaty into effect. It

[1] 3 U. S. Stat. at Large, 523–24.
[2] 8 U. S. Stat. at Large, 554.
[3] Const. U. S., Art. IV, sec. 4.

must be conceded that the question, to some extent, is still a mooted one, but upon the precedents, and the authority of great names, the author submits that the conclusions here presented are just and in accordance with the principles of the Constitution. Another form in which the question has been presented was as to the validity of the treaty which gave an alien subject of a foreign nation with whom the treaty was made the right to hold land in a State, contrary to the law of the State against such right. These questions have been decided by the Supreme Court in favor of the validity of such a provision. This is an extreme view of the treaty power. It could change the law of the State in respect to land tenure within its borders. Perhaps it may be vindicated upon the ground that the Constitution expressly recognized the validity of treaties which had been made, under the Articles of Confederation, in which such a provision is inserted, *e. g.*, in the treaty of 1778 with France; the recognition in the Constitution itself of the binding authority of these treaties would therefore seem legitimately to recognize the validity of any treaty containing such provision made under the present Constitution.[1]

§ 357. The next clause to be considered is in these words: "and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments."

This great power, which gives the official patronage of the government primarily to the President as the nominator, and in a large number of cases to him as the exclusive appointing power, was the subject of great debate during

[1] Const. U. S., Art. VI, clauses 1, 2; Ware v. Hylton, 3 Dall. 199 (Chase, J.); Hauenstein v. Lynham, 100 U. S. 483; Geofroy v. Riggs, 133 id. 258.

the convention, and has been at every period of the history of the government. The Senate is united with the President as the nominator in the appointment of ambassadors and all the superior officers of the government. The words, "whose appointments are not herein otherwise provided for," indicate that there were in the minds of the framers of the Constitution some officers created by the Constitution who were not appointed by the President. When we look for such, we find that the Vice-President is one of them, and that the officers of the two Houses, who are to be chosen by them respectively, are the others. These of course are excepted from the appointing power of the President and the Senate.

Again, the President takes the initiative and nominates, but cannot appoint any of these superior officers but by and with the advice and consent of the Senate. And that advice and consent, it will be noted, is not restricted, as in the treaty-making power, to two-thirds of the members present; but a majority of the Senate may advise and consent to the appointment. This clause makes two classes of officers: those appointed by and with the advice and consent of the Senate, and those who may be appointed under an act of Congress, the President alone, the courts of law or the heads of the departments. The first class included ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other offices which shall be established by law whose appointments are not otherwise provided for in the Constitution. The second class are those that are to be established by law, but on whom Congress imposes the character of inferiority, and gives their appointment to the President without the concurrence of the Senate.

It would seem that the Constitution meant to leave to Congress the determination of what officers are to be regarded as inferior. Let us consider the first class. The President nominates; that is, selects, and in terms appoints, these officers, subject to the advice and consent of the Senate. The Senate, *quo ad* these appointments, is a council advisory to the

President. They advise and consent, but he appoints. Included in this class are those named in the clause, and all others established by law of Congress and not defined as inferior officers, to whose appointment the consent of the Senate is not needed.

A grave question was raised early in the history of the government, whether the officers in this first class could be removed, and by whom. Clearly the judges were not removable, because by a subsequent article it is provided, all judges "shall hold their offices during good behavior."[1] Judges and all other officers, by a subsequent section, are removable from office on impeachment for a conviction of treason, bribery, or other high crimes and misdemeanors;[2] but can the officers of this first class be removed otherwise than on impeachment? Must malfeasance and misfeasance in office be perpetuated unless the officer can be removed by impeachment? This question, as above intimated, was discussed in the First Congress. In the *Federalist* (Nos. 76 and 77) this question was quite fully discussed, and the opinion was expressed that the power of removal of officers of this first class, except judges, was incident to the appointing power, and it was insisted that as the officer was appointed by and with the advice and consent of the Senate, he could only be removed by the President upon like advice and consent. Mr. Madison and others insisted that the appointing power and the removing power were executive functions, and that the President, as the chief executive officer, would, but for the special provision of the Constitution, have had the appointment as well as the removal of the officers of the government. But he argued that the power to appoint was really in the President, qualified by the necessity of the concurrent advice and consent of the Senate, and that as he was the appointing power, subject only to this qualification, the power of removal was not subject to any such qualification, and that he, as the appointing power, could remove without requirement of the concurrence and advice of the Senate. Accord-

[1] Const. U. S., Art. III, sec. 1. [2] Id., Art. II, sec. 4.

ingly, in the bills which were passed by the First Congress for the creation of the heads of the executive departments, the power of the appointment of the various Secretaries of those departments was, by that act, accorded to the President, by and with the advice and consent of the Senate, with these words added: "to be removable from office by the President of the United States." It was moved to strike out these words, because it was contrary to the Constitution to give the President the power of removal when he appointed the officer by and with the advice and consent of the Senate. The motion to strike out was defeated, and the House passed the bill with the power of removal in the President alone, by a vote of 34 to 20. It was passed in the Senate by the casting vote of the Vice-President, and the bill was approved by President Washington.[1]

That settled the question as to all offices in this first class, except the judges. The doctrine was vindicated upon the strong ground that malfeasance in office might occur during a recess of the Senate, and the prompt exercise of the power of removal was essentially necessary to the successful administration of the government; and that the President, who was charged by a later clause with the duty to take care that the laws be faithfully executed, would be impotent to do so, if he could permit an officer to remain in office when he was violating law, and perhaps embezzling the funds of the government. This construction of the Constitution has been recognized in a number of cases. The opinion of the Supreme Court in *Ex parte Hennen*[2] sanctioned this construction and treated it as settled by the custom and usage of the government. Mr. Justice Story, in his Commentaries, has given his approval to it.[3] The settlement of the question in this way was not only based upon sound reason and authority,

[1] Annals of Congress, 368–383; 1 Lloyd's Debates, 599.

[2] 13 Pet. 225.

[3] Story's Com., sec. 1537. See also 1 Kent's Com., ch. 14, pp. 289, 290; 1 Tucker's Blackstone, Appen., 341. See also President Johnson's veto message of the bill "to regulate the tenure of certain civil offices," March 2, 1867.

but is not liable to the objection that it affects the equilibrium between the delegated powers in the government and the reserved powers in the States. It is simply a question of the distribution of the delegated powers among the various departments of the government, and settling it according to the best view of the true meaning of the Constitution.

The case of *Ex parte Hennen*, above referred to, arose under the second class of appointments, where a district court of the United States had appointed a clerk; the judge subsequently removed him without cause, and he sought to be reinstated by a *mandamus* from the Supreme Court; but the court held that the power to appoint involved the power to remove and reinstate. In the discussion of this question, however, the court went into a consideration of the other class of offices, and adverted in a section of its opinion to the mode in which it had been settled as above stated. In the later case of *United States v. Perkins*,[1] the court seems to sanction this settled rule, but to this case reference will be made hereafter. A question has arisen, whether, under the terms of this clause referring to this first class, the President may *ex mero motu* appoint an ambassador or public minister or consul, when Congress has not created those offices. This is a question which cannot be regarded as settled. The power to appoint to an office is executive; the power to create the office as the necessary and proper means for carrying into execution executive functions is a legislative power and clearly vested in Congress, in the co-efficient clause so often referred to.[2] It appears to have been done when the President nominated a minister for a mission not created by law, and the Senate undertook to inquire into the policy of establishing the mission and appointing the minister. It was decided by a small majority that the Senate had no such right; but the Senate has decided the other way on several occasions.[3] Mr. Berrien in 1826 argued against the exercise

[1] 116 U. S. 483.

[2] Const. U. S., Art. I, sec. 8, clause 18.

[3] 5 Marshall's Life of Washington, ch. 5, p. 370; Story's Com., sec. 1528, note 1.

of this power of the President. It is probable that President Washington and President Adams both appointed ministers and envoys to foreign nations without the establishment by law of any such mission, notably, President Adams in sending the three envoys to the French Republic.

§ **358.** It seems to be inconsistent with the distribution of power between the executive and legislative departments that the President should have the power to create these embassies and then to fill them. Why should the President be authorized to create the offices of the Supreme Court judges, and then to fill them, because of their being named immediately after in the same clause? The reason in favor of such a power in the President is very strong when applied to our relations to foreign governments, for the President might very often find it of importance to appoint some agent to go to a foreign court during the vacation of Congress for the purpose of negotiating a treaty or arranging some matter of conflict with that country. It appears that President Madison appointed the three ministers who negotiated the treaty of Ghent in 1814 without authority of law and during the recess of Congress. This was called in question, but not condemned by Congress. A subsequent provision of the Constitution provides that the President shall commission all officers of the United States. In the great case of *Marbury v. Madison* the question was raised whether an appointment was complete before the delivery of the commission. In that case Marbury had been appointed by the President, with the consent of the Senate, a justice of the peace for five years. The commission was signed by the President and the seal of office attached. It lay in the office of the Secretary, but had not been delivered when a succeeding President took the office. Mr. Jefferson, the succeeding President, held that the appointment was not complete until the delivery of the commission, and refused to deliver it. The Supreme Court held that it was complete by the signature of the President and the attachment of the seal to the commission, and delivery was not necessary to complete the appointment;

but at the same time deciding that they had no right to issue a *mandamus*, and their judgment was of no avail. The court held the commission was not like a deed and the grant of the office requiring delivery, but that it was merely evidence of the appointment, which had been completed.[1]

In *United States v. Perkins*, *supra*, it was decided that the second class of officers, named inferior officers, the appointment of which Congress may vest in the President, courts, or heads of departments, cannot be removed by the appointing power except under the limitations, restrictions and regulations which such laws of Congress may enact in respect to them. As to these offices, Congress gives the power to appoint and may regulate the tenure of the office and the responsibility of the officer. This distinguishes this class from the first class. Those in the first class, appointed by the President and the Senate, are removable by the President, as we have seen, and Congress cannot take away from him the power of removal. It is a constitutional function vested in him as the executive of the government; but as to the second class of offices established by law, to which appointments may be made as Congress shall regulate, Congress has the power to dissent from the removal, because it has the power to vest the appointment. In *Mullan v. United States*[2] it was held that although Congress had provided that the President may not remove an officer of the army or navy, except in pursuance of the sentence of a court-martial to that effect, yet that it did not take from the President the power, by and with the advice and consent of the Senate, to supersede him by the appointment of another in his place.

In 1820 Congress passed a law in reference to certain inferior officers, making their terms of service four years, but with a reservation of power of removal by the appointing power.[3] This was intended to give greater permanence to

[1] 1 Cr. 137.

[2] 140 U. S. 240; Blake v. United States, 103 id. 227; Keyes v. United States, 109 id. 336.

[3] 3 U. S. Stat. at Large, 582.

the office, but to reserve to the appointing power the right to remove where the officer was inefficient. In the administration of President Johnson, Congress passed an act called "The Tenure of Office Act."[1] It provided, substantially, that every civil officer, appointed by and with the advice and consent of the Senate, should hold such office until his successor should be appointed by the President, by and with the advice and consent of the Senate, and that the heads of departments should hold their offices during the term of the President by whom they were appointed, and for one month thereafter, subject to removal by and with the advice and consent of the Senate. This was intended to force upon the President, members of the cabinet, irremovable by him without the consent of the Senate, who were antagonistic to him in partisanship, and who made permanent the tenure of all other officers appointed by the President with the consent of the Senate, until the Senate should consent to their removal. This had the effect of reversing the construction of the Constitution to which reference has already been made, and to take away from the President the constitutional function of removal, even as to his own cabinet. The veto message of President Johnson, *supra*, was a very able exposure of the unconstitutionality of this law. It was passed over his veto by both Houses of Congress, and is still, to a certain extent, the law of the land. President Grant recommended the repeal of the law, and Congress did repeal it in certain respects, leaving the provisions as cited still in force. General Grant, however recommended its total repeal. Those offices which Congress may make, to be filled by appointments from the President, the courts, or heads of departments, would seem to me to be such offices as belong peculiarly to the function of the President or of the court or of the head of a department. All such cases are by law made removable at pleasure by the appointing power, and the power to appoint by either of these could not by law of

[1] 14 U. S. Stat. at Large, 430.

Congress give to either the power to appoint the officers appertaining to either of the others.[1]

A few more points I may mention. Notice by the Secretary of the Navy to an assistant surgeon that he has passed his examination for promotion is equivalent to an appointment by the head of a department.[2] One appointed by the assistant secretary, acting as head of the department, is in the second class.[3] But a commissioner of pensions is not the head of a department, and his appointment does not create an officer of the United States.[4] Removal of one officer is complete when a new appointment is made; the official responsibility of the one ceases and the responsibility of the other begins with the new appointment.[5]

§ 359. The next clause we shall consider is as follows: "The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."[6] This clause was adopted to prevent the inconveniences of vacancies in the first class of offices, when the recess of the Senate would make it impossible to fill them. Official duties were thus secured without interruption, by allowing the executive the exclusive power of appointment; but these appointments were to be but temporary. An accidental vacancy was not to change the mode of permanent appointment, and as no limit could be conveniently fixed during the ensuing session of the Senate, the temporary appointment was made to endure until the end of such session. During the session, however, the usual mode of appointment was practicable. The word "happen," in the clause, used with respect to the vacancy, related to some casualty, such as death, resignation, and the like; hence it has been held, and with good reason, that if the Senate is in session when the office is created, and the office is not filled until a recess,

[1] Ex parte Hennen, 13 Pet. 230.
[2] United States v. Moore, 95 U. S. 760.
[3] United States v. Hartwell, 6 Wall. 385.
[4] United States v. Germaine, 99 U. S. 508.
[5] United States v. Kirkpatrick, 9 Wheat. 720, 733–35.
[6] Art. II, sec. 2, clause 3.

the President may not fill it, for no vacancy has happened, as it was never filled.[1] But if the temporary appointment expires at the end of the session, without any permanent appointment with the consent of the Senate, still it is held that the vacancy occurs in the succeeding recess, and this even though the President nominates during the session and the Senate objects, or when he fails to nominate; for as the temporary appointment continues until the end of the session, when by the terms of this clause it expires, then the vacancy occurs at the end of the session,—at the expiration of the temporary appointment,—and the President may fill in the ensuing recess.[2] So a vacancy first occurring during the session of the Senate may be filled in the succeeding recess, for the vacancy happens in that recess, though it existed before the recess.[3] Sustaining the opinions of their predecessors are Mr. Wirt, Mr. Taney and Mr. Legare. A controversy arose in the year 1814 as to the appointment of the commissioners to negotiate the treaty of Ghent. President Madison appointed three commissioners during the recess, without any law authorizing it. The Senate raised the question that the office first existed during the recess, thus conceding the President's power to make it; but no vacancy in the office so created happened in the recess. The office was empty; there was a vacancy in it because it had never been filled; but a vacancy did not happen. The Senate, however, protesting, confirmed the nomination. It has been also held that if the office be created by Congress during the session, and the President fails to nominate, he cannot appoint during the recess. The office never having been filled, no vacancy could have occurred. If the President appoints with a commission in the recess, both appointment and commission expire at the end of the next session. If during the session he nominates the same person, and the Senate concurs and such person be

[1] Story's Comm., sec. 1553.
[2] 1 Opinions of Attorney-General, p. 631; 2 Id. 525; 3 Id. 673; 4 Id. 361, 523.
[3] Mr. Attorney-General Stansbury's Opinions, August 30, 1866, pp. 4–6.

commissioned, then the liability under the bond given by such person, upon his temporary appointment during the recess, ceases as soon as the officer accepts the new appointment made by the President and Senate.[1]

It must be confessed that the terms of the Constitution in reference to appointments have not been so clear and explicit as to leave their interpretation free from difficulty, and the difficulty has not been removed by any adjudication of the courts, or by any authority arising from the concurrence of those departments of government whose powers are involved in the controversy. Mr. Justice Miller has animadverted upon the practice of the President on some occasions in appointing in a subsequent recess one whom he had appointed in a previous one and whose nomination had been rejected at the intervening session of the Senate. The learned judge's criticism occurs in his lectures printed since his death, but in his criticism he does not deny the constitutional power of the President to fill the vacancy, but only its propriety.[2]

Within recent years Congress has passed the Civil Service Law, which required, under rules to be prescribed by the executive, certain candidates for second-class offices, above referred to, to pass prescribed examinations as to fitness to fill the office. This could not apply constitutionally to the first class, where the President nominates and appoints with the consent of the Senate, because to establish by law any precondition as to the selection of the officer by the President would have been a breach of power. It could only be applied, therefore, as we have seen, to the second class; that is, to the inferior offices, as to which Congress could prescribe the mode of appointment and regulate and restrict the same at its pleasure. The policy of the Civil Service Law has been the subject of warm debates in Congress by public men and also in the public press. It has two prominent advantages if it shall be faithfully carried out: one is to limit the corruption resulting from patronage; and the second the improvement in the

[1] United States v. Kirkpatrick, 9 Wheat. 720.

[2] Miller on the Constitution of the United States, Lecture III.

public service. When it is considered that the offices to which it applies number hundreds of thousands, and that the faithful working of the system precludes the favoritism of the appointing power, which breeds corruption, and that the required examination of candidates makes fitness to fill the office rather than a reward for partisan service bestowed on one possibly wholly unfit for office the only requirement, it will be seen at once that however the law may be criticised for not being properly executed, the law itself, if fairly executed, is not open to censure, but should command the confidence and commendation of every lover of his country.

It is needless, in such a work as this, to explain the details of this Civil Service Law, and what has been said relates simply to its constitutionality.

§ 360. "He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient."[1] Under this power President Washington and President John Adams met the two Houses of Congress and gave them the information referred to in an oral speech. This was and is the practice in England by the Queen, and in answer to the speech of the President, as in England, the two Houses made reply by resolutions, or the like. This clause indicates that the President, from his position as the executive head of the government, would, in the recess of Congress, be in a position to accurately get information as to the state of the Union which it would be desirable to be communicated to the two Houses in order to their legislation. Mr. Jefferson, upon his accession to the Presidency, began the practice of sending written messages to Congress from time to time, and that practice has continued until this day. The wisdom and policy of prescribing this duty for the President is so obvious that further comment is unnecessary.

The clause proceeds: "He may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of ad-

[1] Art. II, sec. 3.

journment, he may adjourn them to such time as he shall think proper." The convening of both Houses, under this power, has been frequently exercised, when the condition of the Union required legislation in the recess of Congress. The power to convene either of them, on extraordinary occasions, has reference to the necessity of the session of the Senate, which is associated with the President, as we have seen, in the treaty-making power and in the appointment of officers. Accordingly it has been the habit of every new President to convene the Senate to act upon nominations for the secretaries of the executive departments, who are to constitute the cabinet of the President, and of such other officers as are to be appointed at the beginning of an administration. The clause which relates to his power to adjourn Congress in case of disagreement between the two Houses in respect to the time of adjournment has reference to the provisions in the first article of the Constitution, section 5, clause 4, which reads: "Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting." It is obvious from this that both Houses, during their session, are linked together in such manner that each must continue in session unless the other consents to adjournment. Wherever such a disagreement arises, it is adequate to adjourn them to such time as the President shall think proper, but this power cannot be exercised as long as both Houses desire to remain in session. The exigency for the exercise of the executive power only arises when one House desires to adjourn and the other dissents, which disagreement may be settled by the decision of the President. We are not aware that any occasion for its exercise has ever arisen.

§ **361.** "He shall receive ambassadors and other public ministers." This clause is treated by the *Federalist* as involving only the ceremonial power upon the reception of the public minister from a foreign power. This is one of the cases in which those sagacious writers did not realize the full

extent of the meaning of the Constitution. The power to do this is, under the Articles of Confederation, in Congress, and it has a deeper meaning and significance than the *Federalist* attributed to it.

When a foreign nation changes its government, it is well known that the new government generally sends to foreign countries representatives other than those who had been sent by the old. The presence of the representative of the old government in Washington, recognized as the minister of the foreign power, would embarrass the government if the representative of the new and contesting government of the foreign country appeared and presented his credentials. There must be *ex necessitate* some authority in our government to determine between these contestants for the honor of representing the foreign country. To whom should the power of deciding between them more properly be confided than to the officer who has power, by and with the advice and consent of the Senate, to negotiate and make treaties with foreign powers. The reception, therefore, of one or the other of these contestants is, by the clause under consideration, confided to the President.

Again, a revolution may occur in a foreign country, and a part may separate itself from the body of the nation, of its people, within territorial lines assumed by the revolution. Such an insurgent power may establish a government and send its representative to the government of the United States, and the question may arise, shall that representative be received? For the reasons already adduced, it would seem that the power is properly vested in the President to determine whether the representative of the insurgent power shall be recognized. This is a delicate international question, and the premature recognition of the ambassador from the insurgent government may give cause for protest by the parent government, even to the point of war; for the recognition of the insurgent government gives moral, if not material, aid to the insurrection, which would be regarded by the parent government as contrary to the peaceful relations

existing between it and the United States. The question has never been definitely settled whether the President has the exclusive power of recognition in the case mentioned, or whether he has it in conjunction with the legislative department. In a number of cases in the Supreme Court the judiciary has decided that it can take no notice of the existence of any such new government until it has been duly recognized by the political department of the government.

Chief Justice Marshall said in one case: "The course of the United States in reference to the revolted portion of the foreign nation is regulated and directed by the legislative and executive departments of the government and not by the judicial department."[1] This language of the Chief Justice leaves it unsettled which of these departments is to decide, or whether both are to decide. The practice of the government in this respect has not been uniform. In some cases the recognition is attributed to the executive.[2] It is apparent, on slight consideration, that as the recognition may be an offense to the foreign parent government, such recognition may bring on war. The war power, as we have seen, is in Congress. If the executive can put the United States in a position where war will undoubtedly result, the war power may practically be in the hands of the President through this power of receiving ambassadors. It would seem, then, to be the duty of the President, before recognizing the ambassador or minister in such a case, to give information of the condition of things to the Congress, in order that there may be harmony in the action of the government on so important a question. In reference to Texas, the Senate Committee on Foreign Relations made a report June 18, 1836, through Mr. Clay,[3] in which the latter says: "The President

[1] United States v. Palmer, 3 Wheat. 616. See also The Divina Pastora, 4 Wheat. 52; Rose v. Hemley, 4 Cr. 441; Story's Con., sec. 1566.

[2] United States v. Pico, 23 How. 226; United States v. Yorba, 1 Wall. 412; Prize Cases, 2 Black, 635.

[3] Senate Doc. 406, 24th Cong., First Sess.

of the United States, by the Constitution, has charge of their foreign intercourse, and he should take the initiative in the recognition of the independence of any foreign power. If in any instance the President should be tardy, he may be quickened in the exercise of his power by the expression of the opinion or by other acts of either or both Houses of Congress." Mr. Clay reported a resolution which passed Congress March 3, 1837, for the recognition of the independence of Texas, which resolution was signed by President Jackson, who said in his message December 21, 1836, "that it would be left to the decision of Congress;" and he then adds that "it will always be considered consistent with the spirit of the Constitution, and most safe, that it should be exercised, when probably leading to war, with a previous understanding with that body by whom war alone can be declared, and by whom all the provisions for sustaining its perils must be furnished." President Taylor, in June, 1849, through Secretary Clayton, sent Mr. A. D. Mann as a special agent to investigate the condition of the Hungarian insurrection. In his instructions he intimated that, if the new government proved to be firm and stable, he would be gratified to receive a diplomatic agent from Hungary before the next meeting of Congress, and he entertained no doubt in such case the independence of Hungary would be speedily recognized by that enlightened body. In making Congress the arbiter in this case President Taylor followed the precedent of President Jackson in the case of Texas. Even Dr. Wheaton, after reviewing these cases, closed with this remark: "The recognition by the United States, however, of the independence of Belgium, of the powers who threw off Napoleon's yoke, and of the South American States who have from time to time declared themselves independent of prior governments, has been primarily by the executive; and such also has been the case in respect to the recognition of the successive revolutionary governments of France."

Perhaps the best solution of the question is this: The power of recognition given to the executive in the clause we are

considering is to be qualified by the possibility of war as the result of it, and so to avoid conflict between the two departments the President should avoid the exercise of his power of recognition, unless by communication with Congress he finds that that body is in unison with him, so as to furnish the means necessary to meet the issue of war, if it should result from recognition.

§ 362. "He shall take care that the laws be faithfully executed." This executive duty extends to the carrying out of the laws of the United States to the extent of the several means placed in his hands.[1] It has been decided in the leading case of *Mississippi v. Johnson*, that this executive power cannot be the subject of injunction by the Supreme Court, and that his action for the faithful execution of the laws is in his discretion a judgment and beyond judiciary control.[2] The harmony of this clause with the appointing power, as to all important executive officers, is very obvious, and taking the two together would clothe the President with power to select the agents through whom the laws are to be executed, and to take care that they shall be faithfully executed through those agents. This clause was regarded by Mr. Madison as very important in establishing the power of removal by the President, even though the officer had been appointed by and with the advice and consent of the Senate. The last clause of this section is that the President "shall commission all officers of the United States." The discussion of the distinction between the power to appoint and the power to commission, and that the appointment of the officer is complete when the commission is signed, though it be not delivered, was full and exhaustive in *Marbury v. Madison*.[3]

Section 4 of this article provides that "the President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery or other high crimes and misdemeanors."

[1] 9 Opinions of Attorneys-General, 524.
[2] 4 Wall. 498.
[3] 1 Cr. 156.

This clause should be considered with article I, section 3, clauses 6 and 7. By these clauses, if the President should obstinately retain a faithless officer in the public service, such officer may be removed by this judgment of impeachment, and by such judgment may be disqualified to hold office, and therefore cannot be appointed thereto by the President.[1] We have seen that senators and representatives are not civil officers within the meaning of this clause.[2]

§ 363. Before closing the comments upon the executive, a few miscellaneous points may be adverted to. Congress has the power to declare war; the President, who is commander-in-chief, executes it. During the Mexican war the President, as commander of the invading army in Mexico, took possession of certain portions of that territory, and set up temporary governments there, superseding the local Mexican authority. At the time his power to do so was seriously questioned; but in the case of *Cross v. Harrison*,[3] in the Supreme Court in 1853, the power of the President to do so is fully vindicated by the court. After the treaty of peace by which the territory was acquired, it devolved upon Congress to establish governments within that territory, which superseded those established by the President, which were held only to be valid during the military occupation.

During President Grant's administration Congress passed resolutions congratulating the Argentine Republic and the Republic of Pretoria in South Africa, upon the successful establishment of their republican government. One of them directed the Secretary of State to acknowledge a dispatch of congratulation from the Argentine Republic, and the other to communicate to the Republic of Pretoria the high appreciation of Congress of the complimentary terms, etc. President Grant vetoed both of these resolutions on the ground that the President was the proper agent, under the Constitution, for intercourse with foreign nations,

[1] *Ante*, § 200 *et seq.*
[2] Story's Con., sec. 789; Federalist, No. 66; 4 Tucker's Blackstone, Appen., 578.
[3] 16 How. 164.

and held that it was unconstitutional for Congress to have any such communication with a foreign power. Congress did not attempt to pass the resolutions over the veto of the President.[1]

Reference has been made in what has already been said to the power of the President to create an office and then to appoint to it. It is very obvious, however, that the power to create offices belongs to Congress, from the language of the second clause of the second section of the second article of the Constitution, which speaks of offices which shall be established by law, and to which the President may appoint, with the advice and consent of the Senate. It is true that it authorizes the President "to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court," etc. Whether, if there were no law establishing ambassadors, other public ministers and consuls, and judges of the Supreme Court, the President could appoint them, may admit of doubt. Certainly he could not appoint the judges of the Supreme Court until that court was organized under a law of Congress. That the President may employ agents of his own appointment to ascertain facts in reference to our foreign relations has had several precedents in our history; *e. g.*, in the case of Mr. Mann, appointed by President Taylor to go to Hungary and report upon the condition of things there. In the employment of such agents the President does not create the office, but he exercises the power as a proper means for the execution of the power clearly vested in him, of negotiating treaties and managing the foreign relations of the country. The question of the extent of the President's power in this regard arose upon the proclamation of neutrality issued by President Washington at the outbreak of the European wars between Great Britain, France and other countries, and the question was discussed with remarkable ability in the papers of Pacificus and the papers of Helvetius,— the first by Alexander Hamilton, and the other by

[1] Message of January 26, 1877. Messages and Papers of the Presidents (Richardson), vol. 7, p. 430.

James Madison; which may be referred to as containing the arguments of two great men upon this controversy.

The only remaining power which has not been mentioned, under this head, vested in the President, is what is known as the "veto power;" but this has been so fully discussed heretofore[1] that further comment is deemed unnecessary.

A singular question arose upon a message of President Grant of October 14, 1876, returning with his signature the River and Harbor Bill to the House of Representatives, in which he announced his objections to some features of the bill, and then said "if it was obligatory upon the executive to spend all of the money appropriated by Congress, I should return the River and Harbor Bill with my objections. . . . Without enumerating, many appropriations are made for works of purely private or local interest, in no sense national. I cannot give my sanction to these, and will take care during my term of office no public money shall be expended upon them. . . . Under no circumstances will I allow expenditures upon works not clearly national." By the signature of the President the bill became a law; and it was the duty of the President to take care that the law be faithfully executed. In the face of this duty he announced that he should take care that the public money should not be expended upon those works which in his opinion were not national. It was competent for the President to have vetoed the whole bill, but, having signed the bill, it was not competent for him to refuse to execute a part of it and virtually to veto that part — a power which unquestionably did not belong to him. He must sign the whole bill or veto the whole bill. It did not seem to occur to the President that he was assuming the power expressed by James II. in 1688 — to dispense with the execution of the law when it was his duty to execute it faithfully; that his failure to execute the laws was contrary to the British Constitution, and that this was the principal cause of his leaving the kingdom and abdicating the throne. In the Convention Parliament

[1] *Ante*, § 213.

a clear denunciation of this dispossessing power on the part of the Crown was inserted in their Bill of Rights; and yet the power assumed by President Grant in his message was to execute so much of the law as he approved and dispense with the residue. President Grant, with a view to enabling the President to veto certain appropriations in a general bill while sanctioning others, recommended an amendment to the Constitution to that effect, which was also done by President Cleveland in a later administration. The question was referred to the Committee on Judiciary in the 49th Congress in the form of resolutions to amend the Constitution so as to give authority to the President, when a bill contains more than one appropriation, and has passed both Houses, to veto any of the appropriations and approve the others. The committee reported against such an amendment, and the grounds upon which it was done may be seen by reference to the report.[1] The prominent reason urged by the committee against such an amendment (which was incorporated into the Constitution of the Confederate States) was that appropriations may be made by Congress for various purposes, all of which in their opinion it was proper to make, and which are voted for by members as dependent appropriations; the combining them in one bill is intended to prevent the partial exercise of powers for expenditures in one State which were proper to be made in other States and sections. The vote of Congress for any one of them is therefore secured for all on condition that each shall be valid. If the President, therefore, could by the veto power separate these dependent appropriations, and allow one class while the other classes were vetoed, it would give to him enormous and dangerous powers, against the will of Congress, to make partial and unjust discriminations between the different sections of the country.

[1] Report H. R. No. 1779, 49th Cong., 1st Sess.

CHAPTER XIII.

THE JUDICIAL DEPARTMENT.

§ 364. In the orderly arrangement of the Constitution, the first and second articles have prescribed the Constitution and defined the powers of the Legislative and Executive Departments; the third article relates to the Judicial Department. The language of the first section is as follows: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." This clause may be read in connection with the clause "to constitute tribunals inferior to the Supreme Court."[1] As was declared in reference to the other two departments, this declares the judicial power of the United States shall be vested in one Supreme Court. "Judicial power," not legislative or executive power. These three articles therefore seem to indicate the clear intention to keep the three departments of government in distinct hands, according to the famous maxim of Baron Montesquieu. The framers of the Constitution, looking to the independence of the judiciary and the independence of all the departments of the government, as well as to the passions and opinions of the people, following the precedent of the English government in the third year of William and Mary, made the tenure of the judicial office "during good behavior,"[2] so that there is no power to remove a judge except under the clause in respect to impeachment.

