Police Power

The police power may be defined as that power which inheres in the legislature to make, ordain, and establish all manner of wholesome and reasonable regulations and laws which it may deem the peace and order of society and the safety of its members and to prescribe the mode & manner in which every one may use and enjoy that which is his own so not to preclude a corresponding use and enjoyment of the same by others.

Stat. of Law
Zup v. Pitts

Leading Cases on American Constitutional Law

By LAWRENCE B. EVANS, Ph. D.
Of the Massachusetts Bar

We must never forget that it is a constitution we are expounding.
— *Chief Justice Marshall*

Constitutional law like other mortal contrivances has to take some chances.
— *Justice Holmes*

CHICAGO
CALLAGHAN AND COMPANY
1916

TO MY FRIEND

SAMUEL W. McCALL

STATESMAN

DEFENDER OF CONSTITUTIONAL LIBERTY

PREFACE

The intended scope of this book would have been indicated more accurately if the title were "Some Leading Cases on Some Leading Topics in American Constitutional Law." Accuracy of description however had to be sacrificed to brevity, which indeed is the dominant note of every part of the book. This makes it necessary to explain that the present collection is an attempt to bring together within the compass of about four hundred pages as many as possible of the decisions of the Supreme Court of the United States interpreting the Federal Constitution. Because of limitations of space no attempt has been made to cover the whole subject. Important topics, such as eminent domain, ex post facto legislation, bankruptcy, and the war power, have been omitted altogether in the belief that the fuller treatment of other topics which such omissions made possible would give the collection added value. Sixty-four cases are here included. The basic decisions in which the important doctrines of constitutional law are first elaborated, such as McCulloch v. Maryland, Gibbons v. Ogden, and Cooley v. The Wardens of the Port, are reprinted with considerable fullness, while the later decisions of a less fundamental character are much abbreviated. In every instance however the facts out of which the controversy arose are given, as well as a sufficient portion of the opinion to show why the court decided as it did. The texts of all the decisions made since the beginning of the December Term, 1855 (18 Howard), are taken from the official reports. The texts of decisions made prior to that time are taken from Curtis' Decisions of the Supreme Court of the United States. Except for omissions or paraphrases which are indicated in the usual way, the texts followed have been reproduced *verbatim et literatim*.

I have tried to meet the needs of two classes of students. First, I have had in mind students in law schools where the amount of time given to the subject does not warrant the use of the larger casebooks. It is for them especially that the numerous references to other cases have been included in the notes. Second, I have had in mind college and university classes in government and

constitutional history, and for their assistance I have inserted references to many monographs and treatises, nearly a hundred in all, bearing upon the historical as well as the legal aspects of the topics treated.

In the apportionment of space to the various topics there might well be difference of opinion. In general those branches of the subject in which new questions are coming up have been emphasized rather than those in which the law is well settled. The last four chapters, comprising nearly half the book, are devoted to the commerce clause and the Fourteenth Amendment, which finds its justification in the fact that far more than half of all the constitutional questions which now go to the Supreme Court for adjudication arise out of those two parts of the Constitution. There might also be difference of opinion as to the classification of the cases included in the collection. Many of them belong to one chapter almost as much as to another. In settling this vexed question, I have not been so anxious to attain a logical classification as I have been to place each case where it could be used most effectively for purposes of instruction. For instance, such a case as Leisy v. Hardin might be looked for in the chapter on commerce, but it seemed to me that the study of that case could best be approached from the standpoint of the police power. And so as to many others.

In adding another to the multitude of books dealing with constitutional law, I would adopt as my own the quaint language of old Bellewe, who says in the preface to his *Les Ans du Roy Richard le Second,* "Beseeching you that where you shall finde any faultes, which either by my insufficiency, the intricatenes of the worke, or the Printers' recklesnes are committed, either friendly to pardon, or by some means to admonish me thereof."

LAWRENCE B. EVANS.

701 Barristers Hall, Boston.
November 1, 1915.

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CHAPTER X.

THE POLICE POWER.

The Constitution of the United States.[1]

[1] We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, 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.

[2] 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.

[3] Section. 2. 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.

[4] 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.

[5] 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

[1] The text of the Constitution here given is that printed in Farrand, *The Records of the Federal Convention of 1787*, II, 651, which is intended to be an exact reprint of the original. The text of the first fifteen Amendments is taken from *American History Leaflets*, No. 8, edited by A. B. Hart and E. Channing, and based upon copies made from the originals by the editors. The text of the Sixteenth and Seventeenth Amendments is taken from the proclamations of the Secretary of State declaring them to have been duly adopted. For convenience of reference the present editor has numbered the paragraphs continuously.

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.][1] 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 chuse 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.

[6] When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

[7] The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

[8] SECTION. 3. The Senate of the United States shall be composed of two Senators from each State, [chosen by the Legislature thereof,][2] for six Years; and each Senator shall have one Vote.

[9] 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]

[10] 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.

[11] The Vice President of the United States shall be President

[1] Superseded by the Fourteenth Amendment.

[2] Superseded by the Seventeenth Amendment.

[3] Modified by the Seventeenth Amendment.

of the Senate, but shall have no Vote, unless they be equally divided.

[12] The Senate shall chuse 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.

[13] 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.

[14] 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.

[15] SECTION. 4. 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 chusing Senators.

[16] The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

[17] SECTION. 5. 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.

[18] Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

[19] 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.

[20] 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.

[21] SECTION. 6. The Senators and Representatives shall receive

a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[22] 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 encreased 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.

[23] SECTION. 7. 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.

[24] 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.

[25] 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 Rep-

resentatives, according to the Rules and Limitations prescribed in the Case of a Bill.

[26] SECTION. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and Provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

[27] To borrow Money on the credit of the United States;

[28] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

[29] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

[30] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

[31] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

[32] To establish Post Offices and post Roads;

[33] To promote the Progress of Science and useful Arts, by securing for limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

[34] To constitute Tribunals inferior to the supreme Court;

[35] To define and punish Piracies and Felonies committeed on the high Seas, and Offences against the Law of Nations;

[36] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[37] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[38] To provide and maintain a Navy;

[39] To make Rules for the Government and Regulation of the land and naval Forces;

[40] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[41] 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;

[42] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to

exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; — And

[43] 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.

[44] SECTION. 9. 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.

[45] 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.

[46] No Bill of Attainder or ex post facto Law shall be passed.

[47] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.[1]

[48] No Tax or Duty shall be laid on Articles exported from any State.

[49] 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.

[50] 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.

[51] 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.

[52] SECTION. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder,

[1] Modified by the Sixteenth Amendment.

ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[53] 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 it's 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 Controul of the Congress.

[54] 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.

[55] SECTION. 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

[56] 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.

[57] [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 chuse 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 chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.] [1]

[58] The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

[59] 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.

[60] 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.

[61] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

[62] 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."

[63] SECTION. 2. 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

[1] Superseded by the Twelfth Amendment.

principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[64] 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.

[65] 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.

[66] 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.

[67] 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.

[68] 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 Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

[69] SECTION. 2. 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; [1] — 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.

[70] 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 Fact, with such Exceptions, and under such Regulations as the Congress shall make.

[71] 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.

[72] SECTION. 3. 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.

[73] 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.

[74] 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.

[75] SECTION. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[76] A Person charged in any State with Treason, Felony, or

[1] Modified by the Eleventh Amendment.

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.

[77] No Person held to Service or Labour 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 Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

[78] SECTION. 3. 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.

[79] 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.

[80] 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.

[81] 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 it's equal Suffrage in the Senate.

ARTICLE. VI.

[82] 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.

[83] 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 Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[84] 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.

[85] The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

[86] DONE in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth IN WITNESS whereof We have hereunto subscribed our Names,

Go. WASHINGTON—*Presidt.*
and deputy from Virginia.

Attest WILLIAM JACKSON *Secretary.*

New Hampshire..	John Langdon Nicholas Gilman
Massachusetts	Nathaniel Gorham Rufus King
Connecticut	Wm: Saml. Johnson Roger Sherman
New York	Alexander Hamilton
New Jersey	Wil: Livingston David Brearley. Wm. Paterson. Jona: Dayton

Pennsylvania	B Franklin Thomas Mifflin Robt Morris Geo. Clymer Thos. Fitzsimons Jared Ingersoll James Wilson Gouv Morris
Delaware	Geo: Read Gunning Bedford jun John Dickinson Richard Bassett Jaco: Broom
Maryland	James McHenry Dan of St Thos. Jenifer Danl. Carroll.
Virginia	John Blair —— James Madison Jr.
North Carolina...	Wm. Blount Richd. Dobbs Spaight. Hu Williamson
South Carolina...	J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler.
Georgia	William Few Abr Baldwin

NOTE.—On September 28, 1787, Congress directed that the Constitution, "with the resolutions and letter accompanying the same, be transmitted to the several Legislatures in order to be submitted to a Convention of Delegates chosen in each State by the people thereof, in conformity to the resolves of the Convention made and provided in that case." *Journal of Congress*, XII, 166. When the new government went into operation, the Constitution had been ratified by only eleven States, but ultimately it was ratified by all of them in the following order: Delaware, December 7, 1787; Pennsylvania, December 12, 1787; New Jersey, December 18, 1787; Georgia, January 2, 1788; Connecticut, January 9, 1788; Massachusetts, February 6, 1788; Maryland, April 28, 1788; South Carolina, May 23, 1788; New Hampshire, June 21, 1788; Virginia, June 26, 1788; New York, July 26, 1788; North Carolina, November 21, 1789; Rhode Island, May 29, 1790.

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.]

[87] 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.]

[88] 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.]

[89] 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.]

[90] 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.]

[91] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be de-

prived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI.]

[92] In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

[ARTICLE VII.]

[93] In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

[ARTICLE VIII.]

[94] Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[ARTICLE IX.]

[95] The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

[ARTICLE X.]

[96] 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.[1]

[ARTICLE XI.]

[97] The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

[1] The first ten Amendments were proposed by Congress September 25, 1789, and were ratified by the necessary number of States December 15, 1791.

prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[1]

[ARTICLE XII.]

98 The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such 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 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

[1] The Eleventh Amendment was proposed by Congress March 4, 1794, and was ratified by the necessary number of States February 7, 1795. In a message to Congress on January 8, 1798, President Adams announced that the Amendment might be regarded as a part of the Constitution.

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.[1]

Article XIII.

[99] Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Section 2. Congress shall have power to enforce this article by appropriate legislation.[2]

Article XIV.

