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THE

CONSTITUTIONAL LAW

OF THE

UNITED STATES

BY

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PREFACE.

In the preparation of this work, the aim has been to give a logical and complete exposition of the general principles of the constitutional law of the United States. The effort has been to ascertain and to discuss critically the broad principles upon which have been founded the decisions rendered by the Supreme Court of the United States in the leading cases, and thus to present, as a systematic whole, a statement of the underlying doctrines by which our complex system of constitutional jurisprudence is governed. The performance of this purpose has required that attention should be devoted rather to a consideration of those principles of our public law which are fundamental, and especially of those the possible implications of which are not yet certainly determined, than to a statement in minute detail of those adjudications which, in themselves, establish no general rule of law, or illustrate no novel application of one. This latter task is one which more properly belongs to compilers of digests or to the authors of more special text-books. It is confidently believed, however, that in the present work no really important case has been left unnoticed.

Such merit as the present work may possess must, then, consist in its systematic arrangement, and in the fact that, with reference to the constitutional principles which are discussed, it fully sets forth the processes of judicial reasoning by which they have been established, it suggests the corollaries which may be drawn from them, and it indicates the relations which they bear to one another and to the more general doctrines of American public law.

Whenever space has seemed to permit, the author has reproduced the language of the Federal Supreme Court. This has necessitated many and, at times, extended quotations. It is believed, however, that this practice will commend itself to the reader. Since the character of this work requires in any case that

the arguments should be given, the authoritative language of the nation's highest tribunal is certainly preferable to a statement by a commentator of his understanding of the court's ruling or reasoning.

The author desires to make especial acknowledgment of the very great assistance which he has received from Hon. John C. Rose, United States District Judge, and Dr. Frank J. Goodnow, Professor of Constitutional and Administrative Law at Columbia University. Both of these friends have generously spared the time to read this treatise in the proof. That they have not, however, committed themselves to all of the positions assumed herein, hardly needs to be said.

The author wishes also to express generally his debt to the various law magazines published in this country. These journals are an honor to American legal scholarship, and to the articles contained in them the author owes more than he has been able specifically to acknowledge.

In conclusion, it may be added that, where appropriate, the author has repeated language used by him in an earlier and briefer work entitled *The American Constitutional System.*

The work as a whole is based upon lectures delivered during recent years to the graduate students in Political Science at the Johns Hopkins University.

June, 1910. W. W. W.

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CONSTITUTION OF THE UNITED STATES.[1]

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. 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.[2] 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;

[1] This reprint of the Constitution exactly follows the text of that in the Department of State at Washington, save in the spelling of a few words.

[2] Superseded by the 14th Amendment.

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 Desember, 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 privi-

leged 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 becomes 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. 1 The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense 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 an 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 Define and punish piracies and felonies committed on the high seas, and offenses 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, dockyards, 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.

6 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.

7 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.

8 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.

3. 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.

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 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.[1]

3 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.

4 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.

5 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.

6 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

[1] Superseded by the 12th Amendment.

shall not receive within that period any other emolument from the United States, or any of them.

7 Before he enter on the execution of his office, he shall take the following oath or affirmation: — "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 offenses 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. 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. 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. 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 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 to 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. 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. 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

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

The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

Articles in addition to, and amendment of, the Constitution of the United States of America, proposed by Congress, and ratified by the legislatures of the several States pursuant to the fifth article of the original Constitution.

ARTICLE I[1]

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

[1] The first ten Amendments were adopted in 1791.

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.

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 defense.

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 reëxamined 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[1]

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[2]

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 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 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 the case of the death or other constitutional disability of the President. 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

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1 Adopted in 1798. 2 Adopted in 1804.

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. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

ARTICLE XIII[1]

SECTION 1. 1 Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

2 Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV[2]

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.

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 inhabitants 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.

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[1] Adopted in 1865. [2] Adopted in 1868.

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.

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.

5 The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV[1]

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.

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[1] Adopted in 1870.

UNITED STATES CONSTITUTIONAL LAW.

CHAPTER I.

THE SUPREMACY OF THE UNITED STATES CONSTITUTION.

The fundamental principle of American constitutional jurisprudence is that laws and not men shall govern. This means that when a power, exercised by an official or by a governmental organ, is challenged legal authority therefor derived from some existing law must be shown, and that no valid law can exist save that which is recognized as such by the courts. The courts recognize two great bodies of law; the so-called common law, which is a product of custom and judicial interpretation, which in large measure we have inherited from England; and enacted law, which is the formal creation of the legislative organs of government. This formally enacted law is of two kinds: That embodied in written constitutions, and that enacted by the ordinary legislative bodies and termed statutes.

Independently of express statement to that effect, it has become axiomatic that no statute law is valid if not consistent with the provisions of the Constitution from which the enacting legislature derives its powers. A state statute inconsistent with the Constitution of that state is, therefore, invalid, and an act of Congress not warranted by the provisions of the federal Constitution is similarly void. And the same legal invalidity of course attaches to the unconstitutional act of an executive or judicial organ of government. In addition to being subordinate to the provisions of the state Constitution, every act of the state official or organ is required to conform to the requirements of the federal Constitution, and this applies as well to the provisions of a state Constitution, as to the statutes of its legislature.

Elsewhere we shall have occasion to deal with the constitutional tests to be applied to executive and judicial acts. In this chapter we are concerned with the relation between statute and constitutional law.

§ 1. The Courts and Unconstitutional Laws.

The principle that statutory law, in order to be valid, must be in conformity with constitutional requirements, is a product of American jurisprudence, and peculiar to it. That the acts of the legislatures of subordinate political units must agree with the conditions and recognize the limits laid down by the superior sovereign power is of course not peculiar to the United States; but that the legislative acts of the highest legislative body itself are void if not warranted by the Constitution under which that body is organized, is nowhere else admitted,— neither in England, which is without a written Constitution, nor in any other Continental country which has one.

§ 2. Marbury v. Madison.

The acceptance of this principle in the United States may be dated from the decision by the Supreme Court in 1803 of the case of Marbury v. Madison.[1] This point is of such transcendent importance that the argument of Marshall will be given *in extenso.*

" The question whether an act, repugnant to the Constitution, can become the law of the land," says the great Chief Justice, " is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The

[1] 1 Cr. 137; 2 L. ed. 60.

principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. . . . It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a supreme paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be that an act of the legislature repugnant to the Constitution is void. . . . If an act of the legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? . . . It is emphatically the province and duty of the judicial department to say what the law is. . . . So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply."

The reasoning of Webster and Kent as to the invalidity of

legislative acts contrary to the Constitution, and as to the power of the court to declare them such, is substantially the same as that of Marshall.[2]

§ 3. Criticism.

The force of the reasoning of Marshall, Webster and Kent may in some respects be questioned, or at least added to.

That organ or body which has the final power to interpret the Constitution has necessarily the power to give to that instrument what meaning it will. It thus becomes, in a sense, supreme over all the other organs of government. Unless, therefore, the body from whose action the Constitution itself derived its force is to be resorted to in every case of doubtful construction (and this, of course, is impracticable) the only alternative is to delegate this supreme power to some one of the permanent organs of government. But it does not necessarily follow, as the reasoning of Marshall, Webster and Kent would seem to indicate, that, as an abstract proposition, this power must always be possessed by the judiciary. Indeed, in all other countries except the United States, this power is vested in the legislature. These other written constitutions did not, indeed, exist at the time that Marshall rendered his opinion, but their present existence shows that under a written instrument of government it does not necessarily follow that the courts should have a power to hold void legislative acts contrary to its provisions.

If, then, the possession of this power by American courts is to be established, it must be by a resort either to the words of

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[2] Webster declares: "The Constitution being the supreme law, it follows of course, that every act of the legislature contrary to the law must be void. But who shall decide this question? Shall the legislature itself decide it? If so, then the Constitution ceases to be a legal and becomes only a moral restraint on the legislature. If they, and they only, are to judge whether their acts be conformable to the Constitution, then the Constitution is admonitory or advisory only, not legally binding; because, if the construction of it rest wholly with them, their discretion, in particular cases, may be in favor of very erroneous and dangerous constructions. Hence the courts of law, necessarily, when the case arises, must decide upon the validity of particular acts." Webster, *Works*, Vol. III, 30.

the Constitution itself; or, if these be not explicit, to the general intention of the framers and adopters of the Constitution, so far as this intention may be deduced from the general nature of the government sought to be established, from the records preserved of the conventions in which the instrument was framed and adopted, and from the precedents drawn from colonial practice, if any such are to be found. We are not here concerned, it is to be repeated, with the question whether the federal judiciary should have the power to hold void such acts of the state legislatures as might contravene the provisions of the federal Constitution. This is a distinct question and is considered in its proper place. We have here to deal with the power of the federal courts to refuse to recognize the validity of such acts of the National Legislature as it may consider unconstitutional, and of state tribunals to hold void acts of their state legislatures because contrary to their respective state Constitutions.

As regards state precedents prior to the adoption of the federal Constitution it may be said that there are scarcely to be found a sufficient number to warrant one in saying that the doctrine had

Kent, in his *Commentaries*, says: "The Constitution is the act of the people, speaking in their original character, and defining the permanent conditions of the social alliance; and there can be no doubt on the point with us, that every act of the legislative power contrary to the true intent and meaning of the Constitution, is absolutely null and void. The judicial department is the proper power in the government to determine whether a statute be or be not constitutional. The interpretation or construction of the Constitution is as much a judicial act, and requires the exercise of the same legal discretion, as the interpretation or construction of a law. To contend that the courts of justice must obey the requisitions of an act of the legislature when it appears to them to have been passed in violation of the Constitution, would be to contend that the law was superior to the Constitution, and that the judges had no right to lock into it, and regard it as a paramount law. It would be rendering the power of the agent greater than that of his principal and be declaring that the will of only one concurrent and co-ordinate department of the subordinate authorities under the Constitution was absolute over the other departments, and competent to control, according to its own will and pleasure, the whole fabric of the government, and the fundamental laws on which it rested. The attempt to impose restraints upon the exercise of the legislative power would be fruitless, if the constitutional provisions were left without any power in the government to guard and enforce them." Chapter XX.

become an established one in America in 1787, and therefore to be presumed to have been held by the framers and adopters of the federal Constitution. Still there had been a few instances in which, prior to 1789, the courts had held void acts of their respective legislatures, though not without incurring more or less animadversion for so doing.

Whatever may be the evidence of prior state or colonial practice, it appears quite plainly from the proceedings of the constitutional convention, as well as from the words of the Constitution itself, that it was intended that the courts should have the power of disregarding unconstitutional legislative acts. The greatest solicitude was constantly expressed that the national legislative power should be prevented from encroaching upon the powers of the other departments of government, and a great variety of schemes for preventing this were discussed. In addition to the qualified presidential veto which was finally adopted, it was expressly provided that the Constitution and the laws of the United States made in pursuance thereof should be the supreme law of the land, and that the federal judicial power should extend to "all cases, in law and equity, arising under the Constitution." From this would clearly appear an intention that the courts should have the power to consider the constitutionality of legislative acts.

Marshall in his opinion in Marbury v. Madison adverts to this, but does not, as he should have done, make it the foundation of his argument. He says: "The judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained." After quoting certain prohibitions of the Constitution upon legislative action, Marshall continues: "From these and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature. Why otherwise does it direct the judges to

take an oath to support it? . . . It is also not entirely unworthy of observation that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank. Thus the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument."

This last paragraph clearly exhibits the sequence of the argument in Marshall's mind. First is stated the abstract principle, necessarily bound up with the idea of a written fundamental instrument of government, that the constitutionality of a legislative act may be questioned by the courts. Then the validity of this principle is supported by the express provisions of the Constitution itself. This first observed principle we have seen to be not a necessary one. The entire argument should therefore have been thrown upon the provisions of the Constitution itself interpreted in the light of the intentions of its framers so far as these intentions are discoverable from the debates in the federal constitutional convention and the state ratifying conventions.[3]

§ 4. The Expediency of This Judicial Power.

As regards the expediency of granting to the courts rather than to the legislature itself the final power of construing the Con-

[3] It is generally stated that the power of the courts to declare void unconstitutional laws is an implied one and not an expressly granted power. Mr. Brinton Coxe, however, in his interesting work, *Judicial Power and Unconstitutional Legislation*, argues that the power is expressly given in the clauses which have been quoted in the text,— not expressly in the sense of being unequivocally stated in so many words, but as being necessarily intended by the words used, and not implied as a means of rendering effective some other expressly granted power. In other words, he says in effect, that the power is expressly given even though a careful examination of the text is required to determine the fact. To the author, however, it seems more satisfactory to hold the power an implied one — implied from the express authority given to the federal courts to adjudicate all cases arising under the Constitution which is declared to be the supreme law of the land.

stitution there would seem to be little doubt, though there are indeed some who still question it.[4]

That it was the possible absorption of undue powers by the legislature which the constitutional fathers expressly feared, there is abundant evidence in the records of their views which have been preserved. The following is but one of many similar quotations that might be made. In the *Federalist*,[5] Madison writes: "In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger and watched with all the jealousy which a zeal for liberty ought to inspire. . . . But in a representative republic, where the executive magistracy is limited both in the extent and the duration of its power; and where the legislative power is exercised by an assembly which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength, which is

[4] See for example *American Law Review*, XL, 356, article entitled "The Great Usurpation," and *North American Review*, August 16, 1907, article entitled "Judicial Nullification of Acts of Congress."

[5] No. XLVIII.

The argument, upon grounds of expediency, for giving the power to the courts is stated by Webster and Kent as follows: Webster says: "It cannot be denied that one great object of written constitutions is to keep the departments of government as distinct as possible; and for this purpose to impose restraints designed to have that effect. And it is equally true, that there is no department on which it is more necessary to impose restraints than the legislative. The tendency of things is almost always to augment the power of that department in its relation to the judiciary. The judiciary is composed of few persons, and those not such as mix habitually in the pursuits and objects which most engage public men. They are not, or never should be, political men. They have often unpleasant duties to perform, and their conduct is often liable to be canvassed and censured, where their reasons for it are not known, or cannot be understood. The legislature holds the public purse. It fixes the compensation of all other departments; it applies, as well as raises, all revenue. It is a numerous body and necessarily carries along with it a great force of public opinion. Its members are public men, in constant contact with one another, and with their constituents. It would seem to be plain enough that, without constitutional provisions which should be fixed and certain, such a department, in case of excitement, would be able to encroach on the judiciary. Therefore is it, that a security of judicial independence becomes necessary." *Works*, III, 29.

Kent declares: "From the mass of powers necessarily vested in the legiclature, and the active and sovereign nature of these powers; from the

sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by all the means which reason prescribes, it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions. . . . Its constitutional powers being at once more exclusive and less susceptible of precise limits, it can, with greater facility, mask under complicated and indirect measures, the encroachments that it makes on co-ordinate departments."

§ 5. Courts Do Not "Nullify" Laws.

The doctrine that an unconstitutional law is void is often stated as a deduction from the premise that constitutional law is a superior kind of law to which statute law of inferior rank is obliged to yield. Accurately speaking, however, this is not the case, for the unconstitutional statute is not law at all, whatever its form or however solemnly enacted and promulgated.

There are not and cannot be degrees of legal validity. Any given rule of conduct or definition of a right either is or is not

numerous bodies of which the legislature is composed, the popular sympathies which it excites, and its immediate dependence upon the people by means of frequent periodical elections, it follows that the legislative department of the government will have a decided superiority of influence. It is constantly acting upon all the great interests of society, and agitating its hopes and fears. It is liable to be constantly swayed by popular prejudice and passion, and it is difficult to keep it from pressing with injurious weight upon the constitutional rights and privileges of the other departments. An independent judiciary, venerable by its gravity, its dignity and its wisdom, and deliberating with entire serenity and moderation, is peculiarly fitted for the exalted duty of expounding the Constitution, and taxing the validity of statutes by that standard. It is only by the free exercise of this power that courts of justice are enabled to repel assaults, and to protect every part of the government, and every member of the community, from undue and destructive innovations upon their chartered rights. It has accordingly become a settled principle in the legal polity of this country, that it belongs to the judicial power, as a matter of right and duty, to declare every act of the legislature, made in violation of the Constitution, null and void." *Commentaries*, Lect. XX.

law. When therefore we describe any particular measure as an unconstitutional law, and therefore, of course, void, we are in fact, strictly speaking, guilty of a contradiction of terms, for if it is unconstitutional it is not a law at all; or, if it is a law, it cannot be unconstitutional. Thus when any particular so-called law is declared unconstitutional by a competent court of last resort, the measure in question is not "vetoed" or "annulled," but simply declared never to have been law at all, never to have been, in fact, anything more than a futile attempt at legislation on the part of the legislature enacting it. This is a very important point, for did the decision of the court operate as a veto the effect would be simply to hold that the law should cease to be valid from and after the time such decision was rendered, whereas, in fact, the effect is to declare that the law never having had any legal force no legal rights or liabilities can be founded upon it. In Norton v. Shelby Co.,[6] Mr. Justice Field says: "An unconstitutional act is not a law, it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

An exception to this doctrine, and, to the author's mind, an illogical and ill-considered one, is that made by the Supreme Court in Gelpeke v. Dubuque[7] and the cases affirming it.[8] In these cases it has been held that while a decision of the highest court of a State holding void an act of the State because in conflict with the Constitution of that State will be followed by the federal Supreme Court as to all rights of action accruing after the rendition of such decision, it will not be applied to earlier transactions entered into when the law in question had been declared valid by the state courts and these transactions had been entered into in good faith confiding in the decision of the courts upholding the law.[9]

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[6] 118 U. S. 425; 6 Sup. Ct. Rep. 1121; 30 L. ed. 178.

[7] 1 Wall. 175; 17 L. ed. 520.

[8] See section 517. There are also some other exceptions, among which is the validity given to acts of *de facto* officers and *de facto* corporations whose tenure of office or existence is based upon statutes later held unconstitutional.

[9] It may also be proper to observe that acts committed by persons exercising in good faith powers conferred by acts later held unconstitutional are some-

In declaring unconstitutional, and therefore void, the enactment of a legislative body, it has sometimes been argued that a court defeats the will of the people as whose law-making organ and mouthpiece the legislature acts. In truth, however, what is done is this: The people, acting solemnly and deliberately in their sovereign capacity, declare that certain matters shall be determined in a certain way. These matters, because of their great and fundamental importance, they reduce to definite written form, and declare they shall not be changed except in a particular manner. In addition to this they go on to say, in substance, that so decided is their will, and so maturely formed their judgment, upon these matters, that any act of their own representatives in legislature inconsistent therewith, is not to be taken as expressing their deliberate will. Therefore, when the courts declare void legislative acts inconsistent with constitutional provisions, the judges are giving effect to the real will of the people as they have previously solemnly declared it. Thus, "In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." [10]

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times given a certain validity. This, however, is in accordance with a general principle governing *de facto* officers and is hardly to be treated as an exception to the doctrine stated in the text. In United States v. Realty Co. (163 U. S. 427; 16 Sup. Ct. Rep. 1120; 41 L. ed. 215) it was held that persons acting in good faith under an unconstitutional act of Congress might have an equitable claim against the United States, for the payment of which an appropriation might be made by Congress.

[10] Lindsay v. Commissioners, 2 Ray, 38, 61.

CHAPTER II.

PRINCIPLES OF CONSTITUTIONAL CONSTRUCTION.

§ 6. Circumstances Under Which the Courts Will Hold an Act of Congress Void.

Because an act of Congress is the declaration of a co-ordinate branch of the National Government, the courts have established for themselves certain more or less definite rules governing the conditions under which they will undertake to pass upon the constitutionality of federal statutes. These rules are self-established, under a sense of propriety and expediency, and are not created by any constitutional necessity.[1]

1. Courts of first instance will not hold an act unconstitutional except in clear cases, but will leave this to the final judgment of the higher courts. Inferior courts hold themselves bound by the prior decisions of superior courts as to the validity of an act, even though new reasons, *pro* or *contra,* are raised. The presumption is that all possible arguments were in fact considered by the superior courts.

2. The Supreme Court has held that, ordinarily, it will not hold a law void except by a majority of the full bench. Thus, in 1825, the Court of Appeals of Kentucky refused to follow a decision of the Supreme Court of the United States, which had held a law of Kentucky void as contrary to the federal Constitution, stating as a reason that the decision had not been concurred in by a majority of the entire court.[2] After this occurrence the Supreme Court adopted the rule as stated above. In New York v. Miln,[3] decided in 1834, Marshall said: "The practice of this court is not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four justices [the court then consisted of seven]

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[1] *Cf.* the enumeration of these rules by Cooley in his *Const. Lim.*, Chap. VII.

[2] Bodley v. Gaither, 3 Monroe, 57.

[3] 8 Pet. 120; 8 L. ed. 888.

concur in the opinion, thus making the decision that of a majority of the whole court. In the present cases four justices do not concur in opinion as to the constitutional questions which have been argued. The court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present."

3. The courts will not pass upon the constitutionality of a law except in suits duly brought before them at the instance of parties whose material interests are involved.[4]

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[4] *Advisory Opinions:* The following data regarding Advisory Opinions is largely taken from Thayer, *Cases on Constitutional Law*, I, 175.

The constitutions of four of the States (Massachusetts, Maine, New Hampshire, Rhode Island) provide that upon request by the executive or legislature, the judges of the highest courts shall render an opinion upon the constitutionality of a proposed measure submitted to them. And six States (Colorado, Florida, Idaho, Illinois, Nebraska, Washington) provide that judges may suggest improvements in the law for legislative action. (Dealey, *Our State Constitutions*, p. 40, Annals of the American Academy of Political and Social Science. Supplement, March, 1907.)

In general it may be said that these opinions thus obtained are purely advisory in character, and that they do not even constitute judicial precedents to control the future judgments of the courts that render them. This has been definitely declared in Massachusetts, New Hampshire, Rhode Island, Missouri (where the practice existed from 1865 to 1875) and Florida. In Maine and Colorado, however, these decisions have been held binding. (12 Col. Rept. 466, 70 Maine, p. 503). The Maine court said: "Various questions involving the true construction of the Constitution and statutes . . . arose, and the Governor called upon this court for its opinion on the questions propounded. The court was required by the Constitution to expound and construe the provisions of the Constitution and statutes involved. It gave full answers. The opinion of the court was thus obtained in one of the modes provided in the Constitution for an authoritative determination of 'important questions of law.' The law thus determined is the conclusive guide of the Governor and Council in the performance of their ministerial duties. Any action on their part . . . in violation of the Constitution and law thus declared is a usurpation of authority and must be held void."

Despite Maine and Colorado, the weight of precedent, as well as the better reason and wisdom, is in favor of holding such opinions advisory merely. Such decisions do not arise out of or relate to any particular facts or particular purpose which might explain or limit the generality of their statements. The judges have not had the benefit of the hearing of counsel, and there has been no argument before them.

The opinions of the Attorney-General of the United States resemble in their advisory character these opinions of judges.

4. The court will not pass adversely upon the validity of an act of Congress unless it is absolutely necessary for it to do so in order to decide the question at issue. This principle has been so often declared that the citation of authorities is not necessary.[5]

A number of instances have occurred in which justices in States, whose Constitutions did not give the legislature or executive this power to call for their opinions, have refused to give them when called upon to do so. Especially in Minnesota (10 Minn. 78, 1865) the court held unconstitutional an act which provided that "either house may by resolution require the opinion of the Supreme Court or any one or more of the judges thereof upon a given subject, and it shall be the duty of such court, or judges thereof, when so requested respectively to give such opinions in writing."

The Pennsylvania court, however, in a similar case, gave the desired opinion without comment. (3 Binney, 595.)

In several cases, justices have refused, even in those States where the power to call for an opinion is in the Constitution, to give an opinion upon questions which it was possible might afterward come before them for adjudication. Instances of this occurred several times in Missouri and once in Maine.

In the Constitutional Convention of 1787 it was proposed to give this power to the President and Congress and to ask opinions of the Supreme Court, but nothing came of it. (5 Ell. Deb. 445.)

In 1793 Washington asked the opinion of the Supreme Court *in re* Jay's Treaty. Twenty-nine questions were propounded. The Court refused to answer. Thayer thinks it fortunate that this first request should have come in so weighty a form, else the court might have slipped into an unfortunate precedent, and thus become concerned in politics.

"New York originally not only gave her legislators a share in judicial power, but her judges a share in that of legislation. Her Constitution of 1777 provided for a council of revision, consisting of the Governor, the Chancellor, and the judges of the Supreme Court, to whom all bills which passed the Senate and Assembly should be presented for consideration; and that if a majority of them should deem it improper that any such bill become a law they should within ten days return it with their objections to the house in which it originated, which should enter the objections at large in its minutes, and proceed to reconsider the bill; and that it should not become a law unless repassed by a vote of two-thirds of the members of each house. For forty years this remained the law, and the Council of Revision contained from time to time judges of great ability, Chancellor Kent being one. During this period, 6590 bills in all were passed. One hundred and twenty-eight of them were returned by the Council with their objections, and only seventeen of these received the two-thirds necessary to re-enact them." Baldwin, *The American Judiciary*, p. 30.

[5] In Marbury v. Madison the Supreme Court, although it declared that it had not jurisdiction of the case, went on to lay down the law applicable to the other points at issue. The excuse for so doing was that the court felt itself

5. When it is possible to do so without doing too great violence to the words actually used, the language of a statute will be so re-

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obligated first to determine whether or not the mandamus asked for should issue, so that, if possible, it might dispose of the case without calling into question the constitutionality of the act of Congress granting the original jurisdiction under which the suit had been brought. Whether this was a sufficient excuse is doubtful. Jefferson was vehement in criticism of the action.

In the Dred Scott case the Supreme Court after holding that the lower federal courts from which the case had come by appeal, had had no jurisdiction, went on to discuss the other points raised in the record before it. The propriety of this course was strenuously objected to by the minority justices. Taney's argument was that the plea to the jurisdiction that had been entered was not as to the jurisdiction of the Supreme Court, but as to that of the circuit court in which the suit had been begun, and that, therefore, the case being fairly before the Supreme Court, that tribunal might examine the whole record and correct any errors that might have been made by the courts below. "There can be no doubt of the jurisdiction of this court to reverse the judgment of a circuit court, and to reverse it for any error apparent in the record, whether it be the error of giving judgment in a case over which it had no jurisdiction, or any other material error; and this too, whether there is any plea in abatement or not. The objection appears to have arisen from confounding writs of error to a state court, with writs of error to a circuit court of the United States. Undoubtedly, upon a writ of error to a state court, unless the record shows a case that gives jurisdiction, the case must be dismissed for want of jursidiction in the court. And if it is dismissed on that ground, we have no right to examine and decide upon any question presented by the bill of exceptions, or any other part of the record. But writs of error to a state court and to a circuit court of the United States are regulated by different laws, and stand upon entirely different principles. And in a writ of error to a circuit court of the United States, the whole record is before this court for examination and decision; and if the sum in controversy is large enough to give jurisdiction, it is not only the right, but it is the judicial duty of the court to examine the whole case as presented by the record, and if it appears upon its face that any material error or errors have been committed by the court below, it is the duty of this court to reverse the judgment and remand the case. And certainly an error in remanding a judgment upon the merits in favor of either party, in a case in which it was not authorized to try, and over which it had no jurisdiction, is as grave an error as a court can commit."

Justice Curtis in his dissenting opinion showed by a citation of authority that the foregoing had not in fact been the practice and declared doctrine of the Supreme Court, and properly said that, especially, the court should not have proceeded in the case to declare unconstitutional an act of Congress in violation of the principle that this will not be done when it is possible to render a judgment upon any other ground.

stricted as to render the measure constitutional.[6] For it is always presumed that Congress did not intend to exceed its constitutional powers. Where, however, the scope of the law is plainly expressed, and as such is unconstitutional, the court will not resort to a strained or arbitrary interpretation in order to render the law valid. Thus in Howard v. Illinois Central R. Co.[7] the court declined to restrict the terms of a law with reference to the liability of a common carrier for injury to "any of its employees" to such employees only as should be injured while engaged in interstate commerce, and thereby to render the statute valid as applied within the States.[8]

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[6] "It is elementary when the constitutionality of a state is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. Knights Templars Indemnity Co. v. Jarman (187 U. S. 197; 23 Sup. Ct. Rep. 108; 47 L. ed. 139). And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." United States v. D. & H. Ry. Co., 213 U. S. 366; 29 Sup. Ct. Rep. 527; 53 L. ed. 836.

[7] 207 U. S. 463; 28 Sup. Ct. Rep. 141; 52 L. ed. 297.

[8] "The principles of construction invoked are undoubted, but are inapplicable. Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. Illinois C. R. Co. v. McKendree (203 U. S. 514; 27 Sup. Ct. Rep. 153; 51 L. ed. 298)." The minority in this case assert that the court might properly have so restricted the operation of the act in question as to render it constitutional.

In James v. Bowman[9] is again illustrated the refusal of the court to limit the express terms of an act of Congress in order to render it constitutional. In this case the court declined, by judicial construction, to limit the application of a statute to federal elections which in terms provided for the punishment of bribery committed at all elections, federal and state. To do so, the court declared, would be judicial legislation. "It would be wresting the statute from the purpose with which it was enacted and making it serve another purpose. Doubtless even a criminal statute may be good in part and bad in part, provided the two can be clearly separated, and it is apparent that the legislative body would have enacted the one without the other, but there are no two parts to this statute."

6. The court will not permit the unconstitutionality of a particular provision of a law to invalidate the entire law if it is possible to separate the invalid provision from the other provisions

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In United States v. Reese (92 U. S. 214; 23 L. ed. 563) the court say: "We are, therefore, directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

And in the Trade-Mark Cases (100 U. S. 82; 25 L. ed. 550) the court say: "If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances, under the act of Congress, and in others under state law."

[9] 190 U. S. 127; 23 Sup. Ct. Rep. 678; 47 L. ed. 979.

without destroying or impairing their efficiency to attain the results evidently intended by the legislation that enacted it. Even when thus separable, however, the court will not hold the remainder of the law valid if there is doubt whether, the realization of the whole of its will being rendered impossible, the legislature would have desired the execution of a part only. Thus in the case of Howard v. Illinois C. R. Co.,[10] cited in the foregoing section, the court having held that the act by its terms related to intrastate as well as interstate commerce, declined to hold the act valid even as to employees engaged in interstate commerce. The court say: "As the act before us, by its terms, relates to every common carrier engaged in interstate commerce, and to any of the employees of every such carrier, thereby regulating every relation of a carrier engaged in interstate commerce with its servants and of such servants among themselves, we are unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate." [11]

§ 7. Legislative Motives.

With the motives of the legislators the courts cannot concern themselves. " The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the Constitution. It cannot go beyond that inquiry without intrenching upon the domain of another department of government. That it may not do with safety to our institutions." [12]

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[10] 207 U. S. 463; 28 Sup. Ct. Rep. 141; 52 L. ed. 297.

[11] Citing Trade Mark Cases, 100 U. S. 82; 25 L. ed. 550; Cooley, *Const. Lim.* 178.

[12] Interstate Commerce Commission v. Brimson, 154 U. S. 447; 14 Sup. Ct. Rep. 1125; 38 L. ed. 1047.

" So long as Congress keeps within the limits of its authority as defined by the Constitution, infringing no rights recognized or secured by that instrument, its regulations of interstate and international commerce, whether founded in wisdom or not, must be submitted to by all. . . . To depart from [this rule of construction] because of the circumstances of special cases, or because the rule, in its operation, may possibly affect the interests of business is to endanger the safety and integrity of our institutions and make the Constitution mean not what it says but what interested parties wish it to mean at a particular time and under particular circumstances. . . .

In *Ex parte* McCardle[13] the court declined to take appellate jurisdiction because of the enactment by Congress of a law which it was well known had been passed for the express purpose of preventing the court from questioning the constitutionality of certain measures which the Federal Government had taken for the "Reconstruction" of the Southern States after the termination of the Civil War. "We are not at liberty," said the court, "to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."[14]

§ 8. Expediency and Reasonableness of Legislation not Subject to Judicial Determination.

The power of Congress to legislate being conceded, the wisdom or expediency of the manner in which the power is exercised is beyond judicial criticism or control.[15]

If the statute is beyond the constitutional power of Congress, the court would err in the performance of a solemn duty if it did not so declare. But if nothing more can be said than that Congress erred . . . the remedy for the error and the attendant mischief is the selection of new Senators and Representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law." Northern Securities Co. v. United States (193 U. S. 197; 24 Sup. Ct. Rep. 436; 48 L. ed. 679).

[13] 7 Wall. 506; 19 L. ed. 264.

[14] In McCray v. United States (195 U. S. 27; 24 Sup. Ct. Rep. 769; 49 L. ed. 78) the authorities upon this point are reviewed, the court saying: "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. . . . On the contrary, the doctrine of a number of cases is inconsistent with its existence."

[15] In Treat v. White (181 U. S. 264; 21 Sup. Ct. Rep. 611; 45 L. ed. 853) with reference to a stamp duty levied by Congress, the court say: "The power of Congress in this direction is unlimited. It does not come within the province of this court to consider why agreements to sell shall be subject to the stamp duty, and agreements to buy not. It is enough that Congress, in this legislation, has imposed a stamp duty upon this one, and not upon the other." In Patton v. Brady (184 U. S. 608; 22 Sup. Ct. Rep. 493; 46 L. ed. 713) the court say: "It is no part of the function of a court to inquire into the reasonableness of the excise, either as regards the amount or the property upon which it is imposed."

§ 9. Presumption in Favor of the Constitutionality of an Act of Congress.

The fact that Congress has given a particular construction to a constitutional provision, is of very great weight with the Supreme Court when it is called upon to examine the correctness of this interpretation. This is due to the fact that the court is dealing with the act of a separate and independent department of government which the Constitution intends to be, so far as possible, co-ordinate in power with the executive and judicial departments, that is, co-ordinate in the sense that, like them, when acting within the limits of the power constitutionally granted it, it shall be independent of control by the others.

From necessity the Constitution must have intended that the legislative and executive departments should have the power, in the first instance at least, of determining the extent of the powers constitutionally granted to them, and that, therefore, the judiciary should not substitute its judgment for theirs except in cases where there is no doubt that the action which has been taken is not constitutionally warranted.

"A decent respect for a co-ordinate branch of the Federal Government," says Justice Strong in Knox v. Lee,[16] "demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress, all the members of which act under the obligation of an oath of fidelity to the Constitution."

And in the Sinking Fund Cases[17] Chief Justice Waite says: "The declaration [that an act of Congress is void] should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute and this continues until the contrary is shown beyond a rational doubt."

In Ogden v. Saunders[18] Justice Washington says: "It is but a decent respect due to the . . . legislative body, by which any law is passed, to presume in favor of its validity, until the

[16] 12 Wall. 457; 20 L. ed. 287.

[17] 99 U. S. 700; 25 L. ed. 496.

[18] 12 Wh. 213; 6 L. ed. 606.

violation of the Constitution is proved beyond all reasonable doubt."

Quotations similar to those given might be multiplied, all in substance stating this general rule, declared by the Supreme Court from the first years of its existence, that an act of Congress, with reference to its constitutionality, is to receive the benefit of every reasonable doubt.[19]

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[19] This principle of construction has received a most philosophical examination in the essay of Professor Thayer, entitled *The Origin and Scope of the American Doctrine of Constitutional Law*, and from this source the substance of the immediately following paragraphs are taken.

In giving to a legislative interpretation the benefit of every rational doubt as to its constitutionality, the court in effect says, that it does not attempt to say what its own best judgment is as to the point at issue, but whether it is within the limits of reason for the legislature to give to the Constitution the construction it has given. The case is thus quite similar to the function of a judge when called upon to set aside the verdict of a jury, or of a jury when passing upon the question of self-defense in a criminal trial, or of negligence in an action of tort, or the responsibility of an inferior for acts done at the order of a superior. "The doctrine," says Thayer, ". . . . is this, that in dealing with the legislative action of a co-ordinate department, a court cannot always, and for the purpose of all sorts of questions, say that there is but one right and permissible way of construing the Constitution. When a court is interpreting a writing merely to ascertain or apply its true meaning, then, indeed, there is but one meaning allowable; namely, that which the court adjudges to be its true meaning. But when the ultimate question is not that, but whether certain acts of another department, officer, or individual are legal or permissible, then this is not true. In the class of cases which we have been considering, the ultimate question is not what is the true meaning of the Constitution, but whether legislation is sustainable or not."

Again, Thayer says: "The courts have perceived with more or less distinctness that this exercise of the judicial function does in truth go far beyond the simple business which its judges sometimes describe. If their duty were in truth merely and nakedly to ascertain the meaning of the text of the Constitution and of the impeached act of the legislature, and to determine as an academic question, whether in the court's judgment the two were in conflict, it would, to be sure, be an elevated and important office, one dealing with great matters, involving large public considerations, but yet a function far simpler than it really is. Having ascertained all this, yet there remains a question — the really momentous question — whether, after all, the court can disregard the act. It cannot do this as a mere matter of course — merely because it is concluded that upon a just and true construction, the law is unconstitutional. . . . It can only disregard the act when those who have

§ 10. Presumption in Favor of the Constitutionality of a State Statute.

The rule of construction that has been under consideration has especial application to acts of Congress. When the constitutionality of a state law is involved, the principle is not always applicable. If the question at issue is as to whether a given power resides in the Federal Government or in the States, the fact that a state legislature in its enactment has asserted that it is vested in the States, is no presumption in favor of the validity of this

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the right to make laws have not merely made a mistake, but have made a very clear one,— so clear that it is not open to rational question. That is the standard of duty to which courts bring legislative acts: that is the test which they apply,— not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the Constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the Constitution admits of different interpretations; that there is often a range and choice of judgment; that in such cases the Constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional."

Judge Baldwin, in his work on *The American Judiciary* (p. 103), asserts that, inasmuch as the judgment of the Supreme Court holding unconstitutional an act of Congress is often, and indeed usually, rendered by a divided court, the principle that a congressional statute will not be held void so long as there is a reasonable doubt as to its invalidity, is not applied. "The majority must concede," he says, "that there is a reasonable doubt whether the statute may not be consistent with the Constitution, since some of their associates must have such a doubt, or go further and hold that there is no inconsistency between the two documents, the statute and the Constitution." This argument is not convincing. Admitting that either one or the other of the two opinions must be conceded to the dissenting justices, it does not follow that the doctrine of reasonable doubt is shown to be repudiated. The question which the Supreme Court, as a court, has to decide is as to the existence of this reasonable doubt. There may of course be a difference of opinion as to this, but it is still this fact which the court seeks to determine and which controls its decision. It is no more proper to say that the principle is repudiated when the court is not unanimous, than to hold that in passing by a divided court upon a question of contributory negligence, the principle of reasonable doubt is not applied.

As to whether in recent years courts in fact are guided by the rule under consideration, see article by W. F. Dodd, "Growth of Judicial Power," in *Pol. Sci. Quar.* XXIV, 193.

decision. The Supreme Court in passing finally upon this point is not, then, called upon to review the act of a co-ordinate department, but has to decide between the conflicting claims of two governments, and, quite properly, feels itself at liberty to decide the point as an original proposition; namely, upon the basis of its own judgment as to what is the most reasonable construction of the constitutional provisions involved.

If, however, the state law, whose constitutionality is questioned, is with reference to a matter admittedly within the province of the States, and the question is simply whether that power has been properly exercised, there is held to be a strong presumption that the act is constitutional. Thus, for example, if it is a question whether the States have the power to regulate interstate commerce, or to tax a national bank, or to naturalize aliens, or enact bankruptcy laws, there is no presumption in favor of the constitutionality of acts in which the state power is asserted. If, however, it is a question, for example, whether the police powers, admittedly belonging to the States, have been constitutionally exercised, the presumption is that they have been so exercised.

An excellent illustration of this last, is seen in the treatment by the Supreme Court of the oleomargarine laws of Pennsylvania in the case of Powell v. Pennsylvania,[20] decided in 1887. The plaintiff in error had been indicted for selling oleomargarine, plainly marked as such, in violation of a Pennsylvania law absolutely forbidding the sale and production of that commodity within the State. Powell offered to prove that the oleomargarine was pure and as wholesome as butter, and that, in fact, it differed from butter only in that it had a slightly smaller per cent of a substance termed butterine, which gave a flavor to but had nothing to do with the wholesomeness of the product. He claimed, therefore, that a law forbidding the production and sale of this article was not a proper exercise of the police powers of the State, and operated to deprive him of that liberty and property which the Fourteenth Amendment to the federal Constitution guaranteed him. The Supreme

[20] 127 U. S. 678; 8 Sup. Ct. Rep. 992; 32 L. ed. 253.

Court of the United States, without questioning the facts asserted regarding the wholesomeness of oleomargarine, upheld the state law, declaring that it could not "adjudge that the defendant's rights of liberty and property have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public health and prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects." This, the Supreme Court said, it could not affirm. Whether or not the law is needed as a protection to the public, the court declared to be a question of fact belonging primarily to the state legislature to determine. "And," the court continued, "as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts."

When the federal Supreme Court is called upon to consider the constitutionality of a state law as determined by its conformity with the Constitution of the State, the state Constitution is construed as having for its general purpose the placing of limitations upon the powers of the legislature; whereas, of course, the federal Constitution is viewed as a grant of legislative power. In other words, whereas the federal legislature is construed to have only those powers granted to it expressly or impliedly by the federal Constitution, the state legislatures are considered to possess all powers not expressly or impliedly withdrawn from them by the federal or respective state Constitutions.

In those cases in which the courts of the States are called upon to consider the constitutionality of the acts of their own law-making bodies as tested by the federal or their own state Constitutions, they of course have to deal with the acts of a department of government co-ordinate in power with themselves; and, therefore, they hold themselves, or at least should hold themselves, bound in all cases to give to the laws that same benefit of rational doubt which the federal Supreme Court gives to acts of Congress.

In concluding this subject, it is proper to observe that this preliminary legislative or executive interpretation of constitutional powers having such an importance as we have seen attached to it, the responsibility for its proper exercise is proportionately great. Those legislators, therefore, who vote for a measure without being honestly convinced of its constitutionality, and excuse themselves upon the ground that, if their action is not valid, the courts have the opportunity to so declare, are recreant to their duty. Not only, as we have seen, may serious consequences follow from these acts before their invalidity is judicially determined, but, what is of still more importance, an unfortunate burden is thrown upon the courts. No popular government can successfully endure in which the decisions of its courts do not receive the general approval of the citizen body. But if legislatures recklessly pass measures ostensibly for the benefit of the masses, but invalid when tested by the fundamental law, the odium of defeating these measures is thrown upon the courts, and a popular objection to and distrust of these courts created. For, of course, the people generally cannot be expected to appreciate the constitutional questions involved. All that they can see and appreciate is that their legislative representatives have enacted a measure in their interests, which the courts have declined to recognize as valid.

§ 11. The Force of Contemporaneous or Long Continued Legislative Interpretation.

The presumption of constitutionality which attaches to an act of Congress is increased when the legislative interpretation has been frequently applied during a considerable number of years, or when it dates from a period practically contemporaneous with the adoption of the Constitution, or when, based upon a confidence in its correctness, many and important public and private rights have been fixed.

In United States v. State Bank[21] the court, speaking through Justice Story, say: "It is not unimportant to state that the construction which we have given to the terms of the act is that

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[21] 6 Pet. 29; 8 L. ed. 308.

which is understood to have been practically acted upon by the government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal consideration, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the act, but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable explanation."

The foregoing had reference to the construction of a statute, but the same reasoning is applicable to the Constitution.

In Lithographic Company v. Sarony[22] the court declare: "The construction placed upon the Constitution by the first act of 1790 and the act of 1802 by the men who were contemporary with its formation, many of whom were members of the Convention who framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive.[23]

§ 12. Legislative and Executive Practice Not Absolutely Binding.

The Supreme Court has, however, never held itself absolutely bound by a legislative or executive construction (political questions excepted) however long acquiesced in, or however nearly contemporaneous its first statement with the adoption of the Constitution.[24]

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[22] 111 U. S. 53; 4 Sup. Ct. Rep. 279; 28 L. ed. 349.

[23] See also Stuart v. Laird, 1 Cr. 299; 2 L. ed. 115.

[24] In Swift v. United States (105 U. S. 691; 26 L. ed. 1108) the court say: "The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt."

"Contemporary construction," says Story, in his *Commentaries* (§ 407), "is properly resorted to, to illustrate, and confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the uniformity and universality of that construction, and the known ability and

§ 13. Extrinsic Evidence.

Generally speaking, in the construction of the Constitution the well known distinctions between latent and patent ambiguities, and between the use of extrinsic and intrinsic evidence apply. Where the language of the instrument is itself indefinite or is such that more than one meaning may, by grammatical construction, be drawn from its terms, the courts base their determinations upon the language and provisions found within the four corners of the instrument, and without resort to extrinsic evidence. The governing point is as to what is actually written. If a given power may rationally, logically, and grammatically be construed as granted by a given provision, then it is of no countervailing force to adduce the fact that such was not the intention of those by whom the instrument of government was established. Thus, six years after the adoption of our Constitution, the judicial power of the federal courts was construed to extend to a case in which a State was defendant in a suit brought by a private individual, and support for such construction was undoubtedly supplied by the written word. That such, however, was not the intention of those by whom the Constitution was framed and ratified is quite certain, as was demonstrated by the promptness and unanimity with which the Eleventh Amendment was adopted, preventing a future similar construction.

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talents of those, by whom it was given, is the credit to which it is entitled. It can never abrogate the text; it can never fritter away the obvious sense; it can never narrow down its true limitations, it can never enlarge its natural boundaries."

In United States v. Alger (152 U. S. 384; 14 Sup. Ct. Rep. 635; 38 L. ed. 488) the court say: "As the meaning of the statute as applied to these cases, appears to this court to be perfectly clear, no practice inconsistent with that meaning can have any effect."

In Fairbanks v. United States (181 U. S. 283; 21 Sup. Ct. Rep. 648; 45 L. ed. 862) the constructive force to be given to legislative and executive practice is reviewed at length. With reference to the principle that the judiciary cannot be conclusively bound thereby the court say: "From this resumé of our decisions it clearly appears that practical construction is relied upon only in cases of doubt."

§ 14. Technical Terms.

When, however, there is no ambiguity of grammatical construction, but the words themselves require definition, recourse is properly had to extrinsic evidence. Here it is necessary to learn from extrinsic sources the meaning usually attached to these words at the time the Constitution was framed and, presumably, by those who framed and adopted the Constitution. Examples of such technical terms are "letters of marque and reprisal," "ex post facto," "bill of attainder," "bankruptcy," "admiralty," "equity," "direct tax," "duties," "imposts," "excises," "piracy," "habeas corpus," "citizen," "alliance," "confederation," "republican form of government," "infamous crime," "commerce," etc. The technical term "treason" is defined in the Constitution itself.

One of the principal questions involved in the Dred Scott case was as to the definition of the term "citizens of different States" as employed in Article III of the Constitution. The Insular Cases in considerable measure turned upon the meaning to be ascribed to the expression "United States." In Texas v. White it was necessary to enter into a careful definition of the terms "state" and "government" in order clearly to distinguish them.

As has been repeatedly declared by the courts the best rule for interpreting the technical terms employed in the Constitution is to give to them the meaning which they had at the time that instrument was framed and adopted. When the terms are technical law terms they are to be given the meaning attached to them in the English common law.[25]

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[25] The Supreme Court in South Carolina v. United States (199 U. S. 437; 26 Sup. Ct. Rep. 110; 50 L. ed. 261) states this doctrine as follows: "It must also be remembered that the framers of the Constitution were not mere visionaries, toying with speculations or theories, but practical men dealing with the facts of political life as they understood them; putting into form the government they were creating and prescribing, in language clear and intelligible, the powers that government was to take. Mr. Chief Justice Marshall, in Gibbons v. Ogden (9 Wheat. 1, 188; 6 L. ed. 23) well declared: 'As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to

In a few instances it is, however, to be observed, that the Supreme Court has refused to give to technical terms the meanings attached to them in 1789 by the common law. This has been so especially with reference to the words "admiralty" and "bankruptcy" both of which terms have been given a broader meaning than that furnished by the English common law. Commenting upon this Pomeroy properly says: "The true rule would seem to be this: Where words having a well known, technical sense by the English law are used in the Constitution, and these words are keys to the clauses which protect the private rights and liberties of the people, and especially of clauses which impose direct restraints upon the government in respect of such rights and liberties, and the technical sense itself is necessary for the complete protection of the individual citizen, this signification must still be retained in any interpretation of these provisions. But on the other hand, where words which had a technical meaning by the English law, are used in clauses which relate to the general functions of legislation and administration, and to the political organization and powers of the government, such sense must be

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have intended what they have said.' One other fact must be borne in mind, and that is, in interpreting the Constitution we must have recourse to the common law. As said by Mr. Justice Matthews in Smith v. Alabama (124 U. S. 465; 8 Sup. Ct. Rep. 564; 31 L. ed. 508): 'The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' And by Mr. Justice Gray in United States v. Wong Kim Ark (169 U. S. 649; 18 Sup. Ct. Rep. 456; 42 L. ed. 890): 'In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. Minor v. Happersett (21 Wall. 162; 22 L. ed. 627); Ex parte Wilson (114 U. S. 417; 5 Sup. Ct. Rep. 935; 29 L. ed. 89); Boyd v. United States (116 U. S. 616; 6 Sup. Ct. Rep. 524; 29 L. ed. 746); Smith v. Alabama (124 U. S. 465; 8 Sup. Ct. Rep. 564; 31 L. ed. 508). The language of the Constitution, as has been well said, could not be understood without reference to the common law. 1 Kent, Com. 336; Bradley, J., in Moore v. United States (91 U. S. 270; 23 L. ed. 346).' To determine the extent of the grants of power, we must, therefore, place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be the meaning and scope of those grants."

attributed to them as will best carry out the design of the whole organic law, whether that signification be broader or narrower than the one which had received the sanction of the English Parliament and courts."[26]

§ 15. The Interpretative Value of Debates in Constitutional Conventions.

When it is necessary and proper to resort to extrinsic evidence in interpreting the Constitution, an important source of such evidence is to be found in the history of the events which led up to its adoption. Of special importance are the recorded proceedings of the convention which drafted, of the state conventions which ratified, and the public utterances of the men who played an influential part in the establishment of, the Constitution. Resort is to be had, however, to these sources only with caution, and only where latent ambiguities are to be resolved. Cooley has stated in a manner not to be improved upon the weight properly to be ascribed to debates in conventions. He says: "When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. Where the proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory; but where the question is one of abstract meaning, it will be difficult to derive from this source much reliable assistance in interpretation. Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause. It is quite possible for a clause to appear so clear and unambiguous to the members of a convention as to require neither discussion nor illustration; and the few remarks made concerning it in the convention might have a plain tendency to lead directly away from the meaning in the minds of the majority. It is equally possible for a part

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[26] *Constitutional Law,* 10th ed., p. 607. See also *idem,* p. 345.

of the members to accept a clause in one sense and a part in another. And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. These proceedings, therefore, are less conclusive of the proper construction of the instrument than are legislative proceedings of the proper construction of a statute; since in the latter case it is the intent of the legislature we seek, while in the former we are endeavoring to arrive at the intent of the people through the discussions and deliberations of their representatives. The history of the calling of the convention, of the causes which led to it, and the discussions and issues before the people at the time of the election of the delegates, will sometimes be quite as instructive and satisfactory as anything to be gathered from the proceedings of the convention." [27]

§ 16. The Federalist.

What has been said regarding the interpretative value of the debates in the conventions that framed and ratified the Constitution, and the value of contemporary interpretation thereof by Congress and the Executive, applies to the collection of essays published under the title of *The Federalist.* This is true peculiarly of these essays not only because of their respective authors — Hamilton, Madison and Jay — but because of the purpose for which they were prepared and published, namely, to persuade the several state conventions to ratify the Constitution. Having this construction of the Constitution before them, there are consider-

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[27] *Constitutional Limitations*, 7th ed., p. 101.

able, though not conclusive, grounds for holding that, where the meaning thus published was not repudiated, this was the construction intended by those who put the Constitution into force.[28]

The case of Chisholm v. Georgia[29] is, however, a conspicuous instance in which a view advanced in *The Federalist* (that a State would not be suable in the federal courts at the instance of a citizen of another State) was repudiated by the Supreme Court.

§ 17. History of the Times.

The case of Prigg v. Pennsylvania[30] illustrates the value of a resort to the "history of the times" and to the general object sought to be obtained, in interpreting an ambiguous constitutional provision. In this case, which involved the question as to the exclusiveness of the power granted to the Federal Government under the fugitive slave clause of the Constitution,[31] Justice Story said: "Historically it is well known that the object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves, as property, in every State in the Union into which they might escape from the State where they were held in servitude. . . . How then are we to interpret the language of the clause? The true answer is, in such a manner, as, consistently with the words, shall fully and completely effectuate the whole object of it. If by one mode of interpretation the right must become shadowy

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[28] In Cohens v. Virginia (6 Wh. 264; 5 L. ed. 527) Marshall says: "The opinion of *The Federalist* has always been considered as of great authority. It is a complete commentary on our Constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank; and the part two of its authors performed in framing the Constitution, puts it very much in their power to explain the views with which it was framed. These essays having been published while the Constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it."

[29] 2 Dall. 419; 1 L. ed. 440.

[30] 16 Pet. 539; 10 L. ed. 1060.

[31] Art. IV, Sec. II, Cl. 3.

and unsubstantial, and without any remedial powers adequate to the end, and by another mode it will attain its just end and secure its manifest purpose, it would seem upon principles of reasoning absolutely irresistible that the latter ought to obtain. No court of justice can be authorized so to construe any clause of the Constitution as to defeat its obvious ends, when another construction equally accordant with the words and sense thereof will enforce and protect them."

Here it is to be observed that Story properly introduces the qualifying condition that the construction supported by the history of the times in which, and the purpose for which, it was formed, must, as compared with another possible construction, be "equally accordant with the words and sense thereof." It is thus to be emphasized that extrinsic evidence may never be used to support an interpretation which the written word does not upon its face reasonably permit. In other words, extrinsic evidence may properly be used to decide between two possible constructions of the written word, but not to add to or subtract from its express provisions.[32]

§ 18. The Interpretative Value of Legislative Debates.

As in the case of the examination of the Constitution itself, the courts in considering the constitutionality of a statute hold themselves bound by the words of the statute, that is, they determine the intent of the legislature by the words it has employed. And, therefore, they will not resort to legislative debates except where necessary to resolve a latent ambiguity.

In Maxwell v. Dow[33] the court say: "Counsel for plaintiff in error has cited from the speech of one of the Senators of the United States, made in the Senate when the proposed Fourteenth Amendment was under consideration by that body. . . . What speeches were made by other Senators and by Representatives in the House

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[32] Query, as to whether the resort to "history of the times" was legitimate in the Slaughter House Cases for the interpretation of the clause of the Fourteenth Amendment that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

[33] 176 U. S. 581; 20 Sup. Ct. Rep. 448; 44 L. ed. 597.

upon this subject is not stated by counsel, nor does he state what construction was given to it, if any, by other members of Congress. It is clear that what is said in Congress upon such an occasion may or not express the views of the majority of those who favor the adoption of the measure which may be before that body and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used, and not by the speeches made regarding it. What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it.[34] In the cases of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three-fourths of the States before such an amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the Amendment was adopted. This rule could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit."[35]

[34] Citing United States v. Trans-Missouri Freight Association (166 U. S. 290; 17 Sup. Ct. Rep. 540; 41 L. ed. 1007); Dunlap v. United States (173 U. S. 65; 19 Sup. Ct. Rep. 319; 43 L. ed. 616).

[35] In United States v. Trans-Missouri Freight Association (166 U. S. 290; 17 Sup. Ct. Rep. 540; 41 L. ed. 1007) both the majority and minority opinions detail at some length the congressional history of the so-called Anti-Trust Act of 1890, but both admit that this is not a legitimate source of information. The majority justices after their review of the course of the bill through Congress and the debates attendant thereupon. argue that it is impossible in fact to say what were the views of the majority of the members of each House of

In 1833, Mr. Calhoun when voting in the Senate upon the tariff act of that year said that he wished it distinctly understood that he did so upon the condition that a certain construction and application should be given to the measure. Other Senators, however, promptly and properly pointed out that such a qualification would be void of any force, as the act would, after enactment, necessarily be given such a meaning as its words and the Constitution would permit.[36]

§ 19. Resort to the Preamble for Purpose of Construction.

The value of the Preamble to the Constitution for purposes of construction is similar to that given to the preamble of an ordinary statute. It may not be relied upon for giving to the body of the instrument a meaning other than that which its language plainly imports, but may be resorted to in cases of ambiguity, where the intention of the framers does not clearly and definitely

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Congress in relation to the meaning of the act, and add: "There is, too, a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body (United States v. U. P. Railroad Co., 91 U. S. 72; 23 L. ed. 324; Aldridge v. Williams, 3 How. 9; 11 L. ed. 469; Taney, Chief Justice; Mitchell v. Great Works Milling and Manufacturing Co., 2 Story, 648; Queen v. Hertford College, 3 Q. B. D. 693). The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed." The opinion then goes on to show that from "the history of the times" it would appear that the act in question was intended to have the meaning which the court attaches to it.

Justice Brown in Downes v. Bidwell (182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088) says: "The arguments of individual legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations, or by the assumed necessities of the situation, that they can hardly be considered even as the deliberate views of the persons who make them, much less as declaring the construction to be put upon the Constitution by the Courts." (Citing United States v. Union P. R. Co., 91 U. S. 72; 23 L. ed. 324.)

[36] Benton, *Thirty Years' View*, I, 329.

appear. As Story says: "The preamble of a statute is a key to open the mind of the makers as to the mischiefs which are to be remedied, and the objects which are to be accomplished by the provisions of the statute." [37]

Special significance has at various times been attached to several of the expressions employed in the Preamble to the Constitution. These expressions are:

1. The use of the phrase "We, the People of the United States," as indicating the legislative source of the Constitution.
2. The denomination of the instrument as a "Constitution."
3. The description of the federation entered into as "a more perfect Union."
4. The enumeration of "the common defense" and "general welfare" among the objects which the new government is established to promote.

§ 20. "We, the People."

As regards the phrase "We, the People," it would seem that little light can be obtained from its use, except to fix the fact, which no one has attempted to deny, that the new government derived its right to be from the consent of the people who were to be controlled by it. But whether by "We, the People" was meant all the people of the ratifying States considered as one body politic, or whether it referred to the people as organized in several commonwealth communities, it is, so far as this language is concerned, impossible to say.

The framers of the Constitution of the Southern Confederacy avoided this ambiguity by declaring in the Preamble: "We, the People of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice . . . do ordain and establish this Constitution for the Confederate States of America."

Commenting upon this change in phraseology, Pomeroy says: "Thus have the opponents of our nationality by their most

[37] *Commentaries*, § 459.

solemn and deliberate act conceded the correctness of the construction which has been placed [by the Northern States] upon this utterance of the sovereign people of the United States."[38] This is by no means a correct deduction. It was quite proper that the framers of the Confederate Constitution should, without conceding the correctness of the construction of their opponents, from an abundance of caution, use language which no one could misconstrue.

In Martin v. Hunter's Lessee[39] Justice Story says: "The Constitution of the United States was ordained and established not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by the people of the United States. So far from saying that it is established by the governments of the several States, it does not even say that it is established by the people of the several States, but it pronounces that it is established by the people of the United States in the aggregate. . . . Words cannot be plainer than the words used."

This last statement is certainly extreme. It is indeed made plain that the Constitution is not ratified by the Governments of the individual States, but it is not clearly indicated whether the ratifying parties are to be considered singly or as a composite whole. And in contradiction to the fact that a single political whole was meant is the fact that in ratifying the Constitution the people did vote by States.[40]

The only way by which the force of this fact is avoided is by the proposition that the ratifying state conventions acted *ad hoc* as agents of a single united people. But this argument is greatly weakened, if not absolutely destroyed, by the fact that only those States were to be considered members of the new Union whose respective people, acting in convention, should ratify the Constitution.

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[38] *Constitutional Law*, § 95.

[39] 1 Wh. 304; 4 L. ed. 97.

[40] The fact that the States are not, as in the Articles of Confederation, mentioned, individually, by name, is of no significance for the reason that they could not be so mentioned because it could not be known in advance which of the States would ratify.

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The use of the phrase "We, the People of the United States" as indicating the ordainers and establishers of the Union, is, however, of significance in determining the nature of the Union that was intended to be created when taken in connection with the provision of Article VII that the Constitution is to be ratified, not by the state legislatures, but in conventions, for it indicates that the Union was one that the state legislatures were not competent to create; that, in other words, it was to be not a mere league or confederacy, such as the existing state governments might enter into, but a fundamental Union resulting in the creation of a new National State which, according to the political philosophy of that date, only the people acting in their original sovereign capacity were able to create.

§ 21. "Constitution."

The fact that the instrument of 1789 is termed a "Constitution" has by some been taken to indicate that a National State, and not a confederacy of States was intended to be created. Thus Webster in his reply to Hayne said: "They [the people of the United States] undertook to form a general government which should stand on a new basis; not a confederacy, not a league, not a compact between States, but a Constitution." And in his reply to Calhoun, he declared: "Sir, I must say to the honorable gentleman that, in our American political grammar, Constitution is a noun substantive; it imparts a distinct and clear idea of itself; and it is not to be turned into a poor, ambiguous, senseless, unmeaning adjective, for the purpose of accommodating any new set of political notions. . . . By the Constitution we mean, not a 'constitutional compact,' but simply and directly the Constitution, the fundamental law; and if there be one word in the language which the people of the United States understand, it is that word." And later he says: "Does it call itself a compact? Certainly not. Does it call itself a league, a confederacy, or subsisting treaty between the States? Certainly not. But it declares itself a Constitution."

By members of the school of Webster weight is also given to the fact that it is declared that the people of the United States "do ordain and establish" and not that they "do contract" or "enter into a treaty."

The writer of this treatise is not disposed to ascribe much value to this argument of Webster based upon the use of the word "Constitution." At most it can only have a corroborating value. In the first place, it is by no means certain that the term had, in 1789, the definite technical meaning which Webster ascribes to it. And, in the second place, and more significantly, the nature of the Union provided for by the Constitution is properly to be determined by the distribution of powers actually provided for by it, and not by the title that may have been given to it.

The description of the new federation in the Preamble as "a more perfect Union," has occasionally been referred to as an argument of the complete sovereignty of the United States. For example, in Texas v. White,[41] Chief Justice Chase, after referring to the fact that the Articles of Confederation had provided for a perpetual Union, says: "And when these articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be more indissoluble if a perpetual Union, made more perfect, is not?"

§ 22. "Common Defense and General Welfare."

The declaration in the Preamble that the new Union is established for the common defense and general welfare, and the grant by Article I, Section 8, of the Constitution to Congress of the power "to levy and collect taxes, duties, imports, and excises, to pay the debts and provide for the common defense and general welfare of the United States," has at times been argued to be equivalent to a grant to the General Government of all powers, the exercise of which may in any way contribute to the effectuation of either of these ends.

41 7 Wall. 700; 19 L. ed. 227.

Especially by those who desire to magnify the powers of the Federal Government it has been argued that instead of construing Section 8 of Article I as simply the grant of an authority to raise revenue in order to pay the debts and provide for the common defense and general welfare of the United States, it should be interpreted as conferring upon Congress two distinct powers; namely: (1) the power of taxation; and (2) the power to provide for the common defense and general welfare. And, under the latter of these two grants, it has been argued that the Congress has the authority to exercise any power that it may think necessary or expedient for advancing the common defense or the general welfare of the United States. It scarcely needs be said that this interpretation has not been accepted by the courts. Were this view to be accepted the government of the United States would at once cease to be one of the enumerated powers, for it would then be possible to justify the exercise of any authority whatsoever upon the ground that the general welfare would thereby be advanced.

§ 23. The Constitution is to be Construed as a Whole.

Though the terms of the Constitution may not be varied, or its grants of authority limited by abstract doctrines of private rights and of political justice and expediency, the words of each clause are to be interpreted in the light of the other provisions of the Constitution. The Constitution is a logical whole, each provision of which is an integral part thereof, and it is, therefore, logically proper, and indeed imperative, to construe one part in the light of the provisions of all the other parts.[42]

This principle has been of dominant force in the construction of the Constitution.

The principle that the Constitution is to be interpreted in the light of the general purpose for the attainment of which it was

[42] "In construing the Constitution of the United States we are, in the first instance, to consider what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts." Story, *Commentaries*, § 405.

adopted, coupled with the fact that many of its terms are general in character, has made possible and legitimate two schools of constructionists — the Loose or Nationalistic school, and the Strict or States' Rights school — each dependent upon a belief held as to the general end which the framers of the Constitution had in mind when that instrument was drafted. The Strict or States' Rights constructionist has not always been one who would deny sovereignty or efficiency to the National Government. Thus, Taney, a leader of the strict constructionists, never for a moment doubted the sovereignty of the General Government, or, as he showed in his decision in Ableman v. Booth, the supremacy of its laws and of its agents over the laws and agents of the States. He did believe, however, that the sovereign national laws should be kept within as limited a space as possible. This he showed from the first year of his chief-justiceship.

From the general nature and intent of the Constitution have been deduced, not to mention other doctrines, the denial of the right of secession, the power of the courts to hold void state or federal laws contrary to the Constitution, the jurisdiction of the federal courts to entertain appeals from the highest state courts in cases in which a federal right, privilege, or immunity has been set up and denied, the immunity of federal governmental agencies from interference on the part of the States by taxation or otherwise, the immunity of state agencies from federal taxation, the exclusive federal jurisdiction in matters of naturalization, and the liberal construction of "implied" powers generally.

§ 24. So-called "Natural" or "Unwritten Constitutional" Laws Have no Constructive Force.

The so-called "natural" or unwritten laws defining the natural, inalienable, inherent rights of the citizen, which, it is sometimes claimed, spring from the very nature of free government, have no force either to restrict or to extend the written provisions of the Constitution. The utmost that can be said for them is that where the language of the Constitution admits of doubt, it is to be presumed that authority is not given for the violation of acknowledged principles of justice and liberty.

In not a few instances, especially during early years, the binding force of natural laws is declared, but a careful examination of these cases shows that, practically without exception, the doctrine was used not as the real *ratio decidendi,* but to support, upon grounds of justice and expediency, a decision founded upon the written constitutional law.

Prior to the separation from England, the colonial courts were naturally inclined to minimize the power of the English Parliament, and, therefore, to uphold Coke's *dictum* in the famous Bonham case that an act of Parliament contrary to natural rights and justice is void. And in the political controversies which preceded the Revolution the doctrine of natural rights was relied upon.[43] It would appear, however, that, though often asserted by the courts, no legislative act was held void solely because it was conceived to exceed the proper limits of all legislative power.[44]

When American independence came, it was to be expected that the Americans would apply the doctrine of natural rights and justice in limitation of the law-making powers of their own legislatures, and thus, as said, we do find the principle not infrequently stated, during the early years of the Constitution.[45] Even Chief Justice Marshall lent it, upon occasion, a qualified sanction. "It may well be doubted," he observes in Fletcher v. Peck[46] whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where they are to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation? To the [state] legislature all legislative power is granted; but the question whether the act of transferring the property of an individual to the public be in the nature of the legislative power is well worthy of serious reflection." [47]

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[43] For instance by Otis in his arguments against writs of assistance.

[44] As to whether the South Carolina case of Bowman v. Middleton, 1 Bay, 252, was such a case, see Thayer, *Cases on Const. Law,* I, 53, note 2.

[45] *Cf.* Stimson, *Handbook of American Labor Law,* p. 4, note.

[46] 6 Cr. 87; 3 L. ed. 162.

[47] One of the clearest statements of the doctrine, though given *obiter,* is that of Justice Chase in Calder v. Bull (3 Dall. 386; 1 L. ed. 648). He says: "I cannot subscribe to the omnipotence of a state legislature, or that it should

§ 25. The "Spirit" of the Constitution.

Closely allied to the assertion that the Constitution is to be interpreted in the light of "natural law," is the doctrine that the fundamental purpose of the constitutional fathers was the erection of a free republican government, and that, therefore, the

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be absolute and without control; although the authority should not be expressly restrained by the constitution, or fundamental law of the State. The people of the United States erected their Constitution or form of government, to establish justice, to promote the general welfare, and secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundations of the legislative power they will decide what are the proper objects of it. The nature and ends of the legislative power will limit the exercise of it. This fundamental principle follows from the very nature of our republican governments, that no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit. There are acts which the federal or state legislatures cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principle of the social compact, cannot be considered a rightful exercise of the legislative authority. The obligation of a law in governments established on express compact, and on republican principles must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; a law that takes property from A and gives it to B: It is against all reason and justice for a people to entrust a legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes; and establish rules of conduct for all its citizens in future cases; they may command what is right and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our federal or state legislature possesses such powers if they had not been expressly restrained, would in my opinion be a political heresy, altogether inadmissible in our free republican governments."

Constitution should, whatever its express terms may provide, never be so construed as to violate the abstract principles deducible from this fundamental fact. Generally speaking, whereas the so-called natural laws have reference to the private rights of the citizen, the protection of his person and property; these principles claimed to be deducible from the spirit of the Constitution as the framework of a free government have reference to the public and political rights of the individual.

Stated in this abstract, philosophical form, the doctrine that the "Spirit" of the Constitution is to prevail over its language has no more legal validity than has the doctrine of natural law.

§ 26. Applicability of Constitutional Provisions to Modern Conditions.

In construing the Constitution the very proper and indeed absolutely necessary principle has been followed that that instrument was intended to endure for all time and that its grants of power are, therefore, to be interpreted as applicable to new conditions

Justice Iredell though agreeing in the decision of the court dissented from Chase's reasoning, saying: "If, then, a government composed of legislative, executive and judicial departments were established by a Constitution which imposed no limits on the legislative power, the consequence would immediately be that whatever the legislative should choose to enact would be lawfully enacted, and the judicial power could never interfere to pronounce it void. It is true that some speculative jurists have held, that a legislative act against natural justice must in itself be void; but I cannot think that under such a government, any court of justice would possess a power to pronounce it so. . . . If any act of Congress, or of the legislature of a State, violates those constitutional provisions [of the United States Constitution], it is unquestionably void; though, I admit, as the authority to declare it void is of a delicate and awful nature, the court will never resort to that authority but in a clear and urgent case. If, on the other hand, the legislature of the Union, or the legislature of any member of the Union, shall pass a law within the general scope of their constitutional power, the court cannot pronounce it void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and purest men have differed upon the subject; and all that the court could properly say in such an event, would be, that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice."

as they arise. By this is not meant, however, that these new conditions shall in any case justify the exercise of a power not granted, or create a limitation not imposed by the Constitution, but that the powers which are granted shall, if possible, be made applicable to these new conditions.

Thus the grant to the Federal Government of the control over interstate and foreign commerce is held to be one the extent of which, though not its importance, is not varied by the fact that the instrumentalities by which it is carried on are widely different from those employed in 1789. On the other hand, if the writing of insurance policies, or the dealing in banking instruments of exchange were not, in 1789, considered interstate commercial transactions, and by reason of their very nature could not properly have been, no augmentation in their amount and no increase in the practical need for their federal regulation will justify a construction that will attach an interstate commercial character to them, and thus bring them within the power of the Federal Government to control.

The principle, as it has been stated, does not prevent a construction by which the powers and limitations enumerated in the Constitution are made applicable to new conditions of fact which were not and could not have been foreseen by those who adopted the Constitution. In the Dartmouth case[48] Marshall says: "It is more than possible that the preservation of the rights of this description was not particularly in the minds of the framers of the Constitution when the clause under consideration, impairment of contracts, was introduced into that instrument. . . . It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further and to say that had this particular case been suggested the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operations likewise, unless there is something within its literal construction so ob-

[48] 4 Wh. 518; 4 L. ed. 629.

viously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expounded the Constitution in making it an exception." Again, in *Re* Debs[49] the court say: "Constitutional provisions do not change, but their operation extends to new matters as the modes of life and habits of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation by land was by coach and wagon and on water by canal-boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown. Just so is it with the grant to the National Government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce then unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop." [50]

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[49] 158 U. S. 564; 15 Sup. Ct. Rep. 900; 39 L. ed. 1092.

[50] To the same effect, as the foregoing, is the declaration of the court in South Carolina v. United States (199 U. S. 437; 26 Sup. Ct. Rep. 110; 50 L. ed. 261), in which they say: "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces within its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in Scott v. Sandford (19 How. 393; 15 L. ed. 691), 'It is not only the same in words, but the same in meaning, and delegates the same power to the government, and reserves and secures the same rights and privileges to the citizen; and in its present form it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'"

Justice Story, in Martin v. Hunter's Lessee (1 Wh. 304; 4 L. ed. 97), discussing the principle of construction to be applied to the Constitution, declares: "The instrument was not intended to provide merely for the

§ 27. The Wilson-Roosevelt Doctrine of Construction.

A doctrine of construction radically different from that which has just been stated, and which has never been accepted by the Supreme Court, is that originally put forth by James Wilson of Pennsylvania, and in recent years urged by President Roosevelt. This doctrine is, that when a subject has been neither expressly excluded from the regulating power of the Federal Government, nor expressly placed within the exclusive control of the States, it may be regulated by Congress if it be, or become, a matter the regulation of which is of general importance to the whole nation, and at the same time a matter over which the States are, in practical fact, unable to exercise the necessary controlling power. According, then, to this doctrine, the Ninth and Tenth Amendments which declare that: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," and that "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," are not to be interpreted as reserving to the States, or to the people, those powers which, though not granted to the Federal Government, are, in fact, such as are of federal importance and which the States are unable effectively to exercise.

The argument of James Wilson, made in 1785 when the United States was under the Articles of Confederation but applicable, *a fortiori*, to the present Constitution, is in the following language: "Though the United States in Congress assembled derive from the particular States no power, jurisdiction, or right

exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which at the present might seem salutary might in the end prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers as its own wisdom and the public interests should require."

which is not expressly delegated by the Confederation, it does not then follow that the United States in Congress have no other powers, jurisdiction, or rights, than those delegated by the particular States. The United States have general rights, general powers, and general obligations, not derived from any particular States, nor from all the particular States taken separately; but resulting from the union of the whole. . . . To many purposes the United States are to be considered as one undivided, independent nation; and as possessed of all the rights, powers and properties by the law of nations incident to such. Whenever an object occurs, to the direction of which no particular State is competent, the management of it must, of necessity, belong to the United States in Congress assembled. There are many objects of this extended nature."

President Roosevelt has expressly adopted the foregoing doctrine as sound. He says: "I cannot do better than base my theory of governmental action upon the words and deeds of one of Pennsylvania's greatest sons, Justice James Wilson." Interpreting this theory, Roosevelt says: "He developed even before Marshall the doctrine (absolutely essential not merely to the efficiency but to the existence of this nation) that an inherent power rested in the nation, outside of the enumerated powers conferred upon it by the Constitution, in all cases where the object involved was beyond the power of the several States and was a power ordinarily exercised by sovereign nations. In a remarkable letter in which he advocated setting forth in early and clear fashion the powers of the National Government, he laid down the proposition that it should be made clear that there were neither vacancies nor interferences between the limits of state and national jurisdictions, and that both jurisdictions together composed only one uniform and comprehensive system of government and laws; that is, whenever the States cannot act, because the need to be met is not one merely of a single locality, then the National Government, representing all the people, should have complete power to act. . . . Certain judicial decisions have done just what Wilson feared; they have, as a matter of fact, left

vacancies, left blanks between the limits of actual National jurisdiction over the control of the great business corporations. . . . The legislative or judicial actions and decisions of which I complain, be it remembered, do not really leave to the States power to deal with corporate wealth in business. Actual experience has shown that the States are wholly powerless to deal with this subject; and any action or decision that deprives the nation of the power to deal with it, simply results in leaving the corporations absolutely free to work without any effective supervision whatever; and such a course is fraught with untold danger to the future of our whole system of government, and, indeed, to our whole civilization."[51]

The foregoing doctrine is one quite different from the established doctrine of implied powers as developed by Marshall, a doctrine which will be discussed in the next chapter. That doctrine, as it will be seen, holds that from an expressly given federal power there may be implied those powers which are necessary and proper for effectively exercising it. The doctrine thus does not justify, under any circumstances, the assumption of a new power by the Federal Government. The Wilson-Roosevelt doctrine on the other hand asserts that a given subject not originally within the sphere of federal control, may, by mere change of circumstances, be brought within the federal field. Thus, to illustrate concretely, it might be argued according to the doctrine of implied powers that as implied in authority expressly granted to Congress to regulate foreign and interstate commerce, Congress might compel all corporations or individuals manufacturing commodities for foreign or interstate commerce to obtain a federal license, such a license to be granted upon such terms as Congress might see fit to dictate. According to the Wilson-Roosevelt doctrine, however, it could be argued that the control of manufacturing is not expressly denied the Federal Government nor expressly placed within the exclusive control of the States, and that, under existing industrial conditions it being of federal importance that these manufacturing concerns, or certain of them, should be regu-

[51] Speech at the dedication of the Pennsylvania capitol at Harrisburg.

lated, and the States being incompetent to furnish the necessary regulation, therefore, the Federal Government has the power.

Here, it will be seen, there is no resort whatever to the commerce clause, or to any other express grant of power. The doctrine is thus one which in the absence of express prohibition in the Constitution will support the assumption by the Federal Government of any power whatsoever if there be fair ground for holding that regulation is needed and that the States are not able to furnish it.

In the very recent case of Kansas v. Colorado,[52] decided May 13, 1907, substantially this Wilson doctrine was urged upon the court, the argument being, as summarized by Justice Brewer that: "All legislative power must be vested in either the State or the National Government, no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States."

In refutation of this argument Justice Brewer says: "But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further

[52] 206 U. S. 46; 27 Sup. Ct. Rep. 655; 51 L. ed. 956.

powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The Preamble of the Constitution declares who framed it,—'We, the People of the United States,' not the people of one State, but the people of all the States; and Article X reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

§ 28. Stare Decisis.

There have not been many cases in which the Supreme Court has explicitly and avowedly overruled its prior decisions, but there have been frequent instances in which the doctrines declared in prior cases, have been in part evaded or modified without explicit repudiation.

Taney in the Passenger Cases[53] says: "I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to be founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

In Washington University v. Rouse[54] Justice Miller said: "With as full respect for the authority of former decisions as belongs, from teaching and habit, to judges trained in the common law system of jurisprudence, we think there may be questions touching the powers of legislative bodies which can never be closed by the decisions of a court."

There are indeed good reasons why the doctrine of *stare decisis* should not be so rigidly applied to the constitutional as to other laws.

In cases of purely private import, the chief desideratum is that the law remain certain, and, therefore, where a rule has been judicially declared and private rights created thereunder, the courts will not, except in the clearest cases of error, depart from the doctrine of *stare decisis*. When, however, public interests are involved, and especially when the question is one of constitutional construction, the matter is otherwise. An error in the construction of a statute may easily be corrected by a legislative act, but a constitution and particularly the federal Constitution, may be changed only with great difficulty. Hence an error in its interpretation may for all practical purposes be corrected only by the court's repudiating or modifying its former decision.[55]

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[53] 7 How. 283; 12 L. ed. 702.

[54] 8 Wall. 439; 19 L. ed. 498.

[55] *Cf.* Baldwin, *American Judiciary*, pp. 56–57.

CHAPTER III.

THE DIVISION OF POWERS BETWEEN THE UNITED STATES AND ITS MEMBER STATES.

§ 29. Federal Powers.

The United States Constitution serves a double purpose. It operates as an instrument to delimit the several spheres of federal and state authority, and to provide for the organization of the Federal Government. In this chapter we shall be concerned with only the first of these two subjects. That *quaestio vexata* of the original purpose of the Constitution, whether intended to serve as an agreement between sovereign compacting States, or as the fundamental instrument of government of a single sovereign people, it is fortunately no longer necessary to discuss. For the purpose of a treatise on the constitutional law of the United States as it exists to-day it is sufficient to describe the Constitution as a legal instrument distributing the totality of governmental powers between the federal and state governments, according to the general principle that the powers granted the Federal Government are specified, expressly or by implication, and that the remainder of the possible governmental 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."[1]

It will have been noticed that in speaking of the powers possessed by the General Government, the term "delegated" is used, whereas, in speaking of the powers possessed by the States, the word "reserved" is employed. This exhibits the fundamental principle governing the division of powers between the General Government and the States according to which the former possesses only those powers that are by the Constitution granted to it, whereas the States are entitled to all powers except those ex-

[1] Tenth Amendment. As to certain of the powers granted to the Federal Government, as will presently appear, the fact that they may be exercised by that government does not, until they are so exercised, deprive the States of the authority to exercise them.

pressly or by implication denied to them by the Constitution. Thus the General Government is commonly spoken of as one of enumerated and the State governments as governments of un-enumerated powers.

This distinction would in all probability have been recognized and adopted by the Supreme Court as a logical corollary from the general character of the Constitution, had there been no express direction in that instrument itself to such effect. Out of superabundant caution, however, the Tenth Amendment was adopted.

The phrase "or to the people" covers these powers which, though constitutionally exercisable by the States, for aught the federal Constitution has to say, are by their own state constitutions denied to their respective governments. Thus the federal and the state constitutions differ in this important respect that the grants of the former operate to endow the General Government with powers that it would not otherwise possess, whereas the provisions of the latter in the main operate to deprive the governments which they create of powers they otherwise would possess.

Except when expressly limited,— as, for instance, where the power which is given to levy taxes is restricted by the provisions that "all duties, imposts, and excises shall be uniform throughout the United States," that "no tax or duty shall be laid on articles exported from any State," and that "no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken," a power granted to Fed eral Government is construed to be absolute in character.

§ 30. Express and Implied Powers.

Though the Federal Government is one of enumerated powers, its powers are not described in detail, and from the very beginning it has been construed to possess not simply those powers that are specifically or expressly given it, but also those necessary and proper for the effective exercise of such express powers. After enumerating the various powers that Congress is to possess, the Constitution declares[2] "[The Congress shall have

[2] Art. I, Sec. 8.

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 or in any department or officer thereof." Furthermore it will be noticed that in the Tenth Amendment, above quoted, the powers reserved to the States or to the people are not those expressly delegated to the United States, but simply those not delegated. This is significant in view of the fact that in the corresponding section in the Articles of Confederation the word "expressly" is carefully inserted.[3]

§ 31. Federal Powers to be Liberally Construed.

The Constitution is in terms and general character a grant of powers — a grant from the people of the several States to the National Government, and, strictly speaking, as in all grants of power, the authority that may be exercised thereunder is to be limited to that specifically granted or impliedly given. But whereas, in general, grants of authority are strictly construed as against the grantee and in favor of the reserved rights of the grantor, in the case of the federal Constitution this principle has, it is seen, not been applied. The justification for this has been deduced from the general nature of the Constitution as an instrument of government, and from the character of the end which was sought to be obtained by its establishment. The Federal Governments exists not for the benefit of those who exercise its powers, but to subserve the national interests,— political, industrial, and social,— of the people who framed and adopted it. While, therefore, it is, in essential character, a grant of powers, and is to be construed as such, its terms are to be interpreted in the light of the fact that the people in adopting it desired the establishment and maintenance of an effective National Government, and therefore one endowed with powers commensurate with that end.[4]

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[3] 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."

[4] "In construing a grant or surrender of powers by the people to a monarch, for his own benefit or use, it is not only natural, but just, to presume, as in

In the case of Gibbons v. Ogden[5] Marshall took pains to assert that there is no good reason for holding that either the express or the implied powers of the National Government are to be strictly construed. His language is as follows: "This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not therefore think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construc-

all other cases of grants, that the parties had not in view any large sense of the terms, because the objects were a derogation presumably from their rights and interests. But in construing a constitution of government, framed by the people for their own benefit and protection, for the preservation of their rights, and property, and liberty; where the delegated powers are not, and cannot be used for the benefit of their rulers, who are but their temporary servants and agents; but are intended solely for the benefit of the people, no such presumption of an intention to use the words in the most restricted sense necessarily arises. The powers given by the people to the General Government are not necessarily carved out of the powers already confided to the state governments. They may be such as they originally reserved to themselves. And, if they are not, the authority of the people in their sovereign capacity, to withdraw power from their state functionaries, and to confide it to the functionaries of the General Government, cannot be doubted or denied. If they withdraw the power from the state functionaries, it must be presumed to be, because they deem it more useful for themselves, more for the common benefit and common protection, than to leave it where it has been hitherto deposited. . . . The state governments have no right to assume that the power is more safe or more useful with them, than with the General Government; that they have a higher capacity and a more honest desire to preserve the rights and liberties of the people than the General Government." Story *Commentaries*, §§ 413–416.

[5] 9 Wh. 1; 6 L. ed. 23.

tion which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government and render it unequal to the objects for which it was declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred."

§ 32. Strict Construction a Corollary of the States' Rights Doctrine.

Without in any way questioning the validity of the rule of construction stated in the preceding paragraphs, it is to be observed that its propriety is absolutely dependent upon the prior assumption that the Federal Government exists as the agent of the people, and not, according to the States' Rights theory, as the agent of the States. Had the theory which conceives the United States to be a confederacy of sovereign States, and its government as the agent of these creating component units, been accepted, it would have logically followed that a doctrine of strict construction of federal powers would have been appropriate, for then these powers would have been in direct derogation of the rights reserved by the States that granted them. Strict construction thus is a logical corollary of the States' Rights theory.

§ 33. "Necessary and Proper."

In pursuance of the foregoing principles the Supreme Court of the United States has, from the very beginning, declared that the powers thus impliedly granted the General Government as necessary and proper for the exercise of the powers expressly given, are to be liberally construed. The words "necessary and proper," it was early held, were not to be interpreted as endowing the General Government simply with those powers indispensably necessary for the exercise of its express powers, but as equipping it with any and every authority the exercise of which may in any way assist the Federal Government in effecting any of the purposes the attainment of which is within its constitutional sphere. Thus in the case of the United States v. Fisher,[6] decided in 1804, Marshall declared: "It would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary because the end might be obtained by

[6] 2 Cr. 358; 2 L. ed. 304.

other means. Congress might possess the choice of means which are in fact conducive to the exercise of a power granted by the Constitution."

§ 34. McCulloch v. Maryland.

The classic statement, however, of the scope of the "implied" powers of Congress is of course that made by Marshall in the opinion which he rendered in McCulloch v. Maryland.[7] In that great case, the Chief Justice says: "It may with great reason be contended, that a government, entrusted with such ample powers [as is the United States] on the due execution of which the happiness and prosperity of the Nation so vitally depends, must be entrusted with ample means for their execution. The power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to stay and embarrass its execution by withholding the most appropriate means."

The determination of what are appropriate means must, Marshall goes on to declare, belong to the government which is to employ them. "The government which has a right to do an act, and has imposed on it the duty of performing that act," he says, "must, according to the dictates of reason, be allowed to select the means."

To the argument that a selected means must be an indispensable as well as a proper one, Marshall replies: "Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful, or essential to another."

Applying this interpretation of the word to its use in the Constitution the opinion declares:

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[7] 4 Wh. 316; 4 L. ed. 579.

"The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it."

In conclusion of this point, the Chief Justice says: "The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble. We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the

Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."

Reviewing the effect of this decision, it is seen that the words "and proper" as used in the phrase "necessary and proper" are construed not as declaring that a means selected by Congress shall be proper as well as necessary — that is, indispensable — for carrying into effect a specified power, but as qualifying and extending the force of "necessary" so as to render constitutional the selection of any means that may be appropriate, that is, may in any way assist the General Government in the exercise of its constitutional functions. It need not be said, of course, that the question as to whether or not the particular means selected is the best possible means that might have been adopted, is one for Congress to answer. All that the courts have to consider in passing upon its constitutionality is as to whether it is calculated in any appreciable degree to advance the constitutional end involved.

One further fact regarding the implied powers of Congress is to be noticed. This is that a power employed as incidental to the exercise of an express power may be used free from the limitation under which it would rest if exercised as an express power. Thus, in Veazie Bank v. Fenno[8] and Head Money Cases[9] the Supreme Court decided that the power of taxation when used simply as a means for regulating commerce and currency, is not subject to the constitutional limitations under which it would rest if exercised for the purpose of raising a revenue. In the Head Money Cases the court declared, relative to a *per capita* tax levied by

[8] 8 Wall. 533; 19 L. ed. 482.

[9] 112 U. S. 580; 5 Sup. Ct. Rep. 247; 28 L. ed. 798.

Congress upon persons, not citizens of the United States, coming to this country: "If this is an expedient regulation of commerce by Congress, and the end to be obtained is one falling within the power, the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax. In the case of Veazie Bank v. Fenno, the enormous tax of ten per cent. per annum on the circulation of state banks, which was designed, and did have the effect, to drive all such circulation out of existence, was upheld because it was a means properly adopted by Congress to protect the currency which it had created. . . . It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple."

§ 35. Administrative Necessity as a Source of Federal Power.

Since the close of the Civil War the sovereignty of the National Government has been undisputed. Starting with this as a fundamental premise, constitutional development of the last forty years has been in the direction of endowing the Federal Government with administrative powers adequate for the accomplishment of the purposes for which it is acknowledged to exist. Just as the doctrine of implied powers has been used to broaden the scope of federal authority at the expense of the reserved rights of the States, so the principle of administrative efficiency has been employed to permit the field of individual rights to be entered. Thus in a remarkable series of cases the courts have permitted the exercise by federal executive officials of degrees of administrative discretion that would have startled constitutional jurists of but a generation ago.

In these cases the Supreme Court has frankly argued that where, for the efficient performance of the administrative duties laid upon the General Government, it is necessary that an administrative order should take the place of a judicial process, the private rights of person and property are not to be allowed to stand in the way. In Murray's Lessee v. Hoboken[10] it was held that an administrative officer could fix finally, without judicial

[10] 18 How. 272; 15 L. ed. 372.

review, the amount due the Government from a public official, and collect it by a distress warrant.

In Springer v. United States[11] the power of the Government to collect a tax by a sale of land under a warrant issued by the collector was upheld. In Smelting Co. v. Kemp[12] the administrative decision of the United States Land Office was held final as to the facts within its statutory jurisdiction.

The power of the Postmaster-General to exclude from the postal service the mail of concerns whose business he deems fraudulent has been sustained, though, by the statute conferring the power, no right of judicial review is given. The Supreme Court say: "If the ordinary daily transactions of the Departments which involve an interference with private rights were required to be submitted to the courts before action was finally taken, the result would entail practically a suspension of some of the most important functions of government." [13] In Bartlett v. Kane[14] the court refused to examine the correctness of an appraisement by an administrative officer of property for taxation, saying: "The interposition of the courts in the appraisement of importations would involve the collection of the revenues in inextricable confusion and embarrassment." Finally, and most extreme of all, with regard to the exclusion of aliens, it has been held that an administrative officer may decide finally whether or not a person claiming to be a citizen of the United States is in fact such, and, therefore, entitled to enter this country.[15] This decision Justice Brewer, in his dissenting opinion, characterized as "appalling;" but there is little chance that its doctrine will be disturbed in subsequent cases.[16]

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[11] 102 U. S. 586; 26 L. ed. 253.

[12] 104 U. S. 636; 26 L. ed. 875.

[13] Public Clearing House v. Coyne (194 U. S. 497; 24 Sup. Ct. Rep. 789; 48 L. ed. 1092).

[14] 16 How. 263; 14 L. ed. 931.

[15] United States v. Ju Toy (198 U. S. 253; 25 Sup. Ct. Rep. 644; 49 L. ed. 1040).

[16] This subject of the conclusiveness of administrative determinations will receive more particular treatment in chapter LXIV.

In a manner similar to that in which the National Government has thus by Congress and the Supreme Court been equipped with the powers necessary for the efficient performance of the administrative duties which modern industrial and commercial conditions have thrown upon it, the Supreme Court has, upon simple ground of necessity, sanctioned the exercise by the Federal Government of powers requisite to meet the problems assumed by it in the imperialistic policy upon which it has entered since the Spanish war.

In De Lima v. Bidwell [17] the power of the United States over its dependencies was declared to arise, not out of the territorial clause, but from the necessities of the case and from the inability of the States to act on the subject. In Hawaii v. Mankichi[18] upon similar grounds of expediency the right to jury trial was asserted not to have been extended to Hawaii, although by joint resolution Congress had declared that all local laws inconsistent with the Constitution of the United States should have no force. In Downes v. Bidwell the majority justices, Brown excepted, argue at length the practical necessity of conceding to the General Government the power of annexing foreign territory without incorporating it into the United States.

Upon the same grounds of expediency and practical necessity the Supreme Court, in United States v. Kagama,[18a] has sustained the continued exclusive control of the Federal Government over the Indians, even though their tribal autonomy is no longer respected by Congress.

§ 36. International Sovereignty and Responsibility as a Source of Implied Powers.

Starting from the premise that in all that pertains to international relations the United States appears as a single sovereign nation, and that upon it rests the constitutional duty of meeting all international responsibilities, the Supreme Court has deduced

[17] 182 U. S. 1; 21 Sup. Ct. Rep. 743; 45 L. ed. 1041.

[18] 190 U. S. 197; 23 Sup. Ct. Rep. 787; 47 L. ed. 1016.

[18a] 118 U. S. 375; 6 Sup. Ct. Rep. 1109; 30 L. ed. 228.

corresponding federal powers. In Fong Yue Ting v. United States[19] that court say: "The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective."

Thus, from this general source has been deduced the implied power of the United States to punish the counterfeiting in this country of the securities of foreign countries, the authority to annex by statute unoccupied territory, to establish in foreign countries judicial tribunals, to lease and administer foreign territory, to include or to expel from our shores undesirable aliens, and in general to exercise by treaty or statute all those powers properly to be embraced under the term "foreign relations" which other sovereign States possess. The extent of the authority of the United States under its treaty-making powers will receive special treatment in a later chapter. It is sufficient to point out in this place that decisions of the Supreme Court have established the doctrine that in the exercise of its treaty-making powers, and in fulfilling its international responsibilities, the United States may exercise regulative control over matters which are not within the legislative power of Congress and which are in general reserved to the States. In short, it may be stated as an established principle of our constitutional law that the supreme purpose of our Constitution is the establishment and maintenance of a State which shall be nationally and internationally a sovereign body, and, therefore, that all the limitations of the Constitution, express and implied, whether relating to the reserved rights of the States or to the liberties of the individual, are to be construed as subservient to this one great fact.

§ 37. Resulting Powers.

The two preceding sections have shown that the doctrine of implied powers is sufficiently broad to justify the exercise by the Federal Government of powers not deduced from specific grants

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19 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905.

of authority, but from the general fact that the United States is, with reference to its own citizens and its constituent Commonwealths, a fully sovereign national State, and, with reference to other States, a political power equipped with all the authority possessed by other independent States. Story in his *Commentaries* describes as "Resulting Powers" these federal powers which result from the aggregate authority of the General Government. That federal authority may be deduced from this general source and that it is not necessary for the Federal Government to trace back every one of its powers to some single grant of authority, was early stated by Marshall in Cohens v. Virginia.[20] In that case he said: "It is to be observed that it is not indispensable to the existence of every power claimed for the Federal Government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and to infer from them all that the power claimed has been conferred." And later in the same opinion he says: "And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power."

§ 38. Inherent Sovereign Powers.

Sometimes confused with, but quite distinct from the doctrine which ascribes to the Federal Government plenary authority in matters international, and quite different also from the doctrine of resulting powers is that theory which argues the possession generally by the United States of "inherent" sovereign powers — that is, powers not regarded as implied in express grants of authority whether singly or collectively considered, but as flowing directly from the simple fact of national sovereignty. The two former doctrines are fairly deducible from the doctrine of implied powers. The latter doctrine, upon the contrary, would

[20] 6 Wh. 264; 5 L. ed. 257.

derive federal authority not from powers expressly granted, but from an abstraction, and would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State.[21]

There can be no question as to the constitutional unsoundness, as well as of the revolutionary character, of the theory thus advanced. To accept it would be at once to overturn the long line of decisions that have held the United States Government to be one of limited, enumerated powers. Taney in denying the President the right to authorize a suspension of the writ of habeas corpus explicitly repudiated the doctrine. "Nor can any argument be drawn," he said, "from the nature of sovereignty, or the necessities of government for self-defense in times of tumult and

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[21] This theory has played a certain part in our constitutional history for many years, and was especially pressed during the period following the Spanish-American War and before the decision of the recent Insular Cases. Thus, Senator Platt of Connecticut declared in the Senate, December 19, 1898, that the United States "possesses every sovereign power not reserved in its Constitution to the States or to the people; that the right to acquire territory was not reserved, and is, therefore, an inherent sovereign right; that it is a right upon which there is no limitation and with regard to which there is no qualification, that in certain instances the right may be inferred from specific clauses in the Constitution but that it exists independent of the clauses; that in the right to acquire territory is found the right to govern it; that as the right to acquire is a sovereign and inherent right, the right to rule is a sovereign right not limited in the Constitution." *Congressional Record*, XXXII, No. II, pp. 321–3.

So also, Senator Foraker of Ohio declared in the Senate, July 1, 1898, in response to a question as to the constitutional source whence he derived the power of the United States to annex foreign territory, that "the power was to be found inherent in our sovereignty — attached to it necessarily as a part of our sovereignty as a nation," and "was also to be found in the Constitution — expressly conferred upon Congress by that provision of the Constitution which authorizes Congress to provide for the general welfare." When asked if he called this doctrine the "higher law," he replied: "The proposition is that it is inherent in sovereignty to do whatever sovereignty may see fit to do, and among other things to acquire territory."

Of substantially the same character are the arguments of Gardiner (*Our Right to Acquire and Hold Foreign Territory*, Putnams', 1899), and of Magoon, Law Officer, War Department (*Report on the Legal Status of the Territory and Inhabitants of the Islands Acquired by the United States during the War with Spain*. Doc. 234, 56th Cong., 1st Session).

danger. The Government of the United States is one of delegated and limited powers. It derives its existence and authority altogether from the Constitution and neither of its branches can exercise any of the powers of government beyond those specified and granted."[22]

Unfortunately, however, the Supreme Court has not always been as careful as it might have been in repudiating the argument based upon the inherent sovereign rights of the National Government. Although it has never explicitly justified the exercise of a power by the Federal Government upon this ground, it has, *obiter,* several times used language suggesting its validity.[23]

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[22] *Ex parte* Merryman (Campbell's Reports, 246).

[23] In the Legal Tender Cases (12 Wall. 457; 20 L. ed. 287), Justice Bradley says: "The United States is not only a Government but it is a National Government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all of which are forbidden to the state governments. . . . Such being the character of the General Government it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the Government of the United States has express authority in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted and vindicating its authority and existence."

In United States v. Jones (109 U. S. 513; 3 Sup. Ct. Rep. 346; 27 L. ed. 1015) the power of eminent domain was declared to be possessed by the United States as an "incident of sovereignty," and because it "belongs to every independent government."

In Church of Jesus Christ v. United States (136 U. S. 1; 10 Sup. Ct. Rep. 792; 34 L. ed. 478) "the power to make acquisitions of territory by conquest, by treaty, and by cession" was declared to be possessed by the United States, not from any express or otherwise implied power, but because these are "an incident of national sovereignty."

In Fong Yue Ting v. United States (149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905) "the right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions in war or in peace," was declared to belong to the United States as "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare."

These *dicta* which are cited in the footnote, if taken by themselves might seem to indicate the acceptance by the Supreme Court of the doctrine of inherent sovereign powers of the General Government. An examination of the cases in which they were delivered discloses, however, that in each instance they were *obiter,* the power that was sustained being actually justified as a resulting or implied power. In the recent Insular Cases the doctrine was strongly urged upon the court but received no countenance; and in Kansas v. Colorado,[24] a case decided in 1907, in which the doctrine was set up in a somewhat disguised form, the court was emphatic in its repudiation.[25]

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24 206 U. S. 46; 27 Sup. Ct. Rep. 655; 51 L. ed. 956.

25 After referring to the absence of power in the Federal Government to control private property in the States, Justice Brewer, who rendered the opinion of the court, said: "Appreciating the force of this, counsel for the government relies upon 'the doctrine of sovereign and inherent power;' adding, 'I am aware that in advancing this doctrine I seem to challenge great decisions of the court, and I speak with deference.' His argument runs substantially along this line: All legislative power must be vested in either the state or the national government; no legislative powers belong to a state government other than those which affect solely the internal affairs of that State; consequently all powers which are national in their scope must be found vested in the Congress of the United States. But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act; and that if in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to wit, 'the people.' Its principal purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The pre-

§ 39. Express Limitations Upon the Federal Government.

The express limitations upon the powers of the Federal Government are in part limitations upon the manner of exercise of powers expressly given, as, for example, that direct taxes shall be apportioned among the several States according to their respective populations, that naturalization, bankruptcy, and tariff laws shall be uniform throughout the United States, etc.; and in part absolute prohibitions upon the exercise, in any manner, of the powers specified. These absolute prohibitions are to be found, in the main, in Section 9 of Article I and in the first eight Amendments.

From the very first it has been construed by the Supreme Court that the prohibitions contained in these Amendments apply only to the United States. This was first authoritatively declared by Marshall in the case of Barron v. Baltimore[26] decided in 1833.

amble of the Constitution declares who framed it,—'we, the people of the United States,' not the people of one State, but the people of all the States; and Article 10 reserves to the people of all the States the powers not delegated to the United States. The powers affecting the internal affairs of the States not granted to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, and all the powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of the things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article 10 is not to be shorn of its meaning by any narrow or technical construction but is to be considered fairly and liberally so as to give effect to its scope and meaning." Mr. C. J. Tiedeman in his work *The Unwritten Constitution of the United States* raises the point whether a correct interpretation of the Tenth Amendment would not give to the National Government those powers the exercise of which is prohibited to the States, but which are neither prohibited nor delegated to the General Government. His claim is that the General Government should be construed to have those powers, for, he argues, the powers must rest somewhere; they are expressly prohibited to the States, and, therefore, they must be possessed by the Nation. The advantage which he conceives would follow from an acceptance of this principle would be the avoidance in many cases of resorting to an undue straining of the doctrine of implied powers in order to enable the General Government to exercise an authority essential to its welfare but not expressly delegated to it.

[26] 7 Pet. 243; 8 L. ed. 672.

In his opinion rendered in that case, Marshall said: "The plaintiff . . . . insists that the [Fifth] Amendment being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State as well as that of the United States. The question thus presented is, we think, of great importance, but not of much difficulty. The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a Constitution for itself, and in that Constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed next a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers to be conferred on the Government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, and not of distinct governments framed by different persons and for different purposes."

The correctness of this decision has never been questioned either by the federal or the state courts. However, as we shall notice in a later chapter, the argument has been made, but not accepted as valid by the Supreme Court, that the clause of the Fourteenth Amendment which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," should be so construed as to render the provisions of the first eight Amendments operative upon the States.

In regard to these first eight Amendments it has sometimes been said that it was only an excess of caution that required their incorporation in the federal Constitution. Inasmuch as the United States was to have only the powers expressly or impliedly given it, it has been asserted that the General Government would have been, in the absence of such express limitations, without

the authority to exercise the powers that these Amendments enumerate.[27] A consideration, however, of the construction which several of the provisions of these Amendments have received, especially during recent years, will, it is believed, make it evident that these express limitations upon the Federal Government have been of considerable importance.[28]

§ 40. Implied Limitations Upon the Federal Government.

The implied limitations upon the Federal Government are: first, those implied in the express limitations; and second, those which arise from the general nature of the American federal State. The Constitution looks to a preservation of the several States in the administrative autonomy that is allotted to them, and from this is deduced the principle that the Federal Government may not, unless it be absolutely necessary to its own efficiency, interfere with the free operation of state governments either by way of imposing upon them the performance of duties, or of unduly restraining their freedom of action by way of taxation or otherwise.

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[27] Indeed, in the eyes of some, of Hamilton at least, there were affirmative reasons why these limitations should not be expressly stated. In *The Federalist*, No. 84, after showing that Bills of Rights were "stipulations between Kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince," whereas in constitutions "the people in reality surrendered nothing," Hamilton proceeds: "I go further and affirm that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They 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? . . . Men disposed to usurp . . . 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 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."

[28] See chapter XLV.

The principles governing the deduction of implied from express limitations upon the Federal Government are the same as those applicable to the construction of implied powers.

In Fairbank v. United States[29] the court say: "We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that, where prohibition or limitation is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when, in respect to grants of powers, there is, as heretofore noticed, the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose."

§ 41. Exclusive and Concurrent Federal Powers.

The legislative powers possessed by the Federal Government may be divided into two classes; the one embracing those powers the exercise of which is exclusively vested in the General Government; the other those which, in default of federal exercise, may be employed by the States.

Some of the powers granted by the Constitution to the General Government are expressly denied to the States. As to the ex-

[29] 181 U. S. 283; 21 Sup. Ct. Rep. 648; 45 L. ed. 862.

clusive character of the federal jurisdiction over these there cannot be, of course, any question. It has, however, been often a matter difficult of determination whether or not various of the powers given to the United States, but not expressly made exclusive, or denied to the States, are so exclusively subject to federal control that the exercise of them by the States is under no circumstances permissible. Shortly stated, the principle that the Supreme Court has laid down for determining this question in each particular case as it has arisen has been the following: As regards generally the powers granted to the National Government there is a difference between those which are of such a character that the exercise of them by the States would be, under any circumstances, inconsistent with the general theory or national polity of the Constitution, and those not of such a character. As regards this latter class, the Supreme Court has held that as long as Congress does not see fit to exercise them, the States may do so. Laws thus passed by the States are, however, of course subject to suspension at any time by the enactment by Congress of laws governing the same subjects.[30]

In the early case of Sturges v. Crowninshield[31] Chief Justice Marshall, in reference to the matter of bankruptcy, laid down the distinction between the exclusive and concurrent powers of the Federal Government, in the following language: "When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been that the mere grant of

[30] By the enactment of a federal law a state law governing the same subject is not nullified but merely suspended during the existence of the federal statute. Upon the repeal of the federal statute, the state law again operates without any re-enactment by the State.

[31] 4 Wh. 122; 4 L. ed. 529.

a power to Congress did not imply a prohibition on the States to exercise the same power. But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. The confusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted by Congress, or the nature of the power required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it."

The principle thus stated by Marshall is a simple and rational one, and has never been departed from by the Supreme Court, though that court has at times varied in its judgment whether the nature of a given power is such as to preclude state action in the absence of congressional regulation.

In Houston v. Moore[32] Justice Johnson says: "The Constitution containing a grant of powers in many instances similar to those already existing in the state governments, and some of those being of vital importance also to state authority and state legislation, it is not to be admitted that the mere grant of such powers in affirmative terms to Congress, does, *per se,* transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion that the powers so granted are never exclusive of similar powers existing in the States, unless where the Constitution has expressly, in terms, given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example of the first class is to be found in the exclusive legislation delegated to Congress over places purchased by the consent of the legislature of the State in which the same shall be, for forts, arsenals, dockyards, etc.; of the second class, the prohibition of a state to coin money or emit bills of credit; of the third class, as this court have

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[32] 5 Wh. 1; 5 L. ed. 19.

already held, the power to establish a uniform rule of naturalization (Chirac v. Chirac, 2 Wh. 259; 4 L. ed. 234) and the delegation of admiralty and maritime jurisdiction (Martin v. Hunter, 1 Wh. 304; 4 L. ed. 97). In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the Eleventh [Tenth?] Amendment of the Constitution, but upon the soundest principles of general reasoning."

So, later, in Cooley v. Board of Wardens[33] the court declare: "The grant of commercial power to Congress does not contain any terms which expressly exclude the States from exercising an authority over its subject-matter. If they are excluded it must be because the nature of the power thus granted to Congress requires that a similar authority should not exist in the States."

Still later, in Cardwell v. American River Bridge Co.,[34] the court, after quoting a number of cases, say: "These cases illustrate the general doctrine now fully recognized, that the commercial power of Congress is exclusive of state authority only when the subjects upon which it is exerted are national in their character and admit and require uniformity of regulations affecting alike all the States, and that when the subjects within that power are local in their nature or operation, or constitute mere aids to commerce, the States may provide for their regulation and management until Congress intervenes and supersedes their action."

Applying this principle the Supreme Court has held that the States may legislate regarding such matters as pilotage, wharves, harbors, etc.; but may not, even though Congress has not acted, take any steps that in effect will operate to hinder or regulate the carrying on of interstate commerce itself. "The power of Congress," the court has said in Brown v. Houston,[35] "is certainly so far exclusive that no State has power to make any law or regula-

[33] 12 How. 299; 13 L. ed. 996.

[34] 113 U. S. 205; 5 Sup. Ct. Rep. 423; 28 L. ed. 959.

[35] 114 U. S. 622; 5 Sup. Ct. Rep. 1091; 29 L. ed. 257.

tion which will affect the full and unrestrained intercourse and trade between the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States coming or brought within its jurisdiction. All laws and regulations are restricted by natural freedom to some extent, and where no regulation is imposed by the government which has the exclusive power to regulate, it is an indication of its will that the matter shall be left free. So long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that the commerce shall be free and untrammeled, and any regulation of the subject by the State is repugnant to such freedom." [36]

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[36] For a full discussion of the concurrent legislative powers of the States with reference to interstate and foreign commerce, see chapter XLII. For a further discussion of concurrent powers with reference to the federal control of elections, see chapter XXXVIII.

CHAPTER IV.

THE SUPREMACY OF FEDERAL AUTHORITY.

§ 42. Federal Supremacy.

The supremacy of the Federal Government, when operating within its constitutional sphere, over all persons and bodies politic within its territorial limits, is no longer open to question. That the extent of this federal constitutional sphere of action is to be determined in the last resort by the federal Supreme Court, is equally well settled.

The maintenance of this supremacy unimpaired, while at the same time preserving to the States their proper autonomy and independence of action, has, however, been a difficult task; and, so long as the federal form is retained, this task will continue to tax to the utmost the legal and political abilities of our courts and political bodies. With a quite proper motive those who have controlled the public actions of the States, and those who have guided the activities of the United States, have sought for their respective governments the greatest possible constitutional power and independence, and, therefore, have not hesitated to occupy debatable territory. Thus, without there being any denial of the supremacy of the federal law, when operating within its proper field, or of the right of the federal Supreme Court to determine, in final resort, the extent of that proper field, frequent conflicts have resulted. These conflicts in their many and varied forms furnish much of the material for the present treatise, and they will be severally considered in their logical order. It will not be without value, however, to review in this introductory chapter some of the more important cases in which the supremacy of federal over state law has been generally and broadly asserted.

The general statement may be made that, since the beginning of our present Government, in no instance has the federal Supreme Court failed to assert the supremacy of the federal power when its authority has been attacked by the States. In 1793 the court upheld its right under the Constitution, as it then stood,

to entertain a suit against the State of Georgia brought by a citizen of another State.[1] The next year the court clearly intimated that it would disregard a state law in conflict with a federal treaty.[2] The supremacy of federal law was again asserted the next year in Penhallow v. Doane,[3] and in 1796 in Ware v. Hylton.[4] In Calder v. Bull[5] the doctrine was definitely asserted, though its application was not found necessary, that a state law in conflict with the federal Constitution would be disregarded. In 1809, in United States v. Peters,[6] this action became necessary and the doctrine was applied, Chief Justice Marshall speaking for the unanimous court, saying: "If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under these judgments, the Constitution becomes itself a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all, and the people of Pennsylvania, as well as the citizens of every other State, must feel a deep interest in resisting principles so destructive of the Union and in asserting consequences so fatal to themselves. . . . The State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause." "It will be readily conceived," the great Chief Justice concludes, "that the order which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory mandamus must be awarded."