[1] Const. U. S., Art. I, sec. 8, clause 9. [2] 3 Madison Papers, 1365, 1458–59.

a clear denunciation of this dispossessing power on the part of the Crown was inserted in their Bill of Rights; and yet the power assumed by President Grant in his message was to execute so much of the law as he approved and dispense with the residue. President Grant, with a view to enabling the President to veto certain appropriations in a general bill while sanctioning others, recommended an amendment to the Constitution to that effect, which was also done by President Cleveland in a later administration. The question was referred to the Committee on Judiciary in the 49th Congress in the form of resolutions to amend the Constitution so as to give authority to the President, when a bill contains more than one appropriation, and has passed both Houses, to veto any of the appropriations and approve the others. The committee reported against such an amendment, and the grounds upon which it was done may be seen by reference to the report.[1] The prominent reason urged by the committee against such an amendment (which was incorporated into the Constitution of the Confederate States) was that appropriations may be made by Congress for various purposes, all of which in their opinion it was proper to make, and which are voted for by members as dependent appropriations; the combining them in one bill is intended to prevent the partial exercise of powers for expenditures in one State which were proper to be made in other States and sections. The vote of Congress for any one of them is therefore secured for all on condition that each shall be valid. If the President, therefore, could by the veto power separate these dependent appropriations, and allow one class while the other classes were vetoed, it would give to him enormous and dangerous powers, against the will of Congress, to make partial and unjust discriminations between the different sections of the country.

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§ 364. In the orderly arrangement of the Constitution, the first and second articles have prescribed the Constitution and defined the powers of the Legislative and Executive Departments; the third article relates to the Judicial Department. The language of the first section is as follows: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." This clause may be read in connection with the clause "to constitute tribunals inferior to the Supreme Court."[1] As was declared in reference to the other two departments, this declares the judicial power of the United States shall be vested in one Supreme Court. "Judicial power," not legislative or executive power. These three articles therefore seem to indicate the clear intention to keep the three departments of government in distinct hands, according to the famous maxim of Baron Montesquieu. The framers of the Constitution, looking to the independence of the judiciary and the independence of all the departments of the government, as well as to the passions and opinions of the people, following the precedent of the English government in the third year of William and Mary, made the tenure of the judicial office "during good behavior,"[2] so that there is no power to remove a judge except under the clause in respect to impeachment.

[1] Const. U. S., Art. I, sec. 8, clause 9. [2] 3 Madison Papers, 1365, 1458–59.

Again, the Judicial Department, as an independent one, is essential to the paramount force of the Constitution. It was the intention of the framers of the Constitution that the judicial power should be the protector of the Constitution against violation by either of the other departments, or by the States. Mr. Hamilton, in the *Federalist*,[1] discusses this point, upon reason which only foreshadowed the masterly judgment of the great Chief Justice in the case of *Marbury v. Madison*,[2] which rests upon the simple proposition that, as between two laws or between two authorities, the supreme must have effect given to it over the subordinate, in order to preserve the integrity of the Constitution. The court does not assume superiority over the legislative or executive departments. By its judgment it gives it supremacy which is superior to all over the *ultra vires* acts of either of the departments, or of any officer or State. Without such a judicial power the paramount force of the Constitution would have been paralyzed, and the departments of government would have held practical supremacy over the supreme law of the land. In fact, it is the essential attribute of judicial power, wherever vested, whether in the Supreme Court or a justice of the peace, to give effect to the paramount law, and where the supreme law and the subordinate law come into conflict, to declare that the former shall have effect and that the latter shall be null and void. The clause goes on to insure this independence by requiring that these judges shall not only hold their offices by the tenure of good behavior, but shall receive for their services a compensation which shall not be diminished during their continuation in office. It may be increased, if Congress shall see proper to add compensation for services inadequately compensated, but it shall not be diminished. The power that holds the purse strings shall not starve a judge into compliance with its demands. This is distinguished from the provision as to the President. His compensation shall neither be increased nor diminished during the term of office. It

[1] No. LXXVIII. [2] 1 Cr. 176.

remains to consider in whom this judicial power is vested. The legislative powers were vested in a Congress; the executive powers in a President. In whom shall the judicial power be vested?

§ **365.** (*a*) In one Supreme Court. The unity of the court is assured in order to its supremacy. It is a constitutional court; not created by law, nor to be dispensed with by law, but to be organized by law under the terms of the co-efficient power. The Constitution does not prescribe of how many members it shall consist, hence Congress must make the laws necessary and proper to carry into execution the power vested in this one Supreme Court, in whom the Constitution of the United States vested the judicial power.[1] It will be noted that the Constitution says nothing of the Chief Justice at all, but in a previous provision it is declared that the Chief Justice shall preside when the President of the United States is tried upon impeachment. This by clear inference enjoins upon Congress, in the organization of the Supreme Court, the creation of the office of Chief Justice. (*b*) The judicial power of the United States shall be vested not alone in one Supreme Court, but "in such inferior courts as the Congress may from time to time ordain and establish;" and as already shown, this clause corresponds to a previous article of the Constitution.[2] (*c*) As nothing is said in this clause as to the number of judges in the Supreme Court, Congress must, by law organizing the court, determine this question; accordingly, the Judicial Act of 1789, drawn by the master hand of Oliver Ellsworth, prescribed all of the particulars in the organization of the Supreme Court; but it must be well noted that the jurisdiction of the Supreme Court is constitutional. Its organization is defined by law, but when once organized it is the reception for all of the powers supplied from the judicial reservoir of the Constitution itself, from which Constitution, and not from Congress, save through the medium of the co-efficient power of Congress, it derives all of its authority.

[1] Const. U. S., Art. I, sec. 8, clause 18. [2] Id., Art. I, sec. 8, clause 9.

What this authority is, vested in it by the Constitution, will be noted later.

The jurisdiction of the inferior courts not being prescribed by the Constitution itself must be fixed and defined by Congress under the co-efficient clause, so often referred to. It will thus be noted that while the Constitution itself defines the jurisdiction of the Supreme Court, the jurisdiction of the inferior courts is prescribed and defined by law of Congress. As to the latter Congress has full discretion; as to the former it has none, except as a subsequent clause gives qualified power to Congress to make regulations.

Under this power to ordain and establish inferior courts, as well as to make laws to organize the Supreme Court, there have been constituted and now exist, as the judicature of the United States, the following courts: First, a Supreme Court, now consisting of a Chief Justice and eight other associate justices. Second, circuit courts, district courts and intermediate courts of appeal. Third, a court of claims, as to suits against the United States, established originally in 1853, with jurisdiction enlarged and qualified by the act of 1887. Fourth, courts in the Territories, which have been decided not to be United States courts, where therefore the judges hold at pleasure and not during good behavior.[1] It will be perceived, therefore, that if Congress had not by law exercised this co-efficient power above referred to, there would have been no Supreme Court of the United States of any kind, and the State courts would have been left as the judicial conservators of the Constitution of the United States against unconstitutional laws by Congress or the States, and would have held all the jurisdiction which by the Constitution is intended to be conferred upon the Federal judicature; and so now, except so far as the judicial power has been delegated to and vested in the Federal courts by the Constitution and the acts of Congress, and is not prohibited by it to the States, the latter have the complete reserve power to deal with all

[1] American Ins. Co. v. Canter, 1 Pet. 511; Cooley on Const. Law, 52, 53.

such questions under the tenth amendment to the Constitution of the United States.

Further, the jurisdiction of the Supreme Court is defined by a subsequent clause of the Constitution in these words: "In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned (that is, mentioned in a previous clause which has not yet been referred to) the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."[1]

Thus as far as the original jurisdiction is concerned, that is vested by the Constitution itself, without power of Congress to qualify or regulate it. But as to its appellate jurisdiction, the Supreme Court holds it both as to law and fact, with such exceptions and under such regulations as the Congress shall make, thus giving to Congress a very large discretion in the limitation of the jurisdiction of the Supreme Court and in the regulation of such as it generally exercises. Accordingly in the act of 1789, and of the other acts of Congress upon this subject, the discretion of Congress has been largely exercised in limiting and excepting from its appellate jurisdiction a large number of the cases that are mentioned in the previous clause. So that the appellate jurisdiction of the Supreme Court and the original jurisdiction of other Federal courts is capable, under the Constitution, of greater enlargement than has been prescribed in the acts of Congress. This will be explained as we proceed.

The general nature of the judicial power of the United States is described in the second section and first clause of this third article of the Constitution. The language will be quoted in full: "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting am-

[1] Const. U. S., Art. III, sec. 2, clause 2.

bassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects." This general system has always been analyzed into, first, cases which belong to the jurisdiction of the Federal courts because of subject-matter; second, to cases which belong to the Federal jurisdiction because of parties. The word "cases," here used, and the word "controversies," several times used in the above-quoted clause, may be defined as "where parties litigate before a court as to rights of property or person." Judge Tucker[1] distinguishes between cases and controversies thus: "Cases here seems to include all cases, criminal as well as civil, and controversies only such as are of the civil nature;" and this distinction of Judge Tucker is in accord with the opinion of Justice Iredell in *Chisholm v. Georgia*,[2] and by Judge Story in his Commentaries.[3] Now the jurisdiction extends to all cases in law or equity; this obviously fixed in the organism of the Federal judicature the two jurisdictions of common law and chancery. These jurisdictions were parts of the law of every one of the original States, and that made this distinction between law and equity a part of the Constitution of the United States. These constitutional branches of the Federal judicial procedure, and the new procedure which ignores this distinction in some of the States and the civil-law system in Louisiana, which never recognized it, will not be always left to ignore the distinction between these two branches of jurisdiction in any cases arising in a Federal court, though it may in a State where law and equity are not recognized as distinct jurisdictions.[4] The cases in law

[1] 1 Tucker's Blackstone, Appendix, 420–21.
[2] 2 Dall. 419, 431–32.
[3] Story's Com., sec. 1668.
[4] Thompson v. Railroads, 6 Wall. 134; Hunt v. Hollinsworth, 100 U. S. 100; Northern Pacific R. R. v. Paine, 119 id. 561, and many cases cited.

or equity arising in the Federal jurisdiction on account of subject-matter may be arranged under the following heads: First, cases arising under the Constitution of the United States; as where a law of the United States or one of the States is repugnant thereto, and a right protected by the Constitution is violated by the law, and in like cases where the executive power trenches upon the personal and constitutional right of the citizen. Second, cases arising under treaties made under the authority of the United States; as where a right secured to a party under a treaty made under such authority is violated, the party may assert his right in a Federal court. Third, cases arising under the United States laws; and United States laws made in pursuance of the Constitution are the supreme law of the land.[1] A personal right secured under such law of the United States, if violated, may be the subject of a suit for its vindication. That is a case for Federal jurisdiction arising under the laws of the United States; thus, cases in bankruptcy, cases of patents, copyrights, and so on. In the case of *Boyd v. Nebraska*,[2] Boyd claimed, under the naturalization law of the United States, that he was eligible to the office of Governor of Nebraska. The State denied it to him, and he asserted his right before the Federal courts, and the Supreme Court adjudicated in his favor. It was a case of right to a State office, arising under the law of the United States, and yet denied to him by the State. Fourth, admiralty and maritime jurisdiction. The vindication of this jurisdiction being vested in the Federal courts will be found strongly stated in the *Federalist*.[3] A word may be added in respect to it. To have left the final arbitrament of cases involving the repugnance of the law of Congress or of the State to the Constitution of the Union, or any right secured by the Constitution of the United States to a person, or by a treaty made under its authority, or of the law made in pursuance thereof, to the jurisdiction of the local courts of the States, would have not only subjected this class of ques-

[1] Const. U. S., Art. VI, clause 2.
[2] 143 U. S. 135.
[3] No. LXXX.

tions to as many contrary decisions as there were States in the Union, but would have paralyzed the essential force of the Constitution itself, by subjecting the extent of its operations to the judgment of local courts. It was therefore reasonable to confer upon the courts, created under the authority of the United States power to vindicate in their full integrity the provisions of the Constitution itself as well as the laws and treaties made under its authority. Again, as admiralty and maritime jurisdiction belongs to the realm of commerce, and must be under the supervision of the power which regulates foreign and interstate commerce, it would become a necessity to subject the construction of the laws made by Congress in reference to commerce and the general questions of commercial relations with foreign nations and among the several States, not to the local tribunals of the several States, but to judicial tribunals who held their authority under all the States in their united character.

§ 366. As to the jurisdiction which grows out of the character of the parties without regard to subject-matter, that may be defined as follows: First, where ambassadors, other public ministers and consuls are affected. Every government, by international law, is responsible to foreign nations for the treatment of their ambassadors, public ministers and consuls. Improper treatment may be a *casus belli*. The government which receives them and deals with them is responsible for their treatment, and should have in its own organization the means to meet the demands which international duty imposes. To leave cases affecting these public officers of foreign nations, sent to deal with the government of the United States, to the jurisdiction of the State courts would be an anomaly in our system. The courts for the trial of such cases should, therefore, be those of the United States, and that irrespective of the subject-matter of the case. Second, "to controversies to which the United States shall be a party." Cases in which the United States are interested could not properly be left to the jurisdiction of the local courts of the place. There might be as many diverse decisions in respect to the rights as there were States in the Union. The rights of the United States can therefore only properly be asserted and vindicated in the courts of the Union. Third, "to controversies between two or more States." How could a fair and just arbitrament of such controversies be found in the courts of either of the States involved in the controversy, and where could a fair and impartial arbitration be sought but in the courts of the whole Union. Fourth, "between a State and citizens of another State." If the other State courts were left to decide such a controversy, could the opposing State hope for impartiality? The courts of the Union are therefore selected as those which must decide such a controversy. Fifth, "between citizens of different States." The same danger of partiality would arise here, for the court of the State of the defendant would naturally be inclined to favor the defendant against the stranger plaintiff. The court of the Union, though held in the State of the defendant, is therefore selected as the fairest tribunal for the trial of the controversy. Sixth, "between citizens of the same State, claiming lands under grants of different States." The courts of either of the States granting the land might naturally be supposed to support the title conferred by the State to which they belonged, and hence the jurisdiction for such cases was sought in the more impartial attitude of the courts of the Union. Seventh, "between a State, or the citizens thereof, and foreign States, citizens or subjects." In this case the same reason would apply to give to the United States courts the jurisdiction instead of the courts of the State whose own interest, or that of their citizen, was in controversy with a foreign State or a foreign citizen or subject.

It will thus be seen by this brief review that the framers of the Constitution were sagacious in selecting the Federal tribunals for the decision of cases where the character of the parties would make the decision of the State tribunals less fair and impartial in the decision of these controversies than the local courts of the States. So that we see, in the

reason of the thing, the vindication of the wisdom of the Constitution, which vested in the judicial power of the United States the decision of these two great classes of cases. First, where the subject-matter of the case, without regard to the character of the parties; and second, where relations of the parties, without regard to the subject-matter in controversy, make it proper to vest the jurisdiction in the Federal rather than in the State courts.

The language of the clause extends the judicial power to all cases arising under the Constitution, etc.; to all cases affecting ambassadors, etc.; to all cases of admiralty and maritime jurisdiction; and then changes the phraseology as to the other classes of cases already referred to, extending the Federal jurisdiction to those cases, but not to all such cases. The insertion of the word "all" as to some of these, and the exclusion of it as to others, would seem to indicate, as a fair construction of the whole, that those cases where the word "all" is used may, by the action of Congress in defining the jurisdiction of the inferior courts which it is authorized to ordain and establish, and in those cases where the Supreme Court's appellate jurisdiction is to be subject to such exceptions and regulations as Congress shall make, be exclusively given to the United States courts. But as to those where the word "all" is not used, the State judiciary may be left to have concurrent jurisdiction with the Federal courts, but subject to the power of Congress to bring them within the Federal jurisdiction. It has been held in a number of cases that in these cases of concurrent jurisdiction, whichever court, Federal or State, gets jurisdiction first of the subject-matter or of the parties, will hold it against the interference of the other.[1]

The scheme of the judicial department was obviously, first, to make the judicial power commensurate with the ex-

[1] Smith v. McIver, 9 Wheat. 532; Hagan v. Lucas, 10 Pet. 400; Shelby v. Bacon, 10 How. 56; Ableman v. Booth, 21 id. 506; Freeman v. Howe, 24 id. 450; Noonan v. Bradley, 9 Wall. 404; Covill v. Heyman, 111 U. S. 175; Rio Grande R. R. v. Gonilla, 132 id. 478.

ecutive and legislative powers of the government. Second, to make all cases which concern all of the States, or any of the States, or the citizens of the different States, cognizable by the Federal courts, and not leave them to the adjudication of any one of the States. Third, to provide that what concerns the relations of each of the States to foreign nations, or to the people of foreign nations, must be adjudged by the tribunals constituted by all of the States, and not by those constituted by any one State. All being interested in the results of the adjudication in such cases, the rights of all should not be subject to the capricious or partial action of any one.

§ 367. We will proceed now to consider these various branches of jurisdiction in consecutive order. First, all cases arising under the Constitution, etc., shall be within the scope of the judicial power of the United States. From what has been already said, it will be seen that it is of the nature of judicial power to decide upon the constitutionality of any law or act of the government. The supremacy of the Constitution over all such laws and acts is admitted in theory; but how shall this supremacy be made effectual, if in the decision of controversies arising, etc., the courts trying the question cannot give practical supremacy to the Constitution by declaring the law or act of the government inoperative, null and void? It is therefore of the very nature of judicial power to subordinate the laws and acts of the government to the Constitution by declaring such acts to be null and void where they conflict with the Constitution.

The leading case of *Marbury v. Madison*,[1] in which the masterly judgment of Chief Justice Marshall has exhausted the reasons for this principle, is all that need here be referred to. That such a power was contemplated by the Constitution is evident from the writings in the *Federalist*.[2] It is obvious, however, that the judicial power of one State, in deciding upon a case arising under the Constitution, might be in favor of the constitutionality of the law or act of the government, and the decision in another State might

[1] 1 Cr. 137, 176. [2] Nos. LXXX, LXXXI, LXXXII.

be against it. The effect of these diverse decisions upon the same class of cases arising under the Constitution, while conclusive as to the particular controversy, would make the Constitution in effect different in the different States and in its application to these various cases. The Constitution itself, therefore, declared to be the supreme law of the land, would be one thing in one State and a different thing in another State. This would be not only an anomaly in our system, but a great grievance; for instead of one uniform Constitution operating alike upon all the States and the people of the entire Union, we should have as many Constitutions, in effect, as there were diverse opinions among the State judges deciding upon such questions. It was therefore of the first importance that some means should be devised, and that through the judicial department, for making the Constitution uniform in its operation by uniform decisions as to its meaning in every State in the Union and binding upon all the people of all the states. How is this uniformity to be reached?

Some device must be invented by which these diverse decisions may at least be brought to the arbitrament of the one Supreme Court in which the judicial power of the United States is vested. This would make the Constitution uniform in its effect, as it is in theory, and in no other way can it be done. Several modes of doing this were possible. Congress might so constitute the inferior Federal courts as to give them exclusive jurisdiction over such cases as by the Constitution were within the scope of their jurisdiction. But this would be a great evil, *e. g.:* a suit by a citizen of New York against a citizen of Virginia is between citizens of different States, and therefore within the jurisdiction of the Federal courts. But to make it exclusive in these courts would require a suit for $5, as well as a suit for $100,000, to be brought in the United States court, which, looking to the distance of these courts, in many cases, from the parties and witnesses whose attendance would be necessary, would make the expenses of litigation too onerous to be borne. Besides, every lawyer will see at once that the

Federal question, wherein the cases may be said to arise under the Constitution, may never emerge in the course of the controversy until upon the trial of the cases, which would be after the court had taken jurisdiction. In other words, the State court *in limine* would seem to have full jurisdiction, but the constitutional question, supervening in the course of the trial, would show that the Federal court might have had jurisdiction. Hence, in the Judiciary Act of 1789, this exclusiveness of jurisdiction in the Federal courts was rejected and the limit of that jurisdiction is found in cases where the amount involved in controversy was $500, and now by the act of 1887 raised to $2,000. This first method, therefore, was never adopted, as being impracticable. Second, another method might have been adopted: to authorize a removal of a case begun in the State court to the Federal court whenever a constitutional question was involved; but this was inconvenient and impossible for the reason already suggested, that the constitutional question might not emerge until the trial of the case was begun. The original jurisdiction, therefore, could not by anticipation be fixed in the Federal court, because *non constat* the Federal question might ever arise. But this process of removal has been adopted from the beginning where the character of the controversy involving a constitutional question was apparent before trial. This will be referred to hereafter. Third, it might have been made lawful to litigate in the United States court a controversy once adjudged in the State court, when it was apparent that such adjudication involved a constitutional question proper for the judgment of the Federal court; but this would be very awkward and inconvenient. Fourth, another method was adopted by the act of 1789 and has continued until this day. The twenty-fifth section of that act provided that when the highest appellate court of the State decided adversely to a right claimed under the Constitution of the United States, or under a treaty or law of the United States, the party so decided against might appeal from the supreme appellate court of the State to the Supreme Court of

the United States. This allowed to the litigants all the advantage which they might claim from the litigation being conducted in the local State court. The party whose constitutional right might be supposed to be violated by the decision of the inferior court was required to secure the vindication of his right by final appeal to the supreme appellate court of the State. If this last decided adversely to his claim, he could make his appeal to the jurisdiction of the Supreme Court of the United States.

The constitutionality of this law was fiercely contested in the early part of the century on the ground that the appeal from the highest State court to the Supreme Court of the United States assumed the relation of the superiority of the one to the other when it was held that each was supreme in its own ascertained sphere and there was nothing in the Constitution to make the judicial power of the United States supreme upon appeal over the judicial power of the State. It was contended that the Federal and State judiciary constituted co-ordinate departments of two distinct governments, and neither held the relationship of supremacy on appeal. The reasoning on this subject will be found in full in the great case of *Fairfax v. Hunter*.[1] In this case an appeal was taken from the decision of the Court of Appeals of Virginia to the Supreme Court of the United States, and in *Martin v. Hunter*[2] the decision of the Virginia Court of Appeals was reversed, and the Supreme Court issued its mandate to the Court of Appeals to substitute the decision of the Supreme Court in place of its own. The Court of Appeals refused to obey; the Supreme Court declined to attempt to compel obedience by a further procedure, but by its own officer put the party prevailing under the decision of the Supreme Court of the United States in possession of the property in controversy.[3]

[1] 4 Munford's Rep. 1.

[2] 1 Wheat. 304.

[3] The author, after searching in vain in the record of the Supreme Court for any evidence on this subject, obtained from Mr. James Marshall, a very eminent lawyer of Winchester, Virginia, a nephew of the Chief Justice, these facts in reference to the action of the Supreme Court, and the end of that controversy. See also Williams v. Bruffy, 102 U. S. 248.

That was the end of the conflict. In the case of *Martin v. Hunter* the Supreme Court agreed that the twenty-fifth section of the act of 1789 was constitutional, and in *Cohens v. Virginia*[1] Chief Justice Marshall vindicated it in one of his most famous opinions. It is unnecessary to discuss the merits of this celebrated controversy, for the State courts throughout the Union, in Virginia as well as in the other States, have recognized the finality of the decision of the Supreme Court, and for nearly eighty years this has been established in all of the courts as a settled construction of the Constitution. Besides, an analysis of this twenty-fifth section will show that it adopts a more convenient system for the people in securing trial of these cases in their early stages by State tribunals and under local influence, which would not have been the case if either of the other methods referred to had been adopted.

§ 368. We proceed to analyze this section. First, the Supreme Court of the United States, in the cases provided for by it, is given the final appellate jurisdiction. The original trial and procedure is in the inferior court of the State. From the decision of this inferior court an appeal must be taken mediately or immediately to the highest appellate court of the State itself. Again, upon this appeal in the Supreme Court of the United States, nothing will be held as ground for reversal of the decision of the State court unless that decision rested on a ground which involved a right under the Constitution or a treaty or law of the United States, and such decision must have been adverse to such right as claimed.[2] If, however, the State appellate court so decides by a divided court, so that the decision of the inferior court would stand affirmed, an appeal still lies to the Supreme Court of the United States;[3] or if the State appellate court denies an appeal from the decision of the inferior State court, which was adverse to such rights so claimed, an appeal still lies to the Supreme

[1] 6 Wheat. 264.

[2] Hartman v. Greenhow, 102 U. S. 769.

[3] Antoni v. Greenhow, 107 U. S. 672; Boyd v. Thayer, 143 id. 135.

Court of the United States.[1] But if the decision of the State appellate court rests on some ground other than one involving the rights so claimed under the Constitution, or a treaty or law of the United States, no such questions arising in the cases, the Supreme Court of the United States will not have jurisdiction upon appeal, and if an appeal be taken will consider no error in the decision other than where it rests upon a decision adverse to the rights so claimed under the Constitution. The Constitution gave this jurisdiction to the Supreme Court that it might be the guardian of the Constitution of the United States, their treaties and their laws, but not upon any other ground.[2] It thus appears that this twenty-fifth section was faithfully guarded so as to give the State court the exclusive and final jurisdiction of any case, though a question of a right under the Constitution, or a law or treaty of the United States, may arise therein, unless the decision of the State court necessarily involves the denial of the rights so claimed by a party in the case. Cases without number arising under the Constitution have thus been decided by the Supreme Court of the United States, the citation of which will be made as occasion calls for it hereafter. A few may be cited where the constitutionality of the law has been in question.[3] The unconstitutionality of the act of the Executive Department in *Milligan's Case* was adjudged and the sentence annulled.[4]

Where an inferior United States court convicts a person without having jurisdiction to try, the Supreme Court, having no appellate jurisdiction in such cases, will, upon *habeas corpus*, discharge the convict.[5] Where State laws are in violation of the Constitution, decisions of the State courts giving effect to them have been reversed by appeal in the Supreme

[1] Williams v. Bruffy, 102 U. S. 248; Choffin v. Taylor, 114 id. 309.

[2] Murdock v. Memphis, 20 Wall. 590; Spies v. Illinois, 123 U. S. 131; Henderson Bridge Co. v. City of Henderson, 141 id. 679; Hamblin v. Western Land Co., 147 id. 531; Eustis v. Bolles, 150 id. 361.

[3] Marbury v. Madison, 1 Cr. 137; Boyd v. Thayer, 143 U. S. 135.

[4] 4 Wall. 2.

[5] Bain's Case, 121 U. S. 1; In re Ayres, 123 id. 443; Fitts et al. v. McGhee et al., 172 id. 516.

Court. Under this head the cases are innumerable.[1] Thus, however a constitutional right may have been invaded, whether by Congress or any of the departments of the government, or by State law or any other action of a State, on appeal to the Supreme Court of the United States the integrity of the Constitution will be vindicated, and all laws violating that Constitution will be adjudged null and void. This clause goes farther. The Supreme Court, under this twenty-fifth section, can by appeal annul any violation of a right claimed under a treaty made under the authority of the United States. This was done in the case already cited of *Martin v. Hunter*,[2] where a treaty right was involved. So this twenty-fifth section applies to rights claimed under a law of the United States. If the law is valid, then, in effect, this right is under the Constitution of the United States, because under a law passed in pursuance of it; and when such right is violated by a State court, the decision will be reversed and the right upheld, as in the case of *Boyd v. Nebraska*,[3] already referred to.

§ 369. Further, this judicial power extends to all cases in law and equity, whether cases at common law or cases in the chancery. Mr. Hamilton has vindicated the propriety of retaining these distinct jurisdictions in the Federal courts with his usual ability.[4] This first clause uses the words "shall extend to all cases." This clearly means that while Congress has power under the succeeding clause to make exceptions from, and regulations of, this appellate jurisdiction, yet that Congress has the power to extend the jurisdiction to all cases without the exceptions and without any rule abridging it. The judicial power extends to all such cases and it would seem should not be abridged or abated by any action of Congress.

[1] Dartmouth College Case, 4 Wheat. 518; Virginia Coupon Case, 114 U. S. 269.

[2] 1 Wheat. 304. See also Hauenstein v. Lynham, 100 U. S. 483; Geofroy v. Riggs, 133 id. 258.

[3] 143 U. S. 135.

[4] The Federalist, Nos. LXXX-LXXXIII.

The next clause which calls for comment is in these words: "to all cases affecting ambassadors, other public ministers and consuls." It is only necessary to say that the extension of the judicial power to all these cases, and especially by a subsequent clause giving the Supreme Court original jurisdiction in such cases, manifested the wisdom of the framers of the Constitution in preserving the peace of the whole country in its relations with foreign countries. Public ministers of either class are the immediate representatives of their sovereigns. They are invested with an exterritoriality while resident in the country to which they are sent, which gives them immunity from all the laws of the latter. These immunities are determined by the law of nations. If the immunities and privileges of these public functionaries are invaded while they reside in the United States, the sovereign sending them can make it a subject of international controversy which may end in war. Should suits in which these public persons are interested be left to the courts of the States it would be a dangerous anomaly. The government of the United States is responsible to the sovereign sending a public minister for his exemption from everything which trenches upon his exterritorial immunities and privileges. It is therefore clear that the judicial power of the government, internationally responsible for matters affecting these public ministers, should be clothed with complete power to try all cases affecting them.[1] Therefore in the subsequent clause it is provided that the Supreme Court shall have original jurisdiction in all cases affecting ambassadors. Under this provision an indictment against one who has offered violence to a minister has been held not to be a case affecting the ambassador. It is a case affecting the United States, in which the ambassador has no concern.[2] But if a suit be brought against a foreign

[1] See opinion of Chief Justice Marshall in The Exchange v. McFaddon, 7 Cr. 478; Story on Constitutional Law, pp. 1652–54.

[2] United States v. Ortega, 11 Wheat. 467.

minister, the Supreme Court alone has original jurisdiction, and so it would seem with any one connected with his legation.

This jurisdiction has been very much affected by Congressional legislation. As the language extends the jurisdiction of the judicial department to all cases affecting ambassadors, etc., it involves the power of Congress to make this jurisdiction exclusive of that of State courts. But though original jurisdiction is given by a subsequent clause, in such cases, to the Supreme Court, it has been held that as there are no words to negative the power of Congress to confer original jurisdiction on the inferior courts ordained and established by it, Congress has vested the jurisdiction in such cases in these inferior courts. There were some dicta in earlier cases which were adverse to this construction of the Constitution, but in the later case of *Bors v. Preston*,[1] after a full review of all of these decisions, the court adopted the view taken by Chief Justice Taney in the case of *Giddings v. Crawford*,[2] and held that the original jurisdiction given to the Supreme Court in cases of ambassadors is not exclusive of the jurisdiction which Congress may vest in the inferior courts of the United States, but that Congress can make such jurisdiction in the Federal courts exclusive of that in the State courts. So that it seems that the present state of the law upon this question is that the district courts of the United States and the Supreme Court have concurrent jurisdiction of "suits against ambassadors or other public ministers," or their domestics, or domestic servants, or against consuls or vice-consuls, and that, except as to consuls and vice-consuls, all jurisdiction in the Federal courts is exclusive of the jurisdiction in the State courts. The decision of *Ames v. Kansas*,[3] in which Chief Justice Waite reviewed the decisions, is in accord with the decision in *Bors v. Preston*. Reference is made to these de-

[1] 111 U. S. 252.

[2] Taney's Decisions, 1.

[3] 111 U. S. 449.

cisions so reviewed, and to the statutes bearing upon the subject.[1]

It is further agreed that the circuit court of the United States, which has no jurisdiction of a suit against a consul, but has jurisdiction of a suit against an alien, may have jurisdiction of such, though the alien be a consul; and it seems, though the defendant does not plead to the jurisdiction, the court will inspect the record and dismiss the suit in the interest of the foreign government whose privileges are involved, and not in the mere personal interest of the defendant. This power of Congress to regulate the jurisdiction of the courts, except as expressly fixed by the Constitution itself, results from the several purposes mentioned, to wit: The power to constitute tribunals inferior to the Supreme Court,[2] and the clause which vests all judicial power in a Supreme Court and in such inferior courts as Congress may ordain and establish, taken in connection with the power to pass all laws necessary and proper to carry them into execution. It has been the purpose of the legislation of Congress from time to time, sanctioned by the decisions of the Supreme Court just cited, to use these large powers which have produced the results summarized in *Borsv. Preston*, *supra*, as to jurisdiction affecting these foreign officials. The purpose has been to retain, as far as possible, the jurisdiction of the Federal courts over all questions affecting the official representatives of foreign powers in the interest of the public peace, which would be jeopardized if the jurisdiction in these cases was left to the local State courts of the Union.

§ 370. The next clause to which attention will be directed is in these words: "to all cases of admiralty and maritime jurisdiction." By recurring to the powers of Congress, we

[1] United States v. Ortega, 11 Wheat. 467; United States v. Ravara, 2 Dall. 297; Davis v. Packard, 7 Pet. 276; Cohens v. Virginia, 6 Wheat. 264; Osborne v. Black, 9 id. 738; Marbury v. Madison, 1 Cr. 137; R. S. U. S., secs. 563, 629, 711; Act of Feb. 18, 1875 (18 Stats. at Large, 318).