[100] Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[101] Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male 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.

[102] Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under

[1] The Twelfth Amendment was proposed by Congress December 8, 1803, and declared in force by the Secretary of State September 25, 1804.

[2] The Thirteenth Amendment was proposed by Congress January 31, 1865, and declared in force by the Secretary of State December 18, 1865.

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.

[103] SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

[104] SECTION 5. The Congress shall the power to enforce, by appropriate legislation, the provisions of this article.[1]

ARTICLE XV.

[105] 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. —

[106] SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.[2] —

ARTICLE XVI.

[107] The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.[3]

[ARTICLE XVII.]

[108] The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six

[1] The Fourteenth Amendment was proposed by Congress June 13, 1866, and was declared in force by the Secretary of State July 28, 1868.

[2] The Fifteenth Amendment was proposed by Congress February 26, 1869, and was declared in force by the Secretary of State, March 30, 1870.

[3] The Sixteenth Amendment was proposed by Congress July 12, 1909, and was declared in force by the Secretary of State February 25, 1913.

years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

[109] When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

[110] This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.[1]

[1] The Seventeenth Amendment was proposed by Congress May 13, 1912, and was declared in force by the Secretary of State May 31, 1913.

Leading Cases on Constitutional Law

CHAPTER I.

THE AMERICAN SYSTEM OF GOVERNMENT.

SECTION 1. THE SUPREME LAW OF THE LAND.

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.

Constitution of the United States, Art. VI.

MARBURY v. MADISON.

SUPREME COURT OF THE UNITED STATES. 1803.
1 Cranch. 137; 2 Lawyers' Ed. 60.

[Near the end of his term of office President Adams nominated William Marbury to the office of justice of the peace in the District of Columbia. The nomination was confirmed by the Senate, the commission was signed by the President, and the great seal of the United States was affixed by the Secretary of State. On the expiration of Adams' term of office, Marbury applied to James Madison, Secretary of State under Jefferson, for the delivery of his commission. Jefferson held that the appointment was not complete until the commission had been delivered, and directed Madison to withhold it. Marbury and several others similarly circumstanced then moved the court for a rule to James Madison to show cause why a writ of mandamus should not issue ordering him to deliver the commission. No cause having been shown there was a motion for a writ of mandamus.]

MARSHALL, C. J. . . . The first object of inquiry is,

1st. Has the applicant a right to the commission he demands? . . . [The court finds that as Marbury's appointment was complete he has a right to the commission.]

This brings us to the second inquiry, which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? . . . [The court finds that they do.]

It remains to be inquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for; and,

2dly. The power of this court.

1st. The nature of the writ. . . . This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States." . . . The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. . . . In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. In all other cases, the supreme court shall have appellate jurisdiction." . . . If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. . . . To enable this court, then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. . . . It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the

delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of *mandamus* to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the constitution can become the law of the land, 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 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. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. 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 superior 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.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

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.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

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? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

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.

Those, then, who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to

the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favor of its rejection.

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.

In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavors to preserve?

"No person," says the constitution, "shall be convicted of

treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

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? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government—if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

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.

The rule must be discharged.

NOTE.—The principle that an act of legislation contrary to the law under which a legislative body is organized is invalid was familiar to Americans at the time the Constitution was adopted. Prior to the Revolution, the validity of an act could be tested in two ways,—by an appeal to the King in Council to set aside the enactment of a colonial legislature, or by an appeal from the decision of a colonial court. Beginning with the Virginia charter of 1612, the legislatures of the colonies were always expressly restricted to the adoption of laws not repugnant to those of England, while it was necessarily implied that their enactments should conform to all the terms of the charters under which they acted. In all the royal colonies it was required that the enactments of the colonial legislatures should be submitted to the Crown, and such as did not meet with its approval could be "disallowed." On July 4, 1660, there was appointed a Committee of the Privy Council for the consideration of "petitions, propositions, memorials, and other addresses . . . . respecting the Plantations." *Acts of the Privy Council*, I, xiii. In 1677 this Committee annulled three acts of the legislature of Virginia on the ground that they were in excess of its powers. In 1696 this Committee was succeeded by a more famous one known as the "Lords of Trade and Plantation," commonly called the Board of Trade, which until its dissolution in 1782 was the chief instrumentality of the Privy Council for dealing with all matters relating to the legislation of the colonies. In reviewing the acts of the colonial legislatures, the Board was concerned not only with the power of the legislature to enact the measure in question but also with the expediency of the enactment. Before beginning the consideration of such acts, the Board commonly referred them to law officers for an opinion "in point of law," the point which was most frequently raised being that of legislative power. It was not unusual for such officers to hear counsel for the colonists or for persons interested in the legislation under discussion. On the ground that they conflicted with the colonial charter or with the laws of England, enactments were disallowed from Virginia in 1677, from Rhode Island in 1704, from Connecticut in 1705, from North Carolina in 1747, from Pennsylvania in 1760, from New Hampshire in 1764, and from Massachusetts in 1772. In all, 8563 acts of the colonies which later formed the United States were submitted to the Privy Council, of which 469 were disallowed. The records of the Privy Council are so imperfect as to make it impossible to determine how many of these were set aside because of lack of authority on the part of the legislature to enact them, but enough is known to know that the proportion is large. For a full treatment of this subject see Russell, *The Review of Colonial Legislation by the King in Council;* Andrews, *British Committees, Commissions, and Councils of Trade and Plantations;* Chalmers, *Opinions.*

Besides appeals to the Privy Council from the enactments of colonial legislatures, there were also many appeals from the decisions of colonial courts. The best known instance of this is the famous case of Winthrop v. Lechmere (1727-8), Thayer, *Cases on Constitutional Law*, I, 34. In this case the appellant argued that an act of the General Assembly of Connecticut entitled "An Act for the Settlement of Intestates' Estates" was void "as not being warranted by the Charter," and the Privy Council so advised His Majesty, who thereupon issued a decree declaring the Act "null and void and of no force or effect whatever." The nature of the King's action was

appreciated by Winthrop and correctly set forth by him in a petition in 1730, in which he said:

> This action being for the reasons above mentioned, in its own nature null, void, and repugnant to the very powers granted by King Charles the Second, it is a gross mistake in the petitioners to allege that the same was annulled by his Majesty's order in Council of the 5th of February, 1727. Whereas his Majesty did, upon counsel heard upon both sides thereof, only relieve your memorialist as a subject and an inhabitant of the Province of Connecticut, who resorted to his royal justice for relief against the oppression of a Court of Probates acting without any legal jurisdiction, under the pretended authority of an Act of Assembly, which being contrary to law and to their charter was in itself void and null, even before his Majesty for the future information of his Majesty's subjects in Connecticut was graciously pleased to declare it so.
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> *Ib.*, I, 39n.

Here again the records of the Privy Council are so imperfect that it is impossible to determine how many of the cases appealed to it from the American colonies, aggregating more than 260 in number, were based on an alleged conflict between a legislative enactment and a colonial charter. Besides Winthrop v. Lechmere, two other well authenticated cases are known —Philips v. Savage (1738), *Acts of the Privy Council*, III, 432, in which the Privy Council upheld the decrees of the Massachusetts court, and Clark v. Tousey (1745), *Ib.*, III, 580, in which the Privy Council reversed its decision in Winthrop v. Lechmere. For an excellent treatment of this subject see Schlesinger, "Colonial Appeals to the Privy Council," in *Political Science Quarterly*, XXVIII, 279, 433. Also see Hazeltine, "Appeals from the Colonial Courts to the King in Council," *Annual Report of the American Historical Association for 1894*, 299. In several of the colonies attempts were made to prevent appeals to the King in Council, thus leaving to the colonial courts the final determination of the validity of colonial legislation. But the Privy Council declared that "an appeal doth lye to H. M. in his Council as a right inherent in the Crown." Cited by Schlesinger, in *Political Science Quarterly*, XXVIII, 295. See also the case of Christian v. Corren (1716), 1 Peere Williams, 329, also in MacQueen, *The Appellate Jurisdiction of the House of Lords and Privy Council*, 740.

The distinction between the function of the Privy Council as a sort of board for the review of colonial legislation and its function as a court to hear appeals from the decisions of colonial courts was well indicated in an opinion of Sir Charles Pratt (afterwards Lord Camden), Attorney General, and Hon. Charles Yorke, Solicitor General, given August 19, 1760. Questioned as to the power of the King to set aside particular clauses of an act of colonial legislation leaving the rest of the act in force, they advised that this should not be done, but added:

> At the same time we are of opinion that there may be cases in which particular provisions may be void *ab initio* though other parts of the law may be valid, as in clauses where any act of Parliament may be contraversed or any legal right of a private subject bound without his consent. These are cases the decision of which does not depend on the exercise of a discretionary prerogative,

> but may arise judicially and must be determined by the general rules of law and the constitution of England. And upon this ground it is, that in some instances whole acts of assembly have been declared void in the courts of Westminster Hall, and by His Majesty in council upon appeals from the plantations.
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> *Statutes at Large of Pennsylvania*, V, 735.

Besides the cases appealed to the Privy Council, the right of the courts to determine the validity of acts of the legislature had been involved in cases in at least five States before the assembling of the Federal Convention, viz. in Holmes v. Walton, New Jersey, 1780; in Commonwealth v. Caton, Virginia, 1782; in Rutgers v. Waddington, New York, 1784; in Trevett v. Weeden, Rhode Island, 1786; and Bayard v. Singleton, North Carolina, 1787. All these cases are printed in Thayer, *Cases*, I, 55-83, except Holmes v. Walton, for which see *American Historical Review*, IV, 456. In Rutgers v. Waddington, the court distinctly repudiated any claim of right to question the validity of a legislative enactment. In Commonwealth v. Caton the facts did not require the court to pass upon the question, but in the opinion of Chancellor Wythe, there is this strong dictum:

> If the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the Constitution, will say to them, here is the limit of your authority, and hither shall you go, but no further.

This dictum derives additional interest from the fact that the judge who made it was John Marshall's preceptor in law at the College of William and Mary.