In 1810 and 1812 state laws were again held void by the Supreme Court because in conflict with the federal Constitution.[7]

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[1] Chisholm v. Georgia, 2 Dall. 419; 1 L. ed. 440.

[2] Georgia v. Brailsford, 3 Dall. 1; 1 L. ed. 483.

[3] 3 Dall. 54; 1 L. ed. 507.

[4] 3 Dall. 199; 1 L. ed. 568.

[5] 3 Dall. 386; 1 L. ed. 648.

[6] 5 Cr. 115; 3 L. ed. 53.

[7] Fletcher v. Peck (6 Cr. 87; 3 L. ed. 162); New Jersey v. Wilson (7 Cr. 164; 3 L. ed. 303).

Finally in the great case of McCulloch v. Maryland,[8] decided in 1819, not only was a state law held void, but the general doctrine declared that the State cannot, in the exercise of its reserved powers, even of the highest of them, interfere with the operation of a federal agency even though that agency be one of convenience and not of necessity to the United States. "The States have no power," it was declared, "by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the Federal Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

In Martin v. Hunter's Lessee,[9] decided in 1816, and in Cohens v. Virginia,[10] decided in 1821, the Supreme Court upheld its authority to review, on writs of error, decisions of state courts adverse to alleged federal rights, the exercise of this jurisdiction having been provided for by the famous twenty-fifth section of the Judiciary Act of 1789. Justice Story who spoke for the court said: "The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power."

In Cohens v. Virginia,[11] Chief Justice Marshall, speaking for the court, said: "If it could be doubted, whether from its nature it [the National Government] were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that '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, any-

[8] 4 Wh. 316; 4 L. ed. 579.

[9] 1 Wh. 304; 4 L. ed. 97.

[10] 6 Wh. 264; 5 L. ed. 257.

[11] 6 Wh. 264; 5 L. ed. 257.

thing in the Constitution or laws of any State to the contrary notwithstanding.' This is the authoritative language of the American people, and, if the gentlemen please, of the American States. . . . The people made the Constitution and the people can unmake it. . . . But this supreme and irresistible power to make or to unmake resides only in the whole body of the people; not in any subdivision of them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated the power of repelling it. . . . The framers of the Constitution were indeed unable to make any provisions which should protect that instrument against a general combination of the States, or of the people for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State, whose tendency might be to arrest the execution of the laws; and this it was the part of wisdom to attempt. We think they have attempted it."

The importance of the doctrine that was emphatically declared in these two cases it is impossible to exaggerate. This the upholders of States' Rights clearly saw. Thus Calhoun later wrote:[12] "The effect of this is to make the government of the United States the sole judge, in the last resort, as to the extent of its powers, and to place the States and their separate governments and institutions at its mercy. It would be a waste of time to undertake to show that an assumption that would destroy the relation of co-ordinates between the government of the United States and those of the several States,—which would enable the former, at pleasure, to absorb the reserved powers and to destroy the institutions, social and political, which the Constitution was ordained to establish and protect, is wholly inconsistent with the federal theory of government, though in perfect accordance with the national theory. Indeed, I might go further and assert, that it is, of itself, all sufficient to convert it into a national, consolidated government."

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[12] *Discourse on the Constitution and Government of the United States.* Works, I, 338.

During the same year that the case of McCulloch v. Maryland was decided, two other state laws were held void by the Supreme Court, one of New York, in Sturges v. Crowinshield,[13] and one of New Hampshire in Dartmouth College v. Woodward.[14]

In 1824, in Osborn v. Bank of the United States[15] the attempt of Ohio to tax the federal bank was declared unconstitutional. In 1829, in Weston v. Charleston,[16] a municipal tax on stock of the United States held by citizens of the city of Charleston was held invalid. In 1824, in the case of Gibbons v. Ogden,[17] was begun that long line of decisions which has established the power of the United States to regulate interstate commerce free from state interference — an authority the exercise of which has done so much to increase the actual power and influence of the National Government. In this case a law of the State of New York was held void.

In 1823, a law of Kentucky was held of no force by the federal court,[18] and in 1830 a law of Missouri received similar treatment.[19] In 1832 in Worcester v. Georgia,[20] an act of the State of Georgia was held void, but the Supreme Court failed to secure the release of the plaintiff who had been imprisoned under it. This failure was due, however, not to the weakness on part of the Federal Government but to the refusal of the President to lend his executive aid.

From 1835 to the outbreak of the Civil War there can be no question but that the Supreme Court of the United States exerted a much less potent influence in solidifying and expanding the federal power than it had exercised during the thirty-five years preceding. During the two terms of office of Jackson, five vacancies occurred in the Supreme Court, among them that of the

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13 4 Wh. 122; 4 L. ed. 529.

14 4 Wh. 518; 4 L. ed. 629.

15 9 Wh. 738; 6 L. ed. 204.

16 2 Pet. 449; 7 L. ed. 481.

17 9 Wh. 1; 6 L. ed. 23.

18 Green v. Biddle (8 Wh. 1; 5 L. ed. 547).

19 Craig v. Missouri (4 Pet. 410; 7 L. ed. 903).

20 6 Pet. 515; 8 L. ed. 483.

Chief-Justiceship to which Taney was appointed in 1835. The effect of the new appointments upon the views of the court was shown almost immediately. In the case of Briscoe v. Bank of Kentucky,[21] which had been argued just before the death of Marshall, the issue by the bank of bills of credit had been held unconstitutional. A rehearing being granted and the case coming on for argument under Taney, the action of the bank was sustained and the previous decision reversed. The decision marked the beginning of a new era in the history of constitutional interpretation. Up to this time the court had, upon all possible occasions, upheld the General Government in the exercise of its powers, and had held the States strictly to the obligations imposed upon them by the Constitution. Now, however, it began if anything to lean the other way. In Briscoe v. Bank of Kentucky, departing from its former practice, by an extremely loose interpretation of a constitutional limitation that had been laid upon the States, it rendered practically nugatory one of the provisions of the Constitution. Other decisions similarly favorable to States' Rights followed. In the case of City of New York v. Miln,[22] a state law was sustained which might easily have been held an interference with the federal control of interstate commerce. In the Charles River Bridge Co. v. Warren Bridge Co.[23] a doubtful state law was again upheld. In the License Cases[24] interpretations of the Commerce Clause favorable to the States were given. In Kentucky v. Dennison[25] it was held that though the federal Constitution made it a duty of a State to surrender to another State a fugitive from justice from that State, there was no constitutional means by which the Federal Government could compel the performance of that duty. In all these cases the States were favored at the expense of the authority of the General Government.

In 1841, in Prigg v. Pennsylvania,[26] a state law attempting the regulation of the return of fugitive slaves was held unconstitu-

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[21] 11 Pet. 257; 9 L. ed. 709.
[22] 11 Pet. 102; 9 L. ed. 648.
[23] 11 Pet. 420; 9 L. ed. 773.
[24] 5 How. 504; 12 L. ed. 256.
[25] 24 How. 66; 16 L. ed. 717.
[26] 16 Pet. 539; 10 L. ed. 1060.

tional and void on the ground that this subject was wholly withdrawn from the control of the States. Taney, however, though concurring with the majority in holding unconstitutional the particular law in question, took pains to assert that there was no constitutional incompetence on the part of the State to pass laws the intention and actual effect of which were to assist the Federal Government in the capturing and returning of fleeing negroes.

Regarding the attitude of the Supreme Court during this period, the important fact is to be noticed that, though it threw the weight of its influence upon the side of the States so far as concerned a liberal interpretation of the powers reserved to them by the Constitution, not once, in the slightest measure, did it during these years, any more than it had done in the years preceding, intimate that the actual legal and political supremacy was not vested in the National Government. The position of Taney and of the court upon this point was clearly shown in the judgment rendered and in the opinion delivered in the case of Ableman v. Booth,[27] decided in 1859. The facts of this case were these: Booth had been tried in a lower federal court for a violation of the federal fugitive slave law of 1850, and had been found guilty and sentenced to imprisonment. The highest court of the State of Wisconsin, however, stepped in, disregarded this judgment and released the prisoner. Not only this but it went on to declare that its decision, thus rendered, was subject to no appeal and was conclusive upon all the courts of the United States; and when a writ of error from the United States Supreme Court directed to the Wisconsin court was issued, the clerk of the state court replied to it that he had been directed to make no return, and refused to make up and send a record of the case to the federal court. Thereupon the Attorney-General of the United States filed in the Supreme Court of the United States an uncertified record which it was ordered should be received as though returned by the clerk of the Wisconsin court. Having thus gotten the case before it, despite the resistance of the State, the decision of the

[27] 21 How. 506; 16 L. ed. 169.

Supreme Court thereupon was an emphatic condemnation of the State's action. "No State, judge or court," declared Taney who rendered the opinion of the court, "after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the authority of the State, in form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference."

From the foregoing brief review it is thus seen that prior to the Civil War the supremacy of the federal law had been sustained under a wide variety of circumstances and that the resulting subordinate status of the States had been made fully evident. That status the people of certain of the Southern States in 1861 decided no longer to support, and in defense of their views, declared their respective commonwealths independent of the Union, and in support of this independence resorted to the arbitrament of war. That this secession was an illegal act, and that, therefore the seceding States, from the constitutional viewpoint, never were out of the Union, has repeatedly been declared by the Supreme Court. In Texas v. White[28] the Union was declared to be "an indestructible Union composed of indestructible States." The opinion continues: "When, therefore, Texas became one of the United States, she entered into an indissoluble relation. . . . The act which consummated her admission into the Union was something more than a compact; it was the incorporation of a new member into the political body. The union between Texas and the other States was as complete, as perpetual and as indissoluble as the union between the original States. There was no place for reconsideration, or revocation, except through revolution, or through the consent of the States. Considered, therefore, as transactions under the Constitution, the

[28] 7 Wall. 700; 19 L. ed. 227.

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 in 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."

In Knox v. Lee[29] the court said, speaking through the mouth of Justice Bradley: "The doctrine so long contended for, that the federal Union was a mere compact of States, and that the States, if they chose, might annul and disregard the acts of the national legislature, or might secede from the Union at their pleasure, and that the General Government had no power to coerce them into submission to the Constitution, should be regarded as definitely and forever overthrown. This has been finally affected by the national power, as it had often been before by overwhelming argument. . . . The United States is not only a government, but it is a National Government, and the only government in this country that has the character of nationality."

§ 43. The States May Not Be Coerced.

In a Confederacy which is, in effect, a league of completely sovereign States, such coercion as it may be necessary for the central power to apply, may in certain cases be directed directly against the States as such.

In a Federal State such as the United States is now agreed to be, the supremacy of the national authority is never maintained by direct action against its member Commonwealths, but is exhibited in its authority to execute its will upon all persons subject to its jurisdiction, anything in the Constitution or laws of any State to the contrary notwithstanding, and irrespective of what may be the opinions and effects of those exercising the political powers of those States.

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[29] 12 Wall. 457; 20 L. ed. 287.

The individual Commonwealths, having a political status only as members of the Union, have not the legal power to place themselves, as political bodies, in opposition to the national will. Their legislatures, their courts, or their executive officials may attempt acts unwarranted by the federal Constitution or federal law, and they may even command that their citizens generally shall refuse obedience to some specified federal laws or the federal authorities generally, but in all such cases, such acts are, legally viewed, simply void, and all individuals obeying them subject to punishment as offenders against national law. The fact that their respective States have directed them to refuse obedience or to offer resistance to the execution of the federal laws can afford them no immunity from punishment, for no one can shelter himself behind an unconstitutional law, such a law being, in truth, as we have seen, not a law at all, but only an unsuccessful attempt at a law.

Thus President Lincoln, in his first inaugural message, assumed the correct constitutional position when he declared that the Federal Government could not wage public war against a State, not, however, because of a lack of constitutional authority to maintain in every respect its supremacy, but because from the very nature of the Union a State, *qua* State, could not place itself in a position where coercion could be applied to it. After an argument tending to show the sovereign character of the Union, and that it was intended to be perpetual, he declared: "It follows from these views that no State upon its own mere motion can lawfully get out of the Union; that resolves and ordinances to that effect are legally void, and that acts of violence within any State or States against the authority of the United States are insurrectionary or revolutionary, according to circumstances. I therefore consider that, in view of the Constitution and the laws, the Union is unbroken, and to the extent of my ability I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. . . . In doing this there needs to be no bloodshed or violence, and there shall be none unless it be forced upon the national au-

thority. The power conferred upon me will be used to hold, occupy and possess the property and places belonging to the Government and to collect the duty and imposts; but beyond what may be necessary for these objects, there will be no invasion, no using of force against or among the people anywhere."

In taking this position Lincoln had to treat the war when it began as merely an insurrection in which the coercion and punishments were to be applied to individuals. Thus he began his Proclamation of April 15, 1861, in which he called for seventy-five thousand of the militia of the States, by saying: "Whereas the laws of the United States have been for some time past and now are opposed and the execution thereof obstructed in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings:" and closed by commanding "the persons composing the combinations aforesaid to disperse and retire peaceably to their respective abodes within twenty days from this date."

As further showing the theory as to the nature of the contest that was held by the National Government is the fact that Congress did not "declare war" against the South, or, when the struggle was over, enter into a treaty of peace with the Southern Confederacy. The United States did not recognize that the Confederacy had or could have a standing as a political power with which it might deal as with a foreign State. One after another, the surrender of his forces by each Confederate general was accepted as an act of war and thus the Confederacy left to collapse and disappear without any formal, official act to mark its demise.

The possession by the Federal Government of full power to protect any right and to enforce any law of its own at any time, and at any place within its territorial limits, any resistance of private individuals, or state officials, acting with or without the authority of state law to the contrary notwithstanding, has been uniformly asserted by the Supreme Court whenever such an assertion has been necessary. Thus in 1824, in the case of Osborn v. Bank of the United States,[30] Chief Justice Mar-

[30] 9 Wh. 738; 6 L. ed. 204.

shall met the argument that the suit, being against one of its officials and based upon acts committed by him in his official capacity, was in fact a suit against the State of Ohio, one, therefore, which, under the Eleventh Amendment, the court was without authority to try, by declaring: "A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to all cases perfectly clear in themselves; to cases where the [National] Government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law, void in itself, because repugnant to the Constitution, may arrest the execution of any law of the United States. It maintains that if a State shall impose a fine or penalty on any person employed in the execution of any law in the United States, it may levy that fine or penalty by a ministerial officer, without the sanction of even its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the [National] Government. . . . The question, then, is whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union from the attempts of a particular State to resist the execution of those laws." That Marshall answered this question in the affirmative needs not be said.

The attitude of the federal Supreme Court in the case of Ableman v. Booth, decided in 1859, has already been mentioned. Again, after the Civil War, the court said, when confronted by the proposition that because the United States was without any general criminal jurisdiction it might not punish criminally individuals who had violated certain of its laws relating to congressional elections: "It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and terri-

tory of the country. We think that this theory is founded on an entire misconception of the nature and power of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent." [31]

Finally in the Debs case,[32] a case growing out of the great railway strike of 1894, the plenitude of the federal power was emphatically stated. Speaking of the right of the National Government to protect, by armed force if necessary, interstate commerce and the transportation of the mails, the court said: "If the inhabitants of a single State or a great body of them should combine to obstruct interstate commerce or the transportation of the mails, prosecution of such offenses had in such a community would be doomed in advance to failure. And if the certainty of such failure was known and the National Government had no other way to enforce the freedom of interstate commerce and the transportation of the mails than by prosecution and punishment for interference therewith, the whole interests of the Nation in these respects would be at the absolute mercy of a portion of the inhabitants of a single State. But there is no such impotency in the National Government. The entire strength of the Nation may be used to enforce in any part of the land the full and free exercise of all national powers and the security of all rights intrusted by the Constitution to its care. The strong arm of the National

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[31] *Ex parte* Siebold (100 U. S. 371; 25 L. ed. 717). In United States v. Reese (92 U. S. 214; 23 L. ed. 563), 1875, the court said: "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected." And in Strauder v. West Virginia (100 U. S. 303; 25 L. ed. 664), the court said: "A right or an immunity, whether created by the Constitution, or only guaranteed by it, even without any express delegation of power, may be protected by Congress."

[32] *In re* Debs (158 U. S. 564; 15 Sup. Ct. Rep. 900; 39 L. ed. 1092).

Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails. If the emergency arises, the army of the Nation and all its militia are at the service of the Nation to compel obedience to its laws."

§ 44. Conclusion.

The foregoing cases sufficiently illustrate the general principle of the supremacy of the federal law. The maintenance of this principle, by the exemption of federal agencies from state interference by taxation, by means of federal writs of habeas corpus and of injunction to state authorities, and by the removal of suits from state to federal courts, will be discussed in the next succeeding chapters.

CHAPTER V.

THE MAINTENANCE OF FEDERAL SUPREMACY — THE FREEDOM OF FEDERAL AGENCIES FROM INTERFERENCE OR CONTROL BY THE STATES.

§ 45. State Taxation of Federal Governmental Agencies.

The successful maintenance of a federal government, under any circumstances a most difficult task, is an especially difficult one in the United States where federal functions are exclusively performed by federal agents and organs, and state functions by state agents and organs.[1] This has necessitated the maintenance of a complete machinery of government for the United States, and, similarly, a complete political organization for each of the member States of the Union. This arrangement carries with it the general doctrine that the States may not in any wise interfere with the operation of a federal organ or with the exercise by a federal agent of his official functions; and that, conversely, the Federal Government may not interfere with the operation of a state agency or the official actions of state officials when acting within the constitutional limits reserved to the States. Illustrations of these general principles will appear throughout this treatise. Their scope and significance may, however, be best exhibited in their application to the federal and state taxing power, and to a discussion of this especial phase of the subject this and the next succeeding paragraphs will be devoted.

That a State may not, in the exercise of its reserved powers, interfere with a federal governmental agency was settled once for all by the decision of the Supreme Court in McCulloch v.

[1] It has indeed been held that the United States may permit or even request a state official to perform a federal service, but there is no constitutional means by which such state official may, without the consent of his State, be compelled to do so. The same is true as to the performance by a federal official of a state duty. The reason for this rule is the obvious one that otherwise it would be possible for one government to so burden with its own duties the officials of the other government as seriously to interfere with the performance by those officials of the duties laid upon them by their own governments.

Maryland. This case was all the stronger in that the federal agency, with whose activity it was alleged that Maryland had attempted to interfere by taxing it, was an agency neither essential to the National Government nor expressly provided for by the Constitution. The power to establish a National Bank was at most only an implied one, and, in fact, its constitutionality was very widely denied, and, years after this, a bill providing for the establishment by the National Government of a similar institution was vetoed by President Jackson upon the ground of its unconstitutionality. But in this case Maryland had not only denied the constitutionality of the bank but took the position that, even were it constitutional, she had, under the general power reserved to her of taxing all occupations carried on within her territorial limits, the right to tax such branches of the bank as might be located within her borders. Thus, in this case, the State of Maryland did not claim that she might directly and deliberately interfere with the operation of a federal law, but that the exercise by her of an otherwise legitimate authority could not be declared unconstitutional simply upon the ground that, indirectly, or by remote possibility, its effect was, or might be, to interfere with the exercise of a legitimate federal power. In other words, the State took the ground that, while acting within their reserved spheres of authority, the States were as independent and sovereign as was the Union while operating within its constitutional sphere; and that, therefore, their direct interests, within such spheres, might not properly be subordinated to the merely indirect interests of the Union. This position the Supreme Court declared an invalid one. The reasoning of Marshall, who rendered the opinion, was as follows: "The sovereignty of a State," he declared, "extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. These powers are not given by the people of a single State. They are given by the people of the United States to a government whose laws, made in pursuance of the Con-

stitution, are declared to be supreme." Then, after referring to the fact that the power to tax might be used to destroy, he continued: "That there is a plain repugnance in conferring on one government power to control the constitutional measures of another, which other with respect to those very measures is declared supreme over that which exerts the control . . . [is a] proposition not to be denied. . . . If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial processes; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the American States. . . . The Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequences of that supremacy which the Constitution has declared."

In Osborn v. Bank of the United States,[2] decided in 1824, the question of the power of a State to tax the Bank of the United States was reopened by the State of Ohio, and a strenuous attempt made to have the Supreme Court of the United States modify the views it had expressed in McCulloch v. Maryland. The argument was urged that a distinction should be made between the bank as a fiscal agent of the government and as a private company trading with individuals for its own advantage; and that so far as it existed and operated in this latter capacity it might be taxed and otherwise regulated by the States. The Supreme Court held, however, that in practice the distinction had no existence. "To tax its faculties, its trade, and occupation," it declared, "is to tax the bank itself. To destroy or pre-

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[2] 9 Wh. 738; 6 L. ed. 204.

serve the one is to destroy or preserve the other." The opinion continues: "The bank is not considered as a private corporation, whose principal object is individual trade and individual profit, but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. . . . The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact the business more beneficially. . . . Considering the capacity of carrying on the trade of banking, as an important feature in the character of this corporation, which was necessary to make it a fit instrument for the objects for which it was created, the court adheres to its decision in the case of McCulloch v. The State of Maryland, and is of opinion that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States made in pursuance of the Constitution, and, therefore, void."

§ 46. Property of Federal Agencies may be Taxed.

In McCulloch v. Maryland and Osborn v. Bank of Ohio the States had attempted to levy a tax, in the nature of a franchise

tax, upon the operations of the federal bank. In the Maryland case Chief Justice Marshall said: "The opinion does not deprive the State of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State."

This *dictum* of Marshall received judicial application in Thomson v. Union Pacific R. Co.,[3] in which it was held that, in the absence of any legislation of Congress directing otherwise, the property of a railroad company, chartered by a State, but performing federal services, might be taxed by the State. Chief Justice Chase, speaking for a unanimous court, said. "We do not think ourselves warranted in extending the exemption [from state taxation] established by the case of McCulloch v. Maryland beyond its terms. We cannot apply it to the case of a corporation deriving its existence from state law, exercising its franchise under state law, and holding the property within state jurisdiction and under state protection. . . . We think there is a clear distinction between the means employed by the government and the property of agents employed by the government. Taxation of the agency is taxation of the means, taxation of the property of the agent is not always, or generally, taxation of the means. No one questions that the power to tax all property, business and persons, within their respective limits, is original in the States and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and state corporations employed in government service, that when Congress has not interposed to protect their property from state taxation, such taxation is not obnoxious to that objection." [4]

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[3] 9 Wall. 579; 19 L. ed. 792.

[4] The objection to sustaining the principle that the property of corporations performing federal services is by that fact exempt from state taxation, is stated by the court as follows: "We perceive no limits to the principle of

In Thomson v. Union Pacific R. Co. the railroad company concerned, although performing federal services, was chartered by the State. In Union Pacific R. Co. v. Peniston,[5] the same doctrine was applied to a company chartered by Congress. This fact, it was held, did take the case out of the rule laid down in earlier case. "We do not perceive," the court declared, "that this presents any reason for the application of a rule different from that which was applied in the former case. . . . The United States have no more ownership of the road authorized by Congress than they had in the road authorized by Kansas." "It is manifest," the court continues, "that exemption of federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers."

In Owensboro National Bank v. City of Owensboro[6] it was held that the property of national banks, organized under a federal statute, is absolutely exempt from state taxation except in so far as Congress has expressly waived this immunity. This doctrine would be in opposition to that declared in Union Pacific R. Co. v. Penis-

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exemption which the complainants seek to establish. It would remove from the reach of state taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails, or of government property of any description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption. . . . It may admit of question whether the whole income of the property which will remain liable to state taxation, if the principle contended for is admitted and applied in its fullest extent, may not ultimately be found inadequate to the support of the state governments."

[5] 18 Wall. 5; 21 L. ed. 787.

[6] 173 U. S. 664; 19 Sup. Ct. Rep. 537; 43 L. ed. 850.

ton but for the distinction between the national banks as, in themselves, governmental instrumentalities of the United States, and the railroads which are primarily private enterprises, but performing *inter alia* federal services. In Davis v. Bank[7] the court had said: "National Banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the permanent authority of the United States. It follows that an attempt by a State to define their duties, or control the conduct of their affairs is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were created." "It follows, then, necessarily from these conclusions," the court say in the Owensboro case, "that the respective States would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets or franchises, were it not for the permissive legislation of Congress."

In National Bank v. Commonwealth[8] the Supreme Court again resisted a claim attempted to be made under the authority of the doctrine of McCulloch v. Maryland, that the banks as governmental agencies are wholly exempt from the control of state law even with reference to matters unconnected with the services performed by them as federal agencies. The court declared: "It certainly cannot be maintained that banks or other corporations or instrumentalities of the government are to be wholly withdrawn from the operation of state legislation. The most important agents of the Federal Government are its officers, but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. The limitation is, that the agencies of the Fed-

[7] 161 U. S. 275; 16 Sup. Ct. Rep. 502; 40 L. ed. 700.
[8] 9 Wall. 353; 19 L. ed. 701.

eral Government are only exempted from state legislation, so far as the legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would controvert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a federal officer may not be taxed; he may be exempted from any personal services which will interfere with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family, or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the [federal] banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the State incapacitates the bank from discharging their duties to the government that it becomes unconstitutional."

§ 47. State Taxation of Federal Franchises.

A franchise to be or to act as a corporation granted by a State, may be taxed by a State as a piece of intangible property. But franchises or other rights derived from the Federal Government may not be taxed by the States nor any hindrances placed by th States upon their exercise. In California v. Central Pacific R. Co.[9] one of a series of cases dealing with the Pacific Railroads, the court say: "These franchises were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy, nor abridge them, nor cripple them by onerous burdens. . . . Can it tax them? It may undoubtedly tax outside visible

[9] 127 U. S. 1; 8 Sup. Ct. Rep. 1073; 32 L. ed. 150.

property of the company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot."

§ 48. State Taxation of Patent Rights.

In conformity with the foregoing doctrine it has been held that while the States may tax the capital employed in the manufacture of copyrighted or patented articles, as well as the tangible property embodied in these articles, they may not exact a fee as a condition precedent to the exercise of these federally granted rights, nor can they tax the intangible rights themselves as property.[10]

In Patterson v. Kentucky[11] the court held that a state statute regulating the inspection and gauging of oils was a mere police regulation and did not violate a patent right under which a certain oil was manufactured. A similar conclusion was reached in Webber v. Virginia.[12] In Allen v. Riley[13] was held valid a state law which required one selling a patent right in any county in the State, to file with the clerk of such county an authenticated copy of the letters patent, together with an affidavit of the genuineness of the letters patent, and that any written obligation given for the purchase price of a patent right should contain the words "given for a patent right." These, it was held, were proper police requirements. The court say: "We think the State has the power (certainly until Congress legislates upon the subject) with regard to the provision which shall accompany the sale or assignment of rights arising under a patent, to make reasonable regulations concerning the subject, calculated to protect its citizens from fraud.

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[10] Crown Cork and Seal Co. v. Maryland (87 Md. 687); People v. Assessors (156 N. Y. 417); People v. Roberts (159 N. Y. 70). In these cases it is held that if the tax is upon the corporate property, or even upon the shares of stock evidencing that property, the value of the patent rights must be deducted. If, however, the tax be upon the shares of stock to the holders, or is upon the franchise of the corporation, the fact that patent rights are included within the assets of the company is not material. *Cf.* Judson, *Taxation*, § 33.

[11] 97 U. S. 501; 24 L. ed. 1115.

[12] 103 U. S. 334; 26 L. ed. 565.

[13] 203 U. S. 347; 27 Sup. Ct. Rep. 95; 51 L. ed. 216.

. . . The act must be a reasonable and fair exercise of the power of the State for the purpose of checking a well-known evil, and to prevent, so far as possible, fraud and imposition in regard to the sales of rights under patents. Possibly Congress might enact a statute which would take away from the States any power to legislate upon the subject, but it has not as yet done so." [14]

Of course no State may, in the exercise of its police or other powers, in any way discriminate against patented articles.[15]

§ 49. State Taxation of Federally Licensed Occupations.

Where, by federal license, an occupation has been authorized by the United States, enjoyment and employment of the license may not be restrained by a State. Thus in Moran v. New Orleans[16] was held void an ordinance of the city of New Orleans imposing a license tax on certain vessels engaged in foreign commerce and duly enrolled and licensed under act of Congress. The court say: "The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under and which he derives from the constitution and laws of the United States. The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him, for using his boat in this way, he shall not be permitted to act under and avail himself of the license granted by the United States, but may be enjoined from so doing by judicial process. The conflict between the two authorities is direct and express. . . . In such an opposition, the only question is which is the superior authority; and reduced to that it furnishes its own answer."

In Harman v. Chicago[17] this doctrine is approved and again applied.

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[14] Justices White and Day dissented.

[15] Ozan Lumber Co. v. Union Co. Nat. Bank (145 Fed. 344).

[16] 112 U. S. 69; 5 Sup. Ct. Rep. 38; 28 L. ed. 653.

[17] 147 U. S. 396; 13 Sup. Ct. Rep. 306; 37 L. ed. 216.

§ 50. State Taxation of Federal Salaries.

That the salary or other emoluments of office of federal officials may not be taxed by the States has not been questioned since the doctrine was first declared in Dobbins v. Commissioners.[18] "The powers of the National Government," the court say, "can only be executed by officers whose services must be compensated by Congress. The allowance is in its discretion. The presumption is that the compensation given by law is no more than the services are worth, and only such in amount as will secure from the officer the diligent performance of his duties. . . . The compensation of an officer of the United States is fixed by a law made by Congress. It is in its exclusive discretion to determine what shall be given. . . . Does not a tax, then, by a State upon the office, diminishing the recompense, conflict with the law of the United States, which secures it to the officer in its entireness? It certainly has such an effect." [19]

§ 51. State Taxation of Federal Property.

The principle that property belonging to the United States is not taxable by the States in which it is situated did not receive final judicial affirmation until 1885 in Van Brocklin v. Tennessee.[20] Prior to this decision it had quite generally been taken for granted that federal property was thus exempt from state taxation, but in a number of cases Congress would seem to have implied that it was not confident upon this point since it incorporated into enabling acts for the admission of territories into the Union as States, the requirement that after admission the property of the United

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[18] 16 Pet. 435; 10 L. ed. 1022.

[19] It is probable that an act of Congress imposing a tax upon salaries of the president and federal judges would be held void as in violation of the constitutional provision that the compensation of these officials shall not be diminished during the period for which they are elected or appointed. See Sen. Mis. Doc., No. 214, 53rd Cong., 2nd Sess.

In W. U. Telegraph Co. v. Texas (105 U. S. 460; 26 L. ed. 1067) the court held that a state tax upon telegraph messages could not be collected upon messages sent by officers of the United States on public business.

[20] 117 U. S. 151; 6 Sup. Ct. Rep. 670; 29 L. ed. 845.

States should be exempt from state taxation. The effect of the decision in Van Brocklin v. Tennessee was, of course, to hold that these provisions were declaratory merely, and, therefore, superfluous. The fact that the lands concerned in this Tennessee case were acquired by the United States through sales for direct taxes levied by act of Congress and not expressly ceded by the States, was held immaterial.

In Wisconsin C. R. Co. v. Price County[21] the doctrine of Van Brocklin v. Tennessee reappeared and was broadened so as to include taxation not only by the State but by any of its administrative subdivisions.[22]

§ 52. State Taxation of Federal Securities.

United States securities, it has been held, may not be taxed by the States for the reason that to admit this power would give to the State the authority to impair the borrowing power of the National Government. This was early decided in Weston v. Charleston.[23] "The tax on government stock," said Marshall, who rendered the opinion in the case, "is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution."

Distinguishing such a state tax from one on land after it has been sold by the Federal Government — a tax which it was conceded the States might lay — Marshall said: "The lands pur-

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[21] 133 U. S. 496; 10 Sup. Ct. Rep. 341; 33 L. ed. 687.

[22] "It is familiar law that a State has no power to tax property of the United States within its limits. This exemption of their property from state taxation — and by state taxation we mean any taxation by authority of the State, whether it be strictly for state purposes or for more local and special objects — is founded upon that principle which inheres in every independent government, that it must be free from any such interference of another government as may tend to destroy its powers or impair their efficiency."

As to the inability of the States to tax lands allotted in severalty to the Indians under the act of 1881, the improvements on them and the cattle or other property furnished the allottees, see chapter XX of this work, and especially the case of U. S. v. Reckert (188 U. S. 432; 23 Sup. Ct. Rep. 478; 47 L. ed. 532).

[23] 2 Pet. 449; 7 L. ed. 481.

chased become a part of the mass of property in the country with no implied exemption from common burdens. All lands are derived from the general or particular government and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation in any form it may then assume is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans, and it is no impediment to the power of borrowing that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government, stands, we think, on very different principles from a tax on lands which the government has sold."

In Banks v. The Mayor[24] the attempt to make a distinction between the bonds of the government issued for loans of money and certificates of indebtedness given in payment for supplies purchased, and to hold the latter subject to taxation by the States, was defeated by the court. So also in Bank v. Supervisors[25] United States notes issued under the acts of 1862 and 1863 were held exempt from state taxation.

In Bank of Commerce v. Commissioners[26] stock of the United States constituting a part or the whole of the capital stock of a state bank was held not subject to state taxation, the fact that the tax was on the aggregate of the taxpayer's property and not upon the stock by name being held immaterial. So also in the Bank Tax Case[27] a state tax on a valuation equal to the amount of the capital stock paid in, and surplus, of a state bank was held to be a tax on the property of the institution and, therefore, invalid, in so far as that property consisted of stocks of the United States.

In Home Savings Bank v. Des Moines[28] it was held that a state statute directing that shares of stock of state banks should be assessed to such banks, and not to individual shareholders, operated as a tax on the property of the bank and, therefore, in so far as

[24] 7 Wall. 16; 19 L. ed. 57.

[25] 7 Wall. 26; 19 L. ed. 60.

[26] 2 Black, 620; 17 L. ed. 451.

[27] 2 Wall. 200; 17 L. ed. 793.

[28] 205 U. S. 503; 27 Sup. Ct. Rep. 571; 51 L. ed. 901.

such property represented federal securities, violated the immunity of such securities from state taxation.[29]

[29] In its opinion the court say: "We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself. The result of this inquiry is of vital importance, because there may be a tax upon the shares of a corporation, which are property distinct from that owned by the corporation, and with a different owner, without an allowance of the exemption due to the property of the corporation itself, while, if the tax is upon the corporation's property, all exemptions due it must be allowed."

After reviewing Bank of Commerce v. Commissioners (2 Black. 620; 17 L. ed. 451) and Bank Tax Case (2 Wall. 200; 17 L. ed. 793) the opinion continues: "The case at bar cannot be distinguished in principle from these cases. In the first case the tax was on the capital stock at its actual value; in the second case on the amount of the capital stock and the surplus earnings; and, in the case at bar, on the shares of the stock, taking into account the capital, surplus, and undivided earnings. It would be difficult for the most ingenious mind and the most accomplished pen to state any distinction between these three laws, except by the manner by which they all sought the same end,— the taxation of the property of the bank. The slight concealment afforded by the omission of the property *eo nomine* is not sufficient to disguise the fact that, in effect, it is the property which is taxed. If, included in that property it is discovered that there is some which is entitled by federal right to an immunity, it is the duty of this court to see that the immunity is respected."

Of the line of cases affirming the doctrine of Van Allen v. Assessors (3 Wall. 573; 18 L. ed. 229), the opinion declares: "There is nothing in them which justifies the tax under consideration here, levied, as has been shown, on the corporate property. Without further review of the authorities it is safe to say that the distinction established in the Van Allen case has always been observed by this court, and that, although taxes by States have been permitted which might indirectly affect United States securities, they have never been permitted in any case except where the taxation has been levied upon property which is entirely distinct and independent from these securities. On the other hand, whenever, as in these cases, the tax has been upon the property of the corporation so far as that property has consisted of such securities, it has been held void. . . . It is said that where a tax is levied upon a corporation, measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion. But the two kinds of taxes are not equivalent in law, because the State has the power to levy one, and has not the power to levy the other. The question here is one of power, and not of economics. If the State has not the power to levy this tax, we will not inquire whether another tax, which it

Where, however, the state tax may properly be held to be a franchise tax upon the state institution, it has been held valid notwithstanding the fact that United States stocks constitute a part of the assets of the institution. "Nothing is more certain in legal discussion," the court say in Society for Savings v. Coite,[30] "that the privileges and franchises of a private corporation, all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the state government. Authority to that effect resides in the State wholly independent of the Federal Government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in federal securities."[31] So also in Home Insurance Co. v. New York[32] it was held that a state statute imposing a tax upon the "corporate franchise or business" of a company, and making reference to its capital stock and dividends only for the purpose of determining the amount of the tax, was not invalid as levying a tax on the capital stock or property of the company, but upon its corporate franchise, and, therefore, not subject to the objection that it imposed a tax on United States securities constituting a portion of the investments of the company. A tax levied upon shares of stock in the hands of their holders it has been uniformly held is not equivalent to a tax upon of the company, but upon its corporate franchise, and, therefore, it has been consistently held that the States may tax the shares of a national bank in the hands of the shareholders, or, similarly, the stock of corporations whose investments consist wholly or in part of federal securities.[33]

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might lawfully impose, would have the same ultimate incidence. Precisely the same argument was made and rejected in Owensboro Nat. Bank v. Owensboro."

[30] 6 Wall, 611; 18 L. ed. 907.

[31] Citing Osborn v. Bank of U. S. (9 Wh. 738; 6 L. ed. 204).

[32] 134 U. S. 594; 10 Sup. Ct. Rep. 593; 33 L. ed. 1025.

[33] Van Allen v. Assessors (3 Wall. 573; 18 L. ed. 229); Provident Institution v. Massachusetts (6 Wall. 611; 18 L. ed. 907); Palmer v. McMahon (133 U. S. 660; 10 Sup. Ct. Rep. 324; 33 L. ed. 772.)

§ 53. Income from Federal Securities Exempt from State Taxation.

Incomes derived from interest on federal securities, are exempt from state taxation.[34] This was held with reference to the exemption from federal taxation of incomes derived from state securities, and the same reasoning would of course exclude from state taxation incomes derived from federal securities.[35]

§ 54. State Taxation of Circulating Notes of National Banks.

Congress, by an act approved August 13, 1894, has provided that "circulating notes of national banking associations and United States legal tender notes, and other notes and certificates of the United States, payable on demand, and circulating or intended to circulate, as currency . . . shall be subject to [state] taxation as money on hand or on deposit." In Hibernia Savings and Loan Society v. San Francisco[36] the Supreme Court held that notwithstanding the act of Congress of 1862 [37] declaring that "all stocks, bonds, treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal or local authority," certain United States treasury checks for interest accrued upon registered bonds of the United States, where intended for immediate payment of interest, might be taxed by a State in the hands of the owner. "Had the government [of the United States]," said the court, "in the absence of money for the immediate payment of interest upon its bonds, issued new obligations for the payment of this interest at a future day, it might well be claimed that these were not taxable, as the taxation of such notes would, to the extent of the tax, impair their value and negotiability in the hands of the holder. . . . But where the checks are issued payable immediately, they merely stand in the place of coin, which may be immediately drawn

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[34] Bank of Kentucky v. Com. (4 Bush. 48).

[35] Pollock v. Farmers' Loan and Trust Co. (157 U. S. 429; 15 Sup. Ct. Rep. 673; 39 L. ed. 759).

[36] 200 U. S. 310; 26 Sup. Ct. Rep. 265; 50 L. ed. 495.

[37] Rev. Stat., § 3701.

thereon. . . . While the checks are obligations of the United States, and within the letter of Sec. 3701, they are not within its spirit, and are proper subjects of taxation."

§ 55. State Taxation of Bequests to the United States.

Bequests to the United States may be subjected to state inheritance taxes, such taxes, the courts, both state and federal, holding to be not upon the property bequeathed, but upon its transmission by will or by descent. "The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the state legislature assents to a bequest of it." [38]

Further, in Plumber v. Coler[39] it was held that the state inheritance tax might be collected upon a bequest consisting of United States bonds issued under an act of Congress specifically declaring them to be exempt from state taxation in any form. After an exhaustive review of authorities the court say: "We think the conclusion fairly to be drawn from the federal cases is that the right to take property by will or by descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing, and that the incidental fact that such property is composed, in whole or in part, of federal securities, does not invalidate the tax or the law under which it is imposed." In Murdock v. Ward [40] it was held that a similar bequest of federal securities was not exempt from the inheritance tax imposed by the War Revenue act of Congress of 1898.

§ 56. State Taxation of National Banks.

By act of June 3, 1864, certain powers of taxation with reference to national banks were given by Congress to the States. This permission now constituting Section 5219 of the Revised Statutes

[38] United States v. Perkins (163 U. S. 625; 16 Sup. Ct. Rep. 1073; 41 L. ed. 287).

[39] 178 U. S. 115; 20 Sup. Ct. Rep. 829; 44 L. ed. 998.

[40] 178 U. S. 139; 20 Sup. Ct. Rep. 775; 44 L. ed. 1009.

is as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State in which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all shares of national banking associations located within the State, subject to only the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by nonresidents of any State, shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real property is taxed."

As has been already pointed out this permission measures the entire extent of the State's power of taxation with reference to the national banks. This federal act has been construed to operate not as a grant by the United States to the States of a power not previously possessed, but as the removal by Congress of a hindrance to the exercise by the States of a power inherent in them. In Van Allen v. Assessors[41] the court say: "It is said that Congress possesses no power to confer upon a State authority to be exercised which has been exclusively delegated to that body by the Constitution and, consequently, that it cannot confer upon the State the sovereign right of taxation; nor is the State competent to receive a grant of any such power from Congress. We agree to this. But as it respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act. . . . The power of taxation under the Constitution as a general rule, and as has been repeat-

[41] 3 Wall. 573; 18 L. ed. 229.

edly recognized in adjudged cases in this court, is a concurrent power. The qualifications of the rule are the exclusion of the States from the taxation of the means and instruments employed in the exercise of the functions of the Federal Government." [42]

In Van Allen v. Assessors,[43] as previously stated, the court held that the congressional permission to the States to tax the shares of national banks in the hands of the shareholders was not defeated by the fact that such banks have their capital wholly or in part invested in federal securities.

The power of the States under Section 5219 to tax property and the shares of stock of national banks of their holders, does not carry with it the authority to levy a tax that will in any wise operate as a tax on the franchise of the banks, that is, their right to be and to do business within the State.

In Owensboro National Bank v. Owensboro[44] the only question held by the court to be open to argument was as to whether in fact the State tax involved operated as a tax on the franchise of the bank. That it would be void if it did so operate the court held not open to doubt. In this case, the tax, while not a tax on the franchise in a technical sense, was held to be not upon the shares of stock in the names of the shareholders, but upon all the intangible property of the bank and, therefore, void.

§ 57. Federal Taxation of State Agencies.

Correlative to the implied limitation upon the States with respect to interference with federal agencies of government, is the implied obligation upon the Federal Government not to interfere with the operation of the governmental agencies of the States. This limitation upon the Federal Government is not, however, so strictly construed as that laid upon the States. Here, as in every other case, where a conflict arises between the exercise of federal

[42] Compare *In re* Rahrer (140 U. S. 545; 11 Sup. Ct. Rep. 865; 35 L. ed. 572) in which was sustained the power of Congress to permit a State to extend police jurisdiction over imported liquors upon their arrival within the State.

[43] 3 Wall. 573; 18 L. ed. 229.

[44] 173 U. S. 664; 19 Sup. Ct. Rep. 537; 43 L. ed. 850.

powers, and of state powers, the State must yield, although, except for this opposition, it would be within its constitutional rights. Thus franchises granted to interstate railway companies by the United States are not taxable by the States.[45] But in Veazie Bank v. Fenno[46] the Federal Government, in the exercise of its constitutional powers to control the currency, was permitted to tax out of existence the issue of state banks, although it was not denied that the States had the constitutional power to charter such banks.[47]

In this Veazie Bank case it was argued on behalf of the State that the federal tax in question was, in effect, a tax on a franchise granted by the State, and as such unconstitutional. The court held that, in fact, the tax was not upon the franchise of the bank, but declared, *obiter*. "We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property, and when not conferred for the purpose of giving effect to some reserved power of a State, seems to be as properly objects of taxation as any other property."

Similarly in *Ex parte* Rapier[48] it was held that the fact that a lottery company was chartered by a State did not prevent the Federal Government from excluding its tickets from the mails.

The Supreme Court has not, however, permitted this principle of the supremacy of the Federal Government to authorize the National Government, by taxation or otherwise, to interfere with the States in the exercise of their governmental rights, except in as far as such interference is necessary to the exercise of a fed-

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[45] Calif v. Pacific R. R. Co. (127 U. S. 1; 8 Sup. Ct. Rep. 1073; 32 L. ed. 150).

[46] 8 Wall. 533; 19 L. ed. 482.

[47] Briscoe v. Bank of Kentucky (11 Pet. 257; 9 L. ed. 709).

[48] 143 U. S. 110; 12 Sup. Ct. Rep. 374; 36 L. ed. 93.

eral power. In Lane County v. Oregon[49] it was held that the Federal Government was without the power to compel the States to receive in payment of their taxes paper currency that had been declared legal tender by the Federal Government. In its opinion the court say: "The people of the United States constitute one nation, under one government, and this government within the scope of the powers with which it is invested, is supreme. On the other hand the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence. The States disunited might continue to exist. Without the States in union there could be no such political body as the United States. . . . Now, to the existence of the States, themselves, necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function of the government. . . . In respect, however, to property, business and persons, within their respective limits their power of taxation remained and remains entire. It is, indeed, a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but, with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state Constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation. To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress. If, therefore, the condition of any State, in the judgment of its legislature, requires the collection of taxes in kind, that is to say, by the delivery to the proper officers of a

[49] 7 Wall. 71; 19 L. ed. 101.

certain proportion of products, or in gold or silver bullion, or in gold and silver coin, it is not easy to see upon what principle the National Legislature can interfere with the exercise, to that end, of this power, original in the States, and never as yet surrendered. If this be so, it is, certainly, a reasonable conclusion that Congress did not intend, by the general terms of the Currency Act, to restrain the exercise of this power in the manner shown by the Statutes of Oregon."

In the case of Collector v. Day[50] it held that the Federal Government could not levy an income tax upon the salaries of state officials. In that case the court said: "If the means and instrumentalities employed by that [the General] Government to carry into operation the powers granted to it, are, necessarily, and, for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation,— as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can only exist at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

Thus, the court goes on to point out that the alleged federal right that was involved, so far from being similar to that sustained in Veazie Bank v. Fenno, was included within that sphere of state interest which the court in that case expressly declared to be beyond the taxing power of the Federal Government.

50 11 Wall. 113; 20 L. ed. 122.

§ 58. Federal Taxation of Property of Municipalities.

In United States v. B. & O. Ry.[51] it was held that the United States could not collect a tax on money due a municipality of one of the States, the court saying: "A municipal corporation like the City of Baltimore, is a representative not only of the State, but is a portion of its governmental power. It is one of its creatures, made for a specific purpose, to exercise within a limited sphere the powers of the State. The State may withdraw these local powers of government at pleasure, and may, through its legislature or other appointed channels, govern the local territory as it governs the State at large. It may enlarge or contract its powers or destroy its existence. As a portion of the State in the exercise of a limited portion of the powers of the State, its revenues, like those of the State, are not subject to taxation." [52]

In Mercantile Nat. Bank v. New York[53] it was decided that the United States might not tax bonds issued by a State or one of its municipal bodies, under its authority, and held by private corporations.

In the Income Tax case[54] it was held that a federal tax might not be levied on income derived from municipal bonds.

In Ambrosini v. United States[55] the court held that bonds given to secure the proper enforcement of state laws in respect to the sale of intoxicating liquors, were not subject to federal taxation.

§ 59. South Carolina v. United States.

An interesting case of recent date bearing upon the right of the Federal Government, by taxation or otherwise, to interfere with

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[51] 17 Wall. 322; 21 L. ed. 597.

[52] In this case two justices dissented on the ground that, conceding that the instruments for conducting the public affairs of the municipality are entitled to the same exemption from federal taxation as those of the State at large, it did not follow that property possessed and used merely in a commercial way for income or profits was thus exempt.

[53] 121 U. S. 138; 7 Sup. Ct. Rep. 826; 30 L. ed. 895.

[54] Pollock v. Farmers' Loan & Trust Co. (157 U. S. 429; 15 Sup. Ct. Rep. 673; 39 L. ed. 759).

[55] 187 U. S. 1; 23 Sup. Ct. Rep. 1; 47 L. ed. 49.

state governmental operations is that of the State of South Carolina v. United States,[56] decided in 1905. In this case was questioned the right of the Federal Government to levy internal revenue taxes upon intoxicating liquors sold under the state dispensary system of South Carolina.

By several statutes the State had assumed the direct control of the wholesale and retail sale of intoxicating liquors within its limits, had established dispensaries, and appointed dispensers therein. The dispensers received fixed salaries, and had therefore no pecuniary interest in the sales, the entire profits therefrom being appropriated by the State, one-half being divided equally between the municipality and the county in which the dispensaries were located, and the other half paid into the state treasury. In previous cases the Supreme Court of the United States had held that the regulation and control of the sale of intoxicating liquors, so far as interstate commerce was not interfered with, was within the legitimate police power of the States, and, indeed, by express congressional statute the States had been permitted to control the sale of imported liquors after their arrival within the States. The question thus was: had the Federal Government the constitutional power to exact taxes from officials appointed and paid by the State of South Carolina and performing functions which the State was constitutionally empowered to intrust to them? The Supreme Court held that, in this particular case, it had. With reference to the argument that was made by South Carolina that for Congress to tax the agents of the State charged with the duty of selling intoxicating liquors, was to interfere with the State's legitimate police power, the court said: "We are not insensible to the force of this argument, and appreciate the difficulties which it presents, but let us see to what it leads. Each State is subject only to the limitations prescribed by the Constitution, and within its territory is otherwise supreme. Its internal affairs are matters of its own discretion. The Constitution provides that 'the United States shall guarantee to every State in this Union a republican form of Government.'[57] That expresses the

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[56] 199 U. S. 437; 26 Sup. Ct. Rep. 110; 50 L. ed. 261.

[57] Art. IV, § 4.

full limit of national control over the internal affairs of a State. The rights of South Carolina to control the sale of liquor by the dispensary system has been sustained.[58] The profits from the business in the year 1906, as appears from the findings of fact, were over a half a million dollars. Mingling the thought of profit with the necessity of regulation may induce the State to take possession, in like manner, of tobacco, oleomargarine, and all other objects of internal revenue taxation. If one State finds it thus profitable, other States may follow, and the whole body of internal revenue tax be thus stricken down."

The Supreme Court was not content to rest its judgment upon a premised possibility of serious interference with the revenues of the National Government should the State be permitted, by assuming control of an enterprise, to withdraw it from federal taxation. Two additional reasons were given why the tax in question should be held valid. In the first place the court note the fact that the tax "is not imposed on any property belonging to the State, but is a charge on a business before any profits are realized therefrom." It is thus, the court say, similar to a succession tax which has been construed to be a tax levied upon and deducted from property before the person to whom it is bequeathed obtains a title thereto. The second additional reason given by the Supreme Court for holding constitutional the federal income tax upon the South Carolina dispensaries is that it is not a tax upon the means of instrumentalities employed by the State in discharge of its ordinary functions of government. Upon this point the court adverts to the fact that in the cases in which a federal tax upon state agencies had been held unconstitutional, it had been levied upon instrumentalities of government. After a review of the cases, the court say: "These decisions, while not controlling the question before us, indicate that the thought has been that the exemption of state agencies and instrumentalities from national taxation is limited to those which are of a strictly governmental character, and does not extend to those

[58] Vance v. Vandercook Co. (170 U. S. 438; 18 Sup. Ct. Rep. 674; 42 L. ed. 1100).

which are used by the State in the carrying on of an ordinary private business."[59]

In conformity with the doctrine that state inheritance taxes may be levied and collected upon bequests or estates consisting of federal securities, it has been held that state securities are similarly subject to inheritance taxes federally imposed.

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[59] In support of this distinction between the ordinary functions of government, and the control of private enterprises by the State, the court refers to the well-established distinctions between the duties of a public character cast upon municipal corporations, and those which relate to what may be considered their private business, and the resulting different responsibilities in cases of negligence in respect to the discharge of those duties, respectively. (Oliver v. Worcester, 102 Mass. 489; Lloyd v. New York, 5 N. Y. 369; Western Sav. Fund Society v. Philadelphia, 31 Pa. 175.) In the last case it was held that a city supplying gas to the inhabitants acts as a private corporation, and is subject to the same liabilities and disabilities. In its opinion the Supreme Court declare: "Such contracts are not made by the municipal corporation by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political or municipal character. But if the grant was for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." Concluding its opinion, the Supreme Court of the United States say: "Now, if it be well-established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the National Government by an implied inability to impede or embarrass a State in the discharge of its functions. It is reasonable to hold that, while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet, whenever a State engages in a business which is

§ 60. Federal Taxation of State Documents.

In a number of cases in the State courts, interesting points have been raised and decided with reference to the obligation imposed by federal laws to affix stamps to certain documents. There is little doubt that the United States may in its own courts, or in other ways refuse to recognize the validity of unstamped documents, but it would seem that it may not dictate to state agencies what instruments they shall accept as valid and enforceable. Though Congress may provide that certain instruments shall be stamped and that if not so stamped they shall not be received as evidence in federal courts, the State cannot be compelled to exclude them as evidence in its courts upon that ground.

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of a private nature, that business is not withdrawn from the taxing power of the nation."

Three justices dissented from the judgment rendered in South Carolina v. United States. After a review of authorities, which in their judgment did not warrant the position assumed by the majority in the case on trial, these justices say, in answer to the contention that if the instrumentalities of the State in the control of the liquor trade be declared exempt from federal taxation, the way is opened to the States seriously to interfere with federal revenues by extending their operations in other similar directions: "But these extreme illustrations amount simply to saying that it is possible for the imagination to foreshadow conditions which, did they arise, would impair the government created by the Constitution, and, because such conjectures may be indulged in, the limitations created by the Constitution for the purpose of preserving both the state and national governments are to be disregarded. In other words, that the government created by the Constitution must now be destroyed, because it is possible to suggest conditions which, if they arise, would, in future, produce a like result. But the weakness of the illustrations as applied to this case is apparent. They have no relation to this case, since it is not denied that, as to liquor, the State has absolute power, and may prohibit the sale of all liquor, and thus prevent the United States from deriving revenue from that source. Again, therefore, when the true relation of the argument, to the case in hand is seen, it reduces itself to a complete contradiction, viz., a State may, by prohibition, prevent the United States from reaping revenue from the liquor traffic, but any other state regulation by which such result is accomplished may be prevented by the United States, because thereby the State has done indirectly only that which the State had the lawful power directly to do."

As to the point that the State of South Carolina was deriving a revenue from the conduct of the liquor business, the dissenting justices point to the fact that in previous cases it had been expressly settled that the law establishing the State dispensaries had not been passed as a revenue, but as a purely police measure.

It has also been held by state courts that the United States may not impose a stamp tax upon judicial processes of state courts, or forbid the recording of unstamped mortgages, or tax the official bonds of state officers.[60]

§ 61. Federal Exercise of Eminent Domain in the States.

The relation of the federal power to state governmental instrumentalities has been further illustrated in the matter of the Federal Government's right of eminent domain, it having been held that the General Government has an implied right of eminent domain which it may exercise within a State with or without that State's consent.[61] Though never authoritatively decided the better opinion is, however, that the United States may not take for its own use land or other property essential to the State in performance of its governmental functions.

The subject will receive fuller treatment in its appropriate place.[62]

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[60] Jones v. Keep (19 Wis. 376); Fifield v. Close (15 Mich. 505); Tucker v. Potter (35 Conn. 46); Moore v. Quirk (105 Mass. 49); Sayles v. Davis (22 Wis. 225); Davis v. Richardson (45 Miss. 503); Garland v. Gaines (73 Conn. 662); 52 L. R. A. 915. *Cf.* Judson, *On Taxation*, § 501.

[61] Monongahela Navigation Co. v. U. S. (148 U. S. 312; 13 Sup. Ct. Rep. 622; 37 L. ed. 463); Chappell v. U. S. (160 U. S. 499; 16 Sup. Ct. Rep. 397; 40 L. ed. 510).

[62] McClain, *Constitutional Law in the United States*, p. 111, says: "As between the Federal Government and a state government, neither one can authorize the condemnation for public use of land which has already been acquired either by condemnation or purchase by the other for public use." He cites, however, no authority, and, moreover, adds: "Possibly the United States Government could not, by any action of the State, be excluded from appropriating state property for federal purposes, but such questions are not likely to arise, for it is hardly conceivable that the Federal Government should find it expedient and necessary to interfere with any State in the enjoyment and discharge of its public rights and duties."

CHAPTER VI.

THE MAINTENANCE OF FEDERAL SUPREMACY BY WRITS OF ERROR FROM THE FEDERAL SUPREME COURT TO STATE COURTS.

§ 62. Writs of Error to State Courts.

A corollary that follows from the supremacy of federal law is that when a federal right, privilege or immunity is set up as a defense or authority for an act, opportunity shall exist for a final determination of this point in the federal courts. As has been earlier pointed out, the original Judiciary Act, passed in the first year of the Constitution, in its famous twenty-fifth section, provided that a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision of the suit could be had, "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error." In order that this appellate jurisdiction may be effectual this section also provides that instead of remanding the cause to the state court for a final decision therein, the Supreme Court may at their discretion, if the cause has been once before remanded, proceed to a final disposition of the same and award execution.

These provisions have remained substantially unchanged since their enactment to the present day.

It will be observed that provision for writ of error from the federal Supreme Court is made only for those cases in which the judgment in the state tribunals is adverse to the alleged federal right, privilege or immunity. Where the state decision is favorable there is, of course, no need, based upon the principle of federal supremacy, for a federal review.

§ 63. Martin v. Hunter's Lessee.

The constitutionality of this section of the Judiciary Act was affirmed by the Supreme Court in 1816 in Martin v. Hunter's Lessee.[1] This was a writ of error to the Court of Appeals of the State of Virginia, founded upon a refusal of that court to obey a mandate of the federal Supreme Court, the state court, in its judgment, saying: "The court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the Constitution of the United States; that so much of the twenty-fifth section of the Act of Congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in performance of the Constitution of the United States. That the writ of error in this case was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court, and that obedience to its mandate be declined by the court."

This position of the state court, the federal court, in one of the weightiest of its decisions, declared to be erroneous, the argument being that, though not granted in express terms, the very nature of the federal authority provided for by the Constitution makes this appellate power a necessary part of the general judicial power granted to the National Government.

§ 64. Cohens v. Virginia.

The appellate power of the federal Supreme Court under the twenty-fifth section of the Judiciary Act was again contested in

[1] 1 Wh. 304; 4 L. ed. 97.

Cohens v. Virginia,[2] decided in 1821, Chief Justice Marshall rendering the opinion of the court. This was a criminal case and the first point made was that a case in which a State appeared as defendant in error was a suit against a State and as such forbidden by the Eleventh Amendment. The court held, however, that this Amendment has reference only to the suits in law or equity commenced or prosecuted against one of the United States by citizens of another State, and not to suits originally begun by a State. "It is, then, the opinion of the court," declared Marshall, "that the defendant who removes a judgment rendered against him by a state court into this court, for the purpose of re-examining the question whether that judgment be in violation of the Constitution or laws of the United States, does not commence or prosecute a suit against the State."

Secondly, the State renewed its claim that in no case might the appellate jurisdiction of the Supreme Court be constitutionally exercised over the judgment of a state court. To this Marshall replied that the nature of the Federal Union provided by the Constitution and intended by its framers and adopters, required the exercise of the power. "We think," he declared, "that in a government acknowledgedly supreme, with respect to objects of vital interest to the Nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the state tribunals which may contravene the Constitution or laws of the United States, is, we believe, essential to the attainment of those objects."

To the contention made by the State that to grant the appellate jurisdiction in question would be to render possible a complete consolidation of federal and state judicial power, Marshall replied: "A complete consolidation of the States so far as respects the judicial power would authorize the legislature to confer on the federal courts appellate jurisdiction from the state courts in all

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[2] 6 Wh. 264; 5 L. ed. 257.

cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few special cases, in the decision of which the Nation takes an interest, is too obvious not to be perceived by all."

Since Cohens v. Virginia, the constitutional power of the federal Supreme Court to revise by writ of error decisions of state courts coming within the provisions of the twenty-fifth section of the Judiciary Act has been but once seriously questioned, and then under the strong stimulus of objection to the Fugitive Slave Law of 1850.[3]

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[3] Ableman v. Booth (21 How. 506; 16 L. ed. 169). See *ante*, p. 84.

CHAPTER VII.

THE MAINTENANCE OF FEDERAL SUPREMACY BY THE REMOVAL OF SUITS FROM STATE TO FEDERAL COURTS.

§ 65. Right of Removal.

A corollary which necessarily follows from the doctrine of federal supremacy is that no State can declare criminal and punish as such acts authorized by federal law. Since the Civil War this has not been directly denied by the States, but it has been strenuously asserted by them that when an offense has been committed against their own peace, and the one committing it has been apprehended and brought to trial before their own courts, he is not entitled to have his case removed at once to the federal courts simply by setting up as a defense that his act was done in pursuance of an authority delegated him by the General Government. The right to set up this defense has not been denied by the States, nor have they claimed that, should the decision of their courts be adverse to him upon this point, he may not take an appeal from their highest tribunals to the Supreme Court of the United States. But they have asserted that when an act has been committed which is criminal by their laws, it is, primarily, an offense against their peace, and as such cognizable only in their own courts, and, therefore, that though, as has been just said, a right of appeal from their highest courts to the United States Supreme Court upon the questions of federal authority must be allowed, the trial of the offense may not, as a matter of right, be removed by the accused from the state court in which it is begun to one of the lower federal courts.

These lower federal courts, as is well known, possess only those powers which have been granted to them by act of Congress. By the original Judiciary Act[1] Congress did not, as it might have, endow these tribunals with a general jurisdiction in proceedings

[1] 1 Stat. at L. 73.

against federal officers based upon their official acts. By the famous Force Act of 1833, however, an act passed at the time of South Carolina's attempted nullification of the United States tariff law, it was provided that "when any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under, or acting by authority of, any revenue law of the United States, now or hereafter enacted, or against any person acting by or under authority of any such officer, or on account of any act done under color of his office," the case, at the defendant's instance, might be at once removed from the state to the federal courts for trial.

§ 66. Tennessee v. Davis.

This act has been from time to time amended, and now forms § 643 of the Revised Statutes. Its constitutionality was first judicially examined by the Supreme Court in Tennessee v. Davis.[2] In this case Davis, a federal revenue officer, killed a man, was arrested therefor, and, when brought to trial, applied for removal to a federal court under this act. The State of Tennessee denied the constitutionality of this grant of right upon the ground that the act for which Davis was being tried was a violation of state and not of federal law. This the federal authorities admitted, but asserted that, inasmuch as the defendant was a federal official, and claimed to have committed the homicide while in pursuance of his duties as such, the federal courts had the right to assume jurisdiction of the case in order that the independence and supremacy of federal authority might be maintained.

Justice Strong, in rendering the opinion of the United States Supreme Court upon this point, prefaced his discussion by saying: "A more important question can hardly be imagined. Upon its answer may depend the possibility of the General Government's preserving its own existence. As was said in Martin v. Hunter's Lessee,[3] 'the General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can only act through its officers

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[2] 100 U. S. 257; 25 L. ed. 648.

[3] 1 Wh. 304; 4 L. ed. 97.

and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the State, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere at once for their protection — if their protection must be left to the action of the state courts — the operations of the General Government may at any time be arrested at the will of one of its members. The legislature of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government, and in obedience to the laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the State, but equally the federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal authority arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its authority extends, it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it. . . . The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. . . . If there is power in Congress to direct removal before trial of a civil case arising under the Constitution or laws of the United States, and direct its removal because

such a case has arisen, it is impossible to see why the same power may not order the removal of a criminal prosecution, when a similar case has arisen under it. The judicial power is declared to extend to all cases of the character described, making no distinction between civil and criminal, and the reasons for conferring upon the courts of the National Government superior jurisdiction over cases involving authority and rights under the laws of the United States, are equally applicable to both. . . . Such a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is essential, also, to an uniform and consistent administration of national laws. . . . It is true, the [Judiciary] Act of 1789 authorized the removal of civil cases only. It did not attempt to confer upon the federal courts all the judicial power vested in the government. Additional grants have been made from time to time." [4]

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[4] As to the point raised by the State that the act of 1833 provided no specific mode of procedure, Justice Strong said: "The Circuit Courts of the United States have all the appliances that are needed for the trial of any criminal cases. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law. They are not foreign courts. The Constitution had made them courts within the States to administer the laws of the States in certain cases; and, so long as they keep within the jurisdiction assigned to them, their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State, in tribunals of the General Government, grows entirely out of the division of powers between that Government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood, and it is time that it should be, it will not appear strange that even in cases of criminal prosecutions for alleged offenses against a State in which arises a defense under United States law, the General Government should take cognizance of the case and try it in its own courts, according to its own form of proceeding."

In this case Justices Clifford and Field dissented, their dissent being based upon the argument that, granting (which they did not admit), that Congress may pass such laws as it deems necessary for the protection of its agents, and may for that purpose define the acts that shall be considered crimes, and give to the inferior federal courts jurisdiction to try those charged with committing them, it had not in fact done so. The act of 1833 had, indeed, provided for the removal from state to federal courts of criminal suits against officers acting under authority of any federal revenue law growing out of acts committed by them under such authority, but, said the dissentient Justices,

It is seen that Section 643 gives the power of removal only with reference to suits against revenue officers of the Federal Government. Section 641 provides that "when any civil suit or criminal prosecution is commenced in any State Court for any cause whatsoever against any person who is denied or cannot enforce in the judicial tribunals of the State or in the part of the State where such suit or prosecution is pending any right secured by him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of

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there was upon the federal statute books no laws specifically defining as a crime the act with which Davis was charged and affixing an appropriate penalty therefor. Therefore, they held, no federal law having been violated, the federal circuit court could not take or be given jurisdiction of the case. "Criminal jurisdiction is not by the Constitution conferred upon any court," they declared, "and it is settled law that Congress must in all cases, make any act criminal and define the offense before either the District or Circuit Courts can take cognizance of an individual charging the act as an offense against the authority of the United States. . . . Courts of the United States derive no jurisdiction in criminal cases from the common law, nor can such tribunals take cognizance of any act of an individual as a public offense, or declare it punishable as such, until it has been defined as an offense by an Act of Congress passed in pursuance of the Constitution." But, continued the Justices, not only has Congress not legislated so as to give the necessary jurisdiction in the case in question, but it could not constitutionally do so. "Acts of Congress," they said, "cannot properly supersede the police powers of the State. . . . If the police law of the States does not deprive anyone of that which is justly and properly his own, it is obvious that its possession by the State and its exercise for the regulation of the actions of the citizens can never constitute an invasion of the national sovereignty or afford a basis for an appeal to the protection of the national authorities. In other words no case either in law or equity, under the federal Constitution or laws or treaties of the United States, over which the federal judicial power is constitutionally extended (Art. III, § 2) thereby arises." "Offices may be created," they continue, "by a law of Congress, and officers to execute the same may be appointed in the manner specified in the Constitution; and it is not doubted that Congress may pass laws for their protection, and for that purpose may define the offense of killing such an officer when in discharge of his duties. . . . But the principal question in this case is of a very different character, as the indictment is against the officer of the revenue for murdering a citizen of the State having in no way any official connection with the collection of the public revenue. Neither the Constitution nor the Acts of Congress give a revenue officer or any other officer of the United States an immunity to commit murder in a State, or prohibit the State from executing its laws for the punishment of the offender."

the United States or against any officer, civil or military, or other person for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of, or under color of, authority derived from any law providing for equal rights, as aforesaid, or refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may upon the petition of such defendant filed in said State Court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending." The constitutionality of this section has been affirmed.[5] As to all federal officials other than revenue officers, federal protection against state action, when necessary, must be sought in cases not covered by Section 641, either by way of writ of error from the highest state court to the Supreme Court of the United States, or, if that be inadequate, by writ of habeas corpus.[6]

§ 67. Right of Removal in Civil Cases.

The right to remove civil cases begun in state courts into the federal courts will receive treatment in a later chapter.[7] In these cases the right is given not so much that federal supremacy may be maintained as that impartial tribunals may be secured to the litigants.

This argument of the minority as to the constitutional incapacity of Congress to provide for the summary removal from the state to federal courts of cases of the class of the one at issue overlooks, or at least puts aside as not controlling, the possibility, should its view be accepted, of a State, should it so desire, so administering its criminal law as seriously and even vitally to interfere with the exercise by the Federal Government of its acknowledged constitutional powers. This the majority pointed out, the State could do by so delaying the trial in its own courts of federal officials charged with crime, as to render in large measure nugatory the right of the accused to appeal to the United States Supreme Court from the highest state court.

The majority doctrine in the Davis case has never been overruled.

[5] Strauder v. West Virginia, 100 U. S. 303.

[6] Chapter VIII.

[7] Chapter L.

CHAPTER VIII.

MAINTENANCE OF FEDERAL SUPREMACY BY HABEAS CORPUS TO STATE AUTHORITIES.

§ 68. State Courts may not Interfere with Federal Authorities.

During the *ante bellum* period the Federal Government often made use of state tribunals and officers for the execution of its laws. Thus state justices of the peace acted as examining magistrates in criminal cases for the federal courts, state judges officiated in the execution of extradition treaties with foreign countries, aliens were naturalized in state courts, and state jails and penitentiaries were used for the incarceration of federal criminals. Both because of this admixture of federal and state judicial agencies, and because the principle of the absolute independence of the Federal Government from state control was not clearly recognized and admitted, the state courts early assumed the right, by the issuance of writs of habeas corpus, to determine whether a fugitive from the justice of a foreign country and fugitive slaves should be surrendered; whether persons in the federal army were properly held to military service; and even whether persons in the military service of a foreign State should be tried for acts done as belligerents and under the authority of their sovereigns in conformity with the laws of nations.[1]

It was not until 1859 that it was authoritatively established by the United States Supreme Court in the case of Ableman v. Booth[2] that the state courts were without the constitutional power to interfere in any way with the process of federal courts, or, in fact, with any agencies of the National Government.[3] Notwithstanding this decision, however, a number of the state courts still claimed and exercised the right to discharge enlisted soldiers and sailors of the United States from the custody of their

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[1] People v. McLeod (1 Hill, 377). See especially the paper of Seymour D. Thompson before the American Bar Association at its annual meeting in 1884, entitled *Abuses of the Writ of Habeas Corpus.*

[2] 21 How. 506; 16 L. ed. 169.

[3] See *ante*, p. 84.

officers, and this practice was not stopped until 1872 when, in Tarble's case,[4] the federal Supreme Court held this to be beyond their power. In the opinion which he rendered in this case, Justice Field, after pointing out the distinct and independent character of the government of the United States, proceeds: "Such being the distinct and independent character of the two governments within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, in the regulation of which neither can interfere with the other. Now among the powers assigned to the National Government is the power to raise and support armies, and the power to provide for the government and regulation of the land and naval forces. . . . No interference with the execution of this power of the National Government in the formation, organization and government of the armies by any state officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. . . . State judges and state courts, authorized by laws of their States to issue writs of habeas corpus, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application, the writ should be refused."[5]

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[4] U. S. v. Tarble (13 Wall. 397; 20 L. ed. 597).

[5] Chief Justice Chase dissented in this case. In the course of his opinion he said: "I have no doubt of the right of a State to inquire into the jurisdiction of a federal court upon habeas corpus, and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a

Here again, as in the Davis case, the point at issue narrowed itself down to the question whether or not state agencies should be recognized to have a power which might, should the States see fit, be so exercised as seriously to embarrass the National Government in the performance of its constitutional duties. The strict application of the doctrine of a divided sovereignty would have led in both cases to a constitutional *impasse*. But in these as in other cases the federal Supreme Court compelled the States in the exercise of their powers to subordinate themselves to the requirements of national convenience and necessity.

This case settled once for all the principle that it is a sufficient return to a writ of habeas corpus issued by a state court that the party is in custody under claim or color of federal authority derived from either a statute or judicial process.

§ 69. Issuance of the Writ by Federal Courts.

Instead of submitting to interference by the States with the exercise of their powers, the federal courts have, especially of recent years, again and again, on writs of habeas corpus, removed from state custody persons charged with offenses against the peace of the States.

The Judiciary Act of 1789 gave to the federal court authority to issue the writ of habeas corpus only as to persons in jail under or by color of authority of the United States. No provision was thus made for the release by federal courts of persons in custody by order of the authorities of a State.

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court without jurisdiction. If it errs in deciding the question of jurisdiction, the error must be corrected in the mode prescribed by the 25th section of the Judiciary Act; not by denial of the right to make inquiry. I have still less doubt, if possible, that a writ of habeas corpus may issue from a state court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States. . . . To deny the right of state courts to issue the writ, or what amounts to the same thing, to concede the right to issue and to deny the right to adjudicate, is to deny the right to protect the citizen by habeas corpus against arbitrary imprisonment in a large class of cases, and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed or the people who adopted the Constitution. That instrument expressly declares that 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."

The "Force" Act of 1833 gave to the federal courts the power to issue writs of habeas corpus "in all cases of a prisoner or prisoners in jail or confinement where he or they shall be committed or confined, on or by any authority or law for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof."

In 1842 this authority of the federal courts was further broadened by the provision that the writ might issue when a subject or citizen of a foreign State, domiciled therein, is in custody because of an act done or omitted under an alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign State, or under color thereof, the validity or effect of which is dependent upon the law of nations.

This act of 1842 grew out of the McLeod case.[6] McLeod, a British subject, was arrested and indicted for murder in New York, alleged to have been committed by him while one of a force of British troops which, during the Canadian rebellion of 1837, made an attack upon the steamer "Caroline" while moored in New York waters. The British government avowed itself responsible for the act, as a necessary act of war, the steamer being engaged in carrying munitions of war to the Canadian insurgent forces, and demanded of the United States Government McLeod's immediate release. This the Federal Government requested of the New York authorities, but was met with a refusal, and found itself unable to proceed further because of the lack of jurisdiction of the federal courts to issue the necessary writ of habeas corpus.

In 1867 the jurisdiction of the federal courts was still further widened by the provision that the writ might issue "in all cases where any person may be restrained of his or her liberty in violation of the Constitution or any treaty or law of the United States."[7]

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[6] People v. McLeod (1 Hill, 377).

[7] The federal courts also have authority to issue the writ where it is necessary to bring a person into court to testify, or where a person is in custody

Armed with the authority thus given, especially by the act of 1867, the federal courts have repeatedly taken from the custody of the States persons charged therein with offenses against state law. Even the lowest of the federal courts have not hesitated to exercise the power as to persons held for trial before the highest courts of the United States.

In the case of Thomas v. Loney[8] the Supreme Court sustained the action of the lower federal court in releasing from custody by habeas corpus a prisoner who had been arrested by state authority for alleged perjury committed before a notary public of the State in the case of a contested election of a member of the House of Representatives of the United States. "The power of punishing a witness," said the Supreme Court, "for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the nation that witnesses should be able to testify freely before them, unrestrained by legislation of the State, or by fear of punishment in the state courts. The administration of justice in the national tribunals would be greatly embarrassed and impeded if a witness testifying before a court of the United States or upon a contested election of a member of Congress, were liable to prosecution and punishment in the courts of a State upon a charge of perjury preferred by a disappointed suitor or contestant, or instigated by local passion or prejudice. A witness who gives his testimony, pursuant to the Constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United States, whether he testifies in the presence of that tribunal, or before any magistrate or officer (either of the nation or of the State) designated by Act of Congress for the purpose, is accountable for the truth of his testimony to the United States only; and perjury committed in so

under or by color of the authority of the United States, or is committed for trial before some court thereof.

[8] 134 U. S. 372; 10 Sup. Ct. Rep. 384; 33 L. ed. 949.

testifying is an offense against the public of the United States, and within the exclusive jurisdiction of the courts of the United States."

§ 70. The Neagle Case.

The leading case, however, and, in some respects, the most extreme, in upholding the power of the federal courts in the matter of the issuance of writs of habeas corpus to state authorities is that of *Re* Neagle.[9] In that case it was held that without express statutory authorization, the general authority of the President to see that the laws of the Union are faithfully executed empowered him to appoint a deputy marshal to protect a federal judge whose life was threatened; and that upon such deputy being arrested and brought to trial in a state court upon the charge of murder for a homicide committed while acting within the line of the duty thus assigned him, he was entitled to release on habeas corpus issued by a federal judge. In this case the objection was raised that inasmuch as there was no federal statute expressly authorizing such protection as Neagle had been instructed to give, he could not be said, in the language of the act of 1867, to be "in custody for an act done or omitted in pursuance of a *law* of the United States." To this Justice Miller, who rendered the majority opinion of the Supreme Court, replied: "In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is a 'law' within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably. . . . We do not believe that the government of the United States is thus ineffi-

[9] 135 U. S. 1; 10 Sup. Ct. Rep. 658; 34 L. ed. 55.

cient, or that its Constitution and laws have left the high officers of the government so defenseless and unprotected." [10]

§ 71. Writ Issued Only when Imperative.

The Supreme Court of the United States, though uniformly affirming the doctrine that the federal courts have power, by writ of habeas corpus, to inquire into the cause of the restraint of the liberty of any person by a State when the justification of federal authorization or immunity is set up for the act complained of, has, however, repeatedly, and of recent years with increasing emphasis, laid down the doctrine that the federal courts should not, except in cases of peculiar urgency, exercise that power, but should leave such persons to pursue their remedy by writ of error to the federal Supreme Court, after the adjudication of their cases in the States' highest courts.

In *Ex parte* Royall,[11] decided in 1886, the Supreme Court of the United States, while upholding the constitutional power of Congress to grant to the federal courts jurisdiction to issue writs of habeas corpus in all cases where persons, in alleged violation of the Constitution, are in custody of a state court, took pains to emphasize the fact that the jurisdiction is to be exercised at the discretion of the court, and, in the case at bar, sustained the

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[10] Chief Justice Fuller and Justice Lamar dissented from the judgment in the Neagle case upon the ground that the President had had no constitutional power, in the absence of congressional authority, to provide, through the Attorney-General, a guard for Justice Field. Why, they asked, if the President had this power, had it been necessary to pass various habeas corpus acts? "Why could not President Jackson, in 1833, as the head of the Executive Department, invested with the power and charged with the duty to take care that the laws be faithfully executed and to defend the Constitution, have enforced the collection of the federal revenues in the Port of Charleston, and have protected the revenue officers of the government against any arrest made under the pretensions of the state authority with the aid of the act of 1833? Why, in 1842, when the third Habeas Corpus Act was passed, could not the President of the United States by virtue of the same self-existing powers of the Executive, together with those of the Judicial Department, have enforced the international obligations of the government without any such act of Congress?"

[11] 117 U. S. 241; 6 Sup. Ct. Rep. 734; 29 L. ed. 868.

refusal of the Circuit Court to issue the writ. "We are of opinion," said the court, "that while the Circuit Court has the power to do so, and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the National Constitution it is not bound in every case to exercise such a power immediately upon application for the writ. We cannot suppose that Congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims that he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and the mode in which it will exercise the powers conferred upon it. That discretion should be exercised in the light of the relations existing under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to regard and protect rights secured by the Constitution."

From the quotations which have just been made it is apparent that in the issuance of the writ, a distinction is made between those cases in which its issuance is necessary to protect the General Government in the execution of its functions, and those in which the question is merely one of the petitioner's right to liberty. In this latter class of cases, "if," the court say, "it is apparent upon the petition that the writ, if issued, ought not, on principles of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made." The federal courts, the opinion goes on to declare, are to assume that the state courts will neither do injustice nor disregard the settled principles of federal constitutional law. If, however, they should do so, the petitioner still has the privilege of taking his case by writ of

error from the highest state court to the Supreme Court of the United States.[12]

The act of 1867 provides that, upon return of the writ of habeas corpus, "the court or justice, or judge, shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." [13]

It would not appear to be certainly settled just what is the facts to be determined and just what the action is to be taken by the federal court in all cases where the party suing out the writ claims that the act charged against him in the state court was done under the authority of the United States or in pursuance of a process of its courts. When, by means of the writ, the federal court has brought the accused under its control, is it its duty in all cases to determine whether the accused was an officer of the United States and further whether he had acted in good faith, and within the scope of his federal authority, and therefore entitled to a discharge; and, if not, to impose such penalty as the law and facts require? Or is it the duty of the federal court, where the question is not as to the federal authority which is set up, but whether in fact that authority has been overstepped, and there is conflicting evidence as to this, is it the duty of the federal court to remand the party to the state court for the determination of the question?

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[12] For later refusals of the federal courts to issue the writ of habeas corpus to persons in the custody of state courts in alleged violation of the Constitution, see Tinsley v. Anderson (171 U. S. 101; 18 Sup. Ct. Rep. 805; 43 L. ed. 91) and United States *ex rel.* Drury v. Lewis (200 U. S. 1; 26 Sup. Ct. Rep. 229; 50 L. ed. 343). In the first of those cases the Supreme Court reversed the judgment of the lower court, and dismissed the writ of habeas corpus which it had issued, and remanded the accused to the custody of the state authorities. In *Ex parte* Wood (155 Fed. 190), decided in 1907, habeas corpus was granted by a federal court for the release of one who was charged in a state court with a violation of a state law, the enforcement of which had previously been enjoined by a federal court because unconstitutional.

[13] Rev. St., Sec. 761.

The opinions in the Ableman and Tarble cases, and the reasoning of the court in Tennessee v. Davis, would seem to indicate that the former action is the correct one, namely, that the federal court should not remand the accused to the state court, but itself determine the fact whether he has acted in excess of his federal authority. In United States *ex rel.* Drury v. Lewis,[14] however, the court accepted the alternative doctrine, and remanded the accused for trial to the state court, the evidence being conflicting as to whether or not in fact he had exceeded his federal authority.

The court, quoting from Baker v. Grice[15] say; "It is an exceedingly delicate jurisdiction given to the federal courts by which a person under an indictment in a state court, and subject to its laws, may, by the decision of a single judge of the federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the State, and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued."[16] In the case at bar, however, the court find that there were not present the exceptional circumstances justifying this federal intervention, and that the evidence was conflicting as to whether the act charged was done in performance of a federal authority. This being so, the court declare, it is the proper province of the state court and not of the federal tribunal to determine this question.

The court in this case, in the position which it assumed, cites no prior cases exactly in point. It does indeed refer to earlier adjudications, but none of these had reference to instances in which persons in custody of state authorities sought release upon the claim that the acts charged against them were done in the course of official duty. In each instance the petitioners based their claim to release upon the ground that the imprisonment by the state authorities was in violation of their individual rights under the Constitution, laws or treaties of the United

[14] 200 U. S. 1; 26 Sup. Ct. Rep. 229; 50 L. ed. 343.

[15] 169 U. S. 284; 18 Sup. Ct. Rep. 323; 42 L. ed. 748.

[16] Citing *Re* Loney (134 U. S. 372; 10 Sup. Ct. Rep. 384; 33 L. ed. 949); *Re* Neagle (135 U. S. 1; 10 Sup. Ct. Rep. 658; 34 L. ed. 55).

States. In such cases there was of course no reason based upon federal governmental supremacy and efficiency, why the federal courts should not, in their discretion, leave the petitioners to set up such defense as they might have in the state courts, and on writ of error therefrom to the federal Supreme Court.[17]

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[17] The law regarding the jurisdiction of the state courts over federal officers is discussed in a valuable article by Mr. James L. Bishop in the *Columbia Law Review* for May, 1909, entitled "The Jurisdiction of State and Federal Courts over Federal Officers." Mr. Bishop suggests that the maintenance of the freedom of federal authority from state interference, and at the same time the preservation of the proper powers of the state courts could be secured by extending the right of removal of cases from the state to federal courts, now given under Section 643 of the Revised Statutes to federal revenue officers, to all officers acting under authority of the United States; and that the issuance of the writ of habeas corpus by federal courts be limited so as to be merely ancillary to such right of removal.

CHAPTER IX.

THE MAINTENANCE OF FEDERAL SUPREMACY; THE INDEPENDENCE OF FEDERAL COURTS FROM STATE INTERFERENCE.

§ 72. Independence of Federal Authorities.

A federal court having assumed jurisdiction over a person or piece of property, the state authorities are excluded from any interference therewith or from in any way assuming jurisdiction therein. This principle was violated by the authorities of the State of Wisconsin in the case of Ableman v. Booth[1] in annulling the proceedings of a commissioner of the United States and discharging a prisoner who had been committed by the commissioner for an offense against a federal law. The Supreme Court of the United States declared the impropriety of these actions in the following language: "The supremacy of the state courts over the courts of the United States, in cases coming under the Constitution and laws of the United States is now for the first time asserted and acted upon in the supreme court of a State." Protesting against this action, the opinion declares: " . . . We do not question the authority of state court, or judge, who is authorized by the laws of the State to issue the writ of habeas corpus, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court or judge has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the state sovereignty. But, after the return is made, and the state judge or court is judicially apprised that the party is in custody under the authority of the United States, they can proceed no further."

That a state court has no power to issue a mandamus or writ of certiorari to a federal officer is not questioned.[2]

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1 21 How. 506.

2 M'Clung v. Silliman, 6 Wh. 598; 5 L. ed. 340; Kendall v. U. S., 12 Pet. 524; 9 L. ed. 1181; U. S. v. Schurz (102 U. S. 378; 26 L. ed. 167).

The inability of the state courts by injunction or otherwise to control proceedings in federal courts is declared in Weber v. Lee Co.,[3] United States v. Keokuk,[4] and Supervisors v. Durant.[5] This inability arises not so much from the supremacy of the federal courts as because the state and federal judicial systems are independent of one another. In Weber v. Lee Co. the court say: " State courts cannot enjoin the process of proceedings in the circuit [federal] courts; not on account of any paramount jurisdiction in the latter, but because they are entirely independent in their sphere of action." The same reason is given in United States v. Keokuk.

§ 73. Injunctions from Federal to State Courts.

It is, however, not quite correct to say that the two judicial systems are " entirely independent in their sphere of action." It is true that the state courts are wholly without power in any way to control the operations of the federal courts, but the reverse is not true. As has already appeared, a writ of error lies in certain cases from the federal Supreme Court to the state courts, and, when removal of a case is sought, the federal courts may issue a writ of certiorari to the state court demanding a copy of the record, and the clerk of the state court refusing compliance with this demand becomes, under an act of Congress, liable to fine or imprisonment. Furthermore the federal courts possess the right to protect their own jurisdictional rights or the rights of parties to suits before them by restraining orders forbidding proceedings in the state courts.

It is true that, actuated by a desire to preserve so far as possible the independence of the state judiciaries Congress, by act of 1793,[6] which is still in force, has provided that " the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such an injunction may be authorized by any law relating to proceedings in bankruptcy." But, in other than cases in bankruptcy,

[3] 6 Wall. 210; 18 L. ed. 781.

[4] 6 Wall. 514; 18 L. ed. 933.

[5] 9 Wall. 415; 19 L. ed. 732.

[6] Rev. St., Sec. 720.

the federal courts have not hesitated to enjoin proceedings in state courts where this has been necessary to preserve their own jurisdictional rights, or to protect individuals in their federal rights. Thus in Dietzsch v. Huidekoper[7] it was held that the prohibition of Section 720 of the Revised Statutes would not prevent a federal court from issuing an injunction restraining proceedings on a replevin bond, the state suit being based on a judgment obtained in a state court after the defendant had removed the case to the federal courts and there obtained judgment in his favor. The court said: " The action on the replevin bond in that [the state] court was simply an attempt to enforce the judgment of that court in the replevin suit, rendered after its removal to the United States circuit court, and after the state court had lost all jurisdiction over the case. If no judgment had been rendered in the state court against the plaintiffs in the replevin suit, no action could have been maintained upon the replevin bond. The bond took the place of property seized in replevin, and a judgment upon it was equivalent to an actual return of the replevied property. The suit upon the replevin bond was, therefore, but an attempt to enforce a pretended judgment of the state court, rendered in a case over which it had no jurisdiction, but which had been transferred to and decided by the United States Circuit Court, by a judgment in favor of the plaintiffs in replevin. The bill [for injunction] in this case was, therefore, ancillary to the replevin suit, and was in substance a proceding in the federal court to enforce its own judgment by preventing the defeated party from wresting the replevied property from the plaintiffs in replevin, who, by the judgment of the court, were entitled to it, or what was in effect the same thing, preventing them from enforcing a bond for the return of the property to them. A court of the United States is not prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a state court." [8]

[7] 103 U. S. 494; 26 L. ed. 497.

[8] In Mississippi Railroad Commission v. Illinois Central R. Co. (203 U. S. 335; 27 Sup. Ct. Rep. 90; 51 L. ed. 209) it was held that the commission was not a court within the meaning of Rev. St., Sec. 720.

In Martin v. Hunter's Lessee,[9] a case, it will be remembered, arising out of the refusal of the state court to obey a mandate from the federal tribunal, the court did not find it necessary to decide whether or not the federal court had the power to issue a mandamus to the Virginia court to enforce its former judgment. Instead, the court simply reversed the judgment of the Virginia Court of Appeals and affirmed that of the lower court. Justice Johnson rendered a concurring opinion in which he said: "The presiding judge of the state court is himself authorized to issue the writ of error, if he will, and thus give jurisdiction to the Supreme Court; and if he thinks proper to decline it, no compulsory process is provided by law to oblige him. The party who imagines himself aggrieved is then at liberty to apply to a judge of the United States, who issues the writ of error, which (whatever its form) is, in substance, no more than a mode of compelling the opposite party to appear before this court and maintain the legality of his judgment obtained before the state tribunal. An exemplification of the record is the common property of every one who chooses to apply and pay for it, and thus the case and the party are brought before us."

After pointing out that the court disavowed all intention to decide as to the right to issue a compulsory process to the state courts, Justice Johnson, however, goes on to argue that the federal court might properly issue a mandamus only to the lower federal courts, and that in case a state court, whose decrees might be reversed by the federal court, should refuse to alter its action in obedience thereto, the federal Supreme Court, under authority granted by the Judiciary Act, where the case had once before been remanded, could itself proceed to a final decision of the case and

In French v. Hay (22 Wall. 250; 22 L. ed. 857) the court say: "The prohibition in the Judiciary Act against the granting of injunctions by the courts of the United States touching proceedings in state courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision. If the state courts should persist in proceeding — a thing not to be expected — the wrong will be on the part of those tribunals and not of the court below."

9 1 Wh. 304; 4 L. ed. 97.

the awarding of a judgment thereupon.[10] By this means and by a liberal use of the writ of injunction and that of habeas corpus ad subjeciendum, Justice Johnson declared that the constitutional revising power might be fully secured to the United States without ever resorting to compulsory or restrictive processes upon the state tribunals.

The circumstances under which the federal courts will issue injunctions restraining state officials from enforcing, or bringing suits in the state courts to enforce a state act which is alleged to be in contravention of the federal Constitution will be further considered in chapter LIV, in which the suability of the State is discussed.

The federal courts have not been given, nor could they constitutionally be given, the jurisdiction to issue writs of mandamus to compel the performance by state officials of state duties.[11] The constitutional power of Congress to authorize the federal courts, by writs of mandamus, to compel the performance of duties, whether by state or federal officials, imposed by federal law would seem to be beyond question, though Congress has not yet seen fit to grant to these courts the power except as ancillary to jurisdiction already otherwise obtained.[12] It is to be remembered, however, that Congress cannot, without the consent of the State, impose upon its functionaries the performance of federal duties. Where, however, the act ordered is one unconnected with his official state duties, the fact that an individual is a state functionary would not exempt him from the mandatory power of the federal courts.

§ 74. State Restrictions upon the Right of Removal of Suits from State to Federal Courts.

By various acts of Congress rights have been granted to defendants to remove into federal courts civil actions begun in state

[10] By Act of 1867 (Rev. Stat., Sec. 709), the Supreme Court was given this power without reference to whether or not the case had been previously remanded. That act provides, "the Supreme Court may, at their discretion, proceed to a final decision and award execution, or remand the case to the inferior court."

[11] Prigg v. Pennsylvania (16 Pet. 539; 10 L. ed. 1060).

[12] U. S. v. Circuit Court (126 Fed. Rep. 169).

courts, where there is a diversity of citizenship of the parties. This right, which will be more fully discussed in a later chapter,[13] is granted, not that federal supremacy may be maintained, but that an impartial tribunal may be secured in suits in which citizens of different States are parties. One important question, however, with reference to the maintenance of federal authority, has arisen in connection with the right of removal based upon diversity of citizenship, and this is as to the authority of the States to prevent foreign corporations from exercising this federal privilege by making it a condition precedent to their being allowed to enter the State or to continue to do business therein that, when sued by a citizen of the State, they will not have the cause removed into the federal courts. Here it is apparent that the question is not so much the right of the State to interfere with the exercise by a federal court of its jurisdiction when obtained, as it is to prevent that jurisdiction from being invoked.

That States cannot put restrictions upon the removal of cases from their courts to federal tribunals any more than they can prevent it was declared in a case arising under a statute of the State of Wisconsin which provided that insurance companies of other States desiring to do business within its limits should sign a written agreement that they would not remove to the federal courts suits brought against them in the State's courts. One of these companies, having removed a case to the federal courts notwithstanding its agreement not to do so, the Wisconsin courts, ignoring the fact of its removal, proceeded with the case and rendered judgment against the company. The Supreme Court of the United States, upon appeal to it, declared the judgment void upon the ground that the agreement itself and the statute requiring it were illegal, as no one could be compelled to bind himself in advance not to exercise a right guaranteed to him by the Constitution any more than he could barter away his life or freedom.[14]

When, however, in a later case, the Supreme Court of the United States was asked to issue an injunction forbidding the

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[13] See Chapter L.

[14] Home Insurance Co. v. Morse (20 Wall. 445; 22 L. ed. 365).

Secretary of State of Wisconsin to revoke the license of an insurance company that had violated its agreement not to remove, that court held that it could not thus control the action of a state official, even though his action was apparently based upon an improper ground. The court said: "The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding which is not the subject of inquiry in determining the validity of a statute."[15] In other words it was held that the right both of granting and of revoking a license to a foreign corporation to do business within a State belonging to the proper officer of that State, it was not within the competence of a federal court to determine whether that power was exercised for a good or bad reason or for no reason at all.

But when, in a still later case, there was drawn into question the operation of a statute of Iowa which declared that upon the violation by a foreign insurance company of its agreement not to remove a case to the federal courts, its license should thereby become void, the federal Supreme Court held that the violation of an illegal agreement could not of itself operate as a revocation of the company's license. If revoked at all it would have to be by the act of a competent state official, and not, *ipso facto*, by the exercise of a constitutional right.[16]

This entire subject was reviewed in Security Mutual Life Insurance Co. v. Prewitt[17] in which it was held that a State may by statute provide that if a foreign insurance company shall remove to a federal court a case which has been commenced in a state court, the license of such company to do business within the State shall thereupon be revoked. In its opinion the court say: "It is admitted that a State has power to prevent a company from coming into its domain, and that it has the power to take away the right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives; but what the company denied [in this case] is the right of a State to enact

[15] Doyle v. Continental Insurance Co. (94 U. S. 535; 24 L. ed. 148).

[16] Barron v. Burnside (121 U. S. 186; 7 Sup. Ct. Rep. 931; 30 L. ed. 915).

[17] 202 U. S. 246; 26 Sup. Ct. Rep. 619; 50 L. ed. 1013.

in advance that if a company remove a case to a federal court, its license shall be revoked. We think this distinction is not well founded. The truth is that the effect of the statute is simply to place foreign companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the State and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into a federal court, your right to further do business within the State shall cease and your permit shall be withdrawn, is not open to any constitutional objection. The reasoning in the Doyle case we think is good."[18]

From the foregoing cases it is apparent that no abandonment is really made of the principle that the States are constitutionally incompetent to interfere with or prohibit the exercise of a federal right. Corporations chartered in one State and doing business in another State may exercise the right of removal given them by the federal statutes without reference to what the laws of the States in which they are doing business may provide, and this they may do even if they have contracted with those state authorities not to exercise these rights. The fact that the state authorities, in the exercise of a power acknowledged to be possessed by them, withdraw, or threaten to withdraw, a privilege which they have granted, furnishes no ground for federal relief. There is, to be sure, a causal *nexus* between the exercise of the federal right of removal and of the State's right to withdraw its permission to the foreign corporation to do business within the State's limits. But, legally speaking, there is no connection. Each is the exercise of an independent right. The case is not similar to one where the State interferes with or hinders the operation of a federal agency, as, for example, the taxation of its franchise. In the cases above considered, no attempt is made by the States to declare what cases shall and what cases shall not be removed into the federal courts, or in any way to interfere with the exercise

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18 A strong dissenting opinion, concurred in by Justice Harlan, was filed in this case by Justice Day.

of their jurisdiction by those courts after the cases have been removed into them. Whenever this has been attempted the federal courts have prevented it. Thus it has been repeatedly declared that the jurisdiction conferred upon the federal courts cannot be in any way abridged or impaired by the statutes of a State.[19]

So, also, it is held that the proper petition and bond having been filed, a case is considered removed even though the state court may refuse to make an order of removal, and may in fact proceed with the trial of the cause.[20] In such cases the defendant may, if he choose, defend the case in the state court, and after final judgment obtain a writ of error from the United States Supreme Court, and in so doing he does not forfeit his right to defend in the lower federal court. The circuit court can issue a writ of certiorari to the state court demanding a copy of the record in case and the clerk refusing to furnish it becomes liable under a federal act to fine or imprisonment.[21]

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[19] Hyde v. Stone (20 How. 170; 15 L. ed. 874); Smyth v. Ames (169 U. S. 466; 18 Sup. Ct. Rep. 418; 42 L. ed. 819); Mercer Co. v. Cowles (7 Wall. 118; 19 L. ed. 86); Lincoln Co. v. Luning (133 U. S. 529; 10 Sup. Ct. Rep. 363; 33 L. ed. 766); Chicot Co. v. Sherwood (148 U. S. 529; 13 Sup. Ct. Rep. 695; 37 L. ed. 546); Barrow S. S. Co. v. Kane (170 U. S. 100; 18 Sup. Ct. Rep. 526; 42 L. ed. 964).

[20] Home L. Insurance Co. v. Dunn (19 Wall. 214; 22 L. ed. 68); Marshall v. Holmes (141 U. S. 589; 12 Sup. Ct. Rep. 62; 35 L. ed. 870) and cases there cited.

[21] Act of Mch. 3, 1875. Whether Congress has the power thus to punish the refusal of the state official to perform this duty has not received judicial determination. If, however, we judge by analogy from the decision in *Ex parte* Siebold (100 U. S. 371; 25 L. ed. 717), and if the act required is a purely ministerial one, Congress has the power. In *Ex parte* Virginia (100 U. S. 339; 25 L. ed. 676) a judge of a Virginia court had been indicted for a violation of the federal Civil Rights Act of 1875 in that he had excluded negroes from grand and petit juries. The selection of jurors the majority of the court declared to be a purely ministerial act, and, as to the fact that the accused was a state official, said: "We do not perceive how holding an office under a State and claiming to act for the state can relieve the holder from obligation to obey the Constitution of the United States, or to take away the power of Congress to punish his disobedience." Justice Field, in a dissenting opinion concurred in by Justice Clifford, strongly urged that the act of 1875 was unconstitutional in so far as it attempted to govern the selection of jurors in state courts. He argued that the selection of

In the recently decided case of W. U. Telegraph Co. v. Kansas[22] the court takes a position which it is somewhat difficult to harmonize with that assumed in the insurance cases. In this case the court held unconstitutional as an interference with interstate commerce a state law exacting from a foreign telegraph corporation, as a condition of being permitted to continue to do a local business within the State, a charter fee of a given per cent of its entire authorized capital stock. The court declare: "The vital difference between the Prewitt case and the one now before us is that the business of the insurance company, involved in the former case, was not, as this court has often adjudged, interstate commerce, while the business of the telegraph company was primarily and mainly that of interstate commerce." This is true enough, but the essential fact still remains that the Prewitt case permitted the State to exact of the foreign corporation as a condition to its being permitted to do business within the State that it should forego the exercise of a federal constitutional right, whereas, in the later case it was held that the State might not as a condition impose burdens upon the exercise by the foreign corporation of federal right, that of carrying on interstate commerce, which can scarcely be said to be a more important privilege than that involved in the Prewitt case. It would seem, therefore, that the suggestion made by Justice White in his concurring opinion in the later case was a stronger one, namely, that the company having been permitted to enter the State and construct its plant there, the onerous conditions attempted to be imposed by the State as a condition to its remaining there were confiscatory and, therefore, wanting in due process of law.

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jurors is a judicial and not a merely ministerial act (quoting Kentucky v. Dennison), and that Congress had no authority over judicial officers of the States in discharge of their duties under State laws. For a fuller discussion of this case see *post*, p. 189.

[22] 30 Sup. Ct. Rep. 190.

CHAPTER X.

THE FEDERAL CONTROL OF THE FORM OF STATE GOVERNMENTS.

§ 75. State Autonomy.

In the foregoing pages the sovereignty of the United States as opposed to, and inconsistent with, the continued sovereignty of its individual commonwealth members has been sufficiently declared. Whatever doubt there may have been upon this point before the Civil War, the result of that gigantic struggle has left no room for disagreement since, and the subsequent unequivocal assertions of the federal courts have simply registered conclusions that no one could rationally question. Starting, then, from this fundamental fact that, looking at the matter from a purely legal view-point, the individual Commonwealths constitute self-governing but politically subordinate portions of the United States, we shall now proceed to consider the degree of autonomy secured them under the federal Constitution. This subject we may conveniently divide into two parts. First, we may examine the degree of control that the Federal Government may constitutionally exercise over the form of government that the several States may establish for themselves; and, secondly, the extent to which the General Government may supervise or control the exercise by the States of those powers that are reserved to them. First, then, as to the control that may be constitutionally exercised by the United States over the forms of government of its constituent units.

Speaking generally it may be said that, providing its government be republican in form, each State of the Union may establish such governmental organs as it sees fit, and apportion among them its executive, legislative and judicial powers according to its own judgment as to what is expedient and proper.

§ 76. Republican Form of Government Defined.

The federal Constitution provides that "The United States shall guarantee to every State in this Union a republican form

of government, and 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."[1]

In form, the first clause of this section would appear to be for the benefit of the States and to impose a duty upon the Federal Government, and such undoubtedly would be its effect should a foreign power attempt to impose a government of any sort whatever upon the people of one of the States against their will; or should a domestic revolution result in the establishment in power of a government not sanctioned by law or not freely agreed to by the electorate. In fact, however, as we have already seen, and as will presently be more particularly spoken of, this clause was so interpreted during reconstruction times as to give to the Federal Government for several years an almost unlimited power of control of the domestic affairs of those States that had been in rebellion against its authority.

It will be noticed that the Constitution does not itself define the term "republican form of government." It has, however, always been an accepted rule of construction that the technical and special terms used in the Constitution are to be given that meaning which they had at the time that instrument was framed. This is but reasonable, for, in default of anything to the contrary, those who drafted the Constitution are to be presumed to have intended the words which they used to have that meaning they knew them to have. For a definition, then, of "republican government" we must discover what in 1787 such a political form was considered to be. Certainly we may say that the governments of the thirteen original States as they existed at the time the Constitution was drafted must have been considered as illustrating the republican type. Furthermore, the Constitutions of all those States which have been admitted to the Union since 1787 must be regarded as having been impliedly declared republican by Congress at the time of the giving of its assent to their entrance into the Union.

The late Judge Cooley, in his *Principles of Constitutional Law*,[2] has perhaps defined the term as satisfactorily as anyone. "By a

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[1] Art. IV, Sec. 4.

[2] Chapter XI.

republican form of government," he says, "is understood a government by representatives chosen by the people; and it contrasts on the one side with a democracy, in which the people or community as an organized whole wield the sovereign powers of government, and, on the other side, with the rule of one man as King, Emperor, Czar, or Sultan, or with that of one class of men, as an aristocracy." "In strictness," Judge Cooley goes on to say, "a republican government is by no means inconsistent with monarchical forms, for a King may be merely an hereditary or elective executive while the powers of legislation are left exclusively to a representative body freely chosen by the people. It is to be observed, however, that it is a republican form of government that is to be guaranteed; and in the light of the undoubted fact that by the Revolution it was expected and intended to throw off monarchical and aristocratic forms, there can be no question but that by a republican form of government was intended a government in which not only would the people's representatives make the laws, and their agents administer them, but the people would also, directly or indirectly, choose the executive. But it would by no means follow that the whole body of people, or even the whole body of adult and competent persons, would be admitted to political privileges; and in any republican State the law must determine the qualifications for admission to the elective franchise."

In United States v. South Carolina,[3] a case decided in 1905, an *obiter* suggestion was made by the court in its majority opinion that a State by assuming the control of the manufacture and distribution of certain commodities, and, especially, by acquiring and undertaking the management of public utilities might thereby lose its republican form of government. To the suggestions thus made no weight can be given. Whether or not a government is republican in form depends not upon the sphere of its activities, but upon the manner in which its functionaries are selected, and the degree of their legal responsibility to the people. Thus there would be no difficulty in the most socialistic of States having a

[3] 199 U. S. 437; 26 Sup. Ct. Rep. 110; 50 L. ed. 261.

government of the purest republican type. This suggestion to the contrary by the Supreme Court is the first that the writer has seen.

§ 77. The Constitutionality of Referendum Laws.

In the courts of the States, general direct legislation (referendum) laws were in a few early cases held unconstitutional on the ground that their effect is to establish a democratic in place of a republican — that is, representative — form of government. Thus, for example, in Rice v. Foster[4] the court of Delaware declared: "Although the people have the power, in conformity with its provisions, to alter the Constitution, under no circumstances can they, so long as the Constitution of the United States remains the paramount law of the land, establish a democracy or any other than a republican form of government." And this, the court went on to declare, would in effect be done, should the electorate be given a direct legislative power.[5]

In addition to being in violation of the federal Constitution, direct legislation laws of a general character have frequently been held void as in violation of the state Constitutions in that they attempt to delegate to the people that law-making power which has been intrusted to the legislature. In answer to the point that the law-making power was not thus transferred, but simply the operation of the statutes in question made dependent upon the happening of a particular event, namely, the approving vote of the people, the court of New York, in Barto v. Himrod,[6] said: "It is not denied that a valid statute may be passed to take effect upon the happening of some future event, certain or uncertain. But such a statute, when it comes from the hand of the legislature, must be a law *in præsenti* to take effect *in futuro*. . . . The event or change of circumstances on which a law may be made to

[4] 4 Harr. 479.

[5] This case involved only a local option law. Its reasoning, however, applies, and has continued to be applied to general laws. As to local option laws, however, and laws establishing local governments and equipping them with adequate powers, the case may be said to have been overruled.

[6] 4 Seld. 483.

take effect must be such as in the judgment of the legislature affects the question of the expediency of the law; an event on which the expediency of the law in the judgment of the lawmakers depends. On this question of expediency the legislature must exercise its own judgment definitely and finally. . . . But in the present case no such event or change of circumstances affecting the expediency of the law was expected to happen. The wisdom or expediency of the free school law, abstractly considered, did not depend on a vote of the people. If it was unwise or inexpedient before that vote was taken, it was equally so afterward. The event on which the act was made to take effect was nothing else than the vote of the people on the identical question which the Constitution makes it the duty of the legislature itself to decide. . . . The government of the State is democratic, and it is a representative democracy, and in passing general laws, the people act only through their representatives in the legislature."[7]

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[7] While, as indicated, direct legislation laws of a general character have at times been held unconstitutional, special referendal, or local option, laws, have been held valid, the point being taken, among others, that at the time the federal and state Constitutions were adopted, measures of this character were generally recognized as proper, and construed to provide for delegation of local governing, rather than legislative, powers. Thus Cooley, summing up the argument upon this point, says: "It has already been seen that the legislature cannot delegate its power to make laws; but fundamental as this maxim is, it is so qualified by the customs of our race, and by other maxims which regard local government, that the right of the legislature, in the absence of authorization or prohibition, to create towns and other inferior municipal organizations, and to confer upon them the powers of local government, and especially of local taxation and police regulation [liquor laws, etc.] usual with such corporations, would pass unchallenged. The legislature in these cases is not regarded as delegating its authority, because the regulation of such local affairs as are commonly left to local boards and officers is not understood to belong properly to the State, and when it interferes, as sometimes it must, to restrain and control the local action, there should be reasons of state policy or dangers of local abuse to warrant the interposition." *Constitutional Limitations*, 7th ed., p. 264. In the earlier cases (Wales v. Belcher, 3 Pick. 508; Godden v. Crump, 8 Leigh, 120; Burgess v. Pue, 2 Gill, 11) general referendal laws were sustained, but since the decision of the Delaware court in 1847 (Rice v. Foster, 4 Harr. 479) the general practice, as indicated in the text, has been to hold them void as a delegation of legislative power.

§ 78. Dorr's Rebellion.

The first instance in which the Federal Government was called upon to construe this guaranty clause was in connection with Dorr's Rebellion in Rhode Island in 1841. The salient facts of this incident were these. The Constitution under which the people of Rhode Island had lived since the separation from England provided for a very limited suffrage. With the development of more democratic ideas this condition of affairs became very unsatisfactory to those who were thus denied the right to vote. Numerous attempts were made to have the Constitution amended, but these were always defeated by the small oligarchy of legal voters who did not wish to share their special privileges with others. Finally, in 1841, mass meetings of the discontended were held, and, without any instruction or permission from the existing government, the citizens were directed to elect, by a universal manhood suffrage, delegates to a constitutional convention. This was done, and at that convention a Constitution was framed that later was adopted by a clear majority of the adult male resident citizens of the State. Thereupon, the convention, meeting again, declared: "Whereas, by return of the votes upon the Constitution, it satisfactorily appears that the citizens of this State, in their original sovereign capacity, have ratified and adopted said Constitution by a large majority; and the will of the people, thus decisively known, ought to be implicitly obeyed and faithfully executed: We do therefore resolve and declare that said Constitution rightfully ought to be, and is, paramount law and Constitution of the State of Rhode Island and Providence Plantations, and we further resolve and declare for ourselves and in behalf of the people whom we represent, that we will establish said Constitution and sustain and defend the same by all necessary means." Attempts were made to put into operation the government provided for in the instrument thus declared in force, Dorr being elected Governor under it.