[2] Const. U. S., Art. I, sec. 8, clause 9.

find (art. I, sec. 8, cls. 10 and 11) that Congress nas power in respect to offenses committed on the high seas and against the law of nations, connected with the power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. These relate very largely to the rights of the United States in case of war, and to their rights in time of peace. It is well known that, by the rules of international law, captures upon the high seas are adjudicated only in the courts of prize in the country of the captor. That these adjudications should be left to any other courts than the courts of the United States would have been a blunder not to be attributed to the framers of the Constitution. Therefore, as under the term "cases in admiralty" are included all cases of prizes and the like, the propriety of vesting this branch of the admiralty jurisdiction in the exclusive jurisdiction of the United States courts is eminently proper. "All cases" are indicative of their purpose. Prize cases were within the exclusive jurisdiction of admiralty in England, and the clauses of the Constitution above referred to make the jurisdiction of the State courts in such cases out of the question. The Articles of Confederation[1] vested this jurisdiction in the Federal government, and the laws necessary and proper to carry into execution this judicial power as to admiralty make exclusive jurisdiction necessary and proper.[2]

But what other cases are implied in these words? There was great contention in England between the admiralty and common-law courts as to this jurisdiction, which was settled by the statutes of Richard II. and Edward III. A history of this contention may be seen in the dissenting opinion of Mr. Justice Campbell in *The Magnolia*.[3] In the case of *Waring v. Clarke*[4] the Supreme Court held that the admiralty

[1] Art. IX.

[2] United States v. Bevans, 3 Wheat. 387; Houston v. Moore, 5 id. 49.

[3] 20 How. 324.

[4] 5 How. 441.

jurisdiction was not limited or to be interpreted by the English admiralty rules, and that a collision upon a river, as far as the tide ebbs and flows, though *infra corpus comitatus*, is within these terms in the Constitution; and this case was followed in *The Lexington*,[1] in *St. John v. Payne*,[2] and *The New Jersey*.[3] The reasons for the constricted jurisdiction of admiralty under the influence of the statutes of Richard II. and Edward III., and under the potent influence of the opinions of Lord Coke, are stated with great force by Chief Justice Taney in his dissenting opinion in *Taylor v. Carryl*.[4] This opinion of the Chief Justice was obviously intended as an answer to the dissent of Mr. Justice Campbell in *The Magnolia*, *supra*, and should be read in connection with that dissent in order to a full understanding of that subject.

In the important case of *New Jersey Steam Navigation Co. v. Merchants' Bank*,[5] the Supreme Court, reviewing previous cases,[6] held that when the subject-matter arose out of transactions upon the high seas or within tide, though within the body of the county, the jurisdiction was within admiralty. To this there was strong dissent, by the opinions of Justices Daniel and Woodbury. The drift of the decisions in these cases and others[7] confines the jurisdiction to cases where the vessel was engaged in maritime commerce in tidal waters. But in *The Genesee Chief*[8] the Supreme Court took a new departure, with an earnest dissenting opinion from Mr. Justice Daniel. The opinion of Mr. Chief Justice Taney in this case sustained the act of Congress of 1845.[9] He held that the admiralty jurisdiction in England was confined to tidal waters, because their tidal and navigable waters were in

[1] 6 How. 244.
[2] 10 How. 557.
[3] 10 How. 586.
[4] 20 How. 583.
[5] 6 How. 344.
[6] 3 Dall. 297; 2 Cr. 406; 4 id. 443; 1 Wheat. 9; Id. 20.
[7] The Thomas Jefferson, 10 Wheat. 498; Steamer Orleans v. Phœbus, 11 id. 175; The Santissima Trinidad, 7 id. 324.
[8] 12 How. 443.
[9] Stat. at Large, p. 726.

substance synonymous, for all tidal waters were navigable, and none were navigable which were not tidal; but he held that the test of admiralty was not the character of the water, but the character of the stream; if it was navigable, whether it was fresh or tidal, admiralty jurisdiction attached. This opinion and this decision was the initial point of a series of decisions which has established as the law that the navigability of the stream, or of the water, is the characteristic from which arose the admiralty jurisdiction. This was followed immediately by *Fretz v. Bull*,[1] with the same dissent as in the case of *The Magnolia*, *supra;* the court made the same decision with the dissent of Justices Catron, Daniel and Campbell. In the case of *De Lovio v. Boit*,[2] Mr. Justice Story, in 1815, had indicated an opinion in favor of an enlargement of the admiralty jurisdiction; a decision which Mr. Justice Campbell declared was recognized as not law in the later case of *Insurance Co. v. Younger*.[3] It was held, however, in two cases,[4] that where the contract of affreightment and for repairs was as to a voyage of the vessel between two ports of the same State, the admiralty jurisdiction did not attach; but these decisions were disapproved in *The Commerce*,[5] and the admiralty jurisdiction was upheld even as to the voyage between two ports of the same State. In *The Lottawanna*,[6] Mr. Justice Bradley, for the court, sanctioned the decision in *The Genesee Chief* case, and held that the Constitution, by these words "admiralty and maritime jurisdiction," intended "to adopt the general system of maritime law which is familiar to lawyers and statesmen when the Constitution was adopted;" but the Constitution, he said, did not define this jurisdiction nor fix the limits between the local and maritime jurisdiction. This, he said, was a judicial question; and that while the court cannot make, but can only

[1] 12 How. 446.
[2] 2 Gall. 395.
[3] 2 Curtis' Rep. 322.
[4] Allen et al. v. Newberry, 21 How. 245; McGuire v. Card, id. 250.
[5] 1 Black, 578. *Accord:* The Steamer St. Lawrence, id. 522.
[6] 21 Wall. 558.

declare, the law, Congress can change it under the commerce power. To this decision there were two dissenting opinions. The term "navigable rivers" was held to mean those which are such in fact.[1] In *The Hine v. Trevor* the decision sustains *The Genesee Chief*, and upholds the admiralty jurisdiction in the district courts of the United States as exclusive of the State courts. In the case of *The Scotland*[2] it was held that the general maritime law was binding only so far as it was adopted in any particular country.

In *Ex parte Boyer*[3] the admiralty jurisdiction was extended to the cases of the collision of tow-boats on a canal between two points in the State of Illinois.[4] In *The Alaska*,[5] referring to *The Harrisburg*,[6] it was held that no suit in admiralty could be maintained for the death of a person, unless Congress gives the remedy or it is given by a State. In the case of *The Steamer Eclipse*[7] it was held that a court of admiralty cannot administer an equitable remedy. In *In re Garnett*[8] the law of Congress creating a limited liability, in case of tort, was thus made a part of our maritime law, and in this case all the cases were reviewed and the decision was unanimous in its sanction of the Genesee Chief decision. The act of 1851, creating limited liability,[9] is in accord with these decisions. The distinction between admiralty and maritime jurisdiction is thus stated by Judge Cooley, quoting Judge Story: "The first (that is, admiralty) respects acts or injuries done upon the high seas, where all nations claim common right and common jurisdiction; or acts or injuries done upon the coasts of the sea; or, as for these, acts or injuries done within the ebb and flow of the tide. The second (that is, maritime) respects contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation. The former (that is, admiralty) is again divisible into two great branches — one embracing captures and questions of prize arising *jure belli;* the other embracing acts, torts and injuries strictly of civil cognizance, independent of belligerent operations."[1] This quoted statement must be qualified so as to take in, under the decision of *The Genesee Chief*, the great lakes and their navigable waters, and the great rivers, even though their navigable course may be entirely within the limits of a single State; and in *The Commerce*[2] it was held that this jurisdiction had not depended on the Congressional power to regulate commerce, but upon the judicial power over cases of admiralty, as to which Congress can pass laws to carry it into execution. The Federal jurisdiction, therefore, includes cases of collision on navigable lakes or rivers; of vessels engaged in commerce between ports of the same State and occurring within the body of the county; and also contracts of affreightment, though to be carried out in the State where made.[3]

[1] The Daniel Ball, 10 Wall. 557; The Montello, 20 id. 430.
[2] 105 U. S. 24.
[3] 109 U. S. 629.
[4] The Belfast, 7 Wall. 655; Aldrich v. Ætna Co., 8 id. 491.
[5] 130 U. S. 201.
[6] 119 U. S. 199.
[7] 135 U. S. 599.
[8] 141 U. S. 1.
[9] R. S., secs. 4282–89; The Corsair, 145 U. S. 335.

§ 371. From this rapid review it will be seen how extended, at this day, the admiralty jurisdiction has become, as compared with what it was in an earlier period of the government. This is due largely to the fact of the great extension of our commerce, foreign and domestic, and especially to the fact that our commerce upon the navigable fresh waters of the Union, the lakes and great rivers, has become so enormous as to have produced great inconvenience, if the admiralty jurisdiction had not been extended to commerce upon these fresh waters, and had been left to the courts of the States. The broad and sagacious opinion of Chief Justice Taney in the *Genesee Chief Case* widened the scope of admiralty jurisdiction without any detriment to the interests of commerce or the reserved jurisdiction of the State. This jurisdiction may be now said to embrace among others the follow-

[1] Cooley's Const. Law, p. 130.
[2] 1 Black, 578; Waring v. Clark, 5 How. 441.
[3] The Belfast, 6 Wall. 624.

ing cases: The case of salvage,[1] bottomry bonds,[2] seamen's wages,[3] charter-party and affreightment of ship, cases of maritime injuries, and maritime liens.[4] It is not necessary in this work to go into the principles of admiralty practice. This has been regulated by Congress, and rules under its legislation have been prescribed by the Supreme Court. Some cases may be referred to in the note.[5] It may be well to state that as the power of Congress to legislate so as to vest the complete jurisdiction in admiralty in the courts of the United States is nearly connected with its power "to regulate commerce" between the States and with foreign nations, it has been held that Congress may pass laws regulating the mode of navigation by vessels engaged in such commerce, and the violation of such regulations would therefore become the subject of admiralty jurisdiction. The rules, therefore, prescribed for navigation are within the powers of Congress, and Congress may enact laws for the sale and mortgage of vessels, rendering them invalid as against *bona fide* purchasers unless duly registered at the custom-house, and making other regulations for the safety of passengers, and such statutes may be enforced in the admiralty courts.[6] But though Congress may regulate the navigation of the waters of the United States, and the vessels employed therein may be subject to the admiralty jurisdiction, the ownership of the water and of the fish which it contains, and of the soil beneath, remains in the States.[7] These State rights do not appertain to navigation and therefore are not subject to admiralty; nor can admiralty take cognizance where the damage is wholly on land, or to a bridge injured by a passing vessel, nor where a fire on board the ship is communicated to buildings near which she is moored.[1] But where damage is done to the ship by a bridge or other structure, or by defect in the dock, or from piles left in a stream, redress may be had for the ship in admiralty.[2] The jurisdiction of the admiralty is so far exclusive that no State or federal tribunal can take jurisdiction of a pure proceeding *in rem*.[3] But the courts of common law or of equity may entertain a suit *in personam* on a maritime contract, and execute the decree by attaching the vessel, or taking it in execution as in case of other chattels, but they cannot proceed against the vessel *in rem*, or affect it with a lien, except through their jurisdiction over the person of the owner.[4] So under the Judiciary Act of 1789, which saves the right to a party to a suit at common law on any tort or contract, a party may institute suit *in personam* in the common-law court.[5]

[1] 12 Pet. 72; United States v. Coombs. The Blackwell, 10 Wall. 1.
[2] Carrington v. Pratt, 18 How. 63.
[3] Leon v. Galceran, 11 Wall. 185.
[4] The Belfast, 7 Wall. 624.
[5] Phillips' Practice in the Federal Courts; also the rules prescribed in 3, 10, 13, 17 and 21, Howard's Reports. See also Allen v. Newberry, 21 How. 244; Andrews v. Wall, 3 id. 568.
[6] Steamship Co. v. Manufacturing Co., 109 U. S. 578; Ex parte Boyer, id. 629; The Belfast, 7 Wall. 624.
[7] United States v. Bevans, 3 Wheat. 336; McCready v. Virginia, 94 U. S. 391; Smith v. Maryland, 18 How. 71.

§ 372. One question remains to be considered: How far, under the admiralty jurisdiction, can crimes be punished? In the case of *R. v. Keyn*[6] the English court discussed the question whether a man could be tried in the Lord Admiral's court within the marine league of the English coast, and a majority of the court doubted whether by international law the marine league was a part of the territory of England, though by act of Parliament it might be made so. The minority held that it was within the territory of England. The only question considered in that case was as to the jurisdiction of the court which succeeded the Lord Admiral's jurisdiction, and it was held that the court had

[1] The Plymouth, 3 Wall. 20; Johnson v. Elevator Co., 119 U. S. 388.
[2] Railroad Co. v. Towboat Co., 23 How. 209; Leathers v. Blessing, 105 U. S. 626; Cope v. Dry Dock Co., 119 id. 625; Atlee v. Packet Co., 21 Wall. 389.
[3] The Moses Taylor, 4 Wall. 411; The Hine v. Trevor, id. 556; The Glide, 167 U. S. 606.
[4] 24 Pa. St. 259, or s. c., Taylor v. Carryl, 20 How. 583; Leon v. Galceran, 11 Wall. 185.
[5] Cases *supra;* also Schoonmaker v. Gilmore, 102 U. S. 114; Steamboat Co. v. Chase, 16 Wall. 522.
[6] 2 L. R. Ex. D. 3.

not jurisdiction of the case. The reasoning of Lord Chief Justice Cockburn was not satisfactory upon this point.

The decision of Lord Stowell in the *Mud Islands Case*[1] clearly held that the marine league on the shore of the Gulf of Mexico extended three miles beyond the Mud Islands, which were eight miles from the coast, and that a capture of the French vessel by a British man-of-war between the Mud Islands and the coast was clearly in neutral territory and void. The Parliament by law claimed the marine league for British territory, and gave criminal jurisdiction to the courts of crimes occurring therein. The doctrine of the marine league has never been doubted in the United States and has been recognized in numerous cases. If a murder occurs within any of the waters of the State, can it be prosecuted in the State court? In the leading case of *United States v. Bevans*,[2] the court, through Chief Justice Marshall, held that the grant of admiralty jurisdiction does not by any means involve a cession of the waters of the State to the United States, and that the admiralty courts cannot try a case of crime committed within the State or its waters. The murder by Bevans was aboard a man-of-war in Boston harbor, and was cognizable in the State court and not in admiralty. The Chief Justice said that, under the war-power, Congress might punish murder on board a man-of-war whenever it enacted a law to do so, but it had not done so, and therefore the State had jurisdiction. No cases can be found to the contrary. In the case of *United States v. Coombs*[3] the defendant was punished for stealing from a wreck (property which was washed up on the land), but that was held to fall under the commerce power and not a case for admiralty; and in the late case of *Manchester v. Massachusetts*[4] (*Buzzards' Bay Case*), the decision and opinion of the court confirms these views, and sustains the State against the Federal jurisdiction.

[1] 5 Rob. Adm. 73.
[2] 3 Wheat. 336.
[3] 12 Pet. 722.
[4] 139 U. S. 340.

The doctrine in *Waring v. Clark*,[1] as expounded by Justice Wayne, sustains our admiralty jurisdiction on the ground that the admiralty courts in England, despite the rights of prohibition by the common-law courts, exercised a larger jurisdiction than was defined by the statute of Richard II.; and besides, the colonies and the Congress of Confederation held the more ancient limits of admiralty jurisdiction, and did not confine it within the circumscribed boundaries of those acts of Parliament. But while admiralty attaches its jurisdiction *in rem* for collision according to place, and may be exclusive of the common-law courts, yet it cannot seize a vessel which is in possession of a sheriff under State process. In *Taylor v. Carryl*[2] the State courts had seized a vessel under a proceeding by foreign attachment, and a motion was pending for an order of sale. With this condition of things a libel was filed in admiralty for seaman's wages, and the marshal served the process upon the vessel, and the Supreme Court held that the State possession prevailed over the admiralty. In the opinion of Mr. Justice Campbell, speaking for the court, Judge Story's Commentaries on the Constitution,[3] and a number of cases, are cited.[4] Chief Justice Taney, with three other justices, strongly dissented.

It has been further held that the saving of the common-law remedy to parties, in the ninth section of the Judiciary Act of 1789, does not take away the admiralty jurisdiction *in rem*. It applies to common-law jurisdiction *in personam*.[5] This distinction may reconcile the diverse views. The admiralty proceeds against the vessel itself. It is sued in admiralty, and to this extent the admiralty has exclusive jurisdiction; but another court may proceed *in personam* against the officers or master, and through this jurisdiction over the person affect the vessel itself, by execution, attachment or other lien.[6]

[1] 5 How. 441.
[2] 20 How. 583.
[3] Sec. 1666, and note.
[4] Moran v. Sturges, 154 U. S. 256.
[5] The Moses Taylor, 4 Wall. 556.
[6] The Moses Taylor, *supra;* The Hine v. Trevor, 4 Wall. 556; The Glide, 167 U. S. 606.

§ 373. "To controversies to which the United States shall be a party." The word "cases," which had been previously used, is now displaced by the word "controversy." A distinction has been drawn between the two words: "cases" include civil and criminal judicial controversies, but "controversies" is applied only to civil cases.[1] Whether this be a true distinction or not may be doubted. The word "all," before "controversies," is omitted; perhaps in part because it was not intended.

The United States is not suable except with its own consent. This is the attribute of sovereignty in a single State, and for like reasons in the United States. Of course, the United States are not suable in a State court; nor can the State court subordinate the authority of the United States to its jurisdiction.[2] If the United States has purchased property in a State merely as a proprietor, and not as a means of exercising their constitutional function, such property may be condemned by the State for streets, highways or public purposes, under its eminent domain, as the land of any other proprietor.[3] But where Congress buys or condemns property for the purpose of exercising Federal functions, the property is not subject to State law for taxation or condemnation as aforesaid.[4] But while it may not obstruct the Federal functions in respect to such property, unless it has ceded jurisdiction as provided under a former clause of the Constitution,[5] Congress can exercise no legislative function over such property. It is subject to the general legislative power of the State, except such as will obstruct its use in performing Federal functions.[6]

The United States may sue as plaintiff in their own or the State courts, or in the courts of a foreign country.[7] As above

[1] Tucker's Blackstone, Appen., 420–21; Chisholm v. Georgia, 2 Dall. 419, 431–32; Story's Commentaries, sec. 1168, note 2.

[2] Ableman v. Booth, 21 How. 506.

[3] United States v. Chicago, 7 How. 185.

[4] Ft. Leavenworth R. R. Co. v. Iowa, 144 U. S. 538; Palmer v. Barrett, 162 id. 399.

[5] Art. I, sec. 8, clause 15.

[6] People v. Godfrey, 17 Johns. 225; 114 U. S. 528, 538, *supra*.

[7] United States v. Wagner, 2 Ch. App. 582; Cooley on the Constitution, 133.

stated the United States cannot be sued in a United States court or elsewhere but by their consent. So that this clause is limited to cases where the United States is a party plaintiff. A remarkable case may now be referred to where a suit may be brought by a claimant of property held by the officers of the United States for the government. The officer, who is *locum tenens*, cannot plead that the United States are sued in his person, where the holding for the United States was without authority of law, and especially where it is unconstitutional.[1] This case was followed in a number of cases in respect to the suing of a State, to which reference will be had hereafter; the doctrine being that no officer can assert that he defends the State right or the right of the United States involved in his own defensive holding, where the State or the United States claim to hold by a title which was against law and unconstitutional. Such was the case in *United States v. Lee*, *supra*. The purchaser of the property of the plaintiff at a tax sale by an agent for the United States was held to be null and void because the sale was contrary to the Constitution and to the law. Therefore the United States could acquire no valid title under such a sale, and the officer of the United States could not protect the property from the claim of the true owner by alleging that the United States were the real defendants. They could not be the real defendants because they could not have acquired the title, which it was unconstitutional for them to acquire. In that case the United States by their counsel intervened and moved the dismissal of the suit because it was in fact against the United States. The court overruled the motion, gave judgment against the tenant who held for the United States, and the Supreme Court affirmed it. The opinion of the court was elaborate and reviews all the cases. Except in this class of cases the United States cannot be sued without their consent, as has already been stated; but in the year 1854 an act was passed creating what is known as the Court of Claims, the jurisdiction of which has been

[1] United States v. Lee, 106 U. S. 196.

considerably enlarged by an act passed in 1887. In this court the United States may be sued upon a contractual claim which might be asserted either at law or in equity, and very large jurisdiction was given to the court for inquiring into claims that are finally submitted to Congress. These statutes need not be critically commented upon. In the last act mentioned, *i. e.* in 1887, jurisdiction was given also to the circuit courts of the United States in a limited class of cases to allow suit for claims by private parties against the United States. When these courts render judgments in these cases against the United States there is no mode of enforcing them, and the judgment is of no avail until Congress appropriates money to pay it, which is usually done.

§ 374. The next clause is, "to controversies between two or more States." It will be noted that it does not say to "all" controversies, and therefore there is a class of which the Federal courts have no jurisdiction. The reason for establishing this jurisdiction is very obvious and is stated in the *Federalist* with great force.[1] The authority to settle disputes between the States concerning boundaries, jurisdiction, or any other cases whatsoever, was vested by the Articles of Confederation in Congress, but this was a very cumbrous mode of adjudicating them. What better or more appropriate tribunal for adjudicating controversies between the States than the Supreme Court? Colonial disputes had a precedent in the case of *Penn v. Lord Baltimore*.[2] Since the Constitution went into operation many cases of controversies between the States have been before the Supreme Court, and reference will be made to them.[3] These cases hold that questions of boundary, territorial right and property rights of all kinds are proper for this jurisdiction; but it has been held in the noted case of *Commonwealth of Kentucky*

[1] No. LXXX.
[2] 1 Vesey, 444.
[3] Rhode Island v. Massachusetts, 12 Pet. 757; Missouri v. Iowa, 7 How. 660; Florida v. Georgia, 17 id. 478; Alabama v. Georgia, 23 id. 505; Virginia v. West Virginia, 11 Wall. 39; Tennessee v. Virginia, 158 U. S. 257; Maryland v. West Virginia (now pending).

v. Dennison,[1] upon the refusal of the Governor of Ohio to extradite a criminal upon the demand of the State of Kentucky, that at the suit of Kentucky the constitutional duty of the State of Ohio could not be enforced, and that it was a political issue between the States and not one for judicial decision.

§ 375. The next clause is, "between a State and citizens of another State." It is obvious that it was well to extend the jurisdiction of the Federal courts to such cases, but the word "all" was omitted so that the State may sue a citizen of another State in the Federal court, or in the court of the State of which the defendant is a citizen. The *Federalist*[2] gives a satisfactory exposition of the reasons for this. The court of a citizen defendant might not be an impartial arbiter between the plaintiff State and its citizen. Impartiality and justice would more reasonably be expected from the Federal tribunals. This clause gave rise to a noted controversy. It gave the Federal court jurisdiction of controversies between a State and the citizens of another State. That is clear enough where the State is plaintiff; but did the clause mean that the citizen of another State might sue the State in a United States court? In the *Federalist*, above referred to, Mr. Hamilton said that this construction had been raised as an objection to the Constitution, and he undertook to controvert it by saying that it was impossible fairly to construe the Constitution to mean that a citizen as plaintiff could be party to a controversy with a State, and contended that it was contrary to the principle that a sovereign could not be sued without its consent. Despite this strong statement of the *Federalist*, in the celebrated case of *Chisholm v. Georgia*[3] the Supreme Court decided that Chisholm, a citizen of North Carolina, could sue the State of Georgia upon a money claim in the Supreme Court. The decision was rendered on the 19th of February, 1793, and on the 21st of February, so great was the alarm produced by the decision, an amend-

[1] 24 How. 66.
[2] No. LXXX.
[3] 2 Dall. 419.

ment was proposed to the Constitution in Congress which would render nugatory that decision. The history of the proceedings which eventuated in the adoption of the eleventh amendment to the Federal Constitution is given in a number of cases in the Supreme Court.[1]

This amendment must therefore be considered with the clause we are now commenting on. It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." As part of the history of this clause the original proposition did not contain the words "be construed to." Had it been adopted in its original form, it would have been a future limitation to the use of the judicial power. With the insertion of the words "be construed to" it had a retroactive effect by condemning the construction which had been given the original Constitution by the decision in *Chisholm v. Georgia*, *supra*, when the amendment was called to the attention of the Supreme Court.[2] A number of cases were dismissed from the docket because, by virtue of the amendment, the jurisdiction which had been assumed was taken away. The construction of this amendment has been the subject of a good deal of controversy, to which attention must now be called.

§ 376. First, a citizen of another State or of a foreign nation cannot sue a State in the courts of the United States, by reason of this amendment.

Second, as the eleventh amendment did not in terms forbid a citizen to sue his own State, it was contended that he could do so, because the prohibition of the eleventh amendment did

[1] Cohens v. Virginia, 6 Wheat. 406; also Haygood v. Southern, 117 U. S. 52; In re Ayres, 123 id. 443; North Carolina v. Temple, 134 id. 130; In re Neagle, 135 id. 1–23; Antoni v. Greenhow, 107 id. 711; Coster v. Greenhow, 114 id. 317; New Hampshire v. Louisiana, 108 id. 76; United States v. Texas, 143 id. 621; and especially the author's statement *arguendo* In re Ayres, 123 U. S. 443; Ex parte Wilson, 114 id. 417.

[2] Hollingsworth v. Virginia, 3 Dall. 378.

not reach him. But the fallacy of this contention is obvious from the fact that the original Constitution did not authorize a suit in the United States courts between a State and its own citizen, while it did authorize suits between a State and citizens of other States. There is no occasion, therefore, for the eleventh amendment to prohibit a construction of the original Constitution allowing a suit between the State and its own citizen. So the Supreme Court in two cases has decided that a citizen cannot sue his own State in the courts of the United States.[1]

Third, this amendment leaves the original Constitution unchanged as to a suit between two or more States, and, as we have already seen, the jurisdiction of the Supreme Court is fully recognized as to controversies in respect to boundaries and the like brought by one State against another.[2] Furthermore, it has been held that under the original terms of the Constitution, a controversy between the United States and a State is within the jurisdiction of the United States courts. This has been so decided where the United States was plaintiff under the original Constitution, to which the eleventh amendment as to such cases does not apply.[3] It has not yet been decided whether in such a controversy the State may be a plaintiff. An Indian tribe cannot sue a State, because the tribe is not a State.[4] Nor can the District of Columbia or a Territory sue a State, because neither of these is a State; and so also it is a well-settled doctrine that a resident of a Territory or of the District is not a citizen of a State who can sue the citizen of one of the States in the United States court.[5] The form of process against a State when sued has been adjudicated in the cases already referred to, but especially in *The State of New Jersey v. The State of New York.*[6]

[1] Hans v. Louisiana, 134 U. S. 1; North Carolina v. Temple, id. 22.

[2] Florida v. Georgia, 17 How. 478; Virginia v. West Virginia, 11 Wall. 39, and other cases cited *supra*.

[3] United States v. North Carolina, 136 U. S. 211; United States v. Texas, 143 id. 21.

[4] The Cherokee Nation v. Georgia, 5 Pet. 1.

[5] Hepburn v. Ellzey, 2 Cr. 445; Scott v. Jones, 5 How. 343, 377.

[6] 5 Pet. 284.

Fourth, a State may, by the original Constitution, sue a citizen of another State, and citizens and subjects of foreign States, in the United States courts.

Fifth, a bank or other corporation, wherein a State is one of the corporators, or is sole corporator, may, however, be sued by a citizen of another State. The State doffs its sovereignty when it becomes a stockholder, and the corporation is a being distinct from its corporators. The suit in such cases is therefore not against the State, but against the corporation and legal entity distinct from its corporators.[1] The opinion of Mr. Justice Curtis in *Curran v. Bank of Arkansas*[2] expounds this fully.

Sixth, but where a State prosecutes a citizen for a crime and convicts him, the citizen may appeal from the highest State court to the Supreme Court of the United States under the twenty-fifth section of the Judiciary Act already mentioned. It was contended in the case of *Cohens v. Virginia*[3] that this appeal by the convict was a suit against the State, but Chief Justice Marshall, in that famous case, made the distinction that, while the citizen could not assert a claim against the State and get judgment for it, he might on appeal get a judgment reversed which the State had unconstitutionally obtained against him. The appeal simply brought the case of the State against him for review in the appellate court, but in that case it was held that the appeal to the Supreme Court only lay after the highest appellate court in the State had decided against the right of the citizen. It is worthy of note, however, that while the court in that case decided it had jurisdiction to reverse, yet upon the merits it decided to affirm. The same doctrine will hold where the State in a civil suit obtains a judgment against a citizen contrary to his claim of right under the Constitution, laws or treaties of the United States, and this by virtue of the twenty-fifth section of the Judiciary Act.

[1] Briscoe v. Bank of Ky., 11 Pet. 692; Curran v. Arkansas, 15 How. 304; Bushnell v. Kennedy, 9 Wall. 387.

[2] 15 How. 301.

[3] 6 Wheat. 864.

Seventh. We come now to an important question. Can the eleventh amendment be evaded in its operation by suing the officers, boards or other functionaries of the State, and not suing the State by them? This question has been the subject of great and learned controversy. In the case of *Osborne v. Bank of United States*[1] the court said that the eleventh amendment did not apply unless the State was made a party defendant on the record; but in a later case, to which reference will be made, that doctrine has been clearly overruled.[2] In *Louisiana v. Jumel*, *supra*, a board of the State of Louisiana held some funds which, by prior obligations of the State, the board was to hold in trust for their payment. The State legislature afterwards enacted that the board should not pay out any of those funds for these special creditors. The creditors thereupon sued the board to compel the payment of their obligations out of that fund, but the court held that the board was really the State — the authority through which the State held these funds for creditors,— and that to make the board pay the creditors with these funds was equivalent to making the State do so. Therefore the Supreme Court held that it was still a suit against the State; that the State was not a party on the record; and gave judgment for the State. The same doctrine was affirmed in the later cases above cited. In the leading case of *In re Ayres*[3] the State of Virginia had directed its Attorney-General to sue delinquent tax-payers where they had tendered tax-receivable coupons in payment of their taxes, which the Supreme Court decided, in *Antoni v. Greenhow*[4] and *Poindexter v. Greenhow*,[5] that the State was bound to receive. The collecting officers of the State had been forbidden by the law of Virginia to receive these coupons in payment of taxes, and the Attorney-General of

[1] 9 Wheat. 738.

[2] Louisiana v. Jumel, 107 U. S. 711; Cunningham v. Railroad Co., 109 id. 446; Hagood v. Southern, 117 id. 52.

[3] 123 U. S. 443.

[4] 107 U. S. 769.

[5] 114 U. S. 270.

the State was directed to sue any such tax-payer, in which suit the tax-payer was allowed to plead the tender as the discharge of his obligation. One of the large creditors of the State of Virginia filed a bill stating that the coupons upon the bonds of the State were made unsalable by this legislation of the State, and praying an injunction against the Attorney-General and other attorneys for the Commonwealth forbidding them to bring the suits which the law of the Commonwealth had ordered. The Attorney-General and others proceeded to sue despite the injunction order. The judge of the United States court thereupon, upon proper process against them for contempt, fined and imprisoned them. They brought a writ of *habeas corpus*, issued from the Supreme Court, for their release from custody, upon the ground that these proceedings were virtually an injunction against the State forbidding its suing for its taxes, and this despite the fact that the State was not made a party on the record. The Supreme Court held, in a learned opinion of Mr. Justice Matthews, that the State had a constitutional right to sue; and as it could sue only by its officers, an injunction against the officers was an injunction against the State, and that virtually the whole proceeding was a suit against the State of Virginia. The officers were released under the *habeas corpus*. This latter case was followed by that of *McGahey v. Virginia*[1] and *Pennoyer v. McConnaughy*.[2] In the last case Mr. Justice Lamar quoted from the decision of Mr. Justice Bradley in *McGahey v. Virginia*, in which there was a summary of the propositions established by previous decisions, the third of which propositions is in these words: "That no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia, either directly by suit against the Commonwealth by name, or indirectly against her executive officers, to control them in the exercise of their official functions as agents of the State." On the other hand, it has been distinctly held that where the State by its officer seizes the

[1] 135 U. S. 562. [2] 140 U. S. 1.

property of a citizen contrary to his right claimed under the Constitution, such citizen may sue the officer in trespass or other action, and the officer cannot plead, in justification of his action, that it was authorized by law and therefore is virtually the action of the State, because the State cannot authorize an act which by the Constitution it is forbidden to do, and that such citizen may sue such officer to recover his property, or damages for taking it, or by injunction to prevent the taking of it, and such suit will not be contrary to the eleventh amendment, because the officer cannot make his act the act of the State when the State, by the Constitution, is forbidden to do the act. The cases on this subject, besides those already cited, will be referred to in a note.[1] The decisions cited in the note hold that no suit against a State or its officers is allowed by the eleventh amendment to compel any affirmative action against the State or its officers. The State cannot be so enforced; but where the State through its officers is taking affirmative action against a citizen, contrary to his constitutional right, he may either prevent it by injunction or redress it by an action against the officer, and, because the officer is without constitutional authority from the State to do the act, judgment will be allowed against the officer. It will be noted that this is substantially the same principle upon which the decision in *United States v. Lee*,[2] heretofore referred to, rested. In both cases the officer of the State was the State, as far as any suit against him was concerned, where he performs the duties which the State has constitutional power to impose upon him; but where the State has no such authority to impose the duty, his act is defenseless under the shield of the State, and he is liable for it as an individual.