By far the best known of these cases is that of Trevett v. Weeden, where the judges, while dismissing the case for lack of jurisdiction, nevertheless pronounced an act of the legislature invalid, and were summoned before that body to give an account of themselves. One of the judges defended their decision "in a very learned, sensible, and elaborate discourse in which he was upwards of six hours upon the floor." Neither this argument nor that of the other judges satisfied the legislature, for it "Resolved, that no satisfactory reasons had been rendered by them for their judgment on the foregoing information." See *Records of the State of Rhode Island and Providence Plantations*, edited by J. R. Bartlett, X, 215. When the terms of the judges, who were elected by the legislature, expired a short time after, the legislature allowed all but one of them to retire from the bench. In Holmes v. Walton and Bayard v. Singleton, the judgment of the court pronouncing a legislative act invalid was acquiesced in by the legislature.

In the Federal Convention and also in the State conventions called to act on the new Constitution, the question was frequently raised as to what would happen in case Congress should adopt an act which contravened or exceeded the powers with which it was vested. This discussion is well summarized in Melvin, "The Judicial Bulwark of the Constitution," in *The American Political Science Review*, VIII, 167. In the Convention of Virginia Marshall said, "If they were to make a law not warranted by any of the powers enu-

merated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.'' Elliot's *Debates,* III, 553. Patrick Henry said in the same body, ''I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary.'' *Ib.,* III, 325. Similar declarations were made in many other States, as for instance by William R. Davie in the North Carolina Convention, *Ib.,* IV, 155; by Oliver Ellsworth in the Connecticut Convention, *Ib.,* II, 196; by Samuel Adams in the Massachusetts Convention, *Ib.,* II, 151; by Charles Pinckney in the South Carolina Legislature, *Ib.,* IV, 257, and by James Wilson in the Pennsylvania Convention, *Ib.,* II, 489; while Alexander Hamilton made the same idea current throughout the country by saying in *The Federalist:*

> The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred: In other words, the Constitution ought to be preferred to the statutes, the intention of the people to the intention of their agents.

The power of the courts to declare legislative acts invalid because of conflict with the Constitution is often said to be peculiar to the United States, but it is found in many other countries. The Privy Council of Great Britain still continues to set aside acts of the colonial legislatures because of conflict with the fundamental colonial law. Among recent cases, see Royal Bank of Canada v. The King, 1913, Appeal Cases, 283; Cotton v. The King, 1914, Appeal Cases, 176; Attorney-General for Alberta v. Attorney-General for Canada, 1915, Appeal Cases, 363. The courts of appeals of the several colonies exercise a similar power. See the decisions of the High Court of Australia in Australian Boot Trade Employees' Federation v. Whybrow (1910), 10 Commonwealth Law Reports, 267, and The King v. Commonwealth Court of Conciliation and Arbitration (1910), 11 Commonwealth Law Reports, 2. For New Zealand, see Clemison v. Mayor of West Harbour (1895), 13 New Zealand Law Reports, 695. For South Africa, see Municipality of Worcester v. Colonial Government (1907), 24 S. C., Cape of Good Hope, 67, and Howard v. The Attorney General (1909), Transvaal Law Reports, High Court, 164. This power is not confined to British and American jurisdictions but is found in Argentina (Roscoe Pound, *The Judicial Office in the United States,* 17, 20), in Bolivia (*Annual Bulletin, Comparative Law Bureau of the American Bar Association,* July 1, 1914, 69), Colombia (*Ib.,* 101), Cuba (*Ib.,* 104), Mexico (*Ib.,* 121), Venezuela (*Ib.,* 148). For these and other details see *Report to the New York State Bar Association,* Senate Document, No. 941, 63rd Congress, 3rd Session.

A statute is always presumed to be valid, *Ex parte* Young (1908), 209 U. S. 123, and if its language permits, the courts will so construe it as to preserve its validity. Knights Templars' Indemnity Company v. Jarman (1902), 187 U. S. 197; United States v. Delaware & Hudson Ry. (1909), 213

U. S. 366; St. Louis Southwestern Ry. v. Arkansas (1914), 235 U. S. 350. Except in a few States where the courts are required to give advisory opinions, a court will not pass upon the validity of a statute except as incidental to the decision of a case before it, and then only when it is necessary to the decision. California v. San Pablo & Tulare Ry. (1893), 149 U. S. 308. Only one whose rights are affected by a statute will be allowed to question its constitutionality. The Winnebago (1907), 205 U. S. 354; Mallinckrodt Chemical Works v. St. Louis (1915), 238 U. S. 41. Hence the courts will not permit the validity of a statute to be tested in a friendly suit where there is no real antagonism of interests, Chicago & Grand Trunk Ry. v. Wellman (1892), 143 U. S. 339, nor will they accept jurisdiction for the sole purpose of testing the validity of a statute, Muskrat v. United States (1911), 219 U. S. 346; nor will the Federal Supreme Court review the decision of a State court where the interest involved is an official and not a personal one. Marshall v. Dye (1913), 231 U. S. 250.

A statute may contain provisions which are constitutional and others which are not. If they are separable the court will enforce those which are valid, provided it is convinced that the legislature would have enacted them without the invalid provisions. Pollock v. Farmers' Loan and Trust Co. (1895), 158 U. S. 601; Illinois Central Railway v. McKendree (1906), 203 U. S. 514; The Employers' Liability Cases (1908), 207 U. S. 463. In all such cases the courts endeavor to ascertain and apply the will of the legislature. The Trade Mark Cases (1879), 100 U. S. 82; James v. Bowman (1903), 190 U. S. 127. In determining whether an act is valid the courts do not inquire into the motives of the legislature, Fletcher v. Peck (1810), 6 Cranch, 87; Interstate Commerce Commission v. Brimson (1894), 154 U. S. 447; McCray v. United States (1904), 195 U. S. 27; nor are they concerned with the wisdom or expediency of the act, Halter v. Nebraska (1907), 205 U. S. 34. The validity of an act depends upon its actual operation and effect as applied and enforced rather than upon its form. Minnesota v. Barber (1890), 136 U. S. 313; United States v. Reynolds (1914), 235 U. S. 133. "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 a legal contemplation, as inoperative as though it had never been passed." Justice Field in Norton v. Shelby County (1886), 118 U. S. 425. There is authority however for holding that an unconstitutional act may not be treated as an absolute nullity from the date of its enactment to the date of its setting aside by the courts. United States v. Realty Co. (1896), 163 U. S. 427. Especially may an officer who conforms to a legislative act claim the protection of that act if it is not void on its face. The State v. Carroll (1871), 38 Connecticut 449; State ex rel. New Orleans Canal and Banking Co. et al. v. Heard (1895), 47 La. Ann. 1679; 47 L. R. A. 512, where a learned note collects the cases on the subject. See also Allison v. Corker (1902), 67 N. J. Law, 596, annotated in 60 L. R. A. 564, where the court says, "For many purposes an unconstitutional statute may influence judicial judgment, where, for example, under color of it private or public actions have been taken. An unconstitutional statute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with. Nowhere has power been vested to expunge it or remove it from its proper place among the statutes."

There is a voluminous literature upon the power of the courts to disregard

unconstitutional legislation. Besides the authorities cited above, see Baldwin, *The American Judiciary;* Beard, *The Supreme Court and the Constitution;* Brinton Cox, *Judicial Power and Unconstitutional Legislation;* Corwin, *The Doctrine of Judicial Review;* Dougherty, *Power of the Federal Judiciary over Legislation;* Haines, *The American Doctrine of Judicial Supremacy;* McLaughlin, *The Courts, the Constitution and Parties;* J. B. Thayer, *Legal Essays.* A list of cases in which the Federal Supreme Court has declared statutes or parts of statutes invalid down to the end of the October Term, 1888, is given in 131 U. S., Appendix, ccxxxv; but it is not accurate. United States v. Ferreira, 13 Howard 40, which is included, should be omitted, and Scott v. Sandford, 19 Howard 393, which is omitted, should be included. A later and more reliable enumeration and classification of such decisions may be found in Moore, *The Supreme Court and Unconstitutional Legislation.* For the argument against the doctrine of Marbury v. Madison see Eakin v. Raub (1825), 12 Sargeant & Rawle, 330, also in Thayer, *Cases,* I, 133, Jackson's veto of the United States Bank bill, Richardson, *Messages and Papers of the Presidents,* II, 581-583, and a speech by Roscoe Conkling, April 16, 1860, *Congressional Globe,* 36th Congress, 1st session, App. 233.

Section 2. Implied and Inherent Powers of the Federal Government.

> The Congress shall have power . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.
>
> *Constitution of the United States, Art. I, sec. 8.*

McCULLOCH v. THE STATE OF MARYLAND et al.

Supreme Court of the United States. 1819.
4 Wheaton, 316; 4 Lawyers' Ed. 579.

Error to the Court of Appeals of the State of Maryland. . . .

[In 1816, Congress incorporated the Bank of the United States, which in 1817 established a branch in Baltimore. In 1818 the legislature of Maryland passed "An Act to impose a Tax on all Banks, or Branches thereof, in the State of Maryland, not chartered by the Legislature." McCulloch, the cashier of the branch in Baltimore, having issued notes upon unstamped paper in violation of this act, this suit was brought against him. In the course of the argument both the power of Congress to incorporate a bank and the power of a State to tax such a bank were called in question.]

MARSHALL, C. J., delivered the opinion of the court.

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union; and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of the State. The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

The first question made in the cause is, has congress power to incorporate a bank?

It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

It will not be denied, that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people, are to be adjusted, if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first congress elected under the present constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After

being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert, that a measure adopted under these circumstances, was a bold and plain usurpation, to which the constitution gave no countenance.

These observations belong to the cause: but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the constitution was, indeed, elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State, by the people thereof, under the recommendation of its legislature, for their assent and ratification." This mode of proceeding was adopted; and by the convention, by congress, and by the State legislatures, the instrument was submitted to the people. They acted upon it, in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several States; and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the

measures of the people themselves, or become the measures of the State governments.

From these conventions the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But, surely, the question whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the general government be doubted, had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty, created by themselves. To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is per-

petually arising, and will probably continue to arise, as long as our system shall exist.

In discussing these questions, the conflicting powers of the general and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect that it would be this: that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, "anything in the constitution or laws of any State, to the contrary notwithstanding."