All of the above acts, it will be observed, were unsanctioned by any law of the old *de jure* government. Upon an appeal being made by that government to the Federal Government for aid, the President of the United States recognized that government as the

de jure government of the State and took steps to extend the aid that was requested. By this federal executive action two important facts were established with reference to the "guaranty" clause of the federal Constitution. The first of these was that, according to this clause, the Federal Government was obligated to protect the several States not only against the attempts of foreign powers to impose upon them governments not of their own choosing, but against revolutionary action on the part of their own citizens. The second was that it was thus decided that it is not a violation of the provision that a state government shall be republican in form that it rests upon the legal will of a minority of its adult male citizens. In effect it was determined that the old government of Rhode Island, being accepted as republican in form at the time that the State became a member of the Union, it could not be changed by any extra-legal means against the desire of those who by the old instrument were given the sole power of expressing the legal will of the State. This last clause "against the desire of those who by the old instrument were given the sole power of expressing the legal will of the State," is advisedly added, for, as repeated instances have shown, the Federal Government has not felt itself obligated under the guaranty clause to see to it that none of the state Constitutions are ever amended or replaced by new instruments except in strict accordance with the provisions governing constitutional changes existing at the time the changes are made. When such changes, even though brought about in a manner not formally constitutional, have been accepted as valid by the old governments, the Federal Government has not felt itself obligated to interfere. But when, as was the case in Rhode Island, the revolutionary change is resisted by those exercising authority under the old instrument of government, the Federal Government, upon appeal to it for assistance, will almost surely consider itself called upon to recognize and support the old government.

§ 79. Luther v. Borden.

The case of Luther v. Borden,[8] decided by the Supreme Court in 1845, arose out of Dorr's Rebellion. Borden, acting under authority of the old government of Rhode Island, had broken into the house of Luther, who was at the time engaged in an attempt to establish the new government provided for by the Constitution that had been adopted in the popular, extra-constitutional manner spoken of above. Upon being sued in trespass by Luther, Borden justified himself by the plea that he was acting under the authority of the legal government of the State. Luther, upon his side, denied the *de jure* character of that government, and, therefore, its legal competence to empower Borden to exercise the authority he had exercised.

Upon behalf of Luther it was argued "that, by the fundamental principle of government and of the sovereignty of the people acknowledged and acted upon in the United States, and the several States thereof, at least ever since the Declaration of Independence in 1776, the Constitution and frame of government prepared, adopted, and established as above set forth, was, and became thereby, the supreme fundamental law of the State of Rhode Island, and was in full force and effect, as such, when the trespass alleged in the plaintiff's writ was committed by the defendants. That this conclusion also follows from one of the foregoing fundamental principles of the American system of government, which is, that government is instituted by the people, and for the benefit, protection and security of the people, nation, or community. And that when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable right to reform, alter, abolish the same, in such a manner as shall be judged most conducive to the public weal."[9]

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[8] 7 How. 1; 12 L. ed. 581.

[9] In support of this position, the following propositions were urged:

1. "That the sovereignty of the people is supreme, and may act in forming government without the assent of the existing government.

2. That the people are the sole judges of the form of government best calculated to promote their safety and happiness.

In behalf of Borden, the defendant in error, Daniel Webster, who was one of the counsel, argued that, granting that the people are the source of political power, the American principle is that they can exercise this power only through their constituted representatives, and through the votes of properly qualified electors. "The right to choose a representative," he declared, "is every man's portion of sovereign power. Suffrage is a delegation of political power to some individual. Hence the right must be guarded and protected against force or fraud. That is one principle. Another is, that the qualification which entitles a man to vote must be prescribed by previous laws, directing how it is to be exercised and also that the results shall be certified to some central power so that the vote may tell. We know no other principle. If you go beyond these, you go wide of the American track. . . . Our American mode of government does not draw any power from tumultuous assemblages."

The question as to which of the two governments was at that time the legal government of the State thus seemed squarely presented to the court. That tribunal, however, did not feel itself obliged to pass upon the point, holding that the power to determine such a matter had been given by the Constitution to Congress, and by that body had been handed over, to the extent at least of determining when the Federal Government should inter-

3. That as the sovereign power, they have the right to adopt such form of government.

4. That the right to adopt necessarily includes the right to abolish, to reform, and to alter any existing form of government, and to substitute in its stead any other that they may judge better adapted to the purposes intended.

5. That if such a right exists at all, it exists in the States under the Union not as a right of force, but a right of sovereignty, and that those who oppose its peaceful exercise, and not those who support it, are culpable.

6. That the exercise of this right, which is a right original, sovereign, and supreme, and not derived from any other human authority, may be, and must be, effected in such a way and manner as the people may for themselves determine.

7. And more especially is this true in the case of the then subsisting government of Rhode Island, which derived no power from the charter or from the people to alter or amend the frame of government, or to change the basis of representation, or even to propose initiatory measures to that end."

fere, to the President. In the case at bar the President had recognized the legality of the old government and the propriety of this decision the court declared it could not consider.[10]

"After the President has acted, and has called out the militia," continued the court, "is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could. then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President is endeavoring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It

[10] "Under this article of the Constitution," said the court, speaking through Taney, C. J., "it rests with Congress to decide what government is the established one in the State. For as the United States guarantees to each State a republican government, Congress must necessarily decide what government is established in the State before it can be determined whether it is republican or not. And when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. . . . So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the Federal Government to interfere. But Congress thought otherwise. . . . By this act (Feb. 28, 1795) the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. . . . And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by act of Congress."

cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful." As to the point that a discretionary power thus placed in the hands of the President might be abused, the court said: "All power may be abused if placed in unworthy hands. But it would be difficult to point out any other hands in which this power would be more safe, and at the same time equally effectual. . . . At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected, and enforced in its judicial tribunals."

As regards the point that had been raised that by the declaration of martial law and the use of military force, the old government of Rhode Island had ceased to be a republican one, the court said: "Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities. And, unquestionably, a State may use its military authority to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government."[11]

§ 80. The Reconstruction of Southern States after the Civil War.

Acting under the authority assumed to be given it by the guaranty clause, Congress, at the conclusion of the Civil War, assumed an almost complete control over the reconstruction of governments in those States. There can be no question, however, but that in doing so an interpretation was given to that clause which it is difficult to justify. Practical exigencies may have necessitated

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[11] For a fuller discussion of martial law, and its limitations, see *post*, Chapter LXII.

the federal authority that was exercised, but that violence was done to the meaning of this clause must be admitted. A fair interpretation of this clause would have given to the Federal Government at the most nothing more than the right to assist the citizens of the several States in establishing and maintaining governments republican in form and loyal to the Union. When this clause was discussed in the Constitutional Convention of 1787 it was explained by one member that its object was "merely to secure the States against dangerous commotions, insurrections, and rebellions;" and Madison, writing in *The Federalist,* said: "It may possibly be asked what need there could be for such a precaution, and whether it may not become a pretext for alteration 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 of course be bound to pursue the authority. But the authority extends no further than a guaranty of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed 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."

Instead, however, of guaranteeing existing governments in the Southern States, or of assisting their citizens in establishing republican governments, the Federal Government, in pursuance of

the various Reconstruction Acts passed by Congress, went on itself to assume the practical control of the establishment of new governments; and these governments it termed republican in form, though they were imposed upon the States against the will of the great bulk of their citizens, and were maintained in existence by the support that the federal bayonet was able to give them. Furthermore, Congress even then refused to admit the States to a full enjoyment of constitutional rights until they had amended their Constitutions in certain specific ways, and ratified the Fourteenth and Fifteenth Amendments to the federal Constitution. In so doing, not only was violence done to the guaranty clause, but the States in question were deprived of that equality with the other States of the Union to which they were constitutionally entitled.

In an earlier chapter it has been pointed out that in the famous case of Texas v. White[12] the Supreme Court construed the "guaranty" clause of the United States Constitution to authorize Congress to establish and maintain governments in those States which had attempted secession from the Union. It will be remembered, however, that in that case the court did not feel itself called upon to pass upon the constitutionality of any of the particular provisions of the Reconstruction Acts which were enacted by Congress in the exercise of that power, but was content with satisfying itself that the government which had been established and had been in actual operation, had been recognized by Congress, and was, as such, competent to bring suit in behalf of the State of Texas, which, it was declared, had never been, despite its ordinance of secession, out of the Union.[13]

In White v. Hart[14] an attempt was made to have the Supreme Court hold void certain provisions of the reconstruction Constitution of Georgia on the ground that the Constitution had been adopted under the dictation and coercion of Congress, and was not thus, in reality, the act of the State. The Supreme Court replied: "Congress authorized the State to frame a new Constitu-

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12 7 Wall. 700; 19 L. ed. 227.

13 See *ante*, p. 85.

14 13 Wall. 646; 20 L. ed. 685.

tion, and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. The State is estopped to assail it upon such an assumption. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department." In short, the court held that whether or not Congress was justified in requiring of the State that, as a condition to her again enjoying representation in Congress, she should adopt a Constitution containing certain provisions, the State had yielded and adopted a Constitution as required. It was therefore her act, and its provisions were valid as such. Had she continued to refuse to accede to the conditions imposed by Congress, it might ultimately have been necessary to decide whether those conditions were constitutionally requirable. But having yielded to them, the court very properly held that it could not examine into the motives or circumstances which led the State to do so.

§ 81. Restricted Suffrage Compatible with Republic Form of Government.

In Minor v. Happersett[15] the point was raised that a state government is not republican in form in which adult women are not permitted to vote. As to this the court said: "The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially pro-

[15] 21 Wall. 162; 22 L. ed. 627.

vided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution. As has been seen [in the argument that has gone before], all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters."[16]

Precedents have established the principle that where there is a dispute in a State as to the *de jure* character of a particular organ of its government, as, for example, as to which of two individuals has been elected as chief executive, or which of two courts or legislatures is entitled to authority, the Federal Government will not ordinarily interfere, being governed by the principle that each state government has a tribunal for the decision of such contests, and that the General Government will consider itself bound by the decision which that tribunal renders, just as the federal courts hold themselves bound by the decisions of the state courts as to the existence and, in general, the interpretation of their respective state statutes.[17]

In two classes of cases, however, the Federal Government exercises the right to decide which of two contesting state officials or organs is to be recognized as the *de jure* authority. The first of these includes those cases in which a decision becomes necessary in order to determine a matter of direct federal concern. Thus, for example, when each of two contesting state legislatures select and send senators to Congress, it is necessary for the United States Senate to decide which of the two electing bodies is endowed with the authority to act on that behalf for the State. So, also, as in

[16] In this case was also negatived the assertion that to deny women the suffrage is to deprive them of a right guaranted to them by the Fourteenth Amendment.

[17] See *post*, Chapter LII.

the case of Dorr's Rebellion, where federal aid is needed to suppress domestic disorder, it is necessary for the President or Congress to determine which government, claiming authority, it will recognize.

The second class of cases in which the Federal Government, through its Supreme Court, will assume jurisdiction where there is dispute between parties as to who is entitled to a state office, include those in which there is a question whether the state laws, as applied by the state authorities, have violated that provision of the Fourteenth Amendment which declares that no State "shall deprive any person of life, liberty, or property, without due process of law," or have violated the tenth section of Article One of the Constitution of the United States, which declares that no State shall pass a law impairing the obligation of a contract.

§ 82. Public Office not a Property or Contract Right.

The Supreme Court of the United States has held in an unqualified manner, that as between a State and an office-holder, there is no contract right possessed by the latter either to the office or to the salary attached to it, and that, therefore, in the absence of express constitutional provision otherwise, his removal from office or the abolishment of the office itself gives to him no cause of action against the State. Thus in Butler v. Pennsylvania[18] after defining vested private rights of property, the court said: "The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which perfect rights, certain definite, fixed, private rights of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public shall require. The selection of officers, who are nothing more than agents for the effectuating of public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither

[18] 10 How. 402; 13 L. ed. 472.

the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principle of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor promised, would appear to be neither reconcilable with natural justice nor with common sense. The establishment of such a principle would arrest necessarily everything like progress or improvement in government; or if changes would be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult, if not impracticable, in this view, ever to remodel the organic law of a State, as constitutional ordinances must be of higher order and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that, in every perfect and competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the preservation of the body politic, and for the safety of the individuals of the community. It is true that this power or the ex tent of its exercise may be controlled by higher organic law or the Constitution of the State, as is the case in some instances in the state Constitutions, and is exemplified in the provision of the federal Constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone."

Again, summing up the law on this subject, the Supreme Court in Taylor v. Beckham[19] say: "The decisions are numerous to the

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[19] 178 U. S. 548; 20 Sup. Ct. Rep. 890; 44 L. ed. 1187.

effect that public offices are mere agencies or trusts, and not property as such. Nor are the salary and emoluments property secured by contract, but compensation for services actually rendered. Nor does the fact that a constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent, change its character or make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment. In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent either with a property or contract right."[20]

§ 83. Suits between Two or More Claimants to State Office.

When the dispute is not one between the State and one of its officers, but between two individuals each claiming the office and its emoluments,—when, in other words, the office itself is not disturbed nor the salary changed, the question is a different one. Then, it would seem, the office has often to be treated as a piece of property of which the owner may not be deprived without due process of law even by the State itself. In Kennard v. Louisiana[21] an action in the nature of quo warranto was brought against the plaintiff in error, a justice of the Supreme Court of the State, by a Mr. Morgan, and the decision of the Louisiana courts was in his favor. Thereupon Kennard took an appeal to the Supreme Court of the United States upon the ground that, through her judiciary, the State had deprived him of his office without that due process of law which the Fourteenth Amendment secured to

[20] It is to be observed, however, that where a State in a fiscal capacity enters into contracts with private persons for services to be rendered or materials to be furnished, it is to be regarded *pro hac vice* as a private person and as bound accordingly. "When a State becomes a party to a contract as in the case before us, the same rules of law are applied to her as to private persons under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incident to her political sovereignty." Davis v. Gray (16 Wall. 203; 21 L. ed. 447). See also Curran v. Arkansas (15 How. 304; 14 L. ed. 705).

[21] 92 U. S. 480; 23 L. ed. 478.

him. In its opinion the Supreme Court of the United States say: "The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the Constitution. Irregularities and mere errors in the proceedings can only be corrected in the state courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all." And, directing its examination to this point, the court found that in fact due process of law had been provided in the trial of his right to office which he claimed. In thus assuming jurisdiction of the case, and in examining as to whether in fact due process of law had been had, it is apparent that the Supreme Court must have held that the right to the office in question was a property right within the terms of the provision of the Fourteenth Amendment which declares that no State shall deprive a person of life, liberty, or property without due process of law.

Again, in Foster v. Kansas,[22] the federal court assumed jurisdiction in a case where the Supreme Court of Kansas had ousted the plaintiff in error from office, the court in its opinion saying: "As the question of the constitutionality of the statute was directly raised by the defendant, and decided against him by the court, we have jurisdiction and the motion to dismiss must be overruled;" thus affirming the decision of the state court on the ground that the proceedings showed due process of law.

In Boyd v. Nebraska[23] the state supreme court had ousted Boyd from the office of governor and installed Thayer therein. On error to the federal Supreme Court, the judgment of the state Supreme Court was reversed, Thayer ousted, and Boyd reinstated as governor of the State, the ground for this action being that in the proceedings by which Boyd had been originally ousted, the state court had incorrectly decided that he was not a citizen of the United States and therefore disqualified for office. In its opinion, the court say: "As the allegation [of citizenship] . . . sets up a right and privilege claimed under the laws of the United

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22 112 U. S. 205; 5 Sup. Ct. Rep. 8; 28 L. ed. 696.

23 143 U. S. 135; 12 Sup. Ct. Rep. 375; 36 L. ed. 103.

States, this court must determine for itself the question of sufficiency of this allegation, and is not concluded by the view taken of that question by the Supreme Court of Nebraska." The statement that a federal right or privilege was here claimed, would not seem to be correct. No right or privilege attached to, or growing out of federal citizenship was claimed. The judgment of the state court should have been affirmed irrespective of the fact whether or not in truth Boyd was a citizen of the United States.[24]

In Wilson v. North Carolina[25] the Supreme Court of the United States was again called upon to determine whether the plaintiff in error had, by being ousted from office, been deprived of property without due process of law. In its opinion the court again affirm the doctrine that "the procedure provided by a valid state law for the purpose of changing the incumbent of a state

[24] In an emphatic dissenting opinion Justice Field said: "I dissent from the judgment just rendered. I do not think that this court has any jurisdiction to determine a disputed question as to the right to the governorship of a State, however that question may be decided by its authorities. . . . The fact that one of the qualifications prescribed by the State for its officers can only be ascertained and established by considering the provisions of the law of the United States in no way authorizes an interference by the General Government with the state action. Because an officer of a State must [according to the Constitution or statutes of that State] be a citizen of the United States, it does not follow that the tribunals of the United States can alone determine that fact, and that the decision of the State in respect to it can be supervised and controlled by the federal authorities. . . . The office of sheriff was not a right or privilege claimed under a law of the United States, but was a right or privilege claimed by the election under the laws of Missouri. The mere fact that it was necessary that the incumbent of the office should also be a citizen of the United States, did not of itself give him a right to that office. . . . My objection to the decision is not diminished by the fact that there is no power in this court to enforce its decision upon the State of Nebraska should resistance be made to it. Should the incumbent declared by this court not to be entitled to the office refuse to surrender it and the state authorities should stand by him in such refusal, what could be done about it? . . . If the right of this court to interfere in this case can be sustained, every candidate for office alleging that the successful party has not some qualification prescribed by statute, which can only be defined by reference to a federal law, will claim a right to invoke the interference of the federal judiciary to determine whether he ought or not to have been declared elected."

[25] 169 U. S. 586; 18 Sup. Ct. Rep. 435; 42 L. ed. 865.

office will not in general involve any question for review by this court. A law of that kind does but provide for the carrying out and enforcement of a policy of a State with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a federal question."

§ 84. Taylor v. Beckham.

The latest case upon the point under consideration is that of Taylor v. Beckham,[26] decided in 1900. This case arose out of the following facts. At a general election held in November, 1899, in Kentucky, William Goebel and J. C. W. Beckham were the democratic nominees for the offices of governor and lieutenant-governor respectively, and William S. Taylor and John Marshall were the republican candidates. The state board of election commissioners whose duty it was to canvass the returns, determined that Taylor and Marshall were elected, and they were thereupon inducted into office. Goebel and Beckham contested the election upon various grounds, boards of contest were organized, and reported their decisions to the General Assembly for its action thereupon as provided by law. These reports, which were approved by the Assembly, found that Goebel and Beckham had been elected. They were then duly sworn and inducted into office. In February, 1900, Goebel died and Beckham succeeded to the governorship. Taylor and Marshall, however, refused to recognize the validity of the proceedings whereby Goebel and Beckham had been declared elected, and declined to surrender the records and other papers pertaining to the office of governor or to vacate the executive offices in the capitol building at Frankfort. Whereupon Beckham brought an action in the nature of a quo warranto in the Circuit Court of the State against Taylor and Marshall. Judgment of ouster was rendered in favor of the plaintiff. The case was carried on appeal to the Court of Appeals of Kentucky and the judgment affirmed; whereupon a writ of error

[26] 178 U. S. 548; 20 Sup. Ct. Rep. 890; 44 L. ed. 1187.

was obtained by Taylor and Marshall from the Supreme Court of the United States. The Supreme Court dismissed the writ of error.

Two grounds for federal interference had been set up by the plaintiffs in error: (1) That the proceedings by which they had been ousted from office were not compatible with a republican form of government; (2) that they had been deprived of a property right without due process of law.

As to the first contention, the court held that the Commonwealth of Kentucky being in full possession of its faculties as a member of the Union, no exigency had arisen requiring the interference of the Federal Government to enforce the guaranty clause. As to the second point, the court say: "The contention is that, although the statute furnished due process of law, the General Assembly in administering the statute denied it, and that the Court of Appeals in holding to the rule that where a mode of contesting elections is specifically provided by the Constitution, or laws of a State, that mode is exclusive, and in holding that, as the power to determine was vested in the General Assembly of Kentucky, the decision of that body was not subject to a judicial revision, denied a right claimed under the federal Constitution. The Court of Appeals did, indeed, adjudge that the case did not come within the Fourteenth Amendment, because the right to hold the office of governor or lieutenant-governor of Kentucky was not property in itself, and being created by the Constitution, was conferred and held solely in accordance with the terms of that instrument and laws passed pursuant thereto, so that, in respect of an elective office, a determination of the result of an election, in the manner provided, adverse to a claimant, could not be regarded as a deprivation forbidden by that amendment."

The court, after an examination of authorities, declare that the Kentucky court had been correct in thus holding that a public office is not property, and say: "It is clear [then] that the judgment of the Court of Appeals, in declining to go behind the decision of the tribunal vested by the state Constitution and laws with the ultimate determination of the right to these offices, denied no right secured by the Fourteenth Amendment."

In assuming the position here taken as to non-property character of a public office and in dismissing the writ of error on that ground, it would seem that the court was scarcely in harmony with its preceding decisions, in several of which, as we have already seen, by assuming jurisdiction, and by examining the character of the processes by which the contests for office had been settled to see if they provided due process of law, it had assumed that as between two contestants for an office, the right to an office and its emoluments was a property right within the meaning of the Fourteenth Amendment.[27]

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[27] Thus Justice Brewer, in his dissenting opinion, says: "I agree fully with those decisions which are referred to [in the majority opinion], and which hold that as between the State and the office holder there is no contract right either to the term of office or to the amount of salary, and that the legislature may, if not restrained by constitutional provisions, abolish the office or reduce the salary. But when the office is not disturbed, when the salary is not changed, and when, under the Constitution of the State, neither can be by the legislature, and the question is simply whether one shall be deprived of that office and its salary, and both given to another, a different question is presented, and in such a case to hold that the incumbent has no property in the office, with its accompanying salary, does not commend itself to my judgment." Justice Brewer goes on to argue, however, that the judgment of the Court of Appeals of Kentucky should have been affirmed for the reason that due process of law had been observed. "But," he concludes, "because, as I understand the law, this court has jurisdiction to review a judgment of the highest court of a State ousting one from his office and giving it to another, and a right to inquire whether that judgment is right or wrong in respect to any federal question such as due process of law, I think the writ of error should not be dismissed, but that the judgment of the Court of Appeals of Kentucky should be affirmed." Justice Brown concurred in the opinion rendered by Justice Brewer.

A dissenting opinion was also rendered in this case by Justice Harlan. In this he argues not only that the writ of error should not have been dismissed, but that the court should adjudge that the decree in the state court had taken from Taylor and Marshall rights protected by the Fourteenth Amendment. In agreement with Justices Brewer and Brown he argues that as between two claimants a public office is property, and had been so held by the Supreme Court in previous cases. But he goes even further than this, and brings the right of office within the meaning of the term "liberty" as used in the Fourteenth Amendment. "What more directly involves the liberty of the citizen," he says, "than to be able to enter upon the discharge of the duties of an office to which he has been lawfully elected by his fellow citizens? What more certainly infringes upon his

liberty than for the legislature of the State, by merely arbitrary action, in violation of the rules and forms required by due process of law, to take from him the right to discharge the public duties imposed upon him by his fellow citizens in accordance with the law? . . . I grant that it is competent for a State to provide for the determination of contested election cases by the legislature. All that I now seek to maintain is the proposition that when a state legislature deals with a matter within its jurisdiction, and which involves the life, liberty or property of the citizen, it cannot ignore the requirement of due process of law. . . . Looking into the record before us, I find such action taken by the body claiming to be organized as the lawful legislature of Kentucky as was discreditable in the last degree and unworthy of the free people whom it professed to represent." After a statement of the facts which in his opinion justified this characterization of the action of the legislature, Justice Harlan concludes: "Those who composed that body seemed to have shut their eyes against the proof for fear that it would compel them to respect the popular will as expressed at the polls. Indignant, as naturally they were and should have been, at the assassination of their leader, they proceeded in defiance of all forms of law and in contempt of the principles upon which free government rest, to avenge that terrible crime, namely, the destruction by arbitrary methods of the right of the people to choose their chief magistrate. The former crime, if the offender be discovered, can be punished as directed by law. The latter should not be rewarded by a declaration of the inability of the judiciary to protect public and private rights, and thereby the rights of voters, against the wilful, arbitrary action of a legislative tribunal which, we must assume from the record, deliberately acted upon a contested election case involving the rights of the people and of their chosen representative in the office of governor without looking into the evidence upon which alone any lawful determination of the case could be made. The assassination of an individual demands the severest punishment which it is competent for human laws in a free land to prescribe. But the overturning of the public will, as expressed at the ballot box, without evidence or against evidence, in order to accomplish partisan ends, is a crime against free government, and deserves the execration of all lovers of liberty. . . . I cannot believe that the judiciary is helpless in the presence of such a crime. The person elected as well as the people who elected him, have rights that the courts may protect. To say that in such an emergency the judiciary cannot interfere is to subordinate the right to mere power, and to recognize the legislature of a State as above the supreme law of the land. . . . The doctrine of legislative absolutism is foreign to free government as it exists in this country. The cornerstone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate co-ordinate departments, legislative, executive, and judicial. And liberty regulated by law cannot be permanently secured against the assaults of power or the tyranny of a majority, if the judiciary must be silent when rights existing independently of human sanction, or acquired under the law, are at the mercy of legislative action taken in violation of due process of law."

CHAPTER XI.

FEDERAL SUPERVISION OF STATE ACTIVITIES; THE FOURTEENTH AMENDMENT.

§ 85. The Fourteenth Amendment.

In the chapters which have gone before, the manner in which the Federal Government is secured from interference on the part of the States has been considered. We turn now to a topic which, while closely related to this subject, is yet distinct from it. This topic is the extent of the legal power of the Federal Government to examine state laws and supervise their execution with a view to seeing that they do not infringe in any way upon the rights secured to individuals by the federal Constitution. In other words, the question now to be considered is not the maintenance of the supremacy of the Federal Government, but the protection of individuals in the enjoyment of the rights and immunities guaranteed to them by the federal Constitution.

Prior to the adoption of the Fourteenth Amendment in 1868 the laws of the individual States, so long as they related to subjects over which the States had the right of legislation, were not subject to examination in federal courts with a view to ascertaining whether they deprived anyone of life, liberty, or property without due process of law, or denied to anyone equal legal protection. The first nine amendments to the federal Constitution which enumerated the fundamental rights of individuals that might not be violated were, from the beginning, construed to limit not the States but only the Federal Government. Until, therefore, the Fourteenth Amendment was adopted there was, so far as the federal Constitution and laws were concerned, nothing to prevent the several States from enacting laws which denied to their own citizens the equal protection of the laws or deprived them of life, liberty, and property, without due process of law. The only limitations laid upon the States by the Constitution were that they should enact no bills of attainder, or *ex post facto*

laws, or laws impairing the obligation of contracts. As a matter of fact, indeed, all of the States had by their own Constitutions taken from their legislatures the power to enact laws upon certain specified topics, and forbidden them to violate certain declared principles of justice and right. But the adoption of these constitutional limitations was purely voluntary upon their part.

In 1868, however, as one of the results of the Civil War, the Fourteenth Amendment was adopted, which, after declaring that "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," goes on to provide that, "no State shall make or enforce any law which shall abridge the privileges and 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."

For a number of years after the adoption of this Amendment it was by no means certain that the effect of the above-cited provisions would not be to endow the United States Government with additional powers so great as fundamentally to alter the very nature of the Union itself. There can be no question but that the clauses of the Amendment which we have quoted were easily susceptible of an interpretation that would have given them this result, and that, at the time they were framed and adopted by Congress and ratified by the necessary number of state legislatures, there were very many who believed that they would, and desired that they should, work this revolutionary change in the American constitutional system.[1] Fortunately, however, as all must now believe, the Supreme Court has been led to give to these words a construction that robbed them of such an effect.

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[1] See especially the debates attendant upon the passage of the Civil Rights Bill of 1866, the doubts as to the constitutionality of which led to the adoption of the Fourteenth Amendment. See also the dissenting opinion of Justice Harlan in the Civil Rights Cases (109 U. S. 3; 3 Sup. Ct. Rep. 18; 27 L. ed. 835). See also especially Flack, *The Adoption of the Fourteenth Amendment.*

This the court has been able to do by the principles which it has laid down in the cases which follow.[2]

§ 86. The Slaughter House Cases.

The famous Slaughter House Cases,[3] decided in 1873, grew out of the following facts: The State of Louisiana in the exercise of its "police powers," had passed an act chartering a company, and giving to it the exclusive right to establish and maintain stock-yards and landing places and slaughter houses for the City of New Orleans, and providing that all animals intended for food should be slaughtered there. The plaintiffs in the cases that have since come to be known as the "Slaughter House Cases" alleged that this act was unconstitutional as tested by the federal Constitution on the several grounds that it was in violation of the Thirteenth Amendment in that it created an involuntary servitude upon the part of those who were compelled to resort to this privileged company; and that it was in violation of the Fourteenth Amendment in that it deprived persons of liberty and property without due process of law, denied to them the equal protection of the laws, and abridged the privileges and immunities of citizens in the United States. It is only with this last claim that we are now concerned.

As we shall later see, the Fourteenth Amendment has been construed to give to the federal courts the power of examining whether, in the exercise of their ordinary police and other powers, the States have denied to anyone due process of law or the equality of the laws, but the claim that the rights and immunities which were alleged to have been violated by the Louisiana statute were ones coming within the scope of the phrase "privileges or im-

[2] In the following pages there is not attempted a general examination of the Fourteenth Amendment, but only a consideration of the extent to which this addition to the Constitution may be said to have altered the general character of our constitutional system, especially with reference to the extent to which either Congress has been granted an increased legislative power, or the Federal Government endowed with a general supervisory jurisdiction over state legislation.

[3] 16 Wall. 36; 21 L. ed. 394.

munities of citizens of the United States" as used in the Fourteenth Amendment, raised the fundamental question whether or not, by that Amendment, the entire so-called "police powers" of the States had been placed within the direct legislative definition and control of Congress. This would have resulted from the fact that by the Amendment Congress is given authority to enforce its provisions by appropriate legislation. If, therefore, such a right as was here alleged to have been violated could be held to be a federal right it would be within the power of Congress to define it, and all other similar rights, and to impose penalties upon their violation, and thus to deprive the States of their entire police powers. These police powers, it is scarcely necessary to observe, cover almost the entire field of private rights, personal and proprietary, including, as they do, the general authority of the State to legislate regarding the social, economic, and moral welfare of its citizens. To have granted the contention of the plaintiffs would thus have made Congress, instead of the state legislatures, the possible source of the great body of private laws by which the citizen is governed. It is, therefore, not surprising that the court in its majority opinion should have said: "We do not conceal from ourselves the great responsibility which . . . devolves upon us. No questions so far reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several States to each other, and to the citizens of the States and of the United States, have been before this court during the official life of any of its present members."

The argument of the plaintiffs which found acceptance in the opinions rendered by the minority of the court was that the individual as a free man and citizen of a State, had, before the adoption of the Amendment, certain fundamental rights, privileges, and immunities, which were determined by state statutes and the general principles of the common law, and that by that Amendment the citizen became primarily a citizen of the United States, and only secondarily, by residence, a citizen of a particular State

of the Union, and that, therefore, these fundamental rights, privileges, and immunities which formerly belonged to him as a citizen of the State in which he lived now became his as a citizen of the United States, and, as such, no longer subject to abridgement by the States. Only by this interpretation, it was argued, could the clause of the Amendment which we are considering, be given any force whatever. Thus Justice Field, in his dissenting opinion, argued: "The Amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by state legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers . . . to such privileges and immunities as were before its adoption specially designated in the Constitution or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any state legislation of that character. But if the Amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence." [4]

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[4] As illustrative of, and as a partial enumeration of these federal privileges and immunities, Justice Bradley quoted the language used by Justice Washington in Corfield v. Coryell (4 Wash. C. C. 380) in interpreting the article of the Constitution which provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. "The inquiry is," said the Justice in that case, "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

The majority of the court were not able to accept this construction of the Amendment which, as we have seen, would have opened such possibilities of increasing the federal powers at the expense of those of the States. Referring to "the history of the times" in which the Thirteenth, Fourteenth and Fifteenth Amendments were adopted, the court found in them a unity of purpose,— the protection of the freed negroes,— and not an intention radically to alter the constitutional character of the Union. Attention is called to the fact that the Fourteenth Amendment implies and by its language recognizes a continuance of a distinction between federal and state citizenship, and that from this it follows that the privileges and immunities attaching to or growing out of each are to be distinguished. "Was it the purpose of the Fourteenth Amendment," the court ask, "by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the control of Congress the entire domain of civil rights heretofore belonging exclusively to the States? All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by state legis-

would perhaps be more tedious than difficult to enumerate. They may, however, be all 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 justly prescribe for the general good of the whole; the right of a citizen of one State to pass through, or reside in, any other State for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any 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."

lation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. . . . . But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relation of the state and federal governments to each other and of both of these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by Congress which proposed these Amendments, nor by the legislatures of the States, which ratified them."

With reference to the question that is immediately suggested, as to what are these distinctively federal rights which the States are not to infringe, the court says: "Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the States as such, and that they are left to the state governments for security and protection, and not by this article placed under the special care of the Federal Government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so. But lest it should be said that no such privileges and immunities are to be found if those we have

been considering are excluded, we venture to suggest some which owe their existence to the Federal Government, its national character, its Constitution, or its laws. One of these is well described in the case of Crandall v. Nevada.[5] It is said to be the right of the citizen of this great country, protected by implied guarantees of its Constitution, 'to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign countries are conducted, to the sub-treasuries, land offices, and courts of justice in the several States.' And, quoting from the language of Chief Justice Taney in another case, it is said 'that for all the great purposes for which the Federal Government was established, we are one people, with one common country, we are all citizens of the United States,' and it is, as such citizens, that their rights are supported by this court in Crandall v. Nevada. Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as the other citizens of that State. To these may be added the rights secured by the Thirteenth and Fifteenth Articles of

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5 6 Wall. 35; 18 L. ed. 745.

Amendment, and by the other clause of the Fourteenth, next to be considered."[6]

§ 87. Effect of Fourteenth Amendment upon Rights Enumerated in First Eight Amendments.

In *Ex parte* Spies[7] the point was urged upon the court that the privileges and immunities secured against federal infringement by the first eight Amendments to the federal Constitution, were, because so secured, federal privileges and immunities, which, according to the Fourteenth Amendment, and the doctrine of the Slaughter House Cases the States might not abridge or deny. The counsel for Spies in his argument said: "The position I take is this. Though originally the first ten Amendments were adopted as limitations on federal power, yet in so far as they secure and recognize fundamental rights — common law rights — of the man, they make them privileges and immunities of the man as a citizen of the United States, and cannot now be abridged by a State under the Fourteenth Amendment. In other words while the ten Amendments, as limitations on power, only apply to the

[6] Cooley, in his *Principles of Constitutional Law*, p. 245, gives the following enumeration of distinctively federal rights: "A citizen of the United States," he says, "as such has the right to participate in foreign and interstate commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, and to pass from State to State into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are coerced by its law. . . . So every citizen may petition the federal authorities which are set over him in respect to any matter of public concern; may examine the public records of the federal jurisdiction; may visit the seat of government without being subjected to the payment of a tax for the privilege; may be purchaser of the public lands on the same terms with others; may participate in the government if he comes within the conditions of suffrage, and may demand the care and protection of the United States when on the high seas, or within the jurisdiction of a foreign government. The privileges suggest the immunities. Wherever it is the duty of the United States to give protection to a citizen against any harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to federal citizenship." "One very plain and unquestionable immunity," Cooley adds, "is exemption from any tax burden, or imposition under state laws, as a condition to the enjoyment of any right or privilege under the laws of the United States."

[7] 123 U. S. 131; 8 Sup. Ct. Rep. 22; 31 L. ed. 80.

Federal Government, and not to the States, yet in so far as they declare or recognize rights of persons, these rights are theirs as citizens of the United States, and the Fourteenth Amendment as to such rights limits state power as the ten Amendments had limited federal power."

The court, however, found that, in fact, no right of Spies secured by the first eight Amendments had been violated, and that, therefore, it was not necessary to pass upon this constitutional point which his counsel had raised.

In Maxwell v. Dow,[8] however, the court found itself compelled to pass specifically upon this point. The court in its majority opinion denied the claim set up, asserting that the mere fact that a certain privilege or immunity was guaranteed against federal infringement did not operate to make such a privilege or immunity distinctively federal in character. With reference to the rights enumerated in the first eight Amendments, the court said: "In none are the privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the Federal Government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgement by the States of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against the federal governmental powers. The nature of the character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen." [9]

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[8] 176 U. S. 581; 20 Sup. Ct. Rep. 448; 44 L. ed. 597.

[9] Justice Harlan rendered a dissenting opinion in the course of which he said: "It seems to me that the privileges and immunities enumerated in

§ 88. Suffrage not a Necessary Incident of Citizenship.

In Minor v. Happersett[10] it was held that the suffrage is not a right springing from federal citizenship. This doctrine was declared in passing upon the claim made in that case by a woman that because of her federal citizenship she could not constitutionally be disqualified from voting on account of her sex. In passing upon this claim the court admitted that citizenship was not dependent upon sex, but denied that the right of suffrage was necessarily attached to the status of citizenship.[11]

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these Amendments belong to every citizen of the United States. They were universally so regarded prior to the adoption of the Fourteenth Amendment. 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 themselves and their posterity, the political community known as the people of the United States ordained and established the Constitution of the United States; and every member of that political community was a citizen of the United States. It was that community that adopted in the mode prescribed by the Constitution, the first ten Amendments; and what they had in view by so doing was to make it certain that the privileges and immunities therein specified — the enjoyment of which, the fathers believed, were necessary in order to secure the blessings of liberty — could never be impaired or destroyed by the National Government. . . . It does not solve the question before us to say that the first ten Amendments had reference only to the powers of the National Government, and not to the powers of the States. For, if, prior to the adoption of the Fourteenth Amendment, it was one of the privileges or immunities of citizens of the United States that they should not be tried for crime in any court organized or existing under national authority except by a jury composed of twelve persons, how can it be that a citizen of the United States may now be tried in a state court for crime, particularly for an infamous crime, by eight jurors, when that Amendment expressly declares that 'no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States?'"

[10] 21 Wall. 162; 22 L. ed. 627.

[11] The court say: "Sex has never been made one of the elements of citizenship in the United States. In this respect men have never had an advantage over women. The same laws precisely apply to both. The Fourteenth Amendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the Amendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship. The Amendment prohibited the State, of which she is a citizen, from abridging any of her privileges and immunities as a citizen of the United States; but it did not confer citizenship

§ 89. Legislative Power Granted Congress by the Fourteenth Amendment.

From the foregoing cases it appears that the clause of the Fourteenth Amendment which declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," has not given to the General Government any legislative or even supervisory power which it did not possess before the Fourteenth Amendment was adopted.

In another important case it has been held that the last clause of the Amendment which empowers Congress to enforce its provisions by appropriate legislation, does not give to that body a direct legislative power to define and establish the rights of life, liberty, and property of which the individual may not be deprived by the States without due process of law, or to define and establish what shall constitute the equal protection of the laws which the States may not deny to persons within their jurisdiction.

In 1875, in pursuance of an authority which it conceived to be granted by the Fourteenth Amendment, Congress passed a so-called Civil Rights Act, fixing generally the penalties to which state officials should be subject for depriving any citizen of the United States of any of the rights secured him by the Thirteenth and Fourteenth Amendments, and declaring specifically that negroes should receive the same treatment at public inns, hotels,

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on her. That she had before its adoption. . . . The Amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had. No new voters were necessarily made by it. Indirectly it may have had that effect, because it may have increased the number of citizens entitled to suffrage under the Constitution and laws of the States, but it operates for this purpose, if at all, through the States and the state laws, and not directly upon the citizen. It is clear, therefore, we think, that the Constitution has not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted." Continuing the court showed that in no case had the suffrage in the States been considered as co-extensive with citizenship, and concluded: "Certainly, if the courts can consider any question as settled, this is one. For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship did not necessarily confer the right of suffrage."

railways, theaters, etc., as that enjoyed by white persons. The importance of this act lay in the fact that by passing it Congress indicated that it interpreted the Fourteenth Amendment as giving it power not simply to punish persons who should deprive others of any of the rights mentioned in that Amendment, but as empowering itself to determine specifically what those rights should be. If this were to be accepted as the correct interpretation of the power of Congress under this Amendment, it was clear that the reserved powers of the States would henceforth be at the mercy of the federal legislative body; for thus the way would be opened to Congress, should it see fit, to convert by its statutes all private rights into federal rights and as such exclude them from state regulation or violation.

In the Civil Rights Cases,[12] decided in 1883, the court laid down, authoritatively and finally, the doctrine that it is not within the legislative power of Congress to define what are the civil rights of individuals, and to affix and enforce penalties for their denial by private persons. Hence the court held unconstitutional and void those portions of the Civil Rights Act of 1875 which attempted to do this. "Individual invasion of individual rights," the court say, "is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or injures them in life, liberty, or property without due process of law, or which denies to them the equal protection of the laws. It not only does this, but in order that the national will, thus declared, may not be a mere *brutum fulmen,* the last section of the Amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. . . . 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, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the Amendment." The im-

[12] 109 U. S. 3; 3 Sup. Ct. Rep. 18; 27 L. ed. 835.

portance of the doctrine declared in the Civil Rights Cases is seen when the results that would have followed from a different construction of the Amendment are considered. If the Civil Rights Act had been held appropriate for enforcing the prohibitions of that article it would have been, as the court observes, difficult to set limits to the powers of Congress. With equal authority, that body would have the right to enact a detailed code of laws for the enforcement and protection of all the rights of life, liberty, and property, and itself to prescribe what should constitute due process of law in every possible case.[13]

It will have been noticed that the doctrine of the Civil Rights Cases depended in large measure upon the assertion that the prohibitions of the Fourteenth Amendment were directed exclusively against state acts, that is, acts authoritatively sanctioned by the States as such, or officially performed by their agents, and that they had not reference to the acts of private individuals. The doctrine had already been established in a line of cases decided prior to the Civil Rights Cases.

In Strauder v. West Virgina[14] it was held that a state law which excluded negroes from jury service was unconstitutional as a denial to members of that race of the equal protection of the laws. In Virginia v. Rives[15] the question was not as to the existence of a state law excluding negroes from jury service, but as

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[13] As construed in the Civil Rights Cases it is to be noted that the federal legislative power granted by the Fourteenth Amendment is narrower than that granted by the enforcement clause of the Thirteenth Amendment. This distinction the court in its majority opinion in the Civil Rights Cases point cut in the following language: "This [Thirteenth] Amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect, it abolished slavery and established universal freedom. Still legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States."

[14] 100 U. S. 303; 25 L. ed. 664.

[15] 100 U. S. 313; 25 L. ed. 667.

to the administration of a law, not in terms discriminative, in such a way as to exclude negroes from juries. This suit was sought to be removed into the federal courts under the provision of section 641 of the Revised Statutes.[16] Without deciding whether or not Congress had, under the enforcement clause of the Fourteenth Amendment, the power to grant relief in cases such as that presented by the petitioner, the Supreme Court held that the suit was not within the terms of the statute.

In *Ex parte* Virginia[17] a somewhat different state of facts was presented. Here there was no state law the constitutionality of which was questioned, but a judge of a state court charged by the law of that State with the duty of selecting jurors indicted in a federal court for excluding from the grand and petit jury list a certain individual because of his race or color, in violation of a provision of the Act of Congress of 1875. Upon a petition of the accused to the Supreme Court of the United States for a writ of habeas corpus or a writ of certiorari to bring up the record of the lower court in order that he might be dismissed, the Supreme Court denied the writs, holding, in effect, that this act of the judge, involving no necessary exercise of judicial discretion, and committed by him in his official capacity as judge, was an act of the State which he represented, and as such came within the prohibition of the Fourteenth Amendment. The opinion declares: "The prohibitions of the Fourteenth Amendment are addressed to the States. The constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was

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[16] Sec. 641. "When any civil suit or criminal prosecution is commenced in any state court for any cause whatsoever against any person who is denied, or cannot enforce, in the judicial tribunals of the State, or in any part of the State where such prosecution is pending, any right secured to him by any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States, . . . such suit or prosecution may, upon the petition of each defendant, filed in said court at any time before the trial, or final hearing of the case, stating the facts, and verified by oath, be removed before trial into the next circuit court of the United States to be held in the district where it is pending."

[17] 100 U. S. 339; 25 L. ed. 676.

given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated a State, but upon the persons who are the agents of the State in the denial of the rights which were intended to be secured. Such is the Act of March 1, 1875, 18 Stat. at L. 336, and we think it was fully authorized by the Constitution. . . . . We do not perceive how holding an office under a State and claiming to act for the State can relieve the holder from the obligation to obey the Constitution of the United States, or take away the power of Congress to punish his disobedience.[18]

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[18] In this case Justice Field rendered a dissenting opinion, in which he assumed, in the first place, that so much of the Act of 1875 as attempted to regulate the selection of jurors in state courts was unconstitutional and void; in the second place, that the selection of jurors by the judge was a judicial act involving an exercise of discretion and judgment, and, therefore, not subject to enforcement in a particular manner by statute or mandamus, in any event; and, in the third place, that the right to serve as a juror is a political and not a civil right, and therefore not one, the equal enjoyment of which is secured to all by the Fourteenth Amendment. With reference to the purpose for which the war amendments had been adopted Justice Field said: "They do not, in terms, contravene or repeal anything which previously existed in the Constitution and those Amendments. Aside from the extinction of slavery, and the declaration of citizenship, their provisions are merely prohibitory upon the States; and there is nothing in their language or purpose which indicates that they are to be construed or enforced in any way different from that adopted with reference to previous restraints upon the States. The provision authorizing Congress to enforce them by appropriate legislation does not enlarge their scope, nor confer any authority which would not have existed independently of it. No legislation would be appropriate which should contravene the express prohibitions upon Congress previously existing, as, for instance, that it should not pass a bill of attainder or an *ex post facto* law. Nor would legislation be appropriate which should conflict with the implied prohibitions upon Congress. They are as obligatory as the express prohibitions. The Constitution, as already stated, contemplates the existence and independence of the States in all their reserved powers. . . . I cannot think I am mistaken in saying that a change so radical in the relation between the federal and state authorities, as would justify legislation interfering with the independent action of the different departments of the state governments, in all matters over which the States retain jurisdiction, was never contemplated by the recent Amendments. The people, in adopting them, did not suppose that they were altering the fundamental theory of their dual system of governments."

These general principles — that the prohibitions of the Amendment are upon the State and not upon individuals; that Congress has no primary and direct legislative authority to define and enforce the rights guaranteed by the Amendment; that the general "police powers" are still possessed by the States; — have not been departed from by the court in subsequent cases. In Logan v. United States,[19] decided in 1892, the court, after a review of previous adjudications, say: "The whole scope and effect of this series of decisions is that, . . . certain fundamental rights, recognized and declared, but not granted or created in some of the Amendments to the Constitution, are thereby guaranteed only against violation or abridgement by the United States or by the States, as the case may be, and cannot, therefore, be affirmatively enforced by Congress against unlawful acts of individuals." The court, however, add the cautionary remark that "every right created by, arising under or dependent upon the Constitution of the

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Some commentators have found difficulty in harmonizing the decision in *Ex parte* Virginia with that rendered in Virginia v. Rives. Thus, for example, Wise in his *Treatise on American Citizenship*, p. 205, says: "It is impossible to reconcile the decision in *Ex parte* Virginia with the others. . . . As they stand the two cases of Virginia v. Rives and *Ex parte* Virginia present an amusing line of demarcation. In Virginia v. Rives the misconduct of a sheriff in the method of summoning a jury was declared not to be the action of the State and to be remediable on appeal. In the case of *Ex parte* Virginia, decided on the same day, the misconduct of a judge in not summoning a proper jury was held to be the action of the State, remediable by the indictment of the judge although the State had done no wrong. The only legal principle to be deduced from the two decisions is that the boundary line between one officer who is the State and an officer who is not the State, lies somewhere between a sheriff and a judge."

There is, however, no real incongruity in the cases, and Wise's difficulty arises from an imperfect understanding of the actual point decided in Virginia v. Rives. In that case, it was held, as we have seen, simply that the case did not come within the section 641 of the Revised Statutes, under which removal had been had from the state to the federal courts. Thus, in effect, all the court decided was, not that Congress had no power under the Fourteenth Amendment to punish or correct such an act as that of the sheriff complained of, but that it had not, in fact, so legislated. In *Ex parte* Virginia the act complained of was construed to be within the scope of the prohibitions of the Act of Congress of 1875.

[19] 144 U. S. 263; 12 Sup. Ct. Rep. 617; 36 L. ed. 429.

United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution may in its discretion seem most eligible and best adapted to attain the object."

See also in James v. Bowman,[20] decided as late as 1903, the cases are re-examined and the principles declared in them fully approved.

Although by the decision in the Slaughter House and subsequent cases in the Supreme Court, the command laid upon the States to respect federal privileges and immunities has thus been shorn of all but declaratory significance, and the general police powers confirmed in the Commonwealths, the other prohibitions of the first section of the Fourteenth Amendment have been so construed by the Supreme Court as to give to the Federal Government a very extensive supervisory jurisdiction over state legislation which it did not possess prior to 1868. Whenever a claim has been made that a state law has worked a deprivation of life, liberty, or property without due process of law, or has resulted in a denial to any person of the equal protection of the laws, the federal courts have assumed jurisdiction and declared such statutes void. Illustrations of this federal supervisory power will appear throughout this treatise.

It is true that, in the Slaughter House Cases, the court declared, relative to the clause providing for the equal protection of the laws: "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision," but this *obiter dictum* has been repeatedly overruled.

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[20] 190 U. S. 127; 23 Sup. Ct. Rep. 678; 47 L. ed. 979, as to the power of Congress to provide for the punishment of individuals interfering with. or conspiring to interfere with the exercise by others of rights created by or dependent upon the federal constitution or laws, see *Ex parte* Yarbrough, 110 U. S. 651; 4 Sup. Ct. Rep. 152; 28 L. ed. 274; U. S. v. Waddell, 112 U. S. 76; 5 Sup. Ct. Rep. 35; 28 L. ed. 673; Motes v. U. S., 178 U. S. 458; 20 Sup. Ct. Rep. 993; 44 L. ed. 1150.

§ 90. Summary.

By way of résumé we may say that, as interpreted by the Supreme Court, the adoption of the Fourteenth Amendment has not brought about any fundamental change in our constitutional system. No new subjects have been brought within the sphere of direct control of the Federal Government. No new privileges and immunities of federal citizenship have been created or recognized. To Congress has been given no new direct primary, legislative power. It has not been authorized by the Amendment to determine and define the privileges and immunities of federal citizens, nor to define and affirmatively to provide for the protection of the rights of life, liberty, and property, nor by direct legislation to enumerate and describe the privileges which shall constitute the equal protection of the laws. The only legislative power granted to Congress by the Amendment, is the power to provide modes of relief in cases where the States have deprived individuals or corporations of life, liberty, or property without due process of law, or denied to anyone within their jurisdiction the equal protection of the laws. The supervisory powers of the federal courts has been enormously increased; as, by the Amendment, they may examine every claim of illegal violations by States of the prohibitions laid upon them by the Amendment, and where the claim is sustained grant the necessary relief, either by the issuance of the appropriate writ, or by holding void the offending state laws. In fine, then, the Fourteenth Amendment has operated rather as a limitation upon the powers of the States than as a grant of additional powers to the General Government.

CHAPTER XII.

INTERSTATE RELATIONS; FULL FORCE AND CREDIT CLAUSE.

§ 91. States Independent of One Another.

In the chapters which have been gone before the constitutional relations which exist between the Federal Government upon the one side and the State upon the other side have been considered. In the present chapter a description will be given of the relations which exist between the several States.

Except as otherwise specifically provided by the federal Constitution, the States of the American Union, when acting within the spheres of government reserved to them, stand toward one another as independent and wholly separated States. The laws of the State have no force, and their officials have here no public authority, outside of their own territorial boundaries. As to all these matters their relations *inter se* are governed by the general principles of Private International Law or, as otherwise termed, the Conflict of Laws.

During the colonial period the judgments of the courts of the colonies were, as to one another, strictly foreign judgments. That is, they could be impeached for fraud or prejudice, and their merits re-examined. The inconvenience of this state of affairs was soon recognized, and in the Articles of Confederation it was provided that "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."[1] The important difference between this provision and the corresponding one in the present Constitution is that in the latter Congress is given authority to fix by statute the manner in which these acts, records, and proceedings shall be proved and to determine the effect that shall be given them.

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[1] Article IV.

§ 92. Congressional Legislation.

By a law passed in 1790 Congress provided: "That the acts of the legislature of the several States shall be authenticated by having the seal of their respective States affixed thereto; that the records and judicial proceedings of the courts of any State shall be proved or admitted in any court within the United States by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken." [2]

In 1809 this act was supplemented by one which, after providing for the authentication of other than judicial records, declared, in its second section: "And be it further enacted, that all the provisions of this act, and the act to which this is a supplement [Act of 1790] shall apply as well as to the public acts, records, office books, judicial proceedings, courts, and offices of the respective territories of the United States and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, courts and officers of the several States." [3]

In Mills v. Duryee[4] decided in 1813, the Supreme Court, construing these acts held that by them Congress had not only provided for the admission of authenticated judgments of a State as evidence in the courts of the other States in the Union, but that it had, in execution of the constitutional provision, declared that they should be conclusive evidence of all matters properly adjudicated therein.

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[2] 1 U. S. Stat. at L. 122.

[3] 2 U. S. Stat. at L. 298. These two sections are united in section 905 of the Revised Statutes. In a law enacted in 1895 it is provided by Congress that: "The pamphlet copies of the statutes and the bound copies of the Acts of each Congress shall be legal evidence of the laws therein contained in all the courts of the United States and of the several States therein." Section 73, Act of Jan. 2, Ch. 23 (28 Stat. at L. 601).

[4] 7 Cr. 481; 3 L. ed. 411.

This full faith and credit clause, it is to be observed, has reference only to the States, and not to the Territories or to the District of Columbia. Therefore it has been decided that the act of 1804, in as far as it has reference to the Territories and to the District of Columbia, rests, for its constitutionality, upon other clauses of the Constitution. Thus in Embry v. Palmer[5] the court say: "So far as this statutory provision relates to the effect to be given to the judicial proceedings of the States, it is founded on article IV, section I, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the National Government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments of its courts is co-extensive with its territorial jurisdiction. That the Supreme Court of the District of Columbia is a court of the United States, results from the right which the Constitution has given to Congress of exclusive legislation over the District. Accordingly, the judgments of the courts of the United States have invariably been recognized as upon the same footing, so far as concerns the obligation created by them, with domestic judgments of the States, wherever rendered and wherever sought to be enforced."

The same reasoning that in Embry v. Palmer seems to support the power of Congress to give to judgments rendered in the District of Columbia full force and credit in the States, is sufficient to support its power to give equal force in the States to judgments rendered in the Territories and insular possessions of the United States, and *vice versa* as to state judgments sued upon in the Territories or in the insular possessions.

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[5] 107 U. S. 3; 2 Sup. Ct. Rep. 25; 27 L. ed. 346.

§ 93. Federal Judgments and Decrees.

In numerous cases it has been held that full force and credit is to be given to judgments of federal courts obtained in one State or Territory when sought to be enforced in the federal courts in another State or Territory, or the District of Columbia. This is due to the fact that, as the Supreme Court say in Claflin v. Houseman,[6] "The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and, within its jurisdiction, a paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State, concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kinds of rights and not restrained by its Constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under state laws may be prosecuted in the state courts, and also, if the parties reside in different States, in the federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it sees fit, give to the federal courts exclusive jurisdiction."

§ 94. Full Faith and Credit Clause Applies only to Civil Judgments and Decrees.

It seems scarcely necessary to say that the "full force and credit" clause has reference only to civil judgments. No State, it has been held, is by this provision compelled to lend its aid in the enforcement of the penal laws of another. This was definitely determined in Wisconsin v. Pelican Insurance Company.[7] In this case original suit had been brought in the Supreme Court of the United States by the State of Wisconsin upon

[6] 93 U. S. 130; 23 L. ed. 833.

[7] 127 U. S. 265; 8 Sup. Ct. Rep. 1370; 32 L. ed. 239.

a judgment obtained in its own courts against an insurance company, a Louisiana corporation, for penalties imposed by a statute of Wisconsin for not making returns to the insurance commissioners of the State. The federal court held that the grant to it of original jurisdiction in suits between a State and citizens of another State, though given in general terms, was not to be construed to extend to actions brought by a State to enforce even indirectly in another jurisdiction a provision of its own penal law. The court say: "The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all. . . . The rules that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment."

§ 95. Full Faith and Credit Clause Establishes a Rule of Evidence.

The application of the foregoing rule, the court go on to say, is not affected by the full faith and credit clause. That clause, and the acts of Congress under it, it is declared, establish a rule of evidence rather than of jurisdiction. "While they make the record of a judgment, rendered after due notice in one State, conclusive evidence in the courts of another State or of the United States, of the matter adjudged, they do not affect the jurisdiction either of the court in which the judgment is rendered or of the court in which it is offered in evidence. Judgments recovered in one State of the Union, when proved in the courts of another government, whether state or national, within

the United States, differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for a fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. In the words of Justice Story, . . . 'the Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It does not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.'"

As being simply evidence, judgments of the courts of one State, when sued upon in another State, are subject, as regards procedure and remedies, to the law of the latter State. For example, the statute of limitations of the State where suit is brought is applied even though it provides a shorter term of years than that existing in the State in which the judgment was originally obtained.[8]

It has been held in numerous cases that each State of the Union may enforce in its own courts which have jurisdiction of the parties and subject-matters, civil rights of action depending solely upon the statutes of another State, provided there be no local policy of the forum inconsistent therewith. Thus in Dennick v. Central R. R. Co.[9] with reference to a suit for damages brought in New York under an act of New Jersey, the court say: "It is scarcely contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offense was committed, for it is, though a statutory remedy,

[8] McElmoyle v. Cohen, 13 Pet. 312; 10 L. ed. 177; Bacon v. Howard, 20 How. 22; 15 L. ed. 811.

[9] 103 U. S. 11; 26 L. ed. 439.

a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the State, but when the act is done for which the law says the person shall be liable and the action, by which the remedy is to be enforced, is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy or the jurisdiction of the courts to enforce it is in any manner dependent on the question whether it is a statutory right or a common law right. Wherever, by either the common law or the statute law of a State, a right of action has become fixed, and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."[10]

In Slater v. Mexican National R. R. Co.,[11] applying the same doctrine, the court say: "When such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori* with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside of its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio* which, like other obligations, follows the person and may be enforced wherever the person may be found."

In this case the court go on to declare, however, that if the only source of obligation be the law of the place of the act, that law determines not merely the existence of the obligation, but its extent. "It seems to us unjust," the court say, "to allow the plaintiff to come here absolutely depending on the foreign law

[10] See also Stewart v. B. & O. R. R. Co., 168 U. S. 445; 18 Sup. Ct. Rep. 105; 42 L. ed. 537.

[11] 194 U. S. 120; 24 Sup. Ct. Rep. 581; 48 L. ed. 900.

for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

This doctrine is again affirmed and applied in Atchison, etc., R. Co. v. Sowers.[12]

§ 96. Judgments in Rem and in Personam.

The validity of judgments or decrees in States other than those in which they are obtained depends upon the court which rendered them having obtained jurisdiction. In order to obtain jurisdiction in actions *in rem,* the *res* must be located in the State. In all actions service of notice of the commencement of the suit must be had upon the defendants. In actions *in rem* this service need not be actual, but may be constructive, that is, by publication In actions *in personam,* however, actual service is required. Mere constructive service will not warrant a personal judgment or decree which may be sued upon in another jurisdiction. This doctrine is carefully laid down in Pennoyer v. Neff.[13] In its opinion in this case the court say: "It is in virtue of the State's jurisdiction over the property of the non-residents situated within its limits that its tribunals can inquire into that non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-residents have no property in the State, there is nothing upon which the tribunals can adudicate. . . . Where a party is within a territory, he may justly be subjected to its process, and bound personally by the judgment pronounced on such process against him. Where he is not within such territory, and is not personally subject to its laws, if on account of his supposed or actual property being within the territory, process by the local laws may, by attachment, go to compel his appearance, and for his default to appear, judgment may be pronounced against him; such a judgment must, upon general principles, be deemed to bind him only to the extent of such

[12] 213 U. S. 366; 29 Sup. Ct. Rep. 397; 53 L. ed. 695.

[13] 95 U. S. 714; 24 L. ed. 565.

property, and cannot have the effect of a conclusive judgment *in personam,* for the plain reason that, except so far as the property is concerned, it is a judgment *coram non judice*."

The inability of the courts of one State to effect by their judgments or decisions property having its legal situs in another State is illustrated in the recent case of Fall v. Eastin,[14] in which it was held that a deed to a piece of land located in Nebraska made by a commissioner in the State of Washington under the order of a court of that State need not, under the full faith and credit clause, be recognized in the former State. The court point out that had the plaintiff in error obeyed the order of the Washington court and made, as directed, a deed of conveyance, that conveyance would have received recognition in the Nebraska courts. But he having refused to do this, and the deed having been made by a commissioner, the conveyance was to be considered as a part of the proceedings in the court which ordered it, which court was without power to affect the title of real property not within the State. As to this the court quote from Watkins v. Holman,[15] where it is said: "A court of chancery, acting *in personam* may well declare the conveyance of land in any other State, and may enforce its decree by process against the defendant. But neither the decree itself nor any conveyance under it, except by the person in whom title is vested, can operate beyond the jurisdiction of the court."

§ 97. Nul Tiel Record.

From the foregoing it clearly appears that in all cases in which suit is brought in one State upon a judgment rendered in another State, the court in which the suit is brought may examine whether the tribunal in which the judgment sued upon was rendered had jurisdiction to render a personal judgment. In Fauntleroy v. Lum[16] the interesting question was raised whether a court in which suit is brought upon a judgment obtained in another State may examine into the original facts upon which that judgment

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[14] 30 Sup. Ct. Rep. 3.

[15] 16 Pet. 25; 10 L. ed 873.

[16] 210 U. S. 230; 28 Sup. Ct. Rep. 641; 52 L. ed. 1039.

was based, and refuse to give full faith and credit to the judgment if it be found that these facts were such as would not have created a legal claim under the law of the State in which enforcement of the judgment thereupon is being sought. In this case the plaintiff, a citizen of Mississippi, obtained in Missouri a judgment against another citizen of Mississippi upon whom personal service had been obtained while he was temporarily in Missouri, in a suit brought upon a contract in cotton futures entered into in Mississippi in which State such futures were prohibited by law. The case finally reaching the federal Supreme Court, that tribunal held that, the Missouri court having had jurisdiction to render a personal judgment against the defendant, the full faith and credit clause obligated the courts of Mississippi to give to the judgment full force and credit. The court admitted that in the opinion in Wisconsin v. Pelican Insurance Co.[17] language was used which might imply a right in a court to examine as to the original basis of the foreign judgment sued upon, but these words were declared *obiter,* and the doctrine of that case limited to the precise point decided.

In a dissenting opinion in Fauntleroy v. Lum, concurred in by four justices, it was argued that in Wisconsin v. Pelican Insurance Co. the court had held that the full faith and credit clause did not preclude an examination into the basis of the foreign judgment, and rightfully so, inasmuch as at the time of the adoption of the Constitution the rules of comity universally prevailing did not require a sovereignty to give effect to a judgment of another sovereignty when to do so would be to enforce a contract illegal and prohibited by the local law, when both the contract and all the acts done in pursuance thereof had taken place in the State where enforcement of the judgment was sought.

In this dissent reliance is also placed on Anglo-American Provision Co. v. Davis Provision Co.[18] in which it was held that a judgment rendered in Illinois against one corporation in favor of another, both corporations being foreign to New York, was not

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[17] 127 U. S. 265; 8 Sup. Ct. Rep. 1370; 32 L. ed. 239.

[18] 191 U. S. 373; 24 Sup. Ct. Rep. 92; 48 L. ed. 225.

enforceable in the courts of New York, because the statutes of that State did not give the court jurisdiction over such an action as that in which the enforcement was sought. The Supreme Court say: "The Constitution does not require the State of New York to give jurisdiction to the [state] Supreme Court against its will. If the plaintiff can find a court into which it has a right to come, then the effect of the judgment is fixed by the Constitution and the act in pursuance of it which Congress has passed. But the Constitution does not require the State to provide such a court. If the State does provide a court to which its citizens may resort in a certain class of cases, it may be that citizens of other States of the Union also would have a right to resort to it in cases of the same class. But that right even when the suit was upon a judgment of another State would not rest on the first section of article IV, . . . but would depend on the second section entitling the citizens of each State to all privileges and immunities of citizens in the several States."

It has been held that the "full faith and credit clause does not operate to give effect in another State to a state statute exempting from taxation the evidence of the state debt so as to defeat the collection of a tax levied by that other State upon portions of the debt held by persons there residing. This was decided by Bonaparte v. Tax Court,[19] the court saying: "It is insisted . . . that the immunity asked for arises from Article IV, Section 1, of the Constitution. . . . We are unable to give such an effect to this provision. No State can legislate except with reference to its own jurisdiction. One State cannot exempt property from taxation in another. Each State is independent of all the others in this particular. . . . The debt was registered, but that did not prevent it from following the person of its owner. The debt still remained a chose in action, with all the incidents which pertain to that species of property. It was 'movable' like other debts, and had none of the attributes of 'immovability.' The owner may be compelled to go to the debtor State to get what is owing to him, but that does not affect his citizenship or his

[19] 104 U. S. 592; 26 L. ed. 845.

domicile. The debtor State is in no respect his sovereign, neither has it any of the attributes of sovereignty as to the debt it owes, except such as belong to it as a debtor. All the obligations which rest on the holder of the debt as a resident of the State in which he dwells, still remain, and as a member of society he must contribute his just share toward supporting the government whose protection he claims and to whose control he has submitted himself."

§ 98. Marriage and Divorce.

The force and meaning of the "full faith and credit" clause of the Constitution has been especially worked out in connection with the subject of marriage and divorce and it will, therefore, be proper to state briefly the positions that the Supreme Court has taken upon this point.

Generally speaking, it has been held in the United States that jurisdiction to grant a divorce depends upon the domicile of the complainant. With hardly an exception, all of the States of the Union recognize the possibility of the wife obtaining a domicile separate from that of her husband. Until recently, however, a few States (among them New York) held that where the husband and wife were domiciled in different States, decrees of divorce granted in either State would not have to be given full faith and credit in the other States. The unconstitutionality of this doctrine was, however, declared by the United States Supreme Court in Atherton v. Atherton.[20]

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[20] 181 U. S. 155; 21 Sup. Ct. Rep. 544; 45 L. ed. 794.

In all European countries, and in Spanish America, the possibility of the wife (who has not obtained a judicial separation) having a nationality, domicile, or residence apart from her husband is not recognized. A few of the Protestant States of Germany, and possibly other States, permit a wife living apart from her husband to secure naturalization and then to get a divorce, but most States refuse to recognize such a divorce as valid. De Bauffremont v. De Bauffremont, Dalloz, 1878, II, I, 1878, 1, 201; 2 Beale's Cases on Conflict of Laws, 99 (France); *In re* W's Marriage, 25 Clunet, 385; 1 Beale's Cas. 428 (Austria). In England the courts now recognize the possibility of a wife deserted by her husband obtaining a divorce in the State where they last lived together, irrespective of his present domicile. Armytage v. Armytage,

One State of the Union is, of course, not obliged to recognize the validity of a divorce granted by a court of another State unless that State had jurisdiction to grant it,— a jurisdiction which, as just said, is held to depend upon the domicile of one or both of the parties. No valid decree of divorce can, therefore, be granted, on constructive service, by the courts of a State in which neither party is domiciled.[21]

Where the plaintiff has not a *bona fide* domicile in the State, a court cannot render a decree binding in other States even if the non-resident defendant voluntarily enters a personal appearance.[22] Of course, however, there is nothing to prevent courts of one State from recognizing, if they see fit, a decree thus granted in another State. The provision of the federal Constitution is brought into force only when state courts refuse to grant full faith and credit.[23]

Finally it should be said that in all cases where the defendant has not been summoned within the State, or has not voluntarily appeared, the decree that is rendered has no extraterritorial force except as dissolving the matrimonial status. It cannot control in an extraterritorial manner questions of property rights, custody of children and the payment of alimony.

1898, Pr. 179. In most European States a divorce will be recognized only if obtained in the country to which the parties owe allegiance. In England the divorce will be recognized only when obtained at the domicile of the husband. The English court has recently recognized an American divorce obtained at the wife's domicile, where the husband was domiciled in another American State which recognized the divorce. Armtage v. Attorney-General, 22 T. L. R. 306. The court, however, took occasion to reiterate the general principle that "it is the husband's domicile which decides the tribunal to try the cause. In Scotland and the other countries governed by the Roman-Dutch law there is no requirement whatever of nationality or domicile, but residence of the parties for a certain time within the State is sufficient. Weatherley v. Weatherley, Transvaal, Prov. Rep. 66; 1 Beale's Cas. 420." This note is substantially quoted from the article "Constitutional Protection for Decrees of Divorce," by Joseph H. Beale, Jr., in the *Haward Law Review,* June, 1906 (XIX, 589).

[21] Bell v. Bell, 181 U. S. 175; 21 Sup. Ct. Rep. 551; 45 L. ed. 804.

[22] Andrews v. Andrews, 188 U. S. 14; 23 Sup. Ct. Rep. 237; 47 L. ed. 366.

[23] Lynde v. Lynde, 181 U. S. 183; 21 Sup. Ct. Rep. 555; 45 L. ed. 810.

Until the decision in 1906 of the case of Haddock v. Haddock,[24] it had been supposed that a decree of divorce granted the husband or wife by a court of the State in which he or she was domiciled, if the notice of the beginning of the suit required by the local law had been served actually or constructively upon the other party, was in all cases valid in other States. This, it had been thought, had been determined in Atherton v. Atherton.[25]

In Atherton v. Atherton a divorce had been granted, on the ground of desertion, to a husband in Kentucky whose wife had left him and taken up residence in New York. She had not appeared in the suit, but notice had been served upon her by mail. The highest court of New York refused to give effect to this decree upon the ground that the wife had been forced to leave her husband because of cruel treatment, had thereby been entitled to obtain a domicile apart from him, and had not appeared or been personally served with process. The Supreme Court of the United States, however, reversed this holding of the New York court, saying that, inasmuch as the Kentucky court had jurisdiction of the complainant, and constructive service had been had upon the defendant, its decree had to be recognized as conclusively establishing not only the fact of the divorce, but that the wife had abandoned her husband. The opinion declared: "We are of opinion that the undisputed facts show that such efforts were required by the statutes of Kentucky, and were actually made to give the wife actual notice of the suit in Kentucky as to make the decree of the court there, granting a divorce upon the grounds that she had abandoned her husband, as binding on her as if she had been served with notice in Kentucky, or had voluntarily appeared in the suit. Binding her to the full extent, it established beyond contradiction, that she had abandoned her husband, and precludes her from asserting that she left him on account of his cruel treatment. To hold otherwise would make it difficult, if not impossible, for the husband to obtain a divorce for the cause alleged, if it actually existed. The wife not being within the

[24] 201 U. S. 562; 26 Sup. Ct. Rep. 525; 50 L. ed. 867.

[25] 181 U. S. 155; 21 Sup. Ct. Rep. 544; 45 L. ed. 794.

State of Kentucky, if constructive notice, with all the precautions prescribed by the statutes of that State, were insufficient to bind her by a decree dissolving the bonds of matrimony, the husband could only get a divorce by suing in the State in which she was found; and by the very fact of suing her there, he would admit that she had acquired a separate domicile (which he denied), and would disprove his own ground of action, that she had abandoned him in Kentucky."

The court in its opinion was, however, careful to confine the doctrine laid down to the particular case before it. "This case," it declared, "does not involve the validity of a divorce granted on constructive service, by the court of a State in which only one of the parties ever had a domicile, nor the question to what extent the good faith of the domicile may be afterward inquired into. In this case, the divorce in Kentucky was by the court of the State which had always been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky." The court did, however, affirm the general doctrine that "the purpose and effect of a decree of divorce from the bond of matrimony by a court of competent jurisdiction are to change the existing status or domestic relations of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind the other. A husband without a wife, or a wife without a husband, is unknown to the law."

The facts of the case of Haddock v. Haddock[26] very much resembled those of Atherton v. Atherton. The only important difference, if indeed it was an important difference, was that here the decree which was sought to be used as conclusive in another State, had been granted the husband by the courts of a State which was not the matrimonial domicile, but was the then domicile of the husband. The wife, residing in the State of the original matrimonial domicile, had received only constructive notice. The

[26] 201 U. S. 562; 26 Sup. Ct. Rep. 525; 50 L. ed. 867.

courts of the State of the wife's domicile refused to recognize the validity of this decree, on the ground that the separation had occurred through the fault of the husband, and their action was upheld by the federal Supreme Court, that court thus, in effect, deciding that the husband, though divorced in the State (Connecticut) where he had obtained his decree, was not divorced in another State (New York) where his wife — or former wife — resided. In effect, then, limiting the case to the particular facts involved, the doctrine was laid down that where the complainant has abandoned the wife, and obtained a domicile in a State, other than that of the original matrimonial domicile, and only constructive service has been had upon the defendant, no decree of divorce can be granted to which full force and credit must be given in the courts of other States.

In order to distinguish this case from previous adjudications, and especially from that of Atherton v. Atherton, the court, in its majority opinion, reviewed the whole subject and laid down the following doctrines as having been definitely established: "First. The requirement of the Constitution is not that some, but that full, faith and credit shall be given by States to the judicial decrees of other States. That is to say, where a decree rendered in one State is embraced by the full faith and credit clause, that constitutional provision commands that the other States shall give to the decree the force and effect to which it was entitled in the State where rendered. (Harding v. Harding, 198 U. S. 317; 25 Sup. Ct. Rep. 679; 49 L. ed. 1066.) Second. Where a personal judgment has been rendered in the courts of a State against a non-resident merely upon constructive service, and, therefore, without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another State in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is, by operation of the due process clause of the Fourteenth Amendment, void as against the non-resident, even in the State where rendered; and, therefore, such non-resident, in virtue of rights granted by the Constitution of the United States, may successfully resist, even in the State where rendered, the enforce-

ment of such a judgment. (Pennoyer v. Neff, 95 U. S. 714; 24 L. ed. 565.)"

Applying these principles to the case at bar the court held, in the first place, that a suit for divorce is essentially an action *in personam* and not *in rem;* and, in the second place, that, by wrongfully deserting his wife, the domicile of the wife, contrary to the general rule, did not continue that of the husband when he removed to Connecticut, but continued to be in New York, the State of the original matrimonial domicile. Therefore, it was held that the Connecticut courts, never having obtained personal service upon the wife, and the action not being *in rem,* no decree could be rendered against her that would affect her status anywhere except in the State where the judgment was rendered. In effect, it was held that in order to render a decree of divorce that would have to be recognized by the courts of other States, a court must have jurisdiction of both of the parties, that is, of the complainant by *bona fide* residence creating a domicile, and of the defendant either by domicile in the State, by personal service, or actual appearance, or by constructive service. But that this constructive service cannot be relied upon in cases where the defendant, having had good reason for separating from the complainant, has obtained or retained a domicile in another State.

In the Atherton case, it was argued that the constructive service upon the wife had been sufficient to give the court jurisdiction because the wife had not been able to obtain a domicile apart from her husband by wrongfully separating herself from her husband. In the case at bar, however, the complainant had deserted the defendant and matrimonial domicile, and, therefore, she had been entitled to retain her domicile in New York, after the removal of her husband to Connecticut.

Four justices dissented. In the opinion concurred in by them it was argued that the case was governed by the doctrines laid down in Atherton v. Atherton. In that case it was held that jurisdiction over a domiciled complainant and constructive service over the defendant were sufficient to support a decree which was entitled to full force and credit in other States. In the case at bar

the domicile of the complainant was a *bona fide* one, and, it was argued, the facts that it was or had been a matrimonial domicile or that the complainant had wrongfully left his wife were irrelevant. The fact that the Connecticut court had granted the divorce was, or should have been, it was argued, conclusive upon the New York courts that the defendant had deserted the complainant and not *vice versa*. It was denied that a proceeding for divorce is a personal one (though a suit *in personam* is often incorporated with it). In short, then, the *bona fide* domicile of the complainant being granted, and constructive service such as the *lex fori* demanded being had, and decree for divorce actually rendered, the merits of the case, that is, as to which of the parties was responsible for the separation, the dissenting justices argued, were no longer open for examination, and hence the question as to where was or had been the matrimonial domicile became irrelevant.

The decision of the Supreme Court in Haddock v. Haddock undoubtedly came as a great surprise to lawyers generally, and its correctness has been questioned by many.[27]

It is possible that the assertion made in the dissenting opinion that the decision of the Connecticut court that the wife had deserted the husband, and not he her, should have been held conclusive of that fact in the New York courts, may be met by the argument of Justice Peckham's dissenting opinion in Atherton v. Atherton. This was that the court in which the full force and credit of a decree of divorce of a court of another State is demanded, may exercise its own judgment as to the rightfulness or wrongfulness of the separation of the defendant from the complainant in order to determine whether or not such defendant had been able to obtain a domicile apart from the complainant, and, therefore, whether or not such defendant was properly beyond the jurisdiction of the court rendering the decree; that, in other words, the decree of such court is not conclusive upon this point as it goes to a question of jurisdiction.

[27] For acute, and, to the author's mind, destructive criticisms of the position assumed by the majority of the court in Haddock v. Haddock, see articles by J. H. Beale, Jr., in the *Harvard Law Review*, XIX, 586, and by H. A. Bigelow in *The Greenbag*, XVIII, 348.

But in other respects it does appear that the principles laid down by the majority of the court in the Haddock case are open to objection. Especially open to objection are the following statements: that a suit for divorce is to be treated as a proceeding *in personam;* that the fact that the domicile of the complainant was not the original matrimonial domicile is important; and, finally, that a decree of divorce which though not necessarily valid in other jurisdictions is valid in the State where rendered, and that thus, the husband, though legally divorced in one State, is still married in another State. The author is, therefore, inclined to believe that either these doctrines will ultimately be overruled, or, if not, that they will be strictly limited in their application to the precise facts of the Haddock case.

CHAPTER XIII.

INTERSTATE RELATIONS: THE COMITY CLAUSE.

§ 99. Privileges and Immunities.

Article IV, Section 2 of the Constitution declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This provision has for its general aim the prevention of arbitrary and vexatious discriminations by the several States in favor of their own citizens and against the citizens of other States. "It was undoubtedly the object of the clause in question," say the Supreme Court in Paul v. Virginia,[1] "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.[2] Indeed, without some provision of the kind, removing from the citizens of each State the disabilities of alienage in the other, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

In the early case in the federal Circuit Court of Corfield v. Coryell,[3] as has been earlier noted, Justice Washington attempted

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1 8 Wall. 168; 19 L. ed. 357.

2 Citing Lemmon v. The People of N. Y., 20 N. Y. 607.

3 4 Wash. C. C. 371.

a still more particular, though not an exhaustive, enumeration of the privileges and immunities that are protected from state discrimination.[4]

Much of Justice Washington's language was *obiter,* the determination of the enumerated privileges and immunities not being necessarily involved in the case. Many of these rights have, however, in subsequent cases, been specifically passed upon and sustained,[5] and it is believed that there is not one of them that would not be declared by the Supreme Court, in a proper case, to be beyond the discriminating power of the States. Thus in Ward v. Maryland[6] it was held that a State might not levy a license tax upon temporary residents, as a condition precedent to allowing them to sell certain goods. So also the granting of licenses to trade cannot be limited to residents.[7] Nor can a State, except by proper quarantine and other police regulations, deny to citizens of other States free ingress and egress, or the right to export or import property.[8]

In Ward v. Maryland the court say: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union, for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the States, and to be exempt from any higher taxes or excises than are im-

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[4] See *ante,* p. 179.

[5] See especially two articles by W. S. Meyers in *Michigan Law Review,* I, pp. 286, 364, entitled "The Privileges and Immunities of Citizens in the Several States."

[6] 12 Wall. 418; 20 L. ed. 449.

[7] *In re* Wilson, 15 Fed. 511.

[8] This last is unconstitutional as well by the commerce clause of the Constitution.

posed by the State upon its own citizens. Comprehensive as the power of the States is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and, inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell or offer or expose for sale within the district prescribed in the indictment any goods which the permanent residents of the State might sell or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

§ 100. Political Privileges.

The interstate comity clause of the federal Constitution does not compel the several States to grant to resident citizens of the other States immediately upon their entrance into the State the political privileges extended to their own citizens. This the Supreme Court has held from the very beginning and has recently reaffirmed in the case of Blake v. McClung.[9] "A State," says the court in that case, "may by rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each State of the privileges and immunities secured by the Constitution to citizens of the several States. The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within or removes to another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the Government of the Union was ordained and established."

[9] 172 U. S. 239; 19 Sup. Ct. Rep. 165; 43 L. ed. 432.

Finally, it is to be said, the several States may impose upon non-residents such special limitations and obligations as are, in aim and effect, not discriminative but reasonably necessary for the protection of their own citizens from fraud, disease, or injury of any sort. Thus, as an example, though the citizens of other States may not be forbidden to sue in the courts of the State, they may be required to give bonds for costs not exacted of residents.[10]

In connection with this police power of the States a difficult question is raised as to the constitutionality of laws conditioning the exercise of certain professions, such as law, medicine, and dentistry upon residence in the State for specified periods of time. There is no question but that the State in the legitimate exercise of its police power may require evidence of good character or sufficient technical attainments of all persons desiring to practice these professions. A certain period of residence in the State may, therefore, possibly be a proper requirement, in order that the applicant's moral character and general attainments may be learned, but it would seem that if this required period be made unnecessarily long, it might be held that non-residents are unduly discriminated against. We have, however, no cases in which this position has been taken.

§ 101. State Proprietary Privileges.

In McCready v. Virginia[11] the important limitation of the clause was established that a citizen of one State is not, of constitutional right, entitled to share upon equal terms with the citi-

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[10] In Chemung Canal Bank v. Lowery (93 U. S. 72; 23 L. ed. 806) it was held that a Wisconsin statute was not in violation of the equal privileges clause because it provided that when a defendant to a suit was out of the State, the statute of limitations should not run against a resident plaintiff, but that it should if he were a non-resident. The court held that this was a reasonable provision. "If," said the court, "the statute does not run as between non-resident creditors and their debtors, it might often happen that a right of action would be extinguished, perhaps for years, in the State where the parties reside; and yet, if the defendant should be found in Wisconsin, it may be only in a railroad train, a suit could be sprung upon him after the claim had been forgotten. The laws of Wisconsin would thus be used as a trap to catch the unwary defendant after the laws which had always governed the case had barred any recovery." This reasoning seems hardly convincing.

[11] 94 U. S. 391; 24 L. ed. 248.

zens of another State those proprietary interests which may be said to belong generally to that State as such. This case involved the right of cultivating oysters on beds of the tide waters of the State. The court in its opinion say: "We think we may safely hold that the citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State." [12].

§ 102. Privileges of One State Not Carried into Other States.

The comity clause does not entitle a citizen within his own State to privileges and immunities which may be granted by other States to their citizens. In other words, it does not require that when a right is granted by any one of the States of the Union to its citizens, it thereby becomes a right which all the other States must grant to their citizens. This claim, extreme as it may appear, was raised in McKane v. Durston[13] but negatived

[12] The opinion continues: "If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other States had a constitutional right to the enjoyment of this privilege of Virginia citizenship. Neither if, instead of selling, the State had appropriated the same property to be used as a common by its people for the purposes of agriculture, could the citizens of other States avail themselves of such a privilege. And the reason is obvious; the right thus granted is not a privilege or immunity of general but of special citizenship. It does not 'belong of right to the citizens of all free government,' but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used, and they alone had the power to dispose of it as they saw fit. They owned it not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality. The planting of oysters in the soil covered by water owned in common by the People of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purpose of cultivation and profit; and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water. And as all concede that a State may grant to one of its citizens the exclusive use of part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own people alone."

[13] 153 U. S. 684; 14 Sup. Ct. Rep. 913; 38 L. ed. 867.

by the court as scarcely worth an argument. "Whatever may be the scope of Section 2 of Article IV," said the court, . . . "the Constitution of the United States does not make the privileges and immunities enjoyed by the citizens of one State under the Constitution and laws of that State, the measure of the privilege and immunities to be enjoyed, as of right, by the citizens of another State under its Constitution and laws. . . . A citation of authorities upon the point is unnecessary."

It also scarcely needs argument that under this equal privileges clause a citizen of one State residing, or having legal interests in another State, may not lay claim to privileges and immunities which his own State grants him, but which the other State does not grant to its own citizens.

In Paul v. Virginia[14] the court say: "The privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States."

§ 103. Corporations not Citizens within the Meaning of the Comity Clause.

In Paul v. Virginia the doctrine, never since questioned, was laid down that a corporation is not a citizen within the meaning of the term as used in the comity clause. Inasmuch as a corporation is the mere creation of local law, the court declare it can have no legal existence, or right to do business, beyond the limits of the sovereignty by which it is created. In other words, the interstate comity clause of the federal Constitution does not necessitate the recognition by the several States of corporations created by any of the other States. "Having no absolute right of recog-

[14] 8 Wall. 168; 19 L. ed. 357.

nition in other States," the court say, "but depending for such recognition and enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

This principle of state omnipotence when dealing with the corporations of other States is, however, limited in three very important respects. In so far as such corporations are engaged in the conduct of interstate commerce they may not be controlled, the regulation of this subject being exclusively a federal concern; they may not be deprived of property without due process of law or denied the equal protection of the laws; and the obligation of contracts entered into with them may not be impaired.[15]

An instructive construction by the Supreme Court of the comity clause in its application to corporations is to be found in the case of Blake v. McClung,[16] decided in 1898. In that case was held unconstitutional an act of the State of Tennessee which provided that resident creditors of mining and manufacturing corporations chartered in other States, and doing business in the State of Tennessee should have "a priority in the distribution of assets, or subjection to the same, or any part thereof, to the payment of debts over all simple contract creditors, being residents of any other country or countries." After calling attention to the fact that the court had never attempted to give an exact or comprehensive definition of the clause "privileges and immunities" but had deemed it "safe, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined in each case, upon a view of the particular rights asserted and denied therein," the court nevertheless goes on to quote with approval

[15] These limitations will be more fully treated in later chapters.
[16] 172 U. S. 239; 19 Sup. Ct. Rep. 165; 43 L. ed. 432.

the enumeration of Justice Washington in Corfield v. Coryell, and that given in the opinion of the court in Paul v. Virginia and Ward v. Maryland. The opinion then continues: "These principles have not been modified by any subsequent decision of this court. The foundation upon which the above cases rest cannot, however, stand, if it be adjudged to be in the power of one State, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other States. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that State. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other States to deal with that corporation. The State did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee, or should not transact business with citizens of other States. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that State. But the enjoyment of these rights is materially obstructed by the statute in question; for that statute, by its necessary operation, excludes citizens of other States from transacting business with that corporation upon terms of equality with citizens of Tennessee. We hold such discrimination against citizens of other States to be repugnant to the second section of the fourth article of the Constitution of the United States, although generally speaking, the State has the power to prescribe the conditions upon which foreign corporations may enter into its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the supreme law of the land.

Indeed, all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States." [17]

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[17] Chief Justice Fuller and Justice Brewer dissented. For later decisions with reference to the conditions that the States may constitutionally impose upon foreign corporations, see Blake v. McClung. 176 U. S. 64; 20 Sup. Ct. Rep. 307; 44 L. ed. 371; Sully v. American National Bank, 178 U. S. 289; 20 Sup. Ct. Rep. 935; 44 L. ed. 1072; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28; 20 Sup. Ct. Rep. 518; 44 L. ed. 657; Orient Insurance Co. v. Daggs, 172 U. S. 557; 19 Sup. Ct. Rep. 281; 43 L. ed. 552; W. U. Tel. Co. v. Kansas, 216 U. S. 1; 30 Sup. Ct. Rep. 190; Pullman Co. v. Kansas, 216 U. S. 56; 30 Sup. Ct. Rep. 232.

CHAPTER XIV.

INTERSTATE RELATIONS: EXTRADITION.

§ 104. Interstate Extradition.

The Constitution provides that "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." [1]

In the case of Kentucky v. Dennison,[2] decided by the Supreme Court in 1860, the respective powers and duties of the State and Federal Governments in respect to the extradition of criminals, came up for adjudication. Congress had passed a law declaring that, upon request from the State from which the fugitive has escaped, "it shall be the duty of the executive authority of the State" to cause the fugitive to be seized and delivered to the agent of the demanding State. Dennison, the governor of Ohio, refused the request of the Commonwealth of Kentucky to surrender a fugitive from her borders. Thereupon a mandamus was asked from the federal court to compel him to do so. This writ the Supreme Court in a unanimous opinion refused to issue, the argument of Taney, who prepared the opinion of the court, being as follows: The duty of providing by law the regulations necessary for carrying into effect this right to extradition manifestly belongs to Congress. "For," said Taney, "if it was left to the States, each might require different proof to authenticate the judicial proceedings upon which the demand was founded." Furthermore, Taney declared, the duty that is laid upon the governors of States by the Constitution and by the laws that Congress had passed regulating the subject is a mere ministerial duty, and, therefore, one the performance of which may ordinarily be

[1] Art. IV, Sec. 2, Cl. 2.

[2] 24 How. 66; 16 L. ed. 717.

compelled by the courts. Continuing he held that the clause in question by the use of the words "treason, felony or other crime," properly included every act forbidden and made punishable by a State, and did not leave to the governor of a State to which a fugitive from justice might flee, the right to refuse to surrender him upon the ground that the act in question was not one made punishable by the law of the State of which he was the chief executive. "The argument on behalf of the governor of Ohio," said Taney, "which insists upon excluding from this clause new offenses created by a statute of the State and growing out of its local institutions, and which are not admitted to be offenses in the State where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For where can the line of division be drawn with anything like certainty? Who is to mark it? The governor of the demanding State would probably draw one line, and the governor of the other State another. And if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right and yet defining that right so loosely as to make it a never failing subject of dispute and ill will." Also, he declared, it is certain that the words "it shall be the duty" when employed in the ordinary acts of legislation, imply an assertion of the right to command and coerce obedience. "But," said Taney, "looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion the words 'it shall be the duty' were not used as mandatory and compulsory, but as declaratory of the moral duty which this command created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of

the executive of the State; nor is there any clause or provision in the Constitution which arms the government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it. . . . It is true that Congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal."

There have since been a number of occasions in which a governor of one State has refused the extradition of a person found within its borders and who had admittedly come from the State which asked for his return. A notable instance was the refusal of the governor of Indiana to permit the extradition of ex-Governor Taylor of Kentucky who was indicted in the latter State as having been a party to the murder of Governor Goebel.

§ 105. Extradition by the States of the Union to Foreign States.

In 1840 the Supreme Court was called upon to pass upon the question whether it lies within the constitutional power of the individual States of the Union to surrender fugitives from justice to a foreign government.[3] This point the court found it so difficult to decide that, after holding it under advisement for a long time, it divided equally and was, therefore, unable to render an opinion as the opinion of the court, though, according to its practice in such cases, it affirmed the decision of the court below. Taney in his individual opinion took the ground that the surrender of fugitives from justice is a matter that properly falls within the general field of international relations, and that the control of this field being exclusively vested in the Federal Government, the States are absolutely excluded therefrom, and, therefore, cannot, constitutionally, exercise the right of extraditing to foreign countries fugitives from them to their own territories. "The

[3] Holmes v. Jennison, 14 Pet. 540; 10 L. ed. 579.

power in question," he declared, "from its nature, cannot be a concurrent one, to be exercised both by the States and the General Government. It must belong, exclusively, to the one or the other." With Taney agreed Story, McLean, and Wayne. Thompson, Barber and Catron, however, in their opinions, took the view, that the action of the governor of Vermont was not subject to examination upon the part of the federal court, because there then existed no treaty between the United States and the country to which the prisoner was to be extradited, which the governor's action could be said to violate. Baldwin in a separate opinion sustained the power of the State upon the ground that it was a legitimate exercise of its police power to obtain riddance of an undesirable inhabitant.

It would seem that the law upon this point remained in this unsettled state until 1886 when, in the case of United States v. Rauscher[4] the Supreme Court declared, without dissent, that "there can be little doubt of the soundness of the opinion of Chief Justice Taney, that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country which has undoubtedly been conferred upon the Federal Government; and that it is clearly included in the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. There is no necessity for the States to enter upon the relations with foreign nations which are necessarily implied in the extradition of fugitives from justice found within the limits of the State, as there is none why they should in their own name make demand upon foreign nations for the surrender of such fugitives. At this time of day, and after the repeated examinations which have been made by this court into the powers of the Federal Government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of Congress on the subject, the extradition of a fugitive from justice can become the subject of negotiations between a State of this Union and a foreign government."

[4] 119 U. S. 407; 7 Sup. Ct. Rep. 234; 30 L. ed. 425.

This question may probably be now considered definitely settled, but it is interesting to observe that the declaration settling it was, after all, a pure *dictum,* the point not being involved in the case in which it was made.

A number of decisions have held that the asylum State may satisfy the demands of its own laws before surrendering a fugitive to the State from which he has fled. "When a demand is properly made by the governor of one State upon the governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter case have been put in force against the fugitive, and he is imprisoned there, the demands of those laws may first be satisfied."[5]

§ 106. Auxiliary Legislation by the States.

The power of Congress by legislation to render effective the extradition clause is not exclusive, and does not, therefore, exclude the power of the State to enact measures auxiliary thereto. Indeed, such additional legislation is, in general, necessary, as, for example, laws for inquiry into the fact whether the person demanded was actually, and not constructively, within the State claiming him, when the offense charged was committed.[6]

§ 107. Judicial Examination of Extradition Proceedings.

"Upon the executive of the State rests the responsibility of determining, in some legal mode, whether [the one claimed] is a fugitive of the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State."[7]

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[5] Taylor v. Taintor, 16 Wall. 366; 21 L. ed. 287.

[6] *Ex parte* McKean, 3 Hughes (U. S.), 23; *Ex parte* Ammons, 34 Ohio St. 518. See 3 *Fed Statutes Annotated,* 79, note.

[7] *Ex parte* Reggel, 114 U. S. 642; 5 Sup. Ct. Rep. 1148; 29 L. ed. 250. Independent proof apart from its requisition papers that the accused is a fugitive from justice need not, however, be demanded by the governor of the surrendering State. Pettibone v. Nichols, 203 U. S. 192.

The governor cannot be compelled by judicial process, state or federal, to take action, but where he has acted, his action may be inquired into by the courts. Thus in Roberts v. Reilly[8] the court say: "The Act of Congress (§ 5278, R. S.) makes it the duty of the executive authority of the State to which such person has fled, to cause the arrest of the alleged fugitive from justice, whenever the executive authority of any State demands such person as a fugitive from justice, and produces a copy of an indictment found or affidavit made before a magistrate of any State, charging the person demanded with having committed the crime therein, certified as authentic by the governor or chief Magistrate of the State from whence the person so charged has fled. It must appear, therefore, to the governor of the State to whom such a demand is presented, before he can lawfully comply with it; first, that the person demanded is substantially charged with a crime against the laws of a State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the State making the demand; and second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand. The first of these prerequisites is a question of law and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of habeas corpus. The second is a question of fact, which the governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be viewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court. It is conceded that the determination of the fact by the executive of the State in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof." [9]

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[8] 116 U. S. 80; 6 Sup. Ct. Rep. 291; 29 L. ed. 544.

[9] See also Hyatt v. New York, 188 U. S. 691; 23 Sup. Ct. Rep 456; 47 L. ed. 657.

§ 108. Abduction and Forcible Return of Fugitives from Justice.

It has been decided[10] that where a fugitive has been forcibly abducted, without being extradited, from a State to which he had fled to the State from which he had fled, neither the Federal Government, nor the State whose peace has thus been violated, nor the abducted one, has legal redress, unless, indeed, the governor of the State to which he has been taken is willing to return him, and to extradite the persons participating in the abduction. The case of Mahon grew out of the following facts. Mahon, charged with murder in the State of Kentucky, fled to West Virginia. During a correspondence between the governors of the two States regarding extradition, he was forcibly abducted from the latter State and taken to the former State, and there confined in jail pending his trial for murder. Thereupon the governor of West Virginia, on behalf of that State, presented in a District Court of the United States a petition stating these facts, and adding that he had made a requisition upon the governor of Kentucky that Mahon be released and returned to West Virginia, but that such requisition had been refused. Therefore, a writ of habeas corpus was prayed directed to the keeper of the jail where Mahon was confined. A similar petition was filed by Mahon himself. Upon return of the writ the motion for discharge was denied by the court; appeal was taken to the Circuit Court, where the order of the lower court was affirmed; and from this order an appeal was taken to the Supreme Court. In its opinion, affirming the action of the lower tribunals, the Supreme Court say: "If the States of the Union were possessed of an absolute sovereignty, instead of a limited one, they could demand of each other reparation for an unlawful invasion of their territory and the surrender of parties abducted, and of parties committing the offense, and in case of refusal to comply with the demand, could resort to reprisals, or take any other measures that they might deem necessary as redress for the past and security for the future. But the States of the Union are not absolutely sovereign. Their sovereignty is qualified and limited by the conditions of the federal

10 Mahon v. Justice, 127 U. S. 700; 8 Sup. Ct. Rep. 1204; 32 L. ed. 283.

Constitution. They cannot declare war or authorize reprisals on other States. Their ability to prevent the forcible abduction of persons from their territory consists solely in their power to punish all violations of their criminal laws committed within it, whether by their own citizens or by the citizens of other States.

If such violators have escaped from the jurisdiction of the State invaded, their surrender can be secured upon proper demand on the executive of the State to which they have fled. The surrender of the fugitives in such cases, to the State whose laws have been violated, is the only aid provided by the laws of the United States for the punishment of depredations and violence committed in one State by intruders and lawless bands from another State. The offenses committed by such parties are against the State; and the laws of the United States merely provide the means by which their presence can be secured in case they have fled from its justice. No mode is provided by which a person unlawfully abducted from one State to another can be restored to the State from which he was taken, if held upon any process of law for offenses against the State to which he has been carried. If not thus held he can, like any other person deprived of his liberty, obtain his release on habeas corpus. Whether Congress might not provide for the compulsory restoration to the State of parties wrongfully abducted from its territory upon application of the parties, or of the State, and whether such provision would not greatly tend to the public peace along the borders of the several States, are not matters for present consideration. It is sufficient now that no means for such redress through the courts of the United States have as yet been provided." [11]

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[11] Justice Bradley was not convinced by this argument. He said: "I dissent from the judgment of the court in this case. In my opinion, the writ of habeas corpus was properly issued, and the prisoner, Mahon, should have been discharged and permitted to return to West Virginia. He was kidnapped and carried into Kentucky in plain violation of the Constitution of the United States, and is detained there in continued violation thereof. It is true, he is charged with having committed a crime in Kentucky. But the Constitution provides a peaceable remedy for procuring the surrender of persons charged with crime and fleeing into another State. This provision of the Constitution has two objects; the procuring possession of the offender, and the prevention

In Pettibone v. Nichols[12] the court held that because the surrendered one had been given no opportunity at the time of his arrest to test in the courts of the surrendering State the legality of the extradition, no federal right had been violated. "That he had no reasonable opportunity to present these facts before being taken from Colorado," said the court, "constitutes no legal reason why he should be discharged from the custody of the Idaho authorities. No obligation was imposed by the Constitution or laws of the United States upon the agent of Idaho to so

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of irritation between the States, which might arise from giving asylum to each other's criminals, and from violently invading each other's territory to capture them. It clearly implies that there shall be no resort to force for this purpose. The Constitution has abrogated, and the States have surrendered, all right to obtain redress from each other by force. The Constitution was made to 'establish justice' and 'insure domestic tranquillity;' and to attain this end as between the States themselves, the judicial power was extended 'to controversies between two or more States,' and they were enjoined to deliver up to each other fugitives from justice when demanded, and even fugitives from service. This manifest care to provide peaceable means of redress between them is utterly irreconcilable with any right to redress themselves by force and violence; and, of course, what is unconstitutional for the States is unconstitutional for their citizens. . . . A requisition would not apply. That is provided for by the extradition of fugitives from justice. It would apply for the delivery up of the kidnappers, but not for the restoration of their victim. It is a special constitutional remedy, addressed by the executive of one State to the executive of another, imposing a constitutional duty of extradition when properly made in a proper case. But the present case is a different one. It is not the surrender of a fugitive from justice which is sought, but the surrender of a citizen unconstitutionally abducted and held in custody. There must be some remedy for such a wrong. It cannot be that the States, in surrendering their right of obtaining redress by military force and reprisals, have no remedy whatever. It was suggested by the counsel that the State of West Virginia might sue the State of Kentucky for damages. This suggestion could not have been seriously made. No; the remedy adopted was the proper one. Habeas corpus is not only the proper legal remedy, but a most salutary one. It is calculated to allay strife and irritation between the States by securing a judicial and peaceful decision of the controversy."

In Ker v. Illinois (119 U. S. 436; 7 Sup. Ct. Rep. 225; 30 L. ed. 421) the plaintiff urged that in violation of law he had been seized in a foreign country and forcibly brought against his will into the United States, in violation of a treaty between the United States and the foreign country, and in violation of the Fourteenth Amendment. The court held, in a unanimous opinion, that notwithstanding the illegal methods pursued in bringing the accused within the State, there had been no violation of a federal right.

[12] 203 U. S. 192; 27 Sup. Ct. Rep. 111; 51 L. ed. 148.

time the arrest of the petitioner, and so conduct his deportation from Colorado as to afford him a convenient opportunity before some judicial tribunal sitting in Colorado, to test the question whether he was a fugitive from justice, and, as such, liable, under the act of Congress, to be conveyed to Idaho for trial there."

In this case it was decided also that the fact that the illegal abduction from the State was by persons acting under the authority of that State did not take the case out of the operation of the doctrine laid down in the Mahon case.[13]

§ 109. Trial for Offenses Other than Those for which Extradited.

In United States v. Rauscher[14] was considered the question whether a fugitive extradited from a foreign country in pursuance of a treaty between that country and the United States covering the crime charged, could, after coming into the custody of the United States, be tried upon another minor offense not covered by the treaty. The court held that he could not be.[15]

In Lascelles v. Georgia,[16] however, it was held that, as to fugitives from one State of the Union to another, this may be done. "The fallacy of the argument [that this may not be done]," said the court, "lies in the assumption that the States of the Union occupy toward each other, in respect to fugitives from justice, the relation of foreign nations, in the same sense in which the General Government stands toward independent sovereignties on that subject; and in the further assumption that a fugitive from justice acquires in the State to which he may flee some state or personal right to protection, improperly called a right of asylum, which secures to him exemption from trial and punishment for a crime committed in another State, unless such crime is made the special object or ground of his rendition. . . . The sole object of the provision of the Constitution and act of Congress to carry it into effect is to secure the surrender of persons accused of crime who have fled from the justice of a

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13 Justice McKenna dissented as to this.

14 119 U. S. 407; 7 Sup. Ct. Rep. 234; 30 L. ed. 425.

15 Chief Justice Waite dissented. See also Cosgrove v. Winney, 174 U. S. 64; 19 Sup. Ct. Rep. 598; 43 L. ed. 897.

16 148 U. S. 537; 13 Sup. Ct. Rep. 687; 37 L. ed. 549.

State, whose laws they are charged with violating. Neither the Constitution, nor the act of Congress providing for the rendition of fugitives upon proper requisition being made, confers, either expressly or by implication, any right or privilege upon such fugitives under and by virtue of which they can assert, in the State to which they are returned, exemption from trial for any criminal act done therein." [17]

§ 110. Who is a "Fugitive."

"To be a fugitive from justice . . . it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a State committed that which by its laws constitutes a crime, when he sought to be subjected to

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[17] The opinion continues: The case of United States v. Rauscher has no application to the question under consideration, because it proceeded upon the ground of a right given impliedly by the terms of a treaty between the United States and Great Britain, as well as expressly by the acts of Congress in the case of a fugitive surrendered to the United States by a foreign nation. That treaty which specified the offenses that were extraditable, and the statutes of the United States passed to carry it and other like treaties into effect, constituted the supreme law of the land, and were construed to exempt the extradited fugitive from trial for any other offense than that mentioned in the demand for surrender. There is nothing in the Constitution or statutes of the United States in reference to interstate rendition of fugitives from justice which can be regarded as establishing any compact between the States of the Union, such as the Ashburton treaty contains, limiting their operation to particular or designated offenses. On the contrary, the provisions of the organic and statutory law embrace crimes and offenses of every character and description punishable by the laws of the State where the forbidden acts are committed. It is questionable whether the States could constitutionally enter into any agreement or stipulation with each other for the purpose of defining or limiting the offenses for which fugitives would or should be surrendered. But it is settled by the decision of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the Constitution, treaties, or laws of the United States which exempts an offender, brought before the courts of a State for an offense against its laws, from trial and punishment, even though brought from another State by unlawful violence or by abuse of legal process." Citing Ker. v. Illinois, 119 U. S. 436; 7 Sup. Ct. Rep. 225; 30 L. ed. 421; Mahon v. Justice, 127 U. S. 700; 8 Sup. Ct. Rep. 1204; 32 L. ed. 283; Cook v. Hart, 146 U. S. 183; 13 Sup. Ct. Rep. 40; 46 L. ed. 934.

its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another."[18]

In Appleyard v. Massachusetts[19] it was held that the belief of the accused, when leaving the demanding State, that he had not committed a crime against the State, did not prevent his being a fugitive from justice within the meaning of the Constitution and the acts of Congress relating to extradition. To be a fugitive from justice, it was declared, it is only necessary that the accused should have been within the demanding State at the time the crime was committed, and that thereafter he be found within the borders of another State. A fugitive from justice when apprehended in the State to which he has fled, and held for extradition, though restrained of his liberty, under color of authority derived from the Constitution and laws of the United States, is not in the custody of the United States, but of the States. When so apprehended, however, the fugitive has the right to test the lawfulness of his arrest by writ of habeas corpus issued either by a state or federal court.[20]

In Hyatt v. New York[21] it was definitely held, without qualification, that in order to be a "fugitive from justice" within the meaning of the constitutional clause, and of the statutes relating thereto, the person sought to be extradited must have been actually, and not merely constructively, within the demanding State at the time the crime charged was committed. Furthermore, in this case it was held that one who came into the State on business for a single day eight days after the alleged commission of the crime, and months before indictment found, was not, by his departure therefrom, thereby brought within the terms of the statute providing for rendition.[22]

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[18] Roberts v. Reilly, 116 U. S. 80; 6 Sup. Ct. Rep. 291; 29 L. ed. 544.

[19] 203 U. S. 272.

[20] Roberts v. Reilly, 116 U. S. 80; 6 Sup. Ct. Rep. 291; 29 L. ed. 544.

[21] 188 U. S. 691; 23 Sup. Ct. Rep. 456; 47 L. ed. 657.

[22] "It is sufficient for the party charged to show that he was not in the State at the times named in the indictments; and when these facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments. the facts so proved are sufficient to show that the person was not in the State when the crimes were, if ever, committed."

§ 111. Fugitive Slaves.

The same section of Article IV which provides for the extradition of fugitives from justice, provides that "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." This clause is practically obsolete.[23] An elaborate examination of the obligations imposed upon the States, and of the extent of concurrent legislative power in the premises is found in Prigg v. Pennsylvania.[24]

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[23] The question has been raised whether, since the adoption of the Thirteenth Amendment, the fugitive slave clause of the Constitution has become completely obsolete. It is generally so held, but possibly not correctly so. The clause in question, it will be observed, does not employ the word slaves. Its words are sufficiently broad to make the clause cover not only slaves but minor apprentices and possibly others owing services under contract. Indeed, Charles Sumner in a debate in the United States Senate in 1864 maintained that, properly interpreted, it applied only to such and not to slaves at all. (Congressional Globe, 1st Sess., 38th Cong., Pt. II, pp. 1711, 1750). The Thirteenth Amendment abolishes not only slavery but all "involuntary servitude," and it has been held that this renders illegal an attempt to compel, upon the part of adults, the performance of any personal services, whether provided for by contract and already compensated for, or not. Of course, however, damages for breach of contract to render personal services, may be awarded. But this does not render illegal state laws compelling the performance of personal services on the part of minor apprentices, and if this be so, it would seem that a minor apprentice escaping from a State where his services may be compelled, into another State, under a proper law for the purpose, be claimed and removed to the State from which he fled. The subject of peonage will be considered in a later chapter.

[24] 16 Pet. 539; 10 L. ed. 1060.

CHAPTER XV.

INTERSTATE RELATIONS: COMPACTS BETWEEN THE STATES, AND BETWEEN THE UNITED STATES AND THE STATES.

§ 112. Compacts between the States.

The control of international relations being exclusively vested in the Federal Government, it necessarily follows that the several States have no authority to enter into any diplomatic or political relations with foreign powers.[1] Nevertheless, from an excess of caution, the federal Constitution declares that, "No State shall enter into any treaty, alliance or confederation," and that, "No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power."

It will be noticed that in the latter of these two constitutional clauses, the qualification "without the consent of Congress" is introduced. There has, therefore, never been any doubt but that, when this congressional consent is given, the several States of the American Union may enter into agreements and compacts with one another, so long as their effect is not to create what in political language is termed an "alliance" or "Confederation."[2] Not only this; it has been held that there are a variety of subjects concerning which the several States may enter into agreements with one another without the necessity of obtaining the consent of Congress. Upon this point, in Virginia v. Tennessee,[3] the Supreme Court say: "There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building,

[1] See chapter XXXII.

[2] Green v. Biddle, 8 Wh. 1; 5 L. ed. 547; Poole v. Fleeger, 11 Pet. 185; 9 L. ed. 680.

[3] 148 U. S. 503; 13 Sup. Ct. Rep. 728; 37 L. ed. 537.

it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through the State in that way. If the bordering line of the two States should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering States to agree to unite in removing the cause of the disease. So, in the case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session."

"If, then," the court asks, "the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?" "Looking at the clause in which the terms 'compact' or 'agreement' appear," answers the court, "it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States."[4]

The court continue: "Compacts or agreements — and we do not perceive any difference in the meaning, except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'— cover all stipulations affecting the conduct or claims of the parties. The mere selection of parties to run and designate

[4] The court go on to quote with approval from Story's *Commentaries upon the Constitution*, Sec. 1403.

the boundary line between two States, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition. Nor does legislative declaration, following such line, that it is correct, and shall thereafter be deemed the true and established line, import by itself a contract or agreement with the adjoining State. It is a legislative declaration which the State and individuals affected by the recognized boundary line may invoke against the State as an admission, but not as a compact or agreement. The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it, for example, as made upon a similar declaration of the border or contracting State. The mutual agreements may then be reasonably treated as made upon mutual considerations. The compact or agreement will then be within the prohibition of the Constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of federal authority. If the boundary established is so run as to cut off an important and valuable portion of a State, the political power of the State enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary or rather for its adoption afterward, the consent of Congress may well be required. But the running of a boundary may have no effect upon the political influence of either State, it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey, would in no respect displace the relation of either of the States to the General Government. There was, therefore, no compact or agreement between the States in this case which required, for its validity, the consent of Congress, within the meaning of the Constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the

true and real boundary between the States. Such ratification was mutually made by each State in consideration of the ratification of the other." [5]

§ 113. Compact Between the States and the United States.