[1] Coupon Cases, 114 U. S. 269; Cunningham v. Railroad Co., 109 id. 453; Hagood v. Southern, 117 id. 52–70; Davis v. Gray, 16 Wall. 203; Tomlinson v. Branch, 15 id. 460; Litchfield v. Webster Co., 101 U. S. 773; Board of Liquidation v. McComb, 92 id. 531. All of these decisions are fully reviewed by Justice Bradley and Justice Lamar in the cases referred to. McGahey v. Virginia, 135 U. S. 662; Pennoyer v. McConnaughy, 140 id. 1; Fitts et al. v. McGhee et al., 172 id. 516.

[2] 106 U. S. 196.

Eighth. A creditor of a State, as we have seen, cannot sue the State for the debt under the eleventh amendment. Can he assign it to his own State with power to do so for him, and thus give jurisdiction to the Supreme Court, because it is a controversy between two States? This was attempted in recent cases. The court will look to the real parties to the suit, and in the cases of *New Hampshire v. Louisiana* and *New York v. Louisiana*[1] the court found that the suits were brought by the plaintiff States for and in behalf of its citizens, and the jurisdiction was denied as being in effect contrary to the eleventh amendment, because by a suit of the citizen against a State.

Ninth. Can a foreign State sue a State of this Union in the United States court? A foreign State may sue in the Supreme Court.[2] It may sue citizens and corporations of the United States. Can it sue a State? This has never been decided, but from the terms of the original Constitution it gives jurisdiction to controversies between a State and foreign States, citizens or subjects; and as the eleventh amendment forbids a suit by foreign citizens against a State, but does not forbid a suit by a foreign State against a State, it would seem that the original Constitution stands unaffected by the eleventh amendment as to a controversy between a State of the Union and a foreign State, whichever may be plaintiff or defendant. But it has been decided that the United States may only be sued, as by its law it is permitted, in the Court of Claims.

§ 377. In controversies between a State and citizens of another State, or between citizens of different States, etc., the question arises, Who is a citizen of a State within the meaning of these clauses of the Constitution? A citizen may be a citizen of a State, as to jurisdiction, when he resides in that State.[3] A resident of a Territory or of the District of Columbia is not a citizen of a State and cannot sue or be sued in the United States court.[4] He must sue in

[1] 108 U. S. 76.
[2] The Sapphire, 11 Wall. 164.
[3] Gassies v. Ballou, 6 Pet. 761; Shelton v. Tiffin, 6 How. 163.
[4] Hepburn v. Ellzey, 2 Cr. 445–48.

a State court, or be sued in the court of the Territory or in the court of the District of Columbia. An alien, if he has declared his intention to become a citizen, may sue as such in the United States court.[1] A much-controverted question here arises: Is a corporation created by a State a citizen within the meaning of these jurisdictional clauses. It is very obvious that a corporation is not a citizen in the true primal sense of that term. It is a metaphysical entity, a creature of the law, distinct from the personality of all its corporators. A citizen, in the true sense of the term, is a human being, with personal rights and capable of personal privileges and immunities; but it was held in an early case that the reason of the jurisdictional clause of the Constitution applied to the cases of the corporations of different States. The reason that jurisdiction was given between citizens of different States to the United States courts was the apprehension that the State courts, in such controversies, might not be as impartial as a court of the United States. The State court depends for its authority upon the State creating it; its environments consist of the nature, feeling and sympathies of the people of the State. A United States court is created by the Constitution of the Union, and in its independence of State authority and separation from State influence would be a better tribunal for the trial of questions in which the rights of the stranger were involved. This reason for the jurisdiction where the parties were citizens is stronger where one of the parties is a corporation; if the stranger citizen might be prejudiced in a State court, *a fortiori* might a stranger corporation be. Then again it was easy to see that the corporation, which was a being of the law and not a personality, yet represented persons who would likely be citizens of the State which created it. While therefore in form it was a corporation, a legal entity, and not a person representing persons who were citizens of the States which created it, the reason of the rule led to the early decisions that a corporation of a State was to be regarded, for

[1] Story on the Constitution, sec. 1700.

jurisdictional purposes, as if it were the body of the corporators who were citizens of the same State.

This view was strongly stated by Chief Justice Marshall in the case of *Bank of the United States v. Deveaux*,[1] in which, referring to the case of *Mayor, etc. v. Wood*,[2] the judges declared they could look beyond the corporation name and notice the individual. It was decided that on a question of jurisdiction in a suit by the corporation, they could look to the character of the persons composing it. This leading case was followed by others, in which it was held that the court would presume that the corporators were all citizens of the State which created the corporation, and in a later case it was held that this presumption was one which the court would not permit to be rebutted. The cases are referred to in a note.[3] In *Muller v. Dows*[4] the court said that a corporation was in fact not a citizen at all, but, as representing those who were, the jurisdictional question was within the reason of the provision of the Constitution. The conclusiveness of the presumption was first declared in *Railroad Co. v. Letson*.[5] This was followed in *Rundle v. Canal Co.*[6] and *Northern Ind. R. R. Co. v. Michigan Central R. R. Co.*[7] Though this view was opposed in the court and there was strong and persistent dissent, it may now be regarded as settled in favor of the jurisdiction, which presumes a corporation to be a citizen of the State which created it, despite the fact that all of its corporators may not be. It may be added that, where the corporation is a municipal corporation, this principle is properly conclusive, because all its inhabitants are citizens of the State of which the municipality was a part, and so as to eleemosynary corporations.

[1] 5 Cr. 61.
[2] 12 Mod. 669.
[3] Marshall v. B. & O. R. R. Co., 16 How. 316; Ohio & Miss. R. R. v. Wheeler, 1 Black, 286; Railroad Co. v. Whitton, 13 Wall. 270; Louisville R. R. v. Letson, 2 How. 497; Robertson v. Cease, 97 U. S. 646; Kansas Pacific R. R. Co. v. Atchison, T. & S. F. R. R. Co., 112 id. 414. See also Railway v. Arnaud, 16 L. J. (N. S.) C. L. 50.
[4] 94 U. S. 44.
[5] 2 How. 497.
[6] 14 How. 30.
[7] 15 How. 233.

We are justified in saying that while as an original question the rule treating a corporation as a citizen of the State which created it, as the result of the conclusive presumption above referred to, seems to stretch the meaning of the Constitution beyond its legitimate meaning according to its letter, yet, as it accords with the spirit of the Constitution, the rule may be regarded as not an injurious construction of the jurisdictional power of the United States court, and therefore as one that may be readily acquiesced in.

There is involved in the question just considered this additional rule: Under this clause jurisdiction over controversies between a State and citizens of another State was given. The force of the preposition "between" has been held to require that all the plaintiffs must be citizens of different States from all the defendants, and that if any plaintiff be a citizen of the same State with any defendant it is not a suit between citizens of different States, but *quoad* these parties between citizens of the same State. Hence the necessity of the conclusive presumption made in the cases of corporations as to the citizenship of their corporators. As we shall see more distinctly hereafter, the Supreme Court has held that the jurisdiction of the United States courts is a limited one, and that therefore, in every case, it must appear on the record itself that the Federal jurisdiction attaches. Hence it is a rule of practice in the Federal courts for the pleadings of the plaintiff to show that all of the plaintiffs are citizens of different States from all the defendants, and if this does not appear the declaration or bill is demurrable; and even where not demurred to, the court will look into the proceedings, even in an appellate court, and refuse to give judgment or decree where the record does not show the jurisdiction. In other words, they hold that, without this jurisdiction appearing on the record, the suit is *coram non judice*.[1]

[1] Ohio & Miss. R. R. v. Wheeler, 1 Black, 286; Robertson v. Cease, 97 U. S. 649; Cameron v. Hodges, 127 id. 322.

§ 378. In the case of *Scott v. Sanford*[1] it was decided that a negro, no matter where he resided, was not a citizen of the United States, capable of suing in a United States court; but now, by the fourteenth amendment to the Constitution, members of the negro race are citizens of the United States and of the State wherein they reside. So that citizenship being established, the question of the residence of the party is the main question,[2] and it must be the status of the party at the commencement of the suit.[3] But as Congress has the right to establish and ordain the inferior courts, it has also the power to define their jurisdiction, so that the act of Congress provides that no assignee of a chose in action, whatever his citizenship, can sue in a United States court, unless suit could have been brought in that court had no assignment been made.[4] Though the Constitution has defined the limits of the judicial power, it has not prescribed, but has left to Congress to prescribe, the amount of the jurisdiction which shall be vested in the courts.[5]

As already said, the citizenship, to get jurisdiction of the parties plaintiff and defendant, must be expressly averred, or the facts which constitute it must be set forth.[6] This will suffice upon all of the clauses which relate to the parties being citizens of different States; and as to what is a State, as a party, within the meaning of the Constitution, it means a State of the Union. One of these clauses is peculiar and requires a word of explanation. The Federal jurisdiction extends to cases between citizens of the same State claiming lands under grants of different States. The decision of such cases, where the power of different States to convey title was involved, is for reasons already stated proper to be left to the jurisdiction of a court having no connection with either State, but established under the Constitution of the United States. Cases of this kind have occurred and are within this jurisdiction, wherever the parties claim under grants made by the different States.[1]

[1] 19 How. 393.
[2] Curtis' Commentaries, sec. 73.
[3] Connelly v. Taylor, 2 Pet. 556; Gassies v. Ballou, 6 id. 761; Shelton v. Tiffin, 6 How. 163.
[4] Sheldon v. Sill, 8 How. 441.
[5] Turner v. Bank, 4 Wall. 10; McIntyre v. Wood, 7 Cr. 506; Kendall v. United States, 12 Pet. 616; Cary v. Peters, 3 How. 245.
[6] Cases *supra*.

The last clause to be noticed gives jurisdiction "to controversies between a State, or the citizens thereof, and foreign States, citizens, or subjects."[2] The eleventh amendment, as we have seen, excludes from the operation of this clause all suits at law or in equity commenced or prosecuted against one of the United States by citizens of another State, or subjects of any foreign State. So that while as against a State as defendant no suit can be brought by a citizen of another State, or citizens or subjects of any foreign State, the original clause remains unchanged as to a suit brought against a State by a foreign State. As to this it would seem that the foreign State may sue a State of the Union in the United States court. In any suit brought, however, by a foreign citizen or subject against citizens of any State, the alien has the right to sue, whether he sue in his own capacity or as trustee, if he have a substantive interest as trustee;[3] and if the nominal plaintiff, although a citizen, sue for the use of a citizen, the case is within the jurisdiction.[4] A foreign corporation is an alien for the purposes of suit.[5] The opposite party must be a citizen, and the alienage of the plaintiff and citizenship of the defendant must appear from the record.[6] A mere declaration of intent to become a citizen, as it does not make him a citizen, leaves him in the condition of alienage, and he may sue under this clause a citizen of a State.[7]

§ 379. The next clause has already been referred to, but further comment is necessary. While this clause gives the

[1] Town of Pawlet v. Clark, 9 Cr. 292; Colson v. Lewis, 2 Wheat. 277.
[2] Chappedelaine v. De Chenaux, 4 Cr. 306; Browne v. Strode, 5 id. 303.
[3] Chappedelaine v. De Chenaux, *supra*.
[4] Browne v. Strode, *supra*.
[5] Society, etc. v. New Haven, 8 Wheat. 464; Commercial & Vicksburg Bank v. Slocomb, 14 Pet. 60.
[6] Jackson v. Twentyman, 2 Pet. 136.
[7] Beard v. Federy, 3 Wall. 478; Jones v. McMasters, 20 How. 8; Lanfear v. Hensley, 4 Wall. 209; Semple v. Hagar, id. 436.

Supreme Court original jurisdiction in cases of ambassadors, and those to which a State is a party, the question has arisen: Is this original jurisdiction which is conferred on the Supreme Court exclusive, or may it be conferred on the inferior courts which Congress may establish? Some diversity of decisions has occurred upon this question. In *United States v. Ravara*[1] the jurisdiction of the inferior court was sustained. The contrary has been intimated by the Supreme Court in several cases,[2] but the late decisions already referred to of *Bors v. Preston*[3] and *Ames v. Kansas*,[4] and the cases cited therein, settled this question against the exclusiveness of the original jurisdiction. It is clear that Congress can confer on the Supreme Court no other original jurisdiction than the Constitution has vested in it,[5] but it may confer upon inferior courts a concurrent jurisdiction with the Supreme Court as to the cases in which it has original jurisdiction, and then confer on the Supreme Court the appellate jurisdiction from the judgment of the inferior courts in such cases. But it must be observed that such appellate jurisdiction in those cases does not arise from the nature of the parties, but from the nature of the case — from the subject-matter of litigation. The clause then provides: "In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make." This appellate jurisdiction of the Supreme Court then embraces all other subjects of jurisdiction set forth in the first clause of this second section, except those in which, as already seen, it has original jurisdiction.

An interesting question, already referred to, may now be considered further. Does the appellate jurisdiction of the Supreme Court reach to judgments of the State courts as well

[1] 2 Dall. 297; Story on the Constitution, 1699, and Kent's Com., lecture 15.

[2] Marbury v. Madison, 1 Cr. 137; Martin v. Hunter, 1 Wheat. 337; Osborne v. Bank, 9 id. 420.

[3] 111 U. S. 252.

[4] 111 U. S. 449.

[5] Marbury v. Madison, 1 Cr. 137.

as to those of the inferior United States courts? The reasoning of the Supreme Court in the leading cases of *Martin v. Hunter*, *supra*, and in *Cohens v. Virginia*,[1] is very strong to show that, unless the appellate jurisdiction extended to the judgments of the State courts, it would become necessary, where the State court had jurisdiction of a case within the judicial powers given by the Constitution to the United States courts, to remove the cases at once from the State courts into the United States courts for trial. In the language of the court in the case of *Martin v. Hunter*,[2] *supra*, this would be the case "not only when the *casus fœderis* should arise directly, but when it should arise incidentally, in cases pending in State courts." It is obvious that such a construction would necessitate a great abridgment of State jurisdiction in the primary stages of the litigation, and a need for a constant removal from the State to the Federal courts, even in the midst of a trial, when the Federal question first emerged. Congress, therefore, has the discretion to prescribe the jurisdiction of the inferior Federal courts, and it was thought best to leave a large concurrent jurisdiction to the State and Federal courts in many cases, and to bring to final review by the Supreme Court the judgments of the State courts in cases within the legitimate jurisdiction of the Federal judiciary. It has been already stated[3] that this appellate jurisdiction from the judgments of State courts was vigorously contested in the case of *Hunter v. Martin*,[4] but for eighty years the contest has ceased, and the appellate jurisdiction of the Supreme Court to the judgments of State courts has been acquiesced in universally; and it is best that it should be so, rather than to make necessary the exercise of the power, which unquestionably existed, to remove the case from the State court to the inferior Federal court, in order that an appeal from the judgment of the Federal court to the Supreme Court might insure a final decision by the

[1] 6 Wheat. 264.

[2] 1 Wheat. 339.

[3] *Ante*, § 367.

[4] 4 Munford, 1 (Va.).

latter upon all questions of Federal jurisdiction. In some way it is obvious that this final resort to the Supreme Court on all questions of Federal jurisdiction should be secured in order to a uniformity of operation of the laws of the United States and treaties made under their authority in all of the States of the Union.

Under the terms of this important section, Congress may establish courts inferior to the Supreme Court and give exclusive jurisdiction to these courts in some of the cases of Federal jurisdiction therein mentioned; *e. g.*, if it would be proper, give this exclusive jurisdiction in all cases to which the United States is a party, and in cases of prize, in some of which the Constitution itself requires that the jurisdiction should be exclusive.[1] So it has been said by the Supreme Court in the case of *United States v. Bevans*,[2] that Congress might give the Federal courts jurisdiction of crimes committed on a public man-of-war of the United States.

§ 380. Another question has arisen: Can Congress vest in the State courts any part of the judicial power of the United States? This has been intimated by the *Federalist*.[3] In *Martin v. Hunter*, *supra*, it was denied,[4] and this would seem to be the better opinion. It is true, the State courts having had jurisdiction, prior to the adoption of the Constitution, of a large number of cases which are within the Federal jurisdiction under the Constitution, may still continue to exercise that jurisdiction; but that is very different from the Congress having power to vest in the State courts any part of the jurisdiction which the Constitution has vested in the Federal judiciary. It is true that the State courts may enforce, by judicial action, rights secured to a party under the Constitution and laws of the United States. According to this, it has been held that a State court may administer

[1] Martin v. Hunter, *supra;* Cohens v. Virginia, *supra;* Story's Commentaries, sec. 1748; 1 Kent, lecture 18; 1 Tucker's Blackstone, Appen., 181, 183; Georgia v. Madrazo, 1 Pet. 128; Houston v. Moore, 5 Wheat. 25, 69. See also Federalist, No. LXXXII.

[2] 3 Wheat. 336.

[3] Federalist, Nos. XLV, LXXXI.

[4] Houston v. Moore, 5 Wheat. 68.

the naturalization laws as well as the Federal courts,[1] and this has been done in other cases.[2] Can either State or Federal court interfere with the other in the exercise of their respective jurisdiction? It has been held with great consistency that these two systems of courts are independent and complete within their respective spheres, and that neither can intrude upon the action of the other. By an act of Congress in 1793, the United States courts are forbidden to enjoin proceedings in the State courts.[3]

On the other hand, the State court and State cannot interfere with the proceedings and judgments of the United States courts.[4] The cases herewith cited are, however, cases where the State and Federal courts have concurrent jurisdiction; but where the State court is proceeding in a matter as to which a Federal court has exclusive or paramount jurisdiction, it is otherwise. Thus, in an admiralty proceeding, a monition may issue to a party proceeding in a State court to present his claim in the admiralty court in order to a complete remedy, *in rem*, between all the parties.[5] And where a valid order of removal of a case from a State court to a Federal court is made, and the State court still proceeds, it has been said that an injunction will issue from the Federal court to the State court;[6] but the better rule has been established that the vindication of the rightful jurisdiction of the Federal court, under the order of removal, will be left to an appeal from both courts to the Supreme Court, where the judgment of a State court, if the order of removal is valid,

[1] Rumpf v. Commonwealth, 6 Casey, 475.

[2] Claflin v. Houseman, 93 U. S. 136; United States v. Jones, 109 id. 513; Ex parte McNeil, 13 Wall. 236; Illinois v. Delafield, 8 Paige, 527; Delafield v. Illinois, 2 Hill, 159; Teal v. Felton, 12 How. 292.

[3] Ex parte Dorr, 3 How. 103; Taylor v. Carryl, 20 id. 596; Leroux v. Hudson, 109 U. S. 469; Haines v. Carpenter, 91 id. 254; Dial v. Reynolds, 96 id. 340; Watson v. Jones, 13 Wall. 679; Peck v. Jenness, 7 How. 612.

[4] McKim v. Voorhies, 7 Cr. 279; United States v. Peters, 5 id. 115; United States v. Wilson, 8 Wheat. 253; Wayman v. Southard, 10 id. 21; Bank of United States v. Halstead, 10 id. 51.

[5] Steamship Co. v. Manufacturing Co., 109 U. S. 578.

[6] French v. Hay, 22 Wall. 250.

will be wholly reversed, and the judgment of the Federal court in such cases will be affirmed; or where the order of removal is invalid the Supreme Court will reverse its action.[1]

So the United States courts, sitting in bankruptcy, may enjoin a State court from impairing the right of the assignee in bankruptcy or distributing the assets of the bankrupt by its order.[2] But in such a case as this it will not interfere with the rightful jurisdiction of the State court as to liens upon the bankrupt's estate prior to the bankrupt proceedings.[3] In cases, therefore, of concurrent and co-ordinate jurisdiction, the court first having possession must be allowed to proceed without interference by its concurrent rival.[4]

§ 381. Some other points may be considered. When the United States courts take jurisdiction of a case on account of the character of the parties thereto, they administer the laws of the State as the State courts would do; they recognize the common law and the statute law of the State and the decisions of the State courts, on its own Constitution and laws, on questions as to land or other property. As to these they hold the State courts to be the final arbiters for the interpretation of its laws in their application to controversies concerning property contracts and torts; for the Federal courts have not jurisdiction of such cases on account of subject-matter, but only incidentally on account of subject-matter, because of the character of the parties. It would destroy the uniformity of the operation of State laws if Federal courts departed from the precedence of State courts in their own decisions.[5] If the State decisions are at variance, the United States court will follow the last-settled adjudication of the highest State

[1] Railroad Co. v. Whitton, 13 Wall. 270; Removal Cases, 100 U. S. 457.
[2] Ex parte Christy, 3 How. 292.
[3] Peck v. Jenness, 7 How. 612.
[4] Riggs v. Johnson Co., 6 Wall. 166; French v. Hay, 22 id. 250; Akerly v. Vilas, 15 Wis. 401.
[5] Wheaton v. Peters, 8 Pet. 591; Livingston v. Moss, 7 id. 469; Railroad v. Railroad Co., 20 Wall. 137; Townsend v. Todd, 91 U. S. 452; Elmwood v. Marcy, 92 id. 259; Railroad Co. v. Georgia, 98 id. 359; Walker v. Harbor Commissioners, 17 Wall. 648; Shelby v. Guy, 11 Wheat. 361; Bucher v. Cheshire R. R. Co., 125 U. S. 555.

court;[1] and this is in accordance with the provision of the statute of the United States,[2] which in terms provides: "The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the courts of the United States in cases where they apply." But this rule and this statute will not apply where the State decision is on a question of which, by the Constitution of the United States, the Federal judiciary has the final decision.[3] Nor will it apply to questions not regulated by statute, but of general law, such as the law of negotiable paper, insurance, and the like. These questions depend on principles of general law, and not on local statutes.[4] Nor does it apply where the State statute is in the nature of a contract and the State law undertakes to impair its validity. Such a case, as we shall see, is a case arising under the Constitution of the United States, which forbids a State to impair the obligation of a contract.[5] In *Bucher v. Cheshire R. R. Co.*, *supra*, the court said that the statute of the United States applied to trials at common law, but that the rule did not apply to cases in admiralty or in equity, nor to criminal offenses against the United States; but the decision of its highest court, as to the Constitution and statutes of a State, was regarded as part of the Constitution and statute of the State and binding upon the courts of the United States.[6] In the case of *Burgess v. Seligman*[7] the whole sub-

[1] Green v. Neal, 6 Pet. 291; Suydam v. Williamson, 24 How. 427; Fairfield v. Gallatin, 100 U. S. 47.
[2] R. S., sec. 721.
[3] State Bank v. Knoop, 16 How. 369; Jefferson Branch Bank v. Skelly, 1 Black, 436.
[4] Chicago v. Robbins, 2 Black, 418; Boyce v. Tabb, 18 Wall. 546; Venice v. Murdock, 92 U. S. 494.
[5] Gelpcke v. Dubuque, 1 Wall. 175; Olcott v. Supervisors, 16 id. 678; Kring v. Missouri, 107 U. S. 221; Virginia Coupon Cases, 114 id. 269; McGahey v. Virginia, 135 id. 662.
[6] Leffingwell v. Warren, 2 Black, 599; Luther v. Borden, 7 How. 1; Post v. Supervisors, 105 U. S. 667. And that it also applies to rules of evidence, see Ex parte Fisk, 113 U. S. 713.
[7] 107 U. S. 20.

ject has been ably reviewed, and in the case of *Railroad Co. v. Putnam* it was held that the power of a court of the United States in charging a jury was not restrained by the State statute forbidding judges to express an opinion on the facts, citing *Nudd v. Burrows;*[1] and in *Peters v. Bain*[2] the Supreme Court accepted the construction given to a Virginia statute by the highest court of that State as controlling its decision. In that case the decision of Waite, C. J., in the circuit court of the United States, and the opinion of Chief Justice Fuller fully sustain the propositions stated. In all these cases the Federal courts differ from the decisions of the State courts as to subjects clearly within State jurisdiction, and *e contra* State courts differ from those of the United States as to those in the Federal jurisdiction. This is according to well-recognized rules of judicial comity.

§ 382. Can a State court take jurisdiction of a case for enforcing a right arising under the Constitution of the United States or a law of the United States? The English courts enforce in the domestic forum a right arising under foreign law.[3] The forum of trial will regard the foreign law in its decision of the case.[4] The Constitution and the laws of the United States are the laws of each State; hence, unless the Constitution of the United States or a law of Congress excludes the jurisdiction of a State court, in a case of a right arising under the Constitution or law of the United States, the State court, as it had jurisdiction before, can still exercise it.[5] There is another form of the same question: Can a State court take jurisdiction of a case arising under local law, when the defense justifies under the Constitution or law of the United States; *e. g.:* Can a citizen sue a Federal officer for trespass when he justifies under the Constitution or law of Congress?

[1] 91 U. S. 426.
[2] 133 U. S. 670.
[3] Mostyn v. Fabrigas, Cowper, 161.
[4] Buron v. Denman, 6 Exch. 166.
[5] Federalist, No. LXXXII; Claflin v. Houseman, 93 U. S. 136; F. & M. Bank v. Bank, 92 id. 29; Ex parte McNeil, 13 Wall. 236; The Moses Taylor, 4 id. 429; Eyster v. Gaff, 91 U. S. 591; Bors v. Preston, 111 id. 282; Ames v. Kansas, Id. 449; United States v. Jones, 109 id. 513.

There is no good reason against this jurisdiction of a State court, unless the Constitution or law of the United States gives exclusive jurisdiction to the United States court. It is true, as we have seen, that this exclusive jurisdiction may be given to the United States court by a removal of the case from the State to the United States court, but unless so removed the State court will have jurisdiction.[1] This principle applies to the case of a suit against a military officer of the United States who justifies under the articles of war;[2] but where the United States officer holds property under process from the United States court, suit cannot be brought against the officer in the State court, for its judgment, if against the officer, would virtually oust the Federal court of the custody of the property through its officer.[3] And this principle of non-interference by comity is extended by the United States court to a State court in case a similar controversy arise.[4] In both classes of cases the rule is that the court which first obtained jurisdiction by service of process will not be interfered with by the other by injunction, *habeas corpus*, or other interference with its jurisdiction. The exercise of its jurisdiction thus first obtained will be free from interference until final judgment or execution.[5]

All cases, however, where the cause of action or the defense to an action was based on the Constitution of the United States, or a law of Congress or treaties made under the authority of the United States, will be subject to an appeal from the final judgment of the highest State court to the Supreme Court of the United States. From what has been already said, it will be apparent, therefore, that the power vested in the Supreme Court of the United States to take cog-

[1] Slocum v. Maybury, 3 Wheat. 1; Gelston v. Hoyt, 3 id. 247; Teal v. Felton, 12 How. 284; Buck v. Colbath, 13 Wall. 334; Hagan v. Lucas, 10 Pet. 400; Peck v. Jenness, 7 How. 624; Day v. Gallup, 2 Wall. 97.
[2] Wise v. Withers, 3 Cr. 337; Wilkes v. Dinsman, 7 How. 89; s. c., 12 id. 404; Dynes v. Hoover, 20 id. 65.
[3] Home v. Freeman, 20 How. 583; Buck v. Colbath, *supra;* Ames v. Kansas, 111 U. S. 449.
[4] Diggs v. Wolcott, 4 Cr. 179; Peck v. Jenness, 7 How. 624.
[5] Rio Grande R. R. Co. v. Gomila, 132 U. S. 478.

nizance of appeals from the decision of the Supreme Court of a State, upon questions arising under the Constitution, laws or treaties of the United States, will amply protect these from violation by the decisions of State courts and give uniformity to the decisions in all the States in respect to them under the final judgment of the Supreme Court of the United States.

§ 383. This appellate power, given to the Supreme Court, from the decisions of the inferior courts of the United States, as well as from the decision of the highest appellate court of a State, covers the whole range of subjects which by the second section of this article are embraced within the judicial power of the United States. In the second clause and second section, after stating the cases already referred to in which the Supreme Court shall have original jurisdiction, the clause gives appellate jurisdiction to the Supreme Court, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. The language, "both as to law and fact," gave rise to apprehensions when the Constitution was under consideration by the people of the different States, to which the *Federalist*[1] refers, and in which Mr. Hamilton expressed the opinion that it would not give the power to the Supreme Court to re-examine facts decided by the juries in the inferior courts; but he insisted that it applied only to those cases, as in equity and in admiralty, where jury trials did not exist, and where the facts decided by the court would be embodied in the record which came to the appellate tribunal. The question, however, was not left to this reasonable view of the distinguished writer, but was made the subject of the seventh article of amendment proposed in the first Congress under the Constitution, and subsequently ratified by the States. That article reads as follows: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United

[1] No. LXXXI.

States, than according to the rules of the common law." This important amendment preserved the integrity of jury trial, so as to avoid the criticism which had been made upon the original Constitution, and excluded the re-examination by the Supreme Court of any fact, tried by a jury, otherwise than according to the rules of the common law. Those rules allow a motion for a new trial to the court itself, and would necessarily involve a re-examination by the appellate tribunal of the judgment of the court upon that motion, either in granting or refusing a new trial by jury.

The third clause of this second section reads thus: "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." This trial by jury, in all criminal cases except impeachment, is but a re-enactment of the thirty-ninth article of King John's Magna Carta, in the year 1215. The eulogium of Blackstone,[1] of De Lolme,[2] and of Mr. Justice Story,[3] on this provision, may be referred to without being quoted. It will be seen, however, that it provides that the trial shall be held within the State where the crime is committed, etc. Much uneasiness was manifested at the time of the adoption of the Constitution, which caused the adoption of the fifth and sixth articles of amendment, on which comment has already been made in a former part of this work, and need not be repeated here.

The power of Congress is largely discretionary as to the distribution of jurisdiction between the inferior courts which they may from time to time ordain and establish. In a work on the Constitution it is hardly necessary to go into an analysis of the acts of Congress which have distributed the jurisdiction of the United States among the several

[1] 3 Blackstone's Commentaries, 378–381.

[2] Book 1, ch. 13; Book 2, ch. 16.

[3] Story's Constitution, secs. 1773, 1774.

courts. It may be sufficient to say that in a great many cases Congress has left to the State courts a concurrent jurisdiction with the Federal courts; but we have seen, where the Constitution confers jurisdiction upon the Federal courts, it is competent for Congress to make the jurisdiction exclusive. Judge Cooley, whose accuracy will be a voucher for his statements, has given, in his judicial work on the Constitution, this enumeration of the cases and proceedings where Congress has vested exclusive jurisdiction in the courts of the Union: "All crimes and offenses cognizable under the authority of the United States; all suits for penalties and forfeitures incurred under the laws of the United States; all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it; all seizures under the laws of the United States, on land or waters not within admiralty and maritime jurisdiction; all patent and copyright cases; all proceedings in bankruptcy; all controversies of a civil nature where a State is a party, except between a State and its citizens, and between a State and citizens of other States or aliens."[1] So Federal courts have original jurisdiction of actions under the postal laws; suits for drawbacks of duties, and other cases set out in the Revised Statutes of the United States;[2] also of suits by the United States, or any officer thereof, suing under authority of an act of Congress; suits arising under the revenue laws; suits arising under any law relative to the slave trade; and suits brought by any person to recover damages for an injury to person or property on account of any act done by him under any law of the United States for the protection or collection of any of its revenues, or to enforce the rights of citizens of the United States to vote in any State; also of suits of a civil nature, at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum of five hundred dollars (by act of 1887 changed to two thou-

[1] Cooley on the Constitution, p. 138 [2] R. S. U. S. (1878), secs. 563, 711. *et seq.*

sand dollars), and the United States are petitioners, or where the suit is between a citizen of the State in which it is brought and the citizen of another State. In many of the suits just referred to, the States have concurrent jurisdiction, as a plaintiff might sue a defendant in a State court to his disadvantage, and he would naturally prefer that his case should be tried in the Federal court. To reach all such cases, though brought in the State court within the jurisdiction of the Federal courts, Congress has gone further, and has made large provision for removing cases from State courts, having original jurisdiction of them, into the inferior Federal courts for trial. Judge Cooley has mentioned a number of cases of this kind in the work just referred to.[1] A single instance may be mentioned: A Virginia plaintiff sues a Massachusetts defendant, whom he reached by process in Virginia, in the Virginia court. By the Constitution, this suit between citizens of different States is within the jurisdiction of the United States court. The law of Congress gives him a right to remove it. The same plaintiff might sue the same defendant in a Massachusetts State court, and this might be satisfactory to the defendant, but not to the plaintiff. After the suit was brought, a former law permitted the plaintiff to remove the case to the United States court, but the act of 1886–87 prevents this on the ground that the plaintiff, having made his election, shall not be allowed to remove. It is further provided that, on affidavit by a defendant corporation that it has a defense under the Constitution of the United States, no matter what the amount involved, the case shall be removed to the Federal court. The cases illustrative of this practice are very numerous, and may be referred to in the note.[2] This right of removal, granted by

[1] Cooley's Constitution, pp. 139–59.