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the 10th amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;" thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the articles of confederation, and probably omitted it to

avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted 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 clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the North should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the constitution to be preferred which would render these operations difficult, hazardous, and ex-

pensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers its confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue, and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation, is one appertaining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever, is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America, the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign, with respect to the objects committed to it, and neither

sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain, that the extent of power granted by the people is to be ascertained, not by the nature and terms of the grant, but by its date. Some state constitutions were formed before, some since that of the United States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the general government the power contained in the constitution, and on the States the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were entrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains, that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the general government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the constitution of the United States has not left the right of congress to employ the necessary means, for the execution the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this consti-

tution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on congress the power of making laws. That, without it, doubts might be entertained whether congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a congress, which is to consist of a senate and house of representatives. Each house may determine the rule of its proceedings; and it is declared that every bill which shall have passed both houses, shall, before it becomes a law, be presented to the President of the United States. The 7th section describes the course of proceedings, by which a bill shall become a law; and, then, the 8th section enumerates the powers of congress. Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation? After allowing each house to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention, that an express power to make laws was necessary to enable the legislature to make them? That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but only such as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical neces-

sity, 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. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated, by the passage cited at the bar, from the 10th section of the 1st article of the constitution. It is, we think, impossible to compare the sentence which prohibits a State from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," with that which authorizes congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the general government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary" by prefixing the word "absolutely." This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. 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 confining the choice of means to such narrow limits are 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. The powers vested in congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility, as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend that the legislature might not superadd to the oath directed by the constitution, such other oath of office as its wisdom might suggest.

So, with respect to the whole penal code of the United States. Whence arises the power to punish in cases not prescribed by the constitution? All admit that the government may, legitimately, punish any violation of its laws; and yet this is not among the enumerated powers of congress. The right to enforce the observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." The

several powers of congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So, of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the constitution and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conducive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehenisve when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment?

In ascertaining the sense in which the word "necessary" is used in this clause of the constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and properly to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that in the absence of this clause, congress would have some choice of means. That it might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional. This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the legislature to select its means. That this could not be intended, is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:—

1. The clause is placed among the powers of congress, not among the limitations on those powers.

2. Its terms purport to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned for thus concealing an intention to narrow the discretion of the national legislature, under words which purport to enlarge it. The framers of the constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and after deep reflection, impress on the mind another, they would rather have disguised the

grant of power, than its limitation. If then, their intention had been, by this clause, to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," &c., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

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 consist with the letter and spirit of the constitution, are constitutional.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government, from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But

being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the construction which has been uniformly put on the 3d section of the 4th article of the constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States," is not more comprehensive, than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. Under the confederation, congress justifying the measure by its necessity, transcended, perhaps, its powers to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument, as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act

was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

After this declaration, it can scarcely be necessary to say, that the existence of state banks can have no possible influence on the question. No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution. But were it otherwise, the choice of means implies a right to choose a national bank in preference to state banks, and congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the constitution, and is a part of the supreme law of the land.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches, and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

2. Whether the State of Maryland may, without violating the constitution, tax that branch? . . . [This part of the opinion is given *post*, page 212.]

We are unanimously of opinion, that the law passed by the

legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void. . . .

NOTE.—The doctrine of implied powers as worked out by Marshall in McCulloch v. Maryland has been so unreservedly accepted that it has now become almost axiomatic and has been affirmed in scores of decisions. The essential principles upon which Marshall based his argument had been stated by Hamilton in his Opinion on the Constitutionality of the United States Bank, a paper with which Marshall was familiar. In this paper Hamilton had said:

> Every power vested in a government is in its nature sovereign, and includes by force of the term a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution.
>
> Hamilton, *Works* (Lodge, Ed.) III, 181.

And again, in discussing "a criterion of what is constitutional and of what is not so," Hamilton said:

> This criterion is the end, to which the measure relates as a means. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority.
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> *Ib.*, III, 192.

No other opinion of the Supreme Court has been so much praised as has that of Marshall in McCulloch v. Maryland. A most competent critic has said:

> If we regard at once the greatness of the questions at issue in the particular case, the influence of the opinion, and the large method and clear and skillful manner in which it is worked out, there is nothing so fine as the opinion in McCulloch v. Maryland.
>
> Thayer, *John Marshall*, 85.

IN RE NEAGLE.

SUPREME COURT OF THE UNITED STATES. 1890.
135 U. S. 1; 34 Lawyers' Ed. 55.

Appeal from the Circuit Court of the United States for the Northern District of California.

[When Mr. Justice Field, of the Supreme Court of the United States, was travelling on circuit in California, there was reason to believe that one Terry, a suitor in Justice Field's court, would attack him and do him bodily harm. Therefore, by direction of the Attorney General of the United States, David Neagle,

a deputy United States marshal, was instructed to accompany Justice Field for his protection. While on the way from Los Angeles to San Francisco for the purpose of holding court, Justice Field was attacked by Terry, whereupon Neagle shot and killed Terry. Having been arrested by officers of the State of California charged with the murder of Terry, Neagle sued out a writ of *habeas corpus* in the United States Circuit Court on the ground that he was in custody for an act done in pursuance of the laws of the United States. The court having ordered his discharge, the sheriff having Neagle in custody appealed from this order to the Supreme Court of the United States.]

MR. JUSTICE MILLER . . . delivered the opinion of the court. . . .

These are the material circumstances produced in evidence before the Circuit Court on the hearing of this *habeas corpus* case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, travelling with him, and aware of all the previous relations of Terry to the Judge,—as he was,—of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defense of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the State authorities for this offence, unless there be found in aid of the defence of the prisoner some element of power and authority asserted under the government of the United States.

This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the Circuit Courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty as circuit justice in the case for which they were committed for contempt of court; and that the deputy marshal of the United States, who killed Terry in defence of Field's life, was charged

with a duty under the law of the United States to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death.

To the inquiry whether this proposition is sustained by law and the facts which we have recited, we now address ourselves. . . .

We have no doubt that Mr. Justice Field when attacked by Terry was engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties, and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of *habeas corpus* must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits, and act as a body-guard to them, to defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of *habeas corpus* to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be 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."

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible 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. . . .

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States; because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the per-

formance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution? . . .

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence already cited in this opinion between the marshal of the Northern District of California, and the Attorney-General, and the district attorney of the United States for that district, although prescribing no very specific mode of affording this protection by the Attorney-General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provision which he did make, for the protection and defence of Mr. Justice Field.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter fourteen of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 788 declares:

"The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

If, therefore, a sheriff of the State of California was authorized to do in regard to the laws of California what Neagle did, that is, if he is authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the laws of the United States. . . .

That there is a peace of the United States; that a man assault-

ing a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have cited, in connection with the powers conferred by the State of California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

. . .

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.

MR. JUSTICE LAMAR (with whom concurred MR. CHIEF JUSTICE FULLER) dissenting. . . .

NOTE.—The inherent powers of the Federal Government should be distinguished from its implied powers. The latter are always derived from an express grant. The former are involved in the very nature of the government and the exigencies of the situation. The argument upon which they are founded was thus expressed in 1785 by James Wilson, afterwards a Justice of the Supreme Court of the United States:

> Though the United States in Congress assembled derive from the particular States no power, jurisdiction, or right which is not expressly delegated by the Constitution, 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.
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> Wilson, *Works* (Andrews, Ed.), I, 557.

The same idea was expressed by Alexander Hamilton, in his Opinion on the National Bank which he submitted to President Washington. He said:

> It is not denied that there are implied, as well as express powers, and that the former are as effectually delegated as the latter. And for the sake of accuracy it shall be mentioned that there is another class of powers, which may be properly denominated resulting powers. It will not be doubted that if the United States should make a conquest of any of the territories of its neighbors, they would possess sovereign jurisdiction over the conquered territory. This would be rather a result from the whole mass of the powers of the government, and from the nature of political society, than a consequence of either of the powers specially enumerated.
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> Hamilton, *Works* (Lodge, Ed.), III, 184.

With this should be compared the language used by Mr. Justice Bradley in his concurring opinion in The Legal Tender Cases (1871), 12 Wallace, 457, 555, 556:

> The Constitution of the United States established a government, and not a league, compact or partnership . . . . As a government it was invested with all the attributes of sovereignty . . . . 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 . . . . Such being the char-

> acter 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.

To the same effect is the language of Mr. Justice Miller in United States v. Kagama (1886), 118 U. S. 375:

> 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 concerning 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 a later case, however, when this doctrine was urged upon the Supreme Court, it was expressly repudiated. See Kansas v. Colorado (1907), 206 U. S. 46. The whole subject is well discussed in Willoughby, *The Constitutional Law of the United States*, I, 49 seq., and in Tiedeman, *The Unwritten Constitution of the United States.*

FONG YUE TING v. UNITED STATES.
WONG QUAN v. UNITED STATES.
LEE JOE v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1893.
149 U. S. 698; 37 Lawyers' Ed. 905.

Appeals from the Circuit Court of the United States for the Southern District of New York.

These were three writs of *habeas corpus*, granted by the Circuit Court of the United States for the Southern District of New York, upon petitions of Chinese laborers, arrested and held by the marshal of the district for not having certificates of residence, under section 6 of the act of May 5, 1892, c. 60, . . .

Each petition alleged that the petitioner was arrested and detained without due process of law, and that section 6 of the act of May 5, 1892, was unconstitutional and void. [The section complained of required Chinese laborers within the limits of the United States at the time of the passage of the act to take out certificates of residence. Those who neglected to do so within one year without good cause were made liable to deportation.]

In each case, the Circuit Court, after a hearing upon the writ of *habeas corpus* and the return of the marshal, dismissed the writ of *habeas corpus,* and allowed an appeal of the petitioner to this court, and admitted him to bail pending the appeal. . . .

Mr. Justice Gray, after stating the facts, delivered the opinion of the court.

The general principles of public law which lie at the foundation of these cases are clearly established by previous judgments of this court, and by the authorities therein referred to.

In the recent case of Nishimura Ekiu v. United States, 142 U. S. 651, 659, the court, in sustaining the action of the executive department, putting in force an act of Congress for the exclusion of aliens, said: "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 cases and upon such conditions as it may see fit to prescribe. 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. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress."

The same views were more fully expounded in the earlier case of Chae Chan Ping v. United States, 130 U. S. 581, in which the validity of a former act of Congress, excluding Chinese laborers from the United States, under the circumstances therein stated, was affirmed.

In the elaborate opinion delivered by Mr. Justice Field, in behalf of the court, it was said: "Those laborers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." "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 inde-

pendenee and seeurity throughout its entire territory." 130 U. S. 603, 604.