Closely connected with the question of compacts of the States, *inter se,* is that of compacts between the individual States and the United States.

Of compacts of this character which have been entered into, the greater number have been made at the time the States in question have been admitted as States into the Union, and have attempted to place such States under restrictions not directly deducible from the federal Constitution, and are, therefore, restrictions not resting upon the other States. To this extent they have been in violation of the general principle of the equality of the States. This principle, it may be said, is not expressly stated in the federal Constitution, but would seem to be implied in the general nature of that instrument.[6]

The Constitution, without distinguishing between the original and new States, defines the political privileges which the States

[5] The opinion continues: "The Constitution does not state when the consent of Congress shall be given, whether it shall precede or follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as to where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them; and observes that where a State is admitted into the Union, notoriously upon a compact made between it and the State of which it previously composed a part, there the act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact. Knowledge by Congress of the boundaries of a State, and of its political subdivisions, may reasonably be presumed, as much of its legislation is affected by them, such as relates to the territorial jurisdiction of the courts of the United States, the extent of their collection districts, and of districts in which process, civil and criminal, of their courts may be served and enforced."

[6] See article "Are the States Equal under the Constitution?" by W. A. Dunning, in *Political Science Quarterly,* III, 425.

are to enjoy, and declares that all powers not granted to the United States shall be considered as reserved "to the States." From this it almost irresistibly follows that Congress has not the right to provide that certain members of the Union, possessing full statehood, shall have their constitutional competences in any manner less than that of their sister States. According to this, then, though Congress may exact of territories whatever conditions it sees fit as requirements precedent to their admission as States, when admitted as such, it cannot deny to them any of the privileges and immunities which the other Commonwealths enjoy.

§ 114. Equality of the States.

The principle of the equality of the States had its origin before the adoption of the Constitution itself. In the acts of cession by the several States through which the old Confederacy obtained the control of the Northwest Territory, it was provided that from this vast area new States should, from time to time, be organized, which should be admitted to the Confederacy, with the same sovereign rights enjoyed by other States.

The famous Northwest Ordinance of 1787, re-enacted by the Congress of the United States in 1789, after laying down the general conditions upon which statehood was to be accorded, declared that the States, so admitted, should be "on an equal footing with the original States in all respects whatever."

Notwithstanding, however, this requirement of equality, Congress at an early date began the practice of exacting from would-be States various promises by the terms of which they were to hold themselves bound after their admission to the Union and until Congress should release them. Thus, for example, beginning in 1802 with Ohio, the first State formed from the Northwest Territory, it was demanded by Congress that that State, when admitted, should pass an ordinance, irrevocable without the consent of Congress, not to tax for five years all public lands sold by the United States; and a requirement substantially similar was demanded of many of the States later formed. When Missouri was admitted in 1821 it was required to declare that its Constitution

should never be so construed as to permit its legislature to pass a law excluding citizens of other States from the enjoyment of any of the privileges and immunities granted them by the federal Constitution.[7]

Beginning with the admission of Nevada in 1864, the promises exacted of Territories seeking admission as States assumed a more political character. Of Nevada it was required that her Constitution should harmonize with the Declaration of Independence and that the right to vote should not be denied persons on account of their color. Of Nebraska, admitted in 1867, it was demanded that there should be no denial of the franchise or any other right on account of race or color, Indians excepted. Of the States that had attempted secession, still more radical were the requirements precedent to the granting to them of permission again to enjoy the other rights which they had for the time being forfeited. Of all of them it was required that there should be, by their laws, no denial of the right to vote except for crime; and of three, that negroes should not be disqualified from holding office, or be discriminated against in the matter of school privileges.[8] Finally, Utah, when admitted as a State in 1894, was required by Congress by the Enabling Act to make " by ordinance irrevocable without the consent of the United States and the people of the United States, provisions for perfect religious toleration and for the maintenance of public schools free from sectarian control; and that polygamous or plural marriages are forever abolished."

It would seem that as regards the enforceability of these contracts, a distinction is to be made between those that attempt to place the State under political restrictions not imposed upon all the States of the Union by the federal Constitution, and those which seek the future regulation of private, proprietary interests.

[7] A superfluous requirement, for with or without such a promise, a State is, and was then, constitutionally unable to deprive any one of the rights guaranteed by the federal Constitution.

[8] By the adoption of the Fourteenth and Fifteenth Amendments, some of these limitations have been made applicable to all the States and thus an equality, as to them, created.

The first class of these agreements the Supreme Court has repeatedly held are not enforceable against the State after it has been admitted into the Union.

In Pollard v. Hagen[9] the court held that a stipulation of an act of Congress passed for the admission of the State of Alabama into the Union that "all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, without any tax, duty, impost or toll therefor, imposed by said State" did not give to the United States any greater control of the navigable waters of that State than was possessed by the Federal Government over the waters of any other State.[10]

In Escanaba v. Lake Michigan Transportation Co.[11] the court declared, relative to certain limitations placed upon the governing powers of Illinois while in a territorial condition: "Whatever the limitations upon her powers as a government while in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her after she became a State of the Union. On her admission, she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted and could be admitted only on the same footing with them."

And in Boln v. Nebraska[12] it was declared: "This court has held in many cases that, whatever be the limitations upon the power of a territorial government, they cease to have any operative force, except as voluntarily adopted after such Territory has become a State of the Union. Upon the admission of a State it becomes entitled to and possesses all the rights of dominion and

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[9] 3 How. 212; 11 L. ed. 565.

[10] *Cf.* Strader v. Graham, 10 How. 82; 13 L. ed. 337; Weber v. Harbor Commissioners, 18 Wall. 57; 21 L. ed. 798; Sands v. Manistee River Imp. Co., 123 U. S. 288; 8 Sup. Ct. Rep. 113; 31 L. ed. 149; Shively v. Bowlby, 152 U. S. 1; 14 Sup. Ct. Rep. 548; 38 L. ed. 331.

[11] 107 U. S. 678; 2 Sup. Ct. Rep. 185; 27 L. ed. 442.

[12] 176 U. S. 83; 20 Sup. Ct. Rep. 287; 44 L. ed. 382.

sovereignty which belongs to the original States, and, in the language of the act of 1867 admitting the State of Nebraska, it stands upon an equal footing with the original States in all respects whatever."

In the foregoing cases reference was had, as appears from the quotations, to States created out of Territories. There would seem to be, however, no reason why the same doctrine should not be applied to the political limitations exacted of a number of the Southern States at the time of their readmission to full constitutional privileges after the period of the Civil War and Reconstruction.

§ 115. Contracts Regarding Proprietary Interests.

Turning now to a consideration of the continued validity and enforceability of compacts between the States and General Government with reference to proprietary interests, one finds the comparatively recent case of Stearns v. Minnesota[13] most illuminating. That case involved the construction and application of an agreement made by the State with the United States at the time of its admission to the Union, with reference to public lands, within its boundaries, owned by the United States. The court in its opinion say: "That these provisions of the Enabling Act and the Constitution, in form at least, made a compact between the United States and the State, is evident. In an inquiry as to the validity of such a compact this distinction must at the outset be noticed. There may be agreements or compacts attempted to be entered into between two States, or between the State and the Nation, in reference to political rights and obligations, and there may be those solely in reference to property belonging to one or to the other. That different considerations may underlie the question as to the validity of these two kinds of compacts or agreements is obvious. It has often been said that a State admitted into the Union enters therein in full equality with all the others, and such equality may forbid any agreement or compact limiting or qualifying political rights and

[13] 179 U. S. 223; 21 Sup. Ct. Rep. 73; 45 L. ed. 162.

obligations; whereas, on the other hand, a mere agreement in reference to property involves no question of equality of status, but only of the power of a State to deal with the Nation or with any other State in reference to such property. The case before us is one involving simply an agreement as to property between a State and the Nation. That a State and the Nation are competent to enter into an agreement of such a nature with one another has been affirmed in past decisions of this court, and that they have been frequently made in the admission of new States, as well as subsequently thereto, is a matter of history. . . . We are of opinion that there was a valid contract made with these companies in respect to the taxation of these lands — a contract which it was beyond the power of the State to impair; that this subsequent legislation does impair that contract and cannot, therefore, be sustained."

§ 116. Suits Between States.

This subject will be treated in connection with the Judicial Power of the United States.[14]

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[14] See chapter LIII.

CHAPTER XVI.

THE PERSONS SUBJECT TO THE JURISDICTION OF THE UNITED STATES: STATUS OF ALIENS.

§ 117. Territorial Sovereignty.

By international law and by the public law of all civilized States the legal jurisdiction of a State is generally recognized to extend over all persons for the time being within the districts under its *de facto* control. The only exceptions, if exceptions they be, are those coming within the principle of extraterritoriality. A State has jurisdiction over, not only its native-born and naturalized subjects, but all the subjects of other States permanently or, at any given time, temporarily resident, within its borders.

Nowhere, perhaps, has this general constitutional principle been better stated than by Marshall in the great case of The Exchange,[1] decided in 1812. In the opinion rendered in this case, the Chief Justice, after pointing out that the jurisdiction of a State within its own territory is necessarily exclusive as well as absolute, goes to show that the exceptions to this principle, generally recognized in practice, are themselves founded upon the will of the State recognizing them. Thus the so-called doctrine of extraterritoriality, though often spoken of as a fiction, namely that the diplomatic representatives and their establishments, and public ships of war, are upon, or are parts of, the territory of the States to which they belong, is not a necessary fiction. Such immunity from local jurisdiction as exists is due to the consent of the local State. That is to say, it is by an exercise of the jurisdiction of that State that these persons are exempted from the operation, though entitled to the protection, of the local law.

§ 118. De Facto Control.

The authority of States over districts and their inhabitants temporarily subject to its *de facto* control, will be considered in

[1] 7 Cr. 116; 3 L. ed. 287.

another chapter. At this place it will be sufficient to quote the opinion in United States v. Rice[2] in which, with reference to the status of the port of Castine, Maine, at the time it was in the possession of the British authorities during the War of 1812, the Supreme Court, speaking through Justice Story, said: "By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case, no other laws could be obligatory upon them; for, where there is no protection or allegiance or sovereignty, there can be no claim to obedience."

Upon this same point, Chancellor Kent in his *Commentaries* says: "If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a State, while abroad, and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. It is equally the doctrine of the English common law that during such hostile occupation of a territory, and the parents adhering to the enemy as subjects *de facto,* their children, born under such a temporary dominion, are not born under the ligeance of the conquered." And, he adds, there is no reason why the same principles should not apply to the United States.[3]

§ 119. Status of Aliens.

As regards the status of aliens, that is, subjects of other States, who are temporarily or permanently domiciled in a State, it may

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[2] 4 Wh. 246; 4 L. ed. 562.

[3] 6th ed. II, 42.

be said that the fact that they are within the territorial limits makes them, in a broad constitutional sense, members of that State and, therefore, subject to the authority of its laws, though they still remain the subjects or citizens of their native States. In fact, being under the protection of the State where they are, they owe an allegiance to it according to the maxim *protectio trahit subjectionem, et subjectio protectionem.* Webster, when Secretary of State, in his report on Thrasher's Case in 1851, declared: "Independently of a residence with intention to continue such residence, independently of the taking of any oath of allegiance, or of renouncing any former allegiance, it is well known, that by the public law an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason or other crimes as a native-born subject might be, unless his case is varied by some treaty speculations." [4]

This principle thus stated by Webster has been several times quoted and approved by the Supreme Court.[5]

§ 120. Double Allegiance.

There is no objection to predicating the existence of this double allegiance, for, despite the fact that modern sovereignty is generally spoken of as territorial, it is, in fact, personal, and imports a personal relationship between the sovereign political person — the State — and its political inferiors, its subjects. Sovereignty in truth is a purely legal concept and exists only within the field of constitutional law. International relations, the relations between States, are not legal in character, and international laws, so-called, are not laws at all in a strict positive sense. They are not commands from a legal superior to a legal inferior, but are regulations governing the conduct of political equals. Within this general international field the authority or jurisdiction of governments is strictly territorial — over each territorial district there

[4] Webster's Works, VI, 526.

[5] United States v. Carlisle, 16 Wall. 147; 21 L. ed. 426; United States v. Wong Kim Ark, 169 U. S. 649; 18 Sup. Ct. Rep. 456; 42 L. ed. 890.

is a particular *de facto* government recognized by the various States to have a right based upon actual power, to exercise political control, and, correspondingly, is held by them responsible for whatever occurs within such districts. Internationally speaking, therefore, jurisdiction is territorial and exclusive. Over any given territory, one, and only one, governing body is recognized to have legitimate authority. But sovereignty, denoting, as said, legal supremacy, a personal relationship, as predicated upon a legal subjection or allegiance of individuals to a legal superior, is not territorial; and there is thus no inherent difficulty in a sovereign claiming legal authority over individuals located outside of the limits of the territory conceded by other nations to belong to it; or of two or more States claiming at the same time, under the operation of their respective municipal laws, the allegiance of the same individual, as for instance, as we shall presently see, when one State naturalizes the subject of a State whose municipal law does not recognize the right of expatriation.

From the viewpoint of international relations, as we have just seen, the law of one State is not permitted by other States to operate outside of the territorial limits of the State which promulgates it, and, therefore, though claiming a legal authority over an individual outside of such limits, a State will not be permitted by other States to exercise it against the consent of the State within whose limits the individual is situated. But that does not render impossible the existence of or invalidate such a claim, for when, if ever, such an individual is apprehended within the territory of the State claiming authority over him he may be held responsible for acts committed while abroad. And also, as still more plainly showing the personal and non-territorial character of allegiance and sovereignty is the principle universally recognized both in municipal and international law, that a citizen of a State is in many cases entitled to the protection of that State while abroad. Thus he does not in any way lose his citizenship by departing from the territorial limits of the State of which he is a member, nor does he escape from beneath its law or cease to be entitled to its protection.

§ 121. Status of Aliens in the United States.

In the preceding section it has been shown that a State has absolute legal authority over all persons within its territorial jurisdiction, and over its own citizens wherever they may be. In the exercise, however, of this authority over persons within its territorial limits who are claimed as citizens by other States, that is, over resident aliens, or naturalized citizens whose native States do not recognize the right of expatriation, this legal power, though not subject to legal limitation, is actually subject to certain limitations which international custom has created. Thus each State demands that its subjects, when abroad, shall receive protection in life and property, and in their private rights be not unduly discriminated against by the foreign State in which they may happen to be. Also States do not permit the foreign States to require from their subjects the performance of duties that properly may be required only of citizens, as, for example, service in its army. Resident aliens may indeed be required to lend their assistance, by service in the militia and police forces, or in a *posse comitatus,* to put down domestic disorder; for, enjoying the protection of the local law, they may fairly be required to aid in overcoming resistance to its enforcement. But they may not be compelled to serve in the national military forces in cases of public war.

During the Civil War, Great Britain did not object to the enrollment in the local militia of her citizens domiciled in the United States; and in the case of one Scott, who had declared his intention of becoming an American citizen, refused to take any steps to prevent his enrollment in the army in the field. Great Britain, however, emphatically protested to the government of the Southern Confederacy against the conscription of her subjects in the Southern States. Several of the leading European powers protested against the attempt on the part of the United States to conscript into its armies domiciled aliens who had declared their intention of becoming American citizens, whereupon the United States granted to such aliens sixty-five days in which to leave the country, upon failure to do which they were held liable

to conscription; and this arrangement was acquiesced in by the Powers concerned, though not without complaint that the principles of international comity were being violated. When, in 1873, the State of Nicaragua attempted by an amendment to her Constitution to make foreigners liable to military and other public services, protests from the American Minister were made, in consequence of which the project was abandoned.

§ 122. Domiciled Aliens.

A distinction is made in practically all countries between domiciled and non-domiciled aliens, with reference to the legal burdens that may be imposed and the civil and political rights that may be enjoyed.

An alien becomes domiciled in a particular place when he takes up residence there with an intention to remain for an indefinite time (*animo manendi*). When so domiciled, all matters other than political, which relate to his personal status, are regulated by the *lex domicilii.* Thus the local law governs his power to enter into contracts, regulates succession to personal property, and the validity of wills with reference thereto, and, in the United States, England, and many of her dependencies, determines the validity of marriages. In France, and some other countries, however, this last subject is held regulated by the individual's national law wherever he may be domiciled. Thus, while the marriage in the United States of a Frenchman domiciled in the United States is held valid by the United States law if its provisions governing marriages are satisfied, it would not be held valid in France, unless the requirements of the French law were also satisfied.

Domicile is immediately fixed when residence is taken up with the intent to remain for an indefinite length of time. Thus, for example, in 1781 when the English captured from the Dutch the island of St. Eustatius, a native-born English citizen who had arrived at the island but a few hours before with the intention of residing there for an indefinite length of time, was held to be domiciled there and his property subject to the same liabilities as those of the other residents of the place. The same doctrine

was applied by the Supreme Court of the United States in the case of The Venus.[6] In this case with reference to the status of such a domiciled alien in time of war the court said: "The next question is, what are the consequences to which this acquired domicile may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes a permanent allegiance? A neutral in his situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, in the strict sense of the word, yet he is deemed such with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence. It is found adhering to the enemy. He is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or, probably refuses, when required by his country, to return. The same rule as to property engaged in the commerce of the enemy applies to neutrals; and for the same reason. The converse of this rule inevitably applies to the subject of a belligerent State domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with all the rest of the world.

"But this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he resided, on his way to another. To use the language of Sir W. Scott, it is an adventitious character gained by residence and which ceases by non-residence. It no longer adheres to the party from the moment he puts himself in motion, *bona fide,* to quit the country *sine animo revertendi.*"

§ 123. Aliens not Domiciled.

An alien passing through the United States, or for any purpose only temporarily in the country, is held fully subject to local

[6] 8 Cr. 253; 3 L. ed. 553.

criminal law. He is also able to enter into civil contracts which may be enforced against him to the extent of any property that he may have within the United States.

§ 124. Exclusion and Expulsion of Aliens.

All countries have, according to the principles of international law, the right to determine for themselves whether or not they will admit aliens within their borders, or whether they will admit some and not others. Furthermore, after admission, aliens, whether domiciled or not, may remain only so long as the State where they are sees fit to permit them to do so. These rights exercised arbitrarily, oppressively, or opprobriously may give rise to just grounds of complaint upon the part of States whose subjects are thereby injured or discriminated against. But the existence of the right of an independent State to determine for itself whom it will receive or allow to remain within its borders, cannot be questioned.

§ 125. The Chinese.

The right of the United States, from both the international and constitutional viewpoints, to prohibit entrance within its borders to such aliens as it may deem undesirable additions to its population, has been examined and upheld in numerous cases, most of them dealing with the exclusion of the Chinese.

In the Chinese Exclusion Case,[7] decided in 1887, the Supreme Court said: "To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the

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[7] *Sub nom.* Chae Chan Ping v. United States, 130 U. S. 581; 9 Sup. Ct. Rep. 623; 32 L. ed. 1068.

subjects affected are concerned, are necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases, its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interest or dignity may demand; and there lies its only remedy."

In this case the court held that so essential to a State is this right of excluding undesired aliens, the State may not be prevented, even by treaty, from exercising it at its own discretion. Thus, in holding valid an act of Congress the terms of which were in violation of a treaty previously entered into by this country with China, the court said: "The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained previous

to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. Whether a proper consideration by our government of its previous laws, or a proper respect for the nation whose subjects are affected by its action, ought to have qualified its inhibition and made it applicable only to persons departing from the country after the passage of the act, are not questions for judicial determination. If there be any just ground for complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject."

This power of exclusion, as the Supreme Court has, in a line of cases, held, may be exercised through executive officers without judicial intervention.[8]

As we have seen from the foregoing quotations, the same principles that support, constitutionally, the right of the United States to exclude aliens, support the right to expel them when occasion demands. Bonfils states the international doctrine as follows: "A State has the right to expel from its territory aliens, individually or collectively, unless treaty provisions stand in the way. . . . In ancient times, collective expulsion was much practised. In modern times it has been resorted to only in case of war. Some writers have essayed to enumerate the legitimate causes of expulsion. The effort is useless. The reasons may be summed up and condensed in a single word: The public interests of the State. Bluntschli wished to deny the States the right of expulsion, but he was obliged to acknowledge that aliens might be expelled by a single administrative measure. (French law of December 2, 1849, arts. 7 & 8 — Law of Oct. 19, 1797, art. 7.) An arbitrary expulsion may nevertheless give rise to a diplomatic claim."[9]

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[8] Ekiu v. United States, 142 U. S. 651; 12 Sup. Ct. Rep. 336; 35 L. ed. 1146; Fong Yue Ting v. United States, 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905; Lem Moon Sing v. United States, 158 U. S. 538; 15 Sup. Ct. Rep. 967; 39 L. ed. 1082; Turner v. Williams, 194 U. S. 279; 24 Sup. Ct. Rep. 719; 48 L. ed. 979; United States v. Ju Toy, 198 U. S. 253; 25 Sup. Ct. Rep. 644; 49 L. ed. 1040; Chin Low v. United States, 208 U. S. 8; 28 Sup. Ct. Rep. 201; 52 L. ed. 369.

[9] *Manuel du Droit International Public*, 442; Moore, *Digest of International Law*, § 550.

§ 126. Protection of the Persons and Property of Aliens.

Aliens are, by the general doctrines of public law, entitled to the same protection of person and property as that enjoyed by the citizens of the State in which they are resident. In all cases, when injured, the same means of redress as are open to citizens should be given them. But they are, of international right, entitled to no special privileges in these respects.[10]

In a number of cases the United States Government has been called upon by foreign governments to furnish pecuniary and other redress to resident aliens who have been illegally killed, injured, or their property destroyed. These claims have in practically all cases arisen out of injuries received at the hands of mobs moved by feelings of animosity against the injured because of their race. Thus claims of this sort were advanced after the New Orleans Spanish Riots of 1851, the Denver Chinese Riot in 1880, the Chinese Riot in 1885 at Rock Springs in the Territory of Wyoming, the Chinese Riot at Seattle in the same year, and the lynching of certain Italians at New Orleans in 1891.

In a number of cases the United States, *ex gratia,* has paid indemnities to the injured or to their families, but in no case has acknowledged that, under the principles of international law, it was obligated to do so. As regards the punishment of those who have committed the assaults, the United States has called attention to the fact that this is a matter for the local authorities where the assaults occur. Had, of course, any public officials of the United States participated, as such, in the assaults, or sanctioned them, or, had the United States refused to the injured aliens, or failed to provide them with, the protection which was accorded to American citizens, it was admitted that the case would have been different, and international responsibility would have been incurred.

As a result of the McLeod incident, described in section 69 of this treatise, Congress passed the next year an act providing that the Supreme Court, the Circuit Court, and the District Courts of the United States should have the power to

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[10] See Moore, *Digest of International Law,* IV, 534, and authorities there cited.

issue writs of habeas corpus "in all cases of any prisoner or prisoners in jail or confinement, where he, she, or they being subjects or citizens of a foreign State and domiciled therein, shall be committed or confined, or in custody, under or by any authority of law, or process founded thereon, of the United States, or of any of them, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission or order or sanction of any foreign State or Sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.".[11]

The constitutionality of this act can scarcely be questioned. In so far as the United States admits, and properly admits, itself to be responsible to foreign States, it has undoubtedly an implied constitutional power to extend its judicial power sufficiently to enable it to discharge the obligations which its international relations may impose upon it.

It will be observed that under the statutory authority conferred by Section 753 the federal court may, by writs of habeas corpus, obtain possession of, and release persons situated as was McLeod. But it does not give to the federal courts the power to prevent, or secure the punishment of persons committing, acts of violence or other illegal acts within the States upon aliens. That they should be given this authority because, by such acts, the United States may become responsible to foreign powers has been several times suggested in presidential communications to Congress, and

[11] Stat. at L. v. 539. At present, as stated in the Revised Statutes (Sec. 753) the power of the federal courts to issue writs of habeas corpus is as follows: "Sec. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted, under any alleged right, title, authority, privilege, protection, or exemption, claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

bills providing this have been introduced in that body but never as yet enacted into law. President Harrison in his annual message of December, 1891, referring to the lynching of the Italians at New Orleans, said: "Some suggestions growing out of this unhappy incident are worthy the attention of Congress. It would, I believe, be entirely competent for Congress to make offenses against the treaty rights of foreigners domiciled in the United States cognizable in federal courts. This has not, however, been done, and the federal officers and courts have no power in such cases to intervene either for the protection of a foreign citizen or for the punishment of his slayers. It seems to me to follow, in this state of the law, that the officers of the State charged with police and judicial powers in such cases must, in the consideration of international questions growing out of such incidents, be regarded in such sense as federal agents as to make this government answerable for their acts in cases where it would be answerable if the United States had used its constitutional power to define and punish crimes against treaty rights."

A bill carrying out the suggestion here made was introduced into Congress but not enacted into law, and from time to time since then substantially similar measures have been urged upon Congress in presidential messages, and have been introduced and debated but without result. The matter has also been debated by the American Bar Association and the American Society of International Law. The constitutionality of a law giving this additional jurisdiction to the federal courts has been questioned, but, it would seem, not with good reason. A decision of the Supreme Court that would seem to sanction such legislation is that of United States v. Arjona.[12] Arjona, the defendant, was indicted under an act of Congress of 1884 providing for the punishment of persons counterfeiting the securities of foreign governments. Upon the constitutionality of this act being questioned upon the ground that, though the United States had the implied right to declare criminal the counterfeiting of its own bonds and notes, it had not the power thus to protect those of the other powers, the

[12] 120 U. S. 479; 7 Sup. Ct. Rep. 628; 30 L. ed. 728.

Supreme Court, in its opinion, say: "The National Government is . . . made responsible to foreign nations for all violations by the United States of their international obligations, and because of this Congress is expressly authorized to 'define and punish . . . offenses against the law of nations.' . . . Consequently a law which is necessary and proper to afford this protection is one that Congress may enact because it is one needed to carry into execution a power conferred by the Constitution on the Government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the States. Therefore, the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation and which the law of nations has imposed upon them as part of the international obligations. This, however, does not prevent a State from providing for the punishment of the same thing, for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a State, as well as that of the United States."[13]

[13] *Cf.* on this whole subject the essay by J. I. Chamberlain, *The Position of the Federal Government of the United States in Regard to Crimes Committed against the Subjects of a Foreign Nation Within the States.* Also Reports of American Bar Association for 1891, 1892, 1893; Congressional Record, 52nd Congress, 1st Session, 1892; Annual Message of President, December, 1901, and Proceedings of the American Society of International Law, 1907.

CHAPTER XVII.

AMERICAN CITIZENSHIP.

§ 127. Citizenship Defined.

From the consideration of the status of aliens, we turn to an examination of the status of citizens or subjects.

The citizen or subject body of a State, regarded from the viewpoint of other States, that is, from the viewpoint of International Law, constitutes one homogeneous body, all the members of which have the same status, the same rights and duties. Considered, however, from the viewpoint of the constitutional or municipal law of the State in question, they may be grouped into distinct classes, with differing public and private rights. Thus it is that in the constitutional jurisprudence of the United States we have at present not only a distinction between federal and state citizenship, but, within the class of federal citizens, as including all those persons subject to the full sovereignty of the United States, a distinction between those who are "citizens of the United States" according to the meaning of that phrase as used in the Constitution of the United States, and those who, though subjects of the United States, are not citizens within this narrower constitutional sense.

In Minor v. Happersett,[1] decided in 1875, the definition of citizenship, its essential character, and the privileges necessarily attached to its possession, were examined in passing upon the claim made that a woman, as a citizen of the United States, might not, simply because of her sex, be denied by a State the right of suffrage. In denying this claim, Chief Justice Waite, who rendered the unanimous opinion of the court, declared: "There cannot be a nation without a people. The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the per-

[1] 21 Wall. 162; 22 L. ed. 627.

sons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance. For convenience it has been found necessary to give a name to this membership. The object is to designate by a title the person and the relation he bears to the nation. For this purpose the words 'subject,' 'inhabitant,' and 'citizen' have been used, and the choice between them is sometimes made to depend upon the form of the government. Citizen is now more commonly employed, however, and as it has been considered better suited to the description of one living under a republican government, it was adopted by nearly all of the States upon their separation from Great Britain, and was afterward adopted in the Articles of Confederation and in the Constitution of the United States. When used in this sense it is understood as conveying the idea of membership of a nation, and nothing more."[2]

[2] See, holding that the elective franchise is not a necessary incident of citizenship: 1. As to negroes — Smith v. Moody, 1866 (26 Ind. 299); United States v. Crosby, 1871 (1 Hughes, 448); Anthony v. Holderman, 1871 (7 Kans. 50); Van Valkenburg v. Brown, 1872 (43 Cal. 42); United States v. St. Petersburg (3 Hughes, 493); United States v. Reese, 1875 (92 U. S. 214; 23 L. ed. 563); and see Opinions of Justices, 1857 (44 Me. 507). 2. As to women — Spencer v. Board, 1873 (8 D. C. 169); United States v. Anthony, 1873 (11 Blatchf. 200); Minor v. Happersett, 1874 (21 Wall. 162; 22 L. ed. 627); Dorsey v. Brigham (177 Ill. 250); Gougar v. Timberlake, 1896 (148 Ind. 38); and see also People v. Oldtown, 1878 (88 Ill. 202); also Ware v. Wisner, 1883 (50 Fed. 310) holding that women are citizens. 3. As to minors — Lyons v. Cunningham, 1884 (66 Cal. 42); and see People v. Oldtown, *supra*. 4. As to Indians, holding that though they may have voted, this did not make them citizens — Laurent v. State, 1863 (1 Kans. 313). 5. As to aliens — Spragins v. Houghton, 1840 (2 Scam. 3 Ill. 377); *In re* Wehlitz, 1863 (16 Wis. 443); United States v. Hirschfield, 1876 (13 Blatchf. 330); Lanz v. Randall, 1876 (4 Dill. 425); City of Minneapolis v. Reum, 1893 (56 Fed. 576). An averment in pleading that one was "a citizen and resident" was held not equivalent to a specific charge that he was an "elector" — Blanck v. Pausch, 1885 (113 Ill. 60). That the elective franchise is not a right of citizenship is shown also by the fact that the courts have repeatedly sustained legislation which provides for a certain prior residence before voting in the county, town, and precinct. See Anthony v.

§ 128. State and Federal Citizenship Distinguished.

As adopted, the federal Constitution contained no definition of citizenship. Impliedly, however, it recognized a state citizenship in that clause which provides that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." It would also seem to have recognized a federal citizenship in the clauses providing that the President shall be "a natural born citizen, or a citizen of the United States at the time of the adoption of the Constitution;" that Senators and Representatives shall have been nine and seven years respectively citizens "of the United States;" and that Congress shall have the power to pass laws regulating the naturalization of aliens.

The relationship between these two citizenships, state and national, however, the Constitution did not expressly determine.

There has never been any question as to the existence under the Constitution of a distinction between state and federal citizenship.[3] The only dispute has been as to the relation of the two.

Prior to the argument of the Dred Scott case there was surprisingly little discussion of this point. The opinion generally held seems, however, to have been that every citizen of a State was a citizen of the United States. This was the view declared by Rawle in his work on the Constitution and by Story in his *Commentaries*. Story says: "Every citizen of a State is *ipso facto* a citizen of the United States."[4] But it would appear that Story did not hold that the federal citizen body is made up exclusively of state citizens, for in the next section he adds: "And

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Holderman, 1871 (7 Kans. 50). And for the imposition of other requirements for voting see Anderson v. Baker, 1865 (23 Md. 531); People v. De La Guerra, 1870 (40 Cal. 311).

This note is taken from the *Report on Citizenship*, 1906. H. R. Doc. No. 326, 59th Cong., 2d Session, p. 46.

[3] See, for instance, the early case of Talbot v. Janson (3 Dall. 133), decided in 1795, in which the renunciation of state citizenship, for which provision was made by the state Constitution, was held not to operate as a renunciation of allegiance to the United States. Of course, state citizenship may be lost by residence outside of the State without national citizenship being affected. (Prentiss v. Brennan, 2 Blatchf. 162.)

[4] § 1687.

a person who is a naturalized citizen of the United States, by a like residence in any State of the Union becomes *ipso facto* a citizen of that State. So a citizen of a territory of the Union by a like residence acquires the character of the State where he resides." In support of this last statement, Story refers to the case of Gassies v. Ballon.[5] In that case, decided in 1832, it was held that the allegation that the defendant had been naturalized as an American citizen and was residing in Louisiana was equivalent to an averment that he was a citizen of that State. "A citizen of the United States," Marshall declared without argument, "residing in any State of the Union, is a citizen of that State."

From the foregoing it appears that it was held that there was a reciprocal relationship between federal and state citizenship. By residence in a State a federal citizen became *ipso facto* a citizen of that State; and a state citizen was *ipso facto* a federal citizen. This doctrine did not, it is evident, decide the question as to which of the two citizenships was the more fundamental. Calhoun and others of his school have, by some writers, been credited with the doctrine that there was no federal citizenship apart from the state citizenship — that one could become a federal citizen only by first becoming a citizen of one of the States.[6] Calhoun did not, however, take exactly this position. In a speech delivered in the United States Senate in 1833 upon the then pending Force Bill, he declared: "If by a citizen of the United States he [Senator Clayton] means a citizen at large, one whose citizenship extends to the entire geographical limits of the country without having a local citizenship in some State or Territory, a sort of citizen of the world, all I have to say is that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of the population. . . . Every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all the privileges and immunities of citizens in the several States; and it is in this and no other sense that we are citizens of the United States."

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[5] 6 Pet. 761; 8 L. ed. 573.

[6] For example, see Brannon, *The Fourteenth Amendment*, p. 17.

From this it will be seen that Calhoun recognized not only a state citizenship but a territorial citizenship, which latter, of course, could be derived only from a federal source. What he and others of the States' Rights school held was that as between state citizenship and federal citizenship, the former was the more fundamental; that, in other words, the latter, except as to citizens in the Territories, was derived from the former. The fact of the federal control of naturalization Calhoun explained by alleging that that power was one which enabled Congress simply to remove the disabilities of foreign birth, the several States being left free to decide whether or not, when such disabilities had been removed from aliens resident within their borders, they should be accepted by them as citizens.

§ 129. The Dred Scott Case.

The whole question of the relation between state and federal citizenship came up for discussion and decision in the Dred Scott case[7] decided in 1856. Two of the questions involved in this case were: Whether a State might make a negro one of its citizens; and, if so, whether such a one thereby necessarily became a citizen of the United States and as such entitled to the special privileges and immunities created by the Constitution, among which privileges was the right to bring a suit in a federal court under that clause of the Constitution which gives to the federal judiciary the power to hear and determine suits between "citizens of different States."

The plaintiff in this case was a negro of African descent, whose ancestors were of pure African blood, and who had been brought into this country and sold as slaves. The plea in abatement set up that, whether free or not, and whether by the laws of Missouri a citizen of that State or not, Scott was not, and could not by the action of a State be made a "citizen" in the strict sense of that word as used in Article III of the Constitution. In sustaining this plea, Chief Justice Taney in his opinion said: "The words 'people of the United States' and 'citizens' are synonymous

[7] Scott v. Sanford, 19 How. 393; 15 L. ed. 691.

terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty. . . . In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of a citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and privileges

secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character."

There was no dissent on the part of any of the Justices of the Supreme Court from the doctrine declared by Taney that it did not lie within the power of the individual States to create federal citizens by admitting whomsoever they should see fit to their own citizenship. Justice Catron, however, argued that, under the pleadings, the plea in abatement, and, therefore, the question of citizenship, was not properly before the Supreme Court, and Justices McLean and Curtis in the particular case at bar argued that Scott by fact of birth within the United States was a citizen of the United States, and, by domicile, was a citizen of the State of Missouri. In his dissenting opinion, Justice McLean argued that under the demurrer which was filed to the plea in abatement, Scott was to be considered a free man, and that, as such, whether or not he was of negro descent and had been a slave, he was a citizen of the United States and of the State in which he was domiciled. "Being born under our Constitution and laws," he said, "no naturalization is required, as one of foreign birth, to make him a citizen. The most general and appropriate definition of the term 'citizen' is a 'freeman.' Being a freeman, and having a domicile in a State different from that of the defendant, he is a citizen within the act of Congress, and the courts of the Union are open to him."

Justice Curtis in his dissenting opinion, after declaring the principle that the Constitution must have recognized as citizens of the United States all those who were recognized by the States as citizens at the time the Constitution was adopted, took issue with Chief Justice Taney as to the statement that in 1789 free negroes were nowhere in America recognized as citizens. At that time, he alleged, not only were all free native-born inhabitants of New Hampshire, Massachusetts, New York, New Jersey, and North Carolina, including those descended from African slaves,

citizens of those States, but free negroes, where they had the necessary qualifications, possessed the franchise of electors on equal terms with other citizens. Hence, he declared, when the Constitution was adopted these became citizens of the United States, and of course remained citizens of the States in which they were domiciled. "I can find nothing in the Constitution," he said, "which, *proprio vigore,* deprives of their citizenship any class of persons who were citizens of the United States at the time of its adoption, or who should be native-born citizens of any State after its adoption; nor any power enabling Congress to disfranchise persons born on the soil of any State, and entitled to citizenship of such State by its Constitution and laws. And my opinion is, that under the Constitution of the United States, every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States."[8]

[8] In an able article, entitled "Emancipation and Citizenship" in the *Yale Law Journal,* XV, 263 (April, 1906), Mr. Gordon E. Sherman shows conclusively the fact that during the period from 1775 to 1789 free negroes were very generally held to be citizens of the colonies or States in which they lived, but that there soon began in some commonwealths a desire to banish the freedmen from their borders, to prohibit their entrance from other States, and to deny the privileges and status of citizenship to such as remained within their several jurisdictions. The historical data supplied by this article fully demonstrate the incorrectness of Taney's assertion that, at the time the Constitution was adopted, the free negro was nowhere regarded as a citizen or as qualified for citizenship. Furthermore, there had been, prior to the Dred Scott case, several decisions of state courts in which free negroes had been held to be citizens. Thus, for example, in State v. Manuel (3 Dev. & Bat. 20), decided in 1835, the court said: "According to the laws of this State all human beings within it who are not slaves fall within one or two classes. Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution all free persons born within the dominions of the King of Great Britain, whatever their color or complexion, were native born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did exist in the British colonies. Slaves were not, in legal parlance, persons, but property. The moment the incapacity — or disqualification of color — was removed they became persons, and were then either British subjects, according as they were or were not born within the allegiance of the British King. Upon the Revolution no other change took place in the law of North Carolina than was consequent

It will be noticed that Curtis, in his opinion, makes federal citizenship dependent on state citizenship — that everyone who is by the Constitution or laws of a State a citizen thereof, is *ipso facto,* a federal citizen, and that, indeed, the General Government is without the power to deny its citizenship to those thus created state citizens by state law. This he states still more ex-

upon the transition from a colony dependent on an European king to a free and sovereign State. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, continued aliens. Slaves manumitted here became freemen; and, therefore, if born within North Carolina are citizens of North Carolina, and all free persons born within the State are born citizens of the State. A few only of the principal objections which have been urged against this view of what we considered the legal doctrine will be noticed. It has been said that by the Constitution of the United States the power of naturalization has been conferred exclusively upon Congress, and therefore it cannot be competent for any State by its municipal regulations to a make a citizen. But what is naturalization? It is the removal of the disabilities of alienage. Emancipation is the removal of the incapacity of slavery. The latter depends wholly upon the internal regulations of the State; the former belongs to the Government of the United States. It would be a dangerous mistake to confound them."

The court then goes on to show that the state Constitution gave the franchise to every adult, without regard to color, who had paid a public tax. For cases holding that the free negro was not a citizen, see Amy v. Smith (1 Litt. [Ky.] 326), decided in 1822; Crandall v. State (10 Conn. 339), decided in 1834; State v. Claiborne (1 Meigs [Tenn.] 331), decided in 1838; Pendleton v. State (6 Ark. 509), decided in 1846; Cooper v. Mayor (4 Ga. 68), decided in 1848. In the first of these cases the court said: "Prior to the adoption of the federal Constitution the States had a right of making citizens of any persons they pleased, but as the Constitution does not authorize any but white persons to become citizens of the United States it furnishes a presumption that none others were citizens at the time of its adoption."

In Pendleton v. State, the judge declared: "If citizens in a full and constitutional sense, why were they not permitted to participate in its formation? They certainly were not. The Constitution was the work of the white race; the Government, for which it provides, and of which it is the fundamental law, is in their hands and under their control; and it could not have been intended to place a different race of people in all things upon terms of equality with themselves. Indeed, if such had been the desire, its utter impracticability is too evident to admit of doubt. The two races, differing as they do in complexion, habits, conformation, and intellectual endowments, could not, nor ever will live together upon terms of social or political equality. A higher than human power has so ordered it, and a greater than human

plicitly a little later on. The only power granted to Congress with reference to the subject, he says, is that of naturalization, and this extends only to the removal of the disabilities of foreign birth. These disabilities removed, it is left, he declares, with the States individually to determine whether or not the persons thus relieved of such disabilities, are to be admitted to state citizenship and thereby to federal citizenship. Even as to native-born free white persons it is left to the States to determine whether or not they shall be recognized as citizens. In his opinion, Curtis says: "Undoubtedly, as has already been said, it is a principle of public law, recognized by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. But it must be remembered, that though the Constitution was to form a government, and under it the United States of America were to be one united sovereign nation, to which loyalty and obedience on the one side, and from which protection and privileges on the other, would be due, yet the several sovereign States, whose people were then citizens, were not only to continue in existence, but with powers unimpaired, except so far as they were granted by the people of the National Government. Among the powers unquestionably possessed by the several States, was that of determining what persons should and what persons should not be citizens. It was practicable to confer on the government of the Union this entire power. It embraced what may, well enough for the purpose now in view, be divided into three parts: First, the powers to remove the disabilities of alienage, either by special acts in reference to each individual case, or by establishing a rule of naturalization to be administered and applied by the courts. Second: Determining what persons should enjoy the privileges of citizenship, in respect to the internal affairs of the several

agency must change the decree. Those who framed the Constitution were aware of this, and hence their intention to exclude them as citizens within the meaning of the clause to which we have referred."

In a number of cases the courts held a middle position according to which free negroes were described as citizens of an order lower than that of whites. For these, and other references, see Report on Citizenship of the United States (1906), H. R. Doc. No. 326, 59th Congress, 2nd Session, pp. 63–66.

States. Third: What native-born persons should be citizens of the United States. The first-named power, that of establishing a uniform rule of naturalization, was granted; and here the grant, according to its terms, stopped."

Referring to that clause of the Constitution which provides that "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," Justice Curtis says: "Nowhere else in the Constitution is there anything concerning a general citizenship; but here privileges and immunities to be enjoyed throughout the United States, under and by force of the national compact, are granted and secured. In selecting those who are to enjoy these national rights of citizenship — how are they described? As citizens of each State. It is to them these national rights are secured. The qualification for them is not to be looked for in any provision of the Constitution or laws of the United States. They are to be citizens of several States, and, as such, the privileges and immunities of general citizenship, derived from and guaranteed by the Constitution, are to be enjoyed by them. It would seem that if it had been intended to constitute a class of native-born persons within the States, who should derive their citizenship of the United States from the action of the Federal Government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States. . . . Laying aside, then, the case of aliens, concerning which the Constitution has recognized the general principle of public law, that allegiance and citizenship depend on the place of birth, that it has not attempted practically to apply this principle by designating the particular classes of persons who should or should not come under it; that when we turn to the Constitution for an answer to the question what free persons, born within the several States, are citizens of the United States, the only answer we can receive from any of its express provisions is, the citizens of the several States are to enjoy the privileges and immunities of citizens in every State, and their franchise as electors under the Constitution depends on

their citizenship in the several States. Add to this, that the Constitution was ordained by the citizens of the several States; that they were 'the people of the United States,' for whom and whose posterity the government was declared in the preamble of the Constitution to be made; that each of them was 'a citizen of the United States at the time of the adoption of the Constitution,' within the meaning of those words in that instrument; that by them the government was to be and was in fact organized; and that no power is conferred on the Government of the Union to discriminate between them, or to disfranchise any of them — the necessary conclusion is, that those persons born within the several States, who by force of their respective constitutions and laws, are citizens of the State, are thereby citizens of the United States. . . . It has been objected, that if the Constitution has left to the several States the rightful power to determine who of their inhabitants shall be citizens of the United States, the States may make aliens citizens. The answer is obvious. The Constitution has left to the States the determination what persons born within their respective limits, shall acquire by birth citizenship of the United States, and it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress."[9]

In effect, the Dred Scott decision held that native-born negroes, whether free or slave, living in the United States, though subjects of, that is, owing allegiance to the United States, were not, and could not either by state or federal action, be made "citizens" of the United States within the meaning of the Constitution.

[9] At the first hearing of this case before the Supreme Court, four justices, McLean, Catron, Grier, and Campbell, held that the plea in abatement, setting up the question of citizenship, was not properly before the court because the defendant had submitted and pled over to the merits. Justice Nelson was in doubt as to this. Upon the second hearing, Nelson agreed with these four, and, consequently, no one of the five — a majority of the court — discussed the question in the opinions which they individually rendered. Justices Wayne and Daniel agreed with Taney and Curtis that the plea was properly before the court.

§ 130. The Fourteenth Amendment.

In 1868 was adopted the Fourteenth Amendment which provides that "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."

The two main purposes of this declaration undoubtedly were: (1) The assertion that national citizenship is primary and paramount to state citizenship; and (2) the granting of both national and state citizenship to the negro. That national citizenship was to be paramount is shown not only in the words just quoted, but in the further provision of the amendment that "no State shall make or enforce any law which shall abridge the privileges and 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."

In the Slaughter House Cases, as we have already learned,[10] the Supreme Court held, in effect, that this amendment did not have the effect of absorbing state citizenship and its appurtenant rights into the national citizenship, but that the two remain as distinct as before. Upon this point the court declare: "It [the clause defining citizenship] declares that persons may be citizens of the United States without regard to the citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States.[11] The next observation is more important. . . . It is, that the dis-

[10] *Ante*, § 86.

[11] This interpretation of the phrase "subject to its jurisdiction" was a mere *dictum* of the court, the point not being involved in the suit at bar. Moreover it was an incorrect *dictum* so far as regards persons born within the United States of parents who are aliens. U. S. v. Wong Kim Ark, 169 U. S. 649; 18 Sup. Ct. Rep. 456; 42 L. ed. 890.

tinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."

In the above it will be noticed that the court declare that an additional element is necessary to convert a federal citizen into a state citizen. This additional element, furthermore, is one the giving or refusing of which is not within the control of the State. By the mere act of taking up residence within a State, which the State cannot prevent, a federal citizen, *ipso facto,* becomes a citizen of the State. The State thus no longer has any power to determine who shall be or become its own citizens. The federal Constitution fixes that once for all.

But though the States may not determine who shall constitute its citizen body, they still retain, as the decision in the Slaughter House Cases goes on to declare, a full authority, free from federal supervision and control, to decide what political privileges — as, for instance, the right to vote, or to hold office — shall exist, and who shall be entitled to enjoy them. Thus, upon the one hand, federal and state citizenship does not entitle one, of right, to the suffrage or qualify him for public office. Upon the other hand, the States may grant, and in a number of cases have granted, these privileges to aliens who, though not naturalized, have declared their intention, according to the requirements of the national law regulating naturalization, of becoming United States citizens.

Since the adoption of the Fourteenth Amendment there has been no question but that all persons, including negroes, born or naturalized in the United States become by mere residence in a

State citizens of the State. Furthermore, there is, and has been, no question but that, as Taney says in his opinion in the Dred Scott case, a State cannot, by granting its citizenship to an alien, create such a one a federal citizen or endow him with any of the privilege appertaining to that status, for the right of naturalization is, as we shall see, exclusively vested in the Federal Government.

But though it has never been authoritatively so decided by the Supreme Court of the United States, it would seem that while a State cannot prevent a federal citizen from becoming one of its own citizens, it may grant its own citizenship to one not a federal citizen, and even to one, as for instance a Mongolian, who, according to existing federal law, cannot become a federal citizen. This position is taken by the state court of Wisconsin in *Re* Wehlitz.[12]

In a line of decisions it has been held that a person may by residence abroad lose his state citizenship within the meaning of the constitutional provision which opens the federal courts to suits between citizens of different States, without losing his federal citizenship.[13]

Whether or not a State may make an alien one of its own citizens is quite largely an academic question; for, as already said, it can, without making him such, endow him with all the privileges of citizenship, and even give him the franchise. In Arkansas, Indiana, Kansas, Missouri, Nebraska, South Dakota, Texas, Oregon, and Wisconsin, the alien can, according to existing (1909) law, vote at all elections, if he has declared his intention to become a citizen of the United States. It may be added, also, that in a number of States, the alien who has made this declaration is given certain privileges which are denied to other aliens; for example, to hold real estate, and to be employed on public works. By federal law, also, he may preëmpt and acquire public lands:[14] and, if he dies before becoming actually natural-

[12] 16 Wis. 443. See also Desbois' Case, 2 Martin, 185. *Contra*, Lanz v. Randall, 4 Dill. 428.

[13] Prentiss v. Brennan, 2 Blatchf. 162; Picquet v. Swan, 5 Mason, 35.

[14] Rev. Stats., Secs. 2259, 2289.

ized, his inchoate right to citizenship descends to his widow and children who may be naturalized without themselves making the declaration.[15] He is, on the other hand, liable to certain obligations not required of other aliens; for example, the performance of military service.[16]

§ 131. District of Columbia and Territories.

Inhabitants of the District of Columbia and of a Territory are not citizens of a State within the meaning of the Constitution. They are, however, of course, citizens of the United States.[17]

§ 132. Boyd v. Nebraska Criticized.

In Boyd v. Nebraska,[18] decided in 1892, the Supreme Court took the extreme view, that, in the case of a state law or constitution which demanded as one of the qualifications for office, that the incumbent should have been for two years next preceding his election a citizen of the United States, it did not lie with the tribunals of that State finally to determine in any given case when such citizenship existed; and, in the case at bar, which was a proceeding in quo warranto, the federal court declared entitled to the office of governor of the State one who the court of that State had declared ineligible because, as it held, he was not a citizen of the United States. In other words, the federal Supreme Court substituted its judgment for that of the State's supreme tribunal as to the existence of a qualification for a state office prescribed by the Constitution of that State. In so doing, to the author's mind, the court exceeded its proper powers. Had there been involved the exercise of a right, or the recognition of a privilege or immunity attached by the federal Constitution or laws to federal citizenship, there can be no question but that the state

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15 Rev. Stat., Sec. 2168; and Act June 29, 1906. *Cf.* Boyd v. Nebraska, 143 U. S. 135; 12 Sup. Ct. Rep. 375; 36 L. ed. 103.

16 Act March 3, 1863.

17 Hepburn v. Ellzey, 2 Cr. 445; 2 L. ed. 332; Reilly v. Lamar, 2 Cr. 344; 2 L. ed. 300; Barney v, Baltimore City, 6 Wall. 280; 18 L. ed. 825; New Orleans v. Winter, 1 Wh. 91; 4 L. ed. 44; American Insurance Co. v. Canter, 1 Pet. 511; 7 L. ed. 242.

18 143 U. S. 135; 12 Sup. Ct. Rep. 375; 36 L. ed. 103.

tribunals should not have been given final authority to determine as to the existence of this federal citizenship, any more than they are permitted in the case of a state law alleged to impair the obligation of a contract to determine whether a contract exists to be impaired, or, if it exists, whether it has in fact been impaired. But in Boyd v. Nebraska the real question was as to the existence of a qualification for a state office — the qualifications for which, it was undisputed, the State might determine as it should see fit. The reasoning of Justice Field in his dissenting opinion upon this point seems incontrovertible.[19]

§ 132. Wong Kim Ark Case.

In the case of United States v. Wong Kim Ark,[20] decided in 1898, the Supreme Court was called upon to determine whether, under the terms of the Fourteenth Amendment, persons born in the United States of alien parents, are citizens of the United States. In this case the question was as to the citizenship of a child of Chinese parents who not only were not citizens of the United States, but could not, under the existing laws, become such by naturalization. In sustaining Ark's citizenship the court held that the clause of the Amendment declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States," is but declaratory of the common law principle unreservedly accepted in England since Calvin's case (the case of Postnati, decided in 1608) and in the United States since the Declaration of Independence, that all persons, irrespective of the nationality of their parents born within the territorial limits of a State, are *ipso facto,* citizens of that State. The court admitted that the principle of the Roman law according to which the citizenship of the child follows that of the parent, irrespective of the place of birth, had been accepted by certain of the European nations, but denied that this principle had become a true and universal rule of inter-

[19] See *ante,* § 83.

[20] 169 U. S. 649; 18 Sup. Ct. Rep. 456; 42 L. ed. 890.

national law, or if it had, that it had thereby superseded the rule of the common law.[21]

The opinion declares: "The first section of the Fourteenth Amendment of the Constitution begins with the 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.' As appears upon the face of the Amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the fact of birth within the United States, who would thereby have become

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[21] The court say: "At the time of the passage of that act, although the tendency on the continent of Europe was to make parentage rather than birthplace, the criterion of nationality, and citizenship was denied to the native-born children of foreign parents in Germany, Switzerland, Sweden, and Norway, yet it appears still to have been conferred upon such children in Holland, Denmark, and Portugal, and, when claimed under certain specified conditions, in France, Belgium, Spain, Italy, Greece, and Russia. Cockburn, *Nationality*, 14–21. There is, therefore, little ground for the theory that, at the time of the adoption of the Fourteenth Amendment of the Constitution of the United States, there was any settled and definite rule of international law, generally recognized by civilized nations, inconsistent with the ancient rule of citizenship by birth within the dominion. Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own Constitution and laws, what classes of persons shall be entitled to its citizenship. Both in England and in the United States, indeed, statutes have been passed at various times enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents. But those statutes applied only to cases coming within their purport; and they have never been considered, in either country, as affecting the citizenship of persons born within its dominion. . . . So far as we are informed, there is no authority, legislative, executive, or judicial, in England or America which maintains or intimates that the statutes (whether considered as declaratory, or as merely prospective), conferring citizenship on foreign-born children of citizens, have superseded or restricted, in any respect, the established rule of citizenship by birth within the dominion. Even those authorities in this country which have gone the farthest toward holding such statutes to be declaratory of the common law, have distinctly recognized and emphatically asserted the citizenship of native-born children of foreign parents. 2 Kent, *Com.* 39, 50, 53, 258, note; Lynch v. Clarke (1 Sandf. Ch. 583, 649); Ludlam v. Ludlam (26 N. Y. 356) [84 Am. Dec. 193]."

citizens according to the law existing before its adoption.[22] It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in Dred Scott v. Sandford, 1857,[23] and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States.[24] But the opening words, 'All persons born,' are general, not to say universal, restricted only by place and jurisdiction, and not by color or race — as was clearly recognized in all the opinions delivered in the Slaughter House Cases above cited."

Regarding the phrase of the Fourteenth Amendment "subject to the jurisdiction thereof," the court say: "The real object of the Fourteenth Amendment of the Constitution in qualifying the words, 'all persons born in the United States,' by the addition, 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in peculiar relation to the National Government, unknown to the common law), the two classes of cases — children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State — both of which, as has already been shown by the law of England, and by our own law, from the time of the first settlement of the English colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country."[25]

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[22] For comments on the "history of the times," and the debates in Congress as showing the intended meaning of the citizenship clause of the Amendment, see pages 697–699 of the opinion in the Wong Kim Ark Case. See also Van Dyne, *Citizenship of the United States*, chapter I.

[23] 19 How. 393; 15 L. ed. 691.

[24] Citing The Slaughter House Cases, 16 Wall. 36; 21 L. ed. 394; Strauder v. West Virginia, 100 U. S. 303; 25 L. ed. 664; *Ex parte* Virginia. 100 U. S. 339; 25 L. ed. 676; Neal v. Delaware, 103 U. S. 370; 26 L. ed. 567; Elk v. Wilkins, 112 U. S. 94; 5 Sup. Ct. Rep. 41; 28 L. ed. 643.

[25] Citing Calvin's Case, 7 Coke, 118*b*; Cockburn, *Nationality*, 7; Dicey, *Confl. Laws*, 177; Inglis v. Sailor's Snug Harbor, 3 Pet. 99; 7 L. ed. 617; 2 Kent, *Com.* 39.

"The power of naturalization, vested in Congress by the Constitution," the opinion continues, "is a power to confer citizenship, not a power to take it away. 'A naturalized citizen,' said Chief Justice Marshall, 'becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States precisely under the same circumstances which a native might sue.'[26] Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, *a fortiori*, no act or omission of Congress, as to the providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship. No one doubts that the Amendment, as soon as it was promulgated, applied to persons of African descent born in the United States, wherever the birthplace of their parents might have been; and yet, for two years afterward, there was no statute authorizing persons of that race to be naturalized. If the omission or the refusal of Congress to permit certain classes of persons to be made citizens by naturalization could be allowed the effect of correspondingly restricting the classes of persons who should become citizens by birth, it would be in the power of Congress, at any time, by striking negroes out of the naturalization laws, and limiting those laws, as they were formerly limited, to white

[26] Osborn v. U. S. Bank, 9 Wheat. 738; 6 L. ed. 204.

persons only, to defeat the main purpose of the constitutional amendment. The fact, therefore, that acts of Congress or treaties have permitted Chinese persons born out of this country to become citizens by naturalization, cannot exclude Chinese persons born in this country from the operation of the broad and clear words of the Constitution, 'All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States.'"

The acceptance of the foregoing doctrine, it was held, does not prevent the United States from providing that children born abroad of American citizens shall be considered citizens of the United States.[27]

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[27] Chief Justice Fuller rendered in the Wong Kim Ark case a dissenting opinion concurred in by Justice Harlan. These justices took the position that nationality was essentially a political idea and as such the constitutional provisions regarding it were to be interpreted in the light of international rather than English municipal provisions. "Obviously," they said, "where the Constitution deals with common-law rights and uses common-law phraseology, its language should be read in the light of the common law; but when the question arises as to what constitutes citizenship of the nation, involving as it does, international relations, and political as distinguished from civil status, international principles must be considered, and unless the municipal law of England appears to have been affirmatively accepted, it cannot be allowed to control in the matter of construction."

This affirmative acceptance of the English common law upon this subject, these justices are unable to find. Upon the contrary, they find in the executive practice and various legislative acts of the United States Government rejection of important parts of the English doctrine of citizenship. Thus, for example, since the Declaration of Independence, this country has consistently rejected what, until 1870, was the doctrine of inalienable allegiance; that is, the doctrine denying the general right of expatriation. Furthermore, it is asserted in this dissenting opinion, that the act of Congress providing that children born abroad of American parents are American citizens, is an evidence that the common-law doctrine of *jus soli*, as distinguished from the civil rule of *jus sanguinis*, was not accepted as the general principle governing natural citizenship. After a review of the treaties of the United States, with China and various acts of Congress and decisions of the courts with reference thereto, Chief Justice Fuller concludes: "Did the Fourteenth Amendment impose the original English common-law rule on this country? Did the Amendment operate to abridge the treaty-making power, or the power to establish an uniform rule of naturalization? I insist that it cannot be maintained that this government is unable through the action of the President, concurred in by the Senate, to make a treaty with a foreign government providing that the

subjects of that government, although allowed to enter the United States, shall not be made citizens thereof, and that their children shall not become such citizens by reason of being born therein. A treaty couched in those precise terms would not be incompatible with the Fourteenth Amendment, unless it be held that that Amendment has abridged the treaty-making power. Nor would a naturalization law excepting persons of a certain race and their children be invalid, unless the Amendment has abridged the power of naturalization. This cannot apply to our colored fellow citizens, who never were aliens — were never beyond the jurisdiction of the United States. 'Born in the United States, and subject to the jurisdiction thereof,' and 'naturalized in the United States, and subject to the jurisdiction thereof,' mean born or naturalized under such circumstances as to be completely subject to that jurisdiction, that is, as completely as citizens of the United States, who are of course not subject to any foreign power, and can of right claim the exercise of the power of the United States on their behalf wherever they may be. When, then, children are born in the United States to the subjects of a foreign power, with which it is agreed by treaty that they shall not be naturalized thereby, and as to whom our own law forbids them to be naturalized such children are not born so subject to the jurisdiction as to become citizens, and entitled on that ground to the interposition of our government, if they happen to be found in the country of their parents' origin and allegiance, or any other. . . . I think that it follows that the children of Chinese born in this country do not, *ipso facto*, become citizens of the United States unless the Fourteenth Amendment overrides both treaty and statute. Does it bear that construction; or, rather, is it not the proper construction that all persons born in the United States of parents permanently residing here and susceptible of becoming citizens, and not prevented therefrom by treaty or statute, are citizens, and not otherwise? But the Chinese under their form of government, the treaties and statutes, cannot become citizens nor acquire a permanent home here, no matter what the length of their stay may be. Wharton, *Confl. Laws*, § 12. . . . It is not to be admitted that the children of persons so situated become citizens by the accident of birth. On the contrary, I am of opinion that the President and the Senate by treaty, and the Congress by naturalization, have the power, notwithstanding the Fourteenth Amendment, to prescribe that all persons of a particular race, or their children, cannot become citizens, and that it results that the consent to allow such persons to come into and reside within our geographical limits does not carry with it the imposition of citizenship by birth on children born in the United States of parents permanently located therein, and who might themselves become citizens; nor, on the other hand, does it arbitrarily make citizens of children born in the United States of parents who, according to the will of their native government and of this government, are and must remain aliens."

CHAPTER XVIII.

NATURALIZATION.

§ 133. Naturalization by Statute.

Each country determines, by its own municipal law, the persons to be admitted to its citizenship.

Since the adoption of the Constitution it has been recognized that citizenship of the United States may be obtained in two ways — by birth within the country, and by naturalization. As has been already learned, up to the time of the Dred Scott decision there was doubt whether birth within the United States or naturalization by the General Government was sufficient to endow one with either federal or state citizenship. By that decision this doubt was resolved in the negative, it being held that no one by mere birth became a citizen of the United States, and that one could become a federal citizen only by becoming first a citizen of a State, though it was also held, it will be remembered, that a State could not, by making an African negro one of its own citizens, thereby endow him with the general constitutional privileges of federal citizenship. By the Fourteenth Amendment, however, it was declared that national citizenship is no longer dependent upon state citizenship, and that mere birth within the United States, even though of alien parents, or naturalization by federal law, is sufficient to create national citizenship; and that residence in a State is sufficient to render such a one a citizen of that State.

We thus see that the power given to Congress by Article I, Section VIII, Clause 4, of the Constitution "to establish an uniform rule of naturalization" is not to be construed, as was once alleged, as simply a power to remove the disabilities of foreign birth, leaving it to the States to determine whether or not, when such disabilities are removed, the individual shall become a citizen of the State where he resides, and thereby a citizen of the United States in the full constitutional sense of the term; but that it is a full complete power on the part of Congress to provide for the creation

of federal citizens by the naturalization of persons of foreign birth. With the exception of a few early cases[1] there has never been any question but that the power of naturalization, whatever its scope, is vested exclusively in Congress. The cases holding this from the time of Chirac v. Chirac[2] to United States v. Wong Kim Ark[3] are too numerous to cite.[4]

It lies within the legislative discretion of Congress to determine the mode of naturalization, the conditions upon which it will be granted, and the persons and classes of persons to whom the right will be extended; but, as was said in the Wong Kim Ark case, not to limit the civil and political rights of naturalized citizens beyond the limits provided for in the Constitution.

Except as limited by the Constitution it is within the power of Congress to determine the civil and political rights which naturalized citizens shall enjoy, and to make these rights less than those possessed by native-born subjects. The due process of law clause of the Fifth Amendment, however, would prevent any very great discrimination as to civil rights, and this limitation is reinforced by the obligations of international comity. The Constitution itself provides that only a native-born citizen shall be eligible to the Presidency,[5] or to the Vice-Presidency.[6]

In the United States the granting of naturalization is held to be a judicial act.[7]

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[1] See especially Collet v. Collet, 2 Dall. 294; 1 L. ed. 387.

[2] 2 Wh. 259; 4 L. ed. 234.

[3] 169 U. S. 649; 18 Sup. Ct. Rep. 456; 42 L. ed. 890.

[4] For an excellent statement of the exclusiveness of the federal power, see Taney's opinion in Scott v. Sandford. 19 How. 393; 15 L. ed. 691.

[5] Art. II, Sec. 1, Cl. 5.

[6] Twelfth Amendment.

[7] Spratt v. Spratt, 4 Pet. 393; 7 L. ed. 897. Until 1870 naturalization in England was by special act of Parliament. Naturalization papers are now granted by the Home Secretary. India and many of the other British colonies have laws of their own fixing the terms on which they will grant their own special citizenship to aliens — a citizenship which, of course, does not carry with it a general English citizenship. This practice is anomalous in that it makes the one so naturalized swear fealty to the English King and repudiate all foreign allegiance, and yet does not make him an English citizen except for the particular colony. Thus the British Naturalization Act of 1870 (Section 16) provides: "All laws, statutes, and ordinances which may be

Congress by statute determines the courts which shall exercise the right to naturalize, and to such courts the function is exclusively confined. Congress may authorize, and for many years, has authorized, state courts to entertain naturalization proceedings, but there is, of course, no power on the part of the Federal Government to compel the exercise by such state courts of the power so granted.[8]

duly made by the legislature of any British possession for imparting to any person the privileges, or any of the privileges of naturalization, to be enjoyed by such person within the limits of such possession, shall, within such limits, have the authority of law." In an interesting note in the *Juridical Review* (XIV, 299) entitled "Naturalization in the Colonies," the question is raised as to the status in foreign countries of a person who has been granted all the rights of British citizenship within a particular colony, and has sworn fealty to the British King and has foresworn all other allegiance:— whether, for example, such a one while in France plotting against the English King would be guilty of treason, or what degree of British protection such a naturalized colonial would be entitled to in other than British territory. The author inclines to the belief that such a one would not, in the case supposed, be guilty of treason, also that a naturalized colonial would not be entitled to British protection while abroad.

In the report of the Inter-Departmental Committee on the Naturalization Law, presented to the Houses of Parliament July 24, 1901, it was recommended that "provision should be made by legislation enabling a Secretary of State, or the Governor of a British possession, to confer the status of a British subject upon persons who fulfil the requisite conditions in any part of the British Dominions, and that the status so conferred should be recognized by British law everywhere within and without His Majesty's dominions. This provision should be without prejudice to the power of the legislature of any British possession to provide for the conferring upon any persons under such conditions as it might see fit, the whole or any of the rights of British subjects within its own territory."

[8] The question as to the power of the federal courts to set aside, upon the ground of fraud, a decree of naturalization granted by a state court, or to annul it by an injunction prohibiting giving effect to it, seems in doubt, as appears from some decisions rendered prior to the Act of 1906 below quoted: United States v. Norsch, 42 Fed. Rep. 417; United States v. Gleason, 78 Fed. Rep. 396. *Cf.* article by Judge Henry Stockbridge, "the Law of Naturalization," in the *Green Bag*, XVII, 644. The Act of June 29, 1906, Section 15, provides that "it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and cancel-

It has been held that naturalization has a retroactive effect to the extent of removing liability to forfeiture of lands held during alienage.[9]

The naturalization of a father operates as a naturalization of his minor children if they are dwelling within the United States.[10] This same case holds that a declaration of a father of an intention to become naturalized gives to his children who attain their majority, before their father's naturalization is completed, an inchoate citizenship which, upon majority may be repudiated. "Clearly," say the court, "minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them, and determine that they will accept allegiance to some foreign potentate or power rather than hold fast to the citizenship which the

ing the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. Whenever any certificate of citizenship shall be set aside or cancelled, as herein provided the Court in which such judgment or decree is rendered shall make an order cancelling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the Court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the Court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation." This provision has been held constitutional in United States v. Simon, 170 Fed. 680. This section further provides that: "If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country and take permanent residence therein, it shall be considered a *prima facie* evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceedings to authorize the cancellation of his certificate of citizenship as fraudulent."

9 Manuel v. Wulff, 152 U. S. 505; 14 Sup. Ct. Rep. 651; 38 L. ed. 532; Governor's Heirs v. Robertson, 11 Wh. 332; 6 L. ed. 488.

10 Boyd v. Nebraska, 143 U. S. 135; 12 Sup. Ct. Rep. 375; 36 L. ed. 103.

act of the parent has initiated for them. Ordinarily this is determined by application on their own behalf, but it does not follow that an actual equivalent may not be accepted in lieu of a technical compliance."

§ 134. Naturalization by Annexation of Territory and by Treaty.

Where territories are annexed either by treaty or by conquest, the status of their inhabitants is determined at the will of the annexing States. In all cases, however, in the absence of any treaty stipulations to the contrary, the annexation of a territory transfers to the annexing State the allegiance of its inhabitants, and makes them, from the viewpoint of other nations, the citizens of that State. Whether or not, however, they become its citizens in the stricter constitutional sense depends upon the municipal will of that country. This branch of the subject will be treated in the chapter dealing with "Citizenship in the Territories and Dependencies."

Besides naturalization by general acts, by treaty, and by conquest, there have been many instances in the United States of naturalization of specific individuals or groups of individuals by special acts of Congress.[11]

By statute it is provided that "all children heretofore born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.[12]

The application of this principle to persons born in countries which, like the United States, claim as their own citizens all persons born within their limits, is to create a double citizenship. This is true, especially, of course, with reference to England.

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[11] *Cf.* Van Dyne, *Citizenship of the United States*, Chapter VI. See the same work, chapter VI, for questions of citizenship connected with the admission of Territories as States.

[12] Rev. Stat., § 1993.

Most European countries apply the doctrine of *jus sanguinis* in fixing citizenship. That is, they treat as their own citizens persons wherever born, whose parents are their citizens. In some cases also, they apply the *jus soli* as well, claiming as their own citizens persons born upon their soil of alien parents. This, for example, is the practice of France. Many States permit after majority an election to one born in one country of parents who are citizens of another; for example, France, Spain, Belgium, Greece, Bolivia, Italy, Portugal, Mexico, and Great Britain. The British Act of 1870 declares that "any person who is born out of Her Majesty's dominions, of a father being a British subject, may, if of full age, and not under any disability, make a declaration of alienage, . . . and, from and after the making of such declaration, shall cease to be a British subject." In default of such declaration he remains, by birth, a British subject.

Double citizenship is also created, as we shall see in those cases in which one country naturalizes the citizens of another country which does not admit the right of the individual to expatriate himself without the consent of the State of his natural allegiance.

The difficulties and conflicting claims arising out of these cases of double allegiance have been numerous, and have usually been settled, each case upon its own merits, by way of compromise and upon doctrines of comity, rather than by the establishment of any very general principles. Thus it has been held upon numerous occasions by the executive branch of our government that our law cannot operate to relieve such persons from their allegiance to the countries in which they are born so long as they remain in such countries. It has also been generally held that where a naturalized American citizen returns to his native country, he may be held bound by such obligations, as, for example, the rendition of military service, as may have been due by him at the time of his departure from his native country.[13]

[13] *Cf.* W. S. Tingle, *Germany's Claims Upon German Americans in Germany*, Philadelphia, 1903.

CHAPTER XIX.

EXPATRIATION.[1]

§ 135. Denial of Right of Expatriation.

Until comparatively recent times, except in the United States, the right of a citizen to cast off his natural allegiance, the allegiance into which he is born, was generally denied by the States of the world.

This denial was made, but not always enforced in practice, in England down to the time of her Naturalization Act of 1870. Blackstone in his *Commentaries* declared: "It is a principle of universal law that the natural-born subject of one prince cannot, by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance is intrinsic, and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed, the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince."

The statute 3 Jac. 1, chap. 4, provided that promising obedience to any other prince, State, or potentate, subjected the person so doing to be adjudged a traitor, and to suffer the penalty of high treason.

In respect to the naturalization law of the United States, passed in 1795, Lord Grenville wrote to our minister, Rufus King: "No British subject can, by such a form of renunciation as that which

[1] In addition to the general authorities on citizenship, see chapter VII of Moore's *American Diplomacy*, and the address of Hon. Oscar S. Straus entitled "The United States Doctrine of Citizenship and Expatriation" before the American Social Science Association, 1901.

is prescribed in the American law of naturalization, divest himself of his allegiance to his sovereign. Such a declaration of renunciation made by any of the King's subjects would, instead of operating as a protection to them, be considered an act highly criminal on their part.[2]

The assertion by England of this principle with reference to her subjects who had become naturalized American citizens was one of the causes of the War of 1812.[3]

In a proclamation issued in 1807, the King declared: "Now we do hereby warn all mariners, seafaring men, and others our natural-born subjects, that no such letters of naturalization or certificates of citizenship do or can in any manner divest our natural-born subjects of the allegiance or in any degree alter the duty which they owe to us, their lawful sovereign."

In the treaty of Ghent which marked the conclusion of this war no mention, one way or the other, was made of this English doctrine; but in future England ceased to enforce her claims in an arbitrary manner against English born, but American naturalized, citizens.

By the act of 1870 England definitely abandoned the doctrine. By that statute it is recognized that by voluntarily assuming citizenship in another State, British citizenship is lost, though such change of allegiance is not to operate to discharge the expatriated one from liability for acts or defaults committed prior

[2] 2 Am. State Pap., p. 149; Fitch v. Weber, 6 Hare, p. 51.

[3] Moore (Op. Cit., p. 173) calls attention to the fact that the dispute over impressment as a whole did not involve the crucial point of the later controversies as to expatriation. "The burden of the complaint in regard to impressment," writes Moore, "as defined in Madison's war message of June 1, 1812, was that Great Britain sought, under cover of belligerent right, to execute her municipal law of allegiance on board the ships of other countries on the high seas, where no laws could operate 'but the laws of the country to which the vessels belong.' Precisely the same position was maintained by Webster in his correspondence with Lord Ashburton in 1842. Ships on the high seas are treated, for purposes of jurisdiction, as if they were part of the territory of the nation to which they belong. The complaint that the British Government enforced the English law of allegiance on board of American vessels on the high seas was manifestly a different theory from objecting to her enforcement of the same law within British jurisdiction."

to expatriation. The act also provides for the naturalization of resident aliens of countries whose laws or treaties permit expatriation, and declares such naturalized citizens entitled to the protection of Great Britain everywhere except in the respective countries of their original allegiance.

By a number of foreign States, among them Turkey and Russia, the doctrine of inalienable allegiance is still asserted. In many others it is partially upheld. With most of these countries the United States has entered into special treaties governing the subject of naturalization.[4]

§ 136. Right Recognized by United States.

Since 1868 the right of expatriation has been uniformly asserted by all the departments of the United States Government. Prior to that time, the executive, judicial, and legislative branches were not always in harmony upon this point. During the early years, the executive branch of the government, while asserting the right of aliens to become naturalized citizens of the United States, did not affirm that this change in political status should be recognized by the States of their respective original allegiance. Mr. Jefferson as Secretary of State in 1793 wrote: "Our citizens are certainly free to divest themselves of that character by emigrating, and other acts manifesting their intention, and may then become the subjects of another power, and free to do whatever the subjects of that power may do."[5] A little later, Marshall, as Secretary of State, while affirming the right of an alien without the consent of his native State to seek naturalization, observed that other States should recognize such naturalization "unless it be one which may have a conflicting title to the person adopted." At various times the Executive Department of the United States Government asserted that a naturalized American citizen was entitled,

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[4] For the various attitudes of, and treaty relations with, foreign States, see Moore, *Digest of International Law*, Vol. III; Van Dyne, *Citizenship*, Pt. IV, Chap. II; *The American Passport*, pp. 127 *et seq.;* and Report on Citizenship of the United States, Expatriation, and Protection Abroad, 59th Cong., 2d Sess., Doc. 324.

[5] Jefferson's Works (Washington ed.), IV, 37.

while abroad, to the same protection at the hands of the American Government as that to which a native-born citizen was entitled. Mr. Buchanan was, however, the first Secretary of State to declare in unqualified terms that the naturalized American citizen was entitled to the full protection of the American Government while abroad, and even in the State of his original allegiance, whatever might be the doctrines and laws of that country with reference to expatriation.[6]

Later Secretaries of State did not continue to state the American doctrine as absolutely as had Buchanan. Since 1868, however, an express legislative declaration has prevented the Executive Department from qualifying the doctrine in words, but in fact, it has not been rigorously applied in cases where neither justice nor expediency has demanded it.

Since the first years of the Constitution the legislation of Congress upon the subject of naturalization has implied the right of expatriation. By the act of 1868 which is still in force, the right of expatriation was explicitly declared in the most unqualified manner. "Whereas," the act reads, "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas, in the recognition of this principle the government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas, it is claimed that

[6] Moore (*Am. Dip.*, p. 174) writes: "A comprehensive examination of our unpublished diplomatic records enables me to say that the first Secretary of State to announce the doctrine of expatriation in its fullest extent — the doctrine that naturalization in the United States not only clothes the individual with a new allegiance but also absolves him from the obligations to the old — was James Buchanan."

In 1848, writing to the American minister in London, Buchanan said: "We can recognize no difference between the one and the other, nor can we permit this to be done without protesting and remonstrating against it in the strongest terms. The subjects of other countries who from choice have abandoned their native land, and, accepting the invitation which our laws present, have emigrated to the United States and become American citizens, are entitled to the very same rights and privileges as if they had been born in the country. To treat them in a different manner would be a violation of our plighted faith as well as our solemn duty."

such American citizens, with their descendants, are subjects of foreign States, owing allegiance to the governments thereof; and whereas, it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disallowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic. All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this government the same protection of persons and property which is accorded to native-born citizens.[7]

The enforcement, or rather the attempted enforcement, of this legislative declaration has led the diplomatic branch of our government into many difficulties. With reference to a considerable number of countries these difficulties have in a great measure been obviated by the negotiation with them of naturalization treaties.

Judicial decisions in the United States as to the existence of a right of expatriation in the absence of statutes creating it have not been uniform. In Talbot v. Janson,[8] decided in 1795, Justice Iredell denied that the individual had a right of expatriation at will. So also in Murray v. The Charming Betsey,[9] The Santissima Trinidad,[10] Inglis v. Sailor's Snug Harbor,[11] Shanks v. Dupont,[12] the court, while not in each instance passing directly upon the point, showed an inclination to accept the common-law principle which denied the existence of an individual right of expatriation. This same ground was taken by Chancellor Kent in his *Commentaries.*[13] In M'Ilvaine v. Coxe,[14] however, it was held that persons born in the colonies and remaining in the country and giving their allegiance to the new governments after the

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[7] Rev. Stat., §§ 1999, 2000.

[8] 3 Dall. 133; 1 L. ed. 540.

[9] 2 Cr. 64; 2 L. ed. 208.

[10] 7 Wh. 283; 5 L. ed. 454.

[11] 3 Pet. 99; 7 L. ed. 617.

[12] 3 Pet. 242; 7 L. ed. 666.

[13] Lecture XXV.

[14] 2 Cr. 280; 2 L. ed. 279; 4 Cr. 209; 2 L. ed. 598.

Declaration of Independence were released from their British allegiance and came under the protection of and bound in allegiance to the newly established American governments. Since 1868 the courts have not questioned the right of the citizen voluntarily to expatriate himself and become a citizen of another country.[15]

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[15] See Moore, *Digest of International Law*, III, § 433, and authorities there cited. See also article by Slaymaker entitled "The Right of the American Citizen to Expatriate" in *The American Law Review*, XXXVII, 191.

The following convenient summary of the attitudes of various foreign governments with reference to the subject of expatriation is given in the Report of the Citizenship Commission. (H. R. Doc. 326, 59th Cong., 2d Sess., p. 12.)

"A. The right of voluntary expatriation is wholly denied. A subject has no right to leave the territory of his origin without the express permission of his sovereign; he may not renounce his original allegiance or assume another, and upon his return to the jurisdiction of his origin he is liable to arrest and punishment. (For example, this is the attitude of Russia and Turkey.)

B. The right of expatriation is admitted, provided there exists at the time no unperformed obligation to military service; but, in case this obligation exists, naturalization in a foreign country obtained before it is discharged is considered as void. (For example, this is the attitude of France.)

C. The right of expatriation is admitted, but naturalization in a foreign country does not become valid from the point of view of the country of origin without an express and formal renunciation of the original citizenship made in the country of origin and in accordance with its forms of law. (For example, this is the attitude of Switzerland.)

D. The right of expatriation is admitted, but, while naturalization abroad is freely allowed, in case of a return to the country of origin the person thus naturalized is not denied the rights of citizenship in that country, but is permitted without further formality to retain his rights as a citizen as if he had never departed from the country. (For example, this is the attitude of Venezuela.)

E. The right of expatriation is admitted, and citizenship absolutely ceases (although it may afterward be legally recovered) at the moment when the act of naturalization in a foreign country is performed. (This is the attitude of the majority of foreign governments.)

F. The right of expatriation is admitted and is assumed to have been accomplished when a citizen absents himself from the parent country for a prolonged period of years. (For example, this is the attitude of the Netherlands.)"

CHAPTER XX.

THE LEGAL STATUS OF INDIANS.

The question of the legal status of Indians, which for many years, and especially during the last quarter of the nineteenth century, decreased in practical importance, has, since the annexation of the Philippine Islands, gained a new constitutional value for the reason that upon the islands there are many tribes which for years to come it may be necessary to govern in ways analogous to, if not identical with, those which, in the past, we have employed in the control of the red men in the United States proper. It will, therefore, be well to treat this subject rather more particularly than we should otherwise have done.

The legal relations of the Indians to various governments, established by their white conquerors, have had reference, broadly speaking: (1) to their rights to the lands occupied by them; and (2) to their political status either as tribes or as individuals.

§ 137. Indian Lands.

With reference to the title possessed by Indians in the lands occupied or hunted over by them, the principle was from the first applied by the white settlers that by discovery and occupation the title in fee to all the lands thus taken possession of became vested in the sovereign of the State under whose authority the conquest was made.[1]

This principle that the original title to all the land within a State is in the sovereign of that State, and that by grant from him all individual titles are obtained, was the feudal one which

[1] In earlier years the attempt was made to establish in international law the principle that mere discovery of unoccupied land, or land inhabited by uncivilized tribes, is sufficient to give title to the sovereign by whose subjects the discovery was made. This principle, however, never obtained general recognition, and the present doctrine was established that in order to give a national title which other States are bound to respect, discovery must be followed, within a reasonable time, by effective occupation.

the crown lawyers of England had developed; and, after the separation from that country, the American Commonwealths continued to apply the doctrine, substituting, however, of course, the respective States for the English Crown. With the formation of the present Union, and the transfer to it by the several States of their respective claims to public lands, the United States was substituted as the owner of all lands to which private titles had not been obtained. This grant to the Federal Government carried with it whatever interest or title the several States had had in the Indian lands.

The first discussion in the Supreme Court of the United States of the title or interest still retained by the Indians in the lands occupied by them, was in the case of Fletcher v. Peck.[2] This case involved the question whether the State of Georgia had been seized in fee of certain lands which it had sold, but later resumed possession of. Marshall in his opinion, without attempting any argument, said: "It was doubted whether a State can be seized in fee of lands subject to the Indian title, and whether a decision that they were seized in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title. The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State."[3]

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[2] 6 Cr. 87; 3 L. ed. 162.

[3] Justice Johnson dissented from this doctrine, holding that the fee was in the Indians, and that the interest of the United States consisted in a right of pre-emption. He said: "What, then, practically, is the interest of the States in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain definite limits. All restrictions upon the right of soil in the Indians amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. If the interest of Georgia was nothing more than a pre-emptive right, how could that be called a fee simple, which was nothing more than a power to acquire a fee simple by purchase, when the proprietors should be

In Johnson v. M'Intosh[4] the question of titles to Indian lands was thoroughly examined and a conclusion reached which was substantially the same as that boldly stated without argument by Marshall in the Fletcher v. Peck case. In substance it was held that while the fee to Indian lands is in the United States, and, therefore, that the Indians are not able to grant titles to the same which will be recognized in the courts of the United States, nevertheless these Indians have certain possessory rights from which they may be dispossessed by the United States only with their consent, and upon compensation therefor.

The doctrines thus laid down in 1823 by Marshall in Johnson v. M'Intosh have never been changed, and the practice of the United States government uniformly throughout its history has been in acordance with it. That is to say, where Indians have been dispossessed of their lands their consent, in form at least, has been obtained, and compensation made either in the form of money or other lands. Where tribal relations have been maintained these possessory rights have been held to be vested in the tribes respectively, and not severally in the individual Indians. From time to time, however, as we shall see, the United States Government has provided for the dividing up of these tribal lands and their apportionment in severalty among the individual Indians.

§ 138. The Legal Status of Indians.

From the earliest times the Indians, though treated as subject to the sovereignty first of the foreign colonizing powers, then of the colonies or States, and, finally, of the United States, have been considered not as citizens or subjects, that is, as members of the various bodies politic within whose midst they have lived, but, from the constitutional viewpoint, as aliens, and their tribes as foreign nations to be dealt with as such, namely, by treaties and

pleased to sell? And if this was anything more than a mere possibility, it certainly was reduced to that state when the State of Georgia ceded to the United States, by the Constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States."

[4] 8 Wh. 543; 5 L. ed. 681.

agreements rather than by statutes. As alien nations, their members have not, in default of express provisions to the contrary, been held subject to the general laws of the States in which they have resided or to the statutes of the General Government. The relations of Indians to one another have been held to be a matter for the several tribal authorities to regulate, and when these tribal authorities have been impotent, the Indians have lived practically without law.

At the same time, however, that these Indians have thus enjoyed tribal autonomy, and their relations to the States and the Federal Government regulated by treaties and agreements rather than by statute, and their tribes spoken of as foreign nations, there has never been any question but that, in reality, the sovereignty over them after the Revolution and prior to 1789 was in the individual States, and since that time in the United States. From the point of view of general international relations the Indians have ever been subjects of the American States or the United States, and, consequently, foreign States have never been recognized to have a right to deal directly with them. Furthermore, from the point of view of American constitutional law, such attributes of independence and sovereignty as they have enjoyed have been derived by concession from the States, or, since 1789, from the Federal Government. Hence these rights have been at all times subject to withdrawal without the Indians' consent. This was conspicuously shown by the Act of Congress of 1871. This law for the enactment of which the consent of the Indians was neither sought nor obtained declared: "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty." [5]

Since this act of 1871 the legal supremacy of the United States has been further shown by a number of legislative acts, some of them extending the authority of federal laws and the jurisdiction of the federal courts over acts previously subject exclusively to the authority of the tribes; others providing for the apportionment in

[5] Rev. Stat., § 2079.

severalty of the tribal lands and the naturalization of Indians without their request or consent.

From the first settlement of the American colonies the Indians were treated as alien peoples outside of the control of domestic laws. No attempt was made to interfere with their domestic affairs or systems of self-government, except to endeavor to keep out the agents of other European powers who might engage them in foreign alliance. When their lands were desired, they were purchased and not confiscated. Purchases by individuals, however, were not permitted except with governmental permission. Thus, typical is the proclamation of the King of England in 1763 after the ratification of the Articles of Peace with France, in which it was declared: "And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve under dominion, for the use of the said Indians, all the lands and territory lying to the westward of the sources of the rivers which fall into the sea, from the west and northwest as aforesaid: and we do hereby strictly forbid, in pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained. And we do further strictly enjoin and require all persons whatsoever, who have, either wilfully or inadvertently, seated themselves upon any lands within the countries above described, or upon any other lands which, not having been ceded to, or purchased by us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements."

In July, 1775, the first action looking to a national, that is, inter-colonial management of Indian affairs was taken when the Continental Congress resolved "that the securing and preserving the friendship of Indian nations appears to be a subject of the utmost moment to these colonies," and provided for three Indian departments with commissions in each "to treat with the Indians in their respective departments, in the name and on the behalf of the United Colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions."

In the Declaration of Independence the Indian question figures, it being charged against the British King that he had 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 the Articles of Confederation the Congress of the United States was given "the sole and exclusive right and power . . . of 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."

The phrase "not members of any of the States," here used, had reference to those Indians who had separated from their tribes and become mixed in the general citizen populations of the several States. It was intended also to except from national control those Indians who, though still in tribes, had become surrounded by the whites. The exception, indeed, from federal control of these isolated and surrounded Indian tribes, and their absolute subjection to state authority continued under the Constitution of 1789, and when, in 1802, a general statute was passed for the government of the Indians, it was provided that "nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States and being within the ordinary jurisdiction of any of the individual States." Thus States like New York, Massachusetts, and Maine were permitted to continue to deal according to their discretion with Indian tribes within their borders. "As a dry matter of power," observes Thayer, "Congress might at any time have taken control of them [for as we shall see, the Constitution gives to the Federal Government full authority over the Indians so long as they remain distinct from the citizen bodies of the several States]. But while Congress was staying its hand, it might happen and has happened in Massachusetts, that the tribal relation had been dissolved."[6]

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[6] *A People Without Law.* Two articles in the *Atlantic Monthly* for October and November, 1891. The author is much indebted to these articles of this

§ 139. Federal Power over Indians.

The only direct references to the Indians in the present Constitution are in the provisions that "Indians not taxed" shall not be counted in determining the number of representatives in Congress to which a State is to be entitled,[7] and that Congress shall have power "to regulate commerce . . . with the Indian tribes."[8]

The powers conferred upon the General Government by the Commerce Clause will be discussed in another chapter. It may here be observed, however, that the federal authority over commerce with the Indians is much broader than that over commerce between the States. As Prentice and Egan observe: "The purpose with which this power [commerce with the Indians] was given to Congress was not merely to prevent burdensome, conflicting or discriminating state legislation, but to prevent fraud and injustice upon the frontier, to protect an uncivilized people from wrongs by unscrupulous whites, and to guard the white population from the danger of savage outbreaks. A grant made with such a purpose must convey a different power from one whose purpose was to insure the freedom of commerce. Congress has, in the case of Indians, prohibited trade in certain articles, it has limited the right to trade to persons licensed under federal laws, and in many ways asserted a greater control than would be possible over other branches of commerce."[9]

"Commerce with foreign nations and among several States is that commerce which involves transportation across state lines, and is put within federal control to avoid discriminating, conflicting, and burdensome state legislation. Commerce with the Indian tribes frequently involves no such transportation. It may be carried on wholly within the limits of a single State. . . . In this case . . . the power of Congress is not determined by

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eminent jurist. The reference to Massachusetts has in mind the law of that State enacted in 1869 whereby every Indian in that State was made a citizen of the State.

[7] Art. I, Sec. 3.

[8] Art. I, Sec. 8, Cl. 3.

[9] *The Commerce Clause of the Federal Constitution*, p. 342.

the locality of the traffic, but extends wherever intercourse with Indian tribes, or with any member of an Indian tribe, is found, although it may originate and end within the limits of a single State. The jurisdiction is, therefore, personal rather than economic in its nature." [10]

In United States v. Holliday[11] the court held that Congress had the power to forbid the sale of liquor to an Indian in charge of an agent, in a State and outside of an Indian reservation. The opinion declared: "The locality of the traffic [with Indians] can have nothing to do with this power. The right to exercise it with reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on."

And in United States v. 43 Gallons of Whiskey[12] was upheld the power of Congress to exclude spirituous liquors not only from existing Indian country but from that which had ceased to be so by reason of its cession to the United States, but was adjacent to the Indian settlements. The same regulation, the court declared, could be provided by the treaty-making power.

It has been held by the Supreme Court that the General Government has an authority over the Indians not springing from these specific grants of power, but from the practical necessity of protecting the Indians and the non-existence of a power to do so in the States. Thus in United States v. Kagama[13] the courts refused to derive the power of the United States to enact a criminal code for the Indians from its power to regulate commerce with them, but rested it upon the broader basis that has been mentioned. The Indian tribes, the court declared in that case, "owe no allegiance to the States and receive from them no protection. Because of the local ill feeling the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the dealing of the Fed-

[10] Prentice & Egan, Op. cit., p. 346.

[11] 3 Wall. 407; 18 L. ed. 182.

[12] 93 U. S. 188; 23 L. ed. 846.

[13] 118 U. S. 375; 6 Sup. Ct. Rep. 1109; 30 L. ed. 228.

eral Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court whenever the question has arisen. . . . The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

§ 140. Congressional Legislation.

By the Act of March 30, 1802, consolidating, revising, and reenacting various prior laws, and entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," a system of regulation was established which remained largely in force for many years. By Section 1, the boundary lines between the United States and the various Indian tribes according to treaties entered into with them are laid down. By following sections it is provided that no citizen of or other person resident in the United States shall, under penalty of one hundred dollars, or imprisonment for six months, enter the Indian territory without a passport; that robbery, larceny, trespass, or other crime, against the person or property of any friendly Indian, "which would be punishable, if committed within the jurisdiction of any State against a citizen of the United States," is to subject the offender to fine and imprisonment; that when Indian property is taken or destroyed, the offender shall be liable in a sum double its value; that no settlements by citizens or other persons shall be made on any lands belonging to the Indians; that no traders shall reside in Indian settlements without a license; that "no purchase, grant, lease, or other conveyance of lands, or of any title of claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or

equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."

"In order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship," Section 13 declares it lawful for the President of the United States "to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he may judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: provided, that the whole amount of such presents and allowance to such agents shall not exceed $15,000 per annum."

In the event of Indians crossing the boundaries of their lands into the States and Territories of the United States and their committing crimes of violence or stealing or destroying property, report is to be made to the tribes to which the offenders belong, and, in case the tribes refuse to make satisfaction, the President of the United States is to be notified and he is to take such steps to compel satisfaction as may be necessary. In no case are the individuals who are injured to attempt redress by private warfare. The superior courts in each territorial district and other federal courts are given full jurisdiction to hear and determine all offenses against the act. Offenders found within any State or territorial district may be apprehended. The vending or distributing spirituous liquors among the Indians is forbidden. And, finally, as quoted above, it is declared that "nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual States." [14]

From this act it will be seen that the tribal Indians are treated as peoples not within the citizen bodies of the States and Territories, and that no attempt is made to regulate anything but the relations between them and outsiders. The relations of individual Indians to one another and to their respective tribal authorities are left untouched.

[14] 2 Stat. at L. 139.

In 1817 an act was passed by Congress declaring criminal the committing of any act within Indian territories under the exclusive jurisdiction of the United States. But offenses of Indians upon Indians were expressly excluded.

From time to time additional acts of Congress were passed for the regulation of the Indians, all of them predicated upon the idea that the Indians living upon Indian lands[15] constitute a class apart with a peculiar status, jurisdiction over whom is exclusively in the General Government.

§ 141. Federal Jurisdiction Exclusive. Cherokee Nation v. Georgia.

The exclusiveness of this federal jurisdiction, and, consequently, the lack of constitutional power of the States in this field first came up for serious discussion in the Supreme Court of the United States in the case of The Cherokee Nation v. Georgia,[16] decided in 1831. This case came before the court on a motion on behalf of the Cherokee Nation of Indians for a subpœna and for an injunction to restrain the authorities of the State of Georgia from executing the laws of the State within the Cherokee territory as designated by a treaty between the United States and the Cherokee Nation. The case, however, was not decided on its merits, the majority of the court, including Chief Justice Marshall, holding that the Cherokee Nation was not a foreign State within the meaning of the clause of the Constitution which extends the federal judicial power over controversies "between a State or the citizens thereof, and foreign States, citizens, or subjects," and gives to the Supreme Courts original jurisdiction in cases in which a State is a party. It was held, therefore, that the court was without power to entertain the suit.

Upon this point, Marshall in his opinion said: "Though the Indians are acknowledged to have an unquestionable, and here-

[15] In Bates v. Clark (95 U. S. 204; 24 L. ed. 471) "Indian lands" are defined by the Supreme Court to be "all the country to which the Indian title has not been extinguished anywhere within the limits of the United States."

[16] 5 Pet. 1; 8 L. ed. 25.

tofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government, yet it may be well doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic independent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them would be considered by all as an invasion of our territory, and an act of hostility. These considerations go far to support the opinion that the framers of our Constitution had not the Indian tribes in view when they opened the courts of the Union to controversies between a State or the citizens thereof, and foreign States." [17]

[17] Justices Johnson and Baldwin delivered opinions concurring with that of Marshall. Justice Thompson dissented, holding the Cherokee Nation to constitute not only a sovereign State — though under the protection of the United States — but a foreign State. He said: "They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence and the rights of self-government, and become subject to the laws of the conqueror. Whenever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances; the Indian nation always preserving its distinct and separate character. And notwithstanding we do not recognize the right of the Indians to transfer the absolute title of their lands to any other than ourselves, the right of occupancy is still admitted to remain in them, accompanied with the right of self-government, according to their own usage and customs; and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety. But the principle is universally admitted that this occupancy belongs to them as a matter of

§ 142. Worcester v. Georgia.

In the great case of Worcester v. Georgia,[18] decided in 1832, the question of the political status of the Indians again came before the Supreme Court for discussion and the doctrine then laid down has remained unquestioned to the present day. This case, like Cherokee Nation v. Georgia, grew out of the attempt of Georgia to exercise jurisdiction over Indian territories situated within the State's limits.

After an historical review of the dealings of England and her American colonies, and the dealings of the United States under the Constitution with the Indians, Marshall says: "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. Is this the rightful exercise of power, or is it usurpation? . . . The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation' so generally applied to them, means, 'a people distinct from others.' The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanc-

right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, without their free consent; or unless a just and necessary war should sanction their dispossession. In this view of their situation, there is as full and complete recognition of their sovereignty, as if they were the absolute owners of the soil. The progress made in civilization by the Cherokee Indians cannot surely be considered as in any measure destroying their national or foreign character, so long as they are permitted to maintain a separate and distinct government; it is their political condition that constitutes their foreign character, and in that sense must the term foreign be understood as used in the Constitution."

[18] 6 Pet. 515; 8 L. ed. 483.

tioned the previous treaties with the Indian Nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same manner.

"Georgia, herself, has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States, and by the government of the United States. Various acts of her legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possess a full right to the lands they occupied until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line, established by treaties; that within their boundary, they possessed rights with which no State could interfere, and that the whole power of regulating the intercourse with them was vested in the United States. . . . The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States. The act of the State of Georgia under which the plaintiff in error was prosecuted is consequently void, and the judgment a nullity." [19]

[19] In the Dred Scott case, Taney describes the political status of the Indians as follows: "It is true," he says, "that they formed no part of the local communities and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by

The absolute power of the Federal Government over the tribal Indians, derived not only from the Commerce Clause of the Constitution, but from the obvious necessities of the case, has carried with it, as we have seen in the Cherokee Nation v. Georgia, and Worcester v. Georgia cases, an implied prohibition upon the State to exercise authority over them.

In the Kansas Indians,[20] decided in 1867, the court, denying to a State the constitutional power to tax the property of Indians not incorporated into its citizen body, say: "If the tribal organization of the Shawnees [the Indians in question] is preserved intact, and recognized by the political department of the Government as existing they are a people distinct from the others, capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the Government of the Union. If under the control of Congress from necessity there can be no

their own laws. Many of these political communities were situated in territory to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our government. It is true that the course of events has brought the Indian tribes within the limits of the United States under subjection to the white race; and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people."

[20] 5 Wall. 737; 18 L. ed. 667.

divided authority." The doctrine in this case was affirmed by the court at the same term in the case of the New York Indians.[21]

It has been held, however, that the state courts have jurisdiction over offenses committed by Indians off the reservation and within the State's territorial limits.[22]

Because of the peculiar *quasi*-independent status ascribed to the Indian tribes, and the exclusion of their individual members from the general citizen body of the United States, the political departments of the General Government in the control of them have not been held bound by the constitutional limitations which apply to the citizens of the United States.[23]

§ 143. Naturalization of Indians by Statute.

In 1884, in the case of Elk v. Wilkins,[24] the question arose whether an Indian, born a member of one of the Indian tribes within the United States, became a citizen of the United States under the Fourteenth Amendment, by reason of his birth within the United States, and his afterward voluntarily separating himself from his tribe and taking up a residence among white citizens. In declaring that he did not and could not thus become a citizen, the court said: "The alien and dependent condition of the members of the Indian tribes could not be put off at their own will, without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization, and satisfactory proof of fitness for civilized life. . . . Indians born within the territorial limits of the United States, members

21 5 Wall. 761; 18 L. ed. 708. See *post*, p. 314, the case of United States v. Rickert, 188 U. S. 432; 23 Sup. Ct. Rep. 478; 47 L. ed. 532.

22 People v. Antonio, 27 Cal. 404; Hunt v. State, 4 Kan. 60; United States v. Yellow Sun, 1 Dill. 271.

23 For a discussion of the reasonableness of this doctrine based upon the necessities of the case, see article in the *American Law Review*, XV, 21, entitled "The Legal Position of the Indians," by George F. Canfield.

24 112 U. S. 94; 5 Sup. Ct. Rep. 41; 28 L. ed. 643.

of, and owing immediate allegiance to one of the Indian tribes (an alien, though dependent power), although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof' within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children, born within the United States, of ambassadors or other public ministers of foreign nations. . . . Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being naturalized in the United States by or under some treaty or statute." [25]

§ 144. Disappearance of Indian Tribal Autonomy.

Since the decision of the Supreme Court in Elk v. Wilkins a number of acts of Congress have been passed which have had the effect of destroying, to a very considerable extent, the autonomous tribal governments of the Indians and of subjecting them to the immediate legislative control of Congress instead of to the treaty-making power. The way had been opened to this change in a "rider" attached to an appropriation bill in 1871 which provided, as has been earlier stated, that "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty." [26]

By an act passed March 3, 1885, the federal courts were for the first time given considerable jurisdiction over crimes committed within the reservations by Indians upon Indians. Section

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[25] Justices Wood and Harlan dissented.

[26] Notwithstanding this act, Congress has continued to deal with the Indians, in many cases, by agreements. That is, their formal consent has been required as a condition precedent to putting into force the legislation proposed. Some question as to the constitutionality of this has been raised, it being alleged that the practice amounts to a delegation by Congress of its legislative power in the premises. It would seem, however, that the objection is not of great weight, as it is conceded that a legislative body may make a statute conditional upon the consent of those to whom it applies, provided such assent affects merely the expediency of the statute (Cooley, *Const. Lim.*, 7th ed., p. 164).

9 of this law provides: "That immediately upon and after the date of the passing of this Act all Indians committing against the person or property of another Indian or other person any of the following crimes; namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any Territory of the United States, and either within or without the Indian Reservation, shall be subject therefor to the laws of said territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner, and shall be subject to the same penalties, as are all other persons charged with the commission of said crimes respectively; and said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above described crimes against the person or property of another Indian or other person, within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties, as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The constitutionality of this act was attacked upon the ground that it was not within the legislative power of Congress thus to interfere with the internal legal affairs of Indians still maintaining tribal governments. The Supreme Court held, however, in United States v. Kagama,[27] that whatever political and legal freedom was enjoyed by the Indians was by way of permission or cession from the Federal Government, and was, therefore, subject to curtailment or complete withdrawal by that power. "These Indian tribes," it declared, "are the wards of the Nation. They are communities dependent on the United States, dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the States, and receive from them no protection."

To this decision the objection was urged, and, it would seem, with considerable force, that since the Indians are no longer permitted to enjoy tribal autonomy, and are no longer treated by the

[27] 118 U. S. 375; 6 Sup. Ct. Rep. 1109; 30 L. ed. 228.

Federal Government as independent communities which are to be dealt with by treaties instead of statutes, there disappears the constitutional justification for denying to the States the control of such of them as live within their territorial limits. To this the Supreme Court had no better answer to give than that of expediency — always a poor, if not an absolutely invalid argument. "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers," it said, "is necessary to their protection, as well as to the safety of those among whom they dwell." Upon this argument the exclusive jurisdiction of the Federal Government over the negroes could, in a degree at least, be justified.

At various times during past years, Congress has declared as to particular Indian tribes, that their lands should be divided and held in severalty by their respective members, and that, thereupon, such Indians should become citizens of the United States, and pass immediately from the exclusive jurisdiction of the Federal Government to that of the States in which they reside. By the General Land in Severalty Law, known as the "Dawes Act," approved February 8, 1887, the President was given the power to apply this process to practically every Indian reservation in the country. The peculiarity of these acts is, it will be observed, that it makes citizens of Indians against their will. The action is taken at the discretion of the President and citizenship is the result.[28]

[28] The following are the provisions of this act upon the points under discussion:

"That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows: . . .

"Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and

The declaration of 1871, and the acts of 1885 and 1887, and the sustaining of their constitutionality by the Supreme Court, illustrate the legal power of the United States to govern the tribal Indians at will as bodies of individuals completely subject to its legal control, despite the status of *quasi*-independence that has been accorded them. This absolute power of control has been conspicuously exhibited in more recent legislation which has been enacted in pursuance of a policy decided upon to abolish, as rapidly as possible, the tribal relations and governments, to extinguish the Indian titles to lands, and to incorporate the individual Indians in the general citizen bodies of the States and Territories in which they live.

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declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. . . .

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory, in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property. . . .

"Sec. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Senaca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska

The new policy was based upon the facts found by the so-called "Dawes Commission," which was created by the acts of March 3, 1893,[29] and March 2, 1895.[30]

The constitutionality of thus summarily dealing with the Indians by statute, has been questioned in a number of cases before the Supreme Court, but has always been sustained.

In Stephens v. Cherokee Nation,[31] decided in 1899, it was held that because such legislation might be in violation of previous treaties with the Cherokees was no ground for holding it invalid.[32] As to the general legislative powers of Congress over the Indians, the court said: "We need not review the decisions on the subject, as they are sufficiently referred to by Mr. Justice Harlan in Cherokee Nation v. Southern Kan. Ry. Co. (135 U. S. 641; 10 Sup. Ct. Rep. 965; 34 L. ed. 295), from whose opinion we quote as follows: 'The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation

adjoining the Sioux Nation on the south added by executive order." (Rev. Stat., § 2316.)

The "Dawes" Act of 1887 also provides for allotments of land and citizenship to Indians who may wish to settle upon the public lands of the United States. It also declares that all Indians forsaking their tribal life and adopting the habits of civilized life shall become citizens. Without this express statutory provision, as was decided in Elk v. Wilkins, citizenship could not thus be obtained.

The peculiar status of those Indians who have not become citizens is illustrated in the form of a letter of protection issued in lieu of a passport, to those traveling abroad. The following is a letter issued by our consul at Odessa, the form of which has been approved by the State Department:

"To whom it may concern:

"The bearer of this document is a North American Indian whose name is Hampa. This Indian is a ward of the United States, and is entitled to the protection of its consular and other officials. He is not, however, entitled to a passport, as he is not a citizen of the United States. This consulate has the honor to request the Russian authorities to grant Hampa all necessary protection during his stay in Russia, and to grant him permission to depart when he requires it."

[29] 27 Stat. at L. c. 209.

[30] 28 Stat. at L. c. 189.

[31] 174 U. S. 445; 19 Sup. Ct. Rep. 722; 43 L. ed. 1041.

[32] Quoting Thomas v. Gay, 169 U. S. 264; 18 Sup. Ct. Rep. 340; 42 L. ed. 740.

alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States.' . . . It is true, as declared in Worcester v. Georgia (6 Pet. 515; 8 L. ed. 483), that the treaties and laws of the United States contemplate the Indian Territory as completely separated from the States and the Cherokee Nation as a distinct community, and (in the language of Mr. Justice McLean in the same case, p. 583), that 'in the executive, legislative, and judical branches of our government we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a State, or a separate community.' But that falls far short of saying that they are a sovereign State, with no superior within the limits of its territory."

In Cherokee Nation v. Hitchcock,[33] decided in 1902, the provisions of the Act of 1898, authorizing the Secretary of the Interior to prescribe regulations for the leasing of mineral lands in the tribal districts of the plaintiffs for the purpose of making these lands productive and of securing therefrom an income for the benefit of the tribe, was held valid.

In Lone Wolf v. Hitchcock,[34] decided in 1903, was questioned the constitutionality of an act of Congress of 1900 providing for allotment in severalty of lands held in common within certain Indian reservations and purporting to give an adequate consideration for the surplus lands not allotted or reserved for their benefit. In its opinion, upholding the validity of the act, notwithstanding its alleged incongruity with previous treaties, the court say: "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, and not subject to be controlled by the judicial department of the government. . . . The power exists to abrogate the provisions of an Indian treaty,

[33] 187 U. S. 294; 23 Sup. Ct. Rep. 115; 47 L. ed. 183.

[34] 187 U. S. 553; 23 Sup. Ct. Rep. 216; 47 L. ed. 299.

though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."

In United States v. Rickert,[35] decided in 1903, it was held that lands allotted in severalty to Indians under the Act of 1887, and held in trust for them by the United States for twenty-five years, are not taxable by the State in which situated, nor are the improvements upon them, or the cattle or other property furnished the allottees by the United States. The court in its opinion say: "To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that 'from their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.' United States v. Kagama, 118 U. S. 375; 6 Sup. Ct. Rep. 1109; 30 L. ed. 228."

With reference to the permanent improvements on the lands in question, the court say: "Looking at the object to be accomplished by allotting Indian lands in severalty, it is evident that Congress expected that the lands so allotted would be improved and cultivated by the allottee. But that object would be defeated if the improvements could be assessed and sold for taxes. The improvements to which the question refers were of a permanent kind. While the title to the land remained in the United States, the permanent improvements could no more be sold for local taxes than could the land to which they belonged. Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements. It is true that the statutes of South Dakota, for the purpose of taxation, classify 'all improvements made by per-

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[35] 188 U. S. 432; 23 Sup. Ct. Rep. 478; 47 L. ed. 532.

sons upon lands held by them under the laws of the United States,' as personal property. But that classification cannot apply to permanent improvements upon lands allotted to and occupied by Indians, the title to which remains with the United States, the occupants still being wards of the nation, and as such under its complete authority and protection. The fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States."

With reference to the personal property provided the allottees, the court declare: "The answer to this question is indicated by what has been said in reference to the assessment and taxation of the land and in the permanent improvements thereon. The personal property in question was purchased with the money of the government, and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose."

Finally, with reference to the question whether the United States had a sufficient interest in the matter to entitle it to bring suit, the opinion declares: "In view of the relation of the United States to the real and personal property in question, as well as to these dependent Indians still under national control, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the government with reference to the Indians it is clear that the United States is entitled to maintain this suit. No argument to establish that proposition is necessary."