[2] Teall v. Felton, 1 N. Y. 537; s. c. in error, 12 How. 284; Boom Co. v. Patterson, 98 U. S. 403; Strauder v. West Virginia, 100 id. 303; Tennessee v. Davis, Id. 451; Virginia v. Rives, Id. 313; Gaines v. Fuentes, 98 Id. 10; Railroad Co. v. Whitton, 13 Wall. 270; Insurance Co. v. Morse, 20 id. 445; Insurance Co. v. Pechner, 95 U. S. 183; Gold Washing Co. v. Keyes, 96 id. 199; Koontz v. Baltimore & Ohio R. R. Co., 104 id. 5.

United States law, cannot be taken away or limited by State law; and where a lawful order of removal has been made, and the State court proceeds to judgment, its judgment is reviewable, on appeal to the Supreme Court from the highest State court, under the twenty-fifth section of the Judiciary Act of 1789. On the contrary, if the order of removal was submitted to by the State, but is illegal, the Supreme Court will reverse the judgment and remand the case to the State court for trial.[1] This results from the fact that the jurisdiction of the United States court is rightful, and may be made exclusive of the State court, upon the legal order for removal; therefore the case in the State court was *coram non judice*. On the other hand, if the order of removal in the Federal court be illegal, the judgment in that court is void because *coram non judice*. The provisions of the statute of 1878, above referred to, have been greatly enlarged by the act of March 3, 1887, modified by the act of 1888.[2] These acts have largely abridged the exclusive jurisdiction of the United States courts, and were so intended.[3] In this last act, National banks must sue and be sued in State courts as if they were State corporations; and so State courts have jurisdiction of a suit brought against a receiver of a State railroad company appointed by the Federal court in that State.

§ 384. The policy of removal of cases in the State courts to the United States courts, established by the original act, was extended by the third section of the act of March 2, 1833,[4] in consequence of the laws of South Carolina passed to sustain its ordinance of nullification. Those laws provided for prosecuting and suing an officer of the United

[1] Koontz v. Baltimore & Ohio R. R. Co., *supra;* Stone v. South Carolina, 117 U. S. 439; Graves v. Corbin, 132 id. 571; The Removal Cases, 100 id. 457.

[2] 24 U. S. Stat. at Large, ch. 373, p. 523; 25 Stat. at Large, pp. 433, 435.

[3] Smith v. Lyon, 133 U. S. 315; Fisk v. Henarie, 142 id. 459; Tennessee v. Bank, 152 id. 454; Hanrick v. Hanrick, 153 id. 192; In re Pennsylvania Co., 137 id. 451; Mo. Pac. Ry. Co. v. Fitzgerald, 160 id. 556.

[4] 4 U. S. Stat. at Large, 632.

States for acts done by him under the tariff laws. For any act done under the color of any revenue law of the United States, or on account of any right, title or authority claimed by such officer or other person set up under such laws, the case might be removed to a Federal court; or in case of the imprisonment of any person for acts done by him under the authority of the United States, a *habeas corpus* from the Federal court for his relief would be granted. This act was somewhat modified and enlarged by the act of 1871[1] and made to apply to criminal prosecutions in the State courts.

It is somewhat singular that this statute was called into operation in respect to the fugitive slave law, and the attempted nullification of that law by the State of Ohio. The United States marshal held, under the United States law, a fugitive slave; a State judge ordered his discharge, which the marshal refused to obey, and the State court committed him for contempt. Mr. Justice McLean, upon *habeas corpus*, discharged the marshal.[2] In the case of *United States v. Jailer, etc.*, on charge of murder, in the courts of Kentucky, the prisoner offered to show that what he did was under the authority of the United States in the execution of the revenue laws. Judge Ballard discharged him.[3] Many other cases of like character have been provided for in the Revised Statutes of 1878. It is provided that in case of the denial to any person, in a civil suit or criminal prosecution in a State court, of any right secured to him by the Constitution or laws of the United States, or in any suit against any civil or military officer for any arrest by virtue of, or under color of, authority derived from any law providing for the equal rights of citizens and the like, such suit or prosecution may, upon petition verified by oath of the defendant, be removed to the circuit court of the United States.[4] It was under section 643 that the important case of *Tennessee v. Davis* arose.[5]

[1] 16 Stat. at Large, 438. See also R. S., sec. 643.

[2] Ex parte Robinson, 6 McLean, 355; Ex parte Bridges, 2 Wood, 428.

[3] 2 Wall. Jr. C. C. 521.

[4] R. S. of U. S. 641–43.

[5] 100 U. S. 257.

Davis was indicted in the State court of Tennessee for murder. He made affidavit that the killing charged was committed in his necessary self-defense, while engaged in the discharge of the duties of his office as internal revenue collector, while attempting to seize an illicit distillery, and while thus engaged he was assaulted and fired upon, and, in defense of his life, returned the fire by which the killing was done. He prayed a removal of the case into the circuit court of the United States. Three questions were adjourned to the Supreme Court: *First.* Whether the indictment for murder was removable to the circuit court of the United States under section 643? *Second.* If removable, whether there is any mode of trial prescribed in the act of Congress? *Third.* If not, can a trial be had in the circuit court of the United States? The first and third questions were answered in the affirmative; as to the second, it was replied that he must be tried under the laws of the State, in the courts of the United States, according to its own forms of proceeding. In this case Justices Clifford and Field dissented in an elaborate opinion, holding that no United States court could have jurisdiction of a homicide committed in the State of Tennessee. With due respect to the decision of the court the author must express his assent to the views of the dissenting judges. The removal was based upon the ground that the United States should protect its officer from prosecution by a State for any alleged crime in the discharge of his Federal office. The removal assumes that the State court would disregard the defense, and violates in its operation the comity which is due from the one government to the other. The law assumed that the United States court alone would uphold the defense. It could not claim that the United States court had jurisdiction to try the offense. The trial involved the hearing of the defense, and a decision upon that, with the right of appeal as shown above, if the decision of the State court had been adverse to the defense of the prisoner. As that defense arose under a law of the United States, the twenty-fifth section of the Judiciary Act affords ample protection to the

prisoner by an appeal from the highest State court to the Supreme Court of the United States. But the removal ousted the State from all jurisdiction to try and punish an offender against *its own law*, and asserted for the United States court, upon the application of the prisoner, an exclusive jurisdiction in that court to try an offender against a State law.

This judicial anomaly by which the court of the United States must try a prosecution by the State against its own citizen presents difficulties of a striking character. Is a jury to be selected according to the law of a State or according to the laws of the United States? If convicted, there was no right to appeal to the Supreme Court of the United States; and the right of appeal to the Supreme Court of the State, which he would have had if convicted in the inferior State court, is out of the question. Again, the question arises: If convicted, who may pardon him — the Governor of the State or the President of the United States? The decision in that case was substantially upheld, however, in *Strauder's Case*,[1] *Virginia v. Rives*,[2] *Ex parte Virginia*,[3] and in *Neagle's Case*.[4] In *Neagle's Case* the defendant was a marshal of the United States who accompanied the venerable and esteemed Justice Field upon his duties as the Circuit Judge in California. Terry, who had threatened the life of Judge Field, assaulted him with great violence while sitting at the dinner-table. Marshal Neagle, in defense of the Judge, shot and killed Terry. The State indicted him for homicide, but before trial he sued out a *habeas corpus* from the United States court, alleging the justification of the act by his duty to defend Justice Field. The United States court discharged him from the custody of the State, and the Supreme Court affirmed the decision. This was done under the Revised Statutes of 1878, section 641. The dissent in this case was very strong. The author, with profound respect for the distinguished judge in whose defense the marshal acted, ventures to concur with the dissent in this case,

[1] 100 U. S. 303.
[2] 100 U. S. 313.
[3] 100 U. S. 339.
[4] 135 U. S. 1.

upon the ground that it goes farther than the doctrine laid down in the case of *Tennessee v. Davis*, *supra*, for it discharged from trial the man who committed the homicide, and did not even remove the case, as in *Tennessee v. Davis*, from the State court to the United States court for trial. A single judge of the United States court discharged Neagle from custody and trial by the State court. In addition to all of the objections stated above to the decision in the case of *Tennessee v. Davis*, the decision in *Neagle's Case* involves the exercise of the pardoning power, which is an executive function, by the judge; for what is pardon, if immunity from prosecution of all crimes be not pardon? In *Neagle's Case* Chief Justice Fuller and Justice Lamar dissented.

Another case was provided for in the act of August 29, 1842.[1] The act was passed in respect to the celebrated McLeod case. McLeod was prosecuted for murder on the Caroline, which was a vessel supposed to be engaged in aiding a revolutionary movement in Canada. He was indicted in the State court of New York for murder, and defended on the ground that, as an officer of Her Majesty's navy, he made the attack for which Her Majesty's government held itself responsible; that the killing was not a personal homicide, but was an act of *quasi*-war. Pending the prosecution quite an extensive correspondence occurred between the government of Great Britain and the government of the United States, in which the former demanded the release of McLeod, and it was felt to be a very delicate situation. Had McLeod been convicted in the State court, despite his defense, the United States might have been involved in hostile relations with Great Britain. The situation suggested the passage of a law providing that wherever a defense rested, as in this case, upon the relations of the offender to a foreign government, and the act, seemingly a violation of State law, was international in its character, proper to be arbitrated between the government of the Union and the foreign power,

[1] 5 Stat. at Large, 529, 641.

the offender should have the privilege of a *habeas corpus* from the United States court, and upon the defense appearing as indicated, that he should be discharged. The validity of this regulation by Congress, it seems to the author, rests upon very solid ground. The United States government has charge of the international relations of the States with foreign powers; and furthermore, under a clause of the Constitution in respect to belligerent operations, has the express power to make rules concerning captures on land and water.[1] The capture of McLeod under the circumstances was a highly belligerent act. He was a prisoner of war for the international act of belligerency, and a prisoner of war cannot be tried by a State for an act of war within the State. His capture brought him within the range of the Federal power, and it was proper to exercise for his discharge the jurisdiction of the United States courts. The case above referred to will be considered hereafter in another connection — in commenting upon the nature of the fourteenth amendment to the Constitution.

§ 385. A large class of cases has arisen where, in aid of and as a branch of the appellate jurisdiction of the Supreme Court, the exercise of that jurisdiction through the *habeas corpus* right has been of great service. The doctrine may be thus stated: When a court, by process of contempt or any other process, undertakes to punish with imprisonment a man for refusing to comply with its order, which the court had no authority to make, the original order being void, the punitive order is equally void, and the party, though no appeal lies to the Supreme Court from the order of the inferior court, may by the writ of *habeas corpus*, issued from the Supreme Court, be discharged from his imprisonment.[2] The same doctrine was extended in *Ex parte Bain*.[3] In this

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

[2] Ex parte Lange, 18 Wall. 163; Ex parte Parks, 93 U. S. 18; Ex parte Siebold, 100 id. 371; Ex parte Virginia, Id. 339; Ex parte Fisk, 113 id. 713; Ex parte Rowland, 104 id. 604; Ex parte Watkins, 7 Pet. 568; Ex parte Milburn, 9 id. 704; Ex parte Kaine, 14 How. 103.

[3] 120 U. S. 1.

case the prisoner was convicted and sentenced to imprisonment by a circuit court of the United States, on an indictment amended by the district attorney, by leave of the court, after it had been returned by the grand jury. It was held that such indictment was not found by a grand jury, and under the fifth amendment of the Constitution the prisoner could not be tried on it, and that his conviction and imprisonment were void. No appeal lay from the judgment of the Circuit Court, but the Supreme Court discharged the prisoner because the judgment was *coram non judice* and void. In the case of *In re Ayres*,[1] the same circuit judge enjoined the Attorney-General of Virginia from bringing suit in behalf of the Commonwealth against its taxpayers. The Attorney-General refused to obey the injunction, and the court committed him for contempt. He prayed a *habeas corpus* from the Supreme Court, who discharged him on the ground that the order of injunction by the circuit judge was void and the commitment for contempt was equally so; and, though no appeal lay from either order to the Supreme Court, yet the illegality of the imprisonment required the discharge under the *habeas corpus*. Again, the powers of the judiciary of the United States are, in terms of the Constitution, judiciary powers only, and they imply no political power. They accept the determination of the political departments of the government as conclusive, whether war exists or peace has been restored. What is the *de facto* government of another country; the authority of foreign ministers; the admission of a State to the Union; the restoration of the seceded States to the Union; the extent of the jurisdiction of a foreign power; the relations of the Indians to the government,—are all questions which belong to the executive and legislative departments of the government, and in respect to which the judiciary power does not apply, except in regard to what has been decided by the political departments.[2] This principle has been pressed to an extreme point,

[1] 123 U. S. 443.

[2] United States v. Anderson, 9 Wall. 56; Gelston v. Hoyt, 3 Wheat. 246; Foster v. Neilson, 2 Pet. 253; Luther v. Borden, 7 How. 1; Georgia v. Stanton, 6 Wall. 50; Williams v. Insurance Co., 13 Pet. 415; Kansas Indians, 5 Wall. 757; United States v. Holliday, 3 id. 407.

to which attention will now be called. Upon the passage of what was generally known as the "Reconstruction Measures" in 1867, vetoed by President Johnson, but passed *non obstante* his objection by two-thirds of both Houses, which substantially subjected the Southern States to a government of military satraps, the State of Mississippi filed a bill against the President praying an injunction restraining the execution of such unconstitutional laws by the President of the United States. The case was argued very fully, and the Supreme Court unanimously refused to allow the bill to be filed, on the ground that it had no judicial power to enjoin the President in the performance of his official duties.[1] The State of Georgia filed a bill against Secretary Stanton upon the same grounds substantially as in the previous case, and the Supreme Court dismissed the bill for want of jurisdiction upon like grounds. Another effort was made by a bill which it was proposed to file against Generals Grant, Meade and others. The report of the cases does not state wherein they differed from the former cases, nor what the court did with them.

These decisions seem to settle the question that the Supreme Court is no arbiter between a State of the Union and the United States government as to any political issue, and that despite the unconstitutionality of the reconstruction acts there was no judicial power to decide upon that question unless it arose in a case between parties where property and personal rights were involved. The political right of a State to be protected against the unconstitutional reconstruction laws of the government is without remedy before the Supreme Court of the United States; and this was held though in the case of *Georgia v. Stanton* the bill charged that the effect of the reconstruction measures would be to dispossess the State of its public property as well as of its polit-

[1] State of Mississippi v. Johnson, 4 Wall. 475.

ical power; the court saying that the question of property was only the effect of the dispossession of the political power and incident to it. In *McCardle's Case*, one imprisoned under the judgment of a military court, organized under the reconstruction laws, sought to be released by *habeas corpus* from the Supreme Court because of the unconstitutionality of those laws and judgment of the courts in pursuance of them. The Supreme Court decided that it had jurisdiction to issue the writ, but postponed the consideration of it until the next term. In the interval Congress passed the Drake bill over the veto of President Johnson, which bill took away the jurisdiction from the Supreme Court to hear the *habeas corpus*. At the next term the court dismissed the writ of *habeas corpus* and refused to release McCardle because it had been divested of its power by the Drake bill.[1] There can be no doubt that except for the Drake bill the Supreme Court would have decided to release McCardle on the ground above stated, because the personal right of a citizen was involved as the consequence of an unconstitutional law.

Courts-martial are the courts which are constituted under the rules and articles of war for the trial of offenses arising under the military and naval service,[2] and of militiamen when called into the actual service of the United States. The power to establish these does not exist as part of the judicial power of the United States, but as part of the general war power: "To make rules for the government and regulation of the land and naval forces. To provide for calling forth the militia to execute the laws of the Union," etc.[3] The fifth article of amendment saves this power in the exception it makes in the following language: "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 in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." The celebrated case of *Milligan*[4] was a case of condemnation to

[1] 6 Wall. 318; s. c., 7 id. 506.
[2] Martin v. Mott, 12 Wheat. 19; Wise v. Withers, 3 Cr. 331.
[3] Const. U. S., Art. I, sec. 8, clauses 14, 15.
[4] 4 Wall. 2.

death of a citizen of Indiana by a court-martial approved by the President. The Supreme Court, after full argument, held the trial, conviction and sentence to be a violation of the Constitution. It may therefore be asserted that courts-martial are only for the trial of persons in the army, navy or military service, when in actual service. Military courts or commissions have been justified by the laws of war and for the trial of persons whose acts impede or obstruct military operations. When the army is in the enemy's country, provincial courts can be established under military orders, as in the case of the Mexican provinces in the military possession of the United States army.[1] While the United States army was in possession of the State of Tennessee during the civil war, Coleman, a soldier of the army, killed a citizen. There were no civil courts to try him for the homicide, and he was tried by a military tribunal and acquitted. After the war he was indicted for the homicide by the civil court of Tennessee and convicted. The Supreme Court held that his acquittal by the military tribunal exempted him from any other trial, and that the conviction by the civil court was wrong and reversed it.[2] The doctrine seems to be sound that, in the exceptional cases mentioned, where the civil courts are not open, a military tribunal may constitutionally try such case. But it must be confessed that the trial of a citizen by a military court is so obnoxious to our Constitution, and especially to the fifth article of amendment above cited, that it is difficult to justify any judgment upon a conviction by such a court.

The last class of courts to which attention is called are the courts of the Territories. As a Territory is not a State of the Union, and is subject to the government of Congress during its temporary existence as a Territory, it is held that the courts established in the Territories are not courts of the United States. Congress may establish them, and regulate their jurisdiction as part of their governmental power

[1] Jecker v. Montgomery, 13 How. 512; The Grapeshot, 9 Wall. 129.
[2] Coleman v. Tennessee, 97 U. S. 509.

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 Wall. 434; Hornbuckle v. Toombs, Pet. 511; Clinton v. Englebrecht, 13 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

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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.*

[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.

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]

§ 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.

duty to preserve the health or morals of the people. Its political power is not a subject for contract of transfer, and such a contract is void and revocable.[1] Therefore a lottery charter, though contractual with the parties to whom granted, may be revoked by the State, because the contract itself is subject to the supreme and inviolable right of the State to regulate the morals of its people.[2] So it cannot, by charter contract, debar itself from regulating railroad charges, for the railroad company is chartered to perform public functions for the benefit of the public, and the State cannot contract away its duty to protect the people against exorbitant charges. The company is presumed to take the charter subject to the power of the State to regulate it.[3] The contract by a State not to tax the property of a corporation is against public policy, and will not be presumed unless it is clearly exempted.[4] To make such a contract valid, there must be a consideration to the State and the contract must not be against public policy.[5] In the *Lake Front Cases*[6] the Supreme Court held that the State of Illinois held the right of the public lakes and their public use for the benefit of its people, and that it had no power to alienate to a railroad company these rights which it held in trust for the public; that the contract was *ultra vires*, and that a repeal of the law was not an impairment of the contract because the contract itself was void.[7]

The several apparent exceptions to the operation of this clause may now be mentioned. A State may not impair or avoid a valid contract, but it may validate a contract which

[1] Butchers' Union, etc. Co. v. Crescent City, etc. Co., 111 U. S. 746.

[2] Stone v. Mississippi, 101 U. S. 814; Fertilizing Co. v. Hyde Park, 97 id. 659.

[3] Railroad Co. v. Fuller, 17 Wall. 560; Pennsylvania R. R. Co. v. Miller, 132 U. S. 75; Chicago, etc. Ry. Co. v. Wellman, 143 id. 339; New York, etc. R. Co. v. Bristol, 151 id. 556.

[4] New Orleans, etc. Co. v. New Orleans, 143 U. S. 192.

[5] Rector, etc. v. County of Philadelphia, 24 How. 300; Delaware R. R. Tax, 18 Wall. 206; Tucker v. Ferguson, 22 id. 527.

[6] 146 U. S. 387.

[7] New Orleans v. New Orleans Water-works Co., 142 U. S. 79; Goszler v. Corporation of Georgetown, 6 Wheat. 597.

otherwise would be void. It cannot make a contract between two parties, but, where a contract made between them is void for lack of some formality, it may be validated. The propriety to do this may be questioned, but the authority to do it is not forbidden by this clause.[1] Again, the interest allowed by a contract cannot be changed by law, for that would impair the obligation of the contract; but the interest on the judgment of the contract may be changed by the law, for this interest on a judgment is not contractual. It operates by force of law and may be changed.[2] Again, this clause only forbids the impairment of the obligation of a contract, and it does not forbid a State to avoid a liability, for a tort *ex vi termini* is not *ex contractu*.[3]

It has been stated above that a charter to a corporation which is not municipal is a contract with those who accept the charter, invest their money on the faith of it, and operate the corporation, and that the State cannot change such charter without the consent of the corporation. A principle has been settled which it is important to consider as modifying this doctrine. As all of these charters grant to certain individuals powers which belong to the public, and to that extent may be detrimental to the public interest, it has been decided in *Charles River Bridge Co. v. Warren Bridge Co.*[4] that the construction of all such charters must be strictly against the corporation and favorable to the public, and that no corporate powers are to be presumed to be conferred except those expressly granted or such as are implied by clear interpretation. The learning of the court, therefore, is against the surrender of public power to the corporation, and the public is only bound to the extent of that which is clearly granted by the charter. In the leading case just mentioned the legislature of Massachusetts granted to the Charles River Bridge Co. a franchise to build a bridge over the Charles river, and

[1] Clark v. Barnard, 108 U. S. 447.

[2] United States v. Walker, 109 U. S. 259; United States v. Poinier, 140 id. 162.

[3] Freeland v. Williams, 131 U. S. 405.

[4] 11 Pet. 421.

afterwards granted a charter to the Warren Bridge Co. to build a rival structure. It was claimed by the first company that its monopoly was infringed upon by the creation of the new charter, but the Supreme Court held that though that was so, the legislature had not so bound itself in granting the first charter that it could not grant another to any other rival company, and the two charters were therefore held valid. The cases on this subject are numerous, but in this work a discussion of all of the distinctions is not deemed necessary.[1] This also applies especially to cases of exemption from taxation. It is not to be presumed that such exemption is intended to be granted to any corporation, and therefore the construction in favor of it from the charter must be very clear and beyond doubt.[2] Such exemption from taxation may be the subject of contract by a State with a person, but it will not be unless clearly granted.[3]

We will consider now what the clause declares shall not be impaired. Note it does not say the contract shall not be impaired, but *the obligation* of the contract shall not be impaired, because it is possible that the contract may be left in its integrity when its obligation is destroyed. What then is meant by the term "obligation," as applied to the contract? The civil-law view of the contract suggests a very clear meaning for this word *obligation*.[4] The word *pactum* (same root as *pax*) is the *aggregatio mentium* of the parties. Pact is simply the agreement between the parties without reference to its legal effect. Another word, *contract* (*con*

[1] Beaty v. Knowler, 4 Pet. 152; Providence Bank v. Billings, Id. 514; United States v. Arredondo, 6 id. 736; Dubuque, etc. R. R. Co. v. Litchfield, 23 How. 66; West River Bridge Co. v. Dix, 6 id. 507; Rice v. Railroad Co., 1 Black, 359; The Binghamton Bridge, 3 Wall. 51; Slidell v. Grandjean, 111 U. S. 412; Vicksburg, etc. R. R. Co. v. Dennis, 116 id. 665; Given v. Wright, 117 id. 655.

[2] Woodruff v. Trapnall, 10 How. 190; State Bank v. Knoop, 16 id. 369; Furman v. Nichol, 8 Wall. 44; Home of the Friendless v. Rouse, Id. 430, 439; Jefferson Branch Bank v. Skelly, 1 Black, 436, 474; Asylum v. New Orleans, 105 U. S. 362; Louisiana v. Jumel, 107 id. 750; Tennessee v. Whitworth, 117 id. 138.

[3] Given v. Wright, 117 U. S. 655.

[4] Maine's Ancient Law, p. 313.

and *traho*), expresses the drawing together of the parties to the pact by the *vinculum juris*. Pact becomes contract when the *vinculum juris* draws and holds the parties together. Pact, without legal sanction, is *nudum pactum;* with legal sanction it is a contract. Obligation (*ob* and *ligo*, binding upon one or to the other) is defined to be *juris vinculum, quo necessitate adstringimur alicujus solvendæ rei.* Contract, therefore, is equal to pact *plus* obligation. Pact *minus* obligation is *nudum pactum.*[1] Obligation of contract is therefore the chain of law which binds parties to the pact, the chain which the law throws around the parties who have made a pact; hence all the legal machinery by which each party to a pact is *ex necessitate legis* bound to fulfill its terms constitutes the chain — the obligation of the contract; but to take away or weaken any link in that chain or any part of the legal machinery (a procedure which obliges the party to perform it) is *pro tanto* to impair the obligation of the contract and is forbidden by this clause of the Constitution. The chain is only as strong as its weakest link. To weaken any link is therefore to weaken the chain.

Each essential remedy to this obligation afforded by State law, at the time of the contract, is secured against impairment by State law. Each is a link in the chain, and to destroy or impair any link is to destroy the obligation of the contract. To leave the contract untouched is not sufficient. The State must leave every essential remedial link in the procedure which constitutes the *vinculum juris* in all of its integrity and without impairment. In the language of Justice Curtis in *Curran v. Arkansas:*[2] "If the law is so changed that the means of enforcing the duty are materially impaired, the obligation of the contract no longer remains the same." In other words the parties contracted on the faith of the remedial procedure by which its obligation is to be enforced. The material impairment of any part of this procedure is to impair the obligation of the contract.[3] The right to sue

[1] State of Louisiana v. Mayor, etc., 109 U. S. 285; Pennsylvania R. Co. v. Miller, 132 id. 75.

[2] 15 How. 304.

[3] Tennessee v. Sneed, 96 U. S. 69; Louisiana v. New Orleans, 102 id.

upon a contract, to prosecute it to judgment, and to issue execution against any party and his property for the satisfaction of the judgment, are successive links in this *vinculum juris*, and included in this are all provisions for sale of property under such execution, or the sale under mortgage or other security given for the debt. A material change in any of these provisions is a change in the *vinculum juris*. If the chain lessens the security it impairs the obligation.[1]

Any such change may be made by the legislature to operate as to future contracts, but cannot operate as to prior contracts. The statute of limitations may be changed by a State and the time may be shortened, but if so shortened as to defeat a right to sue, existing at the date of the law making the change, it impairs the obligation of a contract and is void. And it is held that all such statutes of limitations will be void as to prior contracts, unless the new limitation leaves ample and sufficient time for the party to sue. If it does not it is void.[2] Where executions are allowed at the date of the contract against land and personal property of the debtor, and a law is passed which materially changes the property subject to execution, or postponing the sale of such property by levy or execution, or postponing the sale under a mortgage beyond the time prescribed by it, or making the sale invalid if the property does not bring a certain amount of money, all of these impair the obligation of the contract, because they weaken the link in the *vinculum juris*.

But it is clear that the courts, especially of equity, have judicial discretion to see that property shall not be sacrificed, and may adopt rules which postpone the right of the creditor until a fair sale of the property according to judicial rules can be made. This is not law-making, but it is judicial discretion, and the exercise of such discretion is not within the

203; Hartman v. Greenhow, Id. 672; Fertilizing Co. v. Hyde Park, 97 id. 659; Virginia Coupon Cases, 114 id. 269; White v. Hart, 13 Wall. 646; Walker v. Whitehead, 16 id. 314.

[1] McCracken v. Hayward, 2 How. 608; Howard v. Bugbee, 24 id. 461; Gunn v. Barry, 15 Wall. 610.

[2] Terry v. Anderson, 95 U. S. 628; McGahey v. Virginia, 135 id. 662; Wheeler v. Jackson, 137 id. 245.

prohibition of this clause;[1] and, while execution against the property of a debtor cannot be materially changed, yet the execution of *ca. sa.*, which constrains the debtor's liberty to enforce the payment of the debt, may be abolished or changed without an impairment of the obligation of the contract. The semi-punitive means of imprisonment of the debtor is not regarded as an essential part of the obligation. The means of the debtor, his property, is still left without impairment within the reach of the creditor,[2] nor will any change in the form of action or the mode of court procedure, unless material to its efficiency, be held as an impairment of the obligation of the contract.[3] There was a *dictum* in *Bronson v. Kinzie*,[4] to the effect that what are known as poor-law exemptions might be increased with moderation without conflict with this clause of the Constitution, it being held that the State had a right to provide, by internal polity, against the utter destitution of the poor debtor by execution laws which would sweep away the essential parts of household and kitchen furniture used for the preservation of the life of the inmates of his home. But this *dictum* must be carefully guarded, for it is on the verge of impairment of the obligation of contracts, and, if unduly extended, would amount to it. Thus, homestead laws have been passed in late years which largely extend the exemptions of the debtor's property from the reach of execution. In Virginia $2,000 worth of property is saved to the debtor as his homestead. This would defeat many debts and clearly would impair the obligation of the contract, and such laws have been held void.[5] So stay laws, and laws postponing the foreclosure of mortgages and the like, which would not prevent

[1] Denney v. Bennett, 128 U. S. 489.

[2] Penniman's Case, 103 U. S. 714.

[3] White v. Hart, 13 Wall. 646; Tennessee v. Sneed, 96 U. S. 69; Edwards v. Kearzey, Id. 595; Louisiana v. New Orleans, 102 id. 203; Antoni v. Greenhow, 107 id. 769.

[4] 1 How. 313.

[5] Curran v. Arkansas, 15 How. 304; Von Hoffman v. Quincy, 4 Wall. 535; Taylor v. Stearns, 18 Gratt. 244; The Homestead Cases, 22 id. 266.

but delay the remedy provided by the contract, are changes in the terms of the contract which impair its obligation.[1] In the *Virginia Coupon Cases*,[2] and in *McGahey v. Virginia*,[3] the law of Virginia which changed the contract of these coupons, which were made receivable in the payment of taxes to the State, and forbade their reception for taxes, was a clear impairment of the obligation of the contract, and was so held by the Supreme Court of Virginia and by the Supreme Court of the United States. In all of the above cases the prohibition applies to the obligation of implied as well as express contracts.[4] It may be well to say that a law of Virginia, passed prior to March 4, 1789, which impaired a pre-existing contract, was held to be a valid law, because made before the Constitution went into effect.[5] Does the prohibition to the States, to pass any law impairing the obligation of a contract, involve the inference that Congress may pass such laws. Clearly not, except as to the grant of power to Congress to pass uniform bankrupt laws.[6] The State, because of this prohibitory clause, cannot pass a bankrupt law, but Congress under the express grant of power may do so. On this subject reference may be made to what has been said before.[7]

The remaining words of these prohibitions are: "No State shall grant any title of nobility." This prohibition applies equally to Congress.[8] The obvious purpose of these two prohibitions was that the States of the Union were to continue republican States. The guaranty clause shows this.[9]

[1] Sturges v. Crowninshield, 4 Wheat. 200; Ogden v. Saunders, 12 id. 213; Planters' Bank v. Sharp, 6 How. 301; Hawthorne v. Calef, 2 Wall. 10; Taylor v. Stearns, 18 Gratt. 244.

[2] 114 U. S. 269.

[3] 135 U. S. 662.

[4] Gunn v. Barry, 15 Wall. 610; Fisk v. Jefferson Police Jury, 116 U. S. 131.