It was also said, repeating the language of Mr. Justice Bradley in Knox v. Lee, 12 Wall. 457, 555: "The United States is not only a government, but it is a national government, and the only government in this country that has the eharaeter of nationality. It is invested with power over all the foreign relations of the country, war, peaee, and negotiations and intercourse with other nations; all of which are forbidden to the State governments." 130 U. S. 605. And it was added: "For local interests the several States of the Union exist; but for international purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." 130 U. S. 606.

The eourt then went on to say: "To preserve its independence, and give security against foreign aggression and encroaehment, 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 encroaehment eome, whether from the foreign nation aeting in its national eharaeter, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for proteetion 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 subjects affected are eoneerned, is necessarily eonclusive upon all its departments and offieers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different raee in this country, who will not assimiliate with us, to be dangerous to its peaee and security, their exclusion is not to be stayed because at the time there are no aetual hostilities with the nation of whieh the foreigners are subjeets. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same neeessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the neeessity in one ease must also determine it in the other. In both eases, its determination is eonclusive upon the judieiary. If the government of the eountry of whieh the foreigners exeluded are subjeets is dissatisfied with this action, it ean make eomplaint to the executive head of our government, or resort to any other measures whieh, in its judgment, its interests or dignity may demand; and there lies its only remedy. The power of the government to exclude foreigners from the eountry, whenever, in its judgment, the public interests require sueh

exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." 130 U. S. 606, 607. This statement was supported by many citations from the diplomatic correspondence of successive Secretaries of State, collected in Wharton's International Law Digest, § 206.

The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.

This is clearly affirmed in dispatches referred to by the court in Chae Chan Ping's Case. In 1856, Mr. Marcy wrote: "Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war. A memorable example of the exercise of this power in time of peace was the passage of the alien law of the United States in the year 1798." In 1869, Mr. Fish wrote: "The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested." Wharton's International Law Digest, § 206; 130 U. S. 607. . . .

The right to exclude or to 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 to 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.

The Constitution of the United States speaks with no uncertain sound upon this subject. That instrument, established by the people of the United States as the fundamental law of the land, has conferred upon the President the executive power; has made him the commander-in-chief of the army and navy; has authorized him, by and with the consent of the Senate, to make treaties,

and to appoint ambassadors, public ministers, and consuls; and has made it his duty to take care that the laws be faithfully executed. The Constitution has granted to Congress the power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to define and punish piracies and felonies committed on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces; and to make all laws necessary and proper for carrying into execution these powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. And the several States are expressly forbidden to enter into any treaty, alliance, or confederation; to grant letters of marque and reprisal; to enter into any agreement or compact with another State, or with a foreign power; or to engage in war, unless actually invaded, or in such imminent danger as will not admit of delay. . . .

The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by act of Congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene. . . .

Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides. . . .

In our jurisprudence, it is well settled that the provisions of an act of Congress, passed in the exercise of its constitutional authority, on this, as on any other subject, if clear and explicit, must be upheld by the courts even in contravention of express stipulations in an earlier treaty. As was said by this court in Chae Chan Ping's Case, following previous decisions: "The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the

supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case, the last expression of the sovereign will must control." "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." 130 U. S. 600. See also Foster v. Neilson, 2 Pet. 253, 314; Edye v. Robertson, 112 U. S. 580, 597-599; Whitney v. Robertson, 124 U. S. 190. . . .

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.

Upon careful consideration of the subject, the only conclusion which appears to us to be consistent with the principles of international law, with the Constitution and laws of the United States, and with the previous decisions of this court, is that in each of these cases the judgment of the Circuit Court, dismissing the writ of habeas corpus, is right and must be *Affirmed.*

[Mr. Chief Justice Fuller, Mr. Justice Brewer, and Mr. Justice Field delivered dissenting opinions.]

Note.—On a similar state of facts involving the right of an alien to enter the colony of Victoria, the Privy Council of Great Britain reached the same result. Musgrove v. Chun Teeong Toy, L. R. 1891, Appeal Cases, 272; 60 L. J. P. C. 28. In the United States, Congress may legislate for the exclusion of aliens not only in the exercise of the inherent authority of the Federal Government, but also by virtue of its delegated authority to regulate foreign commerce. Nishimura Ekiu v. United States (1892), 142 U. S. 651.

The inherent right to exclude aliens has found many applications, all of which rest exclusively within the discretion of the political departments of the government. Among the first classes excluded were contract laborers, United States v. Laws (1896), 163 U. S. 258, but the restriction has been extended to anarchists, United States v. Williams (1904), 194 U. S. 279, to

persons convicted of crime, United States v. Williams (1913), 203 Fed. 155, to paupers or persons liable to become a public charge, Japanese Immigrant Cases (1903), 189 U. S. 86, to persons assisted by others to come to the United States, United States v. Rodgers (1911), 191 Fed. 970, and to prostitutes, United States v. Bitty (1908), 208 U. S. 393, Low Wah Suey v. Backus (1912), 225 U. S. 460, Lapina v. Williams (1914), 232 U. S. 78. The right to exclude aliens involves the right to control the privilege of transit through the United States, Fok Yung Yo v. United States (1902), 185 U. S. 296.

The most important measures adopted for the exclusion of aliens are those directed to the exclusion of Chinese "laborers." This word has been held to include a lodging-house keeper, In re Tenny (1898), 86 Fed. 303, a prostitute, Lee Ah Yin v. United States (1902), 116 Fed. 614, a gambler, United States v. Ah Fawn (1893), 57 Fed. 591, a merchant who worked in a laundry, United States v. Yong Yew (1897), 83 Fed. 832, and a tenant of a farm, Lew Quen Wo v. United States (1911), 184 Fed. 685.

The right to exclude aliens involves the right to expel, Tiaco v. Forbes (1913), 228 U. S. 549.

While the abstract right to exclude or expel aliens is admitted, the duties attendant upon membership in the family of nations must not be overlooked. The political and commercial relations of nations are so close and the privilege of entrance and residence has been so freely accorded that an arbirtrary exclusion or expulsion may give rise to a diplomatic claim. Bonfils, *Manuel de Droit International Public*, §§ 441, 442.

> For a state to exclude all foreigners would be to withdraw from the brotherhood of civilized peoples; to exclude any without reasonable or at least plausible cause, is regarded as so vexatious and oppressive that a government is thought to have the right of interfering in favor of its subjects in cases where sufficient cause does not, in its judgment, exist.
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> Hall, *International Law*, 223.

The expulsion of aliens even more than their exclusion imposes upon the state the duty of showing circumstances which justify its act. The prevailing practice was well stated by Gresham, Secretary of State, in these words:

> The just rule would seem to be that no nation can single out for expulsion from its territory any individual citizen of a friendly nation without special and sufficient grounds therefor. And even when such grounds exist the exclusion should be effected with as little injury to the individual and his property interest as may be compatible with the safety and interests of the country which expels him.
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> Moore, *Digest of International Law*, IV, 84.

The whole subject is admirably treated in Bouvé, *A Treatise on the Laws Governing the Exclusion and Expulsion of Aliens in the United States.*

Section 3. The Relations of the Federal Government and the States.

CRANDALL v. STATE OF NEVADA.

Supreme Court of the United States. 1867.
6 Wallace, 35; 18 Lawyers' Ed. 745.

Error to the Supreme Court of Nevada.

In 1865, the legislature of Nevada enacted that "there shall be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and that the proprietors, owners, and corporations so engaged should pay the said tax of one dollar for each and every person so conveyed or transported from the State. For the purpose of collecting the tax, another section required from persons engaged in such business, or their agents, a report every month, under oath, of the number of passengers so transported, and the payment of the tax to the sheriff or other proper officers.

With the statute in existence, Crandall, who was the agent of a stage company engaged in carrying passengers through the State of Nevada, was arrested for refusing to report the number of passengers that had been carried by the coaches of his company, and for refusing to pay the tax of one dollar imposed on each passenger by the law of that State. He pleaded that the law of the State under which he was prosecuted was void, because it was in conflict with the Constitution of the United States; and his plea being overruled, the case came into the Supreme Court of the State. That court—considering that the tax laid was not an impost on "exports," nor an interference with the power of Congress "to regulate commerce among the several States"—decided against the right thus set up under the Federal Constitution. Its judgment was now here for review. . . .

Mr. Justice Miller delivered the opinion of the court.

The question for the first time presented to the court by this record is one of importance. The proposition to be considered is the right of a State to levy a tax upon persons residing in the State who may wish to get out of it, and upon persons not residing in it who may have occasion to pass through it. . . .

Having determined that the statute of Nevada imposes a tax

upon the passenger for the privilege of leaving the State, or passing through it by the ordinary mode of passenger travel, we proceed to inquire if it is for that reason in conflict with the Constitution of the United States.

In the argument of the counsel for the defendant in error, and in the opinion of the Supreme Court of Nevada, which is found in the record, it is assumed that this question must be decided by an exclusive reference to two provisions of the Constitution, namely: that which forbids any State, without the consent of Congress, to lay any imposts or duties on imports or exports, and that which confers on Congress the power to regulate commerce with foreign nations and among the several States. . . .

But we do not concede that the question before us is to be determined by the two clauses of the Constitution which we have been examining.

The people of these United States constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. Here sits its legislature, composed of senators and representatives, from the States and from the people of the States. Here resides the President, directing through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation, to which all its citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the Federal government. That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a State over whose territory they must pass to reach the point where these services must be rendered. The government, also, has its offices of secondary importance in all other parts of the country. On the sea-coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a State to obstruct this right that would not enable it to defeat the purposes for which the government was established.

The Federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any State of the Union.

If this right is dependent in any sense, however limited, upon the pleasure of a State, the government itself may be overthrown by an obstruction to its exercise. Much the largest part of the transportation of troops during the late rebellion was by railroads, and largely through States whose people were hostile to the Union. If the tax levied by Nevada on railroad passengers had been the law of Tennessee, enlarged to meet the wishes of her people, the treasury of the United States could not have paid the tax necessary to enable its armies to pass through her territory.

But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or 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 a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it.

The views here advanced are neither novel or unsupported by authority. The question of the taxing power of the States, as its exercise has affected the functions of the Federal government, has been repeatedly considered by this court, and the right of the States in this mode to impede or embarrass the constitutional operations of that government, or the rights which its citizens hold under it, has been uniformly denied. . . . [Here follows a discussion of McCulloch v. Maryland, 4 Wheat. 316; Brown v. Maryland, 12 Wheat. 419; Weston v. Charleston, 2 Pet. 449.]