In *Re* Hoff,[36] decided in 1905, however, the court held that an Indian to whom an allotment under the Act of 1887 had been made, and who, by that act, had been granted the privilege of citizenship, and given the benefit of, and subjected to, the civil

[36] 197 U. S. 488; 25 Sup. Ct. Rep. 506; 49 L. ed. 848.

and criminal laws of the State in which he resided, was a member of the citizen body of that State, and no longer under such federal control as to empower Congress, under the Commerce Clause, to penalize the sale within the State of liquor to him.[37]

[37] After a review of the recent legislation of Congress dealing with the Indian, and a consideration of the police powers reserved to the States, the court say: "But it contended that, although the United States may not punish under the police power the sale of liquor within a State by one citizen to another, it has power to punish such sale if the purchaser is an Indian. And the power to do this is traced to that clause of § 8, Art. I, of the Constitution which empowers Congress 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.' It is said that commerce with the Indian tribes includes commerce with the members thereof, and Congress, having power to regulate commerce between the white men and the Indians, continues to retain that power, although it has provided that the Indian shall have the benefit of and be subject to the civil and criminal laws of the State, and shall be a citizen of the United States, and therefore a citizen of the State. But the logic of this argument implies that the United States can never release itself from the obligations of guardianship; that, so long as an individual is an Indian by descent, Congress, although it may have granted all the rights and privileges of national, and therefore state, citizenship, the benefits and burdens of the laws of the State, may at any time repudiate this action and reassume its guardianship, and prevent the Indian from enjoying the benefit of the laws of the State and release him from obligations of obedience thereto. Can it be that because one has Indian, and only Indian, blood in his veins, he is to be forever one of a special class over whom the General Government may, in its discretion, assume the rights of guardianship which it has once abandoned, and this whether the State or the individual himself consents? We think the reach to which this argument goes demonstrates that it is unsound. But it is said that the government has provided that the Indian's title shall not be alienated or encumbered for twenty-five years, and has also stipulated that the grant of citizenship shall not deprive the Indian of his interest in tribal or other property; but these are mere property rights, and do not affect the civil or political status of the allottees. . . . But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title. Many a tract of land is conveyed with conditions subsequent. . . . But it is unnecessary to pursue this discussion further. We are of the opinion that, when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of, and requires him to be subject to, the laws, both civil and criminal, of the State, it places him outside of police regulations on the part of Congress; that the emancipation from federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

The last acts of Congress in this history of its purpose to assimilate the tribal Indians into the general citizen body of the nation are two statutes enacted in 1906.

By an act approved April 26, 1906, provision is made for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory. In this statute rules are laid down for determining tribal membership; the removal of chiefs for non-performance of duties prescribed by the act; the transfer of tribal schools to the control of the Secretary of Interior; for the collection of tribal revenues by officers appointed by the Secretary; the abolishment of tribal taxes; the disposition of tribal buildings and other property; the sale of unallotted lands; the *per capita* distribution of tribal funds; the prohibition for a period of twenty-five years of the sale or encumbering by Indians of lands allotted to them (though leases may be entered into, except homesteads, with the approval of the Secretary of the Interior); that all lands, thus restricted, shall be exempt from taxation as long as the title remains in the original allottee.[38]

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[38] Sections 27 and 28 provide as follows:

"Sec. 27. That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: Provided, That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other Act of Congress.

"Sec. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: Provided, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: Provided further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States."

By an act approved May 8, 1906, Section 6 of the Act of 1887 is amended so as to read as follows: "Sec. 6. That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subjected to the exclusive jurisdiction of the United States: And provided further, That the provisions of this Act shall not extend to any Indians in the Indian Territory."[39]

The Enabling Act of June 6, 1906, providing for the admission of the Territories of Oklahoma and Indian Territory as the State

[39] 34 Stat. at L. 182.

of Oklahoma, provided: "That nothing contained in the said Constitution [of Oklahoma] shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

CHAPTER XXI.

THE ADMISSION OF NEW STATES.

§ 145. The Admission of New States.

The process of admitting new States to the American Union is a comparatively simple process and but few constitutional questions have arisen in connection with it. The constitutional clause governing the subject reads as follows: "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] It will thus be seen that nothing is said as to the conditions that must be met by a given territory before it may claim, or Congress be obligated to grant, admission to the Union as a State. The whole matter is left absolutely to the discretion of Congress. There can be no question but that at the time of the adoption of the Constitution the idea was generally held that all non-state territory held or to be held by the United States was to be regarded as material from which new States were to be created as soon as population and material development should warrant. But no attempt was made to force the hand of Congress under circumstances that could not be foreseen by defining in the Constitution itself the conditions under which statehood should be accorded. But one limitation is laid down, and that impliedly, and this relates rather to the status of new States after admission, than to the process of admission itself. This is that the new Commonwealths, when received into constitutional fellowship with the older members of the Union, shall stand upon an exactly equal footing with them.

As has been seen, the Constitution does not attempt to fix the *modus operandi* in which new members are to be admitted into the Union. It does not even say whether they are to be formed from territory already under its sovereignty, and in one instance,

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[1] Art. IV, Sec. 3.

that of Texas, a new State was received by the direct process of incorporating, by a joint resolution of Congress, a foreign independent State. In all other cases, however, new States have been formed from areas already belonging to the United States and organized as territories.

The usual process by which these territories have obtained statehood is as follows: The people of a territory petition Congress to grant them statehood. If that body is favorably disposed, a so-called "enabling act" is passed, authorizing the framing of a state Constitution, prescribing the manner in which it shall be framed, and laying down certain requirements that must be met. All these conditions having been met, a resolution reciting this fact is passed by Congress, and the Territory declared a State and admitted as such into the Union. In some cases the final step in the process has been a proclamation issued by the President in obedience to the direction of Congress.

The above has been the usual and regular process. In not a few instances, however, the inhabitants of Territories have met in conventions and framed Constitutions without first obtaining the authorization of Congress. The acceptance, however, by that body, of the instrument framed has been considered sufficient to validate the proceeding.

There has been some little constitutional speculation as to whether the decisive, creative act in the bringing into existence of a new State is the Resolution of Congress approving the constitution that has been drawn up and declaring the former Territory one of the States of the Union; or whether the vivifying force is derived from the constituent act of the people of the Territory in framing and adopting their state Constitution. The latter is the view most acceptable to the States' Rights school.[2] It would

[2] In Brownson's *American Republic*, premising that the entrance of Territories into the Union as States is the free act of the peoples of the respective Territories, the argument is made that the States of the Southern Confederacy, by their ordinances of secession, in effect annulled these acts, and thus, *ipso facto*, relegated themselves to the status of Territories, and as such came under the complete control of Congress for that body to "reconstruct" their governments as it should see fit, and readmit them as States, and upon such terms, as it should approve.

seem to be sufficently plain, however, that the former is the correct doctrine; for there can be no question but that it lies within the power of Congress arbitrarily to refuse its approval to a constitution that has been framed by the people of a Territory strictly in accordance with the requirements of the Enabling Act. The final, and therefore decisive step, has thus to be taken by the Federal Government.

This doctrine has, indeed, received implied judicial sanction at the hands of the United States Supreme Court in its decision in the case of Scott v. Jones.[3]

In this case was involved the validity of an act of a legislature of a Territory passed prior to the admission of the Territory into the Union as a State. The Supreme Court dismissed the case for lack of jurisdiction on the grounds that the law in question was not passed by a legislature of a State and did not, therefore, come within the express terms of the Judiciary Act, which provided the court with its appellate jurisdiction. Referring to the fact that the jurisdiction conferred by the twenty-fifth section of the Judiciary Act had been granted lest a State might legislate against some part of the Constitution, or trench upon matters not within its province, the court said: "Such being the evil or danger, it precludes the idea that this clause in the Judiciary Act had any reference to the fact that public bodies which had not been duly organized, and not been admitted into the Union, would, as States, undertake to pass laws, without being empowered to do it, which might encroach on the Union or its granted powers, and hence should be thus guarded against. Such conduct by such bodies, if not situated within the territory of the Union, would be a foreign affair, and not within the cognizance of any of the departments of this government, unless so interfering with its rights as to call for the political exercise of the executive and legislative authority over our foreign relations. Again, such conduct by bodies situated within our limits, unless by States duly admitted into the Union, would have to be reached either by the power of

[3] 5 How. 343; 12 L. ed. 181. *Cf.* Jameson, *Constitutional Convention*, Sec. 207.

the Union to put down insurrections, or by the ordinary penal laws of the States or Territories within which these bodies unlawfully organized are situated and acting. While in that condition their measures are not examinable at all by a writ of error to this court, as not being statutes by a State, or a member of the Union. And after such bodies are recognized as having been duly organized, and are admitted into the Union, if they ever be, the judicial tribunals of the General Government, which acquiesces in the political organization that has been professing to pass statutes, and which admits it as a legal and competent State, must treat its statutes passed under that organization as they would the statutes of any other State, within the meaning and spirit of the Judiciary Act. And if so, we must inquire only into the validity of their subject-matter, and not as to the new, any more than the old, States, ever suppose that the question of their political competency or power to pass statutes at all was an inquiry intended to be placed under our consideration and decision by the twenty-fifth section of the Judiciary Act. It follows, then, that a statute, passed by a political body before its admission into the Union, seems either not to be one, under the cognizance of the Union or its judicial tribunals, by means of Sec. 25 of the Judiciary Act, unless re-enacted or adopted after becoming a State; then it is treated like the statute of any State; or the admission of the State into the Union by Congress, subsequently with the constitutional and political organization under which the statute was passed by the State — a competent State — leaving, as in other cases, merely its subject-matter to be examined in order to see if it violates or not any acts or provisions of the General Government."

CHAPTER XXII.

THE POWER OF THE UNITED STATES TO ACQUIRE TERRITORY.

In the chapters that have gone before the effort has been made to set forth the constitutional relations subsisting between the Union and its commonwealth members. From the very beginning, however, the American constitutional system has included other political units than the States. These units are Territories, Dependencies, and a Federal District or seat of National Government.[1] To a consideration of the constitutional questions incident to the annexation and government by the National Government of the territories and peoples of which these political elements are composed, we shall now turn. This will involve a discussion of the following points. (1) The constitutional power of the United States to acquire territories; (2) the modes or purposes for which they may be acquired; and (3) their constitutional status. First then as to the power to acquire.[2]

No express power is given to the United States by the Constitution to acquire additional territory. In 1803, however, the vast Louisiana Territory was purchased from France and annexed to the Union; in 1819 Florida was obtained from Spain; in 1846 the Oregon Territory was obtained through discovery, occupation, and convention with England; in 1845 the State of Texas was annexed; in 1848 and 1853 additional territory was obtained by cession from Mexico; in 1856 the annexation of the Guano Islands was authorized by a congressional statute; in 1867, Alaska, the first territory non-contiguous to the United States, was obtained from Russia; in the same year Midway Island was taken posses-

[1] The term "Dependency" can hardly be said to have been as yet accepted as a technically correct term, and possibly never may be. In default, however, of a better word the term will be here provisionally employed.

[2] In this chapter there is considered simply the question as to the power of the United States to extend its sovereignty over additional territory. The question whether territory when thus brought under the dominion of the United States is necessarily "incorporated" in it, in a peculiar constitutional sense, is discussed in a later chapter (Chapter XXX).

sion of by the President; in 1898 the Hawaiian Islands were annexed; in 1898, as a result of the Spanish-American War, the islands of Porto Rico, the Philippines, and Guam came under the sovereignty of the United States; and in 1900, three of the Samoan Islands were acquired.[3]

The constitutional power of the United States thus to annex foreign territory has been, at various times, and by various writers, derived from the following sources:

1. The power to admit new States into the Union.[4]
2. The power to declare and carry on war.[5]
3. The power to make treaties.[6]
4. The power, as a Sovereign State, to acquire territory by discovery and occupation or by any other methods recognized as proper by international usage.

These various sources will be considered seriatim.

§ 146. The Right to Annex Based on the Right to Admit New States.

At the time of the adoption of the Constitution, the territory subject to the sovereignty of the United States consisted of the respective territories of the thirteen original States, and the vast reaches of land to the west,— that to the north and west of the Ohio river being known as the Northwest Territory. These areas had been ceded to the old Confederation of the States and governed according to the provisions of the famous Northwest Ordinance of 1787; which provisions were re-enacted upon the establishment of the new government in 1789.[7]

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[3] The term "Insular Possessions" has been officially applied to the islands owned by the United States.

[4] Art. IV, Sec. 3, Cl. 1.

[5] Art. I, Sec. 8, Cl. 11.

[6] Art. II, Sec. 2, Cl. 2.

[7] To this government Georgia and North Carolina later ceded their western lands.

The act of August 7, 1789, was as follows:

"An Act to Provide for the Government of the Territory Northwest of the River Ohio:

"Whereas, in order that the ordinance of the United States in Congress assembled for the government of the territory northwest of the River Ohio

It is not necessary in this place to trace the history of the part played during the period preceding 1787 by the conflicting claims of the colonies or States to the "back lands," and how Maryland refused to sign the Articles of Confederation until all the States should surrender these lands to the Congress for the joint benefit of all the people of the States to be in proper time "parcelled out by Congress into free convenient and independent States and Governments," and how, finally, this was substantially done.

That the Congress of the Confederation had no constitutional power to accept these cessions of territory is sufficiently plain,[8] but this was not questioned at the time, and in 1787 the ordinance for the government of the Northwest Territories was enacted. The Articles of Confederation did, however, provide for the admission of new States, Article XI declaring that, "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 the Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States."

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may continue to have full effect, it is requisite that certain provisions should be made so as to adapt the same to the present Constitution of the United States.

"Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases in which by the said ordinance any information is to be given or communication made by the Governor of said Territory to the United States in Congress assembled, or to any of their officers, it shall be the duty of said Governor to give such information and to make such communication to the President of the United States, and the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint all officers which by said ordinance were to have been appointed by the United States in Congress assembled, and all officers so appointed shall be commissioned by him, and in all cases where the United States in Congress assembled might by the said ordinance revoke any commission or remove from any office, the President is hereby declared to have the same power of revocation and removal.

"Section 2. And it is further enacted, That in case of the death, removal, resignation or necessary absence of the Governor of said Territory, the secretary thereof shall be and is hereby authorized and required to execute all the powers and perform all the duties of the Governor during the vacancy occasioned by the removal, resignation or necessary absence of said Governor."

[8] *Cf.* Taney in Scott v. Sandford, 19 How. 393; 15 L. ed. 691.

In the Convention which framed the present Constitution the Virginia resolutions declared "that provision ought to be made for the admission of States lawfully arising within the limits of the United States whether from a voluntary juncture of government, transitory or otherwise, with the consent of a number of voices in the national legislature less than the whole." This was agreed to without debate in the committee of the whole. As reported by the Committee of Detail, the draft of the Constitution provided[9] that "new States lawfully constituted or established within the limits of the United States may be admitted, by the legislature into the government; but to such admission the consent of two-thirds of the members present in each House shall be necessary."

In the Convention, in order to cover certain conditions then existing, especially the status of Vermont, this clause, after repeated amendments, was finally made to read: "New States may be admitted by the legislature into the Union; but no new States shall be hereafter founded 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."

As finally phrased by the Committee on Style and adopted by the Convention the clause reads: "New States may be admitted by the Congress into this Union; but no new State shall be founded 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."

During this course of evolution it will be seen that the limitation "within the limits of the United States" disappeared. It does not, however, appear from the debates just why these words of limitation were omitted. From some expressions of opinion of the time, there is, nevertheless, evidence that the possibility and desirability of an expansion of the United States beyond the limits fixed by the treaty of 1783, was early recognized by men active in the framing and adoption of our present Constitution.

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[9] Art. XVII.

Alexander Hamilton, in a letter to Washington, wrote: "We must remain in a position to take advantage of circumstances, we must be prepared to acquire Florida, and to annex Louisiana and we must even wink further South."

And Gouverneur Morris, the author of that clause of the Constitution which confers upon Congress the power to make rules and regulations respecting territory and other property of the United States, writing in 1803 to Livingston said: "I am very certain that I had it not in contemplation to insert a decree *de coercendo imperio* in the Constitution of America. Without examining whether a limitation of territory be or be not essential to the preservation of republican government, I am certain that the country between the Mississippi and the Atlantic exceeds by far the limits which prudence would assign, if in effect any limitation be required. Another reason of equal weight must have prevented me from thinking of such a clause. I knew as well then as I do now that all North America must at length be annexed to us. Happy, indeed, if the lust of dominion stop there." Writing again to Livingston, however, Morris said that while he held that the United States might acquire additional territory, it could not create new States of the Union out of it. He said: "I perceive I mistook the drift of your inquiry, which substantially is, whether Congress can admit, as a new State, territory which did not belong to the United States when the Constitution was made. In my opinion they cannot. I always thought, when we should acquire Canada and Louisiana, it would be proper to govern them as provinces and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit to establish the exclusion. Candor obliges me to add my belief that had it been more pointedly expressed, a strong opposition would have been made." [10]

§ 147. Annexation of Louisiana. Views of Jefferson.

When, in 1790, North Carolina made a cession to the United States of its title to western territory, this was accepted by Con-

[10] *Life and Writings* (Sparks), III, 185, 192.

gress in the Act of April 2, 1790, without constitutional question. This it will be observed, however, involved only a transfer of title from a State to the Nation and not an annexation of territory foreign to the United States. The acquisition of the Louisiana Territory was, however, of this latter character, and Jefferson, then President, felt, and expressed, as we know, most serious doubts as to the constitutionality of the act, though, upon grounds of political expediency, he urged that the treaty providing for it be ratified, and if necessary, a constitutional amendment giving to the National Government the necessary power be adopted.[11]

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[11] Before the ratification of the treaty Jefferson wrote to John Dickinson as follows: "The General Government has no powers but such as the Constitution gives it; and it has not given it power of holding foreign territory, and still less of incorporating it into the Union. An amendment of the Constitution seems necessary for this. In the meantime we must ratify and pay our money, as we have treated for a thing beyond the Constitution and rely on the nation to sanction an act done for its great good without its previous authority."

To John C. Breckenridge he wrote: "The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into our Union. The Executive, in seizing the fugitive occurrence which so much advances the good of their country, has done an act beyond the Constitution. The Legislature, in casting behind them metaphysical subtleties and risking themselves like faithful servants, must ratify and pay for it and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it. It is a case of a guardian investing the money of the ward in purchasing an important adjacent territory, and saying to him when of age: 'I did this for your good; I pretend to no right to bind you; you may disavow me and I must get out of the scrape as best I can; I thought it my duty to risk myself for you.' But we shall not be disavowed by the nation, and their act of indemnity will confirm and not weaken the Constitution by more strongly marking its lines."

Writing to William C. Nicholson before the ratification of the Louisiana treaty he said: "Whatever Congress shall think best to do should be done with as little debate as possible, and particularly as far as respects the constitutional difficulty. I am aware of the force of the observations you make on the power given by the Constitution to Congress to admit new States into the Union without restraining the subject to the territory then constituting the United States. But when I consider that the limits of the United States are precisely fixed by the treaty of 1783; that the Constitution expressly declares itself to be made for the United States, I cannot help believing that

Though not perfectly clear upon the point, it would seem that Jefferson drew a distinction between the constitutional power of the United States to extend its sovereignty over additional territory and to "incorporate" it in the United States as a part thereof; and that his constitutional qualms were excited rather by the exercise of the latter power than of the former. In answer to a letter of Gallatin he wrote (January, 1803): "There is no constitutional difficulty as to the acquisition of territory, and whether when acquired it may be taken into the Union by the Constitution as it now stands will become a question of expediency. I think it will be safer not to permit the enlargement of the Union but by the amendment of the Constitution."

In the first of the drafts of a constitutional amendment which, for this purpose, Jefferson drew up, it was provided that, "The Province of Louisiana is incorporated with the United States and made a part thereof." The second draft provided that, "Louisiana as ceded by France to the United States is made a part of the United States. Its white inhabitants shall be citizens and stand, as to their rights and obligations, on the same footing with the citizens of the United States in analogous situations." [12]

The question of the annexation of territory without "incorporation" into the United States will be discussed in Chapters XXIX and XXX.

Jefferson stood by no means alone in his doubts as to the constitutional power of the United States to annex and incorporate

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the intention was to permit Congress to admit into the Union new States which should be formed out of the territory for which and under whose authority alone they were acting. I do not believe it was meant that they might receive England, Holland, Ireland, etc., into it, which would be the case in your construction. When an instrument admits of two constructions, one safe and the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather risk enlargement of power from the nation where it is found necessary than to assume it by a construction which makes our powers boundless."

[12] For other declarations of Jefferson upon this point, and a review of the debates in Congress concerning the Louisiana purchase, see Downes v. Bidwell, 182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088, and the argument of the Attorney-General in Goetze v. United States, *The Insular Cases*, H. R. Doc., 509, 56th Cong., 2d Sess., pp. 152 *et seq.*

Louisiana, but these doubts were not sufficiently general to lead the people to give expressly by constitutional amendment that right, the implied existence of which was questioned.[13]

With regard to deriving the power to annex from the power to admit new States, it may be observed that not only is reference to this source for authority unnecessary, but, when appealed to, would not seem to yield to the National Government as ample powers as are furnished it when the treaty and war powers are relied upon.[14]

It may further be observed that when recourse is had to the power to admit new States for the authority to annex foreign

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[13] In the debates attendant upon the annexation of Texas, Choate in the Senate and Winthrop, Brangle, and Barnard in the House argued that the United States was without constitutional authority to annex foreign territory (Cong. Globe, 28th Cong., 2d Sess.). In 1838 when the annexation of Texas was being agitated, J. Q. Adams in the House of Representatives offered the following resolution: "Resolved, that the power of annexing the people of any independent foreign State to the Union is a power not delegated by the Constitution of the United States to their Congress, or to any department of the government, but reserved by the people. That any attempt by act of Congress or by treaty would be a usurpation of power, unlawful and void, and which it would be the right and the duty of the free people of the Union to resist and avoid."

Continuing, he declared, that, if annexed, it would be such a violation of the national compact as "not only inevitably to result in a dissolution of the Union, but fully to justify it, and we not only assert that the people of the free States ought not to submit to it, but we say with confidence that they would not submit to it." Many Southerners, on the other hand, asserted that if Texas were not admitted, they would destroy the Union.

[14] "If it [the power of annexation] is to be implied only from the latter power [the right to admit new States], it would seem quite reasonable to hold that it could be exercised in any case only for the purpose of creating a new State out of the acquired territory, and there would be no power to govern it except for that purpose, but the right of Congress to admit the acquired territory as a State or States, or to refuse to do so, according to its own judgment and discretion, is universally admitted, and, therefore, it would seem to follow that the power to acquire and govern cannot be derived from the power to admit, for, if it did, all territory acquired by either of the methods stated would have to be converted into a State or States. It may be said that no territory ought to be acquired which cannot be ultimately fitted for admission as a State or States — but this is a political and not a judicial question." Address of John G. Carlisle before the American Bar Association, 1902.

territory considerable support is given to the position that, in exercising it, the consent of the other States should be obtained. Thus at the time of the debate in Congress over the purchase of Louisiana, Pickering, who did not deny the right of the United States to acquire new territory by conquest or purchase to be held and governed as dependent territory, denied that territory could be annexed with the pledge that it should be divided up and admitted as States into the Union, unless the consent of the copartner States were obtained. Griswold took much the same view. He contended that "the Union of the States was formed on the principles of a copartnership, and it would be absurd to suppose that the agents of the parties who have been appointed to execute the business of the compact, could admit a new partner without the consent of the parties themselves." [15]

§ 148. Territories as Embryo States.

There can be no question but that it was the general intention at the time that the Constitution was adopted that all the territory then under the sovereignty of the United States and not included within the limits of any one of the then several States should ultimately be divided up and admitted as States into the Union.

It will be remembered that the Ordinance for the government of the Northwest Territory provided that — "There shall be formed in the said territory not less than three nor more than five States. . . . And . . . such State shall be admitted . . . on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent Constitution and state government.[16]

The treaty which provided for the cession of Louisiana to the United States declared that — "The inhabitants of the ceded territory shall be incorporated into the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all the rights,

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[15] Annals of Cong. 1803–4, p. 461.

[16] Art. 5.

advantages, and immunities of the citizens of the United States." [17]

In the treaty with Spain which confirmed the title of the United States to the Floridas the United States promised that — "The inhabitants of the territories . . . shall be incorporated in the Union of the United States as soon as it may be consistent with the principles of the Federal Constitution and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States." [18]

In the treaty of 1848 with Mexico whereby Mexico relinquished its rights to Upper California and New Mexico the United States promised that — "The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic conformably with what is stipulated in the preceding article, shall be incorporated in the Union of the United States and to be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution." [19]

In the treaty with Russia for the cession of Alaska the United States agreed that — "The inhabitants of the ceded territory . . . should be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States." [20]

In the provisions of all of these several treaties there is thus to be recognized the presence of the idea in the minds of those who framed and ratified them that the territories thus acquired were to be incorporated as integral elements in the United States and ultimately to be erected into States and admitted into the Union in full and equal fellowship with the original States. The consideration which led the ceding nations to have these promises inserted in the treaties of cession was the same which urges all nations in parting with portions of their territories and their inhabitants to provide, as far as possible, that their former citi-

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[17] 8 Stat. at L. 202.

[18] 8 Stat. at L. 256.

[19] 9 Stat. at L. 930.

[20] 15 Stat. at L. 542.

zens thus handed over to the control of a foreign power, shall not be oppressed but be treated on an equality with the other citizens of the annexing State.

Down to the time of the war of 1898 with Spain we find repeated utterances of public men and of the courts that all of the territories of the United States, originally owned and acquired, not already States, were destined for that status.[21] Senator Hoar, indeed, declared in the Senate when the future of the Philippine Islands was being discussed, "I have been unable to find a single reputable authority more than twelve months old, for the power now claimed for Congress to govern dependent nations or territories not expected to become States. The contrary, until this war broke out, has been taken as too clear for reasonable question."

In support of the view that the holding permanently of territory not destined for statehood is foreign to, and not compatible with, our principles of government, the declarations of Jefferson, Madison, Monroe, J. Q. Adams, Webster, Calhoun, Clay, Reverdy Johnson, Berrien, Edward Everett, Seward, and Sumner have been quoted; and, of course, if Senator Hoar's statement be correct, this list might be almost indefinitely extended.

§ 149. Judicial Dicta. Taney's Views.

A certain number of *dicta* of the Supreme Court of the United States may also be found in which the language indicates an accepted assumption that the territories held by the United States were all ultimately to be erected into States. Thus in Loughborough v. Blake,[22] Marshall, after referring to the attempt of Great Britain to tax her American colonies, said: "The difference between requiring a continent with an immense population to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean and associated with it by no common feelings, and permitting the representatives of the

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[21] Alaska may be treated as an exception. This area, at the time of its annexation, had a very small population and it was not expected that this population would increase.

[22] 5 Wh. 317; 5 L. ed. 98.

American people, under the restrictions of our Constitution, to tax a part of the society, which is in a state of infancy, advancing to manhood, looking forward to complete equality as soon as that state of manhood shall be attained, as is the case with the Territories, is too obvious not to present itself to the minds of all."

Thus also, in Shively v. Bowlby,[23] the court said, "The Territories acquired by Congress whether by deed or cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify, of being admitted into the Union as States upon an equal footing with the original States in all respects; and the title and dominion of the tidewaters and the lands under them are held by the United States for the benefit of the whole people, and, as this Court has often said, in trust for the future States. . . . Upon the acquisition of a Territory by the United States, whether by cession from one of the States or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the benefit of the whole people and in trust for the several States to be ultimately created out of the Territory."

Chief Justice Taney has often been cited as holding in his opinion in the Dred Scott case that foreign territory might be acquired by the United States only under its power to admit new States. This is not correct. In Fleming v. Page,[24] he had already expressly declared that foreign territory might be acquired under the treaty and war-making powers, and in the Dred Scott case, approves, upon this point, the decision of Marshall in American Insurance Co. v. Canter.[25] He asserts, however, that these powers are to be exercised only for the purpose of acquiring territories that ultimately may become States, and that, when acquired, they are to be governed with this end in view, namely, of preparing them for this status. It is thus apparent that the constitutional limitation which, in this case, Taney is intent upon emphasizing, is rather one upon the con-

[23] 152 U. S. 1; 14 Sup. Ct. Rep. 548; 38 L. ed. 331.

[24] 9 How. 603.

[25] 1 Pet. 511; 7 L. ed. 242.

trol of Congress over territories that have been annexed, than upon the power of the General Government to acquire them. In his opinion he says: "There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure, nor to enlarge its territorial limits in any way except by the admission of new States. That power is plainly given, and if a new State is admitted it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State and the citizens of the State and the Federal Government. But no power is given to acquire a territory to be held and governed permanently in that character. And, indeed, the power exercised by Congress to acquire territory and establish a government there according to its own unlimited discretion was viewed with great jealousy by the leading statesmen of the day. . . . We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given, and in the construction of this power by all the departments of the Government it has been held to authorize the acquisition of a territory not fit for admission at the time, but to be admitted as soon as its population would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion."

So, likewise, it will be found that the various opinions delivered in this case by the other members of the court, concurring and dissenting, are concerned rather with the limitations of the powers of government of annexed territory, than with the extent of the power to acquire. We shall consider this phase of the question in another chapter.

§ 150. Conclusions.

Concerning the validity of this claim that the Constitution looks to a Union composed only of States and potential States, this much may be granted: Beyond all reasonable doubt those who framed and adopted the federal Constitution did not anticipate, and therefore cannot be said deliberately to have provided for, the time when the United States should extend its sovereignty over territories not intended ultimately for statehood. Nor can it be said that a different view was held upon this point by practically any one until comparatively recent times. But in admitting this, the conclusion that the annexation of such territory was an unconstitutional act does not follow. For in the first place, as has been repeatedly declared by the Supreme Court, it is not enough to say that a particular case was not in the minds of those who framed and adopted the Constitution in order to hold an act unconstitutional. One must go further and show that had the particular case been suggested to those framers and adopters of the Constitution, they would so have modified its language as to exclude it.[26] In the second place, even were this principle of constitutional construction not sufficiently broad to uphold the federal power in question, there would be applicable two principles, each of which would prevent the Supreme Court from passing upon this point. The first of these principles is the one elsewhere mentioned that the question of *de facto* and *de jure* sovereignty is one regarding which the courts hold themselves bound by the determination of the executive and legislative branches of government; the second is that the motive of an act, except for the purpose of solving an ambiguity in its application, is not a proper subject for judicial examination, and that, therefore, in the case of an annexation of territory, it would not be proper for the court to seek to learn whether or not ultimate

[26] "The case being within the words of the rule, must be within its operations likewise, unless there be something within its literal construction so obviously absurd or mischievous, or repugnant to the general spirit of that instrument as to justify those who expounded the Constitution in making it an exception." Dartmouth College v. Woodward, 4 Wh. 518; 4 L. ed. 629.

statehood was intended to be granted the lands and peoples obtained. Indeed, as we have seen, as regards the contiguous continental territories of the United States, it has been uniformly held that the grant to them of statehood lies wholly within the discretion of Congress, and that no legal means exist for compelling action should that body arbitrarily refuse for an indefinite length of time to grant this privilege to a deserving territory.

The question whether or not territory not contiguous to the other territory of the United States may be annexed is very similar to the one just discussed and may be answered in much the same manner. For this purpose we may borrow the words of the report of the Committee favoring the annexation of Hawaii: "The fact that territory is contiguous or noncontiguous is to be considered in reference to the policy or expediency of annexation, but it is submitted that both on principle and precedent there is all the constitutional power necessary to accomplish annexation in any case where annexation is deemed to be to the interest of this country. The fact that territory is contiguous or noncontiguous can have no bearing upon the constitutionality of its acquisition; but simply goes to affect the value of the territory proposed to be annexed. On general principles, if it is contiguous, it is more easily governed and defended. But whether this is so or not depends upon circumstances. In these days distance is not a matter of miles, but of hours. When California was annexed it was two months distant from the centre of civilization in the United States. Honolulu to-day lies only ten and a half days from Washington. As to the arguments presented in favor of the unconstitutionality of the annexation of noncontiguous territory, it is submitted that because our forefathers of 1776 did not discuss or contemplate any given proposition is no reason, constitutional or otherwise, why their children should not discuss and contemplate any and every problem which is presented to them in 1897 upon its merits, whether their ancestors ever heard of such subject or not. It is further submitted that the precedents in United States history are all against the unconstitutionality of the annexation of noncontiguous territory. Alaska is separated

from the United States by a vast foreign territory. Midway Island is approximately three thousand miles from the American coast. The Aleutian Islands, reaching almost to the Asiatic coast, extend twelve hundred miles west of Alaska, and the guano islands are scattered all over the Pacific and the Caribbean Sea." [27]

§ 151. The Right to Annex Based on the Treaty and War-Making Powers.

As has been incidentally indicated in the preceding pages, the Supreme Court has held that whether or not the right to admit States into the Union carries with it the power to acquire new territory, this power is derivable from the authority of the General Government to declare and carry on war, and to enter into treaties. This it has repeatedly declared, both in earlier cases and in the recent so-called Insular Cases.

In American Insurance Co. v. Canter[28] Marshall says, without, apparently, deeming an argument necessary: "The Constitution confers absolutely upon the government of the Union the power of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or treaty." In Fleming v. Page[29] Taney says: "The United States . . . may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war." In Stewart v. Kahn,[30] the court say: "The war power and the treaty-making power each carries with it authority to acquire new territory." And in United States v. Huckabee[31] it is declared: "Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States."

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[27] Sen. Rpt. 681, 55th Cong., 2d Sess., pp. 47, 48.

[28] 1 Pet. 511; 7 L. ed. 242.

[29] 9 How. 603; 13 L. ed. 276.

[30] 11 Wall. 493; 20 L. ed. 176.

[31] 16 Wall. 414; 21 L. ed. 457.

It is to be observed that in none of these cases is there any argument to show just why, and in what manner, the acquiring of the foreign territory is a necessary or proper means by which war may be carried on, or treaties entered into. In fact it will be seen that the acquiring of foreign territory has been treated as a result incidental to, rather than as a means for, the carrying on of war and the conducting of foreign relations.

This leads us to the consideration of the doctrine which, constitutionally speaking, appeals to the author as the soundest mode of sustaining the power of the United States to acquire territory, as well as the one which, in application, affords the freest scope for its exercise. According to this doctrine, the right to acquire territory is to be searched for not as implied in the power to admit new States into the Union, or as dependent specifically upon the war and treaty powers, but as derived from the fact that in all relations governed by the principles of International Law the General Government may properly be construed to have, in the absence of express prohibitions, all the powers possessed generally by States of the World. This doctrine thus is that the control of foreign relations being exclusively vested in the United States, that government has in the exercise of this jurisdiction the same power to annex foreign territory that is possessed by other sovereign States. The argument in support of this doctrine has already been given in Section 36 of this treatise.

In one instance at least, the United States has acquired territory under an authority which could not be, and was not alleged to be, derived from the treaty-making power or from any other specific express power,—but was upheld by the Supreme Court as based upon the general sovereignty of the nation in all that falls within the field governed by international law.

In 1856 Congress, by a statute which was re-enacted in the Revised Statutes, declares that whenever any citizen of the United States shall discover a deposit of guano on any island, rock, or key not within the lawful jurisdiction of any other government, and shall take possession thereof, such island, rock, or key may, at the discretion of the President, " be considered as appertaining

to the United States." Furthermore, the act goes on to declare all crimes committed on such island, rock, or key to be punishable according to United States law in the federal courts. Upon one Jones being convicted of murder under the provisions of this statute he took an appeal to the Supreme Court upon the ground that the federal law and federal court could not take cognizance of acts committed on the island in question because that island was not constitutionally a part of the United States. In overruling this plea the Supreme Court spoke as follows: "By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name and by its authority or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning Guano Island. . . . Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."[32]

This case thus not only practically upheld the right of the United States to acquire territory by discovery and occupation, but applied the principle that the United States may exercise a power not enumerated in the Constitution, provided it be an international power generally possessed by sovereign States.[33]

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[32] Jones v. United States, 137 U. S. 202; 11 Sup. Ct. Rep. 80; 34 L. ed. 691.

[33] A clear statement of the power of the United States to annex territory because of its national sovereignty was made by Senator Foraker, in the United States Senate July 1, 1898, in a debate with reference to the annexation of Hawaii. Speaking of the original thirteen States before they

§ 152. Power of the United States to Alienate Territory.

The subject will be discussed in Chapter XXXV of this treatise.

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came into the Union, he said: "Each one of those sovereign States had every power that sovereignty enjoys ordinarily, and among the powers so enjoyed by each one of the sovereign States was the power to make treaties with foreign nations, and any kind of a treaty it might choose to make, because there was no restriction unless by itself upon the exercise of that power. It could make war; it could make a treaty for the acquisition of territory; it could annex in any way it saw fit to annex. But, Mr. President, no Senator will contend here that any State in this Union has that power now. That power has been lost to each and every State of the Union. As the price for coming into the Union, it was required to surrender it. The Constitution of the United States prohibits to the States the exercise of the treaty-making power with foreign nations. It prohibits all kinds of transactions on the part of States with foreign nations. No State could acquire territory by treaty in any other manner. Therefore each one of the States in the Union has surrendered that power of sovereignty. No one of them has it. Are we to be told that that inherent power of sovereignty, which every State enjoyed before it came into the Union, has been lost to the States and has not been given to any other power? What has become of it? Where has it gone? Our contention is that when to the States was denied this power, which they had a right to exercise as a sovereign power, it went by implication to the General Government among the implied powers, and it is not any "higher law." It seems to me it is but the necessary and legitimate result of a fair construction of the provisions of the Constitution."

This theory has been declared by several publicists, and in a number of *obiter dicta,* of the Supreme Court. Thus Magoon in his Report to the War Department on the "Legal Status of the Territory and Inhabitants of the Islands Acquired by the United States During the War with Spain," says: "The United States derives the right to acquire territory from the fact that it is a nation; to speak more definitely, a sovereign nation. Such a nation has an inherent right to acquire territory, similar to the inherent right of a person to acquire property." So also Mr. Charles A. Gardner declares: "The nation needs no express grant of power for any international act. . . . The right to acquire territory irrespective of its situs, contiguous or foreign, by conquest, treaty, purchase or discovery, is an acknowledged and well established attribute of sovereignty and has been exercised by sovereigns from the beginning of recorded history. No one pretends that the right is specifically enumerated in the Constitution. Hence it remains an attribute of the sovereign people, and Congress and the President, the sole agents and trustees of that sovereignty, have exclusive and unrestricted power to exercise it. I advance the proposition with deference that this right is itself a primary and substantive attribute of sovereignty, as is the right of national existence or self-defence; and I shall regard it in this discussion as the primary and fundamental authority for territorial expansion." (Pamphlet entitled "Our Right to Acquire and Hold Foreign Territory." Published 1899.)

For an excellent argument for the support of the position here taken see also the prize essay of Mr. W. H. Bikle, entitled "The Constitutional Power of Congress Over the Territory of the United States," and published as a supplement to the American Law Register for August, 1901. See also Butler, "The Treaty-Making Power of the United States." Butler declares his opinion to be: "That the treaty-making power of the United States, as vested in the Central Government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that government as an attribute of sovereignty, and that it extends to every subject which can be made the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any matter whatever and vested that power exclusively in, and expressly delegated it to, the Federal Government."

CHAPTER XXIII.

THE MODES IN WHICH, AND PURPOSES FOR WHICH, TERRITORY MAY BE ACQUIRED BY THE UNITED STATES.

§ 153. Constitutional Modes of Acquiring Territory.

Having shown the constitutional power of the United States to acquire territory whether by treaty, conquest, or discovery and occupation, we now approach the question as to the modes by which this federal authority may be exercised.

A history of the territorial expansion of the United States shows that territories have been annexed in three different ways: (1) by statute, (2) by treaty, and (3) by joint resolution.

The process of extending American sovereignty by simple statute and executive action authorized thereby was illustrated, as we have just seen, in the case of the Guano Islands. The annexation of territory by treaty has been the method most usually employed. The Louisiana Territory, Florida, Alaska, the Mexican cessions, the Samoan Islands, Porto Rico, and the Philippines were obtained in this manner. The constitutionality of this mode of acquisition has already been discussed.

§ 154. Annexation by Joint Resolution.

In two instances, that of Texas in 1845, and Hawaii in 1898, the sovereignty of the United States has been extended over new territory by means of a Joint Resolution of the Houses of Congress. In the case of Texas an attempt had been made to annex the State by treaty, but this effort, requiring a two-thirds favorable vote in the Senate, had failed. Thereupon the same end was secured by a Joint Resolution which needed but a simple majority vote in each of the two branches of the national legislature, with, of course, the approval of the President. This resolution provided that "Congress doth consent that the territory properly included within and rightfully belonging to the Republic of Texas may be erected into a new State to be called the State

of Texas with a republican form of government to be adopted by the people of said republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of the Union." Upon Texas taking the action called for by this clause, Congress later by Joint Resolution declared Texas one of the States of the American Union.

The peculiarity of the annexation of this State was not simply that it came under American sovereignty by Joint Resolution but that it became at once one of the States of the Union, and thus never had the transitional territorial status. This fact, indeed, gave additional constitutional support to the action of Congress in the matter, for to that body is given by the Constitution the right to admit new States into the Union, and, therefore, its admission of Texas to fellowship with other American commonwealths might easily be construed as a legitimate exercise of that power.

The acquisition of the Hawaiian Islands was another instance of the extension of the United States sovereignty by a simple Joint Resolution of the two branches of Congress. In this case, however, the islands were not, as was Texas, admitted as a State or States of the Union, but were simply annexed as a territory.

The constitutionality of the annexation of Hawaii, by a simple legislative act, was strenuously contested at the time both in Congress and by the press. The right to annex by treaty was not denied, but it was denied that this might be done by a simple legislative act. The incorporation of one sovereign State, such as was Hawaii prior to annexation, in the territory of another, is, it was argued, essentially a matter falling within the domain of international relations, and, therefore, beyond the reach of legislative acts. Only by means of treaties, it was asserted, can the relations between States be governed, for a legislative act is necessarily without extraterritorial force — confined in its operation to the territory of the State by whose legislature it is enacted. To meet this point Senator Foraker argued that though a treaty may be the proper mode for annexing a portion of the territory

of another State, it is inappropriate when an entire State is annexed by another. "I agree," he said, "with Senators on the other side that a treaty is a contract — that has been your contention throughout — until the treaty has been signed on both sides. The very minute that is done one of the parties is gone, and there is no continuing contract. Therefore it is simply a cession on their part and an acceptance on ours, and it might be done just as well by legislation as otherwise."

In the report made March 16, 1898, by the Senate Committee on Foreign Relations[1] in favor of the Joint Resolution of Annexation, the annexation of Texas was cited as a precedent and in addition the assertion made that for annexation the consent of the government of the annexed territory is needed but not, necessarily, that of its populace.[2]

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[1] Senate Report 681, 55th Cong., 2d Sess.

[2] "This Joint Resolution [annexing Texas]," the Committee declare "clearly establishes the precedent that Congress has the power to annex a foreign State to the territory of the United States, either by assenting to a treaty of annexation or by agreeing to articles of annexation or by act of Congress based upon the consent of such foreign government obtained in any authentic way. No exercise of power could be more supreme than that under which Texas was annexed to the United States, either as to its scope or the manner of the annexation or the choice of conditions upon which Congress would merge the sovereignty of an independent republic into the supremacy of the United States. The act also establishes the fact that a treaty with a foreign State which declares the consent of such State to be annexed to the United States, although it is rejected by the Senate of the United States, is a sufficient expression and authentication of the consent of such foreign State to authorize Congress to enact a law providing for annexation, which, when complied with, is effectual without further legislation, to merge the sovereignty of such independent State into a new and different relation to the United States and toward its own people. It further establishes the fact that Congress, in legislating upon the question of the annexation of a foreign State, rightfully acts upon the consent of such State, as the sovereign representative of its people, and that the power of Congress to complete the annexation of such foreign State depends alone upon the sovereign will and consent of such State, given and expressed through its organized tribunals. It further establishes the fact that Congress cannot acquire the right or jurisdiction to annex a foreign and independent State through a vote of a majority of its people, in opposition to the will of its constituted authorities. It is the constitutional power of Congress that operates to annex foreign territory. Such a proceeding on the part of Congress as the sub-

The assertions here made by the Committee that the annexation of Texas constituted a precedent for annexation by legislative act, the consent of the constituted governmental authorities of the annexed territory being obtained, is open to question. For it it will be remembered that Texas was admitted directly into the Union as a State, and, therefore, its admission could be upheld as an exercise of the power given to Congress and the President to admit new States into the Union.

§ 155. Consent of Inhabitants of Annexed Territory not Required.

As to the question whether it be necessary to obtain the consent of the inhabitants of the territories to be annexed, it may be said that this is, or may be, a matter of justice and political expediency but not of legal necessity. The act of annexation being, *ex hypothesi,* legislative, its legal force is derived from the body which enacts it, and it would be an error to hold its legal force necessarily dependent upon a consent obtained from some other source. There would, of course, be no legal objection to Congress providing, should it see fit, that the going into effect of an act of annexation should be dependent upon its approval by the inhabitants of the territory to be annexed, just as in its "enabling acts" for the admission of Territories as States, or in many of its acts with reference to the Indians, it provides that the consent of those directly concerned shall be obtained. But this is not a matter of legal necessity. It is not a division or a delegation of legislative power, either of which would be necessarily unconstitutional.

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mission of the question to vote of the people of such a State would only create disorder and revolution in a foreign State applying through its constituted authorities for admission into the United States. This important, clear, and far-reaching precedent established in the annexation of the Republic of Texas is a sufficient guide for the action of Congress in the passage of the Joint Resolution herewith reported. If, in the judgment of Congress, such a measure is supported by a safe and wise policy, or is based upon a national duty that we owe to the people of Hawaii, or is necessary for our national development and security, that is enough to justify annexation, with the consent of the recognized government of the country to be annexed."

Nor is there any principle of public law, or general precedent from our own practice that requires the consent of the population of an annexed territory to be obtained. In none of the instances, except that of Texas, has the United States deemed this consent necessary.[3]

As we shall later see, it is quite usual to provide in treaties of annexation that the people of the territories transferred shall have an election whether they shall become citizens of the annexing State or retain their old national status. But this, of course, is a question quite distinct from the transfer of the sovereignty over the territory in question.

Though it thus appears that territory may be annexed without the consent of the people, it has not yet been shown that, in fact, a legislative act is constitutionally adequate for the purpose. It has been shown that the admission of Texas by a Joint Resolution of Congress directly into the Union as a State could be justified as an exercise of the power given to Congress by the Constitution to admit new States into the Union, and did not, therefore, establish a precedent for the annexation of Hawaii. To the author's mind the annexation of Hawaii by legislative act, was constitutionally justified upon the same ground that the extension of American sovereignty by statute over the Guano Islands was justified; namely, as an exercise of a right springing from the fact that, in the absence of express constitutional prohibition, the United States as a sovereign nation has all the power that any sovereign nation is recognized by international law and practice to have with reference to such political questions as the annexation of territory.

In addition to this source of authority, it would also be quite reasonable to argue that the annexation of the Hawaiian Islands

[3] Hawaii was annexed at the request of the Hawaiian Government but it cannot be said that the United States made a favoring popular vote a condition precedent to annexation. Upon the general international practice, see Solière, *Le plébiscite dans l'annexation*. 1901. Hall, *International Law*, 4th ed., p. 49, says: "The principle that the wishes of a population are to be consulted when the territory they inhabit is ceded has not been adopted in international law, and cannot be adopted into it until title by conquest has disappeared." *Cf.* Moore, *Digest of Int. Law*, § 83.

by act of Congress was a "necessary and proper" measure for the military defense of the nation, and for the protection and increase of our foreign commerce; for there can be no question but that a conceived military and commercial need was one of the strongest of the motives that operated to bring about the annexation.[4]

The question as to the constitutionality of the annexation of Texas or of Hawaii has never been directly raised and passed upon by the Supreme Court of the United States. In fact, however, the court has of course impliedly recognized the validity of the annexation both of Texas and Hawaii in every case in which it has enforced the laws of, or federal laws relating to, these territories. That the point has not been directly raised is due to the principle uniformly declared by the court, when the point has, in other instances, been raised, that the territorial limits of sovereignty is a question the decision of which by the political branches of the government is absolutely binding upon its judiciary.

[4] The Committee (Senate Report 681, 55th Cong., 2d Sess.) in its report favoring annexation of Hawaii, say: "As the place — the only one — in the North Pacific Ocean for the concentration of cable lines; for obtaining coal, water, or provisions for ships; for the repair of vessels; or for the storage of goods in bond, or otherwise, from all countries for the purposes of trade around the whole circuit of the coasts of the Pacific Ocean; and with its numerous islands, the Hawaiian Islands are the central point of distribution which can have no possible competitor. This enormous advantage to our trade in the islands and across the Pacific Ocean must be felt by every industry in the United States. Their separation by a distance of 2,000 miles from all other lands, and their central location as to every point on the great arc of the circle that extends from the Mexican border almost to the coast of Siberia, the Pacific frontier of Alaska, Washington, Oregon, and California, makes the Hawaiian Islands the most important point in the seas of the Western Hemisphere for the fostering and protection of our coastwise and foreign commerce. As ships of war are the necessary complement of ships of commerce, these great advantages belonging to the geographical location of the Hawaiian Islands are equally indispensable to our Navy, as the protector of our commerce, coming from both the Atlantic and Pacific Oceans. On the commercial and military views of these questions the opinions of merchants and navigators, and of our naval officers, as to the developments and necessities of the future — as yet unknown — are our most intelligent and safest guides. The Committee can appeal to these sources of information and safe forecast with the confidence that comes from their almost unanimous agreement."

With reference to the annexation of the Philippine Islands, the point was raised by certain "Anti-Imperialists" that the United States did not get a valid title for the reason that Spain had never reduced some of them to possession; and that, as to others, at the time of transfer neither she nor the United States was in effective occupation. This, however, is not a question of constitutional, but of international law — one, that is, that a foreign power might possibly raise, but which could not be considered in our courts.

CHAPTER XXIV.

THE CONSTITUTIONAL SOURCES OF THE POWER OF CONGRESS TO GOVERN THE TERRITORIES.

§ 156. Power to Govern Territories not Questioned.

There has never been any question as to the power of the United States to govern the territories possessed or acquired by it and not included within the limits of any of the individual States. The only question has been as to the source and extent of this power. This federal authority to govern has been derived from three sources: (1) The express power given to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" (2) The implied power to govern derived from the right to acquire territory; and (3) The power implied from the fact that the States admittedly not having the power, and the power having to exist somewhere, it must rest in the Federal Government.

All three of these sources of authority have been, at different times, recognized by the Supreme Court.

The earliest case is that of Sere v. Pitot,[1] decided in 1810, with reference to the Territory of Orleans. In his opinion Marshall says: "The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and hold property. Could this position be contested, the Constitution of the United States declares that 'Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States.' Accordingly, we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the Territory of Orleans. Congress has given them a legislature, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively."

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[1] 6 Cr. 332; 3 L. ed. 240.

From this it will be seen that both the first and second sources of authority mentioned above are relied upon. Marshall himself is plainly of the opinion that the power to govern is a necessary incident to the power to acquire, but indicates that this view may possibly be contested.

In American Insurance Co. v. Canter,[2] decided in 1828, with reference to the government of Florida, Marshall uses the following language: "In the meantime [until it is admitted as a State] Florida continues to be a Territory of the United States; governed by virtue of that clause which empowers Congress 'to make all needful rules and regulations, respecting the territory, or other property belonging to the United States.'" He adds, however: "Perhaps the power of governing a territory belonging to the United States which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

Here, then, all three of the possible sources of the authority of Congress to govern acquired territory are referred to, though the two latter are only suggested as possible sources.

In United States v. Gratiot,[3] decided in 1840, it is declared: "The term territory as here used [Art. IV, Section III] is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest."

In Cross v. Harrison,[4] decided in 1853, with reference to territory acquired from Mexico, the court say: "The territory had been ceded as a conquest, and was to be preserved and governed

[2] 1 Pet. 511; 7 L. ed. 242.

[3] 14 Pet. 526; 10 L. ed. 573.

[4] 16 How. 164; 14 L. ed. 889.

as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting territory and other property belonging to the United States."

In United States v. Guthrie,[5] decided in 1854, Justice McLean in a dissenting opinion declared: "The power under which the territorial governments are organized is a matter of some controversy. . . . It seems to me that the power to govern a territory is a necessary consequence of the power given 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.' No one doubts the power of Congress to sell the public lands beyond the limits of any State; and this renders necessary the organization of a government for the protection of the persons and property of the purchasers. This is an implied power, but it necessarily results from the power to sell the public lands." [6]

§ 157. Doctrines of the Dred Scott Case.

This review of decisions brings us chronologically to the Dred Scott case. Up to this time, it must be observed, that the chief reliance for the power to govern the territories had been the grant of authority contained in Article IV, Section III. It is further to be observed that recourse to this source of authority is subject to the possible limitation that it applies only to territories possessed by the United States at the time the Constitution was adopted, and, therefore, that it cannot be appealed to for authority to govern areas acquired since that time; also that, over such territories as it is applicable to, it does not grant to the Government general governing powers, but only such as are necessary and proper for disposing of and regulating the public lands as prop-

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[5] 17 How. 284; 15 L. ed. 102.

[6] It is worthy of note, that, though McLean relies upon an express grant of power given Congress in Article IV, Section III, he construes this to be not a direct grant of governing power, but of a power to dispose of lands which carries with it the implied power to govern.

erty, and preparing them and their inhabitants for admission to the Union as States.

This was the position assumed by the majority of the court in the great case of Scott v. Sandford,[7] decided in 1857.

This case we have already discussed with reference to its bearing upon citizenship in the United States. We have now to examine it in its bearing upon the status of territories.

This suit, it will be remembered, was one brought by Dred Scott, a negro, who had been owned and held as a slave in the State of Missouri, had been carried by his master first to the State of Illinois, where slavery did not exist, where he remained for two years; then to the Territory then known as Upper Louisiana, from which slavery had been excluded by the Missouri Compromise Act of 1820; and finally brought back to Missouri. Scott alleged that by being carried by his master voluntarily into the free State of Illinois and the free Territory he became a free man. He thereupon brought suit in the nature of an action of trespass against his master for restraining his liberty. The suit was brought in a federal court, the jurisdiction of the federal court being based upon a diversity of citizenship, Scott claiming to be a citizen of the State of Missouri, and Sandford, the defendant, being a citizen of the State of New York. The plea in abatement that Scott was not a citizen of a State within the constitutional sense, has already been considered in Chapter XVII.

A plea in bar was filed which set up that Scott was still a slave, and that, therefore, no legal injury had been done him by the defendant; that when he was taken into Illinois as a slave and held there as such, and brought back by his master to Missouri, his status as fixed by the laws of Missouri was not changed; and that, as for his being carried into the free Territory of Upper Louisiana, Congress had had no constitutional power to exclude slavery therefrom, as it had attempted to do by the Act of 1820. It was in passing upon this last point that the court found it necessary to examine as to the constitutional power of the United States to acquire foreign territory and to govern it when acquired.

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[7] 19 How. 393; 15 L. ed. 691.

The case was first argued in 1856 and at that time the majority of the court were of the opinion that it would not be necessary to consider the question whether or not Scott was a citizen, but that the case could be decided upon its merits, namely, that Scott, being originally a slave, his being carried into Illinois and Upper Louisiana did not affect his status after his return to Missouri; that, in other words, the law of Missouri as determined by the highest courts of that State should govern the Supreme Court in its disposition of the case. This decision, it will be observed, made it unnecessary for the court to pass upon either the question as to whether a free negro could become a citizen of a State in the constitutional sense of the term, or the question as to the power of Congress to prohibit slavery in the Territories. To Justice Nelson was assigned the preparation, upon this basis, of the opinion of the court, and the individual opinion which he finally read was the one prepared for this purpose. In this opinion he said: "In the view we have taken of the case, it will not be necessary to pass upon this question [of citizenship], and we shall therefore pass at once to an examination of the case on its merits." Justice Nelson does later say, however: "It is perhaps not unfit to notice in this connection that many of the most eminent statesmen and jurists of the country entertain the opinion that this provision of the Act of Congress [of 1820], even within the Territory to which it relates, was not authorized by any power under the Constitution." But he goes on to say that whether it was valid or not, the act could have no operation or effect within the limits of the State of Missouri, and could not, therefore, affect the status of the plaintiff after his return thither.

A second argument of the case having been asked for and had, five justices agreed that the plea in abatement was not properly before the court and that, therefore, the case would have to be decided upon the merits.

With the judgment of the court as to the effect of the laws of Congress governing the Territory of Upper Louisiana and of the State of Illinois upon the status of Scott after his return to Missouri we are not here concerned. That which does concern

us is that six of the nine justices held that the power of Congress over the Territories was of such a limited character as to render unconstitutional an attempt to exclude slavery from them.

The Chief Justice, who was among those who took this position, argued as follows: "The counsel for the plaintiff has laid much stress upon that article in the Constitution which confers on Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,' but in the judgment of the court, that provision has no bearing on the present controversy, and the power there given, whatever it may be, is confined, and was intended to be confined, to the territory which at that time belonged to, or was claimed by, the United States, and was within their boundaries as settled by the Treaty with Great Britain, and can have no influence upon a territory afterwards acquired from a foreign government. It was a special provision for a known and particular Territory, and to meet a present emergency, and nothing more. A brief summary of the history of the times, as well as the careful and measured terms in which the article is framed, will show the correctness of this proposition." [8]

[8] After reviewing the circumstances leading up to the cession by the individual States to the Confederacy of their claims to western lands, and after adverting to the fact that the Confederacy had no constitutional power to accept the grant or to enact the Northwest Ordinance of 1787 for its government, he says: "This was the state of things when the Constitution of the United States was formed. The territory ceded by Virginia belonged to the several confederated States as common property, and they had united in establishing in it a system of government and jurisprudence, in order to prepare it for admission as States, according to the terms of the cession. They were about to dissolve this federative Union, and to surrender a portion of their independent sovereignty to a new government, which, for certain purposes, would make the people of the several States one people, and which was to be supreme and controlling within its sphere of action throughout the United States; but this government was to be carefully limited in its powers, and to exercise no authority beyond those expressly granted by the Constitution, or necessarily to be implied from the language of the instrument, and the objects it was intended to accomplish; and as this league of States would, upon the adoption of the new government, cease to have any power over the territory, and the ordinance they had agreed upon be incapable of execution, and a mere nullity, it was obvious that some provision was necessary to give the new government sufficient power to enable it to carry

It has often been stated that in this case Chief Justice Taney and all those Justices who agreed with him, held that the United States might increase its territory only by the admission of new States. This is not quite correct. These justices did, indeed, hold that foreign territory might be acquired only for the purpose of admitting new States; but its annexation of areas with this end in view they agreed might be effected by an exercise of the treaty

into effect the objects for which it was ceded, and the compacts and agreements which the States had made each other in the exercise of their power of sovereignty. It was necessary that the lands should be sold to pay the war debt; that a government and system of jurisprudence should be maintained in it; to protect the citizens of the United States, who would migrate to the Territory, in their rights of person and of property. It was also necessary that the new government, about to be adopted, should be authorized to maintain the claim of the United States to the unappropriated lands in North Carolina and Georgia, which had not then been ceded, but the cession of which was confidently anticipated upon some terms that would be arranged between the General Government and these two States. And, moreover, there were many articles of value besides this property in land, such as arms, military stores, munitions, and ships of war, which were the common property of the States when acting in their independent characters as confederates, which neither the new government nor any one else would have a right to take possession of, or control, without authority from them; and it was to place these things under the guardianship and protection of the new government, and to clothe it with the necessary powers, that the clause was inserted in the Constitution which gives Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' It was intended for a specific purpose, to provide for the things we have mentioned. It was to transfer to the new government the property then held in common by the States, and to give to that government power to apply it to the objects for which it had been destined by mutual agreement among the States before their league was dissolved. It applied only to the property which the States held in common at that time, and has no reference whatever to any territory or other property which the new sovereignty might afterwards itself acquire. The language used in the clause, the arrangement and combination of the powers, and the somewhat unusual phraseology it uses, when it speaks of the political power to be exercised in the government of the Territory, all indicate the design and meaning of the clause to be such as we have mentioned. It does not speak of any Territory, nor of Territories, but uses language which, according to its legitimate meaning, points to a particular thing. The power is given in relation only to the territory of the United States — that is, to a Territory then in existence, and then known or claimed as the territory of the United States. It begins its enumeration of powers by that of disposing in other words, making sale of lands, or raising money

making or other powers. Upon this point Taney declared: "There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers and duties of the State, and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory to be held and governed permanently in that character. . . . The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the government, it has been held to authorize the acquisition of territory not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion. It is a question for the political department of the government, and not

from them, which, as we have already said, was the main object of the cession, and which is accordingly the first thing provided for in the article. It then gives the power which was necessarily associated with the disposition and sale of the lands — that is, the power of making needful rules and regulations respecting the Territory. And whatsoever construction may now be given to these words, every one, we think, must admit that they are not the words usually employed by statesmen in giving supreme power of legislation. They are certainly very unlike the words used in the power granted to legislate over territory which the new government might afterwards itself obtain by cession from a State, either for its seat of government, or for forts, magazines, arsenals, dockyards, and other needful buildings. . . . This view of the subject is confirmed by the manner in which the present Government of the United States dealt with the subject as soon as it came into existence."

the judicial; and whatever the political department of the government shall recognize as within the limits of the United States the judicial department is also bound to recognize, and to administer in it the laws of the United States, so far as they apply, and to maintain in the territory the authority and rights of the government; and also the personal rights and rights of property of individual citizens, as secured by the Constitution. All we mean to say on this point is, that, as there is no express regulation in the Constitution defining the power which the General Government may exercise over the person or property of a citizen in a territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution, and its distribution of powers, for the rules and principles by which its decision must be governed."

With the exception of Justice Curtis, none of the other justices discussed at length the source of the power to acquire territory. Five of the other justices, however, concurred with the Chief Justice in holding the Act of 1820 unconstitutional, and, therefore, where they do not expressly say so, may be presumed to have agreed with him as to the source whence and the purpose for which foreign territory might be acquired, and as to the restriction of the authority granted by Congress by Article IV, Section III, to the territories possessed by the United States in 1787.

Justice Curtis in his dissenting opinion declared that whatever doubt there may have been as to the power of the United States to acquire additional territory, four precedents and several judicial sanctions had established its existence beyond doubt.[9] The power to govern this acquired territory Curtis found in Article IV, Section III.[10]

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[9] *Citing* American Insurance Co. v. Canter, 1 Pet. 511; 7 L. ed. 242; and Sere v. Pitot, 6 Cr. 332; 3 L. ed. 240.

[10] He said: "There was to be established by the Constitution a frame of government, under which the people of the United States and their posterity were to continue indefinitely. To take one of its provisions, the language of which is broad enough to extend throughout the existence of the government, and embrace all territory belonging to the United States throughout all time, and the purposes and objects of which apply to all Territory of

The arguments and opinions in the Dred Scott case revealed the difficulties involved in a recourse to Article IV, Section III, for the power to govern acquired territories, and, accordingly, since that date we find the Supreme Court emphasizing the doctrine that the power is implied in the right to acquire, as well as arguable from the fact that inasmuch as the States have no authority in the premises the Federal Government must have it. Thus in United States v. Kagama[11] the court say: "The power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations con-

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the United States and narrow it down to territory belonging to the United States when the Constitution was framed, while at the same time it is admitted that the Constitution contemplated and authorized the acquisition, from time to time, of other and foreign territory, seems to me to be an interpretation as inconsistent with the nature and purpose of the instrument, as it is with its language, and I can have no hesitation in rejecting it. I construe this clause, therefore, as if it had read, Congress shall have the power to make all needful rules and regulations respecting those tracts of country out of the limits of the several States, which the United States have acquired, or may hereafter acquire, by cessions as well as of the jurisdictions as of the soil, so far as the soil may be the property of the party making the cession, at the time of making it. It has been argued that the words 'rules and regulations' are not appropriate terms in which to convey authority to make laws for the government of the Territory. But it must be remembered that this is a grant of power to the Congress — that it is, therefore, necessarily a grant of power to legislate — and certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a legislature to make all needful rules and regulations respecting the Territory, is a power to pass all needful laws respecting it . . . Without government and social order there can be no property; for without law, its ownership, its use and the power of disposing of it cease to exist, in the sense in which those words are used and understood in all civilized States. Since, then, this power was manifestly conferred to enable the United States to dispose of its public lands to settlers, and to admit them into the Union as States, when in the judgment of Congress they should be fitted therefor, since these were the needs provided for, since it is confessed that government is indispensable to provide for those needs, and the power is, to make all needful rules and regulations respecting the Territory, I cannot doubt that this is a power to govern the inhabitants of the Territory, by such laws as Congress deems needful, until they obtain admission as States."

[11] 118 U. S. 375; 6 Sup. Ct. Rep. 1109; 30 L. ed. 228.

cerning the territory and other property of the United States, as from the ownership of the country in which its territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else." In the Late Corporation of the Church of Jesus Christ v. United States[12] the court say: "The power of Congress over the Territories of the United States is . . . . general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property of the United States, it would be absurd to hold that the United States has the power to acquire territory, and no power to govern it when acquired." Here, though Section III of Article IV is indeed referred to, the power to acquire is clearly emphasized as the source of the power to govern. Finally in De Lima v. Bidwell,[13] one of the so-called "Insular Cases," the court say: "It [the power to govern] is an authority which arises not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the States to act on the subject."

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[12] 136 U. S. 1; 10 Sup. Ct. Rep. 792; 34 L. ed. 478.

[13] 182 U. S. 1; 21 Sup. Ct. Rep. 743; 45 L. ed. 1041.

CHAPTER XXV.

THE EXTENT OF THE POWER OF CONGRESS TO GOVERN THE TERRITORIES.

§ 158. Power to Govern Absolute.

Since the time when the necessity for the exercise of the authority arose, there has been almost no question as to the absolute power of Congress to determine the form of political and administrative control to be erected over the Territories, and to fix the extent to which their inhabitants shall be admitted to a participation in their own government. Both by legislative practice and by judicial sanction, the principle has been from the first asserted that upon this matter the judgment of Congress is absolute. This, however, has not been construed to carry with it the absolute control of the federal legislature over the civil rights — the private rights of person and property — of the inhabitants of the Territories. The extent of the power of Congress with respect to these will be discussed in the next chapter.

The first act for the government of Territories, the "Ordinance for the Government of the Territory of the United States Northwest of the Ohio River," implied the doctrine that to Congress is given the complete discretion as to the form of government to be supplied,[1] and that the inhabitants of this region are not, except by congressional grant, entitled to local self-government. The act provides that "as soon as there shall be five thousand free male inhabitants, of full age, in the district" they shall receive authority to elect a representative legislative assembly, and that as soon "as may be consistent with the general interest," the territory is to be subdivided into States, which are to be admitted into the Union on an equal footing with the original States. Until, however, the Assembly is established, all governing power is vested in a governor, a secretary and a court of three judges, all nominated by the President and appointed by and with the consent

[1] By Act of August 7, 1789, the first Congress under the Constitution reenacted the ordinance of 1787, with the necessary change that the officers provided for by it should be nominated by the President and appointed by and with the advice and consent of the Senate.

of the Senate. During this period, then, there was to be no local self-government whatever.

By the Act of May 26, 1790, the Southwest Territory was given a government in all respects the same as that erected for the Northwest Territory.

By the Act of October 31, 1803, passed for the government of the Louisiana Territory purchased from France, the President was given full power to take possession, using for this purpose such force as might be necessary, and "that, until the expiration of the present session of Congress, unless provision for the temporary government of the said territories be sooner made by Congress, all the military, civil, and judicial powers exercised by the officers of the existing government of the same shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct, for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion."

A formal remonstrance against the autocratic regimé thus established, as being in violation of the rights guaranteed by the treaty with France, was presented in behalf of the inhabitants of the Territory to the United States Senate, but no question as to the constitutionality of the action was raised.

The Act of March 3, 1819, for the taking possession and temporary government of Florida, was almost identical with the Louisiana Act of 1803.

Without attempting to trace further the legislation with reference to the government of the Territories it is sufficient to say that Congress has continued to the present day uniformly to consider this subject one to be dealt with absolutely at its own discretion.[2]

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[2] For legislation of Congress with reference to the Territories, see W. F. Willoughby, *Territories and Dependencies of the United States: Their Government and Administration;* Farrand, *The Legislation of Congress for the Government of the Territories of the United States; Organic Acts for the Territories of the United States with Notes Thereon,* Compiled from the Statutes at Large of the United States; also Appendix *Comprising Other Matters Relating to the Government of the Territories.* (Senate Document, No. 148, 56th Congress, 1st Sess.)

Acting in pursuance of its powers, Congress has thus from time to time, as new territories have been acquired, established for them, by statutes, territorial governments. The latest of these statutes are those establishing civil rule in Porto Rico and the Philippines.

§ 159. Classes of Territorial Governments.

Generally speaking, it may be said that the governments thus created have been and are of four kinds.

First, there is the class of so-called Unorganized Territories, at present consisting only of Alaska. These have no local self-government but are governed by officials nominated by the President and confirmed by the Senate, and have for their laws such as have been given them by Congress. To this class of autocratically governed territories should also possibly be added the Samoan, Wake, Midway, and Guano Islands which are ruled by officers of the military force of the United States.

Second, there is the whole class of Organized Territories that has included all of the continental territories of the United States except Indian Territory and Alaska, and at the present time embraces New Mexico, Arizona, and Hawaii. The chief executive and judicial officers of these governments are nominated by the President and confirmed by the Senate and hold office for four years. Their legislatures consist of two Houses, each elected by those inhabitants of the territories who have been given the suffrage by federal law. The law-making power of these bodies is extended by Congress "to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." The laws passed in pursuance of this legislative authority are, of course, not only subject to scrutiny in the courts as to their constitutionality, but may be amended or annulled at any time by an act of Congress.

Third, there is the government of the island of Porto Rico which stands in a class by itself. According to the Foraker Act of April 12, 1900, its governor and chief executive officials and judges are nominated by the President and confirmed by the

Senate, and its legislature is composed of two houses, the upper of which consists of the six chief executive officials and five native Porto Ricans, and the lower of thirty-five members elected by popular vote.

Fourthly, and finally, there is the government of the Philippine Islands by means of a Commission appointed by the President and confirmed by the Senate under authority granted by act of Congress. Since 1907 there has been also a popularly elected legislative chamber.

§ 160. Constitutionality of These Governments.

The constitutionality of this legislation has never been seriously questioned.[3]

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[3] In the early case of Sere v. Pitot (6 Cr. 332; 3 L. ed. 240), decided in 1810, in its first reference to the power, the Supreme Court, without dissent, speaking through Marshall, after declaring the right of the United States to acquire and govern territory say: "Accordingly we find Congress possessing and exercising the absolute and undisputed right of governing and legislating for the Territory of Orleans. Congress has given them a legislature, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively."

In American Insurance Co. v. Canter (1Pet. 511; 7 L. ed. 242), decided in 1828, Marshall, after referring to certain provisions of the treaty by which Florida was acquired from Spain, says: "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States . . . They do not, however, participate in political power; they do not share in the government, till Florida shall become a State."

In Snow v. United States (18 Wall. 317; 21 L. ed. 784), decided in 1873, the court say: "The government of the Territories of the United States belongs primarily to Congress; and secondarily to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the General Government. It is, indeed, the practice of the Government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the organic act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt."

In the Dred Scott case, Taney, though otherwise emphasizing the limitations upon the power of Congress over Territories, concedes that it has a full discretion with reference to the form of governments it may establish over

The plenary character of the legislative power of Congress in this respect is perhaps best stated in National Bank v. County of Yankton.[4] Chief Justice Waite, speaking for the court, says: "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States." Again, in Murphy v. Ramsay[5] the court declare: "The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are ex-

them. He says: "The power to acquire, necessarily carries with it the power to preserve and apply to the purposes for which it was acquired. The form of government to be established necessarily rested in the discretion of Congress. It was their duty to establish the one that would be the best suited for the protection and security of the citizens of the United States and other inhabitants who might be authorized to take up their abode there, and that must always depend upon the existing condition of the Territory, as to the number and character of its inhabitants, and the situation in the Territory. In some cases a government, consisting of persons appointed by the Federal Government, would best subserve the interests of the Territory, when the inhabitants were few and scattered, and new to one another. In other instances, it would be more advisable to commit the powers of self-government to the people who had settled in the Territory, as being the most competent to determine what was best for their own interests. But some form of civil authority would be absolutely necessary to organize and preserve civilized society, and prepare it to become a State; and what is the best form must always depend on the condition of the Territory at the time, and the choice of the mode must depend upon the exercise of a discretionary power by Congress acting within the scope of its constitutional authority, and not infringing upon the rights of person or rights of property of the citizen who might go there to reside or for any other lawful purpose. It was acquired by the exercise of this discretion and it must be held and governed in like manner, until it is fitted to be a State."

[4] 101 U. S. 129; 25 L. ed. 1046.

[5] 114 U. S. 15; 5 Sup. Ct. Rep. 747; 29 L. ed. 47.

pressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people resident in the Territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States, and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved."

In Late Corporation, etc., v. United States[6] the foregoing decisions are cited and unqualifiedly approved.

There is in fact an unbroken line of judicial *dicta* upon this point. Even in the Dred Scott case, Taney, who would limit the legislative power of Congress over the Territories in other respects, does not deny that as to the form of government to be established over them, Congress has full discretion. Upon this point the preceding opinions which we have quoted are cited by Taney with approval. He does, indeed, say that no power is given by the Constitution to the Federal Government to acquire territory to hold and maintain permanently as colonies, but admits, as we have seen, that territory may be annexed which is not immediately ready for statehood, and that until so fitted, the form of its government must necessarily lie in the discretion of Congress.

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[6] 136 U. S. 1; 10 Sup. Ct. Rep. 792; 34 L. ed. 478.

In the opinion rendered by Justices White, Shiras, and McKenna and concurred in by Gray, in Downes v. Bidwell[7] it is intimated that there may be unexpressed but inherent limitations upon the discretion of Congress in the establishment of governments for the Territories. After calling attention, in illustration of the plenitude of power of Congress in this respect, to the fact that Congress has established in the District of Columbia "a local government totally devoid of local representation in the elective sense, administered solely by officers appointed by the President, Congress, in which the District has no representative, in effect acting as the local legislature, the opinion nevertheless goes on to say: "While, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any or all of the Territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free governments which cannot be with impunity transcended [Chuch of Jesus Christ v. United States, 136 U. S. 1, 10 Sup. Ct. Rep. 792; 34 L. ed. 478]. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."

It is difficult for the author to follow the reasoning of the Justices as set forth in these sentences. It would seem that there is some confusion of the authority of Congress to create governments for the Territory, and its power to legislate regarding the private civil rights of their inhabitants. The reference to the Mormon Church case shows this, for that case had nothing to do with the governing powers of Congress. These governing powers are absolute, without any express, implied, or "inherent" limitations.

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[7] 182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088.

§ 161. Territorial Governments are Congressional Governments.

The governments established in the Territories by Congress act as agencies of Congress, in the same sense that an administrative board acts as the agent of the law-making body that creates it. As such congressional agencies, the territorial governments are not considered to be parts of the General Government established or directly provided for by the Constitution. This point was early determined in American Insurance Co. v. Canter.[8] In this case the point was raised that the territorial judges in Florida had been appointed for terms of but four years, whereas the Constitution provides that the judges of both the Supreme and inferior federal courts shall hold office during good behavior. In sustaining the validity of the territorial law in this matter, Marshall said: "These courts . . . are not constitutional courts in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but was conferred by Congress in execution of those general powers which that body possesses over the Territories of the United States."

In Benner v. Porter[9] the court say with reference to territorial governments: "They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the federal and state authorities. There is but one system of government or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to state and federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of the powers

[8] 1 Pet. 511; 7 L. ed. 242.

[9] 9 How. 235; 13 L. ed. 119.

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of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these territorial governments, it is not now material to examine." [10]

In United States v. Pridgeon[11] it was held that the courts provided for the Territory of Oklahoma could be and had been authorized by Congress to sit as territorial courts to administer the laws of the Territory, and as courts of the United States to administer the laws of the United States.

In American Insurance Co. v. Canter[12] and in *Re* Cooper[13] it was held that the territorial courts may be granted admiralty jurisdiction. Also, though not "inferior" courts within the meaning of Section 1 of Article III of the Constitution, an appeal may be granted from them to the Supreme Court. In United States v. Coe[14] the court say: "As wherever the United States exercises the power of government, whether under specific grant, or through the dominion and sovereignty of plenary authority as over the Territories, that power includes the ultimate executive, legislative, and judicial power, it follows that the judicial action of all inferior courts established by Congress may in accordance with

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[10] In Clinton v. Englebrecht (13 Wall. 434; 20 L. ed. 659), the court say: "There is no Supreme Court of the United States, nor is there any district court of the United States in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution of the General Government. The courts are the legislative courts of the Territories, created in virtue of that clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States."

To the same effect are the cases Hornbuckle v. Toombs, 18 Wall. 648, 21 L. ed. 966; Good v. Martin, 95 U. S. 90; 24 L. ed. 341; Reynolds v. United States, 98 U. S. 145; 25 L. ed. 244; The City of Panama, 101 U. S. 453; 25 L. ed. 1061; McAllister v. United States, 141 U. S. 174, 11 Sup. Ct. Rep. 949; 35 L. ed. 693; United States v. Pridgeon, 153 U. S. 48; 14 Sup. Ct. Rep. 746; 38 L. ed. 631, and United States v. Coe, 155 U. S. 76; 15 Sup. Ct. Rep 16; 39 L. ed. 76.

[11] 153 U. S. 48; 14 Sup. Ct. Rep. 746; 38 L. ed. 631.

[12] 1 Pet. 511; 7 L. ed. 242.

[13] 143 U. S. 472; 12 Sup. Ct. Rep. 453; 36 L. ed. 232.

[14] 155 U. S. 76; 15 Sup. Ct. Rep. 16; 39 L. ed. 76.

the Constitution be subjected to the appellate jurisdiction of the supreme judicial tribunal of the government. There has never been any question in regard to this as applied to territorial courts, and no reason can be perceived for applying a different rule to the adjudications of the court of private land claims over property in the Territories."

Whether or not the courts of the District of Columbia are "inferior" federal courts within the meaning of Section 1 of Article III of the Constitution has never been squarely settled. In James v. United States[15] the court implies that is not determined, but does not in that case find it necessary to pass upon the point.

With reference to the District of Columbia it will be pointed out[16] that Congress may not delegate to the local governing body legislative powers, but only authority to issue local municipal ordinances. This limitation does not apply with reference to the Territories; for whereas with regard to the District it is provided that Congress shall exercise exclusive legislation in all cases whatsoever, with regard to the Territories it is provided simply that Congress shall have the power "to dispose of and make all needful rules and regulation." There has thus been no question but that, under this grant of authority, Congress may provide for the establishment in the Territories of legislatures exercising full law-making powers, subject of course to the provisions of the Constitution and to subsisting or subsequent acts of Congress. Thus, for example, in Leitensdorfer v. Webb,[17] with reference to the establishment of courts, the court declare: "It was, undoubtedly, within the competency of Congress either to define directly, by their own act, the jurisdiction of the courts created by them or to delegate the authority requisite for that purpose to the territorial governments."

[15] 202 U. S. 401; 26 Sup. Ct. Rep. 685; 50 L. ed. 1079.
[16] Chapter XXVI.
[17] 20 How. 176; 15 L. ed. 891.

CHAPTER XXVI.

THE DISTRICT OF COLUMBIA.

§ 162. The Government of the District of Columbia.

The constitutional status of the district used as the seat of the Federal Government is almost the same as that of the Territories. Clause 17 of Section VIII of Article I of the Constitution empowers Congress "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."

In Loughborough v. Blake[1] Marshall declared the District of Columbia to be a part of the "United States" within the narrower constitutional meaning of the term,[2] and as such Congress to be restrained when legislating for it, by the limitations applicable generally to the United States as thus narrowly defined.[3]

In Loughborough v. Blake[4] the question was as to the power of Congress under a general law to levy and collect a direct tax in the District of Columbia. In denial of this power it was argued that while Congress might, when acting simply as a local legislature, levy and collect such a tax for local purposes, in the same manner that the legislature of a State might do, it might not do so under its general taxing power, for the reason that the Constitution provides that "Representatives and direct taxes shall be ap-

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[1] 5 Wh. 317; 5 L. ed. 98.

[2] See, *post*, the discussion of the term in the Insular Cases.

[3] This *dictum* of Marshall's was later held by the Supreme Court in Downes v. Bidwell (182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088) to be an erroneous one; but these limitations upon the legislative power of Congress, though thus not immediately applicable have been by statute (16 Stat. at L. 42, act of July 21, 1871) extended over the District. Justice Brown, however, held that the District was entitled to these rights by reason of the fact that it was once a part of a State entitled to them, and that these rights having once attached, they were not, and could not, by cession of the District to the United States, be taken away.

[4] 5 Wh. 317; 5 L. ed. 98.

portioned among the States which may be included within the Union, according to their respective numbers." To this, however, Marshall replied: "The object of this regulation is, we think, to furnish a standard by which taxes are to be apportioned, not to exempt from their operation any part of our country. Had the intention been to exempt from taxation those who were not represented in Congress, that intention would have been expressed in direct terms." The grant to Congress of the "power to levy and collect taxes, duties, imposts and excises," is, Marshall declared, a general grant without limitation as to place. "If this could be doubted," he continues, "the doubt is removed by the subsequent words which modify the grant. These words are 'but all duties, imposts and excises shall be uniform throughout the United States.' It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to levy and collect duties, imposts, and excises, may be exercised and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and Territories. The District of Columbia, or the Territory west of the Missouri is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principle of our Constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one than in the other."

Marshall, however, goes on to argue that while the general grant of power to lay and collect taxes is a general one and, therefore, authorizes Congress to include the District and Territories, within the operation of a general direct tax (in which case it must be apportioned in such District and Territories according to their respective populations) it does not follow that such areas must be included within the operation of such laws. "If . . . a direct tax be laid at all, it must be laid on every State conformably to the rule provided in the Constitution. Congress has clearly no power to exempt any State from its due share of the burden. But

this regulation is expressly confined to the States, and creates no necessity for extending the tax to the District or Territories."

In Hepburn v. Ellzey[5] it was held by Marshall in a very brief opinion that a resident of the District of Columbia could not maintain an action in a federal circuit court on the ground that he was a citizen of another State, for the reason that the District is not a State. The Chief Justice said:

"On the part of the plaintiffs it has been urged that Columbia is a distinct political society; and is, therefore, 'a state' according to the definition of writers on general law.

"This is true. But as the act of Congress obviously uses the word 'state' in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the constitution.

"The house of representatives is to be composed of members chosen by the people of the several states; and each state shall have at least one representative.

"The senate of the United States shall be composed of two senators from each state.

"Each state shall appoint for the election of the executive, a number of electors equal to its whole number of senators and representatives.

"These clauses show that the word state is used in the constitution as designating a member of the union, and excludes from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it.

"Other passages from the constitution have been cited by the plaintiffs to show that the term state is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

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[5] 2 Cr. 445; 2 L. ed. 332.

"It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration."

The District of Columbia though not a "State" in the sense in which that word is used in the constitutional clause which gives to the federal courts jurisdiction in suits between citizens of different States,[6] it is declared in DeGeofroy v. Riggs,[7] to be a State within the meaning of a treaty granting certain rights to aliens within the "States of the Union." That the District is a part of the United States internationally viewed was declared in Loughborough v. Blake, and this *dictum* has never been questioned.

But with reference to the form of government to be given the District, the authority of Congress is as absolute as we have seen it to be with regard to the Territories. "The Congress of the United States being empowered by the Constitution 'to exercise exclusive jurisdiction in all cases whatever,' over the seat of the National Government, has the entire control over the District of Columbia for every purpose of government, national or local. It may exercise within the District all legislative powers that the legislature of a State might exercise within a State."[8]

The Constitution provides that Congress shall "exercise exclusive legislation in all cases whatsoever" over such district as should, by cession of particular States, become the seat of government. To the author it would seem that the intent of those who framed this provision was that by it Congress should be granted authority exclusive of the State or States by which the district might be ceded. Congress has, however, since the beginning, acted upon the assumption that by this provision it is intended

[6] Hepburn v. Ellzey, 2 Cr. 445; 2 L. ed. 332; Hooe v. Jamieson, 166 U. S. 395; 17 Sup. Ct. Rep. 596; 41 L. ed. 1049.

[7] 133 U. S. 258; 10 Sup. Ct. Rep. 295; 33 L. ed. 642.

[8] Capital Traction Co. v. Hof, 174 U. S. 1; 19 Sup. Ct. Rep. 580; 43 L. ed. 873.

that while ordinary municipal powers, such as grants to a city, may be delegated to the local governing body in the District, it may not delegate to such body the general legislative powers possessed by a State of the Union. That, in other words, the legislative authority over the District being vested by the Constitution "exclusively" in Congress, it may not by delegation be exercised by any other body. Thus, if we divide the governing powers in the United States into national, state and local, it has been held necessary that, as regards the District the first two must be exercised by Congress itself.

It cannot be said that the Supreme Court has passed squarely upon this point, but by various *dicta* this doctrine has been declared. In Stoutenburgh v. Hennick,[9] the court, after saying that the creation of municipalities exercising local self-government does not violate the rule that legislative powers may not be delegated, go on to say: "But as the repository of the legislative powers of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes' could only authorize it to exercise municipal powers." Strictly speaking, this *dictum* was *obiter* as regards the delegation to the local body of local legislative powers such as are exercised by the States, within their several state limits, for the point actually determined in the case was the constitutional inability of Congress to give to the district government authority to legislate with reference to a matter of national concern, namely, interstate commerce. It is believed, however, that the long-continued legislative construction which has been consistently followed, reinforced by this and other judicial *dicta*,[10] makes very improbable the acceptance of a different doctrine.

When legislating for the District, and the same is true as regards the Territories, Congress acts not only as a local legislature in the sense that a State acts as the local legislature for that State, but also as a National Legislature. Whence it follows that the laws thus enacted though of course only applicable to the local

[9] 129 U. S. 141; 9 Sup. Ct. Rep. 256; 32 L. ed. 637.

[10] *Cf.* Roach v. Riswick, McArthur & Mackay, 171; Cohens v. Virginia, 6 Wh. 264; 5 L. ed. 257.

areas, the District or the Territories, especially referred to, are yet national acts in that, so far as is necessary for their enforcement, they have a validity throughout the Union. This doctrine is clearly laid down by Marshall in Cohens v. Virginia,[11] and has not since been questioned. In that case the court say:

"The clause which gives exclusive jurisdiction is, unquestionably, a part of the Constitution, and, as such, binds all the United States. Those who contend that acts of Congress, made in pursuance of this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by Congress, as the legislature of the Union, is not a law of the United States, and does not bind them. . . . The power vested in Congress, as the legislature of the United States, to legislate exclusively within any place ceded by a State, carries with it, as an incident, the right to make that power effectual. If a felon escapes out of the State in which the act has been committed, the government cannot pursue him into another State, and apprehend him there, but must demand him from the executive power of that other State. If Congress were to be considered merely as the local legislature for the fort or other place in which the offense might be committed, then this principle would apply to them as to other local legislatures, and the felon who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the State. But we know that the principle does not apply; and the reason is, that Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution."

[11] 6 Wh. 264; 5 L. ed. 257.

§ 163. Places Purchased.

The same clause of the Constitution which grants to Congress exclusive jurisdiction over the district to be selected for the seat of the National Government, authorizes Congress "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, dockyards, and other needful buildings."

The federal ownership of such tracts within the States is to be sharply distinguished from political jurisdiction over them. This latter, as the Constitution provides, may be obtained only when the districts have been acquired with the consent of the States in which they are situated.

The language of Clause 17 would seem to indicate that the framers of the Constitution intended that the General Government should or could acquire lands within the States only by purchase and with the consent of the States. In practice, however, this consent has not always been obtained, or been deemed necessary. But, in such cases, the political jurisdiction of the State is not ousted, unless the lands are used for the purposes of government. In Fort Leavenworth R. R. Co. v. Lowe[12] the court say: "The consent of the States to the purchase of lands within them for the special purposes named [in Clause 17] is . . . essential under the Constitution, to the transfer to the General Government with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals."

Also, the General Government is able to acquire lands within the States by the exercise of the right of eminent domain, a right which it may employ when "necessary and proper" to the exer-

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[12] 114 U. S. 525; 5 Sup. Ct. Rep. 995; 29 L. ed. 264.

cise of any of its expressly given powers.[13] When thus obtained, the lands like those acquired by direct purchase and without the consent of the States, remains subject to the general political jurisdiction of the States in which they are located. As property of the United States they are not, however, subject to taxation by the States.[14]

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[13] Kohl v. United States, 91 U. S. 367; 23 L. ed. 449; St. Louis v. W. U. Tel. Co., 148 U. S. 92.

[14] Van Brocklin v. Tennessee, 117 U. S. 151; 6 Sup. Ct. Rep. 670; 29 L. ed. 845.

CHAPTER XXVII.

MILITARY AND PRESIDENTIAL GOVERNMENT OF ACQUIRED TERRITORY.

§ 164. Conquest or Military Occupation does not Operate to Annex Territory.

Mere conquest, that is, the occupation by military force of foreign territory, is not sufficient to annex such territory to the State whose forces are in possession of it. However, for the time being, as a belligerent right, and from necessity, the entire control of this area, its government, and the life and property of its inhabitants are in the hands of the victorious power. The inhabitants are no longer protected by the State whose forces have been ousted, and for the time being owe no allegiance to it, but owe an allegiance to the State which is in possession.

In the quite early case of United States v. Rice[1] the doctrine of military possession is discussed with reference to the port of Castine, Maine, which, for a time during the War of 1812, was in possession of the British military forces, but after peace was restored, and returned to the United States. The court say: "It appears, by the pleadings, that on the first day of September, 1814, Castine was captured by the enemy, and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace in February, 1815. . . . By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose.

[1] 4 Wh. 246; 4 L. ed. 562.

From the nature of the case, no other laws could be obligatory upon them, for where there is no protection or allegiance or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port; and goods imported into it by the inhabitants were subject to such duties only as the British Government chose to require. Such goods were in no correct sense imported into the United States. The subsequent evacuation by the enemy, and resumption of authority by the United States, did not, and could not, change the character of the previous transactions."

In Fleming v. Page[2] the question arose whether duties levied upon goods entering the United States from the port of Tampico, at the time it was in the military possession of the United States, were properly levied under the Act of Congress which imposed duties upon goods imported from a foreign country. Taney, who rendered the opinion of the court, said: "The Mexican authorities had been driven out, or had submitted to our army and navy and the country was in the exclusive and firm possession of the United States and governed by the military authorities, acting under the orders of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country, in the sense in which these words are used in the acts of Congress. The country in question had been conquered in war. But the genius and character of our institutions are peaceful and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the General Government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens. A war, therefore, declared by Congress can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's territory. The United States, it is true, may enlarge its boundaries by conquest or treaty and may

[2] 9 How. 603; 13 L. ed. 276.

demand the cession of territory as a condition of peace in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expense of the war; but this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war. His duty and power are purely military. . . . He may invade the hostile country and subject it to the sovereignty and authority of the United States; but his conquests do not enlarge the boundaries of this Union nor extend the operations of our institutions and laws beyond the limits before assigned to them by the legislative power. It is true, that, when Tampico had been captured, and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For, by the laws and usages of nations, conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries. But yet it was not a part of this Union. For every nation which acquires territory by treaty or conquest, holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States while it was occupied by their arms did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. And the country from which these goods were imported was invaded and subdued, and occupied as the territory of a foreign hostile nation, as a portion of Mexico, and was held in possession in order to distress and harass the enemy. While it was occupied by our troops, they

were in an enemy's country, and not in their own; the inhabitants were still foreigners and enemies, and owed to the United States nothing more than the submission and obedience, sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged. And every place which was out of the limits of the United States, as previously established by the political authorities of the government, was still foreign; nor did our laws extend over it. Tampico was, therefore, a foreign port when this shipment was made."

At first it may appear that the doctrine declared in Fleming v. Page is not in harmony with that uttered in United States v. Rice; for in the former case it was held that mere military occupation was not sufficient to annex the territory occupied by the United States; whereas, in the latter case, it was declared that military occupation by the forces of another State did operate to render the port foreign to the United States. If these two decisions had been given by an international tribunal, or had had reference to the status of the territories received internationally, they undoubtedly would have been inharmonious. For, looked at from the international side, a country belongs to that power which is in effective control of it. Therefore, thus viewed, Castine belonged to Great Britain while its military forces were in paramount control of it. In like manner, Tampico, viewed internationally, was a part of the United States, and other States would have held the United States responsible for anything that might have occurred there while it was in possession. But when, as was the case both in United States v. Rice and Fleming v. Page, the question was purely one of domestic municipal law, it was within the province of the Supreme Court to determine in each case the status of the territory concerned according to the peculiar municipal or constitutional law which it was interpreting

and applying. In other words, in the Fleming v. Page case the Supreme Court would not have been justified in declaring that Tampico did not, during American occupancy, belong to the United States in an international sense; whereas it was justified in holding that from the viewpoint of American constitutional law it was not a part of the United States, any more than, for example, was Cuba during the time of its administration by American authorities.[3]

In Neely v. Henkel,[4] with reference to the status of Cuba, during the American occupation, the Supreme Court say: "Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The

[3] In De Lima v. Bidwell (182 U. S. 1; 21 Sup. Ct. Rep. 743; 45 L. ed. 1041) the court say: "It is not intended to intimate that the cases of United States v. Rice and Fleming v. Page are not harmonious. In fact they are perfectly consistent with each other. In the first case it was merely held that duties could not be collected upon goods brought into a domestic port during a temporary occupation by the enemy, though the enemy subsequently evacuated it; in the latter case, that the temporary military occupation by the United States of a foreign port did not make it a domestic port, and that goods imported into the United States from that port were still subject to duty. It would have been obviously unjust in the Rice case to impose a duty upon goods which might already have paid a duty to the British commander. It would have been equally unjust in the Fleming case to exempt the goods from duty by reason of our temporary occupation of the port without a formal cession of such port to the United States."

This reasoning, based simply on principles of justice or expediency, hardly seems convincing, but that the two cases are not necessarily inharmonious has been shown above in the text.

The dissenting justices in the De Lima case, however, held that the two cases were harmonious, but not upon the grounds stated by the majority. That which, in their opinion, justified the court in holding in the Fleming case that Tampico was not within the scope of the United States tariff laws was because Congress had not so legislated as to bring it within a collection district or to establish a custom house there. "At Castine," they say, "the instrumentalities of the custom laws had been divested, at Tampico they had not been invested."

[4] 180 U. S. 109; 21 Sup. Ct. Rep. 302; 45 L. ed. 448.

occupancy of the island by troops of the United States was the necessary result of the war. The result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba. It is true that as between Spain and the United States — indeed, as between the United States and all foreign nations — Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action."

In Dooley v. United States,[5] one of the "Insular Cases" decided in 1901, the doctrine of Fleming v. Page is applied in fixing the status of Porto Rico while under the military government of the United States, but prior to the ratification of the treaty of peace ceding the island to the United States. The court say: "During this period the United States and Porto Rico were still foreign countries with respect to each other, and the same right which authorized us to exact duties upon merchandise imported from Porto Rico to the United States authorized the military commander in Porto Rico to exact duties upon goods imported into the island from the United States. The fact that, notwithstanding the military occupation of the United States, Porto Rico remained a foreign country within the revenue laws, is established by the case of Fleming v. Page." [6]

[5] 182 U. S. 222; 21 Sup. Ct. Rep. 762; 45 L. ed. 1074.

[6] President McKinley was criticized, and with justice, for issuing on December 21, 1898, that is, on a date prior to the ratification of the treaty with Spain ceding the Philippines, an executive order in which he declared: "With the signature of the treaty of peace between the United States and Spain by their respective plenipotentiaries at Paris on the 10th instant, and as the result of the victories of American arms, the future control, disposition, and government of the Philippine Islands are ceded to the United States. In fulfilment of the rights of sovereignty thus acquired, etc." The treaty was not ratified by the treaty-making power of the United States until the following February, and did not go into effect until April 11, 1899.

§ 165. Authority of De Facto Governments.

The government established and maintained by one State in military possession of territory of another, is, of course, a *de facto* one, but *de facto* in a somewhat different sense from that of a government established as a result of a rebellion or civil war. But in either case the authority of the *de facto* government is to an extent at least recognized. This is adverted to by the Supreme Court in Thorington v. Smith[7] in passing upon the status of the Confederate Government established during the Civil War.[8]

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[7] 8 Wall. 1; 19 L. ed. 361.

[8] The court say: "There are several degrees of what is called *de facto* government. Such a government, in its highest degree, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such a government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will, in general, be respected by the government *de jure* when restored. It is very certain that the Confederate Government was never acknowledged by the United States as a *de facto* government in this sense. Nor was it acknowledged as such by other powers. No treaty was made with it by any civilized State. No obligations of a national character were created by it, binding after its dissolution, on the States which it represented, or on the National Government. From a very early period of the Civil War to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government, called also by publicists a government *de facto*, but which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the Territories, and against the rightful authority of an established and lawful government; and (2) that while it exists, it must necessarily be obeyed in civil matters by private citizens who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrongdoers, for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered also by civil authority, supported more or less directly by military force. One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during the war of 1812. . . . A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United

§ 166. Status of Conquered Domestic Territory.

In New Orleans v. New York Mail Steamship Co.[9] was considered the status of territory of the Southern Confederacy which had been conquered by the federal forces. The court held that the federal forces in possession might exercise the same absolute authority as in the case of territory conquered from a foreign State.[10]

States. It was determined by this court, in Fleming v. Page (9 How. 603; 13 L. ed. 276), that although Tampico did not become a port of the United States in consequence of that occupation, still, having come together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the national forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part. The central government established for the insurgent States differed from the temporary governments at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war, but it was not, on that account, less actual or less supreme. And we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it, in its military character, very soon after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent government cannot be questioned. That supremacy did not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity but a duty. Without such obedience, civil order was impossible."

9 20 Wall. 387; 22 L. ed. 354.

10 "Although the City of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National Government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country, and had been subjugated in a foreign war. The Prize Cases, 2 Black, 635; 17 L. ed. 459; Mrs. Alexander's Cotton, 2 Wall. 404; 17 L. ed. 915; Mauran v. Ins. Co., 6 Wall. 1; 18 L. ed. 836. In such cases the conquering power has a right to displace the pre-existing authority, and to assume, to such extent as it may deem proper, the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its

§ 167. Presidential Governments.

In 1846, during the war with Mexico, the United States military forces took possession of Upper California. In 1847 the President as Commander-in-Chief of the army and navy authorized the establishment, by the military commanders, of a civil and military government for the conquered territory. This was done. In Cross v. Harrison[11] the question was raised whether this government might lawfully continue its existence after the date of the treaty of peace by which the territory was formally annexed to the United States, and until Congress had legislated for its government. In deciding this in the affirmative, the court said: "The territory had been ceded as a conquest, and was to be preserved and governed as such until the sovereignty to which it had passed had legislated for it. That sovereignty was the United States, under the Constitution, by which power had been given to Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, with the power also to admit new States into this Union, with only such limitations as are expressed in the section in which this power is given. The government of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It has been instituted during the war by the command of the President of the United States. It was the government when the Territory was ceded as a con-

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pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. These principles have the sanction of all publicists who have considered the subject. They have been repeatedly recognized and applied by this court. Cross v. Harrison, 16 How. 164; 14 L. ed. 889; Leitensdorfer v. Webb, 20 How. 176; 15 L. ed. 891; The Grapeshot, 9 Wall. 129; 19 L. ed. 651. In the case last cited the President had, by Proclamation, established in New Orleans a Provisional Court for the State of Louisiana, and defined its jurisdiction. This court held the Proclamation a rightful exercise of the power of the Executive, the court valid, and its decrees binding upon the parties brought before it. In such cases the laws of war take the place of the Constitution and laws of the United States as applied in time of peace."

[11] 16 How. 164; 14 L. ed. 889.

quest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government. And the more so as it was continued until the people of the territory met in convention to form a state government, which was subsequently recognized by Congress under its powers to admit new States into the Union."

The government maintained by the President over a conquered territory being belligerent, is, as is stated in the paragraph quoted above, absolute in character, according to the general doctrines of international law regarding military occupation: "It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war." [12]

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[12] When, after the capitulation of the Spanish forces in Santiago, Cuba, the military forces of the United States took possession of the eastern part of the province, the President instructed the military commander, *inter alia*, as follows: "The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their rights and relations. . . . All persons who either by active aid or by honest submission, co-operate with the United States to give effect to this beneficent purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible. Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of persons and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. The

We have seen from the preceding cases that the power of the President, as Commander-in-Chief of the army and navy, is practically absolute over conquered territory. And also, that this power persists after the formal annexation of the territory in question to the United States and until Congress legislates for its

judges and other officials connected with the administration of justice may, if they accept the supremacy of the United States, continue to administer the ordinary law of the land, as between man and man, under the supervision of the American commander-in-chief. The native constabulary will, so far as may be practicable, be preserved. The freedom of the people to pursue their accustomed occupation will be abridged only when it may be necessary to do so. While the rule of conduct of the American commander-in-chief will be such as has just been defined, it will be his duty to adopt measures of a different kind if, unfortunately, the course of the people should render such measures indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native officials in part or altogether; to substitute new courts of his own constitution for those that now exist, or to create such new or supplementary tribunals as may be necessary. In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice. One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the government of the country in its own right, and all arms and supplies and other movable property of such government, may be seized by the military occupant and converted to his own use. The real property of the State he may hold and administer, at the time enjoying the revenues thereof, but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways, and boats, belonging to the State may be appropriated to his use, but, unless in case of military necessity, they are not to be destroyed. All churches and buildings devoted to religious worship and to the arts and sciences, all schoolhouses, are, so far as possible, to be protected, and all destruction or intentional defacement of such places, of historical monuments or archives, or works of science or art is prohibited, save when required by urgent military necessity. Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines or cables, railways and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained. While it is held to be the right of the conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expense of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation

government. It would appear, however, that during this latter period, the President's power is not so absolute as in the period prior to annexation. Absolute power, according to American constitutional doctrines, is only justified by military necessity, and, therefore, with the cessation of hostilities and the annexation of the territory by which it is brought within the general province of the American doctrine, there spring up certain limitations upon the President's governing power.[13] The extent of these limitations will be discussed in a later chapter dealing with martial and military law, and with the doctrines laid down by the Supreme Court in the "Insular Cases" determining the political status and the civil rights of the inhabitants of the islands acquired in 1898 from Spain.

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the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army. Private property taken for the use of the army is to be paid for, when possible, in cash at a fair valuation, and when payment in cash is not possible receipts are to be given. All ports and places in Cuba which may be in the actual possession of our land and naval forces will be opened to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the prescribed rates of duty which may be in force at the time of the importation." Moore *Digest of Int. Law*, VII, § 1143. The order was issued July 18, 1898.

[13] See, for example, the language of the court in Dooley v. United States, 182 U. S. 222; 21 Sup. Ct. Rep. 762; 45 L. ed. 1074.

CHAPTER XXVIII.

THE ANNEXATION OF TERRITORY BY TREATY.

§ 168. Congressional Action not Needed to Complete Annexation of Territory Acquired by Treaty.

That, under the treaty-making power provided in the Constitution, a foreign country may be brought under the sovereignty of the United States, and thus, from the viewpoint of international law, become a part of it, is, as we have seen, beyond question. In De Lima v. Bidwell,[1] one of the "Insular Cases," decided in 1901, was urged the point, however, that, before such an annexed territory can become "domestic" territory and as such be brought, *ipso facto,* under the operation of the federal laws generally, an act of Congress to that effect is necessary.

Prior to this De Lima case, this question had been several times raised, especially with reference to the immediate applicability of the revenue laws of the United States to annexed territories, but had never been thoroughly discussed, nor had administrative practice always been harmonious with judicial pronouncements, or these judicial pronouncements harmonious with one another.

In Fleming v. Page,[2] decided in 1850, it was held, as we have seen, that conquest and military occupation of a foreign district did not, *ipso facto,* make that district a part of the United States, and, therefore, that duties were properly levied upon goods imported therefrom into the United States under the act of Congress imposing duties upon imports from foreign countries. Taney, however, in his opinion went further than the facts of the case necessitated, and adverted to the circumstance that the administrative department of the government had, as a rule, continued to treat territory acquired by treaty as foreign until Congress by legislation had extended over it its revenue laws.[3]

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[1] 182 U. S. 1; 21 Sup. Ct. Rep. 743; 45 L. ed. 1041.

[2] 9 How. 603; 13 L. ed. 276.

[3] He said: "This construction of the revenue laws has been uniformly given by the administrative department of the government in every case that

§ 169. Cross v. Harrison.

In Cross v. Harrison,[4] however, decided in 1853, it was held by a unanimous court, including Chief Justice Taney himself, that by the ratification of the treaty of 1848 between Mexico and the United States, California became a part of the United States, and the tariff laws of the United States then in force *ipso facto* applicable to it.

The treaty which fixed the boundary between Mexico and the United States was ratified May 30, 1848. The *de facto* military government continued in force after this date, but, after official

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has come before it. And it has, indeed, been given in cases where there appears to have been stronger ground for regarding the place of shipment as a domestic port. For after Florida had been ceded to the United States, and the forces of the United States had taken possession of Pensacola, it was decided by the Treasury Department, that goods imported from Pensacola before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty. That is, although Florida had by cession, actually become a part of the United States, and was in our possession, yet under our revenue laws, its ports must be regarded as foreign until they were established as domestic by act of Congress; and it appears that this decision was sanctioned at the time by the Attorney-General of the United States, the law officer of the government. And, although not so directly applicable to the case before us, yet the decisions of the Treasury Department in relation to Amelia Island, and certain ports in Louisiana, after that province had been ceded to the United States, were both made upon the same grounds. And in the latter case, after a custom-house had been established by law at New Orleans, the collector at that place was instructed to regard as foreign ports Baton Rouge and other settlements still in the possession of Spain, whether on the Mississippi, Iberville, or the seacoast. The department in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly-acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by an act of Congress. The principle thus adopted and acted upon by the Executive Department of the government has been sanctioned by the decisions in this court and the circuit courts whenever the question came before them. We do not propose to comment upon the different cases cited in the argument. It is sufficient to say that there is no discrepancy between them. And all of them, so far as they apply, maintain that under our revenue laws every port is regarded as a foreign one, unless the custom-house from which the vessel clears is within a collection district established by act of Congress, and the officers granting the clearance exercise their functions under the authority and control of the laws of the United States."

[4] 16 How. 164; 14 L. ed. 889.

notice of the treaty was received, the commander in charge ceased collecting the military duties which he had been imposing, and substituted therefor duties imposed by the revenue laws of the United States. He reported this to the President and his action was approved. By a letter of October 9, 1848, the Secretary of War instructed the commander that "the government *de facto* can of course exercise no powers inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the States and Territories of our Union. For this reason no import duties can be levied in California on articles of growth, produce, or manufacture of any State or Territory of the United States, and no such duties can be imposed in any part of the Union on the productions of California; nor can duties be charged on such foreign productions as have already paid duties in any port of the United States."[5]

[5] The Secretary of the Treasury also at this time issued a circular (October 7, 1848), in which he declared: "By the treaty with Mexico, California is annexed to this Republic, and the Constitution of the United States is extended over that Territory and is in full force throughout its limits." "Congress also," he added, "by several enactments subsequent to the ratification of the treaty, have distinctly recognized California as a part of the Union, and have extended over it in several particulars the laws of the United States. Under these circumstances the following instructions are issued by this Department:

"First. All articles of the growth, produce, or manufacture of California shipped therefrom at any time since the 30th of May last are entitled to admission free of duty into all ports of the United States.

"Second. All articles of the growth, produce, or manufacture of the United States are entitled to admission free of duty into California, as are also all foreign goods which are exempt from duty by the laws of Congress, or on which goods the duties prescribed by those laws have been paid to any collector of the United States previous to their introduction into California.

"Third. Although the Constitution of the United States extends to California, and Congress has recognized it by law as a part of the Union and legislated over it as such, yet it is not brought by law within the limits of any collection district, nor has Congress authorized the appointment of any officers to collect the revenue accruing on the import of foreign dutiable goods into that territory. Under these circumstances, although this Department may be unable to collect the duties accruing on importations from foreign countries into California, yet if foreign dutiable goods should be introduced there and shipped thence to any port or place of the United States they will be subject to duty, as also to all the penalties prescribed by law when such importation is attempted without payment of duties."

Acting in accordance with these instructions, the existing tariff and navigation laws of the United States were enforced by the *de facto* government. In Cross v. Harrison the legality of this action was sustained. In passing upon the status and power of the government after the treaty of peace, the court said: "It was urged that our revenue laws covered only so much of the territory of the United States as had been divided into collection districts, and that out of them no authority had been given to prevent the landing of foreign goods, or to charge duties upon them, though such landing had been made within the territorial limits of the United States. To this it may be successfully replied that collection districts and ports of entry were no more than designated localities within and at which Congress had extended a liberty of commerce in the United States, and that so much of its territory as was not within any collection district must be considered as having been withheld from that liberty. It is very well understood to be a part of the laws of nations, that each nation may designate, upon its own terms, the ports and places within its territory for foreign commerce, and that any attempt to introduce foreign goods elsewhere within its jurisdiction is a violation of its sovereignty. It is not necessary that such should be declared in terms, or by any degree or enactment, the expressed allowances being the limit of the liberty given to foreigners to trade with such nations. Upon this principle, the plaintiffs had no right of trade with California with foreign goods, excepting from the permission given by the United States under the civil government and war tariff which had been established there. And when the country was ceded as a conquest, by a Treaty of Peace, no larger liberty to trade resulted. By the ratifications of the Treaty, California became a part of the United States. And as there is nothing differently stipulated in the Treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage. . . . The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution

which enjoins that all duties, imposts and excises, shall be uniform throughout the United States. Indeed, it must be very clear that no such right exists, and that there is nothing in the condition of California to exempt importers of foreign goods into it from the payment of the same duties which were chargeable in the other ports of the United States. As to the denial of the authority of the President to prevent the landing of foreign goods in the United States out of a collection district, it can only be necessary to say, if he did not do so, it would be a neglect of his constitutional obligation 'to take care that the laws be faithfully executed.' . . . In respect to the suggestion that it has not been the practice of the United States to collect duties upon importations of foreign goods into a ceded Territory until Congress had passed an act for that purpose, counsel cited the cases of Louisiana and Florida. The reply is, that the facts in respect to both have not been recollected. There was no forbearance in either instance, in respect to duties upon imports, until Congress had acted."

§ 170. De Lima v. Bidwell.