[5] Owens v. Speed, 5 Wheat. 420.

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

[7] *Ante*, Bankruptcy. See also Cooley on the Constitution, 343, 344; Gunn v. Barry, 15 Wall. 610, and the dissenting opinion in Sinking Fund Cases, 99 U. S. 700.

[8] Const. U. S., Art. I, sec. 9, clause 8.

[9] Id., Art. IV, sec. 1, clause 1.

Baron Montesquieu had declared, and his statement was quoted with approbation in the *Federalist*, that a union between republics and monarchies was inconsistent. Nobles are non-elective, their political power being hereditary. The existence of such a class would be inconsistent with our republican system in State and Federal government. The consideration of this article calls for an observation upon the effect of its provisions upon the broader question of the relations of States to the Union.

We come now to qualified limitations upon the powers of the States. Those in the first clause of this section were absolute. The second clause of this section provides: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." An analysis of this section results in this: *First.* The State is prohibited from laying any duties on imports or exports, without the consent of Congress. *Second.* Despite this prohibition the State may lay such imposts or duties where absolutely necessary for executing its inspection laws. *Third.* The net produce of all duties and imposts laid by any State shall be for the use of the treasury of the United States. *Fourth.* All such laws shall be subject to the revision and control of Congress. It will be noted that under the first head a State may lay duties on exports as well as imports with the consent of Congress. Congress cannot lay any duties or tax on articles exported from any State.[1] This power to lay imposts or duties on imports might infringe upon the power of Congress to lay duties on imports, and it is therefore intended that the State should not exercise this power, which might so conflict with the revenue power of Congress, without its consent. And further, lest there should be conflict

[1] Id., Art. I, sec. 9, clause 5.

after the consent of Congress was given, the saving clause was inserted, that the net produce of all such duties and imports (that is, after paying the expenses of collection) should go into the treasury of the United States. This prevented the State from using this power for revenue purposes. The purpose the States might have in view in such duties was intimated to the convention as being the protection of their own products against foreign competition. The case of *Brown v. Maryland*[1] decided that a license tax imposed by the State of Maryland after they pass the custom-house was a tax and duty on imports, and being without the consent of Congress was unconstitutional and void. The court held that a duty on imports then was not merely a duty on the act of importation, but is a duty on the thing imported; a duty on the articles entering the country, as well as a duty on the article after it has entered the country. The words "exports" and "imports," here used, mean to and from the foreign country.[2]

It does not seem that this power of the State has ever been exercised under any consent of Congress. Under the second head we have the exceptions of such imposts or duties on imports or exports as may be absolutely necessary for executing the inspection laws of a State. The language and the decisions under it make this exception free from the necessity of the pre-consent of Congress. In the great case of *Gibbons v. Ogden*,[3] the Chief Justice said that the power to pass inspection laws was not derived from the power to regulate commerce, but was distinct from it; and also that "the object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for

[1] 12 Wheat. 419; Law v. Austin, 13 Wall. 29.

[2] Woodruff v. Parham, 8 Wall. 123; Almie v. California, 24 How. 169; Brown v. Houston, 114 U. S. 622.

[3] 9 Wheat. 1, 203.

that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to a general government; all which can be most advantageously exercised by the States themselves." In the case of *Turner v. Maryland*,[1] Mr. Justice Blatchford, in a very elaborate opinion, resting upon the decision and language of the opinion in *Gibbons v. Ogden*, *supra*, says that these laws "may have a remote and considerable influence on commerce;" and decided, speaking for the court, that the function of inspection is not only to inspect the article produced, but the package containing it, and therefore that involves the inspection of the "quality of the article, form, capacity, dimensions and weight of package, mode of putting up and marking and branding of various kinds," and that they may lawfully require the article to be brought to a State warehouse for inspection. All of these provisions (as to which the opinion goes into great detail) are proper for inspection laws, and taxes and duties imposed upon articles so to be exported are valid because within the exception of this clause of the Constitution. In the case of *People v. Compagnie, etc.*,[2] the Supreme Court sanctioned the decision just cited, and decided further that it applied exclusively to the inspection of personal property. But let it be observed that these inspection laws, and the duties on imports or exports connected therewith, do not need the pre-consent of Congress; that the last sentence of this clause clearly makes them subject to the revision and control of the Congress. In the case of *Turner v. Maryland*, *supra*, the inspection laws as to tobacco adopted by the State of Maryland as well as an outage charge were held to be constitutional. The revision of these laws and control of them by Congress was intended to prevent the inspection power of the States by provisions that might conflict with the revenue and commercial powers of the Federal government. It is not very clear whether the net produce

[1] 107 U. S. 38.

[2] 107 U. S. 59.

which is to be paid into the treasury from such duties and imposts applies to those laid for executing its inspection laws, but it is probable that the fair construction applies to those imposts or duties which are to be laid only with the consent of Congress, as well as those which are laid in respect to the execution of the inspection laws.

"No State shall, without the consent of Congress, lay any duty of tonnage." The power to lay duties on tonnage is clearly included in the eighth section of the first article of the Constitution. If the States could lay a duty on tonnage, it would interfere with the power given to Congress; therefore this prohibition on the State's exercise of the power is subject to the pre-consent of Congress. A duty on tonnage is not only a revenue, but a commercial measure, because to regulate commerce, as we have seen, means to regulate navigation. A duty on tonnage meant to prohibit the States from levying a duty on vessels, measured by their capacity, or upon them as instruments of commerce, or upon their privilege of trading to any port. These all relate to commerce, to vessels as the instruments of commerce with foreign nations or among the States, and belong to Congress under the powers just referred to.[1] A State may tax the ship as property,[2] but cannot tax the vessel by the ton.[3] So demanding of a vessel on landing a sum proportioned to its tonnage is within this prohibition.[4] But a wharfage due is not a tax and may be laid in proportion to tonnage.[5]

The clause proceeds: No State "shall keep troops or ships of war, in time of peace," without the consent of Con-

[1] Cannon v. New Orleans, 20 Wall. 577; State Tonnage Tax Case, 12 id. 204; Steamship Co. v. Tinker, 94 U. S. 238; Peete v. Morgan, 6 Wall. 31; s. c., 19 id. 581; Steamship Co. v. Port Wardens, 6 id. 34; Transportation Co. v. Wheeling, 99 U. S. 273.

[2] Transportation Co. v. Wheeling, 99 U. S. 273; St. Louis v. Ferry Co., 11 Wall. 423.

[3] State Tonnage Tax Cases, *supra*.

[4] Steamship Co. v. Tinker, 94 U. S. 238, *supra;* Peete v. Morgan, 19 Wall. 581, *supra;* Cannon v. New Orleans, 20 Wall. 577.

[5] Packet Co. v. Keokuk, 95 U. S. 80; Packet Co. v. Catlettsburg, 105 id. 559.

gress. This was to prevent the States from being on a war footing. If they had this power it might be dangerous to their neighbors in the Union or incite them to belligerency with foreign powers, either of which would involve the Union in the hostile action of any one of its members, which would be contrary to the nature of the alliance between them. But this does not mean to forbid the use of the militia, which is left completely under the control of the States, by the previous provisions of the Constitution, except when they are called forth to execute the laws of the Union.[1] This is the more obvious from the latter part of this clause, which forbids the State to engage in war, unless invaded or in such imminent danger as will not admit of delay. So that it is clear a State may engage in war when actually invaded, etc.; but how could it engage in war in either event unless it had an armed force; and that such was within the contemplation of the framers of the Constitution is obvious from the two important numbers of the *Federalist* to which reference has been made in a former part of this work.[2]

The remaining prohibition of this clause is that no State shall, without the consent of Congress, "enter into any agreement or compact with another State, or with a foreign power." The object of this is very clear. An agreement or compact with another State, of a political character, might be in conflict with the agreement and compact of the Union. A compact as to boundary might enlarge or decrease one or the other State, and might in this way transfer territory from one to the other, which, under the fair interpretation of the subsequent provisions of the Constitution, should require the consent of Congress. Under the pretext of settling a boundary line, one State might be materially increased and another diminished, which would change the proportion of representation in the House of Representatives by the action of two States without the consent of the oth-

[1] Const. U. S., Art. I, sec. 8, clauses 16, 17.

[2] Federalist, Nos. XXVIII, LXVI.

ers. It was a wise policy, therefore, which prohibited any such action by two States without the consent of the Congress.[1] In closing this comment upon the prohibitions upon the States, it is proper to say that but for this prohibition the States were in condition to have exercised concurrently with Congress all the chief powers which were vested in it by the Constitution, and the purpose of the Constitution was to maintain in their integrity the powers which the States had conferred upon the general government without the right of any one State to interfere with them. These are all of the prohibitions that were made under the original Constitution, and are those referred to in the tenth amendment to the Constitution by the words: "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 war between the States which began in 1861 and ended in 1865 suggested, in the course of a few years, three amendments: the thirteenth, fourteenth and fifteenth, which contain further and important limitations to the powers of the States, to which attention will now be called. Much has been said as to the character of the powers delegated to the United States as compared to those reserved to the States, and it has been concluded by some writers that the States, by the Constitution, have been reduced to municipalities, while all the chief sovereign powers have been granted to the Federal government. It is said the war power, the treaty power, the commerce power, and the like, are national powers which belong to the Federal government and are denied to the States.

Looking to the number of powers assigned to the two governments in our system, all of which are sovereign powers, the State has unquestionably the large majority of them. The nature of the two classes gives the pre-eminence in the reach and majesty of power to the Federal government. The State in the management of internal polity has a wide field,

[1] Poole v. Fleeger, 11 Pet. 185; Rhode Island v. Massachusetts, 12 id. 657.

but these domestic objects are not as striking in their dignity as the range of Federal polity over the affairs of a continent, and the international relations of the continent to the outside world. But in their essential sovereignty of dominion they are alike and are of equal dignity.

The real question in the comparison of the two classes is as to the holders of the respective powers. The Federal government holds the one class and the State governments the other class. Back of both is the reserved authority of the States, as delegators of both classes, and as the original source of all powers belonging to both governments. The powers held by the Federal and State governments are delegated to them by the States, as the Bodies-politic, with essential sovereignty, from which emanate the functional capacities of each of these governments. That this is so, in fact, is demonstrated by these sections of the Constitution which prohibit the States from the exercise of certain functions assigned to the Federal government. Each prohibition is a negation, with the affirmation that except for the self-denial each State could exercise the forbidden power. The State has all the potentiality to exercise the power, else why forbid its exercise by the State? If the nature of the Federal system shriveled the statehood into such proportion that the State had no potentiality to make war or treaties, why forbid it to do so? The prohibition implies the potentiality, which must be prevented from exercise by a self-denying stipulation. Annul the prohibition by striking out this section, and these powers would belong to the State governments concurrently with the Federal government. The States granted them to the Federal government and denied them to the State governments, because the States wisely declared such powers were better delegated exclusively to the Federal government than to the State governments concurrently with that government, or by exclusive reservation.

So far, therefore, from these sections supporting the idea that the States are dwarfed into municipalities by them,

they prove that the States, as Bodies-politic, are masters of both governments, and that the State has equal potentiality with the Federal government to hold and exercise these tremendous powers; but the exercise of them by the State governments has been prohibited by the Constitution because of the relations of the States to each other. The fact, therefore, that such powers had been delegated to the Federal government and the exercise of them denied to the State governments for reasons of public policy does not disparage the potential capacities of the State governments, nor does it, *a fortiori*, derogate from the essential sovereignty of the States, as Bodies-politic, whose mandatory authority, expressed in the Constitution, is the source of the powers conferred on the Federal government, and of the prohibition of the same to the State governments.

Referring to what has been said in another place on the general character of these amendments, and of the war which preceded their adoption, it is proposed now to discuss the effect of these amendments upon the powers of the States. On the 1st of February, 1865, Congress passed a resolution proposing the thirteenth article of amendment to the Constitution. It was ratified by the legislatures, and was proclaimed by the Secretary of State as a part of the Constitution on the 18th day of December, 1865. It is in the following words: "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Section 2. "Congress shall have power to enforce this article by appropriate legislation."

The date of the passage of the resolution was more than two months before the surrender of the armies of the Confederate States, but it was ratified many months after the actual close of the war. The Southern States recognized that the doom of slavery was pronounced by the failure of their cause; and a number of the Southern States ratified the article with that conviction, so that both sections adopted

the amendment as a declaration of the fact, which was the inevitable result of the downfall of the Confederacy. Slavery had long been an apple of discord between the two sections. The restoration of the Union in peace required that the institution should be abolished in order to harmony in the Union. When adopted by the States it was a new stipulation of the compact of the Union that slavery should cease everywhere. The language of the article is copied from the celebrated Ordinance of 1787. The original Constitution had agreed that the slave trade should be prohibited after the 1st of January, 1808. This amendment prohibited the existence of the institution of slavery after its adoption. It declared that slavery should not exist within the United States, *i. e.*, in any one of the States of the Union, and that the prohibition extended to any place subject to their jurisdiction. It prohibited it in the States where it was subject to the jurisdiction of each State, and then prohibited it in any place subject to their jurisdiction, *i. e.*, the jurisdiction of the United States. This includes the District of Columbia, courts, arsenals, Territories, etc., which were not subject to the jurisdiction of any single State, but to their jurisdiction — the jurisdiction of the many States united.

The amendment, therefore, in emphatic terms recognizes that slavery could be abolished in the States and in the places subject to the jurisdiction of the United States only by an amendment of the Constitution, and thus it implies that it could not have been done by an act of Congress. The second clause of the amendment gives to Congress the power to enforce this article by appropriate legislation. The meaning of this phrase is substantially the same as the words "necessary and proper" used in the legislative article,[1] and the use of the word "appropriate" confirms the definition which was given to those words by Judge Story and affirmed in the *Legal Tender Cases;*[2] but as to the power given to Congress in this clause, reference may be had to what has been

[1] Const. U. S., Art. I, sec. 8, clause 18. [2] 12 Wall. 573.

said in another place.[1] It seems to have been thought by Congress that it justified the passage of the Civil Rights Act of March, 1875, which sought to secure the social and civil privileges of freedmen, but that law was held unconstitutional. In the *Civil Rights Case*[2] it was held that the amendment related only to the status of slavery and its incidents and to their abolition, and did not relate to race discrimination in inns, cars, places of amusement, etc. So much for the thirteenth amendment.

The fourteenth amendment was ratified in 1868. It was proposed June 16, 1866. It was not adopted for some time, and the question arose whether three-fourths of the States, leaving out the States which seceded, would be sufficient to ratify the amendment. The Secretary of State held that it must be ratified by three-fourths of all the States, including those which had seceded, and this view prevailed. Before considering its clauses in detail it is pertinent to say that while it was under discussion in Congress the States which had seceded were excluded from the halls of Congress. The non-seceding States acted upon a clause which proposed as part of this amendment the following words: "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all the privileges and immunities of citizens in the several States, and to all persons in the several States, equal protection in the right of life, liberty and property." This was rejected. Had it been adopted it would have given Congress direct power to secure to citizens and persons the privileges and immunities and protection named in the amendment. The objection to it, when compared with the language of the amendment as ratified, is very striking and suggestive of the true meaning of the article adopted. That article, as we shall see, forbade the States to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, saying nothing of the citizens of each State in the several States. The amendment, as adopted,

[1] *Ante*, § 294.

[2] 109 U. S. 3.

forbade the State to deprive any person of life, liberty or property, without due process of law, or to deny to any person within its jurisdiction the equal protection of the law. The fifth clause of the amendment adopted gave to Congress the power to enforce the abridgment by the State of privileges and immunities, etc. The above-named proposed amendment gave to Congress the power, by affirmative legislation, to do these things; while the amendment as adopted gave only to Congress the power to negative the action of the State abridging or denying these privileges. The first section of the fourteenth amendment is in these words: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The first sentence clearly refers to the decision in *Scott v. Sanford*.[1] By that decision in 1857, the Supreme Court, two justices dissenting, held *inter alia* that Dred Scott, being a negro, was not a citizen of a State within the meaning of the clause which gave jurisdiction to the Federal courts in cases between citizens of different States. It is a part of the history of the times that this decision excited great opposition. The decision itself was never departed from by the Supreme Court, but, as a part of the policy of the non-slaveholding States, this provision of the amendment was intended to reverse the decision in that case, and to establish the right of citizenship of both races. It will be perceived that it gives citizenship to all persons born or naturalized in the United States and subject to the jurisdiction thereof,—citizenship of the United States and citizenship of the State wherein they reside. This would give to the negro the status of citizenship in the State where he resided, and make him properly a party

[1] 19 How. 393.

to a suit in the Federal court between himself and a citizen of another State; and furthermore would give to him, as such, all the privileges and immunities of citizens in the several States.[1] Under this clause an Indian who belongs to a tribe and is born within the United States, the tribe being a dependent nation, is not born within the jurisdiction of the United States, and is not entitled to be a citizen under this clause, though he separates from his tribe and lives among the whites, unless he becomes naturalized.[2] This clause speaks of citizenship for the person,—citizenship of the United States and citizenship of the State. The individual has rights as a citizen of the State, which, as a citizen of the United States, he does not have, and *vice versa*. It becomes very important, therefore, that these diverse citizenships should be well understood because of the following provisions.

The next clause of this amendment is: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." What, then, are the immunities of men as citizens of the United States? In the case of *Smith v. Turner*,[3] Chief Justice Taney said: "For all the purposes for which the Federal government was established, we are one people and citizens of the United States." Mr. Justice Miller, in delivering the opinion of the court in the *Slaughter-House Cases*,[4] quoted the language of Judge Taney with approval, that the privileges and immunities of men as citizens of the United States were those "which owe their existence to the Federal government, its national character, its Constitution or its laws." And so, in *Crandall v. Nevada*,[5] the court held that the right of free transit from State to State, or from any State to the seat of government or to the ports of the United States, were rights appertaining to the citizen as a citizen of the United States; and that all rights claimed under treaty, or on the high seas,

[1] Const. U. S., Art. IV, sec. 2.
[2] Elk v. Wilkins, 112 U. S. 94.
[3] 7 How. 283.
[4] 16 Wall. 74
[5] 6 Wall. 36. See also United States v. Wong Kim Ark, 169 U. S. 649.

or in foreign countries; rights under the Constitution and its amendments; the right to come to the capital or to any seaport; rights of commerce of any State with foreign countries, are those rights which belong to men as citizens of the United States. These rights and privileges pertaining to him as a citizen of the United States, under the Constitution, laws and treaties, are properly placed beyond the power of a single State to abridge. But it has been decided that a State may abridge the privileges and immunities and rights which belong to the man as a citizen of the State. Thus the regulation of the business of the butchers in New Orleans was a regulation of a right pertaining to the citizen as a citizen of the State, not of the United States.[1] Congress can take no action under this fifth section of the fourteenth amendment to protect a citizen in his rights as a citizen of a State. They are exclusively within the State power.[2] A citizen of this country, therefore, has two guardians; his privileges and immunities are doubled. Those which are secured under the Constitution and jurisdiction of the Federal government belong to him as a citizen of the United States. Those which are secured to him under the Constitution and laws of his State belong to him as a citizen of the State. It has been decided as a general principle that this clause of this amendment does not limit the police powers of the States, nor affect the State organism or its functions.[3] Thus, the privilege to practice law in the State court belongs to him under the citizenship of the State; in the United States court, as a citizen of the United States.[4] All limitations upon this privilege in the State courts were unaffected by this amendment.[5] So in respect to suffrage, which is exclusively under State jurisdiction, except as affected by the fifteenth amendment. The right of suffrage

[1] Slaughter-House Cases, *supra*.
[2] United States v. Harris, 106 U. S. 629; Presser v. Illinois, 116 id. 252.
[3] United States v. Cruikshank, 92 U. S. 549; In re Kemmler, 136 id. 436.
[4] Barbier v. Connolly, 113 U. S. 27, 31.
[5] Bradwell v. State, 16 Wall. 130.

is a State privilege, belonging to State citizenship, and is exclusively under State jurisdiction. The United States can confer no such privilege within a State.[1] So as to the right of a physician to practice his profession. That is a right *qua* citizen of a State, which is not touched by this amendment.[2] And so, though a doubt was expressed in one case (*Supervisors v. United States*[3]), yet in *Mugler v. Kansas*[4] and in *Eilenbecker v. District Court of Plymouth County*[5] it was held that a State might forbid an owner to sell liquor or to manufacture it, and might destroy it as a nuisance, without compensation, and prohibit its uses; and that a proceeding on contempt for suppression of the traffic was valid without jury trial. So a greater penalty for fornication between African and white, than between persons of the same race, is valid.[6] Such legislation by the State trenches upon no right or privilege of the guilty parties as citizens of the United States. So police regulations as to laundries, prohibiting the use of them at certain times and at certain places, are valid.[7] So any denial of a right in a State court, which by any one of the ten amendments is forbidden, is not unconstitutional, for those amendments are limits upon Federal power only, and the State court may do, contrary to the terms of those amendments, what the Federal court is forbidden to do.[8]

The next clause is more sweeping in its operations, for it drops the word "citizen" and uses the word "person." "Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." This applies to persons as such, and not to persons as citizens.

It will be seen that this clause applies to persons and not

[1] Minor v. Happersett, 21 Wall. 129; Crowley v. Christensen, 137 U. S. 86; Williams v. Mississippi, 170 id. 213.

[2] Dent v. West Virginia, 129 U. S. 114.

[3] 18 Wall. 79.

[4] 123 U. S. 623.

[5] 134 U. S. 31.

[6] Pace v. Alabama, 106 U. S. 583.

[7] Barbier v. Connolly, 113 U. S. 27; Soon Hing v. Crowley, Id. 703; Holden v. Hanry, 168 id. 366.

[8] Walker v. Sauvinet, 92 U. S. 90; Spies v. Illinois, 123 id. 131.

citizens; *i. e.*, persons, whether they be citizens or not citizens. In the case of *Corfield v. Coryell*,[1] Judge Washington, in commenting upon the words "privileges and immunities," used in another article of the Constitution,[2] says: "The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental privileges are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may prescribe for the general good of the whole." This definition was adopted in the main in the case of *Ward v. Maryland*,[3] and in *Paul v. Virginia*.[4] The Supreme Court in the *Slaughter-House Cases*[5] sanctioned this definition and added: "Its sole purpose was to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." These fundamental privileges to which Judge Washington refers would seem to include those named in the clause under consideration: the right to life, liberty and property, of which the person shall not be deprived without due process of law, and the right of every person within its jurisdiction to the equal protection of the laws. It would seem, therefore, to be a just construction of this article that every person, whether

[1] 4 Wash. C. C. 371.

[2] Const. U. S., Art. IV, sec. 2, clause 1.

[3] 12 Wall. 430.

[4] 8 Wall. 180.

[5] 16 Wall. 36, at pp. 76, 77.

a citizen or not, and no matter where residing, is protected by this clause against any action by a State which will deprive him of life, liberty or property without due process of law, or deny to any person the equal protection of the laws.

If it be asked why the Constitution of the United States should intervene so as to limit the action of the State toward any person in the manner described in the article, the answer is clear. In the free intercommunication provided for between the States of the Union, a person resident in one State might often be subject to the operation of the laws of another where he was temporarily sojourning, and should have the protection of the Constitution of the Union against any hostility on the part of the State upon his rights and his privileges, and his equal right to the protection of its laws. As might be inferred from the rejection of the proposed amendment to this fourteenth article, it was not intended to give to Congress the power, by affirmative action, to afford this protection within the States, but simply to give to Congress the power to nullify any such hostile action by the State through its laws. A few cases bearing upon this clause of the Constitution, in addition to those already cited, may be referred to. In the *Laundry Cases*,[1] *supra*, municipal regulations as to laundries, making no discrimination between persons, was held to be valid; but in the subsequent case of *Yick Wo v. Hopkins*,[2] where the municipal discrimination between Chinese and whites in the regulation of the laundry business, denying the Chinese the rights accorded to the whites, the law of the municipality was held to violate this second clause as to the equal protection of the laws to all persons; and where a State officer in the administration of the law deprived a person of this equal right, it was held to be the State that did it.[3]

But where private parties, innkeepers, proprietors of places of amusement, etc., were denied these privileges, it was held that it was not the State that discriminated, but private

[1] 113 U. S. 27, 703.
[2] 118 U. S. 356.
[3] Yick Wo v. Hopkins, 118 U. S. 356.

parties. The State does not deny — the private party does deny — equal privileges;[1] and it was decided that the Civil Rights Bill passed by Congress, giving to negroes equal privileges with white people, in such cases was unconstitutional and void.

In the late case of *Mattox v. United States*[2] the Supreme Court decided upon the construction of a clause in the sixth amendment requiring the accused to be confronted with the witnesses against him; and it was held that the stenographic notes of the evidence of a witness in living presence on the first trial could be used on the second trial. The court upon a review of the contradictory decisions in the States upon this question held that these amendments in favor of personal liberty were to be interpreted "in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject, such as his ancestors had inherited and defended since the days of Magna Charta." There was a strong dissent by three of the judges.

The effect of this clause upon railroad companies has been considered in several cases. In the case of *Railroad Co. v. Mississippi*,[3] where the law of the State required railroad companies carrying passengers to provide equal but separate accommodations for the white and colored races, the Supreme Court of the State held that the law applied only to the carrying of passengers within the State, and not to interstate carriage. The Supreme Court adopted the construction which the State court had put upon its own law, and held that the law, limited to the carrying of passengers within the State only, was constitutional and valid. The court differentiated the case from the cases of *Hall v. Decuir*[4] and *Railroad Co. v. Illinois*,[5] in which cases the State law had undertaken to regulate the interstate carriage of passengers,

[1] Civil Rights Cases, 109 U. S. 3.
[2] 156 U. S. 237.
[3] 133 U. S. 587. See also Blake v. McClung, 172 id. 239.
[4] 95 U. S. 485.
[5] 118 U. S. 557.

and in this respect differed from the case of *Railroad Co. v. Mississippi*, *supra*. In the late case of *Plessy v. Ferguson*[1] it was decided that the law of Louisiana requiring railroad companies to provide equal but separate accommodations for the white and colored races on their trains, and providing that no person should be permitted to occupy seats in other coaches different from the seats assigned to them on account of the race to which they belong, and requiring the officers of the trains to assign each passenger to the coach designated for the race to which he belongs, and imposing fines or imprisonment upon passengers insisting upon going into any other car than the one assigned to his race, and conferring upon the officers of the trains the power to refuse to carry passengers refusing to occupy coaches assigned to them, and exempting the companies from liability for such refusal, were not in conflict with the thirteenth or fourteenth amendments to the Constitution. But this was on the ground that the Louisiana law applied only to the transportation of passengers within the State, and therefore did not conflict with the interstate commerce power of Congress. The court referred to a large number of cases, and differentiated the case of *Railroad Co. v. Brown*,[2] where a railroad company, incorporated by Congress, was granted a charter upon condition that no person should be excluded from the cars on account of color; and the court held that there was no right to exclude an African from any part of the train. The language of Justice Bradley, in the *Civil Rights Case*, was quoted in these words: "The fourteenth amendment does not invest Congress with power to legislate upon subjects which are within the domain of State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of State laws, . . . when these are subversive of the fundamental rights specified in the amendments. Positive rights and privileges are undoubtedly secured by the four-

[1] 163 U. S. 537.

[2] 17 Wall. 445.

teenth amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges and by power given to Congress to legislate for the purpose of carrying such prohibition into effect." This language of Justice Bradley confirms what has been already said as to the effect of the rejection in Congress of the proposed amendment to this fourteenth article. The court refers to a large number of cases in the States to the same effect. The court, in the last case of *Plessy v. Ferguson*, *supra*, on page 551, combats the objection that this enforced separation stamps the colored race with the brand of inferiority, and holds that it does no such thing, but simply recognizes that social prejudices cannot be overcome by legislation, and that equal rights are not to be secured to the negro by an enforced commingling of the races, and refers to the case of *The People v. Gallier*.[1]

It has been attempted to construe the fourteenth amendment so as to deny to the State any violation of the equality of taxation, but the Supreme Court has held that the fourteenth amendment has fixed no iron rule for taxation. A municipality may tax adjacent owners for street improvements after due notice and hearing.[2] It may assess lands with a special tax for drainage of swamps, which affect the value of such lands.[3] The State may make water rates a charge upon property preferred to other liens.[4]

The effect of this amendment upon the police power of the States was the subject of an able discussion in the case of *Barbier v. Connolly*.[5] Under an ordinance of San Francisco, the carrying on the laundry business was prohibited within certain defined limits between certain hours. It did not discriminate between classes of persons engaged in the business, as in the case of *Yick Wo v. Hopkins*, *supra*.[6] The Supreme

[1] 93 N. Y. 438.

[2] Barbier v. Connolly, 113 U. S. 27; Bell's Gap R. Co. v. Pennsylvania, 134 id. 232.

[3] Davidson v. New Orleans, 96 U. S. 97.

[4] 113 U. S. 506.

[5] 113 U. S. 27.

[6] 118 U. S. 356; Tinsley v. Anderson, 171 id. 101.

Court held that this provision was a police regulation not in conflict with the fourteenth amendment. Mr. Justice Field said that this amendment in the clause under consideration "undoubtedly intended that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." But neither the amendment — broad and comprehensive as it is — nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. This decision was followed in *Soon Hing v. Crowley*,[1] in which it was determined that a municipal ordinance applying to the laundry business as to time and place — and to no other — was not embraced within the language of the amendment, because the two occupations were not of the same character, and different regulations were proper for these distinct employments. The operations of the law must not be different in respect to the same employment; if so, it would deny the equal protection of the laws to the two classes. The same general doctrine was applied to the question of taxation in the case of *Railroad Co. v. Pennsylvania*.[1] In that case a tax was imposed upon the face value of bonds instead of upon their actual value, which was held valid, as the State courts decided under State law. Mr. Justice Bradley said: "But, be this as it may, the law does not make any discrimination in this regard which the State is not competent to make. All corporate securities are subject to the same regulation. The provision in the fourteenth amendment . . . was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all classes. They must be decided as they arise. We think that we are safe in saying that the fourteenth amendment was not intended to compel the State to adopt an iron rule of equal taxation."

[1] 113 U. S. 703.

[1] 134 U. S. 232. See cases cited, King v. United States, 99 id. 229; National Bank v. Commonwealth, 9 Wall. 353; Dollar Savings Bank v. United States, 19 id. 227; Davidson v. New Orleans, 96 U. S. 97; Hagar v. Reclamation Dist. No. 1, 111 id. 701; Walston v. Nevin, 128 id. 575. Also Smyth v. Ames, 169 id. 466.

Accordingly it was held that taxes may be unequal on different classes of persons or subjects without offending the terms of this amendment. If the tax-payers are in like condition and subject to like conditions, or the subjects of taxation are the same, the doctrine of equality may be invoked as controlling them, though this is not clearly established. But the amendment does not touch the power of a State to adopt its own system of taxation, however unequal it may be, if it does not operate unequally upon the same persons or subjects of taxation in precisely like conditions. Thus a State may assess lands for drainage of swamps which affect them.[1] For the same reason a tax upon an adjacent owner for opening streets, after due notice and hearing, would be upheld as not contrary to the provisions of this amendment. Thus, in *Provident Institution v. Mayor*,[2] it was held that an act making water rents and charges upon lands in a municipality a lien prior to all incumbrances in the same manner as taxes was no violation of the fourteenth amendment. It declares that no State shall deprive any person of property without due process of law, and the court declared they were not prepared to say the giving to such lien priority over liens already created by mortgage or otherwise would be repugnant to this article. Cases have arisen on the procedure in the States to condemn private property for public use. Thus, in the case of *Railroad Co. v. Iowa*,[3] the question arose whether the right of a party could be affected by *mandamus* in a State court where there was a denial of the right of trial by jury, and whether there was due process of law in denying a jury trial. The court decided that this did not offend against the provisions of the fourteenth amendment. The court said: "It is clear that the fourteenth amendment in no way undertakes to control the power of the State to determine by what process legal rights may be asserted or legal objections enforced, provided the methods

[1] Davidson v. New Orleans, 96 U. S. 97.

[2] 113 U. S. 506.