In all these cases, the opponents of the taxes levied by the States were able to place their opposition on no express provision of the Constitution, except in that of Brown v. Maryland. But in all the other cases, and in that case also, the court distinctly placed the invalidity of the State taxes on the ground that they interfered with an authority of the Federal government, which was itself only to be sustained as necessary and proper to the exercise of some other power expressly granted.

In The Passenger Cases, to which reference has already been made, Justice Grier, with whom Justice Catron concurred, makes

this one of the four propositions on which they held the tax void in those cases. Judge Wayne expresses his assent to Judge Grier's views; and perhaps this ground received the concurrence of more of the members of the court who constituted the majority than any other. But the principles here laid down may be found more clearly stated in the dissenting opinion of the Chief Justice in those cases, and with more direct pertinency to the case now before us than anywhere else. After expressing his views fully in favor of the validity of the tax, which he said had exclusive reference to foreigners, so far as those cases were concerned, he proceeds to say, for the purpose of preventing misapprehension, that so far as the tax affected American citizens it could not in his opinion be maintained. He then adds: "Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States from the most remote States or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State of the Union. . . . For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it."

Although these remarks are found in a dissenting opinion, they do not relate to the matter on which the dissent was founded. They accord with the inferences which we have already drawn from the Constitution itself, and from the decisions of this court in exposition of that instrument.

Those principles, as we have already stated them in this opinion, must govern the present case. . . .

Judgment reversed, and the case remanded to the Supreme Court of the State of Nevada, with directions to discharge the plaintiff in error from custody.

MR. JUSTICE CLIFFORD. I agree that the State law in question is unconstitutional and void, but I am not able to concur in the prineipal reasons assigned in the opinion of the court in sup-

port of that conclusion. . . . I hold that the act of the State legislature is inconsistent with the power conferred upon Congress to regulate commerce among the several States, and I think the judgment of the court should have been placed exclusively upon that ground. . . . The CHIEF JUSTICE . . . concurs in the views I have expressed.

TEXAS v. WHITE ET AL.

SUPREME COURT OF THE UNITED STATES. 1868.
7 Wallace, 700; 19 Lawyers' Ed. 227.

THE CHIEF JUSTICE delivered the opinion of the court.

This is an original suit in this court, in which the State of Texas, claiming certain bonds of the United States as her property, asks an injunction to restrain the defendants from receiving payment from the National government, and to compel the surrender of the bonds to the State. . . .

It is not to be questioned that this court has original jurisdiction of suits by States against citizens of other States, or that the States entitled to invoke this jurisdiction must be States of the Union. But, it is equally clear that no such jurisdiction has been conferred upon this court of suits by any other political communities than such States.

If, therefore, it is true that the State of Texas was not at the time of filing this bill, or is not now, one of the United States, we have no jurisdiction of this suit, and it is our duty to dismiss it. . . .

It [the word state] describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region, inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. . . .

In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a com-

mon constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country. . . .

In all respects, so far as the object could be accomplished by ordinances of the convention, by acts of the legislature, and by votes of the citizens, the relations of Texas to the Union were broken up, and new relations to a new government were established for them.

The position thus assumed could only be maintained by arms, and Texas accordingly took part, with the other Confederate States, in the war of the rebellion, which these events made inevitable. During the whole of that war there was no governor, or judge, or any other State officer in Texas, who recognized the National authority. Nor was any officer of the United States permitted to exercise any authority whatever under the National government within the limits of the State except under the immediate protection of the National military forces.

Did Texas, in consequence of these acts, cease to be a State? Or, if not, did the State cease to be a member of the Union?

It is needless to discuss, at length, the question whether the right of a State to withdraw from the Union for any cause, regarded by herself as sufficient, is consistent with the Constitution of the United States.

The Union of the States never was a purely artificial and arbitrary relation. It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to "be perpetual." 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 indissoluble if a perpetual Union, made more perfect, is not?

But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation, each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the States were much restricted, still, all

powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence," and that "without the States in union, there could be no such political body as the United States." County of Lane v. Oregon, 7 Wallace, 76. Not only therefore can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible States.

When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union and all the guarantees of republican government in the Union, attached at once to the State. 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. And it was final. 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 consent of the States.

Considered therefore as transactions under the Constitution, the ordinance of secession, adopted by the convention and ratified by a majority of the citizens of Texas, and all the acts of her legislature intended to give effect to that ordinance, were absolutely null. They were utterly without operation 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. If this were otherwise, the State must have become foreign, and her citizens foreigners. The war must have ceased to be a war for the suppression of rebellion, and must have become a war for conquest and subjugation.

Our conclusion therefore is, that Texas continued to be a State, and a State of the Union, notwithstanding the transactions to which we have referred. And this conclusion, in our judgment,

is not in conflict with any act or declaration of any department of the National government, but entirely in accordance with the whole series of such acts and declarations since the first outbreak of the rebellion.

But in order to the exercise, by a State, of the right to sue in this court, there needs to be a State government, competent to represent the State in its relations with the National government, so far at least as the institution and prosecution of a suit is concerned.

And it is by no means a logical conclusion, from the premises which we have endeavored to establish, that the governmental relations of Texas to the Union remained unaltered. Obligations often remain unimpaired, while relations are greatly changed. The obligations of allegiance to the State, and of obedience to her laws, subject to the Constitution of the United States, are binding upon all citizens, whether faithful or unfaithful to them; but the relations which subsist while these obligations are performed, are essentially different from those which arise when they are disregarded and set at nought. And the same must necessarily be true of the obligations and relations of States and citizens to the Union. No one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit, instituted in her name, could be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and her people as citizens of the Union, were suspended. The government and the citizens of the State, refusing to recognize their constitutional obligations, assumed the character of enemies, and incurred the consequences of rebellion.

These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. The first of these duties having been performed, the next necessarily engaged the attention of the National government.

The authority for the performance of the first had been found in the power to suppress insurrection and carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. The latter, indeed, in the case

of a rebellion which involves the government of a State, and for the time excludes the National authority from its limits, seems to be a necessary complement to the former.

Of this, the case of Texas furnishes a striking illustration. When the war closed there was no government in the State except that which had been organized for the purpose of waging war against the United States. That government immediately disappeared. The chief functionaries left the State. Many of the subordinate officials followed their example. Legal responsibilities were annulled or greatly impaired. It was inevitable that great confusion should prevail. If order was maintained, it was where the good sense and virtue of the citizens gave support to local acting magistrates, or supplied more directly the needful restraints.

A great social change increased the difficulty of the situation. Slaves, in the insurgent States, with certain local exceptions, had been declared free by the Proclamation of Emancipation; and whatever questions might be made as to the effect of that act, under the Constitution, it was clear, from the beginning, that its practical operation, in connection with legislative acts of like tendency, must be complete enfranchisement. Wherever the National forces obtained control, the slaves became freemen. Support to the acts of Congress and the proclamation of the President, concerning slaves, was made a condition of amnesty (13 Stat. at Large, 737), by President Lincoln, in December, 1863, and by President Johnson, in May, 1865 (Ib., 758). And emancipation was confirmed, rather than ordained, in the insurgent States, by the amendment to the Constitution prohibiting slavery throughout the Union, which was proposed by Congress in February, 1865, and ratified, before the close of the following autumn, by the requisite three-fourths of the States (Ib., 774-5).

The new freemen necessarily became part of the people, and the people still constituted the State; for States, like individuals, retain their identity, though changed to some extent in their constituent elements. And it was the State, thus constituted, which was now entitled to the benefit of the constitutional guarantee.

There being then no government in Texas in constitutional relations with the Union, it became the duty of the United States to provide for the restoration of such a government. But the restoration of the government which existed before the rebellion, without a new election of officers, was obviously impossible; and before any such election could be properly held, it was necessary that the old constitution should receive such amendments as

would conform its provisions to the new conditions created by emancipation, and afford adequate security to the people of the State. . . .

It is not important to review, at length, the measures which have been taken, under this power, by the executive and legislative departments of the National government. It is proper, however, to observe that almost immediately after the cessation of organized hostilities, and while the war yet smouldered in Texas, the President of the United States issued his proclamation appointing a provisional governor for the State, and providing for the assembling of a convention, with a view to the reestablishment of a republican government, under an amended constitution, and to the restoration of the State to her proper constitutional relations. A convention was accordingly assembled, the constitution amended, elections held, and a State government, acknowledging its obligations to the Union, established.

Whether the action then taken was, in all respects, warranted by the Constitution, it is not now necessary to determine. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions, as commander-in-chief; and, so long as the war continued, it cannot be denied that he might institute temporary government within insurgent districts, occupied by the National forces, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts, only such means and agents as were authorized by constitutional laws.

But, the power to carry into effect the clause of guarantee is primarily a legislative power, and resides in Congress. "Under the fourth article of the Constitution, it rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not." Luther v. Borden, 7 Howard, 42.

This is the language of the late Chief Justice, speaking for this court, in a case from Rhode Island, arising from the organization of opposing governments in that State. And, we think that the principle sanctioned by it may be applied, with even more propriety, to the case of a State deprived of all rightful government, by revolutionary violence; though necessarily limited to cases where the rightful government is thus subverted, or in imminent danger of being overthrown by an opposing government, set up by force within the State.

The action of the President must, therefore, be considered as provisional, and, in that light, it seems to have been regarded by Congress. It was taken after the term of the 38th Congress had expired. The 39th Congress, which assembled in December, 1865, followed by the 40th Congress, which met in March, 1867, proceeded, after long deliberation, to adopt various measures for reorganization and restoration. These measures were embodied in proposed amendments to the Constitution, and in the acts known as the Reconstruction Acts, which have been so far carried into effect, that a majority of the States which were engaged in the rebellion have been restored to their constitutional relations, under forms of government, adjudged to be republican by Congress, through the admission of their "Senators and Representatives into the councils of the Union."

Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts.

But it is important to observe that these acts themselves show that the governments, which had been established and had been in actual operation under executive direction, were recognized by Congress as provisional, as existing, and as capable of continuance. . . .

What has thus been said generally describes, with sufficient accuracy, the situation of Texas. A provisional governor of the State was appointed by the President in 1865; in 1866 a governor was elected by the people under the constitution of that year; at a subsequent date a governor was appointed by the commander of the district. Each of the three exercised executive functions and actually represented the State in the executive department.

In the case before us each has given his sanction to the prosecution of the suit, and we find no difficulty, without investigating the legal title of either to the executive office, in holding that the sanction thus given sufficiently warranted the action of the solicitor and counsel in behalf of the State. The necessary conclusion is that the suit was instituted and is prosecuted by competent authority.