In De Lima v. Bidwell,[6] with reference to the island of Porto Rico, the court held itself governed by the doctrine declared in Cross v. Harrison. It agreed with the declaration in Fleming v. Page that by mere military occupation a port did not become "domestic," and as such subject to the general revenue laws of the United States, but with reference to the *dictum* of Taney that it remained foreign because the United States customs laws had not been formally extended over it, the majority in their opinion observed: "While we see no reason to doubt the conclusion of the court that the port of Tampico was still a foreign port, it is not perceived why the fact that there was no act of Congress establishing a custom-house there, or authorizing the appointment of a collector, should have prevented the collector appointed by the military commander from granting the usual documents required to be issued to a vessel engaged in the coasting trade. A collector,

[6] 182 U. S. 1; 21 Sup. Ct. Rep. 743; 45 L. ed. 1041.

though appointed by a military commander, may be presumed to have the ordinary power of a collector under an act of Congress, with authority to grant clearances to ports within the United States, though, of course, he would have no power to make a domestic port of what was in reality a foreign port."[7]

After quoting at length, and with approval, from Cross v. Harrison, the majority opinion continues: "The opinion, which is quite a long one, establishes the three following propositions: (1) That under the war power the military governor of California was authorized to prescribe a scale of duties upon importations from foreign countries to San Francisco, and to collect the same through a collector appointed by himself, until the ratification of the treaty of peace. (2) That after such ratification duties were legally exacted under the tariff laws of the United States, which took effect immediately. (3) That the civil government established in California continued, from the necessities of the case, until Congress provided a territorial government. It will be seen that the three propositions involve a recognition of the fact that California became domestic territory immediately upon the ratification of the treaty, or, to speak more accurately, as soon as this was officially known in California. The doctrine that a port ceded to and occupied by us does not lose its foreign character until Congress has acted and a collector is appointed was distinctly repudiated with the apparent acquiesence of Chief Justice Taney, who wrote the opinion in Fleming v. Page, and still remained the Chief Justice of the court. The opinion does not involve directly the question at issue in this case; whether goods carried from a port in a ceded territory directly to New York are subject to duties, since the duties in Cross v. Harrison were exacted upon foreign goods imported into San Francisco as an American port; but it is impossible to escape the logical inference from that case that goods carried from San Francisco to New York after the ratification of the treaty would not be considered as imported from a foreign country."

[7] See *ante*, p. 384, for manner in which the court harmonizes the doctrine stated in U. S. v. Rice with that declared in Fleming v. Page.

The court then examines the practice and rulings of the executive department of the United States with respect to the status of newly acquired territories prior to their status being settled by acts of Congress and finds these rulings and practice, with the single exception of an order of Secretary of State Gallatin in 1803, to be in conformity with the position of the court in Cross v. Harrison.

As showing the construction put upon this question by the legislative department, the court quotes from section 2 of the Foraker Act establishing civil government in Porto Rico, which "makes a distinction between foreign countries and Porto Rico, by enacting that the same duties shall be paid upon 'all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from foreign countries.'"

The opinion, then, summing up the precedents, says: "From this résumé of the decisions of this court, the instructions of the executive department, and the above act of Congress, it is evident that, from 1803, the date of Mr. Gallatin's letter, to the present time, there is not a shred of authority, except the *dictum* in Fleming v. Page (practically overruled in Cross v. Harrison), for holding that a district ceded to and in the possession of the United States remains for any purpose a foreign country. Both these conditions must exist to produce a change of nationality for revenue purposes. Possession is not alone sufficient as was held in Fleming v. Page; nor is a treaty ceding such territory sufficient without a surrender of possession. Keene v. M'Donough, 8 Pet. 308; 8 L. ed. 955; Pollard v. Kibbe, 14 Pet. 353; 10 L. ed. 490; Hallett v. Doe *ex dem.* Hunt, 7 Ala. 899; The Fama, 5 C. Rob. 106. The practice of the executive departments, thus continued for more than half a century, is entitled to great weight, and should not be disregarded nor overturned except for cogent reasons, and unless it be clear that such construction be erroneous. United States v. Johnston, 124 U. S. 236; 8 Sup. Ct. Rep. 446; 31 L. ed. 389, and other cases cited."

The court then goes on to declare that even were the question presented as an original one, it would be irresistibly impelled to the conclusion which the precedents had furnished. This result, it is argued, is deducible from the fact that by the Constitution treaties equally with acts of Congress are declared to be the supreme law of the land, and that one of the ordinary incidents of a treaty is the cession of territory. "The territory thus acquired is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress."

"The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another. It may undoubtedly become necessary, for the adequate administration of a domestic territory, to pass a special act providing the proper machinery and officers, as the President would have no authority, except under the war power, to administer it himself; but no act is necessary to make it domestic territory if once it has been ceded to the United States. . . . This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains a foreign country. To hold that this can be done as matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court. It is true the nonaction of Congress may occasion a temporary inconvenience; but it does not follow that courts of justice are authorized to remedy it by inverting the ordinary meaning of words."

§ 171. Dooley v. United States.

Applying the doctrine of De Lima v. Bidwell, the Supreme Court in another of the Insular Cases (Dooley v. United States),[8] held that though, after the treaty of peace providing for the annexation of Porto Rico, the military government might continue until Congress should provide the island with a civil government (according to the doctrine of Cross v. Harrison), the island was no longer "foreign territory" and, therefore, under the then existing revenue laws of the United States, providing for the levying of customs duties on goods imported from foreign countries, that duties might not be levied upon importations into the United States from Porto Rico, nor from the United States into that island. With reference to these latter, the court said: "The spirit as well as the letter of the tariff laws admits of duties being levied by a military commander only upon importations from foreign countries; and, while his power is necessarily despotic, this must be understood rather in an administrative than in a legislative sense. While in legislating for a conquered country he may disregard the laws of that country, he is not wholly above the laws of his own. For instance, it is clear that, while a military commander during the Civil War was in the occupation of a southern port he could impose duties upon merchandise arriving from abroad, it would hardly be contended that he could also impose duties upon merchandise arriving from ports of his own country. His power to administer would be absolute, but his power to legislate would not be without certain restrictions — in other words, they would not extend beyond the necessities of the case. Thus, in the case of The Admittance (Jecker v. Montgomery, 13 How. 498; 14 L. ed. 240) it was held that neither the President nor the military commander could establish a court of prize competent to take jurisdiction of a case of capture, whose judgments would be conclusive in other admiralty courts. It was said that the courts established in Mexico during the war 'were nothing more than the agents of the military power, to assist it in preserving order in the conquered terri-

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[8] 182 U. S. 222; 21 Sup. Ct. Rep. 762; 45 L. ed. 1074.

tory, and to protect the inhabitants in their persons and property, while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize, although Congress, in the exercise of its general authority in relation to the national courts, would have power to validate their action. The Grapeshot, *sub nom.* The Grapeshot v. Wallerstein, 9 Wall. 129, 19 L. ed. 651. So, too, in Mitchell v. Harmony (13 How. 115; 14 L. ed. 75) it was held that, where the plaintiff entered Mexico during the war with that country, under a permission of the commander to trade with the enemy and under the sanction of the executive power of the United States, his property would not be liable to seizure by law for such trading, and that the officer directing the seizure was liable to an action for the value of the property taken. To the same effect is Mostyn v. Fabrigas, 1 Cowp. 180. In Raymond v. Thomas (91 U. S. 712; 23 L. ed. 434) a special order, by the officer in command of the forces in the State of South Carolina, annulling a decree rendered by a court of chancery in that State, was held to be void. In delivering the opinion Mr. Justice Swayne observed: 'Whether Congress could have conferred the power to do such an act is a question we are not called upon to consider. It is an unbending rule of law, that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the exigency requires.' Without questioning at all the original validity of the order imposing duties upon goods imported into Porto Rico from foreign countries, we think the proper construction of that order is that it ceased to apply to goods imported from the United States from the moment the United States ceased to be a foreign country with respect to Porto Rico, and that, until Congress otherwise constitutionally directed, such merchandise was entitled to free entry."

The same four justices dissented in the Dooley case that had dissented in the De Lima case. The dissent, however, was not

with reference to the validity of the duties levied prior to the ratification of the treaty of peace, but only with reference to those exacted after that date. These, the dissentient judges held to have been validly levied. After summarizing their arguments in the De Lima case, the dissenting opinion declares that, inasmuch as the court had just decided in Downes v. Bidwell [9] that, despite the treaty of cession, Porto Rico had remained in a position where Congress could impose a tariff duty on goods coming from that island into the United States, it should not be held that that island ceased to be "foreign" within, at least, the meaning of the tariff laws. "The command in tariff laws," reads the opinion, "that import duties should be collected on all merchandise coming from 'foreign countries,' is but a provision that they are to be levied on merchandise arriving from countries which are not a part of the United States, within the meaning of the tariff laws, and which are hence subject to such duties. It must follow that, as long as a locality is in a position where it is subject to the power of Congress to levy an import tariff duty on merchandise coming from that country into the United States, such country must be a foreign country within the meaning of the tariff laws."

In the case The Diamond Rings,[10] decided in 1901, the court applied the doctrine of De Lima v. Bidwell in fixing the status of the Philippine Islands subsequent to the treaty of cession. The fact that resistance on the part of the natives to the control of the United States continued to be made, was held to be without weight.[11]

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[9] 181 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088.

[10] 183 U. S. 176; 22 Sup. Ct. Rep. 59; 46 L. ed. 138.

[11] "The Philippines, like Porto Rico, became, by virtue of the treaty, ceded conquered territory, or territory ceded by way of indemnity. The territory ceased to be situated as Castine was when occupied by the British forces in the war of 1812, or as Tampico was when occupied by the troops of the United States during the Mexican war, 'cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was a part.' Thorington v. Smith, 8 Wall. 1; 19 L. ed. 361. The Philippines were not simply occupied, but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation. . . . The sovereignty of Spain over the Philippines and possession under claim of

§ 172. Duties of President Prior to Congressional Action.

The absolute power of Congress to determine the political or governmental rights in annexed territories constitutionally attaches from the moment that they become subject to the sovereignty of the United States. Until Congress exercises this right, however, and provides them with governments and laws, they remain under the control of the federal executive. This duty devolves upon the President as a result from his general obligation to see that the authority and peace of the United States are everywhere maintained throughout its territorial limits. Thus, after the treaty of peace with Spain in 1899, Porto Rico remained under the control of the President until by the act of April 12, 1900, known as the "Foraker Act," Congress provided a government for that island. So also it was by an exercise of the same authority that the President, after the same treaty of cession, appointed commissions for the government of the Philippine Islands.

On March 2, 1901, Congress enacted[12] that "All military, civil, and judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct for the establishment of civil government and for the maintaining and protecting the inhabitants of said islands in the free enjoyment of their

title had existed for a long series of years prior to the war with the United States. The fact that there were insurrections against her, or that uncivilized tribes may have defied her will, did not affect the validity of her title. She granted the islands to the United States, and the grantee in accepting them took nothing less than the whole grant. If those in insurrection against Spain continued in insurrection against the United States, the legal title and possession of the latter remained unaffected. We do not understand that it is claimed that in carrying on the pending hostilities the government is seeking to subjugate the people of a foreign country, but on the contrary, that it is preserving order and suppressing insurrection in the territory of the United States. It follows that the possession of the United States is adequate possession under legal title, and this cannot be asserted for one purpose and denied for another. We dismiss the suggested distinction as untenable."

[12] This was as an amendment to the act making appropriation for the support of the army for the fiscal year ending June 30, 1902.

liberty, property, and religion." This act changed the basis of the Philippine government from a presidential to a congressional one, but did not change its form, the President being given by Congress practically the same powers that before that time he had exercised by virtue of his position as Chief Executive.

By the Act of July 1, 1902, entitled "an act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," Congress not only approved and ratified the previous acts of the Philippine Commission, but went on to define the general lines of action that body should take, especially with regard to the introduction of local self-government as fast as circumstances should warrant.

The constitutional source of the power of the United States to establish and maintain governments over territories not annexed to itself but in the possession of its military forces is derived both from the expressed power given it to declare and wage war, and from the fact of its exclusive authority in all that relates to international affairs, which fact, as we have seen, properly implies the right, in the absence of express prohibitions, to exercise all the powers possessed by sovereign States generally.

From this same source was derived the power of the United States to administer Cuba, and to establish consular courts in oriental countries.[13]

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[13] See chapter XXXV.

CHAPTER XXIX.

THE DISTINCTION BETWEEN INCORPORATED AND UNINCORPORATED TERRITORIES.

§ 173. Limitations Upon Powers of Congress.

The Constitution of the United States contains a number of express limitations upon the federal legislative power. In addition to those contained in the first ten amendments relative to freedom of religion, speech, and press, the quartering of troops, the right of the people to assemble, to petition, to keep and bear arms, to be secure against unreasonable searches and seizures, to presentment or indictment by jury, to speedy trial, to juries in civil suits, to immunity from excessive bail and fines and cruel and unusual punishments, etc., it is elsewhere provided in the Constitution that all duties, imposts, and excises shall be uniform throughout the United States, that the writ of habeas corpus shall not be suspended, except under certain specified circumstances, that no bill of attainder or *ex post facto* law shall be passed, no capitation or other direct tax laid except in proportion to population, no duty laid upon goods exported from a State, no commercial preferences given to the ports of one State over those of another, no money drawn from the treasury but in consequence of an appropriation made by law, no title of nobility granted, etc. The Thirteenth Amendment also declares that "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

When legislating for the States or for their inhabitants these limitations have of course to be observed. The question whether the same is true when Congress is legislating for the territories and their populations has now to be examined.

In the preceding chapters we have learned the sources whence is derived the power of Congress and of the President to govern annexed Territories. We have learned that by mere military oc-

cupation a territory, though for the time being subject to the *de facto* control of the President as Commander-in-Chief of the army and navy, is not annexed to the United States, that is, does not become permanently subject *de jure* as well as *de facto* to its sovereignty. Only by treaty, or by statute, or by joint resolution of Congress, may this annexation be effected.

§ 174. Possible Status of Territories after Annexation.

When thus annexed, however, a district may, according to the recent "Insular Cases," find itself, or by subsequent statute be placed, in any one of the following categories.

1. A State of the Union.

2. A "Territory" incorporated into the Union. This Territory may be either "unorganized," as for example is Alaska, or "organized," examples of which are at present New Mexico, Arizona and Hawaii.

3. A Territory appurtenant to, that is, subject to the sovereignty of the United States, but not "incorporated," constitutionally speaking, into the Union of States and Territories for the benefit and protection of whose inhabitants the Constitution was adopted.

§ 175. Unincorporated Territory.

Such "appurtenant," dependent or unincorporated territory is, of course, from the international point of view a part of the United States,[1] but is not, as we shall see, a part thereof in the

[1] This international use of the term United States is considered in the case of De Geofroy v. Riggs (133 U. S. 258; 10 Sup. Ct. Rep. 295; 33 L. ed. 642), in which the question involved was whether the terms of a treaty giving to citizens of France the right to inherit an interest in real estate in "States of the Union," were applicable to the District of Columbia or only to the States of the Union. The use of the phrase "States of the Union" would upon its face indicate that only the States and not the extra-State areas were concerned, yet the court held that the treaty was to be construed as generally applicable. In its opinion the court said: "This article is not happily drawn. It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and

stricter constitutional sense in which the term is used in the Constitution with reference to certain limitations which that instrument lays upon the legislative powers of Congress.

§ 176. Distinction between Incorporated and Unincorporated Territories.

With respect to the form of government that may be established and maintained by Congress over the Territories, there is no distinction between an incorporated and an unincorporated Territory. In either case the congressional authority is absolute. With respect, however, to the civil or private rights of the inhabitants of the Territories, the distinction is very important. For if it be that a Territory is merely appurtenant to, but not "incorporated" into the United States, Congress in its legislation regarding it is bound by but few of the limitations which apply in the case of incorporated Territories, whether organized or unorganized.

This distinction between incorporated and unincorporated territory is one that was not clearly made until the decision of the

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the District of Columbia. And yet separate communities, with an independent local government, are often described as States, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. (Halleck on Int. Law, chap. III, §§ 5, 6, 7.) The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government. Within this definition the District of Columbia, under the government of the United States, is as much a State as any of those political communities which compose the United States. Were there no other territory under the government of the United States, it would not be questioned that the District of Columbia would be a State within the meaning of international law; and it is not perceived that it is any less a State within that meaning because other States and other territory are also under the same government."

After referring to the case of De Geofroy v. Riggs, Justice Brown in the individual opinion which he rendered in Downes v. Bidwell (182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088), observes: "In dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal Government, wherever located. In its treaties and conventions with foreign nations, this government is a unit. This is so, not because the Territories comprise a part of the government established by the people of the States in their Constitution, but because the Federal Government is the only authorized organ of the Territories, as well as of the States in their foreign relations."

Insular Cases in 1901. Indeed, prior to that time, there had been a number of decisions by the Supreme Court which indicated that such a distinction did not, and could not, exist according to the Constitutional Law of the United States. There were, however, on the other hand, not a few legislative and administrative precedents which supported such a doctrine; and by rigorously confining the contrary decisions of the Supreme Court to the facts of the cases in which they were rendered, it was found possible to escape from their control, and to hold that the term "United States," as used in at least some of the clauses of the Constitution, does not, and was not intended to, include all districts subject to the sovereignty of the United States; and that as to such areas not within the limits of the "United States," in this strict constitutional sense, Congress, in the exercise of its legislative powers, is not subject to the limitations which rest upon it when dealing with Territories which are included in the United States.

A review of the decisions of the Supreme Court rendered prior to the Insular Cases, shows that, from the first, the doctrine was held by the court that Congress when legislating upon the civil rights of inhabitants of the Territories is governed by all those express and implied limitations which rest upon it when dealing with the same subjects within the States.[2] The only departures from this doctrine, if departures they be, were: (1) The remark thrown out by Justice Bradley in the Mormon Church case[3] that "Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its

[2] See Loughborough v. Blake, 5 Wh. 317; 5 L. ed. 98; Am. Ins. Co. v. Canter, 1 Pet. 511; 7 L. ed. 242; Webster v. Reid, 11 How. 437; 13 L. ed. 761; Scott v. Sandford, 19 How. 393; 15 L. ed. 691; Reynolds v. U. S., 98 U. S. 145; 25 L. ed. 244; Nat. Bank v. Yankton, 101 U. S. 129; 25 L. ed. 1046; Murphy v. Ramsay, 114 U. S. 15; 5 Sup. Ct. Rep. 747; 29 L. ed. 47; Callan v. Wilson, 127 U. S. 540; 8 Sup. Ct. Rep. 1301; 32 L. ed. 223; Mormon Church v. U. S., 136 U. S. 1; 10 Sup. Ct. Rep. 792; 34 L. ed. 478; Am. Pub. Co. v. Fisher, 166 U. S. 464; 17 Sup. Ct. Rep. 618; 41 L. ed. 1079; Springville v. Thomas, 166 U. S. 707; 17 Sup. Ct. Rep. 717; 41 L. ed. 1172; Thompson v. Utah, 170 U. S. 343; 18 Sup. Ct. Rep. 620; 42 L. ed. 1061.

[3] 136 U. S. 1; 10 Sup. Ct. Rep. 792; 34 L. ed. 478.

amendments; but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and distinct application of its provisions;" and (2) the quotation of this observation by Justice Brewer in American Publishing Co. v. Fisher[4] and the statement that "whether the Seventh Amendment of the Constitution of the United States . . . operates *ex proprio vigore* to invalidate this territorial statute may be a matter of dispute."[5]

Opposed, however, to this great weight of judicial opinion, there had been from the beginning, as has been said, a line of administrative and legislative precedents which tended to show a prevailing opinion that the Constitution with its limiting clauses does not immediately extend, *ex proprio vigore,* over all annexed territories, but over only such as have been expressly brought within its sphere of application by being "incorporated" in the Union. And, based upon the fact that this incorporation had certainly taken place with reference to the Territories concerned in the various Supreme Court decisions rendered prior to the Insular Cases, an argument was furnished for holding them not controlling in the Insular Cases which were concerned with districts that had not been so incorporated. These legislative and administrative precedents it does not fall within the province of this treatise to review. It is sufficient to say that in not a few instances various of the constitutional limitations were not applied in practice in the Territories, and that by specific legislative provisions these limitations were, from time to time, extended over the several Territories acquired by the United States, thus indicating on the part of Congress at least a doubt as to whether the constitutional provisions extended *ex proprio vigore* over the Territories.

Finally, it is to be observed, that, in the Constitution itself, there occur expressions which furnish possible ground for holding

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[4] 166 U. S. 464; 17 Sup. Ct. Rep. 618; 41 L. ed. 1079.

[5] The case of *In re* Ross (140 U. S. 453; 11 Sup. Ct. Rep. 897; 35 L. ed. 581), properly construed, did not indicate a departure from the rule.

that some at least of its limitations were not intended to operate over all Territories that might come under the jurisdiction of, but remain merely appurtenant to, the United States. Thus the Thirteenth Amendment declares that slavery and involuntary servitude shall not exist "within the United States, or any place subject to their jurisdiction." Thus is plainly indicated the possibility that there may be districts subject to but not within the United States. And this point is emphasized when it is remembered that this Amendment was drafted and adopted by substantially the same men who drafted and adopted the Fourteenth and Fifteenth Amendments in which this qualifying phrase does not appear. Again, the Sixth Amendment provides that in criminal trials the accused shall be tried by an impartial jury "of the State and district wherein the crime shall have been committed."[6]

[6] In United States v. Dawson (15 How. 467; 14 L. ed. 775), the opinion declares: "But it will be seen from the words of this amendment that it applies only to the case of offenses committed within the limits of a State. . . . The language of the Amendment is too particular and specific to leave any doubt about it." In Cook v. United States (138 U. S. 157; 11 Sup. Ct. Rep. 268; 34 L. ed. 906), the court say: "That amendment has reference only to offenses against the United States committed within a State" (citing United States v. Dawson). Yet, as we have seen in Reynolds v. United States (98 U. S. 145; 25 L. ed. 244), the court declared specifically that the Amendment was applicable to the Territory of Utah.

CHAPTER XXX.

THE INSULAR CASES.

§ 177. Downes v. Bidwell.

As a result of the Spanish-American War the United States came into possession of territories over which, because of their location, their economic and industrial status, and especially the character of their populations, it was deemed expedient to give to the Executive or to Congress the freest possible discretion with reference not only to the manner in which they should be governed, but to the civil rights that should be granted their inhabitants. The question whether in dealing with these new insular possessions, Congress should be held subject to all those constitutional limitations which apply when dealing with civil rights in the States or in the then existing Territories, thus became a most important one.

The form in which this question arose for judicial determination was as to the constitutionality of that clause of the Foraker Act establishing civil "congressional" government in Porto Rico, which provided a scale of customs duties to be paid upon goods brought into the ports of the United States from the island. This necessarily involved an answer to the question whether the provision of the Constitution that "all duties, imposts and excises shall be uniform throughout the United States" applied *ex proprio vigore* to Porto Rico, or whether, having never been formally "incorporated" by Congress into the United States either expressly or by implication, the island was not a part of the "United States" within the meaning of the term as used in the constitutional clause just quoted.

In Downes v. Bidwell[1] five of the nine justices of the Supreme Court concurred in holding that, though by the treaty of cession the island of Porto Rico came under the sovereignty of the United States, and when viewed from the standpoint of all other nations became a part of the United States, it did not, when looked at

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1 182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088.

from the viewpoint of its own public law, become a part of the "United States" as that term is used in the Constitution.

Four of these five justices were able to reach this conclusion: First, by making a sharp distinction between "incorporated" and "unincorporated" Territories; Second, by holding that the treaty-making power though able to annex Territories to the United States, that is, bring them under its sovereignty internationally speaking, is not competent to incorporate such areas in the United States, but that for this purpose the express or implied consent of Congress is necessary; and Third, that Congress in legislating for unincorporated Territories is not subject to many of the limitations which apply when it is legislating for the States and incorporated Territories.

It will be observed that so far as the general limitations upon the legislative powers of Congress are concerned, these four justices place the States and the incorporated Territories in the same class. Only the unincorporated Territories are by them excluded from the protection of such limitations as, for example, that federal tax laws shall be uniform throughout the United States. The fifth justice, Brown, who concurred with these four, does not, as we shall see, make any distinction between incorporated and unincorporated Territories, but excludes them all from the term "United States," and from the protection of all but the most fundamental of the constitutional limitations upon the power of Congress. The constitutional rights which these limitations create, he asserts, do not belong to the citizens of any Territories until by act of Congress they have been extended to them. Thus, while the four justices divide the domains of the United States into the three classes of States, Incorporated Territories, and Unincorporated Territories; Justice Brown recognizes only two categories, States and Territories.

The reasoning of the four justices was as follows:[2] At the beginning very proper care is taken to point out that the ques-

[2] These were the same justices who dissented from the judgment of the court in De Lima v. Bidwell that by the treaty of annexation Porto Rico at once ceased to be "foreign territory" within the meaning of the federal tariff laws.

tion is not as to whether the Constitution is to control in the premises, but as to which of its provisions are applicable. "Every function of the government being . . . derived from the Constitution," says the opinion, "it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable. Hence it is that whenever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits. As Congress in governing the Territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every provision of the Constitution which is applicable to the Territories is also controlling therein. . . . In the case of the Territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable. . . . And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States."

Some of the limitations created by the Constitution, the opinion recognizes, are of such "general and fundamental character or so absolutely laid down" as to restrain Congress in whatever capacity it may be acting — whether as a general legislature for all the regions and peoples subject to United States sovereignty, or only as a local legislature for the Territories. "Albeit," the opinion declares, "as a general rule, the status of a particular Territory has to be taken in view when the applicability of any provision of the Constitution is questioned, it does not follow, when the Constitution has absolutely withheld from the government all power on a given subject, that such an inquiry is necessary. Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen, which are not mere regulations as to form and manner in which a con-

ceded power may be exercised, but which are absolute denials of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot under any circumstances be transcended, because of the complete absence of power." The opinion does not attempt, however, to enumerate any of those absolute prohibitions of power, though it does later describe them as those made "in favor of human liberty."

With reference to the special point at issue, the opinion says: "There is in reason, then, no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice which the Constitution has absolutely denied. There can also be no controversy as to the right of Congress to locally govern the island of Porto Rico as its wisdom may decide, and in so doing to accord only such degree of representative government as may be determined on by that body. There can also be no contention as to the authority of Congress to levy such local taxes in Porto Rico as it may choose, even although the amount of the local burden so levied be manifold more onerous than is the duty with which this case is concerned. But as the duty in question was not a local tax, since it was levied in the United States on goods coming from Porto Rico, it follows that, if that island was a part of the United States, the duty was repugnant to the Constitution, since the authority to levy an impost duty conferred by the Constitution on Congress does not, as I have conceded, include the right to lay such a burden on goods coming from one to another part of the United States. And, besides, if Porto Rico was a part of the United States the exaction was repugnant to the uniformity clause. The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation — for, whether the tax was local or national, it could have been imposed although Porto Rico had no representative local government and was not represented in Congress — but is whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by

answering the inquiry, Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?"

The opinion then examines: First, whether the United States has the constitutional power to acquire territory and hold it as appurtenant and dependent territory without "incorporating" it in itself in a constitutional sense; and, Second, whether, if it has the power, it has done so in the case of Porto Rico.[3]

The power to acquire and hold territory in whatever constitutional status it sees fit, is, says the opinion, an inherent power possessed by all sovereign States (citing numerous international law writers). This power is possessed by the United States. Its power to acquire territory is conceded. But, the opinion continues: "To concede to the United States the right to acquire, and to strip it of all power to protect the birthright of its citizens and to provide for the well being of the acquired territory by such enactments as may in view of its condition be essential, is, in effect, to say that the United States is helpless in the family of nations, and does not possess that authority which has at all times been treated as an incident of the right to acquire."

The assertion that it is contrary to the spirit of the Constitution to hold territories without incorporating them as integral parts of the United States this opinion declares to be based upon political and not upon judicial considerations, there being no particular provision of the Constitution upon the subject. "Conceding," says the opinion, "that the conception upon which the Constitution proceeds is that no territory, as a general rule, shall be acquired unless the territory may reasonably be expected to be worthy of statehood, the determination of when such blessing is to be bestowed is entirely a political question, and the aid of the judiciary cannot be invoked to usurp political discretion in order to save the Constitution from imaginary or real dangers."[4]

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[3] The decision as to Porto Rico would of course conclude the status of the other insular possessions obtained in 1899 from Spain.

[4] This would hardly seem to meet the point, which is not as to the power to hold districts for an indefinite length of time in a territorial condition, but as to the power to annex territory without "incorporating" it in the United States.

Not only, then, has the United States the power to acquire and hold "appurtenant" territory, but, the opinion continues, this is the only status which may be given to annexed territory by the treaty-making power. For incorporation the consent of Congress is required. "It seems," the opinion continues, "impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress. And from this it must follow that there can be no foundation for the assertion that, where the treaty-making power has inserted conditions which preclude incorporation until Congress has acted in respect thereto, such conditions are void and incorporation results in spite thereof. If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States, speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown. While thus aggrandizing the treaty-making power on the one hand, the construction at the same time minimizes it on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treaty-making power, then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted, vested with the right to destroy upon the one hand, and deprived of all power to protect the government on the other.

Though declared to be a political question, the necessity of such a power is argued at length by these justices.

And, looked at from another point of view, the effect of the principle asserted is equally antagonistic, not only to the express provisions, but to the spirit of the Constitution in other respects. Thus, if it be true that the treaty-making power has the authority which is asserted, what becomes of that branch of Congress which is peculiarly the representative of the people of the United States, and what is left of the functions of that body under the Constitution? For, although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue,— bills for which, by the Constitution, must originate in the House of Representatives,— and the authority to prescribe uniform naturalization laws, would be in effect set at naught by the treaty-making power. And the consequent result — incorporation — would be beyond all future control of or remedy by the American people, since, at once and without hope of redress or power of change, incorporation by the treaty would have been brought about. The inconsistency of the position is at once manifest. The basis of the argument is that the treaty must be considered to have incorporated, because acquisition presupposes the exercise of judgment as to fitness for immediate incorporation. But the deduction drawn is, although the judgment exercised is against immediate incorporation and this result is plainly expressed, the conditions are void because no judgment against incorporation can be called into play."

As is later indicated, however, where the treaty of annexation provides for incorporation, the consent of Congress to such incorporation may be implied from legislation that recognizes this status as having been obtained. But where a treaty of cession does not expressly provide for incorporation, and still more, where it expressly provides against it, a more formal congressional action would seem to be necessary.

The opinion then proceeds to maintain that at the time the Constitution was adopted, the term "United States" designated a definite territory, namely, the thirteen original States and the

areas which they had ceded, or had agreed to cede, to the General Government, and that the new government with prescribed powers was established for the benefit of the citizens of this national aggregate of State and Territories. "Thus it was, at the adoption of the Constitution, the United States, as a geographical unit, and as a governmental conception both in the international and domestic sense, consisted not only of States, but also of Territories, all the native white inhabitants being endowed with citizenship, protected by pledges of a common union, and, except as to political advantages, all enjoying equal rights and freedom, and safeguarded by substantial guarantees, all being under the obligation to contribute their proportional share for the liquidation of the debts and future expenses of the General Government."

In short, then, according to this doctrine, the Constitution, from the beginning, extended *ex proprio vigore,* over the States and the extra-State regions then subject to the sovereignty of the United States. In all that concerned the form of government to be established over them, the inhabitants of these territorial, extra-State districts, were subject to the discretionary control of Congress, but in all else, in the private rights of person and property, and the protection of all the limitations upon the federal power, express or implied, they were on a plane of perfect equality with the citizens of the States.

With reference, however, to territories acquired since 1789 the doctrine of the opinion is, as has been said, that they do not by annexation become *ipso facto* integral parts of the United States in this constitutional sense until Congress has incorporated them into the Union as such.

In support of this position the court cite legislative action to this effect with reference to territory annexed since 1787 up to the time of the treaty of 1898 with Spain. In each case, with the exception of this last treaty, the treaty of cession had provided that the territories ceded should be incorporated into the United States, or, as in the treaty of 1867 for the purchase of Alaska, that the civilized inhabitants should be "admitted to the enjoy-

ment of all the rights, advantages and immunities of citizens of the United States." [5]

If, the opinion asks, the effect of annexation were immediately to incorporate the territory annexed into the United States, what was the need of these express treaty provisions? [6]

The opinion next goes on to show that the constitutional doubts expressed by Jefferson at the time of the acquisition of Louisiana were not as to its annexation, but as to its incorporation, as provided by the treaty, into the Union. By reference to various legislative and administrative acts, the opinion shows the territories subsequently annexed to have been either formally incor-

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[5] The treaty for the cession of Louisiana to the United States provided that: "The inhabitants of the ceded territory shall be incorporated into the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all the rights, advantages, and immunities of the citizens of the United States." (8 U. S. Stat. at L. 202.)

In the treaty with Spain whereby was confirmed the title of the United States to the Floridas the United States agreed that: "The inhabitants of the territories . . . shall be incorporated in the Union of the United States as soon as it may be consistent with the principles of the federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States." (8 Stat. at L. 256.)

In the treaty with Mexico by which Mexico relinquished its rights to Upper California and New Mexico the United States promised that: "The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic conformably with what is stipulated in the preceding article, shall be incorporated in the Union of the United States and to be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution." (9 Stat. at L. 930.)

In the treaty with Russia for the annexation of Alaska the United States agreed that: "The inhabitants of the ceded territory . . . shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States." (15 Stat. at L. 542.)

[6] To the author's mind this is by no means conclusive argument; and for two reasons. In the first place, provisions really unnecessary are often inserted in legal documents from abundance of caution; and, in the second place, foreign countries are not presumed to know the constitutional law of foreign countries, and, therefore, the peculiar constitutional rights of the inhabitants of an annexed territory. It is, therefore, a general practice for countries, when handing over certain of their subjects to the political control of a foreign power, to provide as far as possible for the future welfare of these persons the control over whom is thus abandoned.

porated or by necessary implication recognized by Congress as incorporated into the United States. This being so, it is argued that the various earlier *dicta* of the Supreme Court relative to the constitutional limitations resting upon Congress when legislating for the Territories are to be interpreted in that light and do not cover the case of a Territory which has not been incorporated into the United States.

Summing up its doctrine upon this point, the justice reading the opinion declares: "It is, then, as I think, indubitably settled by the principle of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed from the beginning, and by an unbroken line of decisions of this court, first announced by Marshall and followed and lucidly expounded by Taney, that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand, when it has expressed in the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfilment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired Territory has reached that state where it is proper that it should enter into and form a part of the American family."

Having established this doctrine, its application to Porto Rico becomes a comparatively simple matter. The treaty with Spain in no clause provided for incorporation, but, upon the contrary, expressly provided that the civil rights and political status of the native inhabitants of the territories should be determined by Congress; and since annexation, Congress had carefully refrained from any expression of legislative will from which incorporation might be implied.

"The result of what has been said," say the court, "is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico."

§ 178. Position of Justice Brown.

In a separate opinion Justice Brown concurred in the result reached by the four justices whose reasoning we have just been considering, but reached this result by laying down a doctrine that was agreed to by no other of the members of the court. Instead of holding that the term "United States," as used in the Constitution with reference to certain of the limitations placed by that instrument upon the powers of Congress, included the States and those Territories which had been incorporated into the Union, as held the four justices in whose judgment he concurred, he declared that, strictly speaking, the "United States" was to be construed as referring only to the States, and not to any other territory, whether incorporated or unincorporated. In fact Justice Brown does not admit the existence of a distinction between incorporated and unincorporated Territories, holding that as to all extra-State districts the constitutional limitations upon the powers of Congress apply only when, by congressional action, the Constitution has been extended over them.

After calling attention to the fact that, as decided in the case of De Lima v. Bidwell, by cession by treaty with a foreign power, a territory, already in the actual possession of the United States,

at once ceased to be foreign and became domestic territory, Brown points out that the cases under consideration involve the further and more important question whether upon their becoming domestic territory the provisions of the federal Constitution were extended of their own force — *ex proprio vigore* — over them. The Constitution not itself directly giving an answer to this, the solution he says will have to be found in the nature of the government created by that instrument. According to this justice's view, this instrument was created, if not by the States, at least exclusively for the States, and not for the Territories or any other extra-State lands that might belong to the United States. Thus, to quote his own words, "It can nowhere be inferred that the Territories were considered a part of the United States. The Constitution was created by the people of the United States, as a union of States; and even the provision relied upon here, that all duties, imposts, and excises should be uniform 'throughout the United States' is explained by the subsequent provisions of the Constitution, that 'no tax or duty shall be laid on articles exported from any State,' and '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 to be obliged to enter, clear, or pay duties in another.' In short, the Constitution deals with States, their people and their representatives. The Thirteenth Amendment to the Constitution prohibiting slavery and involuntary servitude 'within the United States, or in any place subject to their jurisdiction' is also significant as showing that there may be places within the jurisdiction of the United States that are not part of the Union. . . . Upon the other hand, the Fourteenth Amendment, upon the subject of citizenship, declares only that '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.' Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place 'subject to their jurisdiction.'"

To restate, then, the position of Justice Brown, it would appear that, according to his view, the "United States" when looked at from the domestic or constitutional viewpoint, includes in the Union only the individual States such as Virginia, New York, Texas, etc. The Federal District, the Territories, and, in fact, all areas not within the boundaries of some one of these States, though under the national sovereignty are not a part of the Union. Looked at, however, from the international standpoint, the term "United States" has, as Justice Brown later observes, "a broader meaning than when used in the Constitution, and includes all territories subject to the jurisdiction of the Federal Government, wherever located. In its treaties and conventions with foreign nations this government is a unit. This is so, not because the Territories comprise a part of the government established by the people of the States in their Constitution, but because the Federal Government is the only authorized organ of the territories, as well as of the States, in their foreign relations."[7]

Not being considered a part of the political unit created and organized by the federal Constitution, it would seem logically to follow that the non-State areas, or rather their populations, would not be entitled to any of the privileges or immunities defined in that instrument. But Justice Brown does not draw this conclusion. Speaking of the limitations laid upon the powers of Congress by the Constitution, he says: "There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time and place, and such as are operative only 'throughout the United States' or among the several States. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States' it goes to the competency of Congress to pass a bill of that description. Perhaps the same remark may be applied to the First Amendment that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

[7] Citing De Geofroy v. Riggs, 133 U. S. 258; 10 Sup. Ct. Rep. 295; 33 L. ed. 642.

or abridging the freedom of speech; or of the press; or the right of the people to peacefully assemble and to petition the government for a redress of grievances.' We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight Amendments is of general and how far of local application. Upon the other hand, when the Constitution declares that all duties shall be uniform 'throughout the United States' it becomes necessary to inquire whether there be any territory over which Congress has jurisdiction which is not a part of the 'United States,' by which term we understand the States whose people united to form the Constitution, and such as have since been admitted to the Union upon an equality with them." And later on he says: "We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property, to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, suffrage (Minor v. Happersett, 21 Wall. 162; 22 L. ed. 627), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals.

"Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments — it does not follow that in the meantime, awaiting that decision, the people are in the

matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution, to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States [citing cases]. We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect."

According, then, to Justice Brown, there are some provisions of the Constitution that control Congress and their inhabitants when legislating for such territories as are not within the States and others that do not so apply. Those that do not, he says, may, however, be made applicable by acts of Congress, and in part this has already been done in the case of all but the recently-acquired possessions. And, he implies that when the Constitution has been once formally extended to Territories and their inhabitants, neither Congress nor the territorial legislature can enact laws inconsistent therewith. As to this last assertion it has been argued that if an act of legislation is required to extend the Constitution over a territory, it goes there not as a Constitution but as a statute, and an irrepealable statute is admitted by everyone to be an impossibility — every legislature necessarily possessing a power to repeal equal to its power to enact. This being so, if the premises of Justice Brown be accepted, the conclusion is drawn that at the present time, every Territory of the United States, organized or unorganized, contiguous or non-contiguous, continental and insular, still remains, except possibly as to a few general rights, absolutely subject to the arbitrary will of Congress. Arizona, New Mexico, Oklahoma and even the District of Columbia in this respect, it is argued, stand upon a footing exactly the same as that of Porto Rico or the Philippines.

It is not certain, however, that the premises of this argument are sound. It would seem that there are some legislative acts which produce results which cannot be nullified by subsequent action of the legislative body. Thus, to give a single example, new States are admitted into the Union by enabling acts of Congress, but Congress may not, by subsequent action, expel the States so admitted from the Union. A similar conclusive effect might be given to acts extending the Constitution over the territories.

In support of his position Justice Brown cites numerous instances in the history of the United States in which acts of Congress have been limited in their application to the States, or, where their application to the Territories has been desired, express provision to that effect has been made. The decisions of the Supreme Court, however, upon the question whether the limitations of the Constitution extend *ex proprio vigore* over the Territories, he admits to have been "not altogether harmonious." Those which upon their face seem inconsistent with his position he explains or attempts to explain away. Thus he avoids the case of Loughbrough v. Blake[8] by saying that the District of Columbia having once been a part of a State, it could not by cession to the General Government be deprived of the constitutional rights which it had once enjoyed.[9]

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[8] 5 Wh. 317; 5 L. ed. 98.

[9] He says: "There could be no doubt as to the correctness of this conclusion, so far, at least, as it applied to the District of Columbia. This District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the federal and state governments to a formal separation. The mere cession of the District of Columbia to the Federal Government relinquished the authority of the States, but it did not take it out of the United States or from under the ægis of the Constitution. Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Con-

Other cases he explains away by maintaining that prior to the accruing of the causes of action litigated in them, the Constitution had been extended by act of Congress over the Territories concerned.

The very radical position taken by Justice Brown in the Insular Cases has been stated at some length because of the prominence that has been given it in the public discussions of the judgments rendered in the Insular Cases. As a matter of fact, however, as we have already learned, this position was not concurred in by any one of the other eight justices, and it thus stands not only unsupported by previous opinions of the court, but in flat contradiction to many of them. The "United States," as that term is employed in the Constitution, the four concurring justices said, includes not simply the States, as Justice Brown had said, but also such Territories as have been "incorporated" with them; and the Constitution itself, therefore, extends over them as well as over the States — not of course, however, in the sense that the powers of Congress when legislating for the States and the incorporated Territories are the same, but that, so far as applicable, the provisions of the Constitution are at once applicable to all Territories subject to the sovereignty of the United States, and, therefore, require no act of Congress for their extension, nor can their application to such Territories be denied by Congress.

§ 179. Argument of Dissenting Justices.

Four justices (Chief Justice Fuller, and Justices Harlan, Brewer and Peckham) dissented from the judgment rendered in Downes v. Bidwell. According to their view there is no constitutional distinction to be drawn between Territories incorporated in the United States and Territories unincorporated and merely appurtenant to the United States. States and Territories, they declare, are the only political units known to American Constitutional Law, and when by a treaty of cession and actual occupation, lands and their inhabitants have come under the sovereignty

stitution. Indeed, it would have been a fanciful construction to hold that territory which had once been a part of the United States ceased to be such by being ceded directly to the Federal Government."

of the United States such lands are necessarily a part of the United States, and no approving act of Congress is needed or is efficient to increase the constitutional privileges to which they are entitled and to make effective the legislative limitations upon the powers of Congress.

After calling attention to the essential character of the General Government as one of constitutionally limited powers, the opinion declares: "The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end of the question. To hold otherwise is to overthrow the basis of our constitutional law and moreover, in effect, to reassert the proposition that the States, and not the people, created the government."

With reference to the competence of the treaty-making power to "incorporate" territory in the United States, the dissenting justices urge that the right of annexation being admitted and the Constitution not providing for, or recognizing as possible, territory appurtenant to but not incorporated into the United States, it follows that when territory is annexed by treaty, such territory becomes an integral part of the United States any provisions in the treaty to the contrary notwithstanding. Upon this point, having referred to the clause of the treaty of 1898 with Spain to the effect that "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress," the opinion reads: "This was nothing more than a declaration of the accepted principles of international law applicable to the status of the Spanish subjects and of the native inhabitants. It did not assume that Congress could deprive the inhabitants of ceded territory of rights to which they might be entitled. The grant by Spain could not enlarge the powers of Congress, nor did it purport to secure from the United States a guaranty of civil or political privileges. Indeed, a treaty which undertook to take away what the Constitution secured, or to enlarge the federal jurisdiction, would be simply void."

In the separate opinion which he prepared, Justice Harlan was especially emphatic in his repudiation both of the doctrine asserted by Justice Brown that the Constitution was created "by the people of the United States, as a union of States, to be governed solely by representatives of the States," and of the theory of the other four justices as to the status of "unincorporated" Territories.[10]

§ 180. Summary and Criticism of Downes v. Bidwell.

In order fully to appreciate the radical character of the doctrine held by the four justices who concurred with Justice Brown in the judgment in the Downes case, it is necessary clearly to appreciate that, it was held, in effect, that this so-called incorporation of a Territory by Congress in the United States is not an act, the commission of which is determined by facts, but only by the formal declaration of an intention, express or implied, by Congress. So long as this intention is not declared, a territory is declared to remain unincorporated in the United States notwithstanding the fact that, as was the case in Porto Rico, a complete territorial government may have been created, federal courts established, with the right of appeal therefrom to the United States Supreme Court, and all the local officials required to take an oath to support the Constitution of a Union of which they were

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10 "In view of the adjudications of this court," he declares, "I cannot assent to the proposition, whether it be announced in express words or by implication, that the National Government is a government of or by the States in union, and that the prohibitions and limitations of the Constitution are addressed only to the States. That is but another form of saying that, like the government created by the Articles of Confederation, the present government is a mere league of States, held together by a compact between themselves; whereas, as this court has often declared, it is a government created by the people of the United States, with enumerated powers, and supreme over States and individuals with respect to certain objects, throughout the entire territory over which its jurisdiction extends. If the National Government is in any sense a compact, it is a compact between the people of the United States among themselves as constituting in the aggregate the political community by whom the National Government was established. The Constitution speaks, not simply to the States in their organized capacities, but to all peoples, whether of States or Territories, who are subject to the authority of the United States."

not a part. Especially difficult to accept is the declaration that the treaty-making power of the National Government is by itself incompetent to add territory to the United States in a domestic, constitutional sense. The authority of treaty-making power to annex territory is conceded; the Constitution itself places treaties upon a plane of equality with the statutes of Congress; and the Supreme Court has repeatedly affirmed that a subsequent treaty operates as a repeal of all acts of Congress inconsistent with it; wherefore it would seem irresistible to follow that when the treaty-making power has accepted an unconditional cession of territory to the United States, that act is as absolutely valid and as fully operative as though Congress itself had legislated upon the subject. To assert the contrary is, in effect, to say that the treaty-making and the law-making powers are not coördinate in authority, the express provision of the Constitution to the contrary notwithstanding.

Another objection to the doctrine of the Downes case which it seems absolutely impossible to overcome, is that, in reality, it does not simply assert the right of Congress to legislate regarding unincorporated territory without regard to some of the limitations imposed by the Constitution, but declares that in the exercise of this absolute power Congress may, in effect at least, disregard those same restrictions with reference to the inhabitants of the States of the Union. No argument is needed to show that a tariff law which affects articles taken from a State to an unincorporated territory, or from the latter to the former, affects the inhabitants of both, and cannot therefore be said to be simply a local law. But if not limited in its effects to the unincorporated territory in question, it would seem to be an act necessarily subject to the constitutional limitations placed upon Congress when legislating for the States. It is, therefore, impossible to escape the argument of the dissenting justices in the Downes case when they say: "Conceding that the power to tax for the purposes of territorial government is implied from the power to govern territory, whether the latter power is attributed to the power to acquire or the power to make needful rules and regulations, these particular duties are

nevertheless not local in their nature, but are imposed as in the exercise of national powers. The levy is clearly a regulation of commerce, and a regulation affecting the States and their people as well as this Territory and its people. . . . In any point of view, the imposition of duties on commerce operates to regulate commerce, and is not a matter of local legislation; and it follows that the levy of these duties was in the exercise of the national power to do so, and subject to the requirement of geographical uniformity."

Lastly, it may be said in objection to the doctrines declared in the Downes case, that in attempting to give to Congress a right to legislate for certain Territories under United States sovereignty, free from certain limitations placed by the Constitution upon its powers, there is seriously weakened, if not, from a strictly logical standpoint, absolutely destroyed, that most fundamental principle of our constitutional jurisprudence according to which all the provisions of the Constitution are equally binding upon Congress. The distinction that is made between the absolute prohibitions of legislative power and the limitations imposed by the Constitution upon the exercise of the powers that are granted, is clearly not calculated to support the conclusion that Congress under certain circumstances may disregard the latter when it may not the former. As Chief Justice Fuller declared in his dissenting opinion: "It is idle to discuss the distinction between a total want of power and a defective exercise of it;" and again, "The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end to the question. To hold otherwise is to overthrow the basis of our constitutional law." Mr. Carlisle in the address from which we have already once quoted, has also shown so clearly the fallacy of the argument of the prevailing opinion upon this point we may quote his words. He says: "The distinction attempted to be taken between the obligatory force of absolute prohibitions upon the power of Congress and the obligatory force of limitations and qualifications im-

posed by the Constitution upon the exercise of its powers over a particular subject, cannot, in my opinion, be sustained by any sound process of reasoning. It is true that there is a difference in degree between an absolute denial of all power to do a particular thing and a grant of power to do that thing to a limited extent, or in a prescribed manner only; but the absolute prohibition and the express or implied limitation are equally obligatory upon Congress. It is bound to obey both or its act is void. . . . To say that Congress, in legislating for a Territory, is not bound by the constitutional limitations upon a granted power, but is or may be bound by the express prohibitions, is simply to assert that all parts of the Constitution are not of equal force and effect as restraints upon legislation, and that a power not granted may be constitutionally exercised if it is not expressly prohibited, a theory, which, if sanctioned by the judiciary, would at once revolutionize the government. It would no longer be a government of enumerated and delegated powers, but would possess the whole mass of sovereign power which is now vested in the people, subject only to the comparatively few express prohibitions."

It will have been seen that the net result of the decision in Downes v. Bidwell, whether we follow the reasoning of Justice Brown, or of the four justices who concurred in the judgment rendered, is that as to Territories which have not been incorporated into the United States (or, according to Justice Brown, over which the Constitution has not been extended by act of Congress) Congress is not limited by some of the restrictions enumerated or implied in the Constitution. Just which of these limitations do not, in such cases, control Congress, it remains for the Supreme Court to determine in each particular case as the point arises.

In Downes v. Bidwell it was held that the restriction that "all duties, excises, and imposts shall be uniform throughout the United States" does not apply.

§ 181. Status of Hawaii: Hawaii v. Mankichi.

In Hawaii v. Mankichi[11] it was held that the provisions of the Fifth and Sixth Amendments with reference to indictment by a

[11] 190 U. S. 197; 23 Sup. Ct. Rep. 787; 47 L. ed. 1016.

grand jury and trial by petit jury, also did not apply. The facts and questions of law involved in this case were these. The Joint Resolution of Congress of July 7, 1898, had provided for the annexation of the Hawaiian Islands "as a part of the territory of the United States, and subject to the sovereign dominion thereof." The Resolution, indeed, expressly declared that "The municipal legislation of the Hawaiian Islands . . . not inconsistent with this Joint Resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." After the annexation to the United States, Congress not having determined otherwise, the defendant in error, Mankichi, was tried for and convicted of manslaughter according to the usual course of procedure in force in the Republic of Hawaii prior to July 7, 1898, which course of procedure did not require the indictment to be found by a grand jury, and which permitted a less number than the entire twelve of the petit jury to convict. An application for a writ of habeas corpus having been made by Mankichi upon the ground that, according to the Constitution of the United States, no one might be tried for manslaughter except upon an indictment or presentment found by a grand jury, nor convicted except by a unanimous petit jury, and the case having been appealed to the Supreme Court of the United States, that tribunal was called upon to determine: first, whether it was the intention and the necessary effect of the annexing Joint Resolution to make these constitutional provisions immediately applicable to the islands; and secondly, if it did not, whether it lay within the power of Congress or of the authorities of Hawaii to deny to the accused the rights in question. Both of these questions the majority of the court, five justices, answered in the affirmative.

Here, however, as in Downes v. Bidwell, the justices constituting the majority did not agree in their reasoning. Justice Brown, in his opinion, admitting that a literal interpretation of the Resolution would support Mankichi's claim, but arguing *ab inconvenienti*, asserts that it could not have been the intention of

Congress "to interfere with the existing practice, when such interference would result in imperilling the peace and good order of the islands." "Of course under the Newlands resolution," he continues, "any new legislation must conform to the Constitution of the United States; but how far the exceptions to the existing municipal legislation were intended to abolish existing laws must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may be well held to have taken immediate effect; but where the application of a procedure hitherto well known and acquiesced in left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress. In all probability the contingency which has actually arisen occurred to no one at the time. If it had, and its consequences were foreseen, it is incredible that Congress should not have provided against it. It is not intended here to decide that the words 'nor contrary to the Constitution of the United States' are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: 'Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process or confiscating private property for public use without compensation, remain in force after an annexation of the territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?' We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of

annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being."

In a concurring opinion Justices White and McKenna base their conclusion on the doctrine that by the annexing Resolution Congress had not intended to incorporate the islands *eo instanti* into the United States. With regard to the provision that the municipal legislation of Hawaii not contrary to the Constitution of the United States should remain in force, they say: "Now, in so far as the Constitution is concerned, the clause subjecting the existing legislation which was provisionally continued to the control of the Constitution, clearly referred only to the provisions of the Constitution which were applicable, and not to those which were inapplicable. In other words, having, by the resolution itself, created a condition of things absolutely incompatible with immediate incorporation, Congress, mindful that the Constitution was the supreme law, and that its applicable provisions were operative at all times, everywhere, and upon every condition and persons, declared that nothing in the Joint Resolution continuing the customs legislation and local law should be considered as perpetuating such laws, where they were inconsistent with those fundamental provisions of the Constitution which were, by their own force, applicable to the territory with which Congress was dealing."

Chief Justice Fuller and Justices Brewer, Peckham, and Harlan dissented. The first three of these, after adverting to the impropriety of an argument *ab inconvenienti,* content themselves simply with the statement that, as a matter of fact, the provision of the resolution of annexation which has been quoted above, validating all existing legislation, except such as might be contrary to the Constitution of the United States, should be construed as having extended over the islands the Fifth and Sixth Amend-

ments to that instrument. Justice Harlan, however, in his dissenting opinion, in addition to this, attacks the validity of the position assumed by the majority that it was within the constitutional power of Congress to exclude from operation in a territory, incorporate or not incorporate, any of the provisions of the Constitution.[12]

In effect, then, the prevailing doctrine of this Mankichi case is to hold that the provisions of the Constitution guaranteeing indictment and trial by jury are among those limitations which do not control Congress in legislating for unincorporated Territories, or, according to Justice Brown, for such Territories as have not had the Constitution extended over them by act of Congress.

§ 182. Right to Jury Held to be not Fundamental.

There can be no doubt but that this decision of the court that the right to trial by jury is not a fundamental right, but only one of practice and convenience, states a new principle in American jurisprudence. Blackstone speaks of the right as "the most transcendent privilege which any subject can enjoy or wish for;" Kent declares it "a fundamental doctrine;" Story that it is a "sacred and inviolate palladium" of liberty; and decisions of our courts without number have employed similar language in describing it.[13]

A second especial fact to be noted regarding the position of the four justices concurring with Brown in the judgment ren-

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[12] He says: "I dissent altogether from any such view. It assumes the possession by Congress of power quite as omnipotent as that possessed by the English Parliament. It assumes that Congress, which came into existence, and exists, only by virtue of the Constitution, can withhold fundamental guarantees of life and liberty from peoples who have come under our complete jurisdiction; who, to use the words of the United States minister, have become our fellow-countrymen; and over whose country we have acquired the authority to exercise sovereign dominion. In my judgment neither the life nor the liberty nor the property of any person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal acting under its authority, by any form of procedure inconsistent with the Constitution of the United States."

[13] See article by J. W. Garner, entitled "The Right of Jury Trial in the Dependencies," in *American Law Review*, XL, 1.

dered is that they render most indefinite the criteria by which it may be determined in any given case whether or not a Territory has, in fact, been "incorporated" into the United States. In this case the Territory in question had not been annexed by the treaty power as had the Territories involved in the Insular Cases decided in 1901, but by an act of Congress declaring it "a part of the Territory of the United States," and expressly making the Constitution paramount to the local law. Also all the circumstances preceding and attending the annexation of the islands indicated an intention to "incorporate" them into the United States. The treaty which the annexing resolution had taken the place of had expressly provided that the islands "should be incorporated into the United States as an integral part thereof and under its sovereignty," and there is absolutely nothing to show that when the resolution for annexation was adopted, a different destiny was intended for them.

In Dorr v. United States,[14] decided in 1904, it was held that trial by jury was not a necessary incident of due process of law in the Philippine Islands. By the act of Congress of 1902 providing for the temporary government of the Philippines various individual rights were guaranteed, among them that no person should be held for a criminal offense without due process of law. But the right to jury trial was not mentioned, and Section 1891 of the Revised Statutes was expressly declared not to be applicable.[15]

This decision was necessarily determined by the Downes v. Bidwell, and United States v. Mankichi cases; the former case holding that unincorporated territories were not necessarily entitled to all the privileges created by the Constitution; and the latter that the right to a jury trial is not a fundamental right.

Justice Harlan again dissented upon the same grounds as those given by him in the Mankichi case.

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[14] 195 U. S. 138; 24 Sup. Ct. Rep. 808; 49 L. ed. 128.

[15] This is the section giving force and effect to the Constitution and laws of the United States not inapplicable within all the organized Territories and every Territory thereafter organized as elsewhere in the United States.

§ 183. Alaska Incorporated: Rassmussen v. United States.

In Rassmussen v. United States,[16] decided in 1905, it was held that Alaska had been incorporated into the United States, and, therefore, that the inhabitants were entitled to jury trial. The court did not, however, attempt to lay down any definite rule for determining when incorporation has taken place, but contented itself with quoting the following sentences from the opinion in Dorr v. United States, and holding that the treaty by which Alaska had been acquired, and the legislation of Congress subsequent thereto, did not bring that Territory within the category of unincorporated Territories according to the test implied in the sentences quoted. These quoted sentences were as follows: "If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (article 9) 'the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.' In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly acquired possessions. The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for the temporary civil government (32 Stat. at L. 691, Chap. 1369), there is express provision that Sec. 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands."

In this Rassmussen case the attempt had been made to maintain the doctrine that, even if incorporated, Alaska was not entitled to the right in question for the reason that it had not been made an "organized" Territory. This contention, however, the court held clearly unsound. Incorporation, and not organization, it was declared was the test as to the general applicability of the Constitution. Justice Brown concurred, but, as might have been

[16] 197 U. S. 516; 25 Sup. Ct. Rep. 514; 49 L. ed. 862.

expected from his position in Downes v. Bidwell, held that the general applicability of the Constitution depended not upon the fact of incorporation, but upon whether Congress had by some expression of its will clearly shown that it intended that the particular provision of the Constitution should apply.

Justice Harlan in a concurring opinion again stated his doctrine that the Constitution in all its provisions extends *ex proprio vigore* over all Territories immediately upon annexation to the United States. I cannot agree," he said, "that the supremacy of the Constitution depends upon the will of Congress."

§ 184. Other Insular Cases.

In Binns v. United States[17] it was held with reference to license fees imposed on certain kinds of luxuries, that, though Alaska was an incorporated Territory and, therefore, within the scope of the provision of the Constitution that excises shall be uniform throughout the United States, the tax in question was valid as an act passed by Congress acting as a local legislature, and not as a general legislature exercising a power under the clause[18] empowering it to levy and collect taxes to pay the debts and provide for the common defense and general welfare of the United States.

In Kepner v. United States,[19] decided in 1904, it was held that by an act of Congress of 1902, the immunity from double jeopardy for crime as provided in the Constitution had been extended to the Philippines. The point urged by the United States in this case that the question as to what constitutes double jeopardy should be settled according to the local Spanish civil law, will be considered in another chapter of this work in which the Constitutional provision regarding immunity from a second jeopardy for the same criminal offense will be specially considered.[20]

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[17] 194 U. S. 486; 24 Sup. Ct. Rep. 816; 48 L. ed. 1087.

[18] Art. 1, Sec. VIII, Cl. 1.

[19] 195 U. S. 100; 24 Sup. Ct. Rep. 797; 49 L. ed. 114.

[20] See section 423.

In Goetze v. United States and Crossman v. United States[21] the doctrine of De Lima v. Bidewell was followed with reference to taxes levied on goods imported into the United States from Porto Rico after the taking effect of the Foraker Act establishing civil government in that island.

In the so-called second Dooley case[22] it was held that the tax collected under the Foraker Act on goods imported into Porto Rico from the United States was not a tax on goods exported from a State and, therefore, forbidden by the Constitution. The tax in question, it was held, was in essential character rather a local Porto Rican tax upon goods coming into that country, than an export tax on goods leaving the United States. As Justice Brown in his opinion said: "There can be no doubt whatever that if the legislative assembly of Porto Rico should, with the consent of Congress, lay a tax upon goods arriving from ports of the United States, such tax, if legally imposed, would be a duty upon imports to Porto Rico, and not upon exports from the United States; and we think the same result must follow if the duty be laid by Congress in the interest and for the benefit of Porto Rico. The truth is that, in imposing the duty as a temporary expedient, with a proviso that it may be abolished by the legislative assembly of Porto Rico, at its will, Congress thereby shows that it is undertaking to legislate for the island for the time being and only until the local government is put into operation. The mere fact that the duty passes through the hands of the revenue officers of the United States is immaterial, in view of the requirement that it shall not be covered into the general fund of the Treasury, but be held as a separate fund for the government and benefit of Porto Rico. . . . It is not intended by this opinion to intimate that Congress may lay an export tax upon merchandise carried from one State to another. While this does not seem to be forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without a violation of the first paragraph of Art. 1,

[21] 182 U. S. 221; 21 Sup. Ct. Rep. 742; 45 L. ed. 1065.

[22] Dooley v. United States, 183 U. S. 151; 22 Sup. Ct. Rep. 62; 43 L. ed. 128.

Sec. 8, that 'all duties, imposts and excises shall be uniform throughout the United States.' There is a wide difference between the full and paramount power of Congress in legislating for a Territory in the condition of Porto Rico and its power with respect to States, which is merely incidental to its rights to regulate interstate commerce. The question, however, is not involved in this case, and we do not desire to express an opinion upon it."

In the concurring opinion read by Justice White, the decision is placed upon the ground that the constitutional provision applies only to goods exported to a country wholly "foreign" to the United States and not to a country appurtenant, as was Porto Rico, to the United States.

Four justices dissented holding that the prohibition operates, and was intended to operate, as a general limitation on the power to regulate commerce whether interstate or foreign. "And this," the dissenting opinion says, "is equally true in respect of commerce with the Territories, for the power to regulate commerce includes the power to regulate not only as between foreign countries and the Territories, but also by necessary implication as between the States and Territories. Stoutenburgh v. Hennick 129 U. S. 141; 9 Sup. Ct. Rep. 256; 32 L. ed. 637."

"The proposition that because the proceeds of these duties were to be used for the benefit of Porto Rico they might be regarded as if laid by Porto Rico itself with the consent of Congress, and were therefore lawful, will not bear examination. No money can be drawn from the Treasury except in consequence of appropriations made by law. This act does not appropriate a fixed sum for the benefit of Porto Rico, but provides that the money collected from the citizens of the United States, shall be placed in a separate fund or subsequently in the treasury of Porto Rico, to be expended for the government and benefit thereof. And although the destination of the proceeds in this way were lawful, it would not convert duties on articles exported from States into local taxes. States may, indeed, under the Constitution lay duties on foreign imports and exports for the use of the Treasury of the United States, with the consent of Congress, but

they do not derive the power from the General Government. The power pre-existed, and it is its exercise only that is subjected to the discretion of Congress. Congress may lay local taxes in the Territories, affecting persons and property therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one State to another, or from any State to the Territories, or from any State to foreign countries, or grant a power in that regard which it does not possess. But the decision now made recognizes such powers in Congress, as will enable it, under the guise of taxation, to exclude the products of Porto Rico from the States as well as the products of the States from Porto Rico; and this notwithstanding it was held in De Lima v. Bidwell (182 U. S. 1; 21 Sup. Ct. Rep. 743; 45 L. ed. 1041) after the ratification of the treaty with Spain ceased to be foreign and became domestic territory."[23]

In Lincoln v. United States, and Warner, Barnes & Co. v. United States[24] it was held that the existence of an avowed insurrection of the natives in the Philippine Islands after the ratification of the treaty of peace with Spain did not justify the exaction under a military order of duties on imports from the United States into Manila after that date. The Diamond Rings case[25] was held to govern.

That the Thirteenth Amendment forbidding slavery and involuntary servitude except as punishment for crime is of application in the unincorporated as well as in the incorporated Territories, is clear, its language expressly extending its force not only to the United States but to "any place subject to their jurisdiction."

Certain forms of slavery do, however, undoubtedly exist in some of the Philippine Islands, but there is of course no legality in this, and as soon as is possible, the custom or practice will be suppressed.

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[23] This case will be again considered in Chapter XLI in connection with the discussion of the taxing powers of the United States.

[24] 197 U. S. 419; 25 Sup. Ct. Rep. 455; 49 L. ed. 816.

[25] 183 U. S. 176; 22 Sup. Ct. Rep. 59; 46 L. ed. 138.

CHAPTER XXXI.

CITIZENSHIP IN THE TERRITORIES.

§ 185. Effect of Cession of Territory on Citizenship of Inhabitants.

Whether or not inhabitants of territories ceded by one nation to another necessarily have, according to the principles of International Law, the option of becoming citizens of the annexing State, or retaining their old citizenship, is a point upon which International Law writers do not seem to be fully agreed. Rivier, for instance, in his recent work, "Principes du Droit des Gens," declares that they have not — that unless expressly provided otherwise, they become, *nolens volens,* the subjects of the power to which their territory is united. Other text-book writers, Westlake and Halleck, for instance, claim that the treaty of cession being silent upon this point, an option exists.[1] Halleck declares: "The transfer of territory establishes its inhabitants in such a position toward the new sovereignty that they may elect to become, or not to become, its subjects. Their obligations to the former government are canceled, and they may, or may not, become the subjects of the new government, according to their own choice. If they remain in the territory after this transfer, they are deemed to have elected to become its subjects, and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi,* they are deemed to have elected to continue aliens to the new sovereignty. The status of the inhabitants of the conquered and transferred territory is thus determined by their own acts. This rule is the most just, reasonable, and convenient which could be adopted.

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[1] This right of option as regards citizenship is not to be confounded with the right, by some alleged to exist, of the inhabitants to decide whether or not they will consent to a transfer of sovereignty over their territory to another power. Such a right has never been accepted by International Law writers, nor recognized by the United States in any of the annexations by it of new territories.

It is reasonable on the part of the conqueror, who is entitled to know who become his subjects and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new State, and is not unjust toward those who determine not to become its subjects. According to this rule, domicile, as understood and defined in public law, determines the question of transfer of allegiance, or rather, is the rule of evidence by which that question is to be decided."

That, in the absence of treaty stipulations to the contrary, the citizenship of the inhabitants of ceded territory is to be determined by the rule thus stated, is generally admitted by American International Law writers, and has been more than once declared by the United States Supreme Court. In American Insurance Co. v. Canter, the court say: "The same act which transferred their territory transfers the allegiance of those who remain in it;" and in Boyd v. Thayer[2] it was declared that "the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal or otherwise as may be provided."

§ 186. Treaty Provisions.

In all the treaties entered into by the United States whereby territory was acquired, prior to that with Spain in 1898, it was provided either that the inhabitants of the ceded territories remaining therein should be admitted as soon as possible to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, or that they should be "incorporated in the Union of the United States," or both. It cannot, however, be said with certainty, as has been maintained by some, that it was due to these provisions that the inhabitants of the ceded territories were collectively naturalized, for this point has never been squarely passed upon by the Supreme Court. The undoubted purpose and the probable legal effect of these provisions was only to create an obligation on the part of the United States not to

[2] 143 U. S. 135; 12 Sup. Ct. Rep. 375; 36 L. ed. 103.

discriminate civilly against these peoples, and, when the conditions should warrant, to confer upon them full political privileges. The determination when this time had arrived was left to the discretion of Congress. Provisions similar to those of which we have been speaking are almost always inserted by all nations in treaties of cession at the instance of the ceding power, as a matter of equity, it being but just that in handing over to the control of another power citizens of its own that, as far as possible, a State should obtain a guarantee that they should not be civilly or politically oppressed.

By these treaties of cession entered into by the United States, the inhabitants of the ceded territories did become, however, United States citizens under the general rule quoted above, because those treaties contained no stipulations to the contrary.

In the treaty of peace with Spain which provided for the cession to the United States of Porto Rico, Guam, and the Philippines we find for the first time appearing a provision expressly affirming, that the cession of the islands is not to operate as a naturalization of their native inhabitants, but that the determination of their civil rights and political status is to be left to the subsequent judgment of Congress. Spanish subjects, natives of the Iberian Peninsula, but resident in the islands, are, however, given the right to elect whether or not they will retain their old citizenship or become American subjects.[3]

[3] The provisions of the treaty upon these points are as follows: "Spanish subjects, natives of the peninsula [of Spain] residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce, and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making before a court of record within a year from the date of exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil right and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress."

Relative to the effect of the treaty provision, that the civil or political status of the native inhabitants of the ceded territories are to be determined by Congress, a question presents itself, which has not yet been passed upon by the Supreme Court. This is, whether it is within the constitutional competence of the treaty-making power to confer upon Congress the right to determine whether or not the inhabitants of territories coming under the sovereignty of the United States shall become its citizens. The Constitution declares that the acts of the treaty-making power, as well as those of the federal legislature, shall be the supreme law of the land. The validity of both are, however, dependent upon their consonance with the requirements of the Constitution. If, then, according to that instrument, there may not be the subjects of the United States who are not also its citizens, no treaty can give to the law-making branch the power to treat any persons as such. In the Insular Cases it was held that the islands obtained from Spain have not been incorporated in the "United States." Their inhabitants have not been naturalized by statute, and the treaty with Spain expressly refuses to them citizenship. The whole question of their civil status thus depends upon whether or not they are citizens according to the provision of the Fourteenth Amendment, which declares that "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." That is to say it will depend upon whether the term "United States," as here employed, will be construed to exclude or include "unincorporated" Territories.

As has been said, this question has not been passed upon *in limine,* by the Supreme Court, but the positions taken in the Insular Cases would indicate that inhabitants of these insular possessions, though subject to the sovereignty of and owing allegiance to the United States, are not citizens within the strict constitutional sense. Certainly by the executive and legislative departments of the National Government the position has been taken that they are not.

§ 187. Statutory Provisions.

The citizens of Hawaii have been made citizens of the United States by statute enacted April 30, 1900.

The act of June 14, 1902,[4] provides that no passport shall be granted or issued to, or verified for, any other persons than those owing allegiance, whether citizens or not, to the United States.

Under this provision passports are now issued to citizens of Porto Rico and of the Philippines.

The act of July 1, 1902, providing for the administration of civil government in the Philippine Islands, declares that "All inhabitants of the Philippine Islands continuing to reside therein, who were Spanish subjects on the 11th day of April, 1899, and then resided in said islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace between Spain and the United States, agreed at Paris, December 10, 1898."

The act of April 12, 1900,[5] establishing a civil government for Porto Rico, provides that: "All inhabitants continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in Porto Rico and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain, on or before the 11th day of April, 1900, in accordance with the provisions of the treaty of peace entered into on the 11th day of April, 1899; and they together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of the People of Porto Rico, with guaranteed powers as hereafter confirmed, and with power to sue and be sued as such."

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[4] 32 Stat. at L. 386.

[5] 31 Stat. at L. 77.

Section 30 of the Naturalization Act of June 29, 1906, provides: "That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The Applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission, and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law."

§ 188. Native Inhabitants of Porto Rico not Aliens: Gonzales v. Williams.

In Gonzales v. Williams[6] it was held that a native of Porto Rico who was an inhabitant of that island at the time of its cession to the United States is not an "alien" within the meaning of the act of Congress of March 3, 1891, providing for the detention and deportation of alien immigrants likely to become public charges. No position is taken by the court, however, with reference to the question of citizenship. In its opinion the court say: "We are not required to discuss . . . the contention of Gonzales' counsel that the cession of Porto Rico accomplished the naturalization of its people; or that of the commissioner Degetau, in his excellent argument as *amicus curiae,* that a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in the act of 1891. . . . We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens and subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the

[6] 192 U. S. 1; 24 Sup. Ct. Rep. 171; 48 L. ed. 317.

dominion of the United States; the organic law of whose domicil was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States,—are not 'aliens,' and upon their arrival by water at the ports of our mainland are not 'alien immigrants,' within the intent and meaning of the act of 1891."

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CHAPTER XXXII.

FOREIGN RELATIONS: THE TREATY POWER.

In the discussion of the constitutional power of the United States to extend its sovereignty over new territories and to govern such territories when acquired, the fact has been adverted to and relied upon, that the control of the relations of the United States with foreign nations is exclusively vested in the General Government. We have now to examine in detail the consequences which flow from this fact, and to examine into the manner in which the Constitution has provided that the federal powers thus vested are to be exercised.

§ 189. The Federal Power Exclusive.

The exclusiveness of the federal jurisdiction in all that concerns foreign affairs is deducible both from the national character of the General Government, and from the express provisions of the Constitution.

The States are expressly forbidden to "enter into any treaty, alliance, or confederation," "to grant letters of marque and reprisal," or, unless Congress consents, to "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 admit of no delay."

Upon the other hand, the General Government is expressly empowered "to provide for the common defence and general welfare of the United States;" "to regulate commerce with foreign nations;" "to make treaties;" "to establish an uniform rule of naturalization;" "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;" "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water;" "to raise and support armies;" "to provide and maintain a navy;" "to make rules

for the government and regulation of the land and naval forces;" "to provide for the calling forth the militia to . . . repel invasions;" "to appoint ambassadors and other public ministers and consuls;" to adjudicate causes arising under treaties, and all cases affecting ambassadors, other public ministers and consuls, cases of admiralty and maritime jurisdiction, and cases between a State, or the citizens thereof, and foreign States, citizens and subjects. Finally, it is declared that: "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 the laws of any State to the contrary notwithstanding."

From these express grants of power to the General Government, and prohibitions of treaty powers to the States, the intention of the framers of the Constitution to invest the Federal Government with the exclusive control of foreign affairs is readily deducible.

§ 190. The Federal Power All-Comprehensive.

The control of international relations vested in the General Government is not only exclusive, but all-comprehensive. That is to say, the authority of the United States in its dealings with foreign powers includes not only those powers which the Constitution specifically grants it, but all those powers which sovereign States in general possess with regard to matters of international concern. This general authority in the United States is fairly deducible from the fact that in its dealings with other States the United States appear as the sole representative of the American people; that upon it rests, therefore, the obligation to perform all the duties which International Law imposed upon a sovereign State; and that, therefore, having these duties to perform it is to be presumed to have commensurate powers. "That would appear to be a most unreasonable construction of the Constitution," say the court in the Legal Tender Cases, "which denies to the government created by it the right to employ freely every means, not

prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties." The court then go on to declare: "And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal Government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. . . . And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given."[1]

This doctrine thus asserted in the Legal Tender Cases has been especially emphasized by the Supreme Court in passing upon the constitutional power of the United States to exclude or expel undesirable aliens. In the Chinese Exclusion Cases[2] the court say: "While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens, are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. . . . The control of local matters being left to local authorities, and national matters being intrusted to the Government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests, has been happily solved. For local interests the several States of the Union exist, but for the national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

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[1] 12 Wall. 457; 20 L. ed. 287.

[2] 130 U. S. 581; 9 Sup. Ct. Rep. 623; 32 L. ed. 1068.

And in Ekiu v. United States[3] the court declare: "It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such case and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, 94, 100; 1 Phillimore (3d. ed.), chap. 10, § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war."

Again in Fong Yue Ting v. United States,[4] the following language is used: "The right to exclude or expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare, the question now before the court is whether the manner in which Congress has exercised this right in sections 6 and 7 of the Act of 1892 is consistent with the Constitution. The United States are a sovereign and independent nation, and are vested by the Constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and make it effective. The only government of this country, which other nations recognize or treat with, is the Government of the Union; and the only American flag known throughout the world is the flag of the United States."

In an earlier chapter we have seen that the power of the United States to annex territory is deducible not merely from such express grants of power, as to enter into treaties, to declare war, etc., but from the national sovereignty of the United States in its international relations.

The reasoning of the court in maintenance of the principle that in all that concerns foreign relations the United States has the same plenitude of constitutional power as that possessed by

[3] 142 U. S. 651; 12 Sup. Ct. Rep 336; 35 L. ed. 1146.
[4] 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905.

other sovereign States is sound. This appeal, however, to the fact of "national sovereignty" as a source of federal power is not a valid one outside of the international field. It cannot properly be resorted to when recognition of an international obligation on the part of the United States is not involved, and when, therefore, the matter is purely one relating to the reserved powers of the States or to the private rights of the individuals. To permit the doctrine to apply within these fields would at once render the Federal Government one of unlimited powers.[5]

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[5] The Supreme Court has, however, upon several occasions employed language which would imply the acceptance of the doctrine in this improper manner, or, at least, has appealed to it in support of conclusions reached upon other grounds. Thus in the Legal Tender Cases (12 Wall. 457; 20 L. ed. 287) Justice Bradley says: "The United States is not only a government, but it is a national government, and the only government in this country that has the character of nationality. It is vested with power over all foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the state governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulation and laws. . . . Such being the character of the General Government, it seems to be a self-evident proposition that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally conceded to belong to every government as such, and as being essential to the exercise of its functions."

And in Juillard v. Greenman (110 U. S. 421; 4 Sup. Ct. Rep. 122; 28 L. ed. 204) the court derive additional support for its position upholding the constitutionality of the Legal Tender laws, from the doctrine that sovereign nations generally have the power. The court, in its opinion, say: "The power, as incident to the power of borrowing money and issuing bills or notes of the Government for money borrowed, of impressing upon those bills or notes the quality of being a legal tender for the payment of private debts, was a power universally understood to belong to sovereignty, in Europe and America, at the time of the framing and adoption of the Constitution of the United States. The governments of Europe, acting through the monarch or the legislature, according to the distribution of powers under their respective constitutions, had and have as sovereign a power of issuing paper money as of stamping coin. . . . The exercise of this power not being prohibited to Congress by the Constitution, it is included in the power expressly granted to borrow money on the credit of the United States, . . . Congress as the legislature of a sovereign nation, being expressly empowered by the Constitution to lay and collect taxes, etc. . . . and the power to make the notes of the government a legal tender in the payment of private debts being one of the powers belonging to sovereignty in other civilized

In summary, then, we may say that the United States Government though one of complete powers in all that relates to its dealings with foreign States, is, in all other respects, one of limited, enumerated powers.

§ 191. The Manner of Exercise of the Treaty-making Power.

The Constitution[6] provides that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

It was not until the closing days of the Constitutional Convention that the President was associated with the Senate in the negotiation and ratification of treaties. Upon August 23d, however, Madison observed, "that the Senate represented the States alone, and for this as well as other obvious reasons it was proper that the President should be made an agent in the treaties." September 4th, the Committee to which undetermined sections of the Constitution had been referred, reported back the treaty clause in substantially the form in which it now appears. The only discussion which the clause then received was with reference to the size of the majority that should be required in the Senate for approval of treaties, and whether treaties of peace should not, by way of exception, require only a simple majority vote.

The second clause of Article VI of the Constitution declares that "This Constitution, and the laws of the United States

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nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in the payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress."

In the foregoing it will be observed that the court find the legal tender power implied in other powers expressly given by the Constitution to Congress, but the validity of this implication it founds on the nature of sovereignty as exemplified in the political world generally.

Again in United States v. Jones (109 U. S. 513; 3 Sup. Ct. Rep. 346; 27 L. ed. 1015) with reference to its powers of eminent domain, the court say: "The power to take private property for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of sovereignty, and as said in Boom v. Patterson (98 U. S. 403; 25 L. ed. 206), requires no constitutional recognition."

[6] Art. II, Sec. 2, Cl. 2.

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 and laws of any State to the contrary notwithstanding." It had been suggested in the Convention by Gouverneur Morris that no treaty should be binding on the United States until ratified by a law, but, the disadvantages of such a provision being pointed out, the suggestion was voted own. A proposal was also made, but rejected because of the often necessity of secrecy, that the House of Representatives should participate with the Senate in the ratification of treaties.

That treaties duly ratified should bind the States, and be beyond their power to change, was never questioned in the Convention. Until August 23d, it was agreed that the General Government should have an express power to enforce by arms all treaties, but this provision was then stricken out for the reason that treaties being expressly declared to have the force of law, the federal judicial power would have sufficient authority to determine when they were infringed and to order their enforcement.

In the state ratifying conventions the fact that treaties were to be superior to state constitutions and laws created not a little fear of possible oppression. In Virginia Patrick Henry raised strong objection to this, and in several States there was urged the necessity of an amendment specifically declaring that no treaty should operate to change the Constitution of a State.

§ 192. The Negotiation of Treaties.

With respect to the manner in which treaty-making is, according to the Constitution, to be conducted, the first question that arises is as to the extent to which the Senate may properly participate not only in the ratification, but in the preliminary negotiation of international agreements.

In the same clause, indeed in the same sentence, of the Constitution in which provision is made for entering into treaties, it is provided that the President "shall nominate and by and

with the advice of the Senate shall appoint ambassadors, other public ministers and consuls," etc. Here the phraseology shows that the act of nominating the public officials mentioned, is clearly distinguished from their appointment. They are to be nominated by the President, but to be appointed by the Senate and President. The negotiating of treaties is not, however, by the phraseology of the treaty clause thus sharply distinguished from their ratification as regards the federal organs by which this negotiation and ratification is to be performed. The language is that the President "shall have power, by and with the advice and consent of the Senate, to make treaties," not that "he shall negotiate, and, with the consent of the Senate, ratify treaties."

As further indicative of an intended participation of the Senate in the negotiation of treaties is the fact, already adverted to, that in the Convention, until almost the last moment, it was agreed that the treaty-making power should be vested exclusively in the Senate, a body the membership of which at that time it was thought would remain comparatively small.[7]

Actual practice exhibits frequent instances in which the Senate has participated in the negotiation of treaties.

During the first years under the Constitution the relations between the President and the Senate were especially close. In 1789 President Washington notified the Senate that he would confer with them with reference to a treaty with certain of the Indian tribes, and, on the next day, and again two days later, went with General Knox before that body for that purpose. Again, in 1790, President Washington in a written communication asked the advice of the Senate as to a new boundary treaty to be entered into

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[7] It would appear that the original intention of the framers of the Constitution was that the Senate should act more as an executive council than as an upper legislative chamber. See Ford, *Rise and Growth of American Politics*. "The law makes the Senate the adviser of the President in the making of a treaty through all its stages — not that it requires that, in every instance, the President shall have the advice and consent of the Senate, but that, in every instance, the President has the right to have it, and correspondingly, in every instance, the Senate has the right to enforce it. It is a reciprocal right for a common benefit." Senator A. O. Bacon in the *North American Review*, April 19, 1906.

with the Cherokees. So also, in 1791, he asked the Senate to advise him as to what answer to be made to the French Chargé des Affaires, with regard to a question of tonnage on foreign vessels.

John Quincy Adams in his *Memoirs*[8] relates that Crawford told him that Washington went to the Senate with a draft of a treaty; that "they debated it, and proposed alterations, so that, when Washington left the Senate Chamber, he said he would be damned if he ever went there again. And ever since that time treaties have been negotiated by the Executive before submitting them to the consideration of the Senate."

In fact, however, the Presidents did continue occasionally to consult with the Senate in regard to the negotiation of treaties.

In 1794, when sending the name of John Jay as Envoy Extraordinary to England, Washington explained to the Senate his purpose in doing so; and the same was done by President Adams in 1797 when nominating the special commission to France.[9]

§ 193. Powers of the Senate.

After the first few years under the Constitution, however, the practice on the part of the President of consulting the Senate with regard to the treaties to be negotiated, became an infrequent one, but yet not one wholly obsolete. Thus, in 1818, President Monroe asked the Senate whether he alone as Executive was constitutionally competent to arrange with Great Britain as to naval armaments upon the Great Lakes; and, if not, that they would give him advice as to the proper agreement with reference thereto, that should be entered into. Again, in 1830, President Jackson asked the advice of the Senate as to the terms of a treaty to be negotiated with the Choctaw Indians. His message, however, bears evidence to the fact that he is aware that he is departing from the practice of years immediately preceding, though not from

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[8] VII, 427.

[9] For other instances in which during the early days, as well as at later times, the advice of the Senate has been asked by the President in the negotiation of international agreements, see Crandall, *Treaties: Their Making and Enforcement*, pp. 54 *et seq.* and an article in *Scribner's Magazine*, Jan., 1902, by Senator Henry Cabot Lodge, entitled "The Treaty-making Power."

that of the early period. He says: "I am aware that in thus resorting to the early practice of the government, by asking the previous advice of the Senate in the discharge of this portion of my duties, I am departing from a long and for many years unbroken usage in similar cases. But being satisfied that this resort is consistent with the provisions of the Constitution, that it is strongly recommended in this instance by considerations of expediency, and that the reasons which have led to the observance of a different practice, though very cogent in negotiations with foreign nations, do not apply with equal force to those made with Indian tribes, I flatter myself that it will not meet with the disapprobation of the Senate."[10]

In the article already referred to, Senator Lodge enumerates a not inconsiderable number of instances down to comparatively recent times in which the Senate has participated in the negotiation of treaties.

In a number of cases the Senate has by resolution suggested to the President that certain negotiations be initiated. Thus in 1835 the Senate requested the President to open negotiations with the Central American governments with a view to securing treaties granting protection to such individuals as might undertake the construction of an interoceanic canal. In 1888, President Cleveland was requested by the Senate to open negotiations with China for the regulation of immigration of subjects of that country into the United States. In 1880, by a concurrent resolution, the Senate and House of Representatives requested the Executive to seek the co-operation of other Powers in providing for the amicable settlement by arbitration of disputes which could be settled

[10] "Secretary Webster, in the important negotiations which he conducted for the adjustment of the northeastern boundary kept the Senate advised of the progress of the negotiations and it was mainly for that reason he was able to carry the treaty by an overwhelming vote in the Senate which was politically hostile to the administration. Secretary Buchanan, before signing the treaty adjusting the Oregon boundary, submitted the full text to the Senate and received an informal note approving it. President Jackson even consulted the Senate as to the propriety of refusing to accept the award (under a treaty) of the King of the Netherlands, and procured a note of that body advising him as to the course to be pursued." (J. W. Foster in *Yale Law Journal*, XI, 71.)

through the ordinary diplomatic channels. By an act of Congress, the President was, in 1902, advised and authorized to enter into certain treaty arrangements with reference to the construction of an interoceanic canal.

All of the instances cited above are, however, by way of general exception to the rule according to which the negotiating of treaties is in the hands of the President. The Senate's function, so far at least as its formal action is concerned, is limited to the disapproval, or ratification, with or without amendments, of the treaties after they have been agreed upon by the President and the chancellaries of the foreign countries concerned.

Though, as has just been said, the formal participation of the Senate as a body in the negotiation of treaties is not often now solicited, as a matter of fact that body is, according to modern usage frequently, indeed, it might be said, generally, kept well informed as to the progress of international negotiations by means of personal interviews between the Executive and prominent Senators, especially, of course, those serving upon the Committee on Foreign Affairs of the Senate. In 1898 three of the five Commissioners appointed to negotiate the Treaty of Peace with Spain were Senators and members of the Committee on Foreign Affairs.

Nevertheless, this practice has not prevented frequent friction between the Senate and the Executive with reference to foreign relations. Especially has this been true since the time when Mr. Blaine held the position of Secretary of State. From the time when Monroe became Secretary of State in 1811 to the resignation of Mr. Blaine in 1892, with the exception of a very few years, this Secretaryship was held by men who had previously been in the Senate, but since then, with the exception of Sherman and Knox, this has not been true.[11] Speaking of the lack of harmony which has existed during this recent period, Professor Reinsch writes: "Under these circumstances, it is not surprising that there should have been more friction between the President and the Senate on foreign matters than existed during earlier years of our national life. Such constant friction as has during recent years existed between the Senate and the Department of State is,

[11] *Cf.* Reinsch, *American Legislatures*, p. 95.

in fact, unprecedented in our national history. It began under Mr. Cleveland's régime, when the Olney-Pauncefote arbitration treaty was rejected, partly on account of the unpopularity of the Administration, partly on account of a strong political opposition to any arbitration arrangements with Great Britain. Even under McKinley, notwithstanding the unusual relations of friendliness between the President and the Senate, the most important treaties submitted by the Department of State were rejected or modified by the Senate. Again it proved impossible to have a British arbitration treaty ratified. The Hay-Pauncefote canal treaty failed, and this was also the fate of several important reciprocity treaties. . . . The Senate has continued this critical attitude with the result that no important treaty has been allowed to pass without such modification as has often entirely destroyed its original purpose. The only exception is the Treaty of Paris, in the formation of which individual senators had taken a prominent part. The Newfoundland reciprocity treaty was ruined through the interference of special interests."

In addition to these instances of disagreement, in 1905 came the disagreement between the Senate and Executive with reference to the general arbitration treaties which had been negotiated, and the irritation aroused in the Senate by the San Domingo protocol entered into by the President on January 20, 1905. Further reference to the principles involved in several of these disagreements will presently be made.

Occasionally the Senate has turned down projects to the approval of which it has earlier committed itself.

§ 194. The "Recognition" of Foreign Governments.

The recognition by the United States of a status of belligerency, or the recognition of the sovereignty and independence of a foreign government are political acts, not subject to judicial review[12] and are performed by the President. At times the claim has been made that this power of recognition is one to be exercised at the dictation of Congress, but precedents are against the

[12] See Chapter LI.

claim.[13] It is to be presumed, however, that when the recognition of a status of belligerency or of the independence of a revolutionary government is likely to institute a *casus belli* with some other foreign power, the President will be guided in large measure by the wishes of the legislative branch. Upon the other hand, it is the proper province of the Executive to refuse to be guided by a resolution on the part of the legislature if, in his judgment, to do so would be unwise. The legislature may express its wishes or opinions, but may not command.

§ 195. The Power of the Senate to Amend Treaties.

There would seem to be no question but that, having the power either to approve or to disapprove an international agreement negotiated by the President, the Senate has also the power, when disapproving a proposed treaty, to state upon what conditions it will approve; in other words, to amend any treaty submitted to it.[14] In so doing there can be no question but that the Senate is well within its constitutional right. Upon the other hand, it is equally within the province of the Executive to consider the amendment of a treaty by the Senate as equivalent to a rejection of it. When, therefore, a treaty has been amended in the Senate, it is within the President's power to abandon the whole treaty project, or to reopen negotiations with the foreign country or countries concerned with a view to obtaining their consent to the changes desired by the Senate, or, finally, to begin *de novo* and attempt to negotiate an entirely new treaty, which he may hope will secure senatorial approval. In case he decides to follow the second of these courses, namely, to secure the approval of the foreign country or countries to the amendments to the treaty project made in the Senate, and is successful in this, it would seem

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[13] See Senate Docs., Nos. 40 and 56, 54th Cong., 2d Sess.; Hinds, *Precedents of the House of Representatives*, chapters XLVIII, XLIX.

[14] The approval or disapproval of a treaty project by the Senate is often spoken of as the ratification or refusal to ratify. Strictly speaking, however, this language is incorrect, as the ratification of a treaty is the final act performed by the President by which the agreement is declared in force between the United States and the foreign State or States which are the parties to it.

that the treaty need not again be submitted to that body for its approval, but may be at once promulgated.[15]

When, in 1795, the Jay treaty was submitted to the Senate for approval, that body advised the President to approve on condition that certain specified changes were made in it. These changes having been consented to by Great Britain the treaty was ratified without again submitting the instrument to the approval of the Senate. The question as to the propriety of this course had been submitted by Washington to the members of his cabinet and upheld by them. The same practice has been followed in subsequent cases. Where, however, the changes made in a treaty project have not been specifically indicated by the Senate as desired by that body, it has been very properly held that the amended project should be again submitted to the Senate for its action thereon.[16]

The Senate's right to amend a treaty has been directly upheld by the Supreme Court. In Haver v. Yaker[17] the court say: "In this country a treaty is something more than a contract, for the federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify or approve it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it."[18] The approval of the Senate being essential to the validity of all treaties entered into by the United States,[19] it has been held that all protocols, and explanations given by the Executive as to the meaning of treaty provisions, which have not been passed upon and approved by the Senate, are not to be considered as internationally binding upon the United States, or enforced in its courts. For this reason it is not constitutional for the President to insert in a treaty secret provisions which have not been approved by the Senate. Most of the written constitutions of foreign Powers have specific prohibitions with reference to secret provisions.

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15 Crandall, *Treaties: Their Making and Enforcement*, pp. 68 *et seq.*

16 Crandall, pp. 68 *et seq.*

17 9 Wall. 32; 19 L. ed. 571.

18 Senator Lodge enumerates sixty-eight treaties that were amended by the Senate and afterward ratified.

19 For qualification of this statement, see Chapter XXXIII.

§ 196. Foreign States Held to a Knowledge of the Location of Treaty-Making Powers.

Generally speaking, according to rules of international law, one State is not concerned with, and, therefore, not required to be cognizant of, the constitutional law of another State with which it has dealings. With respect, however, to the constitutional treaty-making powers of the governmental organs of that State, other States are required to be informed;— *qui cum alio contrahit, vel est, vel debet esse non ignarus conditionis ejus* — and, therefore, it is no great ground of complaint on the part of a State, as, for example, England, in whose Executive is exclusively vested the treaty-making power, when a treaty project which has been mutually agreed upon between the Executive of that country and the Executive of the United States, fails of approval, or is amended in the Senate.[20]

It would seem, however, that when the American Senate amends a treaty, and then formally ratifies it as amended, and returns it to the President for him to submit to the other nation concerned, there is some ground for complaint that thereby such nation is improperly placed in a position where it is called upon to pass upon a project which has not been based upon negotiations between the two States in which opportunity has been given to state and argue the merits upon both sides of the project. In other words, that the onus of accepting or rejecting a completed project is thereby improperly placed upon the treaty-making organ of the foreign State. This would appear to have been the objection made by Lord Lansdowne in his note of February 22, 1901, to Lord Pauncefote, with reference to the Hay-Pauncefote treaty which in December, 1900, had been amended and then approved by the Senate. This treaty, it will be remembered, had for its aim the definite determination of certain matters which had been covered by the Clayton-Bulwer treaty, the subsisting force of

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[20] In order, however, to avoid the possibility of a misunderstanding and consequent irritation, it has been a common, though not uniform, practice to state explicitly in the powers granted those who are to negotiate a treaty, that their action, in order to become binding on the United States, requires the approval of the President and the Senate.

which had been in dispute. The Senate's amendment to the new arrangement agreed upon between Secretary of State Hay and Lord Lansdowne, was amended by the Senate by the insertion of the statement that the Clayton-Bulwer treaty was "hereby superseded." Referring to this provision, Lord Lansdowne said: "The Clayton-Bulwer treaty is an international contract of unquestioned validity; a contract, which, according to well-established international usage, ought not to be abrogated or modified save with the consent of both the parties to the contract. His Majesty's Government find themselves confronted with a proposal communicated to them by the United States Government, without any previous attempt to ascertain their views, for the abrogation of the Clayton-Bulwer treaty."

§ 197. Plenary Powers of Ratification.

Whether or not this necessity for senatorial approval to all treaty projects renders it constitutionally impossible for the United States to give to diplomatic agents full powers to ratify treaties negotiated by them and thus render them immediately effective without subsequent submission to the Senate, is doubtful. The point has never been passed upon by our courts; but it is quite possible that should a judicial pronouncement upon this point be required, it would be held that for the Senate to commit itself in advance to whatever conditions the treaty negotiators might agree upon, would be the delegation of a power prohibited by that principle of our constitutional law, which declares that a power the exercise of which is delegated by the Constitution to a particular governmental organ may not be delegated by that organ to another department.

However this may be, the Senate and the President may, of course, give to their agents such powers and instructions as will hold them — the President and the Senate — morally bound to ratify what their plenipotentiaries have agreed to.

In earlier times writers upon International Law, Grotius, Puffendorf and Vattel, for instance, held that a State was absolutely bound by the treaties entered into by its agents when acting

within the limits of their instructions. Later writers, however, generally hold that this ratification may, for strong and substantial reasons, be refused.[21]

Up to 1815 the general practice of the President was to obtain the approval of the Senate to the appointment of, and to the instructions given to, commissioners for the negotiation of contemplated treaties. Since that time, however, this practice has been seldom followed. This change has, however, not escaped occasional formal protest from the Senate.

After a treaty has been signed by the commissioners appointed to negotiate it, or agreed upon between the departments of State of the countries concerned, there is no constitutional obligation upon the President to submit it to the Senate, and, even after submission to that body, he may withdraw it, as for instance was done by President Cleveland with reference to a reciprocity treaty with Spain which had been sent to the Senate in 1884 by President Arthur. In a like manner the Hawaiian annexation treaty of 1893 and the Nicaraguan Canal Convention of 1884 were withdrawn "for re-examination," after having been sent to the Senate.

Even after being favorably acted upon by the Senate, it would appear that, under certain circumstances, the President may refuse his ratification. Thus, in 1888, when China proposed certain changes in an agreement with this country which had already been approved by the Senate, the President abandoned the entire project.

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[21] Crandall, pp. 12 *et seq.*

CHAPTER XXXIII.

INTERNATIONAL AGREEMENTS WHICH DO NOT REQUIRE THE APPROVAL OF THE SENATE.[1]

§ 198. International Agreements not Requiring Approval by Senate.

As has been seen, all treaties to which the United States is a party, in order to become legally binding upon the United States and enforceable in its courts, require, in some stage of their negotiation, the approval of the Senate as manifested by a vote of two-thirds of its members present when the approval is given.[2] Not all agreements entered into by the United States with foreign powers are held to be treaties in the sense in which that term is used in the treaty clause of the Constitution. Such agreements as are held not to be treaties in this sense, it has been the practice of the President, acting in pursuance of his general powers as Chief Executive or as authorized by congressional statute, to enter into and promulgate without submission to the Senate. Furthermore, in not a few instances the Senate has itself expressly conferred upon the President the power to contract with foreign powers with reference to specified matters.

This power, then, of the President to enter into international arrangements free from the necessity of obtaining the subsequent approval of the Senate may be treated under the following heads:

1. His power inherent in him as the Chief Executive and commander-in-chief of the army and navy,

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[1] Upon this subject see the pamphlet entitled "International Agreements Without the Advice and Consent of the Senate," by Mr. James F. Barnett, reprinted, with additions, from the *Yale Review;* the article by Hon. J. B. Moore in the *Political Science Quarterly* for September, 1905, entitled "Treaties and Executive Agreements;" and the article by Mr. C. C. Hyde in the *Greenbag* for April, 1905, entitled "Agreements of the United States other than Treaties."

[2] Only the final vote of approval or to postpone indefinitely requires the two-thirds vote. For all other parliamentary motions with reference to a treaty, a simple majority is sufficient.

2. His power as granted him by statute,

3. His power as delegated to him by the Senate, the co-possessor with him of the treaty-making power.

§ 199. International Powers of the President as Chief Executive: International Correspondence.

International correspondence is exclusively in the hands of the President, or his agent, the Secretary of State.[3] Hence it is improper for any international documents to be addressed to, or sent directly to the Senate, or for any attempt to be made, in any way, by an agent of a foreign power to influence directly the action of the Senate upon a treaty that is pending before it or is later to be sent to it for its action thereupon. Upon the other hand, it is, of course, improper for the Senate or any other organ of the Federal Government, by resolution or otherwise, to attempt to communicate with a foreign power except through the President. Thus, when in 1877 Congress passed two joint resolutions congratulating the Argentine Republic and the Republic of Pretoria upon their having established a republican form of government, and directing, in the one case, the Secretary of State to acknowledge the receipt of a despatch from Argentine, and in the other to communicate with Pretoria, the President vetoed both resolutions.[4]

By virtue of the power exclusively vested in him to conduct diplomatic negotiations between this and foreign countries, the President has, since early years, entered into numerous agreements with foreign chancellaries for the settlement of claims made by private American citizens against foreign governments.[5] In a considerable number of cases, these claims have been settled by

[3] Communications between the States of the Union and the Federal Government are made through the Secretary of State and not through the President. This rule was, however, several times disregarded by President Roosevelt.

[4] Richardson's *Messages and Papers of the President*, VII, 430.

[5] An especially interesting case was that of the Mora claim. For an account of this by Professor J. B. Moore, see the *Political Science Quarterly*, XX, pp. 403 *et seq.*

means of arbitration agreed upon between the foreign offices concerned. After describing the various instances of executive action under this head, Professor Moore says: "It thus appears that, if we include only the more formal settlements, there have been thirty-one cases in which claims against foreign governments have been settled by executive agreement, and that twenty-seven arbitrations have been held under such agreements as against nineteen under treaties, where the settlement embraced claims against the foreign government alone and not against the United States.[6]

In no case has the President attempted, without consulting the Senate, to adjust finally claims brought by foreigners against the United States.[7] In no case, also, has the President, by executive action, attempted the settlement of claims set up by the United States in its own behalf.

§ 200. Protocols.

The term "Protocol," as used in International Law, has ascribed to it several meanings. The two most common of these meanings are:

1. As describing the records of the meetings of commissioners for the negotiation of a treaty. These records, though, of course, not parts of the treaty finally entered into, are often of value for the interpretation of such treaty.

2. As describing an agreement reached between the foreign offices of two countries, which has been reduced to definite written statement, but has not been ratified as a treaty by the States parties to it. How far such agreements, though not legally binding, morally bind the parties to them, depends upon the particular circumstances of each case.

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[6] *Political Science Quarterly*, XX, p. 414.

[7] In two instances claims of foreigners against the United States were submitted to arbitral tribunals by executive agreement, but in both instances it was expressly provided that any awards that might be made should be a claim not against the United States, but solely against the estates of certain American citizens whose estates were to be adjusted before the same arbitral tribunals. *Cf Greenbag*, XVII, 233, Article "Agreements of the United States Other than Treaties."

The most common use to which protocols in this sense are put, is in fixing the general terms in which a final treaty — especially a treaty of peace — is to be negotiated. A recent example of this is the protocol of 1898 providing for the appointment of a commission to negotiate the Treaty of Peace with Spain.[8]

The constitutional authority of the President without consulting the Senate to enter into protocols of agreement as the basis for treaties to be negotiated, is beyond question, and has repeatedly been exercised without demur from the Senate.[9]

The protocol signed by the allies (the United States being among their number) at Pekin in 1901 after the Boxer troubles, though in the nature of a military convention, providing as it did for the withdrawal of the allied forces from Pekin, was yet practically of a treaty character. It provided for the payment of indemnities by China, for an international commission to receive and distribute these indemnities, the prohibition of the importation into China for two years of arms and ammunition, the delimitation of the legation quarters in Pekin, and for various reforms and concessions on the part of China. Commenting upon this protocol, Mr. Barnett observes: "This case is interesting, because it shows how the force of circumstances compelled us to adopt the European practice with reference to an international agreement, which, aside from the indemnity question, was almost entirely political in character. As has been pointed out above, purely political treaties are, under constitutional practice in Europe, usually made by the executive alone. The situation in China, however, abundantly justified President McKinley in not submitting the protocol to the Senate. The remoteness of Pekin, the jealousies between the allies, and the shifting evasive tactics of the Chinese Government, would have made impossible anything but an agreement on the spot."

In the case of the Boxer Protocol, no serious objection was made to the President's failure to adjust the questions involved by

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[8] 30 U. S. Stat. at Large, 1742.

[9] For instances of protocols, see Butler, *The Treaty Making Power*, II, p. 371, note.

means of a treaty submitted to the Senate for its approval. When, however, in January, 1905, President Roosevelt entered into a protocol agreement with San Domingo for the administration of its customs with a view to providing for the adjustment and payment of foreign creditors of that country, it was immediately urged, upon the fact becoming known, that the action contemplated was one which could be authorized only by a treaty which had had the approval of the Senate. Though the protocol of January 20th made no reference to the Senate's approval being necessary to its validity, and contained the provision that it was to go into effect on February 1st, the President disclaimed the purpose of entering into the arrangement without first obtaining the Senate's consent. The protocol, in amended form, expressly providing for the Senate's approval, was submitted to that body, but upon that body's failure to act upon it, the President, acting upon his own responsibility, was able to secure, informally, substantially the end aimed at in the protocol. A treaty governing the subject was finally approved by the Senate and ratified by the Dominican Government.

§ 201. Modi Vivendi.

As the term indicates, a *modus vivendi* is a temporary arrangement entered into for the purpose of regulating a matter of conflicting interests, until a more definite and permanent arrangement can be obtained in treaty form. Continued and unquestioned practice supports the doctrine that these *modi vivendi* may be entered into by the President without consulting the Senate.[10]

§ 202. International Agreements Entered into by the President under His Military Powers.

In the exercise of his powers as Commander-in-Chief of the army and navy the President of the United States, from both necessity and convenience, is often called upon to enter into arrangements which are of an international character. These conventions do not require the approval of the Senate. A con-

10 For instances of *modi vivendi*, see Butler, I, p. 369, note.

spicuous example of international agreements thus entered into is the protocol signed at Pekin in 1901, to which reference has already been made. All protocols of agreement entered into for the purpose of furnishing a basis for treaties of peace, as for example, the Protocol of 1898 with Spain, come under this head. So do all conventions providing in time of war for an armistice, or the exchange of prisoners, etc.

The President's military powers exist in times of peace as well as during war. And thus, in 1817, the President, without obtaining the advice and consent of the Senate, was able, by an exchange of diplomatic notes, to arrange with England regarding the number of vessels of war to be kept by the two powers upon the Great Lakes. So also, upon his own discretion, the President is able to send American vessels of war to whatever ports he sees fit, whether for the purpose of friendly visit, of furnishing protection to American citizens or their property, or of making a "demonstration" in order to obtain desired action on the part of the State thus overawed.

§ 203. International Agreements Entered Into, or Action Taken by the President, by Virtue of Authority Granted Him by Treaties Previously Ratified.

The preceding sections have considered the power of the President to enter into international agreements, and to take action with reference to matters of an international character, by virtue of powers inherent in him either as the Chief Executive of the Nation or as constitutional Commander-in-Chief of the army and navy. We turn now to a consideration of treaty-making powers which may constitutionally be exercised by him, without in each instance obtaining the advice and consent of the Senate, by virtue of general authority given to him in treaties previously entered into and approved by the Senate.

This question, which is one of both political expediency and of constitutional law, received thorough discussion both in Congress and the press in connection with the general treaties of arbitration which were agreed upon in 1904 and 1905 between Secretary

of State Hay in behalf of the United States, and the foreign ministers of various other countries.

At The Hague Conference in 1899 an attempt was made to provide for obligatory arbitration in certain cases. This failed, but by Article XVI it was declared that: "In questions of a judicial character, and especially in questions regarding the interpretation and application of international treaties or conventions, arbitration is recognized by the Signatory Powers as the most efficacious and at the same time the most equitable method of deciding controversies which have not been settled by diplomatic methods;" and article XX provided for the establishment of "a permanent Court of Arbitration, accessible at all times, and acting, unless otherwise stipulated by the parties, in accordance with rules of procedure included in the present convention," to which resort might be had for the settlement of disputes which diplomatic methods had failed to adjust. In addition to these provisions, by Article XIX of The Hague Convention the Signatory Powers reserved the right to enter into general or particular treaties providing for obligatory arbitration with reference to such subjects as they might think advisable.

In 1903, by a treaty signed at London, October 14th, France and England agreed in the future to submit to The Hague Tribunal certain specified classes of questions. Article II provided that "*Dans chaque cas particulier, les Hautes Parties Contractantes, avant de s'addresser à la Cour permanante d'arbitrage, signeront un compromis spécial, déterminant l'objet du litige, l'entendue des pouvoirs des arbitres.*" This Anglo-French treaty became the model for a number of treaties between other European nations, as well as for ten arbitration treaties negotiated by Mr. Hay in 1904–1905, and submitted to the Senate for its approval.

The first two articles of these treaty projects read as follows:

"Article I. Differences which may arise of legal nature. or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the permanent court of

arbitration established at The Hague by the convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence or the honor of the two contracting States, and do not concern the interests of third parties."

"Article II. In each individual case the high contracting parties, before appealing to the permanent court of arbitration, shall conclude a special agreement defining clearly the matter in dispute and the scope of the powers of the arbitrators, and fixing the periods for the formation of the arbitral tribunal and the several stages of the procedure."

In the Senate objection developed to the provision that the definition of the matter in dispute and the fixing of the powers of the arbitrators should be "by special agreements," which, the terminology would imply, might be entered into, in each case, by the President without consulting the Senate. That body, therefore, amended the treaty projects by substituting the word "Treaty" for the word "Agreement." The effect of this change was, of course, to make it necessary to obtain the approval and consent of the Senate to each and every proposition that might thereafter arise for submitting a dispute to arbitration, even when such propositions were clearly within the scope of Article I of the treaties which Secretary Hay had negotiated. President Roosevelt holding that thus, in any event, a special treaty would have to be negotiated and approved by the Senate before a matter could be submitted to arbitration, declared that the ratification of the so-called general arbitration treaties which the Senate had amended, would achieve nothing, and declined to submit them, as thus amended, to the foreign countries concerned, for their approval, and the whole project was, for the time being at least, abandoned.

With the policy or impolicy of the Senate's refusal explicitly to endow the Executive with the authority by "special agreements" to submit to arbitration before The Hague tribunal of matters coming within the terms of the ten arbitration treaties negotiated by Secretary Hay, a treatise on Constitutional Law is not concerned. As regards, however, the point made by some of

the Senators that the delegation of such authority to the President would not be constitutional, it may be said that both judicial precedents and previous practice of the Senate itself support in principle the treaties in question.

There have been numerous instances in which the Senate has approved treaties providing for the submission of specific matters to arbitration, leaving it to the President to determine exactly the form and scope of the matter to be arbitrated and to appoint the arbitrators. Professor J. B. Moore, in the article to which reference has already been made, enumerates thirty-nine instances in which provision has thus been made for the settlement of pecuniary claims. Twenty of these were claims against foreign governments; fourteen were claims against both governments, and five against the United States alone.[11]

Notwithstanding the defeat of the Hay treaties in 1905, the President still has, by virtue of The Hague Convention itself, a considerable power upon his own initiative of referring many matters of international dispute to the Permanent Court of Arbitration at The Hague or to arbitral commissions specially created, as provided for in that instrument. As we have already seen, the President, by reason of his control of all diplomatic relations, has considerable power to refer to arbitration matters of dispute which he is unable to settle through the ordinary diplomatic channels. And, in the exercise of this discretion, he can, of course, refer claims, especially those of a pecuniary nature, and questions of treaty interpretation to the tribunals established or provided for by The Hague Convention. Thus, without consulting with the Senate, he referred the Pious Fund controversy with Mexico to The Hague Tribunal.[12]

Aside from any other treaty agreements, there seems to be some question as to the extent of the President's powers under

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[11] *Political Science Quarterly*, XX, 403.

[12] It is to be observed, however, that at the time the Pious Fund matter was, by the President, with the consent of Mexico, referred to The Hague Tribunal there was a subsisting treaty between this country and Mexico — a treaty which, of course, had had the approval of the Senate — providing for arbitration of disputes of the character of the Pious Fund.