[3] 160 U. S. 389.

of procedure give reasonable notice and fair opportunity to be heard before the issues are decided." In a later case of *Eldridge v. Trezevant*,[1] the Constitution and laws of Louisiana, as interpreted by its highest court, permit the taking, without compensation, of the land of private parties for the construction of the public levee on the Mississippi river. The court held that this provision of statute law did not offend against the provision of the fourteenth amendment, unless in its administration a measure of justice was accorded to a citizen of another State different from that accorded to a citizen of Louisiana, and that the provisions of the fourteenth amendment do not apply to and override public rights existing in the form of servitudes or easements which are held by the courts of a State to be valid under its Constitution and laws.[2]

An interesting class of cases arise in respect to corporations under this amendment. We have seen that a corporation is held to be a citizen within the meaning of the clause conferring jurisdiction on the United States courts in cases between citizens of different States;[3] and that this is because a corporation, though a legal entity, distinct from its corporators, represented the interests of the individual corporators as to property and rights, and that the body of corporators, if members of the partnership, would be entitled to sue and be sued in the United States courts if citizens of the different State from that of the other party, plaintiff, or defendant. The meaning of the Constitution was carried out by considering the corporate entity representing these shareholders as citizens of the State which chartered it. A corporation, whether municipal, joint-stock or eleemosynary, is the representative of the private interests and rights of persons. To touch the corporate right or interest by hostile legislation is to touch the private interest of the persons interested in the corporation. It was therefore just and proper that the court should hold that this clause of the fourteenth

[1] 160 U. S. 452.

[2] Barney v. Keokuk, 94 U. S. 324; Packer v. Bird, 137 id. 661.

[3] Const. U. S., Art. III, sec. 2, clause 1.

amendment should apply as well to corporations as to individual persons.[1]

But when the question of equality of burden upon the property of the corporation and the property of an individual arises, it is proper to take into view that the corporation and the individual do not stand upon the same plane as to their rights. The corporate rights are special privileges conferred by a charter — privileges which do not appertain to the individual. There may, therefore, be reason and justice, in order to attain an absolute equality of burdens between a corporation and an individual, to take into consideration the special privileges conferred upon the one and denied to the other. A tax on a telegraph line running through different States, in the proportion which so much of the line as is within any State bears to its whole line, was held to be constitutional in the case of *Telegraph Co. v. Massachusetts*.[2]

The tax on corporations has in many cases been assessed differently from taxes upon the individual. In *Home Ins. Co. v. New York*[3] a state tax upon all corporate franchises of corporations in the State, or created in another State and doing business in the State, was measured by the dividends of the corporation in the current year, and was held to be constitutional. The court, referring to a number of cases, said: "But the amendment does not prevent the classification of property for taxation, subjecting one kind of property to one rate of taxation, and another kind of property to a different rate — distinguishing between licenses, franchises and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part

[1] Santa Clara County v. Railroad Co., 118 U. S. 394; Silver Co. v. Pennsylvania, 125 id. 181.

[2] 125 U. S. 530. See also Butler v. Eaton, 141 U. S. 240; Railroad Tax Cases, 92 id. 575; Railroad Co. v. Backus, 154 id. 438; Railroad Co. v. Gibbs, 142 id. 336; Maine v. Railroad Co., 142 id. 217; Columbus Southern Ry. Co. v. Wright, 151 id. 470; New York v. Squire, 145 id. 175.

[3] 134 U. S. 594.

of all legislation is special, either in the extent to which it operates or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection, if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint-stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class.[1] In this decision the court referred to the reason above suggested for the difference between the tax laid upon an individual and upon a corporation, arising from the fact that one has artificial rights and privileges conferred by law which the other has not.[2]

In *Railroad Co. v. Gibbs*[3] the court held that a law of South Carolina requiring the expenses of a State railroad commission to be borne by the several corporations owning or operating railroads in the several States was not in conflict with this amendment. The burden was laid for services connected with the railroad corporations which were to bear them. There was no inequality, therefore, in subjecting these corporations to, and exempting others from, the burden. The case of *New York v. Squire*[4] is in accordance with the former decision. In *Railroad Commission Cases*[5] it was decided that a charter which grants a railway company the right to fix, regulate and receive the tolls and charges to be received by them for transportation, and which confers upon the directors the power to make by-laws, rules and regulations touching the disposition and management of the

[1] Society for Savings v. Coite, 6 Wall. 534; Barbier v. Connolly, 113 U. S. 29; Soon Hing v. Crowley, Id. 703; Mo. Pac. Ry. Co. v. Humes, 115 id. 512; Mo. Pac. Ry. Co. v. Mackey, 127 id. 205; Minneapolis Ry. Co. v. Beckwith, 129 id. 26.

[2] Wiggins Ferry Co. v. Railway Co., 142 U. S. 399; New York v. Squire, 145 id. 175.

[3] 142 U. S. 386.

[4] 145 U. S. 175.

[5] 116 U. S. 307.

company's property, and all matters appertaining to its concerns, does not deprive the State of its power to act upon the reasonableness of the charges and tolls so fixed, nor to regulate by a commission charged with the duty of preventing unreasonable rates, and of enforcing reasonable police regulations for the comfort, etc., of travelers. Such power in the State is not offensive to the fourteenth amendment. It belongs to the State to regulate these matters, under what is known as the police power, and this prerogative cannot be granted away, unless by words of positive grant or words equivalent in law.[1] This case was followed by *Stone v. Railroad Co.*[2]

So the reasonable regulation by the State of railroad rates, according to long and short haul, is not contrary to this amendment, but if so unreasonable as to violate property rights of the company, such rates may be held void as denying the equal protection of the laws.[3] But when a commission is appointed to decide finally as to these things and denies the right of judicial inquiry into the propriety of the action of the commission which is investigating these matters, and denies the right to produce evidence in response to a *mandamus* against the company, it was held not to be due process of law and the denial of the equal protection of the laws.[4] But to regulate public carriers for the safety of persons and property is a police power of the State of great importance, and it will not be presumed that it is surrendered if all are put on equal ground. If all in like condition are regulated alike, this amendment will not be violated;[5] and in *Railroad Co. v.*

[1] Citing Charles River Bridge v. Warren Bridge Co., 11 Pet. 419; Delaware Railroad Tax Cases, 18 Wall. 206; Bailey v. Magwire, 22 id. 215; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Newton v. Commissioners, 100 id. 548.

[2] 116 U. S. 347.

[3] Chicago, etc. Ry. Co. v. Minnesota, 134 U. S. 418; Head v. Amoskeag Mfg. Co., 113 id. 21; Soon Hing v. Crowley, Id. 703; Mo. Pac. Ry. Co. v. Humes, 115 id. 512.

[4] Head v. Amoskeag Mfg. Co., 113 U. S. 21; Soon Hing v. Crowley, Id. 703; Mo. Pac. Ry. Co. v. Humes, 115 id. 512.

[5] Railroad Co. v. Mackey, 127 U. S. 205.

Mackey, a law of the State of Kansas providing that every railroad company organized or doing business in that State shall be liable for all damages done to any employee, consequent upon the negligence of its agents, engineers or other employees, was held not to deprive a railroad of property without due process of law, nor the equal protection of the laws, and was not in conflict with the fourteenth amendment. The court said that the special character of the legislation did not make it violative of the fourteenth amendment; that the improvement of cities, the opening of streets, the introduction of water and gas, for the safety and convenience of their inmates, and laws for irrigation and drainage, and for the construction of levees and so on, were of like kind and were valid; "and when legislation applies to particular bodies or associations, imposing on them additional liabilities, it is not open to the objection that it denies to them the equal protection of its laws, if all persons brought under its influence are treated alike under the same conditions; but it seems that where the charter of the company protects it in express and clear terms against this interference, such legislation by a state will be invalid, as impairing the obligation of contracts.[1] In all these cases it was held that the railroad company takes its charter subject to the general police power of the State to regulate the rates of charge, and the general management of the railway, looking to the safety and welfare of its people, and that this general power of the State will be constitutionally exercised, unless a charter exemption from future general legislation is granted expressly or by clear implication.[2] It has not been decided in any of these cases that the State may not bind itself by contract not to regulate the charges of a railroad company.

In the *Lake Front Cases*,[3] the Supreme Court held that the

[1] Railroad Co. v. Iowa, 94 U. S. 155.

[2] Railroad Co. v. Miller, 132 U. S. 75; Railroad Co. v. Minnesota, 134 id. 418; Railroad Co. v. Wellman, 143 id. 339; Railroad Co. v. Bristol, 151 id. 556.

[3] 146 U. S. 387.

State had not the power to alienate to a railroad company the public use of Lake Michigan and its bed, that the contract of the State was *ultra vires*, and that the repeal of the law alienating the public use of the lake did not impair a contract, for it was not valid as such.

A law of the State of Iowa giving double damages against a railroad for cattle killed by it is not contrary to this fourteenth amendment.[1] Nor does this amendment, which inhibits the State from depriving a person of property without due process of law, apply where there is no right of property as to the thing legislated upon.[2]

§ 390. What, then, is "due process of law" referred to in this section of the amendment? Whatever in the regular administration of law in a State is general and impartial in its operation on *all* persons is "due process."[3] An indictment which is defective in form, though not in substance or in the requirements of the sixth amendment, is within the meaning of "due process;"[4] but it must, with reasonable certainty, apprise the defendant of the nature of the crime with which he is charged.[5] Nor is a person denied "due process of law" who is tried and sentenced by a *de facto* judge of a *de jure* court.[6] So trial, without a jury, for breach of a municipal regulation, does not contravene this section.[7]

The statute of limitations fairly operating on the remedy is not repugnant to this clause nor to the one forbidding a State to pass any law impairing the obligation of contracts.[8] And so a law which converts a defendant's appearance in

[1] Minneapolis Ry. Co. v. Beckwith, 129 U. S. 26.

[2] New Orleans v. New Orleans Water Works Co., 142 U. S. 79; Williamson v. New Jersey, 130 id. 189; Essex Public Road Board v. Skinkle, 140 id. 334; Com'rs of Laramie County v. Com'rs of Albany County, 92 U. S. 307.

[3] Walker v. Sauvinet, 92 U. S. 90; Caldwell v. Texas, 137 id. 692.

[4] Caldwell v. Texas, 137 U. S. 692; Leeper v. Texas, 139 id. 462.

[5] Rosen v. United States, 161 U. S. 29.

[6] In re Manning, 139 U. S. 504.

[7] Natal v. Louisiana, 139 U. S. 621; Murray's Lessee et al. v. Hoboken Land & Improvement Co., 18 How. 272. See also Holden v. Hardy, 169 U. S. 366.

[8] Wheeler v. Jackson, 137 U. S. 245.

court for the purpose of contesting the jurisdiction of the court, and for that purpose alone, into a general appearance for all the purposes of the suit, does not deny to him "due process of law;"[1] and a statute of a State has been upheld which provided that "not more than two new trials shall be granted to any party in any action at law,"[2] as also a statute which allowed the State a larger number of peremptory challenges in certain cities, in the organization of juries, than in the counties at large.[3] In the case of *Louisiana v. Mayor of New Orleans*[4] it was held that the State could take away from a municipal corporation the power of levying a tax to pay a judgment against itself, and by such prohibition the owner of the judgment was not deprived of his property without "due process of law." If a State, through its laws, provides "due process," and does not deny "equal protection," etc., and the State court departs from these statutory provisions by an erroneous decision, there is no relief. The State has not failed to provide "due process," etc., but its court has, against its legal provisions.[5] In the case of *Yick Wo v. Hopkins, Sheriff*,[6] an ordinance of the city of San Francisco vested in the board of supervisors the arbitrary power, without restraint, to give or refuse consent to carry on public laundries, without regard to the competency of persons applying therefor. It was held that the ordinance violated the provisions of the fourteenth amendment by making arbitrary and unjust discriminations. This case is differentiated from *Arrowsmith v. Harmoning, supra*. In the former, arbitrary discretion is given the board of supervisors to defeat personal right. In the latter, judicial power, by its decision, puts aside the legislative enactment which the State had provided for all alike. Many cases have arisen under this amend-

[1] York v. Texas, 137 U. S. 15.

[2] Louisville, etc. R. Co. v. Woodson, 134 U. S. 614.

[3] Hayes v. Missouri, 120 U. S. 68. See also Cross v. North Carolina, 132 id. 131; Missouri v. Lewis 101 id. 22.

[4] 109 U. S. 285.

[5] Arrowsmith v. Harmoning, 118 U. S. 194; Davis v. Texas, 139 id. 651.

[6] 118 U. S. 356.

ment, deciding what is "due process" in the exercise of "eminent domain." The taking of private property for public use only, on just compensation, is in accordance with Magna Carta. To determine the question whether it is taken for real public use, and what is just compensation therefor, requires "due process of law." Such a taking is an enforced sale to the public of private property, and therefore to take private property for private use or for public use without just compensation is not "due process of law."[1] The same rule of construction given to the fifth amendment in its application to the Federal government applies with equal force to the States in this clause of the fourteenth amendment.[2]

In Virginia the owner must be fully compensated for the property taken and also damages to the residue of his land beyond the peculiar benefits.[3] The compensation to which the owner may be entitled must be provided for by judicial procedure in order to meet the requirement of "due process of law."[4] The interruption of the use of property without its actual seizure,[5] as also riparian rights,[6] and the right to the use of water, are within this clause. This right exists in the government of the United States for the purpose of exercising the powers conferred in the Constitution;[7] but what should be the limitations of the exercise of such power within the States has been the subject of much controversy.

The destruction of property may be ground for payment, but if destroyed to prevent the spread of fire, either by public authority or private persons, it creates no liability under the clause. In such cases fire is a common enemy; — if the enemy has possession of A's house, from which B and C may be assailed, the fortress may be destroyed.[1]

[1] James River & Kanawha Co. v. Turner, 9 Leigh, 313; Bloodgood v. Mohawk, etc. R. R. Co., 18 Wend. (N. Y.) 9; Tyler v. Beacher, 44 Vt. 648; Monongahela Nav. Co. v. United States, 148 U. S. 312; Loan Ass'n v. Topeka, 20 Wall. 655; Missouri Pacific Ry. Co. v. Nebraska, 164 U. S. 403.

[2] Cole v. La Grange, 113 U. S. 1.

[3] Mitchell v. Thornton, 21 Gratt. 764.

[4] United Statee v. Jones, 109 U. S. 513; Cherokee Nation v. Southern Kansas Ry. Co., 135 id. 641; Boom Co. v. Patterson, 98 id. 403.

[5] Pumpelly v. Green Bay Co., 13 Wall. 166.

[6] Kaukauna Co. v. Green Bay, etc. Canal, 142 U. S. 255.

[7] Kohl v. United States, 91 U. S. 367; United States v. Gettysburg Electric R. Co., 160 id. 668; Luxton v. North River Bridge Co., 147 id. 337.

In criminal procedure this constitutional right has been frequently invoked. In *Hurtado's Case*[2] the Constitution of California authorizing prosecutions for felonies on information rather than indictment, and the statutes passed in pursuance thereof, were upheld as not denying "due process of law" to the prisoner. The rule would be different in a court of the United States under the fifth amendment. A law passed after a crime is committed cannot add solitary confinement until execution to the death penalty,— it is *ex post facto;*[3] but if after the commission of the offense the law is changed in immaterial respects, this is not *ex post facto* nor against the provision for "due process of law;"[4] and so where the law before the commission of the crime made solitary confinement until execution a part of the penalty, the law was held not to be against the eighth amendment, nor the right to "due process of law," provided in the fourteenth amendment.[5] Nor will mere irregularity in the State procedure, not involving the essential rights of the prisoner, be construed as contrary to "due process of law;"[6] nor will the due administration of its laws by the State be interfered with.[7]

At the time of the decision of *Strauder's Case*,[8] he being a negro, the laws of West Virginia, in effect, provided that no negro should sit on a jury. On the part of the prisoner it was urged that such laws denied to him "the equal protec-

[1] Beach v. Trudgain, 2 Gratt. 219; American Print Works v. Lawrence, 3 Zabr. 603; Jones v. City of Richmond, 18 Gratt. 517. But see Wallace v. City of Richmond, 94 Va. 204.

[2] 110 U. S. 516; Hodgson v. Vermont, 168 id. 262.

[3] Medley's Case, 134 U. S. 160.

[4] Holden v. Minnesota, 137 U. S. 483.

[5] McElvaine v. Brush, 142 U. S. 155.

[6] Cross v. North Carolina, 132 U. S. 131.

[7] In re Wood, 140 U. S. 278-284.

[8] 100 U. S. 303.

tion of the laws" as well as "due process of law" secured to him by the fourteenth amendment. He was convicted, and on appeal the court of appeals of the State affirmed the decision of the lower court; but on appeal to the Supreme Court of the United States, under the twenty-fifth section of the Judiciary Act of 1789, the judgment was reversed and the original objection sustained. About the same time a similar case[1] arose in Virginia; the law of Virginia did not exclude negroes from the juries. In this case the prisoner, a negro, moved the court to so modify the *venire* that one-third or some portion of the jury should be composed of negroes. This motion was refused. On petition for removal, under section 641 of the Revised Statutes, the district judge of the United States ordered the case to be docketed in the circuit court of the United States, after refusal to remove had been made by the State court, and under a writ of *habeas corpus cum causa* took the prisoner out of the custody of the State. Virginia applied for a *mandamus* to compel Judge Rives, the district judge of the United States for the western district of Virginia, to remand the cause to the State court and deliver up the prisoner to her custody. The *mandamus* was granted, because there was no ground for removal, since the Virginia law did not exclude negroes from the jury, though the composition of the jury might be only white men. The law, therefore, did not deny equal protection, etc., and the prisoner had no right to demand that negroes should be summoned on the *venire*, as the fourteenth amendment only required that the State, through its laws, must not exclude them; but if the legislature or courts or executive of the State prevents a jury from being constituted of both races, then the State denies the equal protection of its laws to all its citizens alike, and the case, on petition, under section 641 above mentioned, must be removed, or if not, on conviction, an appeal to the Supreme Court will lie.

In *Ex parte Virginia*,[2] Judge Coles, the judge of a county court in the State of Virginia, was indicted in the district

[1] Virginia v. Rives, 100 U. S. 313.

[2] 100 U. S. 339.

court of the United States for the western district of Virginia, under the act of 1875, for excluding and failing to summon negroes on the grand and petit juries because they were negroes. He was held liable, for he acted for the State, and his action was in effect that of the State in denying the equal protection of its laws, etc. Judges Field and Clifford dissented in strong opinions. In *Neal v. Delaware*,[1] as the laws of the State of Delaware contained no prohibition against negroes sitting as jurors, on indictment in the State court, the petition of the prisoner (a negro) for removal of the cause under section 641 of the Revised Statutes of the United States to the circuit court of the United States was properly denied, but as the jury commissioners excluded negroes from the juries because of race, the Supreme Court held that the indictment should have been quashed, and the State court having refused to do so an appeal was properly had to the Supreme Court.[2] In this case the court followed the decision in *Ex parte Virginia*, *supra*. These decisions have been re-affirmed in the late case of *Chicago, B. & Q. R. Co. v. Chicago*,[3] but they have not been accepted without criticism by high authority in some quarters. They are largely based on the dissenting opinions of Judges Clifford and Field in *Ex parte Virginia*, *supra*, and the objections may be stated as follows:

1st. To remove a criminal case from a State court to a Federal court is neither necessary nor proper.[4] For if the State court decides against a right secured under the Constitution or laws of the United States, an appeal lies to the Supreme Court under the twenty-fifth section of the Judiciary Act. The removal, therefore, is not necessary for the protection of such right. Nor is it proper ("*bona fide* appropriate, etc."); for with what propriety can a United States court try a prosecution set on foot by the State under her criminal laws, and for an offense against her laws? Under

[1] 103 U. S. 370.

[2] See also Bush v. Kentucky, 107 U. S. 110; In re Ward, 140 id. 278–370.

[3] 166 U. S. 226.

[4] Const. U. S., Art. I, sec. 8, clause 18.

what law will the jury be selected? challenges made? appeals allowed? and in case of conviction who may pardon? the President of the United States or the Governor of the State?

2d. The amendment protects rights, but does not grant political power. If rights be not equal because power is not (as was argued), the negro must, not may, be on every jury to try negro or white; and so if the exclusion of the negro from a jury is the denial of equal protection, is not his exclusion from the office of judge, member of the legislature or executive the same? Must the State make the negro eligible to all of these in order to equality? If not, why as to juries?

3d. If a like constitution of juries for both races be not equality, how is it to be attained? Must all the jury for a white man be white? and for a negro all be negroes? or how many? and if they *must* not (as the court admits), how is practical equality reached by a "May?" and if such constitution of the jury be essential to equality, how shall a male jury try a female? or adults try an infant? or an American citizen a Chinaman? Equality to *persons* is secured by the amendment. How then as to a corporation? It cannot serve on a jury.

4th. When the fourteenth amendment was adopted, the negro had no right to vote, and, until adopted, no right to hold office, if denied by the States. It may well be asked what "equal protection" could he have, with no vote in making the laws? Yet with no such power, with absolute disfranchisement, the fourteenth amendment assumed that "equal protection" to the negro might be secured without any political power; for if not denied by the refusal of suffrage, how could it be so denied by excluding him from the court and jury? When the fifteenth amendment was adopted, it secured to him suffrage, but nothing else.

5th. These decisions, it is claimed, make the negro a favored class. Foreigners, women and children, non-freeholders, etc., may be tried and have no peer on the jury, but a negro cannot be.

APPENDIX.

June 15th, A. D. 1215.

MAGNA CARTA.

. . . . . .

9. Nec nos nec ballivi nostri seisiemus terram aliquam nec redditum pro debito aliquo, quamdiu catalla debitoris sufficiunt ad debitum reddendum; nec pleggii ipsius debitoris distringantur quamdiu ipse capitalis debitor sufficit ad solutionem debiti; et si capitalis debitor defecerit in solutione debiti, non habens unde solvat, pleggii respondeant de debito; et, si voluerint, habeant terras et redditus debitoris donec sit eis satisfactum de debito quod ante pro eo solverint, nisi capitalis debitor monstraverit se esse quietum inde versus eosdem pleggios.

. . . . . .

12. Nullum scutagium vel auxilium ponatur in regno nostro, nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum, et primogenitum filium nostrum militem faciendum, et ad filiam nostram primogenitam semel maritandam, et ad haec non fiat nisi rationabile auxilium: simili modo fiat de auxiliis de civitate Londoniarum.

13. Et civitas Londoniarum habeat omnes antiquas libertates et liberas consuetudines suas, tam per terras, quam per aquas. Praeterea volumus et concedimus quod omnes aliae civitates, et burgi, et villae, et portus, habeant omnes libertates et liberas consuetudines suas.

14. Et ad habendum commune consilium regni, de auxilio assidendo aliter quam in tribus casibus praedictis, vel de

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14. Et ad habendum commune consilium regni, de auxilio assidendo aliter quam in tribus casibus praedictis, vel de

scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per litteras nostras; et praeterea faciemus summoneri in generali, per vicecomites et ballivos nostros, omnes illos qui de nobis tenent in capite; ad certum diem, scilicet ad terminum quadraginta dierum ad minus, et ad certum locum; et in omnibus litteris illius summonitionis causam summonitionis exprimemus; et sic facta summonitione negotium ad diem assignatum procedat secundum consilium illorum qui praesentes fuerint, quamvis non omnes summoniti venerint.

. . . . . .

17. Communia placita non sequantur curiam nostram sed teneantur in aliquo loco certo.

. . . . . .

20. Liber homo non amercietur pro parvo delicto, nisi secundum modum delicti; et pro magno delicto amercietur secundum magnitudinem delicti, salvo contenemen to suo; et mercator eodem modo salva mercandisa sua; et villanus eodem modo amercietur salvo wainnagio suo, si inciderint in misericordiam nostram; et nulla praedictarum misericordiarum ponatur, nisi per sacramentum proborum hominum de visneto.

. . . . . .

28. Nullus constabularius, vel alius ballivus noster, capiat blada vel alia catalla alicujus, nisi statim inde reddat denarios, aut respectum inde habere possit de voluntate venditoris.

. . . . . .

30. Nullus vicecomes, vel ballivus noster, vel aliquis alius, capiat equos vel caretas alicujus liberi hominis pro cariagio faciendo, nisi de voluntate ipsius liberi hominis.

31. Nec nos nec ballivi nostri capiemus alienum boscum ad castra, vel alia agenda nostra, nisi per voluntatem ipsius cujus boscus ille fuerit.

. . . . . .

39. Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae.

40. Nulli vendemus, nulli negabimus, aut differemus, rectum aut justiciam.

. . . . . .

61. . . . Et nos nihil impetrabimus ab aliquo, per nos nec per alium, per quod aliqua istarum concessionum et libertatum revocetur vel minuatur; et, si aliquid tale impetratum fuerit, irritum sit et inane et numquam eo utemur per nos nec per alium.

. . . . . .

63. Quare volumus et firmiter praecipimus quod Anglicana ecclesia libera sit et quod homines in regno nostro habeant et teneant omnes praefatas libertates, jura, et concessiones, bene et in pace, libere et quiete, plene et integre, sibi et haeredibus suis, de nobis et haeredibus nostris, in omnibus rebus et locis, in perpetuum, secut praedictum est. Juratum est autem tam ex parte nostra quam ex parte baronum, quod haec omnia supradicta bona fide et sine malo ingenio observabuntur. Testibus supradictis et multis aliis. Data per manum nostram in prato quod vocatur Runingmede, inter Windelesorum et Stanes, quinto decimo die Junii, anno regni nostri septimo decimo.

Stubbs' "Select Charters," pp. 296–306.

A. D. 1628.

PETITION OF RIGHT.

3 Car. I., c. i.

The petition exhibited to his Majesty by the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, concerning divers Rights and Liberties of the subjects, with the King's Majesty's royal answer thereunto in full Parliament.

To the King's Most Excellent Majesty:

"Humbly show unto our Sovereign Lord the King, the Lords Spiritual and Temporal, and Commons in Parliament assembled, etc., etc."

After reciting the Statute *De Tallagio non Concedendo*, and several others in the reign of Edward III,—and that the people had been compelled to lend money to the King,—and reciting the Magna Carta, chapter 39,—and its violation in many cases,—and reciting that soldiers had been quartered on the people without their consent, and that martial law had been, by commissioners of his Majesty, enforced so as to adjudge to death subjects not in the army,—the Petition closes thus:

"X. They do therefore humbly pray your most excellent Majesty, that no man hereafter be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of Parliament; and that none be called to make answer, or take such oath, or to give attendance, or be confined or otherwise molested or disquieted concerning the same or for refusal thereof; and that no free-man, in any such manner as is before mentioned, be imprisoned or detained; and that your Majesty would be pleased to remove the said soldiers and mariners, and that your people may not be so burdened in time to come; and that the aforesaid commissions, for proceeding by martial law, may be revoked and annulled; and that hereafter no

commissions of like nature may issue forth to any person or persons whatever to be executed as aforesaid, lest by colour of them any of your Majesty's subjects be destroyed or put to death contrary to the laws and franchise of the land.

"XI. All which they most humbly pray of your most excellent Majesty as their rights and liberties, according to the laws and statutes of this realm; and that your Majesty would also vouchsafe to declare, that the awards, doings and proceedings, to the prejudice of your people in any of the premises, shall not be drawn hereafter into consequence or example; and that your Majesty would be also graciously pleased, for the further comfort and safety of your people, to declare your royal will and pleasure, that in the things aforesaid all your officers and ministers shall serve you according to the laws and statutes of this realm, as they tender the honour of your Majesty, and the prosperity of this kingdom.

"*Qua quidem petitione lecta et plenius intellecta per dictum dominum regem taliter est responsum in pleno parliamento, viz. Soit droit fait come est desiré.*" (*Statutes of the Realm, v. 24, 25.*)

Stubbs' "Select Charters," pp. 515, 517.

A. D. 1689.

BILL OF RIGHTS.

1 Will. & Mar., Sess. 2, c. 2.

Whereas the Lords Spiritual and Temporal, and Commons, assembled at Westminster, lawfully, fully, and freely representing *all the estates of the people of this realm*, did, upon the thirteenth day of February, in the year of our Lord one thousand six hundred and eighty-eight, present unto their majesties, then called and known by the names and style of William and Mary, Prince and Princess of Orange, being present in their proper persons, a certain declaration in writing, made by the said Lords and Commons, in the words following, viz.:

Whereas the late King James II, by the assistance of diverse evil counsellors, judges, and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion, and the laws and liberties of this kingdom:

1. By assuming and exercising a power of dispensing with and suspending of laws, and the execution of laws, without consent of Parliament.

2. By committing and prosecuting divers worthy prelates, for humbly petitioning to be excused from concurring to the same assumed power.

3. By issuing and causing to be executed a commission under the Great Seal for erecting a court, called the Court of Commissioners for Ecclesiastical Causes.

4. By levying money for and to the use of the Crown, by pretence of prerogative, for other time, and in other manner than the same was granted by Parliament.

5. By raising and keeping a standing army within this kingdom in time of peace, without consent of Parliament, and quartering soldiers contrary to law.

6. By causing several good subjects, being Protestants, to be disarmed, at the same time when Papists were both armed and employed contrary to law.

7. By violating the freedom of election of members to serve in Parliament.

8. By prosecutions in the Court of King's Bench, for matters and causes cognizable only in Parliament; and by diverse other arbitrary and illegal courses.

9. And whereas of late years, partial, corrupt, and unqualified persons have been returned and served on juries in trials, and particularly diverse jurors in trials for high treason, which were not freeholders.

10. And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects.

11. And excessive fines have been imposed; and illegal and cruel punishments inflicted.

12. And several grants and promises made of fines and forfeitures, before any conviction or judgment against the persons upon whom the same were to be levied.

All which are utterly and directly contrary to the known laws and statutes, and freedom of this realm.

And whereas the said late King James II, having abdicated the government, and the throne being thereby vacant, his Highness, the Prince of Orange (whom it hath pleased Almighty God to make the glorious instrument of delivering this kingdom from popery and arbitrary power) did (by the advice of the Lords Spiritual and Temporal, and diverse principal persons of the Commons) cause letters to be written to the Lords Spiritual and Temporal, being Protestants, and other letters to the several counties, cities, universities, boroughs, and cinque ports, for the choosing of such persons as represent them, as were of right to be sent to Parliament, to meet and sit at Westminster upon the two-and-twentieth day of January, in this year one thousand six hundred eighty and eight, in order to such an establishment, as that their religion, laws and liberties might not again be in danger of being subverted; upon which letters, elections have been accordingly made.

And thereupon the said Lords Spiritual and Temporal,

and Commons, pursuant to their respective letters and elections, being now assembled in a full and free representation of this nation, taking into their most serious consideration the best means for attaining the ends aforesaid, do in the first place (as their ancestors in like case have usually done), for the vindicating and asserting their ancient rights and liberties, declare:—

1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the Crown, by pretence of prerogative, without grant of parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

7. That the subjects which are Protestants may have arms for their defense suitable to their conditions, and as allowed by law.

8. That election of members of parliament ought to be free.

9. That the freedom of speech, and debates on proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly impanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliament ought to be held frequently.

And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example.

To which demand of their rights they are particularly encouraged by the declaration of his Highness the Prince of Orange, as being the only means for obtaining a full redress and remedy therein.

Having therefore an entire confidence that his said Highness the Prince of Orange will perfect the deliverance so far advanced by him, and will still preserve them from the violation of their rights, which they have here asserted, and from all other attempts upon their religion, rights, and liberties:

II. The said Lords Spiritual and Temporal, and Commons, assembled at Westminster, do resolve, that William and Mary, Prince and Princess of Orange, be, and be declared, King and Queen of England, France and Ireland, and the dominions thereunto belonging, to hold the Crown and royal dignity of the said kingdoms and dominions to them the said Prince and Princess during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange, in the names of the said Prince and Princess, during their joint lives; and after their deceases, the said Crown and royal dignity of the said kingdoms and dominions to be to the heirs of the body of the said Princess; and for default of such issue to the Princess Anne of Denmark,

and the heirs of her body; and for default of such issue to the heirs of the body of the said Prince of Orange. And the Lords Spiritual and Temporal, and Commons, do pray the said Prince and Princess to accept the same accordingly.

. . . . . .

IV. Upon which their said Majesties did accept the Crown and royal dignity of the kingdoms of England, France, and Ireland, and the dominions thereunto belonging, according to the resolution and desire of the said Lords and Commons contained in the said declaration.

V. And thereupon their Majesties were pleased, that the said Lords Spiritual and Temporal, and Commons, being the two Houses of Parliament, should continue to sit, and with their Majesties' royal concurrence make effectual provision for the settlement of the religion, laws, and liberties of this kingdom, so that the same for the future might not be in danger again of being subverted; to which the said Lords Spiritual and Temporal, and Commons, did agree and proceed to act accordingly.