The question of jurisdiction being thus disposed of, we proceed to the consideration of the merits as presented by the pleadings and the evidence. . . .

On the whole case, therefore, our conclusion is that the State of Texas is entitled to the relief sought by her bill, and a decree must be made accordingly.

[Mr. Justice Grier, Mr. Justice Swayne, and Mr. Justice Miller dissented.]

Note.—On the status of the Confederacy and its members during the Civil War and the legal consequences of their acts, see Thorington v. Smith (1868), 8 Wall. 1; Miller v. United States (1870), 11 Wall. 268; Delmas v. Insurance Co. (1872), 14 Wall. 661; Gunn v. Barry (1873), 15 Wall. 610; Horn v. Lockhart (1874), 17 Wall. 570; Sprott v. United States (1874), 20 Wall. 459; Williams v. Bruffy (1877), 96 U. S. 176; Dewing v. Perdicaries (1877), 96 U. S. 193; Keith v. Clark (1878), 97 U. S. 454; Ford v. Surget (1878), 97 U. S. 594; Lamar v. Micou (1884), 112 U. S. 452; Baldy v. Hunter (1898), 171 U. S. 388; Oakes v. United States (1898), 174 U. S. 778.

As to the equality of the States in the Union, see Pollard's Lessee v. Hagan (1845), 3 Howard 212; Permoli v. First Municipality (1845), 3 Howard 589; Strader v. Graham (1850), 10 Howard 82; Escanaba Co. v. Chicago (1882), 107 U. S. 678; Van Brocklin v. Tennessee (1886), 117 U. S. 151; Huse v. Glover (1886), 119 U. S. 543; Sands v. Manistee River Improvement Co. (1887), 123 U. S. 288; Willamette Iron Bridge Co. v. Hatch (1888), 125 U. S. 1; Boyd v. Thayer (1892), 143 U. S. 135; Ward v. Race Horse (1896), 163 U. S. 504; Bolln v. Nebraska (1900), 176 U. S. 83; Stearns v. Minnesota (1900), 179 U. S. 223; Coyle v. Oklahoma (1911), 221 U. S. 559.

TARBLE'S CASE.

Supreme Court of the United States. 1871.
13 Wallace, 397; 20 Lawyers' Ed. 597.

Error to the Supreme Court of Wisconsin.

Mr. Justice Field . . . delivered the opinion of the court. . . .

The important question is presented by this case, whether a State court commissioner has jurisdiction, upon habeas corpus, to inquire into the validity of the enlistment of soldiers into the military service of the United States, and to discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: Whether any judicial officer of a State has jurisdiction to issue a writ of habeas corpus, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government. For it is evident, if such jurisdiction may be exercised by any judicial officer of a State, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlist-

ment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exists at all, can only be limited in its application by the legislative power of the State. It may even reach to parties imprisoned under sentence of the National courts, after regular indictment, trial, and conviction, for offenses against the laws of the United States. As we read the opinion of the Supreme Court of Wisconsin in this case, this is the claim of authority asserted by that tribunal for itself and for the judicial officers of that State. It does, indeed, disclaim any right of either to interfere with parties in custody, under judicial sentence, when the National court pronouncing sentence had jurisdiction to try and punish the offenders, but it asserts, at the same time, for itself and for each of those officers, the right to determine, upon habeas corpus, in all cases, whether that court ever had such jurisdiction. . . .

It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several States, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every State are bound thereby, "anything in the constitution or laws of any State to the contrary notwithstanding." Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National government must have supremacy until the validity

of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the National tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. "The Constitution," as said by Mr. Chief Justice Taney, "was not framed merely to guard the States against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the States then possessed should be ceded to the General government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a State, or from State authorities." And the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it, or in disregard of its provisions. The Constitution is under the view of the tribunals of the United States when any act of Congress is brought before them for consideration.

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, and 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." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall

be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offenses, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its 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. Probably in every county and city in the several States there are one or more officers authorized by law to issue writs of habeas corpus on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the army of the United States, and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them, and no movement could be made by the National troops without their commanders being subjected to constant annoyance and embarrassment from this source. The experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void. Power to issue writs of habeas corpus for the discharge of soldiers in the military service, in the hands of parties thus disposed, might be used, and often would be used, to the great detriment of the public service. In many exigencies the measures of the National government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on habeas corpus are summary, and the delay incident to bringing the decision of a State officer, through the highest tribunal of the State, to this court for review would necessarily occupy years, and in the meantime, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

It is true similar embarrassment might sometimes be occasioned, though in a less degree, by the exercise of the authority to issue the writ possessed by judicial officers of the United States, but the ability to provide a speedy remedy for any inconvenience following from this source would always exist with the National legislature.

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. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority or claim and color of the authority, of the United States, and not under the mere pretense of having such authority.

This right to inquire by process of habeas corpus, and the duty of the officer to make a return, "grows necessarily," says Mr. Chief Justice Taney, "out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress."

. . .

This limitation upon the power of State tribunals and State

officers furnishes no just ground to apprehend that the liberty of the citizen will thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several States are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. Their courts and judicial officers are clothed with the power to issue the writ of habeas corpus in all cases, where a party is illegally restrained of his liberty by an officer of the United States, whether such illegality consists in the character of the process, the authority of the officer, or the invalidity of the law under which he is held. And there is no just reason to believe that they will exhibit any hesitation to exert their power, when it is properly invoked. Certainly there can be no ground for supposing that their action will be less prompt and efficient in such cases than would be that of State tribunals and State officers. . . .

It follows, from the views we have expressed, that the court commissioner of Dane County was without jurisdiction to issue the writ of *habeas corpus* for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the National government; and the same information was imparted to the commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of habeas corpus issued by him could pass over the line which divided the two sovereignties. . . . *Judgment reversed.*

The CHIEF JUSTICE, dissenting. . . .

NOTE.—Accord: Ableman v. Booth (1859), 21 Howard 506; Robb v. Connolly (1884), 111 U. S. 624; Logan v. United States (1892), 144 U. S. 263.

SECTION 4. THE GOVERNMENT OF TERRITORIES AND DEPENDENCIES.

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.

Constitution of the United States, Art. IV, sec. 3.

THE AMERICAN INSURANCE COMPANY AND THE OCEAN INSURANCE COMPANY OF NEW YORK, APPELLANTS, v. 356 BALES OF COTTON, DAVID CANTER, CLAIMANT AND APPELLEE.

SUPREME COURT OF THE UNITED STATES. 1828.
1 Peters, 511; 7 Lawyers' Ed. 242.

MARSHALL, C. J., delivered the opinion of the court.

The plaintiffs filed their libel in this cause in the district court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship Point a Petre; which had been insured by them on a voyage from New Orleans to Havre de Grace, in France. The Point a Petre was wrecked on the coast of Florida, the cargo saved by the inhabitants and carried into Key West, where it was sold for the purpose of satisfying the salvors; by virtue of a decree of a court consisting of a notary and five jurors, which was erected by an act of the territorial legislature of Florida. . . .

The cause depends mainly on the question whether the property in the cargo saved was changed by the sale at Key West. . . . Its validity has been denied on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an act of the territorial legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That act purports to give the power which has been exercised; consequently, the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

The constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued,

to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals, remains in force until altered by the newly created power of the state.

On the 2d of February, 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession contains the following provision: "The inhabitants of the territories which his Catholic majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States." 8 Stats. at Large, 252.

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. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime, Florida continues to be a territory of the United States, governed by virtue of that clause in the constitution which empowers congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

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. In execution of it, congress, in 1822, passed "an act for the establishment of a territorial government in Florida," (3 Stats. at Large, 654), and on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act, the territorial legislature enacted the law now under consideration.

The 5th section of the act of 1823 creates a territorial legislature, which shall have legislative powers over all rightful objects of legislation; but no law shall be valid which is inconsistent with the laws and the constitution of the United States.

The 7th section enacts "that the judicial power shall be vested in two superior courts, and in such inferior courts and justices of the peace as the legislative council of the territory may from time to time establish." . . .

It has been contended that, by the constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction, and that the whole of this judicial power must be vested "in one supreme court and in such inferior courts as congress shall from time to time ordain and establish." Hence, it has been argued that congress cannot vest admiralty jurisdiction in courts created by the territorial legislature.

We have only to pursue this subject one step further to perceive that this provision of the constitution does not apply to it. The next sentence declares that "the judges, both of the supreme and inferior courts, shall hold their offices during good behavior." The judges of the superior courts of Florida hold their offices for four years. These courts, then, 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 3d article of the constitution, but is conferred by congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the constitution, the same limitation does not extend to the territories. In legislating for them, congress exercises the combined powers of the general and of a state government.

We think, then, that the act of the territorial legislature erecting the court by whose decree the cargo of the Point a Petre was sold, is not "inconsistent with the laws and constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the circuit court, awarding restitution of the property to the claimant, ought to be affirmed, with costs.

CALLAN v. WILSON.

SUPREME COURT OF THE UNITED STATES. 1888.
127 U. S. 540; 32 Lawyers' Ed. 223.

Appeal from the Supreme Court of the District of Columbia.

This was an appeal from a judgment refusing, upon writ of habeas corpus, to discharge the appellant from the custody of the appellee as marshal of the District of Columbia. It appears that by an information filed by the United States in the Police Court of the District, the petitioner, with others, was charged with the crime of conspiracy, and having been found guilty by the court, was sentenced to pay a fine of twenty-five dollars, and upon default in its payment to suffer imprisonment in jail for the period of thirty days. . . .

The contention of the petitioner was that he is restrained of his liberty in violation of the Constitution. . . . To this information the defendants interposed a demurrer, which was overruled. They united in requesting a trial by jury. That request was denied, and a trial was had before the court, without the intervention of a jury. . . .

MR. JUSTICE HARLAN . . . delivered the opinion of the court.

It is contended by the appellant that the Constitution of the United States secured to him the right to be tried by a jury, and, that right having been denied, the Police Court was without jurisdiction to impose a fine upon him, or to order him to be imprisoned until such fine was paid. This precise question is now, for the first time, presented for determination by this court. If the appellant's position be sustained, it will follow that the statute (Rev. Stat. Dist. Col. § 1064), dispensing with a petit jury, in prosecutions by information in the police court, is inapplicable to cases like the present one.