The Hague Convention. Ex-Secretary of State John W. Foster has said: "I apprehend that should our government decide to refer any dispute with a foreign government to The Hague Tribunal, President Roosevelt, or whoever should succeed him, would enter into a convention with the foreign government, very carefully setting forth the question to be arbitrated, and submit that convention to the Senate for its advice and consent. If I read the Constitution of the United States and The Hague Convention aright, such would be the only course permissible by those instruments." [13]

To much the same effect is the declaration of Mr. F. W. Holls, who was the Secretary to The Hague Conference. He says: "The appointment of a Commission of Inquiry having no further necessary consequences than the providing for each party's share of necessary expenses, would seem to be within the ordinary diplomatic functions of the President and the Department of State by memorandum or protocol, whereas an agreement to submit any question to a court of arbitration, the decision to be binding upon the parties, must necessarily take the form of a treaty requiring the constitutional co-operation of the Senate." [14]

Upon the other hand, Judge Simeon E. Baldwin gives as his opinion that: "The Hague Convention, when ratified by the Senate, became thus a standing warrant, or, so to speak, a power of attorney, from the United States to the President, to submit such international controversies as he might think fit to the ultimate decision of the International Court of Arbitration." [15]

§ 204. International Agreements Entered Into, or Action Taken by the President, by Virtue of Authority Granted Him by Congressional Statute.

In many instances Congress has, by statute, authorized the Executive to perform acts of an international character, that is, acts with which other countries have been directly concerned.

[13] *Yale Law Journal*, XI, p. 69.

[14] *The Peace Conference at The Hague*, p. 216.

[15] *Yale Review*, IX, p. 415.

Under such authorization, numerous international postal arrangements have been entered into. Thus by act of 1872, Congress declared that "for the purpose of making better postal arrangements with foreign countries," the Postmaster-General, acting under the advice of the President, might "negotiate and conclude postal treaties."

In a similar manner, that is, under congressional sanction, the President has negotiated and entered into agreements with foreign countries with reference to copyrights and trademarks.

Various other congressional acts of this character, as, for example, that of 1901, whereby the President was authorized to lease coaling stations from Cuba, might be mentioned, but the most important of these and the only ones which need discussion are those authorizing action with reference to the tariff laws.

Since the first years under the Constitution, Congress has pursued the policy of giving to the President a considerable executive discretion in the application and enforcement of its laws governing commercial intercourse with foreign countries. Of this character was the Embargo Act of 1794, the act of 1799 governing commercial intercourse with France, the Non-importation Act of 1806, the Non-intercourse Acts of 1809 and 1810, the acts of 1815 and 1830 as to tonnage and other dues, the act of 1866 as to the non-importation of cattle and hides, and the acts of 1815, 1824, 1828, 1886, 1888, and 1897 with reference to the suspension of discriminating duties.[16] All of these acts provided that whether or not they should go into effect should be at the discretion of the President.

By section 3 of the act of 1890 (the so-called McKinley Act) it was provided: "That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions, upon the agri-

[16] *Cf.* J. B. Moore in *Political Science Monthly*, XX, p. 395.

cultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea and hides into the United States, he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea and hides, the production of such country, for such time as he shall deem just, and in such case during such suspension duties shall be levied, collected and paid upon sugar, molasses, coffee, tea and hides, the product of or exported from such designated country, as follows."

This section had been put in the McKinley Act with a view to securing reciprocal commercial agreements with foreign powers, and ten such tariff arrangements were effected by the President by means of an exchange of diplomatic notes simply. These agreements remained in force until the enactment in 1894 of the Wilson-Gorman Act.

The constitutionality of this action under the act of 1890 was contested on the ground that it amounted to a delegation by Congress to the President of a portion of its legislative power; but the Supreme Court in Field v. Clark[17] held the provision valid.[18]

By the third section of the Tariff Act of 1897 (the Dingley Act), the President was authorized to enter into reciprocity agreements with foreign countries with respect to certain enumerated articles, whereby in return for concessions obtained from other countries, equivalent concessions were to be granted by the United States. Under the authority thus granted a number of reciprocity agreements were negotiated and promulgated by the President.

Section 4 of this act of 1897 also provided for reciprocity treaties which should be approved by Congress. This section will receive consideration in the next section.[19]

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[17] 143 U. S. 649; 12 Sup. Ct. Rep. 495; 36 L. ed. 294.

[18] See Chapter LXV in which the delegation of legislative power is discussed.

[19] There have been some instances of international agreements entered into by the President without the advice and consent of the Senate, and without authorization by some previous treaty or statute, which cannot be grouped under any one of the preceding heads mentioned in this chapter. Thus,

§ 205. Extradition.

The greatly preponderant weight of opinion is that, in the absence of authority expressly given him by treaty or statute, the President has not the constitutional right to extradite to a foreign country a fugitive to this country.[20] The single instance in which the President has extradited without such authority expressly conferred upon him is the surrender to Spain by Lincoln in 1864 of one Arguelles.

Whether or not Congress has the power by statute to authorize the President to extradite fugitives to countries with which the United States has no subsisting treaty upon the subject is not certain, as there has been no instance of the exercise of such power. Reasoning upon general principles, however, there would seem to be no constitutional objection to such legislation.[21]

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for example, in 1850 Great Britain ceded to the United States a reef in Lake Erie upon condition that the United States would engage to erect thereupon a lighthouse and maintain it, and agree to erect no fortifications thereupon. This engagement the President made without consulting the Senate, and the cession was made, and later, Congress having appropriated the funds, a lighthouse was constructed.

[20] *Cf.* Moore, *Extradition.*

[21] *Cf.* Butler, § 435.

CHAPTER XXIV.

CONGRESSIONAL LEGISLATION FOR THE ENFORCEMENT OF TREATIES.

§ 206. Treaties Cannot Appropriate Money.

Though all treaties, as declared by the Constitution, are parts of the supreme law of the land, they are not always, in whole or in part, self-executory; but require, in order to be put into full force and effect, ancillary legislative action. Especially is this legislative assistance required when an expenditure of money is called for. The treaty-making power is able to obligate the United States internationally to the payment of sums of money, but is not able itself to appropriate from the United States treasury the amounts called for, or compel the legislature to provide for their payment.

The question as to the obligation of Congress, morally or legally, to appropriate moneys, the payment of which by the United States is called for by agreement entered into with foreign countries by the treaty-making power, arose in 1796 in connection with Jay's treaty, which had been negotiated in 1794 and ratified in 1795. The treaty having been communicated to the House of Representatives in order that the moneys called for by it might be appropriated, Gallatin and other members urged that the House, before passing the appropriation asked for, was entitled to see all the papers in the executive department relating to the treaty in order that it might then pass upon the question of its merits, and refuse or consent to the appropriation as should to the House seem fit. A resolution calling upon the President for the papers was adopted, but Washington, not wishing to create a precedent, refused obedience to it, claiming that the House, being no part of the treaty-making power, was not entitled, of right, to see the documents in question.

Jefferson, in a letter to Monroe, stated[1] the position as follows:

[1] Works, IV, 134.

"We conceive the constitutional doctrine to be that though the President and Senate have the general power of making treaties, yet wherever they include in a treaty matters confided by the Constitution to the three branches of legislature, an act of legislation will be requisite to confirm these articles, and that the House of Representatives, as one branch of the legislature, are perfectly free to pass the act or to refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the treaty go into effect or not. On the precedent now to be set will depend the future construction of our Constitution, and whether the powers of legislation shall be transferred from the President, Senate, and House of Representatives, to the President and Senate, and Piamingo, or any other Indian, Algerine or other chief."

Washington, in his special message refusing compliance with the request of the House's resolution, said: "Having been a member of the general convention, and knowing the principles on which the Constitution was formed, I have ever entertained but one opinion on this subject; and from the first establishment of the government to this moment my conduct has exemplified that opinion, that the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every treaty so made and promulgated thenceforward became the law of the land. It is thus that the treaty-making power has been understood by foreign nations, and in all the treaties made with them, we have declared, and they have believed, that, when ratified by the President, with the advice and consent of the Senate, they become obligatory. . . . As, therefore, it is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty; as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for can throw no light; and as it is essential to the due administration of the government that the boundaries fixed by the Constitution between the different departments should be preserved, a just

regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request."

After some discussion, the House receded from its position and passed the laws and appropriations necessary for carrying the treaty into effect.

When the question of purchasing Louisiana came up, Jefferson, in conformity with his views stated in the letter to Monroe, at first proposed to submit the treaty to both Houses of Congress. He later decided, however, to submit it to the Senate only, but informed the House that as soon as the treaty should be approved by the Senate, it would be submitted to Congress "for the exercise of their functions as to those conditions which are within the powers vested by the Constitution in Congress." And, after the treaty had been approved and ratified, he sent it to Congress saying: "You will observe that certain important conditions cannot be carried into execution but with the aid of the legislature." These legislative measures were enacted, but without any explicit statement of the principle which the House had urged in 1796.[2]

The question was again discussed in connection with the appropriation called for in the treaty of 1867 purchasing Alaska from Russia. After some debate, the House appropriated the money, but prefaced the act with the assertion that "the subjects embraced in the treaty are among those which by the Constitution are submitted to Congress and over which Congress has jurisdiction; and for these reasons it is necessary that the consent of Congress should be given to the said stipulations, before the same can have full force and effect."

The Senate objected to this statement, and, after having referred the matter to a conference committee, the following compromise declaration was agreed upon: "Whereas, the President of the United States has entered into a treaty with the Emperor of Russia, . . . and whereas said stipulations cannot be carried into full force and effect, except by legislation to which the

[2] *Cf.* Moore, *International Law Digest,* V, § 759.

consent of both Houses of Congress is necessary; therefore be it resolved, etc."[3]

What has been said regarding the power of Congress to refuse to appropriate moneys for the payment of which the United States has been obligated by the treaty-making power applies with equal force to whatever other legislation may be required in order to put a treaty into full force and effect.

Though, as is seen from the foregoing, it cannot be said that precedent has established the doctrine one way or the other, it is quite clear that whatever moral obligation, as a matter of good faith, or principle of expediency, may urge Congress to pass appropriation or other laws required for putting into full force and effect agreements entered into by the treaty-making power, there is no constitutional means by which, in case of refusal, such legislation may be compelled; nor is there any constitutional right on the part of the executive or judicial branches of the Federal Government to supply the lacking legislation. A treaty is by the Constitution declared to be a law of the land, and where its provisions operate directly upon a subject, it may be enforced as such without further legislative sanction. But where the treaty is not thus directly executory, the executive and judicial departments must wait until Congress has enacted the necessary legislation. Justice McLean declares: "A treaty is the supreme law of the land in respect of such matters only as the treaty-making power, without the aid of Congress, can carry into effect. Where a treaty stipulates for the payment of money for which an appropriation is required, it is not operative in the sense of the Constitution. Every foreign government may be presumed to know that so far as the treaty stipulates to pay money the legislative sanction is required."[4]

In Foster v. Neilson[5] Chief Justice Marshall with reference to the legal character of a treaty, as fixed by United States Constitutional Law, says: "Our Constitution declares a treaty to

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[3] For other discussions in Congress upon this subject, see Butler, Chapter X.

[4] McLean, *Constitutional Law*, p. 347. As to whether the last statement of McLean is correct or not, see *post*, Section 221.

[5] 2 Pet. 253; 7 L. ed. 415.

be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without aid of any legislative provision. But when the terms of the stipulation import a contract — when either of the parties engages to perform a particular act — the treaty addresses itself to the political, not to the judicial department; and the legislature must execute the contract before it can become a rule for the court."[6]

§ 207. Congress May by Statute Abrogate Treaties.

As has been said, treaties, so far as they are self-executory, are the supreme law of the land, and in this respect rest upon a plane of equality with acts of Congress. But upon no higher plane. Resulting from this, it has been held in a number of well considered cases that an act of Congress operates to repeal or annul prior treaty provisions inconsistent with it.

In Edye v. Robertson,[7] after reviewing various cases, the court say: "A treaty, then, is a law of the land as an act of Congress is, whenever its provisions present a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute. . . . But even in this aspect of the case, there is nothing in this law which makes it irrepealable or unchangeable. The Constitution gives it no superiority over an act of Congress in this respect which may be repealed or modified by an act of a later date. Nor is there anything in its essential character or in the branches of the govern-

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[6] See also United States v. Percheman, 7 Pet. 51; 8 L. ed. 604, and Garcia v. Lee, 12 Pet. 511; 9 L. ed. 1176. "If Congress . . . does not choose to carry out a treaty or if it prefers to violate one, citizens of the United States, or even subjects of foreign powers, seeking relief in our courts, may not, in that manner, be able to obtain redress for evils arising from the failure of the government of the United States to comply with treaty stipulations. The courts are bound by the laws enacted by Congress, and cannot declare them either unconstitutional or inoperative because they violate national contracts or national good faith and honor." Butler, I, §§ 451, 315.

[7] Headmoney Cases, 112 U. S. 580; 5 Sup. Ct. Rep. 247; 28 L. ed. 798.

ment by which the treaty is made, which gives it this superior sanctity. . . . In short we are of the opinion that, so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts of Congress as Congress may pass for its enforcement, modification or repeal."

The doctrine thus unqualifiedly stated has been repeatedly followed in later cases.[8] Especially strong is the Chinese Exclusion Case, Chae Chan Ping v. United States.[9]

§ 208. Whether the Treaty-Making Power may Modify or Repeal Laws Enacted by Congress.[10]

To Congress is given the power by the Constitution to legislate with reference to certain matters. We have already learned that by statute the President has been authorized in a number of instances to enter into international agreements for the regulation of certain matters within the legislative control of Congress. We have now to examine whether, without congressional direction or permission, it is competent for the treaty-making power to regulate a matter which it is within the legislative power of Congress to control; or, by international agreements, to alter arrangements which Congress has by statute already established.

That the treaty-making power extends to subjects within the ordinary legislative powers of Congress there can be no doubt.

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[8] Butler, op. cit. II, 86, cites the following cases in which acts superseding prior treaties in conflict with them have been sustained by the Supreme Court: United States v. McBratney, 104 U. S. 621; 26 L. ed. 869; Chew Heong v. United States, 112 U. S. 536; 5 Sup. Ct. Rep. 255; 28 L. ed. 770; Ward v. Race Horse, 163 U. S. 504; 16 Sup. Ct. Rep. 1076; 41 L. ed. 244; Draper v. United States, 164 U. S. 240; 17 Sup. Ct. Rep. 107; 41 L. ed. 419; Thomas v Gay, 169 U. S. 264; 18 Sup. Ct. Rep. 340; 42 L. ed. 740; Fong Yue Ting v. United States, 149 U. S. 698; 13 Sup. Ct. Rep. 1016; 37 L. ed. 905; Chinese Exclusion Cases, 130 U. S. 581; 9 Sup. Ct. Rep. 623; 32 L. ed. 1068; La Abra Silver Mining Co. v. United States, 175 U. S. 423; 20 Sup. Ct. Rep. 168; 44 L. ed. 223; United States v. Gue Lim, 176 U S. 459; 20 Sup. Ct. Rep. 415; 44 L. ed. 544.

[9] 130 U. S. 581; 9 Sup. Ct. Rep. 623; 32 L. ed. 1068.

[10] For a very full account of discussions of this subject in Congress, see Hinds' *Precedents of the House of Representatives,* Chapters XLVIII and XLIX.

That is to say, the treaty-making power is fully competent to enter into agreements with foreign powers in respect to those matters which are binding internationally upon the United States. The question here to be considered is, however, whether these international compacts become, so far as they are self-executing, immediately binding municipally, that is, may be enforced as law in our courts. The Supreme Court has, in a number of instances, declared that treaties and acts of Congress stand, as law, upon exactly equal planes, and, therefore, that the later treaty operates to supersede the earlier law, exactly, as we have seen, the later law has the effect of abrogating a prior inconsistent treaty. Thus in Cherokee Tobacco Case[11] the court say: "The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress (Foster v. Neilson, 2 Pet. 253; 7 L. ed. 415) and an act of Congress may supersede a prior treaty. (Taylor v. Morton, 2 Curt. C. C. 454; The Clinton Bridge, 1 Wolv. 155.)"

In United States v. Lee Yen Tai[12] the court declare: "That it was competent for the two countries by treaty to have superseded a prior act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument, shall be the supreme law of the land, would not have due effect. As Congress may by statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior act of Congress on the same subject. In Foster v. Neilson (2 Pet. 253; 7 L. ed. 415), it was said that a treaty was 'to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.' In the case of The Cherokee Tobacco (11 Wall. 616), this court said 'a treaty may supersede

[11] 11 Wall. 616; 20 L. ed. 227.

[12] 185 U. S. 213; 22 Sup. Ct. Rep. 629; 46 L. ed. 878.

a prior act of Congress and an act of Congress may supersede a prior treaty.' So in the Head Money Cases (112 U. S. 580; 5 Sup. Ct. Rep. 247; 28 L. ed. 798) this court said: 'So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal.' Again, in Whitney v. Robertson (124 U. S. 190; 8 Sup. Ct. Rep. 456; 31 L. ed. 386); 'By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing.' (See also Taylor v. Morton, 2 Curt. C. C. 454, Fed. Cas. No. 13,799; Clinton Bridge Case, Woolw. 155, Fed. Cas. No. 2,900; Ropes v. Clinch, 8 Blatchf. 304, Fed. Cas. No. 12,041; 2 Story, Const. § 1838.) Nevertheless, the purpose by statute to abrogate a treaty or any designated part of a treaty, or the purpose by treaty to supersede the whole or a part of an act of Congress, must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute or in the treaty "[13]

[13] See also Johnson v. Browne, 205 U. S. 309; 27 Sup. Ct. Rep. 539; 51 L. ed. 816.

Moore, in his *Digest of International Law* (V, 370), says: "A treaty assuming it to be made conformably to the Constitution in substance and form, has the legal effect of repealing under the general conditions of the legal doctrine that '*leges posteriores priores contrarias abrogant,*' all pre-existing federal law in conflict with it, whether unwritten as law of nations, of admiralty, and common law, or written as acts of Congress. A treaty, though complete in itself, and the unquestioned law of the land, may be inexecutable without the aid of an act of Congress. But it is the constitutional duty of Congress to pass the requisite laws. But the need of further legislation, however, does not affect the question of the legal force of the treaty *per se*. Cushing, At Gen. 1854 (6 Op. 291). See also Akerman, At. Gen. 1870 (13 Op. 354).

In fact, however, there have been few (the writer is not certain that there have been any) instances in which a treaty inconsistent with a prior act of Congress has been given full force and effect as law in this country without the assent of Congress. There may indeed have been cases in which, by treaty, certain action has been taken without reference to existing federal laws, as, for example, where by treaty certain populations have been collectively naturalized, but such treaty action has not operated to repeal or annul the existing law upon the subject. Furthermore, with specific reference to commercial arrangements with foreign powers, Congress has explicitly denied that a treaty can operate to modify the arrangements which it, by statute, has provided, and, in actual practice, Congress in every instance succeeded in maintaining this point.

§ 209. Treaties and Revenue Acts.

There would seem to be certainly one exception to the rule that the later treaty abrogates the prior inconsistent statute, and this is in reference to acts for raising revenue. The Constitution expressly declares that "all bills for raising revenue shall originate in the House of Representatives."[14] Strictly interpreted this provision might be held to apply only to "bills," that is to propositions for a statute, but in practice the spirit of the clause has been followed rather than its exact letter.

In 1816 the question received an especially careful discussion in Congress with reference to a convention which the treaty-making power had entered into in 1815 with Great Britain. The house passed a bill specifically enacting in detail the provision of the treaty, with the evident purpose of making it plain that

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See Davis v. Concordia, 9 How. 280; 13 L. ed. 138; Fellows v. Blacksmith, 19 How. 366; 15 L. ed. 684; The Clinton Bridge, 1 Woolworth, 155; Kull v. Kull, 37 Hun (N. Y.), 476.

The provisions of the convention with China, proclaimed December 8, 1894, were self-executing, so as to modify or repeal a prior statute with which they were in conflict. Knox, At. Gen., Oct. 10, 1901 (23 Op. 545) approving opinions of Conrad Act. At. Gen., May 20, 1896 (21 Op. 347) and Harmon, At. Gen., May 26, 1896 (21 Op. 357)."

[14] Art. I, Sec. VII, Cl. 1.

without such legislative enactment the provisions would be without legal force. The Senate refused its concurrence upon the ground that the treaty was self-operative and, therefore, that the legislative approval should be only declaratory in form. After reference to a committee of conference, a bill was agreed upon between the two Houses, based upon the principle, conceded by the Senate, that "whilst some treaties might not require, others may require, legislative provision to carry them into effect; that the decision of the question, how far such provision was necessary, must be founded upon the peculiar character of the treaty itself."[15]

This was clearly a compromise agreement, but later practice has served to strengthen the position of the House and it is believed that there has been no instance in which a treaty has, without legislative permission, been allowed to repeal or annul existing revenue laws.

In 1846, the Senate Committee on Foreign Affairs, to which had been referred a reciprocity treaty negotiated by Mr. Wheaton, reported adversely in the following words: "The committee . . . are not prepared to sanction so large an innovation upon ancient and uniform practice in respect of the department of government by which duties on imports shall be imposed. The convention which has been submitted to the Senate changes duties which have been laid by law. It changes them *ex directo* and by its own vigor, or it engages the faith of the nation and the faith of the legislature through which the nation acts to make the change. In either aspect it is the President and Senate who, by the instrumentality of negotiation, repeal or materially vary regulations of commerce and laws of revenue which Congress had ordained. More than this, the executive department, by the same instrumentality of negotiations, places it beyond the power of Congress to exceed the stipulated maximum of import duties for at least three years, whatever exigency may intervene to require it. In the judgment of the committee the legislature is the department of government by which commerce should be regu-

[15] Moore's *Int. Law Digest*, V, 223.

lated and laws of revenue be passed. The Constitution, in terms, communicates the power to regulate commerce and to impose duties to that department. It communicates it, in terms, to no other. Without engaging at all in examination of the extent, limits, and objects of the power to make treaties, the committee believes that the general rule of our system is indisputably that the control of trade and the functions of taxing belong, without abridgement or participation, to Congress. They infer this from the language of the Constitution, from the nature and principles of our Government, from the theory of republican liberty itself, from the unvaried practice, evidencing the universal belief of all, in all periods and all parties and opinions. They think, too, that, as the general rule, the representatives of the people, sitting in their legislative capacity, with open doors, under the eye of the country, communicating freely with their constituents, may exercise this power more intelligently, more discreetly, may acquire more accurate and more minute information concerning the employments and the interests on which this description of measures will press, and may better discern what true policy prescribes and rejects than is within the competence of the executive department of the Government. To follow, not to lead; to fulfil, not to ordain, the law; to carry into effect, by negotiation and compact with foreign governments, the legislative will, when it has been announced, upon the great subjects of trade and revenue; not to interpose with controlling influence; not to go forward with too ambitious enterprise — these seem to the committee to be the appropriate functions of the Executive."[16]

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[16] *Compilation of Reports of the Committee on Foreign Relations*, VIII, 36. With reference to this report, Mr. Calhoun, then Secretary of State, wrote to Mr. Wheaton, "If this be the true view of the treaty-making power it may be truly said that its exercise has been one continual series of habitual and uninterrupted infringements of the Constitution." He then continued: "From the beginning and throughout the whole existence of the Federal Government, it [the treaty-making power] has been exercised constantly on commerce, navigation, and other delegated powers, to the almost entire exclusion of the reserved, which, from their nature, rarely ever come into question between us and other nations. The treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions

In the reply of Secretary Calhoun to the report of the Senate committee, Calhoun asserted that from the beginning of the government it had been the practice of the treaty-making power to compact regarding matters within the legislative powers of Congress. It will be observed, however, that neither the report, nor the reply of Calhoun bear upon the point we are now considering, namely, whether, when a treaty is entered into providing for the regulation of a matter within the ordinary legislative control of Congress, that treaty before it may be given full force and effect in this country as law, requires congressional approval.

After an account of the practice of the government and of discussions of the subject in Congress, Mr. Crandall, writing in 1904, says: "From this historical review it appears that, whatever may be the *ipso facto* effect of the treaty stipulations, entered into by the President and Senate, upon prior inconsistent revenue laws, not only has the House uniformly insisted upon, but the Senate has acquiesced in, their execution by Congress; that in case of proposed extensive modifications a clause has been inserted in the treaty by which its operation is expressly made dependent upon the action of Congress; and that in the recent Cuban treaty such a clause was inserted on the initiative of the Senate."[17]

It is to be observed, before leaving this subject, that in no case has the treaty-making power, whatever its actual concessions, ever admitted in full terms its inability to fix as law matters which

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that can possibly arise between us and other nations, and which can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers. So far, indeed, is it from being true, as the report supposes, that the mere fact of a power being delegated to Congress excludes it from being the subject of the treaty stipulations, that even its exclusive delegation, if we may judge from the habitual practice of the government, does not — of which the power of appropriating money affords a striking example. It is expressly and exclusively delegated to Congress, and yet scarcely a treaty has been made of any importance which does not stipulate for the payment of money. No objection has ever been made on this account. The only question ever raised in reference to it is, whether Congress has not unlimited discretion to grant or withhold the appropriation." Moore's *Digest of International Law,* V, 164.

[17] *Treaties and Treaty Making,* p. 145.

are within the legislative powers of Congress. Thus in 1902, Senator Cullom emphatically asserted that only with reference to the appropriation of money is legislative assistance needed in order that treaties may receive acceptance as law in our courts.[18]

It is to be remarked, however, that in Bertram v. Robertson[19] and Whitney v. Robertson,[20] though the point is not expressly discussed, it would seem that the court impliedly held that a treaty might modify revenue laws, for in these cases the effect of treaties upon existing tariff laws is considered without a suggestion that the inquiry is an unnecessary one because of the inability of the treaty power to modify such statutes.

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[18] *Cf.* Butler, I, 457.

[19] 122 U. S. 116; 7 Sup. Ct. Rep. 1115; 30 L. ed. 1118.

[20] 124 U. S. 190; 8 Sup. Ct. Rep. 456; 21 L. ed. 386.

CHAPTER XXXV.

THE CONSTITUTIONAL EXTENT OF THE TREATY-MAKING POWER.

§ 210. Treaty-Making Power Granted Without Express Limitations.

The treaty-making power is granted in the Constitution without any express limitations as to the subjects to which it may relate. And all treaties, without qualification, are declared to be the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding." If, then, there are any limitations to its extent, they must be found inherent in the nature of the treaties themselves, or implied in other clauses of the Constitution or in the very nature of the polity which that instrument is designed to create and maintain.

§ 211. Implied Limitations.

No treaty has ever been held unconstitutional in any court, federal or state, in the United States. That there are, however, limits, despite the fact that in no case has there arisen the necessity for applying them in a court of law, would appear beyond question. From the early years of the present Government to the decision of the Insular Cases in 1901, the Supreme Court has, upon frequent occasions, stated, not only in general terms, but with reference to specific matters, that there are limits to the subjects that may, by treaty, be made the supreme law of the land. In New Orleans v. United States[1] speaking with reference to the succession of the United States Government to the French Government in Louisiana, the court said: "This succession did not authorize the United States to exercise prerogatives of sovereignty not consistent with the Constitution of the United States." In Pollard's Lessee v. Hagan[2] the court

[1] 10 Pet. 662; 9 L. ed. 573.

[2] 3 How. 212; 11 L. ed. 565.

said: "It cannot be admitted that the King of Spain could by treaty or otherwise impart to the United States any of his royal prerogatives, and much less can it be admitted that they have capacity to receive or power to exercise them." And, later on in the same opinion: "The court denies the faculty of the Federal Government to add to its powers by treaty." In the Cherokee Tobacco Case[3] the opinion declares: "It need hardly be said that a treaty cannot change the Constitution, or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government."

In De Geofroy v. Riggs[4] Justice Field declares: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. (Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 5 Sup. Ct. Rep. 995; 29 L. ed. 264.) But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. (Ware v. Hylton, 3 Dall. 199; 1 L. ed. 568; Chirac v. Chirac, 2 Wheat. 259; 4 L. ed. 234; Hauenstein v. Lynham, 100 U. S. 483; 25 L. ed. 628; 8 Opinions Attys. Gen. 417; The People v. Gerke, 5 California 381.)"

In Downes v. Bidwell[5] four of the majority justices in their opinion deny the authority of the treaty-making power to "incorporate" annexed territory into the United States. And the minority declare that "a treaty which undertook to take away

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[3] 11 Wall. 616; 20 L. ed. 227.

[4] 133 U. S. 258; 10 Sup. Ct. Rep. 295; 33 L. ed. 642.

[5] 182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088.

what the Constitution secured, or to enlarge the federal jurisdiction, would be simply void."[6]

These *dicta* of the Supreme Court that have been quoted are really *obiter* in that in no case was a treaty provision held void. However, the statement being so often and so positively asserted it may be taken for granted that there are constitutional limits to the treaty-making power, and that when these limits are overstepped, the courts will interpose their veto.

§ 212. The Treaty-Making Power and the Reserved Rights of the States.

The supremacy of a federal treaty over a conflicting state law, with reference to matters not reserved to the States, has not been questioned since the time it was established that a federal statute, enacted within either the concurrent or exclusive constitutional

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[6] For additional declarations by the Supreme Court that treaties are necessarily subordinate to the Constitution, see Ware v. Hylton, 3 Dall. 199; 1 L. ed. 568; United States v. The Peggy, 1 Cr. 103; 2 L. ed. 49; Lattimer v. Poteet, 14 Pet. 4; 10 L. ed. 328; Doe v. Braden, 16 How. 635; 14 L. ed. 1090; Thomas v. Gay, 169 U. S. 264; 18 Sup. Ct. Rep. 340; 42 L. ed. 740. In the Wong Kim Ark case, the minority point out that the effect of the decision of the majority is to limit the treaty-making power to prevent children of resident aliens becoming citizens of the United States.

Calhoun, in his *Discourse on the Constitution and Government of the United States*, says: "It [the treaty-making power] is limited by all the provisions of the Constitution which inhibit certain acts from being done by the government, or any of its departments; of which description there are many. It is also limited by such provisions of the Constitution as direct certain acts to be done in a particular way and which prohibit the contrary, of which a striking example is to be found in that which declares that 'no money shall be drawn from the Treasury but in consequence of appropriations to be made by law.' This not only imposes an important restriction on the power, but gives to Congress as the law-making power, and to the House of Representatives as a portion of Congress, the right to withhold appropriations; and, thereby, an important control over the treaty-making power whenever money is required to carry a treaty into effect; which is usually the case, especially in reference to those of much importance. There still remains another, and more important limitation, but of a more general and indefinite character. It can enter into no stipulation calculated to change the character of the government; or to do that which can only be done by the constitution-making power; or which is inconsistent with the nature and structure of the government." I Works, 203.

competency of Congress, operates to nullify all inconsistent state legislation. In this respect, as the Constitution expressly declares, treaties and acts of Congress are upon precisely the same footing.

In Ware v. Hylton,[7] decided in 1796, Justice Chase says: "There can be no limitation on the power of the people of the United States. By their authority the state constitutions were made, and by their authority the Constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the General Government and to treaties made by their authority. A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a State (which is the fundamental law of the State, and paramount to its legislature) must give way to a treaty, and fall before it; can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual State; and their will alone is to decide. If a law of a State contrary to a treaty is not void, but voidable only by a repeal or nullification of a state legislature, this certain consequence follows: that the will of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the national Constitution, or laws of any of the States, contrary to a treaty, shall be disregarded."

In Fairfax v. Hunter,[8] Chirac v. Chirac,[9] Hauenstein v. Lynham,[10] and other cases, the doctrine declared in Ware v. Hylton was approved and applied.

The attempt has been made to detract from the force of Chase's doctrine as declared in Ware v. Hylton, by emphasizing the fact

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[7] 3 Dall. 199; 1 L. ed. 568.

[8] 7 Cr. 603; 3 L. ed. 453.

[9] 2 Wh. 259; 4 L. ed. 234.

[10] 100 U. S. 483; 25 L. ed. 628.

that in that case the treaty in question was one which had been originally entered into under the Confederation, that is, at a time when the States were severally sovereign, and that, therefore, it was a treaty to which the States may be said to have individually assented. There would not, however, seem to be much force in this, for if, after the adoption of the Constitution, the treaty in question could be considered in any way as still an instrument deriving its validity from the consent of the State, it could have been abrogated by subsequent state action, but this, of course, was expressly denied by the court in Ware v. Hylton. The truth is that the Constitution puts treaties, made and to be made, upon exactly the same footing, and in the later cases which are cited above, the doctrine of Ware v. Hylton is considered as controlling with reference to treaties made after the adoption of the Constitution.

It may, then, be considered as established that a treaty entered into by the Federal Government with respect to a matter within the federal jurisdiction is supreme over a conflicting state law. This leads to the question whether, by an exercise of the treaty-making power, the Federal Government may regulate matters within the States which it may not control by act of Congress, and if, in this respect, the treaty-making power is broader than the legislative, in what respects, and to what extent, it is broader.

§ 213. Judicial Dicta that Reserved Rights of the States May not Be Infringed.

Upon this point the declarations of the Supreme Court are not completely satisfactory. In various of its opinions this tribunal has explicitly asserted that the rights reserved by the Constitution from the control of the other departments of the Federal Government may not be infringed by its treaty-making power.

In Prevost v. Greenaux[11] the court say: "That a treaty is no more the supreme law of the land than is an act of Congress is

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[11] 19 How. 1; 15 L. ed. 572.

shown by the fact that an act of Congress vacates *pro tanto* a prior inconsistent treaty. Whenever, therefore, an act of Congress would be unconstitutional, as invading the reserved rights of the States, a treaty to the same effect would be unconstitutional."

In the License Cases[12] Justice Daniel, dissenting, declared: "This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the Federal Government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were in intention or in fact, ceded to the General Government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States' save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a State or of any citizen of a State. In cases of alleged conflict between a law of a State and the Constitution or a statute of the United States, this court must pronounce upon the validity of either law with reference to the Constitution; but whether the decision of the court in such cases be itself binding or otherwise must depend upon its conformity with, or its warrant from, the Constitution. It cannot be correctly held, that a decision, merely because it be by the Supreme Court, is to override alike the Constitution and the laws both of the States and of the United States."

And in a dissenting opinion in the Passenger Cases[13] Chief Justice Taney with respect to the treaty power declared: "The first inquiry is, whether, under the Constitution of the United States, the General Government has the power to compel the several States to receive, and suffer to remain in association with its

[12] 5 How. 504; 12 L. ed. 256.

[13] 7 How. 283; 12 L. ed. 702.

citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment, this question lies at the foundation of the controversy in this case. I do not mean to say that the General Government have, by treaty or act of Congress, required the State of Massachusetts to permit the aliens in question to land. I think there is no treaty or act of Congress which can justly be so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the States are bound to submit to it. For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to prove a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize nor enforce. I had supposed this question not now open to dispute."

In addition to the foregoing assertions of incompetence of the treaty-making power to invade the reserved rights of the States, there are the *dicta*, earlier quoted, to the effect that this power, though not in terms limited by the Constitution, is not competent to change the general character of our government. If the treaty-making power has not this power, then certainly the reserved rights of the States are not completely at its mercy. For to invade radically the exclusive jurisdiction of the States would be, in effect, to change the nature of our federal constitutional system.

§ 214. Instances in Which Treaties Have Been Upheld though Infringing Reserved Rights of the States.

Opposing, however, these *dicta* which have been quoted are a line of cases, in which treaties have been held constitutional with reference to matters which are admittedly not within the power of Congress to control. And, also, there have been numerous cases in which state laws with reference to matters within the

ordinary legislative competence of the States, have been held void because of conflict with subsisting federal treaties.[14]

Thus, in the case of De Geofroy v. Riggs,[15] to which reference has already been made, it is declared: "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the government of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiations and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. (Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525; 5 Sup. Ct. Rep. 995; 29 L. ed. 264.) But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

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[14] Ware v. Hyltan, 3 Dall. 199; 1 L. ed. 568; Hopkirk v. Bell, 3 Cr. 454; 2 L. ed. 497; Fairfax v. Hunter, 7 Cr. 603; 3 L. ed. 453; Chirac v. Chirac, 2 Wheat. 259; 4 L. ed. 234; Lattimer v. Poteet, 14 Pet. 4; 10 L. ed. 328; Hauenstein v. Lynham, 100 U. S. 483; 25 L. ed. 628; De Geofroy v. Riggs, 133 U. S. 258; 10 Sup. Ct. Rep. 295; 33 L. ed. 642. See also a strong *dictum* in Ward v. Race Horse, 163 U. S. 504; 16 Sup. Ct. Rep. 1076; 41 L. ed. 244.

[15] 133 U. S. 258; 10 Sup. Ct. Rep. 295; 33 L. ed. 642.

In 1898 the President requested the official opinion of his Attorney-General as to the power of the United States to enter into treaty stipulations with Great Britain for the regulation of fisheries in the waters of the United States and Canada along the international boundary. In his opinion Mr. Griggs said: "The waters of the lake and rivers which form the boundary between the United States and Canada are upon this side of the boundary line within the territorial jurisdiction of the several riparian States. The regulation of fisheries in navigable waters within the territorial limits of the several States, in the absence of a federal treaty, is a subject of state rather than of federal jurisdiction. Congress has the paramount right to regulate navigation in the navigable waters of the United States for the benefit of all the citizens of the Union, but Congress has no authority in the absence of treaty regulations, to pass laws to regulate or protect fisheries within the territorial jurisdiction of the States. (McCready v. Virginia, 94 U. S. 391; 24 L. ed. 248; Lawton v. Steele, 152 U. S. 133; 14 Sup. Ct. Rep. 499; 38 L. ed. 385.) The question for consideration, therefore, is whether the United States by treaty may deprive the riparian States of the power of control and regulation over the fisheries in the waters within their respective jurisdictions conterminal with the boundary between the United States and Canada. It is obvious that if by the exercise of the treaty-making power the regulation of this subject is assumed by the Federal Government, the respective state governments will be deprived of jurisdiction over that subject in the same waters. The regulation of fisheries has been recognized as a proper subject for international agreement. . . . Where a lake or river is divided into two jurisdictions by a boundary line between two nations, it is manifest that it would be not only convenient but almost necessary for the adequate regulation of the subject that an agreement by treaty or other stipulation should exist between the governments of the two countries, in order to make any system of regulation and protection effective. The several States are by the Constitution forbidden to enter into any such treaty or regulation with any foreign power, and unless the

United States may regulate the subject by treaty it is impossible of regulation by uniform and reciprocal rules. I advise you, therefore, that the regulation of the fisheries in these boundary waters is a proper subject of the treaty-making power vested by the Constitution in the President. If it be suggested that such a treaty is beyond the constitutional power of the President and the Senate to effect, because it deprives the States of jurisdiction and authority now vested in them, and practically would annul their laws and destroy one subject of state sovereignty, without going into a history of that clause of the Constitution above quoted, which declares that all treaties made or which shall be made by the authority of the United States shall be the supreme law of the land (the discussions of which in the Constitutional Convention and in the state conventions called for the adoption of the Constitution were very extensive and interesting), it is sufficient to say that it has been held by the Supreme Court of the United States that it is no objection to the validity of a treaty that it establishes within state jurisdiction a different law and standard of rights from that established by the laws of the State."

In a number of instances, as said, state laws, with reference to matters ordinarily within state cognizance, have been held void when in conflict with existing federal treaties. Examples of this, are laws denying the right of the alien to be employed by contractors upon public works, or to be employed by private corporations.[16]

§ 215. The True Doctrine.

How, now, are we to harmonize these declarations that the reserved rights of the States may not be infringed by the treaty-making power with the fact that, in specific instances, the invasion of these rights has been upheld?

Essentially speaking, the two positions, thus absolutely stated, cannot be harmonized. There is no principle that can be stated

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[16] Baker v. Portland, 5 Sawyer, 566; *In re* Tiburcio, 6 Sawyer, 349; *In re* Ah Chong, 6 Sawyer, 451. *Cf.* Proceedings of the American Soc. of Int. Law, 1907, Address by Prof. C. N. Gregory.

which will bring the *dicta* quoted into consonance with the decisions referred to. Either the *dicta* denying to the treaty-making power the right to infringe State rights are wrong, and must be abandoned, or the decisions upholding such infringement were improper, and will not be followed in the future.

The author is convinced that the *obiter* doctrine that the reserved rights of the States may never be infringed upon by the treaty-making power will sooner or later be frankly repudiated by the Supreme Court. In its place will be definitely stated the doctrine that in all that properly relates to matters of international rights and obligations, whether these rights and obligations rest upon the general principles of international law or have been conventionally created by specific treaties, the United States possesses all the powers of a constitutionally centralized sovereign State; and, therefore, that when the necessity from the international standpoint arises the treaty power may be exercised, even though thereby the rights ordinarily reserved to the States are invaded.

The writer is led to the belief that this will be the position finally and affirmatively taken by our judiciary from a review of the manner in which, in the past, in every instance in which it has been necessary to endow the Federal Government with a power in order that its national supremacy, and its administrative efficiency, might be preserved, the Supreme Court of the United States has found the means to do so.[17]

§ 216. Constitutional Limits to the Treaty-Making Power.

Assuming, then, that the reasoning which has gone before is correct, it may be asked: Are we led to the conclusion that, in extent, the treaty-making power is without constitutional limits, and may it be predicted that in no conceived case will the Supreme Court hold void of legal force a treaty duly entered into by the treaty-making power? This question may be answered in

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[17] A more detailed statement of this argument is given in Chapter LXIV of this work, in the section entitled "The Conclusiveness of Administrative Determinations."

the negative. As pointed out at the beginning of this chapter, there undoubtedly are limits to the extent of the treaty-making power which the Supreme Court may be expected to recognize and apply. It is true that all of the *dicta* that were quoted are *obiter* in that in no instance were they applied to hold a treaty provision void; yet, when we find the statement so positively asserted, and so many times repeated, we may, I think, take it as established.

If, however, as we have seen, individual rights and the reserved powers of the States may, upon occasion, be sacrificed to the treaty-making power, under what circumstances, and according to what principle, may we expect these limitations to be imposed? Briefly stated, the answer is that these limitations are to be found in the very nature of treaties. That is, that the treaty-making power may not be used to secure a regulation or control of a matter not properly and fairly a matter of international concern. It cannot be employed with reference to a matter not legitimately a subject for international agreement, any more than can the States under the claim of an exercise of their police powers regulate a matter not fairly comprehended within the field of police regulation. Thus, while it might be appropriate for the United States, by treaty with England, to provide that English citizens living in the United States should have certain rights of property, or schooling privileges, etc., within the States, state law to the contrary notwithstanding, it would not be appropriate, and, therefore, would not be constitutional, for the United States by such a treaty to provide that all aliens, whether British subjects or not, should enjoy these rights within the States in which they might live. So likewise, it would not be a proper or constitutional exercise of the treaty-making power to provide that Congress should have a general legislative authority over a subject which has not been given it by the Constitution; or that a power now exercised by one of the departments of the General Government should be exercised by another department. For there are matters of domestic national law with which foreign power has no concern. In short, the treaty-making power is to be exercised with constitutional *bona fides*.

The principle which has been stated, that, to be constitutionally valid, a treaty must have reference to a subject properly a matter for international agreement, excludes from the federal treaty-making power the authority to disregard those prohibitions of the Constitution, express and implied, which are directed not to Congress but to the National Government as a whole.

It is scarcely to be conceived that the treaty-making power will ever make the attempt, but should it seek to override these prohibitions, or to alter the distribution of powers provided for in the Constitution, or in any way to change the general character of the governmental polity by that instrument created, it may be expected that the judiciary will interpose its veto. The treaty-making power in all its fulness is granted that the National Government may be preserved, that it may be efficient for the purposes for which it is created, not that it may be destroyed or changed in essential character.

It is a principle of international law that treaties between nations should be executed with *uberrima fides*. Undoubtedly, however, our courts, in construing a treaty which infringes upon the ordinary reserved rights of the States, will, when possible, so interpret it as to minimize so far as possible the extent of this infringement. And, undoubtedly, the treaty-making power itself will, when possible, refrain from entering upon treaties which will trench upon the States' reserved powers, and will, in the future, take extreme pains so to word international agreements as to render impossible an interpretation by the other signatory parties which will give to them this effect. This caution the recent Japanese school question in California will suggest. But in any case, the Supreme Court will be exceedingly loth to deny legal validity to a treaty provision. For it does not need to be observed that, though by holding a treaty provision unconstitutional that provision is denied legal validity in this country, the United States is not thereby released from its obligation under it to the other signatory powers, and the result is, necessarily, a breach of our covenant with those powers. The same, of course, would be true should Congress refuse to pass the legislation neces-

sary for putting a treaty into full force and effect, unless, indeed, as is sometimes done, it were provided in the treaty itself that it was not to go into effect unless, and until, the necessary legislative assistance was obtained.[18]

§ 217. Legislative Powers Ancillary to Treaty-Making Powers.

One final point with reference to the extent of the treaty-making power deserves notice. This is that where, for its enforcement, a

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[18] Mr. Butler, in his *Treaty-Making Power of the United States*, § 3, gives the following summary of his conclusions regarding the extent of the treaty-making power in the United States: "*First:* That the treaty-making power of the United States, as vested in the Central Government, is derived not only from the powers expressly conferred by the Constitution, but that it is also possessed by that Government as an attribute of sovereignty, and that it extends to every subject which can be the basis of negotiation and contract between any of the sovereign powers of the world, or in regard to which the several States of the Union themselves could have negotiated and contracted if the Constitution had not expressly prohibited the States from exercising the treaty-making power in any manner whatever and vested that power exclusively in, and expressly delegated it to, the Federal Government. *Second:* That this power exists in, and can be exercised by, the National Government, whenever foreign relations of any kind are established with any other sovereign power, in regulating by treaty the use of property belonging to States or citizens thereof, such as canals, railroads, fisheries, public lands, mining claims, etc.; in regulating the descent or possession of property within the otherwise exclusive jurisdiction of States; in surrendering citizens and inhabitants of States to foreign powers for punishment of crimes committed outside of the jurisdiction of the United States or of any State or territory thereof; in fact, that the power of the United States to enter into treaty stipulations in regard to all matters, which can properly be the subject of negotiation between sovereign States, is practically unlimited, and that in no case is the sanction, aid or consent of any State necessary to validate the treaty or to enforce its provisions. *Third:* That the power to legislate in regard to all matters affected by treaty stipulations and relations is co-extensive with the treaty-making power, and that acts of Congress enforcing such stipulations which, in the absence of treaty stipulations, would be unconstitutional as infringing upon the powers reserved to the States, are constitutional, and can be enforced, even though they may conflict with state laws or provisions of state constitutions. *Fourth:* That all provisions in state statutes or constitutions which in any way conflict with any treaty stipulations, whether they have been made prior or subsequent thereto, must give way to the provisions of the treaty, or act of Congress based on and enforcing the same, even if such provisions relate to matters wholly within state jurisdiction."

treaty requires ancillary legislation, Congress would seem to have the constitutional power to enact the needed laws, even though these may relate to matters not within the general sphere of its legislative authority. For it is to be presumed that the General Government has the power to render effective a treaty which it has the constitutional power to enter into. A somewhat analogous case is the legislative power recognized to belong to Congress with reference to matters of admiralty and marine, because of the grant to the Federal Judiciary of jurisdiction over admiralty and maritime causes.

§ 218. The Treaty-Making Power May not "Incorporate" Foreign Territory into the United States.

As we have already learned from our examination of the insular case of Downes v. Bidwell,[19] the treaty-making power is, according to that decision, without the power to incorporate into the United States territory acquired from a foreign power. For this the consent of Congress is required. Four of the five majority justices in this case, it will be remembered, held to a distinction between incorporated and unincorporated territory. The fifth justice (Mr. Brown) held that in no case are Territories parts of the United States in the strict constitutional sense; and that, therefore, they are not entitled to all the constitutional guarantees until, by statute, the Constitution has been extended over them, or until they have been admitted into the Union as States.[20]

§ 219. The Treaty-Making Power May Alienate Territory of the United States or of a State or States.

In several treaties in settlement of boundary disputes areas previously claimed by the United States as its own have been surrendered to foreign powers. These, however, can scarcely be considered as instances of the alienation of portions of its own territory, for the fact that the treaties were assented to by the United States is in itself evidence that it was conceded that the

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[19] 182 U. S. 244; 21 Sup. Ct. Rep. 770; 45 L. ed. 1088.

[20] See *ante*, Chapter XXX.

claim that the areas in question belonged to the United States was unfounded. There has been no instance in which territory, indisputably belonging to the United States, has been alienated to another power. Whether or not the power to do so, should the occasion arise, exists, has been often discussed, and, in fact, we have a number of *obiter* statements upon the point from the Supreme Court.

In De Geofroy v. Riggs[21] Justice Field, in his enumeration of the limitations upon the treaty-making power, includes its inability to cede any portion of a State without its consent. In support of this declaration reference is made to the case of Fort Leavenworth R. R. Co. v. Lowe.[22] That case decided, simply, that the legislative power of Congress is exclusive over lands within a State purchased with its consent by the United States for a constitutional purpose; and that a State has the constitutional power thus to cede portions of its territory to the General Government. The court in its opinion, however, goes on to say that "it is undoubtedly true that the State, whether represented by her legislature, or through a convention specially called for that purpose, is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign country, without the concurrence of the General Government." As to the truth of this *obiter* statement, there can, of course, be no question, for, as we have already learned, the State cannot, constitutionally, have any international dealings.[23]

But the court go on to say: "The jurisdiction of the United States extends over all the territory within the States, and, therefore, their authority must be obtained, as well as that of the State within which the territory is situated, before any cession of sovereignty or political jurisdiction can be made to a foreign country."

In support of this statement the court refers to the adjustment of the northeastern boundary dispute in 1842 with Great Britain,

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[21] 133 U. S. 258; 10 Sup. Ct. Rep. 295; 33 L. ed. 642.

[22] 114 U. S. 525; 5 Sup. Ct. Rep. 995; 29 L. ed. 264.

[23] Except, possibly, as we have seen (Chapter XV), with reference to such an unimportant matter as the administration of fishing upon boundary waters.

in which the United States before coming to an agreement with Great Britain, obtained the co-operation and concurrence of Maine and Massachusetts. Maine appointed commissioners by her legislature, and Massachusetts by her Governor under authority of an act of her legislature, to act with the Secretary of State of the United States in the matter.

This co-operation of the authorities of Maine and Massachusetts was at the suggestion of Webster, then Secretary of State, but it does not appear from his correspondence that he considered this a constitutional necessity, but rather that it was expedient from a political standpoint that the opinion of these two States should be considered.[24] Thus, writing privately to the Governor of Maine, December 21, 1841, Webster says: "In the present position of affairs, I suppose it will not be prudent to stir in the direction of a compromise without the consent of Maine."[25]

Besides the assertions of the Supreme Court in De Geofroy v. Riggs and Fort Leavenworth R. R. Co. v. Lowe, we have the argument of Justice White in Downes v. Bidwell,[26] that the United States is without the treaty-right to sell or trade away any portion of territory, whether within a State or a Territory, which has been "incorporated" into the United States. "In conformity to the principle which I have admitted," he says, "it is impossible for me to say at one and the same time that territory is an integral part of the United States protected by the Constitution, and yet the safeguards, privileges, rights, and immunities which arise from this situation are so ephemeral in their character that by a mere act of sale they may be destroyed. And applying this reasoning to the provisions of the treaty under consideration, to me it seems indubitable that if the treaty with Spain incorporated all the territory ceded into the United States, it resulted that the millions of people to whom that treaty related were, without the consent of the American people as expressed by Congress,

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24 See *Works of Webster*, V, 98; VI, 272.

25 Van Tyne's *Letters of Webster*, 248; quoted in Moore, *Digest of Int. Law*, V. 174.

26 Concurred in by Justices Shiras, McKenna and Gray.

and without any hope of relief, indissolubly made a part of our common country."

Later on in his opinion Justice White is, however, forced to say: "True, from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power, impliedly or expressly ratified by Congress. But the arising of these particular conditions cannot justify the general proposition that territory which is an integral part of the United States may, as a mere act of sale, be disposed of."

In fact, however, as we know, Justice White held that territory might be annexed by treaty without "incorporation" into the United States, and such unincorporated territory concededly might by treaty be sold or traded away.[27]

Opposing these judicial *obiter dicta* are the decisions of the Supreme Court in Lattimer v. Poteet[28] and the opinions of such commentators as Kent, Story and Butler.

In Lattimer v. Poteet the Supreme Court upheld a treaty of the United States with an Indian tribe whereby was ceded to the Indians an area claimed by a State as its own. "It is argued," said the court in its opinion, "that it was not in the power of the United States and the Cherokee Nation, by the Treaty of Tellico in 1798, to vary in any degree the treaty line of Holston so as to affect private rights or the rights of North Carolina. . . . It is a sound principle of international law, and applies to the treaty-making power of this government, whether exercised with a foreign nation or an Indian tribe, that all questions of disputed boundaries may be settled by the parties to the treaty. And to the exercise of these high functions by the government,

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[27] It will be observed that Justice White's denial to the treaty power of the right to alienate incorporated territory, save as necessitated by a disastrous war, is not predicated upon the federal character of the United States, that is, upon a doctrine of reserved rights of the States, but upon the general constitutional character of the Federal Government as one deriving its power by grant from its citizens. *Cf. American Law Register*, February, 1907, p. 83, note.

[28] 14 Pet. 4; 10 L. ed. 328.

within its constitutional power, neither the rights of a State nor those of an individual can be interposed."

Kent in his *Commentaries* says: "The better opinion would seem to be, that such a power of cession of the territory of a State without its consent does reside exclusively in the treaty-making power, under the Constitution of the United States, yet sound discretion would forbid the exercise of it without the consent of the local government who are interested, except in cases of great necessity, in which the consent might be presumed."[29]

"On April 14, 1838, Edward Everett, who was then governor of Massachusetts, confidentially asked the opinion of Mr. Justice Story concerning a resolution of the Massachusetts legislature, which had been presented to him for his signature, in which it was declared that no power delegated by the Constitution to the United States authorized the government to cede to a foreign nation any territory lying within the limits of a State of the Union. Mr. Everett called attention to the fact that in section 1502 of Story's Commentaries on the Constitution, in which certain restrictions on the treaty-making power were named, that of ceding a part of a State was not mentioned, but that the remark was added, 'Whether there are any other restrictions necessarily growing out of the structure of the government will remain to be considered whenever the exigency shall arise.' Mr. Everett further observed that the restriction in question, if it existed, must be one of this character, but that the pending controversy did not appear to him to create such an exigency, since it was a question not of ceding an admitted part of the territory of Maine, but of ascertaining the boundary between British and American territory. Mr. Justice Story, on the 17th of April, replied that he could not admit it to be universally true that the Constitution of the United States did not authorize the government to cede to a foreign nation territory within the limits of a State, since such a cession might, for example, be indispensable to purchase peace, or might be of a nature calculated for the safety of both nations or be an equivalent for a like cession on the other side. The

[29] I, 167, note b.

learned justice added that he had some years previously had a conversation on the subject with Chief Justice Marshall. 'He was,' said Mr. Justice Story, 'unequivocally of opinion, that the treaty-making power did extend to cases of cession of territory, though he would not undertake to say that it could extend to all cases; yet he did not doubt it must be construed to extend to some.'"[30]

Mr. Butler's views as to the constitutional effect of the treaty-making power have already been quoted in this chapter. They grant to the Federal Government full power to alienate without the consent of a State, any portion or all of its territory. On page 394 of his second volume, Mr. Butler, after referring to the settlement of the northeastern boundary, says: "If it be said only a part of a State was involved in that case, and that although the power might possibly be exercised as to a part of a State, an entire State could not have been ceded away, the answer can only be that if the salvation of every other State in the Union depended upon the boundary line being so fixed that an entire State should be included in British possessions, and in default thereof the Union might have been plunged into a war resulting in its destruction, undoubtedly the treaty-making power in the Central Government would have been able to accomplish that result, and it might have been just as necessary to exercise it, as at times it has been necessary to amputate a limb in order to save the life itself; in such extreme cases (and it is to be hoped they will never occur) the full extent of the power would have to be exercised — regretfully indeed but nevertheless effectually."

In accordance with the principles already laid down in this chapter, the author of this treatise is of the opinion that the United States has, through its treaty-making organ, the constitutional power, in cases of necessity, to alienate a portion of, or the entire territory of a State or States. The same reasoning which supports the power of the United States, as a sovereign power in international relations, to annex territories, is sufficient to sus-

[30] Story, *Life of Joseph Story*, II, 286–289. Quoted by Moore, *International Law Digest*, V, 172.

tain its power to part with them, even should the area so parted with be a part of one of the States or include one or more of them.

Should territory be alienated to a foreign power, it would seem that this would have to be done by treaty. Should, however, the alienation be by the way of granting independence to a particular territory, as, for example, Porto Rico or the Philippine Islands, this could be done by joint resolution. Should the people of a territory revolt against the United States control, establish a *de facto* government, and realize in fact their independence, this independence might be recognized by a treaty. But in such case the treaty would recognize a *fait accompli,* rather than bring it about.

§ 220. The Violation of Treaties.

Treaties entered into by the United States may be viewed in two lights; (1) as constituting parts of the supreme law of the land, and (2) as compacts between the United States and foreign Powers. Viewed in this second light this infraction is a matter outside judicial cognizance, and within the exclusive concern of the political departments.

In Taylor v. Morton,[31] approved by the Supreme Court,[32] Justice Curtis says: "Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the view and acts of a foreign sovereign, manifested through his representative, has given just occasion to the political departments of our government to withhold the execution of a promise contained in a treaty or to the act in direct contravention of such promise? I apprehend not. These powers have not been confided by the people to the judiciary, which has no suitable means to exercise them, but to the executive and legislative departments of our government."

[31] 2 Curtis, 454.

[32] 2 Black, 481; 17 L. ed. 277.

The rule thus laid down in Taylor v. Morton has been uniformly followed in subsequent cases. In Head Money Cases,[33] the court say: "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do, and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens."

Again, in Whitney v. Robertson,[34] the opinion declares: "A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing and made of like obligation with an act of legislation. Both are de-

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[33] 112 U. S. 580; 5 Sup. Ct. Rep. 247; 28 L. ed. 798.

[34] 124 U. S. 190; 8 Sup. Ct. Rep. 456; 31 L. ed. 386.

clared by that instrument to be the supreme law of the land, and no superior efficacy is given to either power over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. Whether the complaining nation has just cause of complaint, or our country was justified in its legislation, are not matters for judicial cognizance."

§ 221. Treaties Remain Internationally Binding upon the United States even when Congress has Refused the Legislation Necessary to put Them into full Force and Effect, or when it Has Abrogated Them by Subsequent Legislation, or when the Supreme Court Has Declared them Unconstitutional.

It is a principle of international law that one Nation in its dealings with another Nation is not required to know, and, therefore, is not held to be bound by, the peculiar constitutional structure of that other Nation. It is required, indeed, to know what is the governmental organ through which treaties are to be ratified. But further than this it need not examine, for each State is conclusively presumed to be able to carry into full force and effect any international engagement which it, through its treaty-making power, may enter upon.

In Dana's edition of Wheaton's *International Law,* it is declared: "If a treaty requires the payment of money, or any other special act, which cannot be done without legislation, the treaty is still binding on the nation; and it is the duty of the nation to pass the necessary laws. If that duty is not performed, the result is a breach of the treaty by the nation, just as much

as if the breach had been an affirmative act by any other department of the Government. Each nation is responsible for the right working of the internal system, by which it distributes its sovereign functions; and, as foreign nations dealing with it cannot be permitted to interfere with or control these, so they are not to be affected or concluded by them to their own injury." [35]

This principle the United States has not hesitated upon occasion to assert. Mr. Blaine, when Secretary of State, wrote to our minister to Hawaii, in 1881, with reference to a treaty which that country had concluded with the United States, as follows: "I am not aware whether or not a treaty, according to the Hawaiian constitution is, as with us, a supreme law of the land, upon the construction of which — the proper case occurring — every citizen would have the right to the judgment of the courts. But, even if it be so, and if the judicial department is entirely independent of the executive authority of the Hawaiian government, then the decision of the court would be the authorized interpretation of the Hawaiian government, and however binding upon that government would be none the less a violation of the treaty. In the event, therefore, that a judicial construction of the treaty should annul the privileges stipulated, and be carried into practical execution, this government would have no alternative and would be compelled to consider such action as the violation by the Hawaiian government of the express terms and conditions of the treaty, and, with whatever regret, would be forced to consider what course in reference to its own interests had become necessary upon the manifestation of such unfriendly feeling."

And in 1835 with reference to the refusal of the French Chamber of Deputies to make an appropriation called for by a treaty concluded between France and this country, Mr. Wheaton wrote: "Neither government [France nor the United States] has anything to do with the auxiliary legislative measures necessary, on the part of the other State, to give effect to the treaty. The nation is responsible to the government of the other nation for

[35] Dana's Wheaton, § 543, note 250, citing 1 Kent, 165–6; Heffter, § 84; Vattel, lib. IV, c. 2, § 14; Halleck, 854.

its non-execution, whether the failure to fulfil it proceeds from the omission of one or other of the departments of its government to perform its duty in respect to it. The omission here is on the part of the legislature; but it might have been on the part of the judicial department — the court of cassation might have refused to render some judgment necessary to give effect to the treaty. The King cannot compel the Chambers, neither can he compel the courts; but the nation is none the less responsible for the breach of faith thus arising out of the discordant action of the internal machinery of its constitution."[36]

§ 222. The Date at Which Treaties Go into Effect.

In Haver v. Yaker[37] Justice Davis speaking with reference to the date at which a treaty goes into effect, says: "It is undoubtedly true as a principle of international law, that, as respects the rights of either government under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. (Wheat. Int. Law, by Dana, 336.) But a different rule prevails where the treaty operates on individual rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications, and this we understand to have been decided by this court, in Arredondo's case, reported in 6 Peters. The reason of the rule is apparent. In this country, a treaty is something more than a contract, for the federal Constitution declares it to be the law of the land. If so, before it can become a law, the Senate, in whom rests the authority to ratify it, must agree to it. But the Senate are not required to adopt or reject it as a whole, but may modify or amend it, as was done with the Treaty under consideration. As the individual

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[36] Mr. Wheaton, Minister at Copenhagen, to Mr. Butler, Attorney-General, January 20, 1835, adopted in Lawrence's Wheaton (1863), 459; and quoted also with approval in Meier, *Abschluss von Staatsverträgen*, Leipzig, 1, 1874, p. 168. See Moore's *Digest of Int. Law*, V, 231.

[37] 9 Wall. 32; 19 L. ed. 571.

citizen, on whose rights of property it operates, has no means of knowing anything of it while before the Senate, it would be wrong in principle to hold him bound by it, as the law of the land, until it was ratified and proclaimed. And to construe the law, so as to make the ratification of the treaty relate back to its signing, thereby divesting a title already vested, would be manifestly unjust, and cannot be sanctioned."

§ 223. The Denunciation of Treaties.

Though the Senate participates in the ratification of treaties, the President has the authority, without asking for senatorial advice and consent, to denounce an existing treaty and to declare it no longer binding upon the United States. In important cases, however, he would undoubtedly seek senatorial approval before taking action. But whether or not this approval be sought, the courts hold themselves bound by the denunciation, the existence or non-existence of a treaty being a political question the decision upon which by the political departments of the government is binding upon the judicial departments.[38]

§ 224. The Construction of Treaties.

As to public rights the courts hold themselves bound by the construction given to treaties by the political departments. As to private rights, however, arising under treaties in force, and even as to public rights when these are inseparable from private rights, the courts exercise independent judgment as to the meaning to be given to treaty provisions.[39]

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38 See Chapter LI, and especially the case of Terlinden v. Ames, 184 U. S. 270; 22 Sup. Ct. Rep. 484; 46 L. ed. 534.

39 See Chapter LI.

CHAPTER XXXVI.

THE AMENDMENT OF THE FEDERAL CONSTITUTION.

§ 225. The Amending Clause.

The amendment of the federal Constitution, while politically a subject of great importance, has given rise to few legal adjudications.

Article V of the Constitution provides: "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 parts 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;[1] and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It will be seen that two methods for proposing, as well as two methods for ratifying proposed amendments are provided. In practice, however, the fifteen amendments which have been added to the Constitution as originally adopted have all been proposed by Congress and that body has in each instance provided for ratification by the state legislatures.

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[1] Art. I, Sec. 9, Cl. 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."

Art. I, Sec. 9, Cl. 4: "No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

When proposing amendments it has been held that only two-thirds of those present in the House of Congress and not two-thirds of their entire membership is sufficient.[2]

The requirement of a two-thirds vote applies only as to the vote on the final passage of the proposal. Proposed amendments, it has therefore been held, may be amended by a majority vote, but two-thirds are required when one House is voting finally to concur as to proposals of the other House.[3]

§ 226. Presidential Approval not Required.

The President's approval of a proposed amendment is not required. In Hollingsworth v. Virginia[4] the court without argument say: "The negative of the President applies only to the ordinary cases of legislation; he has nothing to do with the proposition or adoption of amendments to the constitution."

In 1865 a proposed amendment having been inadvertently sent to the President for his approval, the Senate adopted the following resolution:

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[2] The question having been raised by a member, Speaker Reed of the House said:

"The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision of the Constitution says "two-thirds of the House." What constitutes a House? A quorum of the membership, a majority, one-half and more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill that has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object. It has nothing to do with the question of what States are present and represented, or what States are present and vote for it. It is the House of Representatives in this instance that votes and performs its part of the function. If the Senate does the same thing, then the matter is submitted to the States directly, and they pass upon it.

The first Congress, I think, had about sixty-five members, and the first amendment that was proposed to the Constitution was voted for by thirty-seven members, obviously not two-thirds of the entire House. (First session First Congress, Journal, p. 121, Gales and Seaton ed.) So the question seems to have been met right on the very threshold of our Government and disposed of in that way."

[3] Hinds, *Precedents of the House of Representatives,* V, §§ 7029–7039.

[4] 3 Dall. 378; 1 L. ed. 644.

"Resolved, That the article of amendment proposed by Congress to be added to the Constitution of the United States respecting the extinction of slavery therein having been inadvertently presented to the President for his approval, it is hereby declared that such approval was unnecessary to give effect to the action of Congress in proposing said amendment, inconsistent with former practice in reference to all amendments to the Constitution heretofore adopted, and being inadvertently done, should not constitute a precedent for the future; and the Secretary is hereby instructed not to communicate the notice of the approval of said proposed amendment by the President to the House of Representatives."[5]

§ 227. Scope of the Amending Clause.

In scope the amending power is now limited as to but one subject, namely, the equal representation of the States in the Senate.[6] It has by some been argued that even this limitation may be evaded by adopting a constitutional amendment eliminating this limitation upon the amending power, and thus opening the way to subsequent amendments providing for an unequal senatorial representation of the States.[7]

It would seem that a state legislature having rejected an amendment proposed by Congress, may later reconsider its action and give its approval.[8] In 1865 the legislature of Kentucky having rejected a proposed amendment the governor of the State, in a recommendation to the legislature, said: "When ratified by the legislatures of the several States the question will be finally withdrawn, and not before. Until ratified it will remain an open question for the ratification of the legislatures of the several

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[5] For similar decisions in the House of Representatives, see Hinds, *Precedents of the House of Representatives*, V, § 7040.

[6] It has at times been alleged that no amendments in violation of the "spirit" of the Constitution or providing for a change in the essential nature of the American State would be valid. The argument in support of this view rests, however, upon a conception of the Constitution as a contract between the States.

[7] *Cf.* von Holst, *Constitutional Law*, p. 31, note.

[8] Jameson, *Constitutional Conventions*, § 576.

States. When ratified by the legislature of a State, it will be final as to such State; and, when ratified by the legislatures of three-fourths of the several States, will be final as to all. Nothing but ratification forecloses the right of action. When ratified, all power is expended. Until ratified, the right to ratify remains."

In the foregoing quotation it is said that a state legislature having once ratified its action is final. Until three-fourths of the States have ratified, any State may withdraw a rejection previously given. This in fact was done by several States with reference to the Fourteenth Amendment, and the ratifications thus given accepted as valid. That a ratification once given may not be withdrawn would also seem to be settled by the action taken by the federal authorities in counting among those ratifying the Fourteenth Amendment certain States which, having ratified, later attempted to reverse this action.[9]

The submission in 1866 of the Fourteenth Amendment to the legislatures of the States at a time when a number of the Southern States had not yet been "reconstructed" and admitted to the full enjoyment of privileges belonging to member States of the Union, gave rise to the question whether the legislatures of the reconstruction governments in those States were constitutionally qualified to act in the premises. Seward, Secretary of State, seemed at first doubtful of this. In his proclamation of July 20, 1868, announcing the adoption of the Amendment, after saying that in six States ratification had been had "by newly constituted and established bodies avowing themselves to be and acting as the legislatures respectively" of those States, and after calling attention to the fact that Ohio and New Jersey had withdrawn their ratifications, he said, hypothetically: "If the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid Amendment are to be deemed as remaining in full force and effect, notwithstanding the subsequent resolutions of those States which purport to withdraw the consent of those States from such ratification, then the aforesaid Amendment has

[9] Jameson, §§ 577–584.

been ratified in the manner heretofore mentioned, and so has become valid to all intents and purposes as part of the Constitution of the United States."

Later, however, in a second proclamation Seward declared in a positive manner the Amendment to have been adopted.

The requirement of ratification by the States lately in rebellion of the Fourteenth Amendment as a condition precedent to their readmission to full constitutional rights as member States of the Union, was a requirement the imposition of which by Congress it is difficult constitutionally to justify. But, a State having yielded and ratified, the Supreme Court expressed the view in White v. Hart[10] that a claim could not be made that the ratification was void because given under coercion.[11]

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[10] 13 Wall. 646; 20 L. ed. 685.

[11] The court say: "The third of these propositions is clearly unsound, and requires only a few remarks. Congress authorized the State to form a new constitution and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government and is concluded by it."

CHAPTER XXXVII.

CONGRESS — ITS ORGANIZATION: PRIVILEGES OF MEMBERS.

§ 228. The Name.

The first section of Article I of the Constitution provides that "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." Following sections of this article provide for the composition and organization of these two branches of the national legislature and enumerate the powers which they may collectively or severally exercise. In the present chapter we shall be concerned with the constitutional provisions for the organization of Congress.

The term "Congress" is an old one, its international use as the title of formal meetings of heads of sovereign States or their representatives, dates from the seventeenth century.[1] In America the word had been used of such joint conferences as the colonies had convened. When the articles of consideration were drawn up, the term was applied to the confederate administrative and law-making body, and, as was but natural, the same name was given to the legislature provided for in the Constitution which replaced the Articles.

§ 229. Qualifications for Senators and Representatives.

It is required by the Constitution that Representatives shall have attained the age of twenty-five years, have been seven years citizens of the United States,[2] and be, when elected, inhabitants of the State in which they are chosen.[3] Senators are required to be thirty or more years of age, to have been nine years citizens of the United States, and to be, when elected, inhabitants of the State for which they are chosen.[4]

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[1] *Cf.* Reinsch, *American Legislatures,* Chapter I.

[2] This requirement was satisfied in the first congress by assuming that the citizenship demanded could be dated from the time of the Articles of Confederation, if not indeed, from the Declaration of Independence.

[3] Art. I, Sec. II, Cl. 2.

[4] Art. I, Sec. II, Cl. 3.

It is furthermore provided by the Constitution that "no person holding any office under the United States shall be a member of either house during his continuance in office."[5]

Furthermore, by Section 3 of the Fourteenth Amendment it is declared that: "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."[6]

It will be observed that habitancy and not mere residency in a State is required. Habitancy implies greater permanency than does residence. "A man's residence is often a legal conclusion from statements showing his intention. Habitancy is a physical fact which may be proved by eye witnesses."[7]

The constitutional provision is that habitancy shall exist at the time of election. It is thus legally possible for a member of Congress, after election, to become the inhabitant of another State without thereby forfeiting his seat.

§ 230. Qualifications Determined by Congress.

Though essentially a judicial function the conclusive determination as to whether the constitutional qualifications for membership have been met is, by the Constitution, placed in the hands of each of the two Houses of Congress.[8] It thus happens that though neither House may formally impose qualifications addi-

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[5] Art. I, Sec. 6, Cl. 2.

[6] Congress has removed this disability from all, or practically all, persons suffering from them because of participation in the Civil War. Delegates from the Territories who are given the right to sit but not to vote in the House of Representatives have their qualifications and terms of office determined by Congress.

[7] Foster, *Commentaries*, § 62.

[8] "Each House shall be the judge of the elections, returns and qualifications of its own members." Art. I, Sec. IV, Cl. 1.

tional to those mentioned in the Constitution, or waive those that are mentioned, each may in practice do either of these things. For example, in 1900, the House excluded Brigham H. Roberts of Utah because of various charges brought against him, none of which, however, alleged a constitutional disqualification. In this case it was strenuously argued that, having the necessary constitutional disqualifications, Roberts should be admitted to membership, and then, if the House should so see fit, he might be expelled by a two-thirds vote.[9] For the right to expel, it is admitted, is absolute, and may be exercised for any reason which the House thinks adequate.[10] The House, however, by a large majority voted to exclude Roberts.[11]

It is plain that no State may add qualifications to those required by the Constitution of members of Congress. Thus in 1856, the governor of a State having refused to issue credentials to the rival claimants, because they were disqualified under provisions of the state constitution to membership in the House, the House seated the one shown *prima facie* by official statement to have a majority of votes.[12] Similar action was taken by the Senate the same year.

The disqualification of a member of Congress, it has been held, does not entitle the one receiving the next highest vote, to his seat.[13]

Members who have already taken the oath may, it has been held, be unseated by a majority vote. That is to say, disqualification being shown the process of expulsion, which requires a two-thirds vote, is not needed.[14]

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[9] "Each House may . . . with the concurrence of two-thirds, expel a member." Art. I, Sec. V, Cl. 2.

[10] In Patterson's case (Hinds, § 1276) it was held that a resolution of expulsion would not be entertained after the term of the accused Senator had expired. In Whittemore's case it was held that one who, to escape expulsion, had resigned, would, upon re-election, be refused his seat.

[11] For a full statement of the arguments *pro* and *contra* in this important case see House Rpt. 85, 56th Cong., 1st Sess. See also Hinds, *Precedents of the House of Representatives*, Vol. I.

[12] Hinds, op. cit. § 415; Story, *Commentaries*, §§ 623–629.

[13] Hinds, § 424.

[14] Hinds, § 424.

In contested election cases each House may examine witnesses, compel testimony and the production of papers, and punish witnesses for contempt.[15] Imprisonment for contempt must, however, cease with the adjournment of the Congress which orders it, for with the dissolution of that body its authority necessarily ceases.[16]

In the case of *In Re* Loney[17] it was held that a notary public or other state officer designated by Congress to take depositions in cases of contested election of members of the House of Representatives of the United States performs this function under the authority of Congress and not under that of the State; and that perjury alleged to have been committed before such notary or other state official is exclusively cognizable in the federal courts. In its opinion the court say: "Any one of the officers designated by Congress to take the depositions of such witnesses (whether he is appointed by the United States . . . or by the State . . .) performs this function, not under any authority derived from the State, but solely under the authority conferred upon him by Congress, and in a matter concerning the government of the United States. . . . There are cases (the most familiar of which are those of making and uttering counterfeit money) in which the same act may be a violation of the laws of the State, as well as of the laws of the United States, and may be punishable by the judiciary of either [citing cases]. But the power of punishing a witness for testifying falsely in a judicial proceeding belongs peculiarly to the government in whose tribunals that proceeding is had. It is essential to the impartial and efficient administration of justice in the tribunals of the nation that witnesses should be able to testify freely before them unrestrained by legislation of the State, or by fear of punishment in the state courts. . . . A witness who gives his testimony, pursuant to the Constitution and laws of the United States, in a case pending in a court or other judicial tribunal of the United

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[15] Kilbourn v. Thompson, 103 U. S. 168; 26 L. ed. 377.

[16] Anderson v. Dunn, 6 Wh. 204; 5 L. ed. 242.

[17] 134 U. S. 372; 10 Sup. Ct. Rep. 384; 33 L. ed. 949.

States, whether he testifies in the presence of that tribunal, or before any magistrate or officer (either of the Nation or of the State) designated by act of Congress for the purpose, is accountable for the truth of his testimony to the United States only; and perjury committed in so testifying is an offense against the public justice of the United States, and within the exclusive jurisdiction of the courts of the United States, and cannot therefore be punished in the courts of Virginia."[18]

§ 231. Disqualification of Congressmen to Hold Federal Office.

The second clause of Section VI of Article I of the Constitution provides that: "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."

In pursuance of this provision members of Congress have had their seats declared vacant for accepting commissions as officers of the volunteer and regular army forces of the United States. Visitors to academies, directors and trustees of public federal institutions appointed by law, are not held disqualified. In a House Report on this subject,[19] the committee say: "It is not contended that every position held by a member of Congress is an office within the meaning of the Constitution, even though the term office may usually be applied to many of these positions. . . . In United States v. Hartwell (6 Wall. 385; 18 L. ed. 830), it is laid down that 'an office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.' Elsewhere it is held that an office is 'an employment on behalf of the government, in any station of public trust, nor merely transient, occa-

[18] For historical accounts of the manner in which contested elections in Congress have been considered, see *Journal of Social Science*, 1870, pp. 56, and *Political Science Quarterly*, XX, 421.

[19] 55th Cong. 3d Sess. Rpt. No. 2205.

sional or incidental' (20 Johns. Rep. 492). A careful consideration of all the positions above referred to will show that they are merely transient, occasional or incidental in their nature, and none of them possess the elements of duration, tenure or emolument. All of these appointees were but instruments to procure detailed information for the better information and guidance of Congress and are wholly lacking in the essential elements of an office within the meaning of the Constitution."

The House has also held that a contractor under the Federal Government is not constitutionally disqualified as a member.

A state office does not disqualify for membership. Thus, for example, Senator La Follette held the office of Governor of Wisconsin until January, 1906, although the Senate, after his election to that body, met in extra session the preceding March. Senator La Follette did not, however, appear in the Senate or take the oath until January 4, 1906.

Members-elect, it has been held, may defer until the meeting of Congress their choice between their seats and incompatible offices to which they may have been elected or appointed.[20]

The seat of a member who has accepted an incompatible office may be declared vacant by a majority vote.[21]

§ 232. Ineligibility of Congressmen to Offices, the Emoluments of Which Have Been Increased.

In 1909 it having been announced that President-Elect Taft intended to nominate Senator Philander C. Knox as Secretary of State, it was pointed out that he was constitutionally ineligible, the salary of the Secretary's office having been increased by a law passed while Knox was a Senator. In order to render Senator Knox eligible to the Secretaryship an act was passed by Congress reducing the salary in question to that which it had been before the increase mentioned. The strict constitutionality of this action by Congress was questioned by many.[22]

[20] Hinds, § 492.

[21] Hinds, § 504.

[22] In a minority report from a House Committee (House Rpt., No. 2155, 60th Cong., 2d Sess.) it is said: "We do not believe that a provision of the

§ 233. Privileges of Members of Congress.

The first clause of the sixth section of Article I of the Constitution provides: "The Senators and Representatives . . . 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."

The exemption from arrest thus given is now of little importance as arrest of the person is now almost never authorized except for crimes which fall within the classes exempt from the privilege. The words "treason, felony and breach of the peace" have been construed to mean all indictable crimes.[23]

Having decided in Kilbourn v. Thompson[24] that the investigation, in aid of which Kilbourn's testimony had been demanded, was in reference to a matter concerning which Congress had not the power to legislate, and that, therefore, the order for Kilbourn's

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Constitution that is so clear and emphatic should be sought to be annulled or suspended in the manner attempted by the passage of this bill. The emoluments of the Secretary of State were increased by the Fifty-ninth Congress. The occupant of that office has been regularly receiving these emoluments. We believe that the mischief undertaken to be provided against by this provision of the Constitution clearly embraces the act of appointing one of the said United States Senators to the office of the Secretary of State. It might be said, and truly, that this mischief is remote in any event; however this may be, it contained sufficient danger for the framers of the Constitution to provide against it. If the Constitution prohibits it, surely it can not be argued that if this prohibition can be so easily overcome by the device of reducing the salary below what in the judgment of the Congress it should be, with the hope which in this case is almost a certainty, of the salary being restored to its present amount, that that would not be clear evasion of the plain provision of the Constitution. The office of the Secretary of State will be probably held for eight years by its next incumbent, and a designing Senator, which the Constitution seeks to provide against, could reasonably anticipate, that although his salary would be temporarily reduced in the closing years of his senatorial term, at the expiration of that term it would, through his influence, be restored to the amount to which it was placed by the Congress of which he was a member, and thus he would receive the higher salary from at least two to probably eight years."

[23] Williamson v. United States, 207 U. S. 425; 28 Sup. Ct. Rep. 163; 52 L. ed. 278; Hinds, *Precedents of the House of Representatives*, § 2673.

[24] 103 U. S. 168; 26 L. ed. 377.

imprisonment had been void for want of jurisdiction, the court go on to consider the personal liability of the individual members voting for and participating in the commitment for contempt. Having pointed out that these individual members had undoubtedly, by their speeches, reports and notes, approved and authorized the imprisonment of Kilbourn, and having quoted the constitutional clause with reference to the exemption of members of Congress from arrest, and from being questioned as to any speech or debate, the court ask: "Is what the defendants did in the matter in hand covered by this provision? Is a resolution offered by a member, speech or debate, within the meaning of the clause? Does its protection extend to the report which they made to the House, of Kilbourn's delinquency? To the expression of opinion that he was in contempt of the authority of the House? To their vote in favor of the resolution under which he was imprisoned? If these questions be answered in the affirmative, they cannot be brought in question for their action in a court of justice or in any other place. And yet if a report, or a resolution, or a vote, is not speech or debate, of what value is the constitutional protection? We may perhaps find some aid in ascertaining the meaning of this provision, if we can find out its source, and fortunately in this there is no difficulty. For while the framers of the Constitution did not adopt the *lex et consuetudo* of the English Parliament as a whole, they did incorporate such parts of it, and with it such privileges of Parliament, as they thought proper to be applied to the two Houses of Congress."

After reviewing the English case of Stockdale v. Hansard, and the early Massachusetts case of Coffin v. Coffin[25] and the *dictum* of Story in his *Commentaries* (§ 866) the court say: "It seems to us that the views expressed in the authorities we have cited are sound and are applicable to this case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees,

[25] 4 Mass. 1.

to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it. It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the Nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate. In this, as in other matters which have been pressed on our attention, we prefer to decide only what is necessary to the case in hand, and we think the plea set up by those of the defendants who were members of the House is a good defense."

As regards the freedom of the members of Congress from prosecution for words spoken in either House, no comment is needed, except to observe that this privilege does not extend to the outside publication by a member of libelous matter spoken in Congress.[26] As Story observes: "No man ought to have a right to defame others under color of a performance of the duties of his office. And if he does so in the actual discharge of his duties in Congress, that furnishes no reason why he should be enabled through the medium of the press to destroy the reputation and invade the repose of other citizens." [27]

It may further be observed that the constitutional immunity extends to witnesses appearing before committees of Congress, and, probably, to petitions, and other addresses to that body.[28]

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[26] King v. Creery, 1 Maule & Selw. 273.

[27] *Commentaries*, § 863.

[28] See *Columbia Law Rev.* Feb. 1910, the excellent paper of Mr. Van Vechten Veeder, entitled "Absolute Immunity in Defamation: Legislative and Executive Proceedings."

CHAPTER XXXVIII.

ELECTION OF MEMBERS OF CONGRESS.[1]

§ 234. Their Apportionment among the States.

The Constitution provides that the House of Representatives shall be composed of members chosen every second year by the people of the several States, and that they shall be apportioned among the States according to their several populations, the whole number of persons in each State, excluding Indians not taxed, being counted.[2] The Fourteenth Amendment provides, however, that "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 or judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants 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

[1] The Senate and House of Representatives are spoken of as two "Houses" of Congress, the Senate being often termed the Upper House, and the House of Representatives, the Lower House, or, simply the "House."

[2] The original provision of the Constitution (Art. 8, Sec. 88, Cl. 3) was as follows: "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."

By section 2 of the Fourteenth Amendment, it is provided that "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.

which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

This amendment thus leaves it within the constitutional power of the States to place such restrictions as they may choose upon the exercise of the suffrage within their limits, but subject to a reduction of the number of representatives to which they are entitled in Congress to the extent to which the right to vote is denied to adult male inhabitants, citizens of the United States.

The Fifteenth Amendment, adopted two years later, places the absolute prohibition upon the States that "the right of citizens of the United States to vote shall not be denied or abridged . . . on account of race, color or previous condition of servitude."

By some it has been argued that the Fifteenth Amendment is to be construed as repealing the clause of the Fourteenth Amendment relating to the reduction of the representation of the States, in that it renders constitutionally impossible the action which it was the object of that clause to deter the States from taking. This argument, though it has had the support of eminent authority,[3] cannot be considered a sound one, for the clause of the Fourteenth Amendment provides for a reduction not simply in cases where adult male inhabitants, citizens of the United States, are denied the right to vote because of race, color or previous condition of servitude, but for any cause whatever, saving for participation in rebellion or other crime.

As is well known, most of the Southern States have, by various provisions adopted in their several constitutions, in large measure eliminated the negro vote. This has led to a certain amount of agitation both in the public press and in Congress for the enforcement of the reduction of representation clause of the Fourteenth Amendment, but as yet no decisive steps have been taken.[4]

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[3] *E. g.* Senator John Sherman, *Recollections*, I, 450. See also article by Mr. Emmet O'Neal in *North American Review*, Vol. 181, p. 530.

[4] In the platform of the Republican party adopted by the National Convention in 1904 it was declared: "We favor such congressional action as shall determine whether, by special discriminations, the elective franchise in any State has been unconstitutionally limited, and, if such be the case, we demand that representation in Congress and in the Electoral College shall be proportionally reduced, as directed by the Constitution of the United States."

In various States of the Union property, educational, and other qualifications upon the right to vote have been established. These limitations upon adult male suffrage have not, however, been held to warrant an application of the reduction of representation clause of the Fourteenth Amendment. To quote the words of Cooley: "To require the payment of a capitation tax is no denial of suffrage, it is demanding only the preliminary performance of public duty and may be classed, as may also presence at the polls, with registration, or the observance of any other preliminary to insure fairness and protect against fraud. Nor can it be said that to require ability to read is any denial of suffrage. To refuse to receive one's vote because he was born in some particular country rather than elsewhere, or because of his color, or because of any natural quality or peculiarity which it would be impossible for him to overcome, is plainly a denial of suffrage. But ability to read is within the power of any man, it is not difficult to attain it, and it is no hardship to require it. On the contrary the requirement only by indirection compels one to appropriate a personal benefit he might otherwise neglect. It denies to no man the suffrage, but the privilege is freely tendered to all, subject only to a condition that is beneficial in its performance and light in its burden. If a property qualification, or the payment of taxes upon property when one has none to be taxed, is made a condition to suffrage, there may be room for more question." [5]

§ 235. The Mode of Apportionment.

In the first Congress representatives were apportioned among the States according to a rough estimate as to their respective populations. Since that time new apportionments have been based upon the figures of the decennial censuses.

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[5] *Principles of Constitutional Law*, edition of 1898, p. 292. The state courts have very generally held that reasonable registration and other laws for the protection of the ballot against fraud, intimidation, ignorance, etc., are not unconstitutional under the state Constitution as adding to the qualifications laid down. *Cf.* Cooley, *Const. Lim.*, 7th ed., Ch. XVIII.

The first apportionment bill passed by Congress was vetoed by President Washington as unconstitutional in that it provided for a representative for each thirty thousand of population, the minimum fixed by the Constitution, and also an additional number to the States having the largest fractions left over after the division was made.[6]

Until 1842 fractions of populations left over by the dividing of the populations of the several States by the number selected for determining the number of representatives, went unrepresented. Since that time, however, where these fractions have exceeded a half of the ratio number, an additional representative has been allowed.

§ 236. Congressional Districts.

The division of the States into congressional districts for the purpose of selecting representatives is left to the state legislatures. Congress has, however, provided that these districts shall be composed of contiguous territory. It has become an established rule of political practice, though not one of constitutional obligation, that a representative shall be a resident of the district in which he is elected. Representatives are, however, occasionally elected by districts in which they do not reside, and in such cases there is no question as to their right to sit. In certain cases, congressmen at large, that is, from the whole State, are elected. This happens when a State has not been divided into districts, or where, after a reapportionment, an additional representative or representatives have been allotted a State and that State has not re-

6 "Construing the Constitution to authorize a process by which the whole number of representatives should be ascertained on the whole population of the United States, and afterwards 'apportioned among the several States according to their respective numbers,' the Senate [in an amendment which the House accepted] applied the number thirty thousand as a divisor to the total population, and taking the quotient which was one hundred and twenty, as the number of representatives given by the ratio which had been adopted in the House where the bill originated, they apportioned that number among the several States by that ratio, until as many representatives as it would give were allotted to each. The residuary numbers were then distributed among the States having the highest fractions." Marshall, *Life of Washington*, V, 319. *Cf.* Foster, *Commentaries on the Constitution*, I, 395.

districted itself so as to provide the necessary additional districts. In such cases, of course, only the additional representatives are elected at large.

§ 237. Members of the House of Representatives: by Whom Elected.

The Constitution provides that for the election of Representatives to Congress, " the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the state legislature." This places the determination of who may exercise the suffrage wholly within the control of the States, except for the restriction placed upon them by the Fifteenth Amendment. There thus exists the rather curious fact that the National Government though able to control its citizenship by naturalization is not able to confer the suffrage for the election even of its own officials; whereas the States may confer, and, indeed, in a number of instances have conferred this suffrage upon persons not citizens of the United States.[7]

§ 238. The Right to Vote for Representatives not a Necessary Incident of National Citizenship.

That the suffrage is not a necessary incident of federal citizenship is declared by the Supreme Court in Minor v. Happersett,[8] a case in which it was argued that a woman, a citizen of the United States, was, as such, entitled to a vote. In this case the direct question was presented whether all citizens are necessarily voters. This the court answered by declaring that the United States has no voters of its own creation in the States. After going on to show that at the time the Constitution was adopted and ever since, the right of suffrage in the States had not been coextensive with that of citizenship, the opinion concludes: "For nearly

[7] *E. g.*, upon aliens who have declared their intention to become citizens but have not yet taken out their final papers. Hare (*American Constitutional Law*, p. 529) denies the constitutionality of this. He says: "Reading the Constitution in the light of the Fifteenth Amendment, the just inference would seem to be that national citizenship is a prerequisite to the right of suffrage." This view is plainly incorrect.

[8] 21 Wall. 162; 22 L. ed. 627.

ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. . . . Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon anyone, and that the constitutions and laws of several States which commit that important trust to men alone are not necessarily void, we affirm the judgment of the court below."

It cannot be said, therefore, that the right to vote either at federal or state elections is in any case determined directly by federal law. Even the Fifteenth Amendment does not itself give to any one the right. In United States v. Reese[9] the court say: "The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen over another, on account of race, color, or previous condition of servitude. . . . It follows that the Amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude."

And in United States v. Cruikshank[10] the court say: "In Minor v. Happersett (21 Wall. 162; 22 L. ed. 627) we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In United States v. Reese (92 U. S. 214; 23 L. ed. 563), just decided, we held that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in

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[9] 92 U. S. 214; 23 L. ed. 563.

[10] 92 U. S. 542; 23 L. ed. 588.

the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States."

In a much later case, Pope v. Williams,[11] the court again say: "The privilege to vote in any State is not given by the federal Constitution or by any of its Amendments."

In Neal v. Delaware,[12] a case decided but a little later, the court, however, point out that the effect of the Amendment by abolishing *ipso facto* all limitations in state laws and constitutions founded upon race, color, or previous condition of servitude, may in effect operate to qualify certain persons to vote who otherwise would not have the right. The opinion says: "Beyond all question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the state constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. . . . There is, then, an excision or erasure of the word 'white' in the qualification of voters in this State; and the Constitution is now to be construed as if such word had never been there."

Although, as appears from the foregoing, the right of determining the conditions upon which the suffrage is granted lies exclusively within the discretion of the several States, subject only to the limitation of the Fifteenth Amendment, it may happen that state suffrage laws may be rendered invalid because in violation of certain other general limitations laid upon the States. Thus, for example, a disfranchising law, operating as to particular individuals as a bill of attainder, or as an *ex post facto* law, or as tending to destroy a republican form of government in the State, or as favoring the citizens of certain States above those of other States would probably be held void.

In Pope v. Williams[13] the court say: "It is unnecessary in this case to assert that under no conceivable state of facts could a state statute in regard to voting be regarded as an infringement

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[11] 193 U. S. 621; 24 Sup. Ct. Rep. 573; 48 L. ed. 817.

[12] 103 U. S. 370; 26 L. ed. 567.

[13] 193 U. S. 621; 24 Sup. Ct. Rep. 573; 48 L. ed. 817.

upon, or a discrimination against, the individual rights of a citizen of the United States removing into the State, and excluded from voting therein by state legislation. The question might arise if an exclusion from the privilege of voting were founded upon the particular State from which the person came, excluding from that privilege, for instance, a citizen of the United States coming from Georgia and allowing it to a citizen of the United States coming from New York or any other State. In such case an argument might be urged that, under the Fourteenth Amendment of the federal Constitution, the citizen from Georgia was, by the state statute, deprived of the equal protection of the laws. Other extreme cases might be suggested."

In this case the court held valid a state law requiring persons coming into the State to make a declaration of their intention of becoming citizens and residents of the State before they could claim the right to be registered as voters. The court say: "The statute, so far as it provides conditions precedent to the exercise of the elective franchise within the State, by persons coming therein to reside . . . is neither an unlawful discrimination against any one in the situation of the plaintiff in error nor does it deny to him the equal protection of the laws, nor is it repugnant to any fundamental or inalienable rights of citizens of the United States, or a violation of any implied guaranties of the federal Constitution."

§ 239. Though Determined by State Law, the Right to Vote for Representatives is a Federal Right.

A distinction is to be made between the right to vote for a Representative to Congress and the conditions upon which that right is granted. In the preceding section it has been shown that the right to vote is conditioned upon and determined by state law. But the right itself, as thus determined, is a federal right. That is to say, the right springs from the provision of the federal Constitution that Representatives shall be elected by those who have the right in each State to vote for the members of the most numerous branch of the state legislature. The Constitution thus

gives the right but accepts, as its own, the qualifications which the States severally see fit to establish with reference to the election of the most numerous branch of their several state legislatures. This is the doctrine laid down by the Supreme Court in *Ex parte* Yarbrough[14] in which they say: "But it is not correct to say that the right to vote for a member of Congress does not depend upon the Constitution of the United States. The office, if it be properly called an office, is created by that Constitution and by that alone. It also declares how it shall be filled, namely, by election. Its language is: '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 the electors of the most numerous branch of the state legislature.' (Article I, Section 2.) The States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election of members of Congress. Nor can they prescribe the qualifications for those *eo nomine*. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for members of Congress. It is not true, therefore, that members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right depend exclusively on the law of the State."[15]

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[14] 110 U. S. 651; 4 Sup. Ct. Rep. 152; 28 L. ed. 274.

[15] The opinion continues: "Counsel for petitioners, seizing upon the expression found in the opinion of the court in the case of Minor v. Happersett (21 Wall. 162; 22 L. ed. 627) that "the Constitution of the United States does not confer the right of suffrage upon any one," without reference to the connection in which it is used, insists that the voters in this sense do not owe their right to vote in any sense to that instrument. But the court was combatting the argument that this right was conferred on all citizens, and therefore upon women as well as men. In opposition to that idea, it was said the Constitution adopts as the qualification for voters of members of Congress that which prevails in the State where the voting is to be done; therefore, said the opinion, the right is not definitely conferred on any person or class of persons by the Constitution alone, because you have to look to the law of

In Wiley v. Sinkler,[16] an action brought in one of the federal circuit courts against the board of managers of a general state election to recover damages in the sum of twenty-five thousand dollars for wrongfully rejecting the plaintiff's vote for a member of the House of Representatives of the United States. The defendants demurred on the grounds that the court had no jurisdiction because it did not affirmatively appear on the face of the complaint that a federal question was involved, and because the verdict for an amount sufficient to give the court jurisdiction would be excessive. Upon error to the federal Supreme Court, that tribunal held that a federal right was directly involved for

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the State for the description of the class. But the court did not intend to say that when the class or the person is thus ascertained, his right to vote for a member of Congress was not fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors. The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the States. It is in the following language: Sec. 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. Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

"While it is quite true, as was said by this court in United States v. Reese (92 U. S. 214; 23 L. ed. 563) that this article gives no affirmative right to the colored men to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their Constitutions the words 'white men' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the state law, and a part of the state law, it annulled the discriminating word 'white,' and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any further constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women. Neal v. Delaware, 103 U. S. 370; 26 L. ed. 567. In such cases this Fifteenth Article of Amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right."

[16] 179 U. S. 58; 21 Sup. Ct. Rep. 17; 45 L. ed. 84.

"the right to vote for members of the Congress of the United States is not derived merely from the Constitution and laws of the State in which they are chosen, but has its foundation in the Constitution of the United States."[17] The amount of damages claimed, the court held, to be "peculiarly appropriate for the determination of a jury," and that no opinion of the court would "justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the circuit court."[18]

§ 240. Federal Control of Congressional Elections.

According to the Constitution, "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."

In this clause sufficient authority is given the Federal Government, should it so see fit, to assume entire and exclusive control of the elections of Senators and Representatives; to establish by acts of Congress the regulations governing the same, and to apply and enforce these regulations by federal officials and tribunals.

The United States government did not exercise any of the power thus given it until 1842 when, conceiving that the system employed in some States of electing all the members of the House of Representatives upon a general ticket (that is, one according to which each voter voted for as many Representatives as there were Representatives to be elected from his State) gave an undue power to the political party in the majority in the State, Congress enacted a law declaring that each member should be elected by a separate district composed of contiguous territory.[19] In 1866 an act was passed regulating the election of Senators by the state

[17] Citing *Ex parte* Yarbrough, 110 U. S. 651; 4 Sup. Ct. Rep. 152; 28 L. ed. 274.

[18] As to constitutionality of federal regulation and protection, and the federal character of the right to vote for Representatives to Congress, see *In re* Coy, 127 U. S. 731; 8 Sup. Ct. Rep. 1263; 32 L. ed. 274; Mason v. Missouri, 179 U. S. 328; 21 Sup. Ct. Rep. 125; 45 L. ed. 214; Swafford v. Templeton, 185 U. S. 487; 22 Sup. Ct. Rep. 783; 46 L. ed. 1005.

[19] 85 Stat. at L. 491.

legislatures. In 1873 Congress again acted, providing by law that the election of Representatives in all of the States should occur upon the same day, namely, the Tuesday following the first Monday in November, 1876, and on the same day of every second year thereafter.[20] In like manner Congress fixed the day for election of presidential electors.

By act of 1872, amended by that of February 14, 1899, it is provided that "all votes for Representatives in Congress must be by written or printed ballot or voting machine, the use of which has been duly authorized by the state law; and all votes received or recorded contrary to this section shall be of no effect."

Other federal laws prohibit interference in elections by federal troops, or army or navy officers;[21] and by the law of 1870 it is provided generally at all elections that no persons shall be prevented from voting because of race, color or previous condition of servitude.[22]

A general law enacted in 1870 (amended in 1871), entitled a law "To enforce the Rights of Citizens of the United States to Vote in the Several States of the Union," while not itself establishing positive regulations of its own, provided for the appointment of marshals and supervisors of elections to see to it that the state laws governing elections of Representatives to Congress were fairly and effectively executed.[23]

This right of oversight was, however, resisted by some of the States upon the ground that, though the United States might establish regulations of its own, appoint officials to execute them, and compel the officials of the State as well as private citizens to conform to them, it had no right or power to control state officials in the execution of the laws enacted by their own States, even

20 By act of March 3, 1875, this provision was made "not to apply to any State that has not yet changed its day of election and whose Constitution must be amended in order to effect a change in the day of election of state officers in said State." The elections in the States of Maine, Vermont and Oregon at present are held under this provision.

21 Rev. Stat., §§ 2003, 5530, 5528.

22 Rev. Stat, § 2004. This law was of course enacted under authority given by the Fifteenth Amendment.

23 This law was repealed February 8, 1894.

when those laws related to the election of members of the National Legislature.

This controversy reached a judicial settlement in the case of *Ex parte* Siebold,[24] decided in 1879. This suit arose out of the arrest of certain state-appointed judges of elections who were charged with interfering with and resisting supervisors and deputy marshals holding appointment from the Federal Government under the act of 1870. In behalf of the defendants it was maintained that the federal officials had been without constitutional authority, and, therefore, that the resistance offered them was not a legal offense.

The argument is stated by Justice Field in his dissenting opinion. He there takes the position that in granting to the Federal Government the authority to enact laws regulating the elections of Senators and Representatives, the intention of the framers of the Constitution had been simply to authorize the General Government to legislate in case the state government refused to take any steps whatever. He said: "The act was designed simply to give to the General Government the means of its preservation against a possible dissolution from the hostility of the States to the election of Representatives, or from their neglect to provide suitable means for holding such elections." As evidence that this was the intention, Madison's remarks in the Constitutional Convention and Hamilton's in *The Federalist* were cited. So long as the state laws are retained and administered by state officials, they cannot, argued Field, be properly regarded as federal laws, and Congress cannot provide for their federal supervision. "The act of Congress," he said, "asserts a power inconsistent with and destructive of the independence of the States. The right to control their own officers, to prescribe the duties they shall perform, without the supervision or interference of any other authority, and the penalties to which they shall be subjected for a violation of duty is essential to that independence." After quoting from Kentucky v. Dennison,[25] Field continues: "If it be incompetent

[24] 100 U. S. 371; 25 L. ed. 717.
[25] 24 How. 66; 16 L. ed. 717.

for the Federal Government to enforce by coercive measures the performance of a plain duty, imposed by a law of Congress upon the executive officer of a State [the rendition of fugitives from justice] it would seem to be equally incompetent for it to enforce by similar measures the performance of a duty imposed upon him by a law of a State. If Congress cannot impose upon a state officer, as such, the performance of any duty, it would seem logically to follow that it cannot subject him to punishment for the neglect of such duties as the State may impose. It cannot punish for the non-performance of a duty which it cannot prescribe. . . . Whenever, therefore, the Federal Government, instead of acting through its own officers, seeks to accomplish its purposes through the agency of officers of the States, it must accept the agency with the conditions upon which the officers are permitted to act. . . . When, therefore, the Federal Government desires to compel, by coercive measures and punitive sanctions, the performance of any duties devolved upon it by the Constitution, it must appoint its own officers and agents, upon whom its power can be exerted. . . . Whatever Congress may properly do touching the regulations [governing elections] one of two things must follow: either the altered or the new regulation remains a state law, or it becomes a law of Congress. If it remains a state law, it must, like other laws of the State, be enforced through its instrumentalities and agencies, and with the penalties which it may see fit to prescribe, and without the supervision or interference of federal officials. If, on the other hand, it becomes a law of Congress, it must be carried into execution by such officers and with such sanctions as Congress may designate. . . . With respect to the election of Representatives," Field concludes, "as long as Congress does not adopt regulations of its own and enforce them through federal officers, but permits the regulations of the States to remain, it must depend for a compliance with them upon the fidelity of the state officers and their responsibility to their own government. All the provisions of the law, therefore, authorizing supervisors and marshals to interfere with those officers in the discharge of their duties and providing for criminal prosecu-

tions against them in the federal courts, are, in my judgment, clearly in conflict with the Constitution."

The majority of the court, however, in their opinion say: "There is no declaration that the regulations shall be made either wholly by the state legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, the necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power 'to make or alter.'"

As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of their respective officers of election, and for their protection in the performance of those duties, the court say: "While the State will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have shown, Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the state officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, state or national.

Why not? . . . It is objected that Congress has no power to enforce state laws or punish state officers, especially has no power to punish them for violating the laws of their own State. As a general proposition this is, undoubtedly, true; but when, in the performance of their functions, state officers are called upon to fulfil duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfilment? Yet that is the case here. It is the duty of the States to elect Representatives to Congress. The due and fair election of these Representatives is of vital importance to the United States. The Government of the United States is no less concerned in the transaction than the state government is. It certainly is not obliged to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of elections, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed nature of the transaction, state and national. A violation of duty is an offense against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for Representatives owes no duty to the National Government which Congress can enforce; or that an officer who stuffs the ballot box cannot be made amenable to the United States. If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power. The objection that the laws and regulations, the violation of which is made punishable by the Acts of Congress, are state laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordi-

nary officers of election, but has been content to leave them as prescribed by state laws. It has only created additional sanctions for their performance, and provided means for supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The state laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfilment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations."

In *Ex parte* Clarke[26] and *Ex parte* Yarbrough[27] the doctrine declared in Siebold's case is reaffirmed, the court saying in the latter case, "If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the General Government, it must have the power to protect the elections from violence and corruption."

In the Yarbrough case the law of 1870 was held to support an indictment charging a conspiracy to intimidate a citizen of African descent from voting.[28] The parties interfered with some

[26] 100 U. S. 399; 25 L. ed. 715.

[27] 110 U. S. 651; 4 Sup. Ct. Rep. 152; 28 L. ed. 274.

[28] "Rev. Stat., § 2208. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States or because of his having so exercised the same, or if two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years; and shall, moreover, thereafter be ineligible to any office or place of honor, profit or trust created by the Constitution or laws of the United States."

"§ 5520. If two or more persons in any State or Territory conspire to prevent by force, intimidation or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy, in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of the Congress of the United States; or to injure any citizen in person or property on account of such advocacy; each of such persons shall be punished by a fine of not less than

others not officers of the United States, as in the Siebold case, but this difference, the court held, had no bearing upon the constitutional power of the Federal Government to punish those interfering.

"The power in either case arises out of the circumstances that the function in which the party is engaged or the right which he is about to exercise is dependent on the laws of the United States. In both cases it is the duty of that government to see that he may exercise this right freely and to protect him from violence while so doing or on account of so doing. This duty does not arise solely from the interest of the party concerned, but from the necessity of the government itself, that its service shall be free from the adverse influence of force and fraud practised on its agents, and that the votes by which its members of Congress and its President are elected shall be the free votes of the electors, and the officers thus chosen the free and uncorrupted choice of those who have the right to take part in that choice."

§ 241. Enforcement Clause of the Fifteenth Amendment.

By the second section of the Fifteenth Amendment Congress is given power to enact laws necessary for the enforcement of the prohibition expressed in the first section.

The federal authority thus granted, it is to be observed, has reference to all elections whether state or federal. In this respect it is thus much broader than that given in Section IV of Article I. In other respects, however, the power granted is much narrower, for it authorizes federal intervention only in cases where the right to vote has been denied or abridged on account of race, color, or previous condition of servitude. Thus in United States v. Reese[29] an act of Congress which made it a crime to hinder, delay or restrict any citizen from doing any act to qualify him to vote or from voting at any election, was held void because its operation was not confined to cases in which the interference was on account of race, color, or previous condition of servitude.

$500 nor more than $5,000, or by imprisonment, with or without hard labor, not less than six months nor more than six years, or by both such fine and imprisonment."

[29] 92 U. S. 214; 23 L. ed. 563.

In James v. Bowman[30] it was finally determined by the Supreme Court that the prohibition of the Fifteenth Amendment applied not to private but only to state action. Therefore the court held void an act of Congress which provided for the punishment of individuals who by threats, bribery or otherwise should prevent or intimidate others from exercising the right of suffrage as guaranteed by the Fifteenth Amendment.

After reviewing the manner in which the prohibitions of the Fifteenth Amendment had, by judicial construction, been held to relate to state action only, and the legislative power of Congress under the enforcement clause of that Amendment limited to the enactment of laws providing remedies against unconstitutional state action, the court in its opinion, say: "These authorities show that a statute [of Congress] which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress to prevent action by the State through some one or more of its official representatives." [31]

§ 242. Disfranchisement Clauses of the Southern States.

As has been before adverted to, most, if not all, of the Southern States in which the negro population is very considerable, have, by means of constitutional amendments or in constitutions newly adopted, secured in effect the almost total disfranchisement of their colored citizens. This, however, has been done, not by disfranchisement provisions expressly directed against the negroes, but by requiring all voters to be registered, and placing conditions upon registration which very few negroes are able to meet, or, at any rate, to satisfy the registration officers that they do meet them.

If the courts may freely go behind the terms of a constitutional clause to discover its intent, and to construe it by that intent, or if it may test its validity by its actual operation in practice, it would seem that a possible opportunity is afforded for

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[30] 190 U. S. 127; 23 Sup. Ct. Rep. 678; 47 L. ed. 979.

[31] In this case it is also held that "an indictment which charges no discrimination on account of race, color or previous condition of servitude, is likewise destitute of support by such Amendment."

holding void some at least of the disfranchising clauses of the constitutions of the Southern States. As yet, however, no case has been brought before the Supreme Court in which the court has consented to make this examination. As to the circumstances under which the court will consent to go back of the terms of a law, to determine its real intent and effect, two interesting cases are Yick Wo v. Hopkins[32] and Williams v. Mississippi.[33] In the former case the law or ordinance in question was held void in that it attempted to give to an administrative officer an arbitrary discretionary power, and also in that an actual arbitrary discriminating use of that authority was shown. In Williams v. Mississippi the court declined to hold void the state law in question, the law being upon its face not in violation of the equal protection clause of the Fourteenth Amendment, and no discrimination in fact being proved. In Yick Wo v. Hopkins the court say: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of justice is still within the prohibition of the Constitution." This doctrine, however, the court say in the Williams case is not applicable to the Constitution of Mississippi and its statutes. "They do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them."

In Giles v. Harris,[34] decided in 1903, a colored citizen of Alabama brought an action in a federal court against the registrars of his county to compel them to register him as a voter, claiming that the provisions of the Alabama Constitution upon which the registrars based their refusal to register him were in violation of the equal protection clause of the Fourteenth Amendment and of the prohibition of the Fifteenth Amendment. The Supreme Court, to which the case finally came for adjudication, refused the relief

[32] 118 U. S. 356; 6 Sup. Ct. Rep. 1064; 30 L. ed. 220.
[33] 170 U. S. 213; 18 Sup. Ct. Rep. 583; 42 L. ed. 1012.
[34] 189 U. S. 475; 23 Sup. Ct. Rep. 639; 47 L. ed. 909.

prayed, saying: "The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama Constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But, of course, he could not maintain a bill for a mere declaration in the air. He does not try to do so, but asks to be registered as a party qualified under the void instrument. If, then, we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists? If the sections of the Constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion that state constitutions were not left unmentioned in section 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is alleged to be the conspiracy of a State, although the State is not and could not be made a party to the bill. (Hans v. Louisiana, 134 U. S. 1; 10 Sup. Ct. Rep. 504; 33 L. ed. 842.) The circuit court has no constitutional power to control its action by any direct means. And if we leave the State out of consideration, the court has as little practical power to deal with the people of the State in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that State by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged,

by the people of a State and the State itself, must be given by them or by the legislative and political department of the government of the United States." [35]

In Giles v. Teasley,[36] which was an action brought to recover damages against the board of registrars for refusing to register the plaintiff as a qualified elector of the State. The Supreme Court of Alabama held that if the provisions of the state constitution were repugnant to the Fifteenth Amendment they were void and the board of registrars appointed thereunder had no legal existence and had no power to act and would not be liable for a refusal to register the plaintiff; while on the other hand, if the provisions were constitutional the registrars acted properly thereunder and their action was not reviewable by the courts. The Supreme Court of the United States held that the Alabama court had not decided any federal question adversely to the plaintiff, and, therefore, that the Supreme Court had no jurisdiction to review the decision of the state court.