VI. Now in pursuance of the premises, the said Lords Spiritual and Temporal, and Commons, in parliament assembled, for the ratifying, confirming, and establishing the said declaration, and the articles, clauses, matters, and things therein contained, by the force of a law made in due form by authority of parliament, do pray that it may be declared and enacted, That all and singular the rights and liberties asserted and claimed in the said declaration, are the true, ancient, and indubitable rights and liberties of the people of this kingdom, and so shall be esteemed, allowed, adjudged, deemed, and taken to be, and that all and every the particulars aforesaid shall be firmly and strictly holden and observed, as they are expressed in the said declaration; and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come.

VII. And the said Lords Spiritual and Temporal, and Commons, seriously considering how it hath pleased Almighty

God, in his marvellous providence, and merciful goodness to this nation, to provide and preserve their said Majesties' royal persons most happily to reign over us upon the throne of their ancestors, for which they render unto Him from the bottom of their hearts their humblest thanks and praises, do truly, firmly, assuredly, and in the sincerity of their hearts, think, and do hereby recognize, acknowledge, and declare, that King James II having abdicated the government, and their Majesties having accepted the Crown and royal dignity aforesaid, their said Majesties did become, were, are, and of right ought to be, by the laws of this realm, our sovereign liege Lord and Lady, King and Queen of England, France, and Ireland, and the dominions thereunto belonging, in and to whose princely persons the royal State, Crown, and dignity of the same realms, with all honours, styles, titles, regalities, prerogatives, powers, jurisdictions and authorities to the same belonging and appertaining, are most fully, rightfully, and entirely invested and incorporated, united, and annexed."

Chapter VIII declares the succession to William and Mary, and to the survivor of them for the life of such survivor, then to the heirs of the body of her Majesty, and in default thereof, to Princess Anne of Denmark.

Chapters IX and X exclude Papists from the throne, and require every person, who succeeds to the Crown, to take a coronation oath abjuring Papacy, and declaring in all and every such case or cases, "the people of these realms shall be and are hereby absolved of their allegiance;" and that the next in succession shall inherit the Crown, as if the Papist successor were naturally dead.

"XI. All which their Majesties are contented and pleased shall be declared, enacted, and established by authority of this present parliament, and shall stand, remain, and be the law of this realm forever; and the same are by their said Majesties, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in parliament assembled, and by the authority of the same, declared, enacted, or established accordingly."

MISCELLANEOUS RESOLUTIONS.

Friday, October 14, 1774.

"The Congress met according to adjournment, and resuming the consideration of the subject under debate — made the following *declaration* and *resolves:*

Whereas, since the close of the last war, the British parliament, claiming a power, of right, to bind the people of America by statutes in all cases whatsoever, hath, in some acts, expressly imposed taxes on them, and in others, under various pretences, but in fact for the purpose of raising a revenue, hath imposed rates and duties payable in these colonies, established a board of commissioners, with unconstitutional powers, and extended the jurisdiction of courts of admiralty, not only for collecting the said duties, but for the trial of causes merely arising within the body of a county.

And whereas, in consequence of other statutes, judges, who before held only estates at will in their offices, have been made dependant on the crown alone for their salaries, and standing armies kept in times of peace: And whereas, it has lately been resolved in parliament, that by force of a statute, made in the thirty-fifth year of the reign of king Henry the eighth, colonists may be transported to England, and tried there upon accusations for treason, and misprisions, or concealments of treasons committed in the colonies, and by a late statute, such trials have been directed in cases therein mentioned:

And whereas, in the last session of parliament, three statutes were made; one entitled, "An act to discontinue, in such manner and for such time as are therein mentioned, the landing and discharging, lading, or shipping of goods, wares, and merchandize, at the town, and within the harbour of Boston, in the province of Massachusetts-Bay in North-America;" another entitled, "An act for the better regulating the government of the province of Massachusetts-Bay in New England;" and another entitled, "An act for the impartial

administration of justice, in the cases of persons questioned for any act done by them in the execution of the law, or for the suppression of riots and tumults, in the province of the Massachusetts-Bay in New England;" and another statute was then made, "for making more effectual provision for the government of the province of Quebec, &c." All which statutes are impolitic, unjust and cruel, as well as unconstitutional, and most dangerous and destructive of American rights:

And whereas, assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal, and reasonable petitions to the crown for redress, have been repeatedly treated with contempt, by his majesty's ministers of state:

The good people of the several colonies of New Hampshire, Massachusetts-Bay, Rhode Island, and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Newcastle, Kent and Sussex on Delaware, Maryland, Virginia, North Carolina, and South Carolina, justly alarmed at these arbitrary proceedings of parliament and administration, have severally elected, constituted, and appointed deputies to meet, and sit in general Congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties, may not be subverted: Whereupon the deputies so appointed being now assembled, in a full and free representation of these colonies, taking into their most serious consideration, the best means of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties, DECLARE,

That the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS:

Resolved, N. C. D. 1. That they are entitled to life, liberty and property: and they have never ceded to any sovereign

power whatever, a right to dispose of either without their consent.

Resolved, N. C. D. 2. That our ancestors who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.

Resolved, N. C. D. 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

Resolved, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed: But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are *bona fide*, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation internal or external, for raising a revenue on the subjects, in America, without their consent.

Resolved, N. C. D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

Resolved, 6. That they are entitled to the benefit of such

of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

Resolved, N. C. D. 7. That these, his majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.

Resolved, N. C. D. 8. That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

Resolved, N. C. D. 9. That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

Resolved, N. C. D. 10. It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed, during pleasure, by the crown, is unconstitutional, dangerous and destructive to the freedom of American legislation.

All and each of which the aforesaid deputies, in behalf of themselves, and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures.

In the course of our inquiry, we find many infringements and violations of the foregoing rights, which, from an ardent desire, that harmony and mutual intercourse of affection and interest may be restored, we pass over for the present, and proceed to state such acts and measures as have been adopted since the last war, which demonstrate a system formed to enslave America.

Resolved, N. C. D. That the following acts of parliament are infringements and violations of the rights of the colonies; and that the repeal of them is essentially necessary, in order to restore harmony between Great Britain and the American colonies, viz.:

The several acts of 4 Geo. III., ch. 15 and ch. 34; 5 Geo. III., ch. 25; 6 Geo. III., ch. 52; 7 Geo. III., ch. 41 and ch. 46; 8 Geo. III., ch. 22, which impose duties for the purpose of raising a revenue in America, extend the power of the admiralty courts beyond their ancient limits, deprive the American subject of trial by jury, authorize the judge's certificate to indemnify the prosecutor from damages, that he might otherwise be liable to, requiring oppressive security from a claimant of ships and goods seized, before he shall be allowed to defend his property, and are subversive of American rights.

Also 12 Geo. III., ch. 24, intitulated, "An act for the better securing his majesty's dock-yards, magazines, ships, ammunition, and stores," which declares a new offence in America, and deprives the American subject of a constitutional trial by jury of the vicinage, by authorizing the trial of any person, charged with the committing any offence described in the said act, out of the realm, to be indicted and tried for the same in any shire or county within the realm.

Also the three acts passed in the last session of parliament, for stopping the port and blocking up the harbour of Boston, for altering the charter and government of Massachusetts-Bay, and that which is entitled, "An act for the better administration of justice, &c."

Also the act passed in the same session for establishing the Roman Catholic religion, in the province of Quebec, abolishing the equitable system of English laws, and erecting a tyranny there, to the great danger (from so total a dissimilarity of religion, law and government) of the neighboring British colonies, by the assistance of whose blood and treasure the said country was conquered from France.

Also the act passed in the same session, for the better providing suitable quarters for officers and soldiers in his majesty's service, in North America.

Also, that the keeping a standing army in several of these colonies, in time of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

To these grievous acts and measures, Americans cannot submit, but in hopes their fellow subjects in Great Britain will, on a revision of them, restore us to that state, in which both countries found happiness and prosperity, we have for the present, only resolved to pursue the following peaceable measures: 1. To enter into a non-importation, non-consumption, and non-exportation agreement or association. 2. To prepare an address to the people of Great Britain, and a memorial to the inhabitants of British America: and 3. To prepare a loyal address to his majesty, agreeable to resolutions already entered into.

1 Journals of Congress, pp. 26–30.

In December, 1798, the General Assembly of Virginia passed certain resolutions:

"*Resolved*, That the general assembly of Virginia doth unequivocally express a firm resolution to maintain and defend the constitution of the United States, and the constitution of this state, against every aggression, either foreign or domestic, and that they will support the government of the United States in all measures warranted by the former.

"The general assembly most solemnly declares a warm attachment to the union of the states, to maintain which it pledges all its powers; and that for this end it is their duty to watch over and oppose every infraction of those principles, which constitute the only basis of that union, because a faithful observance of them can alone secure its existence, and the public happiness.

"That this assembly doth explicitly and peremptorily declare that it views the powers of the federal government as resulting from the compact, to which the states are par-

ties, as limited by the plain sense and intention of the instrument constituting that compact; as no farther valid than they are authorized by the grants enumerated in that compact; and that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the states, who are parties thereto, have the right and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.

"That the general assembly doth also express its deep regret that a spirit has in sundry instances, been manifested by the federal government, to enlarge its powers by forced constructions of the constitutional charter which defines them; and that indications have appeared of a design to expound certain general phrases (which having been copied from the very limited grant of powers in the former articles of confederation, were the less liable to be misconstrued,) so as to destroy the meaning and effect of the particular enumeration which necessarily explains, and limits the general phrases; and so as to consolidate the states by degrees into one sovereignty, the obvious tendency and inevitable result of which would be, to transform the present republican system of the United States, into an absolute, or at best a mixed monarchy.

"That the general assembly doth particularly protest against the palpable and alarming infractions of the constitution, in the two late cases of the "alien and sedition acts," passed at the last session of congress; the first of which exercises a power no where delegated to the federal government; and which, by uniting legislative and judicial powers to those of executive, subverts the general principles of free government, as well as the particular organization and positive provisions of the federal constitution; and the other of which acts exercises, in like manner, a power not delegated by the constitution; but, on the contrary, expressly and positively forbidden by one of the amendments thereto: a power, which, more than any other, ought to produce universal

alarm; because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

"That this state having by its convention which ratified the federal constitution, expressly declared, 'that among other essential rights, "the liberty of conscience and of the press cannot be canceled, abridged, restrained or modified by any authority of the United States,"' and from its extreme anxiety to guard these rights from every possible attack of sophistry and ambition, having with other states recommended an amendment for that purpose, which amendment was in due time annexed to the constitution, it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shown to the most palpable violation of one of the rights thus declared and secured, and to the establishment of a precedent which may be fatal to the other.

"That the good people of this commonwealth, having ever felt and continuing to feel the most sincere affection to their brethren of the other states; the truest anxiety for establishing and perpetuating the union of all; and the most scrupulous fidelity to that constitution, which is the pledge of mutual friendship, and the instrument of mutual happiness; the general assembly doth solemnly appeal to the like dispositions in the other states, in confidence that they will concur with this commonwealth in declaring, as it does hereby declare, that the acts aforesaid are unconstitutional; and, that the necessary and proper measures will be taken by each, for co-operating with this state, in maintaining unimpaired, the authorities, rights, and liberties reserved to the states respectively, or to the people."

The Kentucky legislature, November 10, 1798, passed the following resolution:

"I. *Resolved*, That the several states composing the United States of America, are not united on the principle of

unlimited submission to their general government; but that by compact under the style and title of a constitution for the United States, and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force: That to this compact each state acceded as a state, and is an integral party, its co-states forming as to itself, the other party: That the government created by this compact was not made the exclusive or final *judge* of the extent of the powers delegated to itself; since that would have made its discretion, and not the constitution, the measure of its powers; but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions, as of the mode and measure of redress."

The House of Representatives of Delaware passed the following resolution February 1, 1799:

"*Resolved*, By the senate and house of representatives of the state of Delaware, in general assembly met, that they consider the resolutions from the state of Virginia, as a very unjustifiable interference with the general government and constituted authorities of the United States, and of dangerous tendency, and therefore not a fit subject for the further consideration of the general assembly."

The State of Rhode Island and Providence Plantations, in General Assembly, February, 1799, passed the following resolutions:

"1. *Resolved*, That in the opinion of this legislature, the second section of the third article of the constitution of the United States, in these words, to-wit: *The judicial power shall extend to all cases arising under the laws of the United States*, vests in the federal courts exclusively, and in the supreme court of the United States, ultimately, the authority of deciding on the constitutionality of any act or law of the congress of the United States.

"2. *Resolved*, That for any state legislature to assume that authority, would be,

1st. Blending together legislative and judicial powers.

2d. Hazarding an interruption of the peace of the states by civil discord, in case of a diversity of opinions among the state legislatures; each state having, in that case, no resort for vindicating its own opinion, but to the strength of its own arm.

3rd. Submitting most important questions of law, to less competent tribunals: and

4th. An infraction of the constitution of the United States, expressed in plain terms."

"COMMONWEALTH OF MASSACHUSETTS,

IN SENATE, February 9, 1799.

"The legislature of Massachusetts having taken into serious consideration the resolutions of the state of Virginia, passed the 21st day of December last, and communicated by his excellency the governor, relative to certain supposed infractions of the constitution of the United States, by the government thereof, and being convinced that the federal constitution is calculated to promote the happiness, prosperity and safety of the people of these United States, and to maintain that union of the several states, so essential to the welfare of the whole; and, being bound by solemn oath to support and defend that constitution, feel it unnecessary to make any professions of their attachment to it, or of their firm determination to support it against every aggression, foreign or domestic.

"But they deem it their duty solemnly to declare, that while they hold sacred the principle, that the consent of the people is the only pure source of just and legitimate power, they cannot admit the right of the state legislatures to denounce the administration of that government to which the

people themselves, by a solemn compact, have exclusively committed their national concerns: That, although a liberal and enlightened vigilance among the people is always to be cherished, yet an unreasonable jealousy of the men of their choice, and a recurrence to measures of extremity, upon groundless or trivial pretexts, have a strong tendency to destroy all rational liberty at home, and to deprive the United States of the most essential advantages in their relations abroad: That this legislature are persuaded, that the decisions of all cases in law and equity, arising under the constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States.

"That the people in that solemn compact, which is declared to be the supreme law of the land, have not constituted the state legislatures the judges of the acts or measures of the federal government, but have confided to them the power of proposing such amendments of the constitution, as shall appear to them necessary to the interests, or conformable to the wishes of the people whom they represent.

"That by this construction of the constitution, an amicable and dispassionate remedy is pointed out for any evil which experience may prove to exist, and the peace and prosperity of the United States may be preserved without interruption.

"But, should the respectable state of Virginia persist in the assumption of the right to declare the acts of the national government unconstitutional, and should she oppose successfully her force and will to those of the nation, the constitution would be reduced to a mere cypher, to the form and pageantry of authority, without the energy of power. Every act of the federal government which thwarted the views or checked the ambitious projects of a particular state, or of its leading and influential members, would be the object of opposition and of remonstrance; while the people, convulsed and confused by the conflict between two hostile

jurisdictions, enjoying the protection of neither, would be wearied into a submission to some bold leader, who would establish himself on the ruins of both."

The New York legislature passed the following resolution March 5, 1799:

"And whereas the senate not perceiving that the rights of the particular states have been violated, nor any unconstitutional powers assumed by the general government, cannot forbear to express the anxiety and regret with which they observe the inflammatory and pernicious sentiments and doctrines which are contained in the resolutions of the legislatures of Virginia and Kentucky; sentiments and doctrines no less repugnant to the constitution of the United States, and the principles of their union, than destructive to the federal government, and unjust to those whom the people have elected to administer it; wherefore,

"*Resolved*, That while the senate feel themselves constrained to bear unequivocal testimony against such sentiments and doctrines, they deem it a duty no less indispensable, explicitly to declare their incompetency, as a branch of the legislature of this state, to supervise the acts of the general government."

The legislature of Connecticut passed the following resolution on the "second Tuesday of May, *anno domini*, 1799:"

Resolved, That this assembly views with deep regret, and explicitly disavows, the principles contained in the aforesaid resolutions; and particularly the opposition to the "alien and sedition acts," acts, which the constitution authorized; which the exigency of the country rendered necessary; which the constituted authorities have enacted, and which merit the entire approbation of this assembly. They therefore decidedly refuse to concur with the legislature of Virginia, in promoting any of the objects attempted in the aforesaid resolutions."

The legislature of New Hampshire passed the following resolution June 14, 1799:

"*Resolved*, That the legislature of New Hampshire unequivocally express a firm resolution to maintain and defend the constitution of the United States, and the constitution of this State, against every aggression, either foreign or domestic, and that they will support the government of the United States in all measures warranted by the former.

"That the state legislatures are not the proper tribunals to determine the constitutionality of the laws of the general government — that the duty of such decision is properly and exclusively confided to the judicial department."

The legislature of Vermont passed the following resolution October 30, 1799:

"*Resolved*, That the general assembly of the state of Vermont do highly disapprove of the resolutions of the general assembly of Virginia, as being unconstitutional in their nature, and dangerous in their tendency. It belongs not to state legislatures to decide on the constitutionality of laws made by the general government; this power being exclusively vested in the judiciary courts of the union: That his excellency the governor be requested to transmit a copy of this resolution to the executive of Virginia, to be communicated to the general assembly of that state: And that the same be sent to the governor and council for their concurrence."

"Resolutions of Virginia and Kentucky."

CONSTITUTION

OF THE

UNITED STATES OF AMERICA.

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section 1.— 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.— 1. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall

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CONSTITUTION

OF THE

UNITED STATES OF AMERICA.

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section 1.— 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.— 1. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall

be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and, until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

Section 3.—1. The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year; and of the third class, at the expiration of the sixth year; so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

Section 4.—1. The times, places, and manner, of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof: but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section 5.—1. Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and, from time to time, publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

SECTION 6.—1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to, and returning from, the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person, holding any office under the United States, shall be a member of either House during his continuance in office.

SECTION 7.—1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill, which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and, if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8.—The Congress shall have power

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States:

2. To borrow money on the credit of the United States:

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes:

4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States:

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures:

6. To provide for the punishment of counterfeiting the securities and current coin of the United States:

7. To establish post-offices and post-roads:

8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries:

9. To constitute tribunals inferior to the Supreme Court:

10. To define and punish piracies and felonies, committed on the high seas, and offences against the law of nations:

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water:

12. To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years:

13. To provide and maintain a navy:

14. To make rules for the government and regulation of the land and naval forces:

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions:

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress:

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places, purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings:—And

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

SECTION 9.—1. The migration or importation of such persons, as any of the states, now existing, shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it.

3. No bill of attainder, or *ex post facto* law, shall be passed.

4. No capitation, or other direct tax, shall be laid, unless in proportion to the *census* or enumeration hereinbefore directed to be taken.

5. No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties, in another.

6. No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States; and no person, holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SECTION 10.—1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by

any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Article II.

Section 1.—1. The Executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows:

2. Each state shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives, to which the state may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit, under the United States, shall be appointed an Elector.

3. The Electors shall meet in their respective states, and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there be more than one, who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one

of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall, in like manner, choose the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.

4. The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

5. No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office, who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

7. The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive, within that period, any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation:

9. "I do solemnly swear (or affirm), that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SECTION 2.—1. The President shall be Commander-in-Chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3.—1. He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully

executed, and shall commission all the officers of the United States.

SECTION 4.—1. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1.—1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION 2.—1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment,

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2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment,

shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed.

SECTION 3.—1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

ARTICLE IV.

SECTION 1.—1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2.—1. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

2. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

3. No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3.—1. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any

state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SECTION 4.—1. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

ARTICLE V.

1. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: provided 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.

ARTICLE VI.

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Article VII.

1. The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

Done in convention by the unanimous consent of the States present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

George Washington,
President and deputy from Virginia.

New Hampshire,
John Langdon,
Nicholas Gilman.

Massachusetts,
Nathaniel Gorham,
Rufus King.

Connecticut,
William Samuel Johnson,
Roger Sherman.

New York,
Alexander Hamilton.

New Jersey,
William Livingston,
David Brearley,
William Patterson,
Jonathan Dayton.

Pennsylvania,
Benjamin Franklin,
Thomas Mifflin,
Robert Morris,
George Clymer,
Thomas Fitzsimons,

Pennsylvania — continued,
Jared Ingersoll,
James Wilson,
Gouverneur Morris.

Delaware,
George Read,
Gunning Bedford, Jr.,
John Dickinson,
Richard Bassett,
Jacob Broom.

Maryland,
James M'Henry,
Daniel of St. Tho. Jenifer,
Daniel Carroll.

Virginia,
John Blair,
James Madison, Jr.

North Carolina,
William Blount,
Richard Dobbs Spaight,
Hu. Williamson.

South Carolina,
J. Rutledge,
C. Cotesworth Pinckney,
Charles Pinckney,
Pierce Butler.

Georgia,
William Few,
Abraham Baldwin.

Attest,
William Jackson, *Secretary.*

AMENDMENTS TO THE CONSTITUTION

Article I.

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; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Article II.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Article III.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, but in a manner to be prescribed by law.

Article IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V.

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 in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war, or public danger; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb;

nor shall be compelled, in any criminal case, to be a witness against himself, 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.

Article VI.

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, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

Article VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

Article VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Article X.

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.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

ARTICLE XII.

1. The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign, and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such a majority, then, from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death, or other constitutional disability, of the President.

2. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators; a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of President, shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

SECTION 1.— Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2.— Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

SECTION 1.— All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2.— Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhab-

itants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.— No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4.— The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5.— The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article XV.

Section 1.— 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.

Section 2.— The Congress shall have power to enforce this article by appropriate legislation.

DECLARATION OF INDEPENDENCE, ARTICLES OF CONFEDERATION, ETC.

I.

A Declaration by the Representatives of the United States of America, in Congress Assembled.

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established, should not be changed for light and transient causes; and, accordingly, all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But, when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design

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to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies, and such is now the necessity which constrains them to alter their former systems of government. The history of the present king of Great Britain is a history of repeated injuries and usurpations, all having, in direct object, the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world:

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and, when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the legislature; a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the State remaining, in the mean time, exposed to all the dangers of invasion from without, and convulsions within.

He has endeavored to prevent the population of these States; for that purpose, obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislature.

He has affected to render the military independent of, and superior to, the civil power.

He has combined, with others, to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock trial, from punishment, for any murders which they should commit on the inhabitants of these States:

For cutting off our trade with all parts of the world:

For imposing taxes on us without our consent:

For depriving us, in many cases, of the benefits of trial by jury:

For transporting us beyond seas to be tried for pretended offences:

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies:

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the powers of our governments:

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection, and waging war against us.

He has plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people.

He is, at this time, transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun, with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian savages, whose known rule of warfare is an undistinguished destruction, of all ages, sexes, and conditions.

In every stage of these oppressions, we have petitioned for redress, in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in attention to our British brethren.

We have warned them, from time to time, of attempts made by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them as we hold the rest of mankind, enemies in war, in peace, friends.

We, therefore, the representatives of the UNITED STATES OF AMERICA, in GENERAL CONGRESS assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name, and by the authority of the good people of these colonies, solemnly publish and declare, That these United Colonies are, and of right ought to be, *free and independent States;* that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain, is, and ought to be, totally dissolved; and that, as FREE AND INDEPENDENT STATES, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which INDEPENDENT STATES may of right do. And, for the support of this declaration, with a firm reliance on the protection of DIVINE PROVIDENCE, we mutually pledge to each other, our lives, our fortunes, and our sacred honor.

JOHN HANCOCK.

New Hampshire.
JOSIAH BARTLETT,
WILLIAM WHIPPLE,
MATTHEW THORNTON.

Massachusetts Bay.
SAMUEL ADAMS,
JOHN ADAMS,
ROBERT TREAT PAINE,
ELBRIDGE GERRY.

Rhode Island.
STEPHEN HOPKINS,
WILLIAM ELLERY.

Connecticut.
ROGER SHERMAN,
SAMUEL HUNTINGTON,
WILLIAM WILLIAMS,
OLIVER WOLCOTT.

New York.
WILLIAM FLOYD,
PHILIP LIVINGSTON,
FRANCIS LEWIS,
LEWIS MORRIS.

New Jersey.
RICHARD STOCKTON,
JOHN WITHERSPOON,
FRANCIS HOPKINSON,
JOHN HART,
ABRAHAM CLARK.

Pennsylvania.
ROBERT MORRIS,
BENJAMIN RUSH,
BENJAMIN FRANKLIN,
JOHN MORTON,
GEORGE CLYMER,
JAMES SMITH,
GEORGE TAYLOR,
JAMES WILSON,
GEORGE ROSS.

Delaware.
CÆSAR RODNEY,
GEORGE READ,
THOMAS M'KEAN.

Maryland.
SAMUEL CHASE,
WILLIAM PACA,

Maryland—continued.
THOMAS STONE,
CHARLES CARROLL, of Carrollton.

Virginia.
GEORGE WYTHE,
RICHARD HENRY LEE,
THOMAS JEFFERSON,
BENJAMIN HARRISON,
THOMAS NELSON, JR.,
FRANCIS LIGHTFOOT LEE,
CARTER BRAXTON.

North Carolina.
WILLIAM HOOPER,
JOSEPH HEWES,
JOHN PENN.

South Carolina.
EDWARD RUTLEDGE,
THOMAS HEYWARD, JR.,
THOMAS LYNCH, JR.,
ARTHUR MIDDLETON.

Georgia.
BUTTON GWINNETT,
LYMAN HALL,
GEO. WALTON.

II.

ARTICLES OF CONFEDERATION

And perpetual union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

ARTICLE I. The style of this Confederacy shall be, "THE UNITED STATES OF AMERICA."

ARTICLE II. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.

ARTICLE III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state; and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively; provided, that such restriction shall not extend so far as to prevent the removal of property imported into any state to any other state, of which the owner is an inhabitant; provided also that no imposition, duties, or restriction shall be laid by any state on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor, in any state, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state to recall its delegates, or any of them, at any time within the year, and send others in their stead for the remainder of the year.

No state shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

Maryland—continued.
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CHARLES CARROLL, of Carrollton.

Virginia.
GEORGE WYTHE,
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THOMAS JEFFERSON,
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Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

In determining questions in the United States in Congress assembled, each state shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonment during the time of their going to, and from, and attending on Congress, except for treason, felony, or breach of the peace.

Article VI. No state, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or state; nor shall any person, holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into by the United States in Congress assembled with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the Courts of France and Spain.

No vessels of war shall be kept up, in time of peace, by any state, except such number only as shall be deemed necessary, by the United States in Congress assembled, for the defence of such state or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only as, in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state; but every state shall always keep up a well-regulated and disciplined

militia, sufficiently armed and accoutred; and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No state shall engage in any war, without the consent of the United States in Congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any state grant commissions to any ship or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled; and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

Article VII. When land forces are raised by any state for the common defence, all officers of or under the rank of colonel shall be appointed by the legislature of each state respectively, by whom such forces shall be raised, or in such manner as such state shall direct; and all vacancies shall be filled up by the state which first made the appointment.

Article VIII. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury which shall be supplied by the several states in proportion to the value of all land within each state, granted to or surveyed for any person as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in Congress assembled shall, from time to time, direct and appoint. The taxes for paying that pro-

portion shall be laid and levied by the authority and direction of the legislatures of the several states, within the time agreed upon by the United States in Congress assembled.

Article IX. The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article: Of sending and receiving ambassadors: Entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever: Of establishing rules for deciding, in all cases, what captures on land or water shall be legal; and in what manner prizes, taken by land or naval forces in the service of the United States, shall be divided or appropriated: Of granting letters of marque and reprisal in times of peace: Appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining, finally, appeals in all cases of captures; provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort, on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any state, in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given, by order of Congress, to the legislative or executive authority of the other state in controversy; and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court

for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States; and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination. And if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each state, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive. And if any of the parties shall refuse to submit to the authority of such court, or to appear, or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being, in either case, transmitted to Congress and lodged among the Acts of Congress for the security of the parties concerned: Provided that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, "Well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward:" Provided also, that no state shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more states, whose

jurisdictions, as they may respect such lands and the states which passed such grants, are adjusted, the said grants, or either of them, being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states: Fixing the standard of weights and measures throughout the United States: Regulating the trade and managing all affairs with the Indians, not members of any of the states; provided that the legislative right of any state within its own limits be not infringed or violated: Establishing and regulating post-offices, from one state to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office: Appointing all officers of the land forces in the service of the United States, excepting regimental officers: Appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States: Making rules for the government and regulation of the land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated A COMMITTEE OF THE STATES, and to consist of one delegate from each state, and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction: To appoint one of their number to preside; provided that no person be allowed to serve in the office of president more than one year in any term of three years: To ascertain the necessary sums of money to

be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses: To borrow money or emit bills on the credit of the United States, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted: To build and equip a navy: To agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state, which requisition shall be binding; and thereupon the legislature of each state shall appoint the regimental officers, raise the men, and clothe, arm, and equip them, in a soldierlike manner, at the expense of the United States; and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled: but if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than its quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such state; unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same; in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared: and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States, in Congress assembled, shall never engage in a war; nor grant letters of marque and reprisal in time of peace; nor enter into any treaties or alliances; nor coin money; nor regulate the value thereof; nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them; nor emit bills; nor borrow money on the credit of the United States; nor appropriate money; nor agree upon the number of vessels of war

to be built or purchased, or the number of land or sea forces to be raised; nor appoint a Commander-in-Chief of the army or navy; unless nine states assent to the same; nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months; and shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each state on any question shall be entered on the Journal, when it is desired by any delegate; and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.

Article X. The committee of the states, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine states, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the Articles of Confederation, the voice of nine states in the Congress of the United States assembled is requisite.

Article XI. Canada, acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

Article XII. All bills of credit emitted, moneys borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed

and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith, are hereby solemnly pledged.

Article XIII. Every state shall abide by the determinations of the United States in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every state; and the Union shall be perpetual. Nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state.

And whereas, it hath pleased the Great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union: Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said Confederation are submitted to them; and that the articles thereof shall be inviolably observed by the states we respectively represent; and that the Union shall be perpetual. In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia, in the state of Pennsylvania, the 9th day of July, in the year of our Lord 1778, and in the 3d year of the Independence of America.

III.

Resolutions and Letter Transmitted to Congress by the Federal Convention.

In Convention, Monday, September 17, 1787.

Present: The States of New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

Resolved, That the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this convention that it should afterwards be submitted to a Convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification; and that each convention, assenting to and ratifying the same, should give notice thereof, to the United States in Congress assembled.

Resolved, That it is the opinion of this Convention, that as soon as the conventions of nine states shall have ratified this Constitution, the United States in Congress assembled should fix a day on which electors should be appointed by the states which shall have ratified the same, and a day on which the electors should assemble to vote for the President, and the time and place for commencing proceedings under this Constitution. That after such publication the electors should be appointed, and the Senators and Representatives elected; that the electors should meet on the day fixed for the election of the President, and should transmit their votes certified, signed, sealed, and directed as the Constitution requires, to the Secretary of the United States in Congress assembled; that the Senators and Representatives should convene at the time and place assigned; that the Senators should appoint a president of the Senate, for the sole purpose of receiving, opening, and counting the votes for President; and that, after he shall be chosen, the Congress, together

with the President, should, without delay, proceed to execute this Constitution.

By the unanimous order of the Convention.

George Washington, *President.*

William Jackson, *Secretary.*

In Convention, September 17, 1787.

Sir: We have now the honor to submit to the consideration of the United States in Congress assembled, that Constitution which has appeared to us the most advisable.

The friends of our country have long seen and desired that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the General Government of the Union; but the impropriety of delegating such extensive trust to one body of men is evident: hence results the necessity of a different organization.

It is obviously impracticable, in the Federal Government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstance as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several states as to their situation, extent, habits, and particular interests.

In all our deliberations on this subject, we kept steadily in our view that which appears to us the greatest interest of every true American — the consolidation of our Union — in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each state in the Convention to be less rigid on points of inferior magni-

tude than might have been otherwise expected; and thus the Constitution which we now present is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.

That it will meet the full and entire approbation of every state, is not, perhaps, to be expected; but each will doubtless consider that, had her interest been alone consulted, the consequences might have been particularly disagreeable or injurious to others; that it is liable to as few exceptions as could reasonably have been expected, we hope and believe; that it may promote the lasting welfare of that country so dear to us all, and secure her freedom and happiness, is our most ardent wish.

With great respect, we have the honor to be, sir, your excellency's most obedient, humble servants.

By unanimous order of the Convention.

GEORGE WASHINGTON, *President.*

His Excellency the PRESIDENT OF CONGRESS.

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By unanimous order of the Convention.

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