In Jones v. Montague,[37] decided in 1904, the court declined to review the dismissal of a petition for a writ of prohibition to prevent the canvass of the votes cast at a congressional election (upon claim that the petitioners had, in violation of the federal Constitution, been denied registration) for the reason that the canvass had in fact been already made, and certificates of election issued to persons who had been recognized by the House of Representatives as members thereof. The court thus, in any event, not being able to provide any relief, the case became merely a moot one, and as such was dismissed.

In the light of the foregoing unsuccessful attempts to obtain from the Supreme Court relief from the operation of the disfranchising clauses of the state constitutions we have been considering, the question may properly be asked whether it is constitutionally possible for the Congress to provide by legislation means by which the constitutionality of these clauses may be fairly passed upon by the courts and the appropriate relief given. It would seem

[35] Justices Harlan, Brewer, and Brown dissented.

[36] 193 U. S. 146; 24 Sup. Ct. Rep. 359; 48 L. ed. 655.

[37] 194 U. S. 147; 24 Sup. Ct. Rep. 611; 48 L. ed. 913.

that much might be done. As regards congressional elections, Congress has, as we have seen, plenary powers of control, and could take complete charge of both the elections and the registration of the voters. In such case the federal registrars might refuse to register white voters under clauses of the state laws which they might hold to be in violation of the federal Constitution, and the voters so refused registration would have to seek redress in the federal courts and set up the validity of these state laws. As regards state elections Congress might enact laws giving to federal courts jurisdiction of actions brought against state registrations or election officials who, in violation of federal constitutional rights, have refused registration or opportunity to vote to legally-qualified persons.

Whether or not such legislation, the possibility of which is above suggested, would be wise is a question by itself. Whether, if wise, it could be efficiently enforced in communities where it would meet strong and united popular opposition is another question. "In the last analysis obedience not voluntarily given must, for the most part, be compelled by force applied through the instrumentality of criminal prosecutions. In the face of the united and passionate opposition of the white people of the South, such prosecutions in the past have failed to accomplish any permanently useful results. It is probable that convictions would be difficult to obtain even where the offense was flagrant and the guilt of the defendants clear." [38]

§ 243. The Power of the United States to Compel the Election by the States of Representatives to Congress, Senators and Presidential Electors.

It has at times been suggested that the States might, if they should so choose, destroy the Federal Government by a refusal to select Presidential Electors, Representatives to Congress and Senators. In the case of Representatives, should the States refuse to take action, their election could, as we have seen, be directly

[38] U. S. Dist. Atty. Rose, in *American Political Science Review*, I, 41, in an article entitled "Negro Suffrage: The Constitutional Point of View."

undertaken by the Federal Government. As regards Senators and Presidential Electors, however, the Federal Government could not itself undertake their election, and it is difficult to suggest legal means by which state action could be compelled. In Cohens v. Virginia,[39] Barbour, arguing in behalf of the position which had been taken by Virginia, declared: "Whenever the States shall be determined to destroy the Federal Government, they will not find it necessary to act, and to act in violation of the Constitution. They can quietly accomplish the purpose by not acting. Upon the state legislatures it depends to appoint the Senators and Presidential Electors, or to provide for their election. Let them merely not act in these particulars, the executive department and part of the legislature ceases to exist, and the Federal Government thus perishes by a sin of omission not of commission." To this position Webster alluded in his speech in reply to Calhoun, and endeavored to minimize its importance from the States' Rights standpoint. "I hear it often suggested," he said, "that the States, by refusing to appoint Senators and Electors, might bring this government to an end. Perhaps this is true; but the same may be said of the state governments themselves. Suppose the legislature of a State, having the power to appoint the governor and the judges, should omit that duty, would not the state government remain unorganized? No doubt, all elective governments may be broken up by a general abandonment on the part of those entrusted with political powers, of their appropriate duties." Moreover, as a matter of fact, as Webster went on to show, in a certain very important sense the federal Constitution relies, for the maintenance of the government which it establishes, upon the plighted faith not of the States, as States, but upon the several oaths of its individual citizens, in that all members of a state legislature are obliged, as a condition precedent to their taking their seats, to swear to support the federal Constitution, and from the obligation of this oath no state power can discharge them. Thus, says Webster, "no member of a state legislature can refuse to proceed at the proper time to elect Sena-

[39] 6 Wh. 264; 5 L. ed. 257.

tors to Congress, or to provide for the choice of Electors of President and Vice-President, any more than the members of this body [Senate] can refuse, when the appointed day arrives, to meet the members of the other House, to count the votes for those officers, and to ascertain who are chosen. In both cases, the duty binds, and with equal strength, the conscience of the individual member, and it is imposed on all by an oath in the very same words. Let it then never be said, Sir, that it is a matter of discretion with the States whether they will continue the government, or break it up by refusing to appoint Senators and Electors. They have no discretion in the matter. The members of the legislatures cannot avoid doing either, so often as the time arrives, without a direct violation of their duty and their oaths; such a violation as would break up any other government."

The correctness of the reasoning of Webster may be granted, and yet the fact remains that however great a moral obligation there may be upon the individual members of the several state governments to take such action as is necessary to equip the Federal Government with the officials necessary for its operation, there exists no legal means, by an issue of mandamus or otherwise, to compel such action when refused.

§ 244. Election of Senators.

The Constitution provides that Senators in the federal Congress shall be chosen by the legislatures of the several States, and that "the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but that Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

Not until 1866 did Congress exercise the control over the election of Senators thus given it. Prior to that date the Senate had recognized the validity of elections based on majority votes in joint conventions of the two houses of the state legislatures, where a concurrent choice of the two houses sitting separately was not obtained. It was held, however, in the case of James Harlan,

1857, that in such joint conventions a quorum of both houses must be present.

By the act of 1866 the entire matter was federally determined. The text of the law is given below.[40]

In the case of James B. Eustis, the Senate held that, under this law, an election made by a majority vote in a joint convention was

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40 Rev. Stat., §§ 14–19.

"§ 14. The legislature of each State which is chosen next preceding the expiration of the time for which any Senator was elected to represent such State in Congress shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a Senator in Congress.

§ 15. Such election shall be conducted in the following manner: Each house shall openly by *viva-voce* vote of each member present, name one person for Senator in Congress from such State, and the name of the person so voted for, who receives a majority of the whole number of votes cast in each house, shall be entered on the journal of that house by the clerk or secretary thereof; or if either house fails to give such majority to any person on that day, the fact shall be entered on the journal. At twelve o'clock meridian of the day following that on which proceedings are required to take place as aforesaid, the members of the two houses shall convene in joint assembly, and the journal of each house shall then be read, and if the same person has received a majority of all the votes in each house, he shall be declared duly elected Senator. But if the same person has not received a majority of the votes in each house, or if either house has failed to take proceedings as required by this section, the joint assembly shall then proceed to choose, by a *viva-voce* vote of each member present, a person for Senator, and the person who receives a majority of all the votes of the joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected. If no person receives such majority on the first day, the joint assembly shall meet at twelve o'clock meridian of each succeeding day during the session of the legislature, and shall take at least one vote, until a Senator is elected."

§ 16. Whenever on the meeting of the legislature of any State a vacancy exists in the representation of such State in the Senate, the legislature shall proceed, on the second Tuesday after meeting and organization, to elect a person to fill such vacancy, in the manner prescribed in the preceding section for the election of a Senator for a full term.

§ 17. Whenever during the session of the legislature of any State a vacancy occurs in the representation of such State in the Senate, similar proceedings to fill such vacancy shall be had on the second Tuesday after the legislature has organized and has notice of such vacancy.

§ 18. It shall be the duty of the executive of the State from which any Senator has been chosen, to certify his election, under the seal of the State, to the President of the Senate of the United States.

§ 19. The certificate mentioned in the preceding section shall be countersigned by the secretary of state of the State.

valid, even though there was not present a quorum of one of the houses.

When there is a dispute as to which of two contesting state bodies is the *de jure* legislature, the United States Senate, while having the power to exercise its own judgment will ordinarily recognize that body which is accepted as *de jure* by the other state authorities.

§ 245. Popular Election of Senators.

The constitutional provision that Senators shall in each State be elected by the legislature thereof has, in a number of instances, been practically evaded by state laws or party regulations providing either that the people shall by popular vote indicate their choice for Senators, such indication being in practice, if not legally, binding upon the members of the state legislature; or that each political party shall in a primary vote indicate its choice, which choice in effect binds the party's Representatives in the state legislature.[41]

§ 246. Vacancies in the Senate.

It is provided by the Constitution that if vacancies in the Senate "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."

There has been considerable difference of opinion as to the proper construction to be given to the term "happen" as employed in the foregoing constitutional clause. By some it has been argued that a vacancy "happens" whenever, for any reason whatever, there is a vacancy in the representation of a State in the Senate. By others, it is asserted, that where a state legislature has had the opportunity to elect a Senator and has failed to do so, it cannot be said that a vacancy has "happened" but that it has been present and brought about by the non-action of the state electoral body, and that that body has thus impliedly

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[41] See Haynes, *The Election of Senators*. Also Sen. Rep. 530, 54th Cong., 1st Sess.; and Sen. Doc. 406, 57th Cong., 1st Sess.

shown that it does not desire the vacancy to be filled. This was the position taken by the Senate in 1900 in the case of Senator Quay from Pennsylvania. The Committee on Privileges and Elections, in its report to the Senate recommending this action, after stating the facts, said: "It will thus be seen that the vacancy, which the Governor of Pennsylvania has here attempted to provide for by a temporary appointment, was one which was foreseen, one which was caused by the expiration of a prior term, one which occurred while the legislature of Pennsylvania was in session, and one which that legislature had an opportunity of filling before it occurred, in the *interim* between the date of the occurrence and the appointment of the Governor. Under these facts we think that the appointment is invalid. . . . After a vacancy in the office of United States Senator occurs or comes to pass, if the next legislature does not fill it, it continues to exist. It is the same vacancy, not a new one. Now the state executive is given power to make temporary appointments in case of a vacancy not as long as it continues or exists, but only until the next meeting of the legislature, which is then required to fill the vacancy. This clearly means that the paramount intent to have the legislature choose the Senators is to prevail, and that, whenever the legislature has had the opportunity to fill the vacancy, either before or after it occurs, the executive has no power to appoint."[42]

The senatorial practice has not been uniform in respect to executive appointments to fill vacancies, but the action in the Quay case has probably determined the doctrine for the future.

§ 247. Vacancies in the House of Representatives.

When vacancies happen in the representation from any State, it is provided that the executive authority thereof shall issue writs of election to fill such vacancies.

Vacancies are occasioned by death, by resignation, or by acceptance of a disqualifying office.[43]

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[42] Sen. Rpt. 153, 56th Cong., 1st Sess.

[43] Van Ness Case, Cl. & H. 122.

CHAPTER XXXIX.

THE PROCESS OF LEGISLATION AS CONSTITUTIONALLY DETERMINED.

§ 248. Constitutional Provisions.

To a certain extent the manner of conducting business in Congress, and the process of legislation are determined by the Constitution. It is provided that the Vice-President shall be the president of the Senate, but shall have no vote except in case of a tie. The Senate, however, is empowered to choose its other officers, including the president *pro tempore* to preside in the absence of the Vice-President or when he is exercising the office of President of the United States. The House is empowered to choose all of the officers, including its presiding officer, the Speaker.

It is required that Congress shall assemble at least once in every year, and that such meeting shall be on the first Monday in December, unless by law a different day is appointed.

A majority of each House is fixed as a quorum to do business, but a smaller number is competent to adjourn from day to day, and to compel the attendance of absent members in such manner and under such penalties as each House may provide.

Each House is authorized to determine the rules of its procedure, to punish its members for disorderly behavior, and, as we have seen, with the concurrence of two-thirds to expel a member.

Neither House may, without the consent of the other House, during a session of Congress adjourn for more than three days, nor to any other place than that in which the Houses are sitting.

Each House is required to keep a journal of its proceedings, and from time to time to publish the same, excepting such parts as may in their judgment require secrecy; and it is ordered that, at the desire of one-fifth of those present, the yeas and nays of members of either House on any question shall be entered on this journal.

The foregoing constitutional provisions impose duties upon and grant powers to the two Houses of Congress, the fulfilment and exercise of which are placed within the discretion of the Houses themselves. Very few questions arising under these clauses have, therefore, been, or could have been, brought before the courts. One important point has, however, been raised and deserves attention. This is discussed in the next section.

§ 249. Conclusiveness of the Records of Congressional Proceedings.

In a few instances the validity of laws purported to have been enacted by Congress has been questioned upon the ground that they have not, in fact, been enacted by that body in accordance with the requirements of the Constitution. This has necessitated the examination of the records of the proceedings of Congress and a determination of the evidential value to be given to these proceedings.

In Field v. Clark[1] it was contended by the appellants that an enrolled act in the custody of the Secretary of State, and appearing upon its face to be a law enacted by Congress, was a nullity, because, as was shown by the records of proceedings in Congress, and the reports of committees, including that of the committee on conference, a section of the bill as finally passed was not in the bill authenticated by the signatures of the presiding officers of the two Houses and signed by the President. The court, however, declared that the attestation of the Speaker of the House and of the President of the Senate, the signature of the President of the United States, and the deposit of a measure as a law in the public archives are to be taken as unimpeachable evidence that the constitutional requirements for legislation have been satisfied, and that the measure as thus certified to has received the approval of the legislative branch of the government. The opinion concludes: "We are of the opinion, for the reasons stated, that it is not competent for the appellants to show, from the journals of either House, from the reports of committees, or from other documents,

[1] 143 U. S. 649; 12 Sup. Ct. Rep. 495; 36 L. ed. 294.

printed by authority of Congress, that the enrolled bill, designated 'H. R. 9416,' as finally passed, contained a section that does not appear in the enrolled Act in the custody of the State Department."

In United States v. Ballin[2] the evidential value of records of congressional proceedings was again considered. The points involved and their decision sufficiently appear from the following quotation from the opinion: "Two questions only are presented: first, was the Act of May 9, 1890, legally passed and, second, what is the meaning? The first is the important question. The enrolled bill is found in the proper office, that of the Secretary of State, authenticated and approved in the customary and legal form. There is nothing on the face of it to suggest any invalidity. Is there anything in the facts disclosed by the journal of the House, as found by the general appraisers, which vitiates it? We are not unmindful of the general observations found in Gardner v. Barney (6 Wall. 499; 18 L. ed. 890) 'that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule.' And we have at the present term, in the case of Field v. Clark, had occasion to consider the subject of an appeal to the journal in a disputed matter of this nature. It is unnecessary to add anything here to that general discussion. The Constitution (Article I, Section 5) provides that 'each House shall keep a journal of its proceedings;' and that '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.' Assuming that by reason of this latter clause reference may be had to the journal, to see whether the yeas and nays were ordered, and if so what was the vote disclosed thereby; and assuming, though without

[2] 144 U. S. 1; 12 Sup. Ct. Rep. 507; 36 L. ed. 321.

deciding, that the facts which the Constitution requires to be placed on the journal may be appealed to on the question whether a law has been legally enacted, yet if reference may be had to such journal, it must be assumed to speak the truth. It cannot be that we can refer to the journal for the purpose of impeaching a statute properly authenticated and approved and then supplement and strengthen that impeachment by parol evidence that the facts stated on the journal are not true, or that other facts existed which, if stated on the journal, would give force to the impeachment." [3]

§ 250. Constitutional Force of Rules of the House and Senate.

In United States v. Ballin was also raised an interesting question as to the constitutional validity of a certain rule of procedure adopted by the House of Representatives. As to this the court, in its opinion, say: "The Constitution . . . provides, that 'each House may determine the rules of its proceedings.' It appears that, in pursuance of this authority, the House had, prior to that day, passed this as one of its rules: Rule XV. 'On the demand of any member, or at the suggestion of the Speaker, the names of members sufficient to make a quorum in the hall of the House who do not vote shall be noted by the clerk and recorded in the journal, and reported to the Speaker with the names of the persons voting, and be counted and announced in determining the presence of a quorum to do business.' (House Journal, 230, Feb. 14, 1890.) The action taken was in direct compliance with this rule. The question, therefore, is as to the validity of this rule, and not what methods the Speaker may of his own motion resort to

[3] With reference to laws of the States, the Supreme Court in Duncan v. McCall (139 U. S. 449; 11 Sup. Ct. Rep. 573; 35 L. ed. 219) say: "It is unnecessary to enter upon an examination of the rulings in the different States upon the question whether a statute duly authenticated, approved and enrolled can be impeached by resort to the journals of the legislature, or other evidence, for the purpose of establishing that it was not passed in the manner prescribed by the state Constitution. The decisions are numerous and the results reached fail of uniformity. The courts of the United States necessarily adopt the adjudication of the state courts on the subject" [citing cases].

for determining the presence of a quorum, nor what matters the Speaker or clerk of their own volition place upon the journal. Neither do the advantages or disadvantages, the wisdom or folly, of such a rule present any matters for judicial consideration. With the courts the question is only one of power. The Constitution empowers each House to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the House, and it is no impeachment of the rule to say that some other method would be better, more accurate, or even more just. It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the House, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal. The Constitution provides that 'a majority of each [House] shall constitute a quorum to do business.' In other words, when a majority are present, the House is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, and when that majority are present the power of the House arises. But how shall the presence of a majority be determined? The Constitution has prescribed no method of making this determination, and it is therefore within the competence of the House to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count as the sole test; or the count of the Speaker and the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact, and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation

of fundamental rights in any, it follows that the House may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question; and all that rule attempts to do is to prescribe a method for ascertaining the presence of a majority, and thus establishing the fact that the House is in a condition to transact business. As it appears from the journal, at the time this bill passed the House there was present a majority, a quorum, and the House was authorized to transact any and all business. It was in a condition to act on the bill if it desired. The other branch of the question is, whether, a quorum being present, the bill received a sufficient number of votes; and here the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body."

§ 251. Revenue Measures.

The Constitution provides that "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."

This provision has given rise to frequent controversies between the two Houses of Congress, but has but seldom been passed upon by the courts. No formal definition of a revenue measure has been given by the Supreme Court, but in Twin City National Bank v. Nebeker[4] the court, in effect, held that a bill, the primary purpose of which is not the raising of revenue, is not a measure that must originate in the House, even though, incidentally, a revenue will be derived by the United States from its execution.

The House has, upon a number of occasions,[5] refused to agree to or consider senatorial amendments to revenue measures upon the ground that the amendments have enlarged the scope or changed the character of the measure as originated in the House. The views held by the House and the Senate, respectively, regarding what, in specific instances, should properly be termed revenue measures and what proper amendments thereto, do not need to

[4] 167 U. S. 196; 17 Sup. Ct. Rep. 766; 42 L. ed. 134.

[5] See Hinds, *Precedents of the House of Representatives*, Chapter XLVII.

be stated in this treatise. They are set out at length in Mr. Hinds' treatise.[6] Especially the House has denied, and the Senate has insisted upon, its right to originate measures which repeal a law or portion of a law imposing taxes, duties, imposts or excises.

§ 252. Appropriation Acts.

It would seem that the Senate has full power to originate measures appropriating money from the federal treasury. This right has at times been denied by certain members of the House,[7] but the House has not itself formally adopted this negative view.

§ 253. Presidential Participation in Law Making.

The duties and powers of the President with reference to the enactment of laws are stated in Clause 2 of Section VII of Article I of the Constitution. This clause reads: 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."

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6 *Precedents of the House of Representatives.*

7 See especially the views of the minority in House Report No. 147, 46th Cong., 3d Sess.; also Hinds, § 1500.

In an earlier chapter it has been pointed out that the foregoing provisions have no application to amendments to the Constitution proposed by Congress to the States for their approval or disapproval.

§ 254. Resolutions.

In the Fifty-fourth Congress, 2d Session, the Senate Committee on the Judiciary was requested to report whether a certain resolution mentioned in a law should be in the form of a "joint resolution," and whether it was necessary that "concurrent resolutions" should be submitted to the President of the United States.

In its report the committee, while admitting that Clause 3, Section VII of Article I of the Constitution, literally applied, would make it necessary that every joint or concurrent resolution of Congress, whatever its substance or intent, would have to be submitted to the President for his approval, go on to say that the Constitution must look beyond the mere form of a resolution, to its subject-matter, and that the words "to which the concurrence of the Senate and House of Representatives may be necessary" are to be construed to relate only to matters of legislation to which the concurrent action of both Houses is by the Constitution made absolutely necessary; in short, only to legislative measures. Thus, in general, joint resolutions need to be sent to the President; concurrent resolutions do not. Of these latter the committee say: "For over a hundred years . . . they have never been so presented. They have uniformly been regarded by all the Departments of the Government as matters peculiarly within the province of Congress alone. They have never embraced legislative decisions proper, and hence have never been deemed to require executive approval. This practical construction of the Constitution, thus acquiesced in for a century, must be deemed the true construction with which no court will interfere."

§ 255. Parts of Bills May not Be Vetoed.

In those States whose Constitutions have not expressly given the executive the power to approve parts, and disapprove the

remainder of bills, it has been uniformly held that he has not the power. When, however, he has attempted to do so, the decisions have been in conflict as to whether such partial approval is no approval at all and amounts to a veto, or whether the entire measure is to be treated as approved, the disapproval of the parts being considered a nullity.[8]

§ 256. Riders.

The federal Executive has never attempted the exercise of, or claimed, the right to veto parts of measures submitted to him by Congress, and to approve the remainder. Because thus bound to accept or reject a bill as a whole, Congress has at times attempted to force the hand of the President by incorporating into a measure which it is known he will feel almost obligated to sign, provisions which it is believed he would disapprove if submitted to him as independent propositions. At times, however, these so-called "riders" have led to the veto of the entire bill. President Hayes returned without his approval several appropriation bills which contained legislation which was not agreeable to him. President Johnson returned the act of March 2, 1867 (Army Appropriation Bill), with his signature, but in a message of protest said: "These provisions are contained in the second section, which in certain cases virtually deprives the President of his constitutional functions as commander-in-chief of the army, and in the sixth section which denies to ten States of the Union their constitutional right to protect themselves in any emergency, by means of their own militia. These provisions are out of place in an appropriation act. I am compelled to defeat these necessary appropriations if I withhold my signature from the act."

§ 257. May Bills Be Signed by the President after the Adjournment of Congress?

As appears from the constitutional provision which has been quoted, a measure, if not returned to Congress within ten days,

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[8] See Art. by Jas. D. Barnett, "The Executive Control of the Legislature," *Am. Law Rev.*, XLI, 384.

Sundays excepted, becomes a law without the President's signature. If, however, Congress adjourns before the expiration of the ten days, the measure does not become a law and this is known as a pocket veto. The question has, however, been several times raised whether the President may not, if he desires the bill to become a law, sign after the adjournment of Congress.

In 1824 President Monroe by inadvertence failed to sign a bill before the adjournment of Congress and the question was discussed by his Cabinet as to his right to sign, notwithstanding the adjournment. Some difference of opinion being manifested, the President decided not to sign.

In 1863 President Lincoln signed a bill eight days after Congress had adjourned. At the next session of Congress the Judiciary Committee of the House, having been instructed to consider the constitutionality of this, unanimously reported that the bill was not a law. No action was taken by the House upon this report, but later substantially the same measure was re-enacted by Congress and signed by the President. The committee, in its report referred to, said: "The ten days' limitation . . . refers to the time during which Congress remains in session, and has no application after adjournment. Hence if the Executive can hold a bill ten days after adjournment and then approve it, he can as well hold it ten months before approval. This would render the laws of the country uncertain and could not have been intended by the framers of the Constitution. The spirit of the Constitution evidently requires the performance of every act necessary to the enactment and approval of laws to be perfect before the adjournment of Congress."[9]

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[9] In United States v. Weil (29 Ct. of Cl. 523) the Court of Claims held that the Supreme Court had impliedly upheld the earlier act, signed after adjournment, by passing upon claims arising under it. However, it is to be observed that the act was valid upon its face, and the point as to the date of its signature was not raised, and the court was not obliged to take judicial cognizance of it.

Professor Barnett in an article in the *Am. Law Rev.*, XLI, 230, entitled "The Executive Control of the Legislature," and Mr. Renick in an article in the same journal, XXXII, 208, entitled "The Power of the President to Sign Bills after the Adjournment of Congress," give a full discussion of this

§ 258. Signing of Bills During Recess of Congress.

In the Weil case the court argued that the President might sign during a recess of Congress even if he might not sign after its adjournment, and this proposition was upheld by the Supreme Court in La Abra Silver Mining Co. v. United States.[10]

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subject. They show that the decisions of the state courts with reference to the signing of state bills by the governor after legislative adjournment are in conflict, with the balance of authority, however, in support of the practice.

[10] 175 U. S. 423; 20 Sup. Ct. Rep. 168; 44 L. ed. 223. "The ground of this contention is that having met in regular session at the time appointed by law, the first Monday of December, 1892, and having on the 22d of that month (two days after the presentation of the bill to the President) by the joint action of the two Houses taken a recess to a named day, January 4, 1893, Congress was not actually sitting when the President, on the 28th day of December, 1892, by signing it, formally approved the act in question. The proposition, plainly stated, is that a bill passed by Congress and duly presented to the President does not become a law if his approval be given on a day when Congress is in recess. This implies that the constitutional power of the President to approve a bill so as to make it a law is absolutely suspended while Congress is in recess for a fixed time. It would follow from this that if both Houses of Congress by their joint or separate action were in recess from some Friday until the succeeding Monday, the President could not exercise that power on the intervening Saturday. Indeed, according to the argument of counsel the President could not effectively approve a bill on any day when one of the Houses, by its own separate action, was legally in recess for that day in order that necessary repairs be made in the room in which its sessions were being held. Yet many public acts and joint resolutions of great importance, together with many private acts, have been treated as valid and enforceable, which were approved by the President during the recesses of Congress covering the Christmas holidays. In the margin will be found a reference to some of the more recent of those statutes. Do the words of the Constitution, reasonably interpreted, sustain the views advanced for appellant? . . . It is said that the approval by the President of a bill passed by Congress is not strictly an executive function, but is legislative in its nature; and this view, it is argued, conclusively shows that his approval can legally occur only on a day when both Houses are actually sitting in the performance of legislative functions. Undoubtedly the President when approving bills passed by Congress may be said to participate in the enactment of laws which the Constitution requires him to execute. But that consideration does not determine the question before us. As the Constitution, while authorizing the President to perform certain functions of a limited number that are legislative in their general nature, does not restrict the exercise of those functions to the particular days on which the two Houses of Congress are actually sitting in the transaction of public business, the court cannot impose such a restriction upon the Executive.

It is made his duty by the Constitution to examine and act upon every bill passed by Congress. The time within which he must approve or disapprove a bill is prescribed. If he approve a bill, it is made his duty to sign it. The Constitution is silent as to the time of his signing, except that his approval of a bill duly presented to him — if the bill is to become a law merely by virtue of such approval — must be manifested by his signature within ten days, Sundays excepted, after the bill has been presented to him. It necessarily results that a bill when so signed becomes from that moment a law. But in order that his refusal or failure to act may not defeat the will of the people, as expressed by Congress, if a bill be not approved and be not returned to the House in which it originated within that time, it becomes a law in like manner as if it had been signed by him. We perceive nothing in these constitutional provisions making the approval of a bill by the President a nullity if such approval occurs while the two Houses of Congress are in recess for a named time. After the bill has been presented to the President, no further action is required by Congress in respect of that bill, unless it be disapproved by him and within the time prescribed by the Constitution be returned for reconsideration. It has properly been the practice of the President to inform Congress by message of his approval of bills, so that the fact may be recorded. But the essential thing to be done in order that a bill may become a law by the approval of the President is that it be signed within the prescribed time after being presented to him. That being done, and as soon as done, whether Congress is informed or not by the message from the President of the fact of his approval of it, the bill becomes a law, and is delivered to the Secretary of State as required by law. Much of the argument of counsel seems to rest upon the provision in relation to the final adjournment of Congress for the session whereby the President is prevented from returning, within the period prescribed by the Constitution, a bill that he disapproves and is unwilling to sign. But the Constitution places the approval and disapproval of bills, as to their becoming laws, upon a different basis. If the President does not approve a bill, he is required within a named time to send it back for consideration. But if by its action, after the presentation of a bill to the President during the time given him by the Constitution for an examination of its provisions and for approving it by his signature, Congress puts it out of his power to return it, not approved, within that time to the House in which it originated, then the bill falls, and does not become a law. Whether the President can sign a bill after the final adjournment of Congress for the session is a question not arising in this case, and has not been considered or decided by us. We adjudge — and touching this branch of the case adjudge nothing more — that the act of 1892 having been presented to the President while Congress was sitting, and having been signed by him when Congress was in recess for a specified time, but within ten days, Sundays excepted, after it was so presented to him, was effectively approved, and immediately became a law, unless its provisions are repugnant to the Constitution."

CHAPTER XL.

THE GENERAL POWERS OF CONGRESS.

§ 259. General Powers.

In the chapters which are immediately to follow will be taken up seriatim the legislative powers of Congress except in so far as these powers have been considered incidentally elsewhere in this treatise.

In addition to its legislative powers the Houses of Congress have certain other powers, judicial or executive in character, such as, for example, with reference to impeachments, to punishing their members for disorderly conduct, or their expulsion if necessary, the determination of contested elections, etc. Each House of Congress has also, it has been held, the power to obtain the information necessary for an intelligent exercise of its law-making power, and for this purpose to summon witnesses, and compel the production of documents, and to punish as contempt disobedience to orders thus given. These non-legislative duties are discussed elsewhere in this treatise, and especially in the chapters dealing with the Separation of Powers.

In some cases the powers granted by the Constitution are also made obligations, and, in general, it may be said that where legislation is necessary to make effective the provisions of the Constitution there is laid upon Congress the constitutional obligation to enact this legislation. At the same time it must be said that this obligation is an "imperfect" one in that no legal means exist for compelling its performance or providing for what shall be done in the event of its non-performance. Thus the Constitution provides that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Should Congress fail by legislation to establish these inferior judicial tribunals and to clothe them with jurisdiction, there would be no constitutional means of compelling it to do so. Indeed, by

failing as well to provide for the appointment and remuneration of Justices of the Supreme Court, Congress might render impossible the exercise of any federal judicial power whatever. Once established the Supreme Court, by the immediate effect of constitutional provision, has the original jurisdiction provided for in Section II of Article I, but it is unable to exercise any appellate jurisdiction by way of appeals either from the state or lower federal courts except as Congress has by statute provided.

This is but a single illustration of many that might be given of the manner in which the existence and administration of the federal government is absolutely dependent upon the action of Congress. For it may be laid down as a principle which admits of no exceptions that no legal means exist for compelling a legislative body to enact a given piece of legislation, or, indeed, to perform any of its functions.

Though, in many respects, not self-executory, and the obligations created by its provisions not enforceable by legal process, the federal Constitution is, it is to be repeated, in all other respects a law and directly enforceable as such in the courts of the land. It is, as has been already said, a law legislatively enacted by the state legislatures or the state conventions which, *quoad hoc* acting as a national law-making body, established it and ratified the amendments to it.

CHAPTER XLI.

FEDERAL POWERS OF TAXATION.

§ 260. Taxes Defined.

Taxes have been defined by an eminent authority to be "burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes."[1] The same author in another work observes that they "differ from forced contributions, loans, and benevolences of arbitrary and tyrannical periods in that they are levied by authority of law, and by some rule of proportion which is intended to insure uniformity of contribution, and a just apportionment of the burdens of government."[2]

The power to tax is ordinarily spoken of as an incident of sovereignty, or, as a sovereign power. A more exact statement is, however, that inasmuch as the raising of a certain amount of revenue is essential to the existence and operation of a public governing body, that body has, even in default of express constitutional grant, an implied power to compel those subject to its authority to contribute the financial means necessary for its support.

The levying of a tax, that is to say, the determination that a given tax shall be imposed, assessed and collected in a certain manner, is a legislative function. In Meriwether v. Garrett[3] the court say: "The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that

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[1] Cooley, *Constitutional Limitations*, 7th ed., p. 678.

[2] *Taxation*, Ch. I.

[3] 102 U. S. 472; 26 L. ed. 197.

department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced."

The determination of the precise amount of the tax which each individual or each piece of property shall pay according to the general rule legislatively laid down, is an administrative act. The determination whether the legislative rule is, constitutionally speaking, a proper one, and whether the administrative officials have properly followed it, as well as observed all the other requirements of law, is, of course, a judicial function. Thus the administrative official must in all cases, in his assessments both as to classes of persons and kinds of property, and as to rates of taxation, be guided by the law. Upon the other hand the legislature, when levying *ad valorem* taxes, has not the power itself, generally speaking, to declare the value of a specific piece, or of specific pieces of property for taxation purposes.[4] Where, however, taxes are laid not according to values of property, but upon persons, as a capitation tax, or upon occupations, as license fees and tolls, or upon documents, as stamp duties, or upon number or quantities of goods ("specific" taxes), the legislature fixes in each case the amount of the contribution.

§ 261. Taxation and Eminent Domain.

The levying and collection of taxes amounts, of course, to the taking of private property for a public use, but the taxing power is distinct from that of eminent domain. When property is taken in exercise of the latter power the Fifth Amendment requires that the Federal Government shall make just compensation. When, however, property is taken under the taxing power the

[4] This question will be further considered in connection with the subject of special assessments.

persons so taxed are held compensated by the special benefits received. Cooley observes that while taxation and eminent domain rest upon substantially the same basis in that they both imply the taking of private property for the public use, the compensation made is different in the two cases. "When taxation takes money for the public use, the taxpayer receives, or is supposed to receive, his just compensation in the protection which government affords to life, liberty, and property, in the public conveniences which it provides, and in the increase in the value of possessions which comes from use to which the government applies the money raised by the tax; and these benefits amply support the individual burden."[5]

§ 262. The Extent of the Taxing Power.

The power to tax is, from its very nature, one of the most important powers possessed by the State. Aside from express constitutional limitations, the power places every person, every occupation, and all forms of property subject to such pecuniary burdens as the legislature may see fit to impose, the manner of apportioning and enforcing the collections of the contributions levied being within the discretion of the law-making body which imposes them.

A classic statement of the extent of the taxing power is that of Marshall in McCulloch v. Maryland.[6] Marshall says: "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the govermnent may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a State, therefore, give to their government a right of taxing themselves and

[5] *Const. Lim.*, 7th ed., p. 715.
[6] 4 Wh. 316; 4 L. ed. 579.

their property, and as the exigencies of the government cannot be limited, they prescribe no limit to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representatives to guard themselves against its abuse." "The power to tax," Marshall concludes, "involves the power to destroy."

§ 263. The Use of the Taxing Power, not for Revenue but for Regulation.

By definition and by primary purpose a tax is a means whereby a public governing power seeks to secure a revenue. It has been generally held, however, that a tax may be levied avowedly and exclusively not for revenue but as a means for regulating a matter which is within the legislature's power to control. Thus in Veazie Bank v. Fenno[7] the power of Congress to levy a tax as a means of regulating the currency is upheld, Chief Justice Chase rendering the opinion. The court say: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin in the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile. Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration."

In the so-called Head Money Cases — Edye v. Robertson[8] — was contested an act of Congress of 1882 which, for the regulation of immigration, imposed upon the owners of steam or sailing vessels bringing passengers from a foreign port into the United

[7] 8 Wall. 533; 19 L. ed. 482.

[8] 112 U. S. 580; 5 Sup. Ct. Rep. 247; 28 L. ed. 798.

States, a tax of fifty cents for every such passenger. To this law it was objected that it was not levied to provide for the common defense and general welfare of the United States and that it was not uniform throughout the United States as required by the Constitution. After disposing of the question of uniformity, the court say: "But the true answer to all these questions is, that the power exercised in this instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce, of that branch of foreign commerce which is involved in immigration. The title of the Act, 'An Act to Regulate Immigration,' is well chosen. It describes as well as any short sentence can describe it, the real purpose and effect of the statute. Its provisions, from beginning to end, relate to the subject of immigration, and they are aptly designed to mitigate the evils inherent in the business of bringing foreigners to this country, as those evils affect both the immigrant and the people among whom he is suddenly brought and left to his own resources. It is true not much is said about protecting the ship owner. But he is the man who reaps the profit from the transaction, who has the means to protect himself and knows well how to do it, and whose obligations in the premises need the aid of the statute for their enforcement. The sum demanded of him is not, therefore, strictly speaking, a tax or duty within the meaning of the Constitution. The money thus raised, though paid into the Treasury, is appropriated in advance to the uses of this statute, and does not go to the general support of the government. It constitutes a fund raised from those who are engaged in the transportation of these passengers, and who make a profit out of it, for the temporary care of the passengers whom they bring among us and for the protection of the citizens among whom they are landed. If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within that power, the Act is not void because, within a loose and more extended sense than was used in the Constitution, it is called a tax."

In Packet Co. v. Keokuk,[9] and Packet Co. v. St. Louis[10] municipal ordinances imposing taxes for the use of wharves belonging to the cities, the amount of which was regulated by the tonnage of the vessels, were held not to be tonnage taxes within the meaning of the constitutional provision that "no State shall, without the consent of Congress, lay any duty of tonnage."

In these cases it is seen that the view taken is that though the laws levy a contribution to the State and thus result in a revenue to the State, they are not, correctly speaking, tax laws at all. Not being, in fact, tax laws, they are not subject to the constitutional limitations upon revenue measures as regards uniformity, apportionment, etc.

A different proposition from the one just discussed, is that a legislature, by a law framed as a tax measure, may, in effect, subject to regulation or even to destruction an enterprise over which it has no direct power of control. This point was squarely raised, with reference to the power of the Federal Government in the comparatively recent case of McCray v. United States,[11] decided in 1904.

In this case was questioned the constitutionality of a law of Congress levying a tax of ten cents a pound upon oleomargarine, artificially colored to look like butter. The contention was that this rate was so high as to be surely prohibitive of the manufacture and sale of such oleomargarine, and that, therefore, it was to be presumed that the motive of those enacting the law was not that a revenue should be secured for the Federal Government, but that the manufacture should be prevented; and this, it was argued, rendered the law an unconstitutional effort upon the part of Congress to regulate the manufacture of a commodity within the States. The Supreme Court, however, held that the law being upon its face a revenue measure, its ultimate effect or the motives of its enactors might not be judicially inquired into. The scope and effect of a law may be inquired into, the court say, to determine whether the act is, in general character, within the legislative power of Congress, but, that determined in the affirma-

[9] 95 U. S. 80; 24 L. ed. 377.

[10] 100 U. S. 423; 25 L. ed. 688.

[11] 195 U. S. 27; 24 Sup. Ct. Rep. 769; 49 L. ed. 78.

tive, the measure may not be invalidated because of consequences that may arise from its enforcement. "Undoubtedly," the opinion declares, "in determining whether a particular act is within the granted power, its scope and effect is to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. This being their necessary scope and operation, it follows that the acts are within the grant of power."

In Knowlton v. Moore[12] it was argued that inheritance taxes levied by Congress were unconstitutional in that the effect of their extreme enforcement would or might be to destroy the right to succession to property on the occasion of death, a subject beyond the control of Congress. As to this the court say: "This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy, which may be the consequence of taxation, is a reason only that the right to tax should be confined to subjects which may be lawfully embraced therein, even athough it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may, when further exercised, be destructive it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied."[13]

The McCray case is, it will be seen, in one respect the opposite of Veazie v. Fenno and the Head Money Cases, in that it holds the law in question to be a tax law and constitutional because it is such; whereas, in the earlier cases, the laws were justified as being, in real character, not revenue measures at all, and, therefore, not subject to the limitations constitutionally imposed upon Congress when enacting revenue laws.

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[12] 178 U. S. 41; 20 Sup. Ct. Rep. 747; 44 L. ed. 969.

[13] For a criticism of McCray v. United States, see *Michigan Law Review*, VI, 277, article entitled "May Congress Levy Money Exactions, Designated 'Taxes,' Solely for the Purpose of Destruction?"

§ 264. Federal Powers of Taxation.

By section VIII of Article I of the Constitution, Congress is given the general power "to lay and collect taxes, duties, imposts and excises."[14]

§ 265. "Tax," "Duty," "Impost," and "Excise" Defined.

Duty and impost have a broad signification which makes them practically synonymous with the general term tax; more generally, however, they are given a narrower meaning according to which they become equivalent to customs or customs dues, that is, to taxes levied upon goods imported from foreign countries.

An excise is an inland tax upon manufacture or retail sale of commodities. It is thus often termed a consumption tax. In the United States the excise taxes are more generally known as internal revenue duties.[15]

The general power to levy taxes being given, the Constitution enumerates duties, imposts and excises as the classes of taxes which are to be levied uniformly throughout the United States.[16]

§ 266. Limitations Upon the Federal Taxing Power.

The power of taxation given to the Federal Government is comprehensive and complete, embracing all possible subjects and modes of taxation except in so far as the Constitution, in other clauses, expressly limits the power, or except in so far as limitations may be implied from the general character of the American constitutional system. The express limitations are: (1) That "all duties, imposts, and excises shall be uniform throughout the United States;"[17] (2) that "no capitation or other direct tax

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[14] The clause continues: "to pay the debts and provide for the common defense and general welfare of the United States." That this is not a general grant of power to the United States to pay the debts and provide for the common defense and general welfare, but is merely a statement of the purpose for which the power to lay and collect taxes, etc., is granted. See *ante*, Section 22. *Cf.* Story, *Commentaries*, §§ 902–926; Tucker, *Constitution*, § 222; The License Tax Cases, 5 Wall. 462; 18 L. ed. 497; Knowlton v. Moore, 178 U. S. 41; 20 Sup. Ct. Rep. 747; 44 L. ed. 969.

[15] For a discussion of the various definitions of excise, duty and impost, see Pacific Insurance Co. v. Soule, 7 Wall. 433; 19 L. ed. 95.

[16] Hylton v. United States, 3 Dall. 171; 1 L. ed. 556.

[17] Art. I, Sec. VIII, Cl. 1.

shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken;[18] and (3) that "no tax or duty shall be laid on articles exported from any State.[19]

The implied limitations upon the federal taxing power are those that relate to the general, if not absolute, exemption of state governmental agencies from federal interference, whether by way of taxation or otherwise,[20] and those arising out of all the express limitations upon the Federal Government, which, of course, are as operative when the Federal Government is exercising its taxing powers, as it is when employing any of the other rights possessed by it. Thus, for example, the United States may not, under the guise of a tax, take property without due process of law.

§ 267. Due Process of Law and Taxation.

We have already seen that the taking of private property by the State in exercise of the taxing power is not brought within the constitutional requirement, applicable in the case of property taken under the power of eminent domain, that direct pecuniary compensation therefor shall be made. In like manner the taking of private property in the form of taxes, is not, in itself, a taking of property without due process of law.

In Davidson v. New Orleans[21] the Supreme Court after considering the meaning of the phrase "due process of law" as employed in the Fourteenth Amendment, and after adverting to the difficulty of stating affirmatively and completely the protection afforded by it, go on to say that they can at least state some of the cases which do not fall within its application, and among these, they say, "we lay down the following propositions as applicable to the case before us: that whenever by the laws of a State, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State or of some more limited portion of the

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18 Art. I, Sec. VII, Cl. 4.

19 Art. I, Sec. VIII, Cl. 5.

20 See Sections 57–60.

21 96 U. S. 97; 24 L. ed. 616

community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. It may violate some provision of the state Constitution against unequal taxation, but the Federal Government imposes no restraints on the States in that regard. . . . It is said that plaintiff's property had previously been assessed for the same purpose, and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the federal Constitution which forbids this, or which forbids unequal taxation by the States. If the act under which the former assessment was made is relied on as a contract against further assessments for the same purpose, we concur with the Supreme Court of Louisiana in being unable to discover such a contract."

From the foregoing it is apparent that the taking of private property in the form of taxes is not, in itself, a taking of private property without due process of law because no direct compensation is made for the property thus taken. Though the taking of the property in the form of a tax is thus not in itself a taking without due process, it may become such by reason of the purpose for which, or the manner in which, the tax is levied, assessed and collected.

Due process of law obliges the United States as well as the individual States, in the exercise of their taxing powers, to conform to the following rules:

1. That the tax shall be for a public purpose.

2. That it shall operate uniformly upon those subject to it.

3. That either the person or the property taxed shall be within the jurisdiction of the government levying the tax.

4. That in the assessment and collection of the tax certain guarantees against injustice to individuals, especially by way of notice and opportunity for a hearing, shall be provided.

§ 268. Taxation Must Be for a Public Purpose.

A tax being in the eyes of the law an enforced contribution upon persons or property to raise money for a public purpose, it follows that where this public purpose is absent, the contribution sought to be enforced cannot be justified as a tax but amounts to an attempt to take property without due process of law. The validity of this proposition is beyond dispute, but judicial records furnish comparatively few instances of tax levies being held void for this reason. This is due, in the first place, to the fact that not often do the laws expressly state the purpose for which a tax is levied; and, in the second place, where this purpose is stated, the courts will, in deference to the legislative judgment, construe the purpose to be a public one if it is possible to do so. In Broadhead v. City of Milwaukee[22] the Supreme Court of Wisconsin say: "To justify the court in arresting the proceedings and declaring the tax void the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable to every mind at the first blush."

A leading federal case with reference to this subject is that of Loan Association v. Topeka.[23] This case did not involve a law levying a tax, but one authorizing towns to issue bonds payable to private manufacturing companies to encourage and aid them in establishing their plants within their respective limits. It was held by the court that inasmuch as taxes would have to be levied for the payment of these bonds, the law in effect attempted to authorize the towns to levy taxes in aid and encouragement of a private enterprise and was, therefore, void. In its opinion the court say: "The subject of the aid voted to railroads by counties and towns has been brought to the attention of the courts of almost every State in the Union. It has been thoroughly discussed and is still the subject of discussion in those courts. It is quite true that a decided preponderance of authority is to be found in favor of the proposition that the legislatures of the States, unless restricted by some special provisions of their Con-

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[22] 19 Wis. 624.

[23] 20 Wall. 655; 22 L. ed. 455.

stitutions, may confer upon these municipal bodies the right to take stock in corporations created to build railroads, and to lend their credit to such corporations. Also to levy the necessary taxes on the inhabitants, and on property within their limits subject to general taxation, to enable them to pay the debts thus incurred. But very few of these courts have decided this without a division among the judges of which they were composed, while others have decided against the existence of the power altogether. State v. Wapello, 13 Iowa, 388; Hanson v. Vernon, 27 Ia. 28; Sharpless v. Mayor, 21 Pa. St. 147; Whiting v. Fond du Lac, 25 Wis. 188. In all these cases, however, the decision has turned upon the question whether the taxation by which this aid was afforded to the building of railroads was for a public purpose. Those who came to the conclusion that it was, held the laws for that purpose valid. Those who could not reach that conclusion held them void. In all the controversy this has been the turning point of the judgments of the courts. And it is safe to say that no court has held debts created in aid of railroad companies by counties as valid on any other ground than that the purpose for which the taxes were levied was a public use, a purpose or object which it was the right and the duty of state governments to assist by money raised from the people by taxation. The argument in opposition to this power has been, that railroads built by corporations organized mainly for the purpose of gain — the roads which they built being under their control, and not that of the State — were private and not public roads, and the tax assessed on the people went to swell the profits of individuals and not to the good of the State, or the benefit of the public, except in a remote and collateral way. On the other hand, it was said that roads, canals, bridges, navigable streams and all other highways had in all times been matter of public concern. That such channels of travel and of the carrying business had always been established, improved, regulated by the State, and that the railroad had not lost this character, because constructed by private enterprise, aggregated into a corporation. We are not prepared to say that the latter view of it is not the

true one, especially as there are other characteristics of a public nature conferred on these corporations, such as the power to obtain right of way, their subjection to the laws which govern common carriers, and the like, which seem to justify the proposition. Of the disastrous consequences which have followed its recognition by the courts and which were predicted when it was first established there can be no doubt. But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

The purpose for which local governing bodies may be authorized to lay and collect taxes must be not only public in character, but must, generally speaking, relate strictly to the locality concerned. In other words, a State may not compel a local body to levy a local tax for the benefit wholly or in considerable part of another community.[24]

[24] In Morford v. Unger (8 Iowa, 82) the Supreme Court of Iowa say: "Conceding to the General Assembly a wide range of discretion as to the objects of taxation, the kind of property to be made liable, and the extent of the territory within which the local tax may operate, there must be some limit to this legislative discretion, which, in the absence of any other criterion, is held to consist in the discrimination to be made between what may reasonably be deemed a just tax, one which a just compensation is provided in the objects to which it is to be devoted, and that which is palpably not a tax, but which, under the form of a tax, is the taking of private property for the public use without just compensation. If there be such a flagrant and palpable departure from equality in the burden imposed, if it be imposed for the benefit of others, and for purposes in which those objecting have no interest, and are, therefore, not bound to contribute, it is no matter

§ 269. Power of Congress to Appropriate Money.

A parity of reasoning would seem to provide the principle that inasmuch as taxes must be for a public purpose, an appropriation of the proceeds of taxes should be for a public purpose. Furthermore, it would seem to be not unreasonable to argue that the Federal Government being one of limited enumerated powers, Congress has not the authority to appropriate money except as required for the performance of the duties thus constitutionally laid upon it. In fact, however, the limitation that an appropriation should be for a public purpose has been without practical effect, as the courts have in no case attempted to hold invalid an appropriation by Congress on the ground that it has been for a purpose not public in character; and, as regards the restriction that appropriations shall be in aid of enterprises which the Federal Government is empowered to undertake, the doctrine has become an established one that Congress may appropriate money in aid of matters which the Federal Government is not constitutionally able to administer and regulate.

The authority of Congress to appropriate money for internal improvements within a State, although the Federal Government has not itself the authority to construct or operate such improvements, is discussed by President Monroe in connection with the veto in 1822 of the Cumberland Road Bill, and by President Jackson in his veto in 1830 of the Maysville Turnpike Bill.

In a paper entitled "Views of the President of the United States on the Subject of Internal Improvements," submitted in connection with his veto, President Monroe takes the position that though Congress has not the constitutional power to provide for the construction or operation under federal direction of roads, canals or other internal improvements within the States, it has the power to appropriate money in aid of such improvements.

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in what form the power is exercised — whether in the unequal levy of the tax, or in the regulation of the boundaries of local government, which results in subjecting the party unjustly to local taxes, it must be regarded as coming within the prohibition of the Constitution designed to protect private rights against aggression, however made, and whether under the color of recognized power or not." *Cf.* McGehee, *Due Process of Law*, 231.

The constitutional grant to Congress of the power "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," he very correctly argues does not operate to vest in the General Government any additional powers of control, but solely to authorize that government to raise revenues and to appropriate money to the purposes specified. These purposes, however, he maintains, are broad enough to enable Congress to appropriate money in aid of enterprises which the General Government cannot undertake or directly control.[25]

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[25] Monroe's argument is as follows: "A power to lay and collect taxes, duties, imposts and excises, subjects to the call of Congress every branch of the public revenue, internal and external, and the addition to pay the debts and provide for the common defense and general welfare gives the right of applying the money raised — that is, of appropriating it to the purposes specified according to a proper construction of the terms. Hence it follows that it is the first part of the clause only which gives a power which affects in any manner the power remaining to the States, as the power to raise money from the people, whether it be by taxes, duties, imposts, or excises, though concurrent in the States as to taxes and excises, must necessarily do. But the use or application of the money after it is raised is a power altogether of a different character. It imposes no burden on the people, nor can it act on them in a sense to take power from the States or in any sense in which power can be controverted, or become a question between the two Governments. The application of money raised under a lawful power is a right or grant which may be abused. It may be applied partially among the States, or to improper purposes in our foreign and domestic concerns; but still it is a power not felt in the sense of other power, since the only complaint which any State can make of such partiality and abuse is that some other State or States have obtained greater benefit from the application than by a just rule of apportionment they were entitled to. The right of appropriation is therefore from its nature secondary and incidental to the right of raising money, and it was proper to place it in the same grant and same clause with that right. By finding them, then, in that order we see a new proof of the sense in which the grant was made, corresponding with the view herein taken of it."

Having explained that the grant is one of simply a power to appropriate, Monroe then considers the extent to which this power may be carried. He writes: "It is contended on the one side that as the National Government is a government of limited powers it has no right to expend money except in the performance of acts authorized by other specific grants according to a strict construction of their powers; that this grant in neither of its branches gives to Congress discretionary power of any kind, but is a mere instrument in its hands to carry into effect the powers contained in the other grants.

In President Jackson's veto of the Maysville Road Bill practically the same constitutional position as that taken by Monroe is assumed; the appropriation in this case, however, is vetoed upon the ground that the improvement in question was, in the

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To this construction I was inclined in the more early stage of our Government; but on further reflection and observation my mind has undergone a change, for reasons which I will frankly unfold. The grant consists, as heretofore observed, of a twofold power — the first to raise, the second to appropriate, the public money — and the terms used in both instances are general and unqualified. Each branch was obviously drawn with a view to the other, and the import of each tends to illustrate that of the other. The grant to raise money gives a power over every subject from which revenue may be drawn, and is made in the same manner with the grants to declare war, to raise and support armies and a navy, to regulate commerce, to establish post-offices and post-roads, and with all the other specific grants to the General Government. In the discharge of the powers contained in any of these grants there is no other check than that which is to be found in the great principles of our system, the responsibility of the representative to his constituents. If war, for example, is necessary, and Congress declares it for good cause, their constituents will support them in it. A like support will be given them for the faithful discharge of their duties under any and every other power vested in the United States. The power to raise money by taxes, duties, imposts, and excises is alike unqualified, nor do I see any check on the exercise of it other than that which applies to the other powers above recited, the responsibility of the representative to his constituents. Congress knows the extent of the public engagements and the sums necessary to meet them; they know how much may be derived from each branch of revenue without pressing it too far; and, paying due regard to the interests of the people, they likewise know which branch ought to be resorted to in the first instance. From the commencement of the Government two branches of this power, duties and imposts, have been in constant operation, the revenue from which has supported the Government in its various branches and met its other ordinary engagements. In great emergencies the other two, taxes and excises, have likewise been resorted to, and neither was the right nor the policy called in question. If we look to the second branch of this power, that which authorizes the appropriation of the money thus raised, we find that it is not less general and unqualified than the power to raise it. More comprehensive terms than to "pay the debts and provide for the common defense and general welfare" could not have been used. So intimately connected with and dependent on each other are these two branches of power that had either been limited the limitation would have had the like effect on the other. Had the power to raise money been conditional or restricted to special purposes, the appropriation must have corresponded with it, for none but the money raised could be appropriated, nor could it be appropriated to other purposes than those which were permitted. On the other hand, if the right of appropriation had been restricted to certain purposes, it would be useless and

President's opinion, of a purely local character, or, as he says, "if it can be considered national, no further distinction between the appropriate duties of the General and State Governments need be attempted, for there can be no local interest that may not with equal propriety be denominated national."

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improper to raise more than would be adequate to those purposes. It may fairly be inferred these restraints or checks have been carefully and intentionally avoided. The power in each branch is alike broad and unqualified, and each is drawn with peculiar fitness to the other, the latter requiring terms of great extent and force to accommodate the former, which have been adopted, and both placed in the same cause and sentence. Can it be presumed that all these circumstances were so nicely adjusted by mere accident? Is it not more just to conclude that they were the result of due deliberation and design? Had it been intended that Congress should be restricted in the appropriation of the public money to such expenditures as were authorized by a rigid construction of the other specific grants, how easy would it have been to have provided for it by a declaration to that effect. The omission of such declaration is therefore an additional proof that it was not intended that the grant should be so construed."

"If, then," Monroe continues, "the right to raise and appropriate the public money is not restricted to the expenditures under the other specific grants according to a strict construction of their powers, respectively, is there no limitation to it? Have Congress a right to raise and appropriate to any and to every purpose according to their will and pleasure? They certainly have not. The Government of the United States is a limited Government, instigated for great national purposes, and for those only. Other interests are committed to the States, whose duty it is to provide for them. Each government should look to the great and essential purposes for which it was instituted and confine itself to those purposes. A state government will rarely if ever apply money to national purposes without making it a charge to the nation. The people of the State would not permit it. Nor will Congress be apt to apply money in aid of the state administrations for purposes strictly local in which the nation at large has no interest, although the State should desire it. The people of the other States would condemn it. They would declare that Congress had no right to tax them for such a purpose, and dismiss at the next election such of their representatives as had voted for the measure, especially if it would be severely felt. I do not think that in offices of this kind there is much danger of the two governments mistaking their interests or their duties. I rather expect that they would soon have a clear and distinct understanding of them and move on in great harmony. Good roads and canals will promote many very important national purposes. They will facilitate the operations of war, the movements of troops, the transportation of cannon, of provisions, and every warlike store, much to our advantage and to the disadvantage of the enemy in time of war. Good roads will facilitate the transportation of the mail, and thereby promote the purposes of

The extent of the appropriating power of Congress is illustrated in the case of United States v. Realty Co.,[26] in which was upheld the power of Congress to appropriate money for the payment of certain claims which the Federal Government was not legally but only morally obligated to satisfy. The court said: "We are of opinion that the parties in these actions . . . acquired claims upon the Government of an equitable, moral or honorary nature . . . Congress has power to lay and collect taxes, etc., 'to pay the debts' of the United States. Having the power to raise money for that purpose, it of course follows that it has power when the money is raised to appropriate it to the same object. . . . The term 'debts' includes those debts or claims which rest upon a merely equitable or honorary obligation, and which would not be recoverable in a court of law if existing against an individual. . . . Payments to individuals, not of right or of a merely legal claim, but payments in the nature of gratuity, yet having some feature of moral obligation to support them, have been made by the government by virtue of acts of Congress, appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of

commerce and political intelligence among the people. They will by being properly directed to these objects enhance the value of our vacant lands, a treasure of vast resource to the nation. To the appropriation of the public money to improvements having these objects in view and carried to a certain extent I do not see any well-founded constitutional objection. . . . The right of appropriation is nothing more than a right to apply the public money to this or to that purpose. It has no incidental power, nor does it draw after it any consequences of that kind. All that Congress could do under it in the case of internal improvements would be to appropriate the money necessary to make them. For every act requiring legislative sanction or support the state authority must be relied on. The condemnation of the land, if the proprietors should refuse to sell it, the establishment of turnpikes and tolls, and the protection of the work when finished must be done by the State. To these purposes the powers of the General Government are believed to be utterly incompetent. . . . The substance of what has been urged on this subject may be expressed in a few words. My idea is that Congress have an unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate it to purposes of common defense and of general, not local, national, not state, benefit."

[26] 163 U. S. 427; 16 Sup. Ct. Rep. 1120; 41 L. ed. 215.

pure charity.[27] . . . . In regard to the question whether the facts existing in any given case bring it within the description of that class of claims which Congress can and ought to recognize as founded upon equitable and moral considerations and grounded upon principles of right and justice, we think that generally such question must in its nature be one for Congress to decide for itself. Its decision recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the Government."

§ 270. Equality in Taxation.

The Fourteenth Amendment requires upon the part of the States that they shall not deny to any persons within their several jurisdictions the equal protection of the laws, and this obligation is, of course, operative in the field of taxation. No similarly phrased obligation is laid upon the Federal Government, but the provision of the Fifth Amendment forbidding the taking of property without due process of law imposes an obligation broad enough to cover all or nearly all cases of unequal protection of the laws. And, furthermore, as to taxes it is specifically provided that they shall be uniform throughout the United States.[28]

Whether or not the equal protection of the laws is included within the general protection against the taking of life, liberty, or property without due process of law, the provision for equal protection does certainly mark off a specific right or a group of rights within the general field of rights against the violation of which by the States he is guaranteed by the Constitution. That this protection applies within the field of taxation is well established. A case clearly stating this doctrine is that of County of Santa Clara v. S. Pacific R. R. Co.,[28a] in which Justice Field rendered the opinion. "With the adoption of the Fourteenth

[27] Senator Daniel in a speech on the Blair Educational Bill enumerated some forty instances in which Congress had appropriated money to private individuals. Cong. Record, XXI, Pt. 3, p. 2295, 1890.

[28] The Insular Cases held that this clause has no application to unincorporated Territories.

[28a] 18 Fed. Rep. 385.

Amendment," Field declared, "the power of the States to oppress any one under any pretense or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights — in his right to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be accessible to him, but that no one shall be subject to any burdens or charges than such as are imposed upon all others under like circumstances. This protection attends every one everywhere, whatever be his position in society or his association with others, either for profit, improvement or pleasure. . . . No State in such is the sovereign command of the whole people of the United States — no State shall touch the life, the liberty, or the property of any person, however humble his lot or exalted his station, without due process of law, and no State, even with due process of law, shall deny to any one within its jurisdiction the equal protection of the law. Unequal taxation, so far as it can be prevented is therefore, with other unequal burdens, prohibited by the Amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. Absolute equality may not be attainable, but gross and designed departures from it will necessarily bring the legislation authorizing it within the prohibition."

As has been already noted, the determination as to when a tax shall be levied and upon what persons and property, and by what rule it is to be assessed and by what means collected is a legislative function. However, in levying an *ad valorem* tax, the legislature may not determine the assessment value of particular pieces of property. So also it follows that while the legislature may, within

its discretion, determine freely what occupations, or classes of property or persons are to be taxed, it may not select out from the general mass of property, or general citizen body, particular pieces of property or particular individuals to bear the burden of the tax. When, therefore, a tax is laid upon certain classes of property or of persons, there must be some reasonable basis for the classifications adopted. By this is meant that there must be some substantial reason why the units, whether of property or of individuals, should be treated as distinct groups.

In Bell's Gap Railroad Co. v. Pennsylvania[29] was involved the validity of a state law which levied a certain tax on all moneyed securities according to their actual value, except that as to all bonds and other securities issued by corporations their nominal or par value should be the basis. It being argued that this violated the requirement of the Fourteenth Amendment as to the equal protection of the laws, the court 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, that no State shall deny to any person within its jurisdiction the equal protection of the laws, 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

29 134 U. S. 232; 10 Sup. Ct. Rep. 533; 33 L. ed. 892.

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 cases. 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 States to adopt an iron rule of taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement and useful industries, and the discouragement of intemperance and vice, and which every State, in one form or another, deems it expedient to adopt."

In American Sugar Refining Co. v. Louisiana[30] it was held that the equal protection of the laws was not denied by a license tax imposed upon manufacturers of sugar, but exempting from its operation those who refined the products of their own plantations. The opinion declares: "The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend on differences of color, race, nativity, religious opinions, political affiliation, or other consideration having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes."

§ 271. Uniformity in Taxation.

Granting the right of the legislature to classify persons and property for purposes of taxation, the requirements of due process of law and of the additional provision found in the federal Con-

30 179 U. S. 89; 21 Sup. Ct. Rep. 43; 45 L. ed. 102.

stitution and in almost all if not in all of the state constitutions that all laws shall be uniform, make it necessary that the assessment of all persons and property within the class or district selected for taxation shall be according to a uniform rule. Cooley states the principle as follows: "As to all taxation apportioned upon property, there must be taxing districts and within these districts the rule of absolute uniformity must be applicable. A state tax must be apportioned through the State, a county tax through the county, a city tax through the city; while in cases of local improvements, benefiting in a special and peculiar manner some portion of the State or of a county or city, it is competent to arrange a special taxing district within which the expense shall be apportioned."[31] And again: "The rule of apportionment must be uniform throughout the taxing district, applicable to all alike, but the legislatures have no power to arrange taxing districts arbitrarily, and without reference to the great fundamental principles of taxation that the burden must be borne by those upon whom it justly rests. The Kentucky and Iowa decisions hold that, in a case where they have manifestly and unmistakably done so, the courts may interfere and restrain the imposition of municipal burdens on property which does not properly belong within the municipal taxing district at all."[32]

All that the rule of uniformity requires is this, that within the classes or districts taxed the law shall operate according to a uniform rule. Thus, for example, it has been generally held that a city levying a general tax may not discriminate between different wards or sections, for all property within a taxing district must be taxed alike.[33]

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[31] Cooley, *Const. Lim.*, 7th ed., 711.

[32] *Const. Lim.*, 7th ed., 724. The cases referred to are Morford v Unger, 8 Iowa, 82; City of Covington v. Southgate, 15 B. Monr. 491; Arbegust v. Louisville, 2 Bush, 271; Swift v. Newport, 7 Bush, 37.

[33] This does not hold true where, by special contract made at the time a rural district is incorporated into the city, special treatment with reference to taxation has been promised. The exemption of certain pieces of property from taxation where this exemption has been for some public purpose or in return for consideration received, does not violate this principle.

§ 272. What Constitutes Uniformity Throughout the United States?

In the Head Money Cases, speaking with reference to the requirement of the federal Constitution that all duties, imposts, and excises shall be uniform throughout the United States, the court say: "The uniformity here prescribed has reference to the various localities in which the tax is intended to operate. 'It shall be uniform throughout the United States.' Is the tax on tobacco void, because in many of the States no tobacco is raised, or manufactured? Is the tax on distilled spirits void, because a few States pay three-fourths of the revenue arising from it? The tax is uniform when it operates with the same force and effect in every place where the subject is to be found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, is uniform and operates precisely alike in every port of the United States where such passengers can be landed. It is said that the statute violates the rule of uniformity and the provisions of the Constitution, that 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another,' because it does not apply to passengers arriving in this country by railroad or by other inland mode of conveyance. But the law applies to all ports alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports of the United States. It may be added that the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation. Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. (State Railroad Tax Cases, 92 U. S. 575; 23 L. ed. 663.) Here there is substantial uniformity within the meaning and purpose of the Constitution."

The principles of uniformity and of reasonable classification for purposes of taxation have been especially examined by the courts with reference to inheritance tax laws.

§ 273. State Inheritance Taxes.

So-called inheritance taxes, that is to say, taxes collected from persons receiving property by inheritance, are levied in many of the civilized States of the world. In the United States they have several times been imposed by federal law, and at present (1910) they are to be found in about thirty-five States. In many cases these taxes have been progressive, the rate being higher for larger than for smaller bequests, and collateral heirs often taxed more heavily than direct descendants. In most cases small inheritances have been wholly exempted from the operation of the tax, as have been also bequests and inheritances of real estate. In some cases state inheritance tax laws have been held questioned because containing some special obnoxious provisions, but the ground upon which they have usually been attacked has been that they have violated the requirements of equality and uniformity, because of their progressive features and because of the exemptions referred to above. In general, however, the laws have been upheld.[34]

[34] The constitutionality of laws exempting small estates is asserted in State v. Clark, 30 Wash. 439; State v. Alston, 94 Tenn. 674; *In re* Wilmerding, 117 Cal. 281; Estate of Stanford, 126 Cal. 112; State v. Hamlin, 86 Me. 495; Minot v. Winthrop, 162 Mass. 113; Crocker v. Shaw, 174 Mass. 266; Gelsthorpe v. Furnell, 20 Mont. 299; High v. Coyne, 93 Fed. Rep. 450; Morris' Estate, 50 S. E. Rep. 682; Union Trust Co. v. Wayne, 125 Mich. 487; Ferry v. Campbell, 110 Iowa, 290; Hickok's Estate (Vt.), 62 Atl. Rep. 724; Frothingham v. Shaw, 175 Mass. 59; Appeal of Nettleton, 56 Atl. Rep. 565; Estate of Magnes, 32 Colo. 527; Pullen v. Commissioners of Wake Co., 66 N. C. 361; Black v. State, 113 Wis. 205.

The constitutionality of a law discriminating between lineal and collateral descendants and between relatives and strangers in blood has been sustained in the following cases: State v. Alston, 94 Tenn. 674; State v. Henderson, 160 Mo. 190; State v. Clark, 30 Wash. 439; Hagerty v. State, 55 Ohio, 613; Nunnemacher v. State, 129 Wis. 190; *In re* McPherson, 104 N. Y. 306; State v. Hamlin, 86 Me. 495; Minot v. Winthrop, 162 Mass. 113; Billings v. State, 189 Ill. 472; State v. Dalrymple, 70 Md. 294; Tyson v. State, 28 Md. 577; Eyre v. Jacob, 14 Gratt. 422; Gelsthorpe v. Furnell, 20 Mont. 299; Wallace v. Myers, 38 Fed. Rep. 184; Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487; Frothingham v. Shaw, 175 Mass. 59; Appeal of Nettleton, 56 Atl. Rep. 565; Estate of Magnes, 32 Colo. 527; Pullen v. Commissioners of Wake Co., 66 N. C. 361; Estate of Campbell, 143 Cal. 623; Thompson v. Kidder (N. H.), 65 Atl. Rep. 392.

In many cases the classifications of the state laws have been upheld as reasonable in themselves, but fundamentally the principle upon which the validity of the laws has been sustained is that an inheritance tax is not a tax upon the property inherited but upon the right to inherit; and that, inasmuch as this is a right which exists only by statute, it is one that may be regulated at the will of the legislature which creates it.[35]

A leading case in the federal courts as to the constitutionality of a state inheritance tax law as tested by the requirements of the Fourteenth Amendment, is that of Magoun v. Illinois Trust and Savings Bank.[36]

In this case the doctrine was reaffirmed that an inheritance tax is not one on property but on the right to take property by devise or descent, and that this, being a right of legislative creation, the States may attach conditions thereunto. Hence, it was held, that the States may, in taxing this privilege, discriminate between relatives and between relatives and strangers without violating state constitutional provisions requiring uniformity and equality of taxation, or the provision of the Fourteenth Amendment prohibiting the denial of the equal protection of the laws. The provision of the Fourteenth Amendment, the court say, does not require "exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances."

In Billings v. Illinois[37] the court say: "It is insisted that the classification sustained in the Magoun Case 'related solely to the graduated feature of the tax.' In the case at bar, it is said, the question is whether or not the Illinois legislature can discrim-

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The constitutionality of a law laying the tax according to a progressively increasing rate has been upheld in the following cases: Kochersperger v. Drake, 167 Ill. 122; Nunnemacher v. State, 129 Wis. 190; State *ex rel.* Foot v. Bazille, 97 Minn. 11; State v. Clark, 30 Wash. 439; Estate of Magnes, 32 Colo. 527; Morris' Estate, 138 N. C. 259; State v. Vinsonhaler (Nebr.), 105 N. W. Rep. 472.

The foregoing references are from a pamphlet on inheritance tax laws issued by the United States Government (U. S. Govt. Printing Office, 1908).

[35] For a full discussion of the constitutionality of inheritance tax laws, see Nunnemacher v. State, 129 Wis. 190, decided in 1906.

[36] 170 U. S. 283; 18 Sup. Ct. Rep. 594; 42 L. ed. 1037.

[37] 188 U. S. 97; 23 Sup. Ct. Rep. 272; 47 L. ed. 400.

inate against constituents of a certain class, and apply different rules for the taxation of its members. Life tenants constitute but a single class, and the incidents of such an estate, the source thereof, the extent, the dominion over and the quality of interest in the tenant, is the same irrespective of the ultimate vesting of the remainder. The tax is not upon the property, but is upon the person succeeding to the property. Undoubtedly, life tenants, regarded simply as persons, may be in legal contemplation the same; estates for life, regarded simply as estates with their attributes also in legal contemplation, may be said to be the same, but that is not all to be considered, nor is it determinative. We must regard the power of the state over testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution. It is upon this power that inheritance tax laws are based, and we said, in the Magoun Case, that the power could be exercised by distinguishing between the lineal and collateral relatives of a testator. There the amount of tax depended upon him who immediately received; here the existence of the tax depends upon him who ultimately receives. That can make no difference with the power of the State. No discrimination being exercised in the creation of the class, equality is observed. Crossing the lines of the classes created by the statute, discriminations may be exhibited, but within the classes there is equality." [38]

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[38] See also Campbell v. California, 200 U. S. 87; 26 Sup. Ct. Rep. 182; 50 L. ed. 382.

Mr. Judson in his valuable treatise, summing up the question of classification for taxing purposes, says: "Classification for taxation is not necessarily based upon any essential difference in the nature or condition of the various subjects. It may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods so as to produce uniform results, or it may be based upon just and well grounded considerations of public policy." Mr. Judson adds, however, that "while classification may thus be based on differences in the nature or condition of the subjects of taxation, or their want of adaptability to the same methods of taxation, it must rest on some other reason than that of mere ownership." *On Taxation*, §§ 454, 455.

§ 274. Federal Inheritance Taxes.

Upon several occasions inheritance taxes have been resorted to for revenue by the Federal Government. By the stamp act of July 6, 1797, a duty was levied on receipts for legacies and shares of personal estate. So also a legacy tax on the devolution of personal property and stamp taxes on probates of wills and letters of administration were imposed by the war revenue acts of July 1, 1862, and June 30, 1864, the latter act providing for a succession tax on real estate. In the income tax provisions of the act of August 27, 1894, incomes were defined to include "money and the value of all personal property acquired by gift or inheritance."[39] Again in the war revenue act of June, 1898, taxes were imposed upon legacies and distributive shares of personal property.

The constitutionality of the inheritance tax provisions of this last law of 1898 was upheld in Knowlton v. Moore.[40] In this case it was argued that the tax was void, first, because it was a direct tax and not apportioned among the States according to their respective populations; second, because it was not, in its operation, "uniform throughout the United States;" and third, that, regarded as a succession tax, it attempted the federal regulation of a matter placed within the exclusive control of the States.

The reasoning of the court upon the first of these points is considered in a later section of this chapter.[41] As to the question of uniformity the contention was that the requirement was violated because the statute exempted legacies and distributive shares in personal property below $10,000, because it classified the rate of tax according to the relationship of the taker to the deceased, and because it provided for a rate progressing according to the amount of the legacy or share. To this contention the court reply: "Considering the text, it is apparent that if the word 'uniform' means 'equal and uniform' in the sense now asserted by

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[39] In Pollock v. Farmers' Loan and Trust Co. (158 U. S. 601; 15 Sup. Ct. Rep. 912; 39 L. ed. 1108), the court held the income tax features of this law void. See Section 279.

[40] 178 U. S. 41; 20 Sup. Ct. Rep. 747; 44 L. ed. 969.

[41] Section 281.

the opponents of the tax, the words 'throughout the United States,' are deprived of all real significance, and sustaining the contention must hence lead to a disregard of the elementary canon of construction which requires that effect be given to each word of the Constitution. Taking a wider view, it is to be remembered that the power to tax contained in Section VIII of Article I is to lay and collect 'taxes, duties, imposts, and excises; . . . but all duties, imposts and excises shall be uniform throughout the United States.'" Thus, the qualification of uniformity is imposed, not upon the taxes which the Constitution authorizes, but only on duties, imposts, and excises. The conclusion that inherent equality and uniformity is contemplated involves, therefore, the proposition that the rule of intrinsic uniformity is applied by the Constitution to taxation by means of duties, imposts, and excises, and it is not applicable to any other form of taxes. It cannot be doubted that in levying direct taxes, after apportioning the amount among the several States, as provided in Clause 4 of Section IX of Article I of the Constitution, Congress has the power to choose the objects of direct taxation, and to levy the quota as apportioned directly upon the objects so selected. Even then, if the view of inherent uniformity be the true one, none of the taxes so levied would be subjected to such rule, as the requirements only relate to duties, imposts, and excises. But the classes of taxes termed duties, imposts, and excises, to which the rule of uniformity applies, are those to which the principle of equality and uniformity in the sense claimed is, in the nature of things, the least applicable and least susceptible of being enforced. Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned. Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. The claim of intrinsic uniformity, therefore, imputes

to the framers a restriction as to certain forms of taxes, where the restraint was least appropriate and the omission where it was most needed. This discord, which the construction, if well founded, would create, suggests at once the unsoundness of the proposition, and gives rise to the inference that the contrary view by which the unity of the provisions of the Constitution is maintained, must be the correct one. In fact, it is apparent that if imposts, duties, and excises are controlled by the rule of intrinsic uniformity, the methods usually employed at the time of the adoption of the Constitution in all countries in the levy of such taxes would have to be abandoned in this country; and, therefore, whilst nominally having the authority to impose taxes of this character, the power to do so would be virtually denied to Congress. Now, that the requirement that direct taxes should be apportioned among the several States contemplated the protection of the States, to prevent their being called upon to contribute more than was deemed their due share of the burden, is clear. Giving to the term uniformity as applied to duties, imposts, and excises a geographical significance, likewise causes that provision to look to the forbidding of discrimination as between the States, by the levying of duties, imposts, or excises upon a particular subject in one State and a different duty, impost, or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes. . . . It is yet further asserted that the tax does not fulfil the requirements of geographical uniformity, for the following reasons: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every State. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the States may obtain as to the objects upon which the tax is levied. The propo-

sition in substance assumes that the objects taxed by duties, imposts, and excises must be found in uniform quantities and conditions in the respective States, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States. Indeed, the contention was substantially disposed of in License Tax Cases.[42]

As to the contention that, viewing the tax as one on succession, the law was in regulation of a matter within the exclusive control of the States, the court, after reaffirming the principle that the tax is one on the right of succession, say: "Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritance or legacies, in any form, is beyond the power of Congress, and is an interference by the National Government with a matter which falls alone within the reach of state legislation. . . . The fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the Government of the United States, on the one hand, or the several States, on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National Government

[42] 5 Wall. 462; 18 L. ed. 497.

from almost every subject of direct and many acknowledged objects of indirect taxation. . . . It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the national and state governments are divested of those powers of taxation which from the foundation of the Government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate. . . . Under our constitutional system both the national and state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."

In Snyder v. Bettman[43] the court say that the case of Knowlton v. Moore "must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that under our Constitution the devolution of property is determined by the laws of the several States."

In an earlier chapter[44] it has been pointed out that a federal inheritance tax levied upon bequests to a State or a municipal corporation thereof,[45] or a state tax on legacies consisting of United States bonds[46] is not unconstitutional.

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43 190 U. S. 249; 23 Sup. Ct. Rep. 803; 47 L. ed. 1035.

44 Chapter V.

45 Snyder v. Bettman, 190 U. S. 249; 23 Sup. Ct. Rep. 803; 47 L. ed. 1035.

46 Plumber v. Coler, 178 U. S. 115; 20 Sup. Ct. Rep. 829; 44 L. ed. 998.

In Murdock v. Ward[47] it is held that a federal inheritance tax may be imposed on legacies or shares consisting of United States bonds, even when these bonds have been issued under a law expressly exempting them from taxation in any form, state or federal, direct or indirect.[48]

§ 275. Protective Tariffs.

The constitutionality of a protective tariff, that is, a system of customs duties levied on foreign imports so arranged as to furnish incidental protection to home industries, though questioned in earlier years, has now passed beyond the range of controversy. Such laws being on their face revenue measures, may not be questioned because their effect, and indeed the intent of the legislature, is primarily to supply protection rather than revenue. The doctrine of the court in McCray v. United States[49] is conclusive as to this. But even if this were not so, a tariff avowedly levied primarily and solely for protection is constitutionally justified under the grant of authority to Congress "to regulate commerce with foreign nations."[50]

§ 276. Bounties.[51]

The constitutionality of bounties has never been squarely passed upon by the Supreme Court. Their validity was questioned in

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47 178 U. S. 139; 20 Sup. Ct. Rep. 775; 44 L. ed. 1009.

48 The court say: "Whether the United States, in the exercise of the power of taxation, can be estopped by a contract that such power shall not be exercised, we need not consider, because the contract in this case does not, as we view it, mean that a State may not, or the United States may not, tax inheritances and legacies, regardless of the character of the property of which they are composed. That some of the holders of United States bonds may not have paid franchise taxes to the States, and others may have paid state or federal inheritance and legacy taxes, has nothing to do with the contract between the United States and the bondholders. The United States will have complied with their contract when they pay to the original holders of their bonds, or to their assigns, the interest, when due, in full, and the principal, when due, in full."

49 195 U. S. 27; 24 Sup. Ct. Rep. 769; 49 L. ed. 78.

50 For a summary of the arguments *pro* and *contra* as to the constitutionality of protective tariffs, see *passim* Stanwood, *Tariff Controversies in the United States in the Nineteenth Century.*

51 For the definition of bounties see Downs v. United States, 187 U. S. 496; 23 Sup. Ct. Rep. 222; 47 L. ed. 275.

Field v. Clark[52] and United States v. Realty Co.,[53] but in neither case did the court find itself obliged to decide the point. The ground upon which the constitutionality of bounties has been contested has been that their payment amounts to an appropriation of public moneys primarily for a private purpose. The courts have often held that an expenditure in the public interest is not invalidated by the fact that incidentally private interests are advanced thereby; but in general they have been held that an appropriation primarily and directly for the furtherance of private interests is not validated by the fact that incidentally public interests are in a measure promoted.[54]

§ 277. Export Duties.

Among the express limitations upon the powers of Congress, enumerated by the Constitution is that which provides that "no tax or duty shall be laid on articles exported from any State." [55] In another clause substantially the same prohibition is laid upon the States, it being declared that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports." [56]

The term "exports" has been judicially limited to goods exported to foreign countries. In the earlier cases of Brown v. Maryland[57] and Almy v. California[58] it was taken for granted by the court that the term applied also to goods carried from one State to another State of the Union, but in Woodruff v. Parham[59]

[52] 143 U. S. 649; 12 Sup. Ct. Rep. 495; 36 L. ed. 294.

[53] 163 U. S. 427; 16 Sup. Ct. Rep. 1120; 41 L. ed. 215.

[54] See Lowell v. Boston, 111 Mass. 454; and Loan Association v. Topeka, 20 Wall. 655; 22 L. ed. 455. *Cf. Harvard Law Review*, V, 320, article by C. F. Chamberlayne entitled "The Sugar Bounties."

[55] Art. I, Sec. IX, Cl. 5.

[56] "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" (Art. I, Sec. X, Cl. 2). The state taxation of exports is considered in Chapter XLII.

[57] 12 Wh. 419; 6 L. ed. 678.

[58] 24 How. 169; 16 L. ed. 644.

[59] 8 Wall. 123; 19 L. ed. 382.

these *dicta* were overruled and the position taken which has not since been disturbed, that the prohibition has reference only to exportations to countries foreign to the United States. In this case, Justice Miller, after referring to the general power given to Congress to levy and collect taxes, duties, and imposts, says: "Is the word 'impost' here used, intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one State to another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of section IX, which declares that no tax shall be laid on articles exported from any State, for no article can be imported from one State into another which is not at the same time exported from the former. But if we give to the word 'imposts' as used in the first-mentioned clause the definition of Chief Justice Marshall, and to the word 'export' the corresponding idea of something carried out of the United States, we have, in the power to lay duties on imports from abroad and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts. It is not too much to say that, so far as our research has extended, neither the word 'export,' 'import,' or 'impost' is to be found in the discussion on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant. . . . Whether we look, then, to the terms of the clause of the Constitution in question, or to its relation to the other parts of that instrument, or to the history of its formation and adoption, or to the comments of the eminent men who took part in those transactions, we are forced to the conclusion that no intention existed to prohibit by this clause [that no State shall, without the consent of Congress, levy any impost or duty upon any export or import] the right of one State to tax articles brought into it from another."

In Dooley v. United States,[60] one of the "Insular Cases," it was argued that the Foraker Act of April 12, 1900, was uncon-

[60] 183 U. S. 151; 22 Sup. Ct. Rep. 62; 43 L. ed. 128.

stitutional in so far as it provided for the payment of duties upon merchandise imported into Porto Rico from the United States. The court, however, held that Porto Rico, after cession to the United States, even though not "incorporated" into the United States was not foreign territory, and, therefore, that, under the definition laid down in Woodruff v. Parham, the tax in question was not a tax on goods exported from the United States. The court, moreover, go on to show from the circumstances of the case that the tax was to be construed rather as one on goods imported into Porto Rico, than upon goods exported from the State of New York. The court in its opinion, however, are careful to add: "It is not intended by this opinion to intimate that Congress may lay an export tax upon merchandise carried from one State to another. While this does not seem to be forbidden by the express words of the Constitution, it would be extremely difficult, if not impossible, to lay such a tax without a violation of the first paragraph of Article I, Section VIII, that 'all duties, imposts, and excises shall be uniform throughout the United States.' There is a wide difference between the full and paramount power of Congress in legislating for a territory in the condition of Porto Rico and its power with respect to the States, which is merely incidental to its right to regulate interstate commerce. The question, however, is not involved in this case, and we do not desire to express an opinion upon it." [61]

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[61] In a dissenting opinion, concurred in by four justices, it was argued that, "The fact that the net proceeds of the duties are appropriated by the act for use in Porto Rico does not affect their character any more than if so appropriated by another and separate act. The taxation reaches the people of the States directly, and is national, and not local, even though the revenue derived therefrom is devoted to local purposes. . . . The prohibition that 'no tax or duty shall be laid on articles exported from any State' negatives the existence of any power in Congress to lay taxes or duties in any form on articles exported from a State, irrespective of their destination, and, this being so, the act in imposing the duties in question is invalid, whether Porto Rico after its passage was a foreign or reputed foreign territory, a domestic territory or a territory subject to be dealt with at the will of Congress regardless of constitutional limitations. . . . The prohibition on Congress is explicit, and noticeably different from the prohibition on the States. The State is forbidden to lay 'any imposts or duties;'

To come within the definition of an export tax, it has been held that the tax must be one levied upon the right to export, or upon goods because of the fact that they are being exported or are intended to be exported. The fact that certain goods are intended for export does not, however, exempt them from an ordinary property tax, for, as said, the tax is one on exports only when its incidence or amount is determined by the fact that the goods are intended for export. This is the doctrine laid down in Coe v. Errol[62] with reference to taxation by the States and in Turpin v. Burgess[63] with reference to federal taxation.[64]

Congress is forbidden to lay 'any tax or duty.' The State is forbidden from laying imposts or duties 'on imports or exports,' that is, articles coming into or going out of the United States. Congress is forbidden to tax articles exported from any State.' . . . Congress may lay local taxes in the territories, affecting persons and property therein, or authorize territorial legislatures to do so, but it cannot lay tariff duties on articles exported from one State to another, or from any State to the territories, or from any State to foreign countries, or grant a power in that regard which it does not possess. But the decision now made recognizes such powers in Congress as will enable it, under the guise of taxation, to exclude the products of Porto Rico; and this, notwithstanding it was held in De Lima v. Bidwell (182 U. S. 1; 21 Sup. Ct. Rep. 743; 45 L. ed. 1041), that Porto Rico after the ratification of the treaty with Spain ceased to be foreign and became domestic territory."

[62] 116 U. S. 517; 6 Sup. Ct. Rep. 475; 29 L. ed. 715.

[63] 117 U. S. 504; 6 Sup. Ct. Rep. 835; 29 L. ed. 988.

[64] In the latter case the court say: "There is another view of this subject, however, independent of the considerations which governed our former decision, which is equally decisive of this case. We have lately decided in Coe v. Errol that goods intended for exportation to another State are liable to taxation as part of the general mass of property of the State of their origin until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose, provided they are taxed in the usual way in which such property is taxed, and not taxed by reason or because of such exportation, or intended exportation, and that the carrying of them to and depositing them at a depot for the purpose of transportation is no part of that transportation. Now the constitutional provision against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are, 'No tax or duty shall be laid on articles exported from any State.' Art. I, § 9, par. 2. In the other they are: 'No State shall, without the consent of Congress, lay any imposts or duties on imports or exports.' Art. I, § 10, par. 2. The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation, or intended exportation, or while they are

In Pace v. Burgess[65] was questioned the validity of a federal law requiring stamps to be affixed to packages of manufactured tobacco intended for exportation. The court, however, held the requirement to be a proper one to prevent fraud and not to amount to a tax on exports. "The stamp was intended," the court say, "for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and to secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed."

In Fairbanks v. United States,[66] however, a stamp tax imposed on foreign bills of lading by the act of 1898 was held to be, in substance and effect, a tax on the articles included in the bills of lading, and, therefore, a tax on exports, and as such unconstitutional. The law had provided for a stamp tax of one cent on

being exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. How can the officers of the United States, or of the States, know that goods apparently part of the general mass, and not in the course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This cannot for a moment be contended. It would not be true, and would lead to the greatest frauds. It is true, as was conceded in Coe v. Errol, that the prohibition to the States against laying duties on imports or exports related to imports from and exports to foreign countries; yet the decision in that case was based on the postulate that when such imposts or duties are laid on imports or exports from one State to another it amounts to a regulation of commerce among the States, and, therefore, is an invasion of the exclusive power of Congress; so that the analogy between the two cases holds good, and what would be constitutional or unconstitutional in the one case would be constitutional or unconstitutional in the other."

65 92 U. S. 372; 23 L. ed. 657.

66 181 U. S. 283; 21 Sup. Ct. Rep. 648; 45 L. ed. 862.

ordinary bills of lading, and of ten cents on export bills of lading. To the contention that the tax was on the bills of lading and not one on the articles exported, the court say: "The fact that Congress has not graduated the stamp tax on bills of lading does not affect the question of power. . . . The question of the power is not to be determined by the amount of the burden attempted to be cast. . . . Constitutional mandates are imperative. The question is never one of amount, but one of power. The applicable maxim is *obsta principiis*, not *de minimis non curat lex*."[67]

In Cornell v. Coyne[68] was sustained the imposition of the same manufacturing tax on an article manufactured for export, and in fact exported, as upon other similar articles not intended for export, the court saying that such a tax is not on the articles exported "but is only a tax or duty on the manufacturing of articles in order to prepare them for export." "The true construction of the constitutional provision," the opinion continues, "is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated."[69]

§ 278. Direct Taxes.[70]

The Constitution provides that capitation and other direct taxes levied by Congress shall be apportioned among the States in pro-

[67] Four justices dissented. They say: "Here, the small duty imposed, without reference to the kind, quality, or value of the articles exported, renders it certain that when Congress imposed such duty specifically on the vellum, parchment, or paper upon which the bill of lading was written or printed, it meant what is so plainly said; and no ground exists to impute a purpose by indirection to tax the articles exported." The dissenting justices also urge that the practice of the government for more than a century should be held controlling.

[68] 192 U. S. 418; 24 Sup. Ct. Rep. 383; 48 L. ed. 504.

[69] Two justices dissented, holding that inasmuch as there was no appreciable interval of time between the commencement of manufacture and the preparation for exportation, it could not be reasonably said that the articles had become a part of the general mass of property in the locality of manufacture, and as such subject to a tax that could be distinguished from a tax upon the articles as subject of export.

[70] For a discussion of direct taxes with reference to the Territories and the District of Columbia, see Chapter XXVI.

portion to their respective populations. In a number of instances the constitutionality of federal taxes not thus apportioned has been questioned upon the ground that they were, within the constitutional meaning of the word, direct taxes. The decision of the Supreme Court in each of these cases in which this point has been raised has supplied an authoritative determination only as to the direct or indirect character of the particular taxes in question. From these decisions, however, a judicial definition of direct taxes may be drawn which makes the term include all taxes levied upon property, real or personal, or upon the income derived from such property, and all capitation or poll taxes. A review of the cases will show that only within recent years has the court been willing to adopt this comprehensive definition, and, when it finally did so, the decision came as a surprise to very many of the lawyers and courts of the country.

In 1798 in Hylton v. United States[71] it was held that a tax on carriages was not a direct tax. Chase in his opinion said: "The Constitution evidently contemplated no taxes as direct taxes, but only such as Congress could lay in proportion to the census. The rule of apportionment is only to be adopted in such cases where it can reasonably apply; and the subject taxed must ever determine the application of the rule. If it is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say that the Constitution intended such tax to be laid by that rule. . . . I am inclined to think, but of this I do not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on land."

Paterson in his opinion said: "Whether direct taxes, in the sense of the Constitution, comprehend any other tax, than a capitation tax and a tax on land, is a questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States in the Union, then, perhaps,

[71] 3 Dall. 171; 1 L. ed. 556.

the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears from the practice of some of the States to have been considered as a direct tax. Whether it be so, under the Constitution of the United States, is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal, I will not say the only objects, that the framers of the Constitution contemplated as falling within the rule of apportionment, were a capitation tax and a tax on land."

Iredell, in his opinion, said: "As all direct taxes must be apportioned, it is evident that the Constitution contemplated none as direct but such as could be apportioned. If this cannot be apportioned, it is, therefore, not a direct tax in the sense of the Constitution. That this tax cannot be apportioned is evident."

In Pacific Insurance Co. v. Soule[72] a tax on receipts of insurance companies was held to be not a direct tax, the *dicta* in Hylton v. United States being relied upon as authority.

In Veazie Bank v. Fenno[73] a tax on the circulating notes of state banks was held to be an indirect tax.

In Scholey v. Rew[74] a tax on succession to real estate was held indirect, the tax being declared to be one not on the land, but upon the right of succession. The court say: "Whether direct taxes, in the sense of the Constitution, comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy." [75]

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[72] 7 Wall. 433; 19 L. ed. 95.

[73] 8 Wall. 533; 19 L. ed. 482.

[74] 23 Wall. 331; 23 L. ed. 99.

[75] Citing Ins. Co. v. Soule, 7 Wall. 433; 19 L. ed. 95; Veazie Bank v. Fenno, 8 Wall. 533; 19 L. ed. 482.

In Springer v. United States[76] the income taxes provided for by the law of 1862 were held not to be direct taxes. After enumerating the various direct taxes previously levied, the court say: "It will thus be seen that wherever the government has imposed a tax which it recognized as a direct tax, it has never been applied to any objects but real estate and slaves. The latter application may be accounted for upon two grounds: 1. In some of the States slaves were regarded as real estate; and, 2, such an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the National Treasury was the same. . . . This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight."

After reviewing earlier cases and citing the opinions of leading commentators, the opinion concludes: "Our conclusions are, that direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate."

§ 279. Income Tax Case — Pollock v. Farmers' L. & T. Co.

The foregoing line of cases, concluding with the emphatic assertion of a unanimous court in Springer v. United States, justly gave rise to the general opinion that the only taxes to be deemed direct taxes within the constitutional meaning of the term were capitation taxes and taxes on real estate. However, in the so-called Income Tax Case — Pollock v. Farmers' Loan and Trust Co.[77]—decided in 1895, this doctrine was overthrown, the court upon the first hearing holding that taxes on the rents or income of real estate are direct taxes; and, upon a rehearing, holding that taxes on personal property or on the income derived from personal property are equally direct.

Upon the first hearing the crucial point was, of course, whether a tax upon the income derived from real estate was distinguish-

[76] 102 U. S. 586; 26 L. ed. 253.

[77] 157 U. S. 429; 15 Sup. Ct. Rep. 673; 39 L. ed. 759, and 158 U. S. 601; 15 Sup. Ct. Rep. 912; 39 L. ed. 1108.

able from a tax on the real estate itself. This being decided in the negative, it necessarily followed that inasmuch as a tax on the real estate is admittedly a direct tax, a tax on the income derived therefrom would be direct. "The real question is," the majority justices declare, "is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income." [78]

[78] In a dissenting opinion, concurred in by Justice Harlan, Justice White, after a review of the earlier adjudications, says:

"The facts, then, are briefly these: At the very birth of the government a contention arose as to the meaning of the word 'direct.' That controversy was determined by the legislative and executive departments of the government. Their action came to this court for review, and it was approved. Every judge of this court who expressed an opinion, made use of language which clearly showed that he thought that the word 'direct' in the Constitution applied only to capitation taxes and taxes directly on land. Thereafter the construction thus given was accepted everywhere as definite. The matter came again and again to this court, and in every case the original ruling was adhered to. The suggestions made in the Hylton case were adopted here, and in the last case here decided, reviewing all the others, this court said that direct taxes within the meaning of the Constitution were only taxes on land and capitation taxes. And now, after a hundred years, after long continued action by other departments of the government, and after repeated adjudications of this court, this interpretation is overthrown, and the Congress is declared not to have a power of taxation which may at some time, as it has in the past, prove necessary to the very existence of the government. By what process of reasoning is this to be done? By resort to theories, in order to construe the word 'direct' in its economic sense, instead of in accordance with its meaning in the Constitution, when the very result of the history which I have thus briefly recounted is to show that the economic construction of the word was repudiated by the framers themselves, and has been time and time again rejected by this court; by a resort to the language of the framers and a review of their opinions, although the facts plainly show that they themselves settled the question which the court now virtually unsettles. In view of all that has taken place and of the many decisions of this court, the matter at issue here ought to be regarded as closed forever. . . . It is said that a tax on the rentals is a tax on the land, as if the Act here under consideration imposed an immediate tax on the rentals. This statement, I

A rehearing of the case having been allowed the court broadened still further the scope of the term "direct taxes," making it include taxes on personal property and upon the income therefrom. To this doctrine four justices dissented.

In Nicol v. Ames[79] the scope of the doctrine laid down in the Income Tax Case was clearly stated. In this case it was argued that a duty levied by the War Revenue Act of 1898 upon sales or agreements of sale of products or merchandise at exchanges or boards of trade was a direct tax and as such unconstitutional because not properly apportioned. The court, however, held that the tax was in the nature of a duty or excise tax for the privilege of doing business at such places and not a tax on the products or merchandise sold, and, therefore, not a direct tax. The court say: "It is asserted to be a direct tax, because it is a tax upon the sale of property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself, and, therefore, subject to the rule of apportionment. Various cases are cited, from Brown v. Maryland (12 Wheat. 419; 6 L. ed. 678) down to those involving the validity of the income tax (Pollock v. Trust Co., 157 U. S. 429; 15 Sup. Ct. Rep. 673; 39 L. ed. 759) for the purpose of proving the correctness of this proposition. All the cases involved the question whether the taxes to which objection was taken amounted practically to a tax on the property. If this tax is not on the property, or on the sale thereof, then these cases do not apply."

In Patton v. Brady[80] a tax upon tobacco, however prepared, manufactured, and sold, for consumption or sale, was held not a direct tax but an excise tax,— "not a tax upon property as such,

submit, is a misconception of the issue. The point involved is whether a tax on net income, when such income is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes, to the extent to which real estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to a direct levy on the land itself? It seems to me the question when thus accurately stated furnishes its own negative response."

[79] 173 U. S. 509; 19 Sup. Ct. Rep. 522; 43 L. ed. 786.

[80] 184 U. S. 608; 22 Sup. Ct. Rep. 493; 46 L. ed. 713.

but upon certain kinds of property, having reference to their origin and intended use."

In Spreckles Sugar Refining Co. v. McClain[81] the special excise tax imposed on sugar refining by the act of 1898, and measured by the gross annual receipts in excess of a named sum, was held to be not a direct tax. "Clearly," the court say, "the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded because of the fact that the amount of the tax is measured by the amount of the gross annual receipts."

§ 280. The Federal Corporation Tax of 1909.

Section 38 of the Tariff Law of 1909 contains the provision that every corporation "organized for profit and having a capital stock represented by shares . . . shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation . . . equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources."

The constitutionality of this tax, as being indirect, would seem to be supported by the decisions cited in the preceding paragraphs, and by that in Knowlton v. Moore,[82] considered in the next paragraph. It is true that in the Income Tax Case[83] the court held that a tax upon income from property is not to be distinguished from a tax on the property itself, but it is probable that the tax levied by Section 38 of the Tariff Law of 1909 will be held to be a tax not on the income of the corporations, but one in the nature of a franchise or excise tax. The constitutionality of such a federal tax upon corporations chartered by the States would seem to be disposed of by the argument in Veazie Bank v. Fenno.[84]

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[81] 192 U. S. 397; 24 Sup. Ct. Rep. 376; 48 L. ed. 496.

[82] 178 U. S. 41; 20 Sup. Ct. Rep. 747; 44 L. ed. 969.

[83] Pollock v. Farmers L. & T. Co., 158 U. S. 601; 15 Sup. Ct. Rep. 912; 39 L. ed. 1108.

[84] 8 Wall. 533; 19 L. ed. 482. See also South Carolina v. United States, 199 U. S. 437; 26 Sup. Ct. Rep. 110; 50 L. ed. 261.

§ 281. Federal Inheritance Taxes not Direct.

The constitutional definition of a direct tax was again raised in Knowlton v. Moore[85] with reference to the constitutionality of the inheritance taxes levied by the War Revenue Act of 1898. The court applied the well established doctrine that the taxes in question were not upon the property inherited but upon the right to inherit, and, therefore, not being taxes upon property but upon a right, were in the nature of an excise tax, and as such indirect.[86]

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[85] 178 U. S. 41; 20 Sup. Ct. Rep. 747; 44 L. ed. 969.

[86] To the argument that the doctrine declared in Scholey v. Rew (23 Wall. 331; 23 L. ed. 99), had been practically overruled by the Income Tax Case, the court say:

"It is asserted that it was decided in the Income Tax Cases that in order to determine whether a tax be direct within the meaning of the Constitution, it must be ascertained whether the one upon whom by law the burden of paying it is first cast can thereafter shift it to another person. If he cannot, the tax would then be direct in the constitutional sense, and hence, however obvious in other respects it might be a duty, impost, or excise, it cannot be levied by the rule of uniformity, and must be apportioned. From this assumed premise it is argued that death duties cannot be shifted from the one on whom they are first cast by law, and therefore they are direct taxes requiring apportionment. The fallacy is in the premise It is true that in the income tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real, or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall. The proposition now relied upon was considered and refuted in Nicol v. Ames, 173 U. S. 509; 19 Sup. Ct. Rep. 522; 43 L. ed. 786."

§ 282. Federal Taxation and Due Process of Law: Hearing Required.

Due process of law requires that in the case of an *ad valorem* tax an opportunity shall be given the taxpayer to appear and give evidence as to the proper valuation of the property which is assessed.[87] In other cases, however, no notice or opportunity for hearing need be given the taxpayer. In Hagar v. Reclamation District[88] the court say: "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as there is no inquiry into the weight of evidence, or other element of a judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the State, or on domestic corporations for franchises, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount

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[87] Or, if it be a special assessment for the purpose of some public improvement, as to the extent to which the property in question will be benefited thereby.

[88] 111 U. S. 701; 4 Sup. Ct. Rep. 663; 28 L. ed. 569.

of the tax would not be changed by it. But where a tax is levied on property, not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially, and in most of the States provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

§ 283. Hearing Before Administrative Tribunal Sufficient.

It is not necessary that the hearing thus required in the case of *ad valorem* taxes should be before a court of justice. The hearing may be had and, in fact, is usually had, before an administrative board whose action in this respect is judicial in character and whose determinations may be final and conclusive in the matter. Thus, for example, by Section 2930 of the Revised Statutes, it is provided that in the matter of appraisement of imports an appeal shall be allowed the importer from the collector of customs to "one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants," but that "if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly." Provision is, however, made for relief in cases where the collectors have acted fraudulently or upon a principle not sanctioned by law, or where they have in any way transcended the powers given them by Congress.

In Hilton v. Merritt[89] the constitutionality of these provisions was upheld. In Auffmordt v. Hedden[90] the court say: "Nor is there anything in the objection that Section 2930 of the Revised Statutes is unconstitutional in making the decision of the appraisers final, and that the plaintiffs had a right to have the question of the dutiable value of the goods passed upon by a jury. As said before, the government has the right to prescribe the conditions attending the importation of goods upon which it will permit the collector to be sued. One of those conditions is that the appraisal shall be regarded as final; and it has been held by this court, in Arnson v. Murphy (109 U. S. 238; 3 Sup. Ct. Rep. 184; 27 L. ed. 920), that the right to bring such a suit is exclusively statutory, and is substituted for any and every common-law right. The action is, to all intents and purposes, with the provision for refunding the money if the importer is successful in the suit, an action against the government for moneys in the treasury. The provision as to the finality of the appraisement is virtually a rule of evidence to be observed in the trial of the suit brought against the collector."

In this case it was held that it was not necessary, and that it had not been the intention of Congress that the hearing before the appraisers or collector should be characterized by all the formalities of a court of law, but that the proceedings might, and from necessity would generally have to be of a summary character. The court thus held that due process of law had not been denied because the importer or his agent had been practically excluded from the hearing upon the reappraisement, that he had not been permitted to confront the opposing witnesses by testimony on his own behalf, or allowed the aid of counsel. "No government," said the court, "would collect the revenues or perform its necessary functions, if the system contended for by the plaintiffs were to prevail."

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89 110 U. S. 97; 3 Sup. Ct. Rep. 548; 28 L. ed. 83.

90 137 U. S. 310; 11 Sup. Ct. Rep. 103; 34 L. ed. 674.

§ 284. Summary Modes of Collection.

For the collection of taxes, as well as in the appraisement of property for taxation, summary modes of procedure may be had, the justification being that without such means no government could maintain itself.[91]

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[91] The leading case is Murray's Lessee v. Hoboken Land Improvement Co., 18 How. 272; 15 L. ed. 372. In this case the account of a collector of customs having been audited by the First Auditor of the Treasury Department, and certified by the First Comptroller, a distress warrant for the balance found due the United States was issued by the Solicitor of the Treasury in accordance with the provisions of an act of Congress, and levied upon the lands of the collector. To the contention that this proceeding denied to the collector due process of law the court replied: "Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law, when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For, though 'due process of law' generally implies and includes *actor, reus, judex,* regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; Hoke v. Henderson, 4 Dev. N. C. 15; Taylor v. Porter, 4 Hill, 146; Van Zandt v. Waddel, 2 Yerg. 260; Bank v. Cooper, Id. 599; Jones' Heirs v. Perry, 10 Yerg. 59; Greene v. Briggs, 1 Curt. 311), yet this is not universally true. There may be, and we have seen that there are, cases, under the law of England after Magna Charta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings. . . . The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution. The power has not been exhausted by the receipt of the money by the collector. Its purpose is to raise money, and use it in payment of the debts of the government; and, whoever may have possession of the public money until it is actually disbursed, the power to use those known and appropriate means to secure its due application continues. As we have already shown, the means provided by the act of 1820 do not differ in principle from those employed in England from remote antiquity — and in many of the States, so far as we know, without objection — for this purpose, at the time the Constitution was formed. It may be added that probably there are few governments which do or can permit their claims for public

§ 285. Notice.

Due process of law in matters of taxation does not require the same kind of notice as is required in a suit of law, or in proceedings for taking private property under the power of eminent domain. No violation of due process of law is committed when a tax is collected according to customary forms and established usages, or in subordination to the principles which underlie them. "This must be so," the court say in King v. Mullins,[92] "else the existence of government might be put in peril by the delays attendant upon formal judicial proceedings for the collection of taxes."[93]

In most of the States it is provided by statute that the assessment or collection of taxes shall not be restrained by a judicial writ; and, since 1867, by act of Congress it has been provided that "no suit for the purpose of restraining the assessment or collection of taxes shall be maintained in any court."[94]

The constitutionality of this provision has been sustained whenever questioned, administrative necessity furnishing the justification. In Cheatham v. United States[95] the court say: "If there existed in the courts, state or national, any general power of impeding or controlling the collection of taxes or relieving the hardship incident to taxation, the very existence of the Government might be placed in the power of a hostile judiciary." And in the Railroad Tax Cases[96] the court say: "The Government of the United States has provided, both in the customs and in the

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taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy, according to the course of the law of the land. Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by summary methods of proceeding, and sometimes by systems of fines and penalties, but always in some way observed and yielded to."

[92] 171 U. S. 404; 18 Sup. Ct. Rep. 925; 43 L. ed. 214.

[93] *Cf.* Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232; 10 Sup. Ct. Rep. 533; 33 L. ed. 892; Turpin v. Lemon, 187 U. S. 51; 23 Sup. Ct. Rep. 20; 47 L. ed. 70; Londoner v. Denver, 210 U. S. 373; 28 Sup. Ct. Rep. 708; 52 L. ed. 1103; Judson, *On Taxation*, Chapter 8, and McGehee, *Due Process of Law*, pp. 235*ff*.

[94] Rev. Stat., § 3224. This provision of course applies only to the federal courts, and by the courts has been construed to relate only to federal taxes. In 1909 a bill was introduced into Congress to amend this section so as to make it apply to state, county, municipal and district taxes as well.

[95] 92 U. S. 85; 23 L. ed. 561.

[96] 92 U. S. 575; 23 L. ed. 663.

internal revenue, a complete system of corrective justice in regard to taxes imposed by the General Government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid. That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' (Rev. Stat., § 3224.) And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, in any case, interfere with the process of collecting the taxes on which the Government depends for its continued existence. It is a wise policy. It is founded on the simple philosophy derived from the experience of ages that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary than those which belong to a court of justice."

§ 286. Borrowing Power of the United States: Legal Tender.

The Federal Government is given power "to borrow money on the credit of the United States."

The power thus given is free from limitations. In the draft of the Constitution reported by the Committee on Detail to the Constitutional Convention, the draft read, "To borrow money and emit bills on the credit of the United States." The express authorization to emit bills of credit was stricken out by the Convention, but, apparently, not with the intention of thereby depriving the United States of the power, but that the power would be included in the general authority to borrow money. That this is so, has not been questioned by the courts. There has, however, been serious controversy as to the power of the United States to give a legal tender character to these bills when issued.

The debates in the Constitutional Convention, and other pro-

visions of the Constitution,[97] would seem to indicate an intention upon the part of the framers of the Constitution that a legal tender character might be given by Congress only to the metallic money coined by the United States, and the Supreme Court in Hepburn v. Griswold[98] so held as regards the payment of debts between private parties created before the enactment of the law. In Knox v. Lee,[99] however, four justices dissenting, this doctrine was overthrown, and the issuance of legal tender notes authorized as a legitimate war power. And finally, in the Legal Tender Cases — Juillard v. Greenman[1] the authority in question was conceded to exist as implied in the general power to borrow money, whether in times of peace or of war, the court saying: "Such being our conclusion in matter of law, the question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as a matter of fact, wise and expedient to resort to this means, is a political question, to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts."

In Knox v. Lee it is to be observed that the legal tender power is deduced not wholly from the power to borrow money but from the ensemble of powers which are granted to the United States, which aggregate of powers, the court holds, evidences the intention to equip the Central Government with all the powers necessary for its maintenance as an effective sovereign State. The doctrine thus comes perilously near to an acceptance of the doctrine of "inherent sovereign powers."[2] Also the court declare that it is not indispensable to the existence of any power claimed for the Federal Government that it should be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers, but that its existence may be deduced from a combination of several expressly granted powers.

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[97] *Cf.* Tucker's argument, *The Constitution of the United States*, I, 508*ff*.

[98] 8 Wall. 603; 19 L. ed. 513.

[99] 12 Wall. 457; 20 L. ed. 287.

[1] 110 U. S. 421; 4 Sup. Ct. Rep. 122; 28 L. ed. 204.

[2] See Chapter III of this treatise.

The various powers from which, in the aggregate, the legal tender power is derived are summarized in the following paragraph, taken from the opinion of the court in Juillard v. Greenman:

"Congress as the legislature of a sovereign Nation, being expressly empowered by the Constitution to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the United States, and to borrow money on the credit of the United States, and to coin money and regulate the value thereof and of foreign coin; and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks and to provide a national currency for the whole people, in the form of coin, treasury notes and national bank bills; and the power to make the notes of the government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized Nations, and not expressly withheld from Congress by the Constitution; we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the Constitution and, therefore, within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this Constitution in the Government of the United States.'"

As regards the contention that the effect of applying the legal tender law to prior contracted debts is to deprive the creditor of property without due process of law, in violation of the Fifth Amendment, the court in Knox v. Lee say: "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war, may inevitably bring upon individuals great losses, may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that because of this a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared."

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