The third article of the Constitution provides that "the trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." The Fifth Amendment provides that no person shall "be deprived of life, liberty or property, without due process of law." By the Sixth Amendment it is declared that "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."

The contention of the appellant is, that the offense with which he is charged is a "crime" within the meaning of the third article of the Constitution, and that he was entitled to be tried by a jury; that his trial by the police court, without a jury, was not "due process of law" within the meaning of the Fifth Amendment; and that, in any event, the prosecution against him was a "criminal prosecution," in which he was entitled, by the Sixth Amendment, to a speedy and public trial by an impartial jury.

The contention of the government is, that the Constitution does not require that the right of trial by jury shall be secured to the people of the District of Columbia; that the original provision, that when a crime was not committed within any State "the trial shall be at such place or places as the Congress may by law have directed," had, probably, reference only to offenses committed on the high seas; that, in adopting the Sixth Amendment, the people of the States were solicitous about trial by jury in the States and nowhere else, leaving it entirely to Congress to declare in what way persons should be tried who might be accused of crime on the high seas, and in the District of Columbia and in places to be thereafter ceded for the purposes, respectively, of a seat of government, forts, magazines, arsenals, and dock-yards; and, consequently that that Amendment should be deemed to have superseded so much of the third article of the Constitution as relates to the trial of crimes by a jury.

Upon a careful examination of this position we are of opinion that it cannot be sustained without violence to the letter and spirit of the Constitution.

The third article of the Constitution provides for a jury in the trial of "all crimes, except in cases of impeachment." The word "crime," in its more extended sense, comprehends every violation of public law; in a limited sense, it embraces offenses of a serious or atrocious character. In our opinion, the provision is to be interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury. It is not to be construed as relating only to felonies, or offenses punishable by confinement in the penitentiary. It embraces as well some classes of misdemeanors, the punishment of which involves or may involve the deprivation of the liberty of the citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime" within the meaning of the third article, or a "criminal prosecution" within the meaning of the Sixth Amendment. And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them. Mr. Justice Story says that the amendment, "in declaring that the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State or district wherein the crime shall have been committed (which district shall be previously ascertained by law), and to be informed of the nature and cause of the accusation, and to be confronted with the witnesses against him, does but follow out the established course of the common law in all trials for crimes." Story on the Constitution, § 1791. And as the guarantee of a trial by jury, in the third article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia, as those residing or being in the several States. There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this district may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property—es-

pecially of the privilege of trial by jury in criminal cases. In the Draft of a Constitution reported by the Committee of Five on the 6th of August, 1787, in the convention which framed the Constitution, the 4th section of Article XI read that "the trial of all criminal offenses (except in cases of impeachment) shall be in the States where they shall be committed; and shall be by jury." 1 Elliott's Deb., 2d ed., 229. But that article was, by unanimous vote, amended so as to read: "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, then the trial shall be at such place or places as the legislature may direct." Id. 270. The object of thus amending the section, Mr. Madison says, was "to provide for trial by jury of offenses committed out of any State." 3 Madison Papers, 144. In Reynolds v. United States, 98 U. S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in Webster v. Reid, 11 How. 437, 460, that the Seventh Amendment secured to them a like right in civil actions at common law. We cannot think that the people of this district have, in that regard, less rights than those accorded to the people of the Territories of the United States. . . .

The judgment is reversed, and the cause remanded with directions to discharge the appellant from custody.

DOWNES v. BIDWELL.

SUPREME COURT OF THE UNITED STATES. 1901.
182 U. S. 244; 45 Lawyers' Ed. 1088.

Error to the Circuit Court of the United States for the Southern District of New York.

This was an action begun in the Circuit Court by Downes, doing business under the firm name of S. B. Downes & Co., against the collector of the port of New York, to recover back duties to the amount of $659.35 exacted and paid under protest upon certain oranges consigned to the plaintiff at New York, and brought thither from the port of San Juan in the Island of Porto Rico during the month of November, 1900, after the passage of the act temporarily providing a civil government and revenues for the Island of Porto Rico, known as the Foraker act.

The District Attorney demurred to the complaint for the want of jurisdiction in the court, and for insufficiency of its averments. The demurrer was sustained, and the complaint dismissed. Whereupon plaintiff sued out this writ of error. . . .

Mr. Justice Brown, after making the above statement, announced the conclusion and judgment of the court.

This case involves the question whether merchandise brought into the port of New York from Porto Rico since the passage of the Foraker act, is exempt from duty, notwithstanding the third section of that act, which requires the payment of "fifteen per centum of the duties which are required to be levied, collected and paid upon like articles of merchandise imported from foreign countries." . . .

In the case of De Lima v. Bidwell, just decided, we held that upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and became a territory of the United States, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the *United States* within that provision of the Constitution which declares that "all duties, imposts and excises shall be uniform throughout the United States." (Art. I, § 8.) If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional, not only by reason of a violation of the uniformity clause, but because by section 9 "vessels bound to or from one State" cannot "be obliged to enter, clear or pay duties in another."

The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress and in the decisions of this court. . . .

It is sufficient to observe in relation to these three fundamental instruments [The Articles of Confederation, the Ordinance of 1787, and the Constitution] that 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,* to be governed solely by representatives of the *States;* and even the provision relied upon here, that all duties, imposts and excises shall be uniform "throughout the

United States," is explained by 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 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 no part of the Union. To say that the phraseology of this amendment was due to the fact that it was intended to prohibit slavery in the seceded States, under a possible interpretation that those States were no longer a part of the Union, is to confess the very point in issue, since it involves an admission that, if these States were not a part of the Union, they were still subject to the jurisdiction of the United States.

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."

The question of the legal relations between the States and the newly acquired territories first became the subject of public discussion in connection with the purchase of Louisiana in 1803. . . . It is well known that Mr. Jefferson entertained grave doubts as to his power to make the purchase, or, rather, as to his right to annex the territory and make it part of the United States, and had instructed Mr. Livingston to make no agreement to that effect in the treaty, as he believed it could not be legally done. Owing to a new war between England and France being upon the point of breaking out, there was need for haste in the negotiations, and Mr. Livingston took the responsibility of disobeying his instructions, and, probably owing to the insistence of Bonaparte, consented to the third article of the treaty, which provided that "the inhabitants of the ceded territory shall be incorporated in 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 citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess." This evidently committed the government to the ultimate, but not to the immediate, admission of Louisiana as a State, and postponed its incorporation into the Union to the pleasure of Congress. . . .

The raising of money to provide for the purchase of this territory and the act providing a civil government gave rise to an animated debate in Congress, in which two questions were prominently presented: First, whether the provision for the ultimate incorporation of Louisiana into the Union was constitutional; and, second, whether the seventh article of the treaty admitting the ships of Spain and France for the next twelve years "into the ports of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States coming directly from France or Spain, or any of their colonies, without being subject to any other or greater duty on merchandise or other or greater tonnage than that paid by the citizens of the United States," was an unlawful discrimination in favor of those ports and an infringement upon Art. I, § 9, 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." This article of the treaty contained the further stipulation that "during the space of time above mentioned no other nation shall have a right to the same privileges in the ports of the ceded territory; . . . and it is well understood that the object of the above article is to favor the manufactures, commerce, freight and navigation of France and Spain." . . .

As a sequence to this debate two bills were passed, one October 31, 1803, 2 Stat. 245, authorizing the President to take possession of the territory, and to continue the existing government, and the other November 10, 1803, 2 Stat. 245, making provision for the payment of the purchase price. These acts continued in force until March 26, 1804, when a new act was passed providing for a temporary government, 2 Stat. 283, c. 38, and vesting all legislative powers in a governor and legislative council, to be appointed by the President. These statutes may be taken as expressing the view of Congress, first, that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the Union; and, second, that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the Consti-

tution, Art. I, § 9, that declares that no preference shall be given to the ports of one State over those of another. It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of States within the meaning of the Constitution.

The same construction was adhered to in the treaty with Spain for the purchase of Florida, 8 Stat. 252, the sixth article of which provided that the inhabitants should "be incorporated into the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution"; and the fifteenth article of which agreed that Spanish vessels coming directly from Spanish ports and laden with productions of Spanish growth or manufacture, should be admitted, for the term of twelve years, to the ports of Pensacola and St. Augustine, "without paying other or higher duties on their cargoes, or of tonnage, than will be paid by the vessels of the United States," and that "during the said term no other nation shall enjoy the same privileges within the ceded territories."

So, too, in the act annexing the Republic of Hawaii, there was a provision continuing in effect the customs relations of the Hawaiian Islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff laws then in force. This was a discrimination against the Hawaiian ports wholly inconsistent with the revenue clauses of the Constitution, if such clauses were there operative.

The very treaty with Spain under discussion in this case contains similar discriminative provisions, which are apparently irreconcilable with the Constitution, if that instrument be held to extend to these islands immediately upon their cession to the United States. By Art. IV the United States agree "for the term of ten years from the date of the exchange of the ratifications of the present treaty, to admit Spanish ships and merchandise to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States"—a privilege not extending to any other ports. It was a clear breach of the uniformity clause in question, and a manifest excess of authority on the part of the commissioners, if ports of the Philippine Islands be ports of the United States.

So, too, by Art. XIII, "Spanish scientific, literary and artistic works . . . shall be continued to be admitted free of duty

in such territories, for the period of ten years, to be reckoned from the date of the exchange of the ratifications of this treaty." This is also a clear discrimination in favor of Spanish literary productions into particular ports.

Notwithstanding these provisions for the incorporation of territories into the Union, Congress, not only in organizing the territory of Louisiana by act of March 26, 1804, but all other territories carved out of this vast inheritance, has assumed that the Constitution did not extend to them of its own force, and has in each case made special provision, either that their legislatures shall pass no law inconsistent with the Constitution of the United States, or that the Constitution or laws of the United States shall be the supreme law of such territories. Finally, in Rev. Stat. § 1891, a general provision was enacted that "the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States."

So, too, on March 6, 1820, 3 Stat. 545, c. 22, in an act authorizing the people of Missouri to form a state government, after a heated debate, Congress declared that in the territory of Louisiana north of 36° 30′ slavery should be forever prohibited. It is true that for reasons which have become historical, this act was declared to be unconstitutional in Scott v. Sandford, 19 How. 393, but it is none the less a distinct annunciation by Congress of power over property in the territories which it obviously did not possess in the several States.

The researches of counsel have collated a large number of other instances, in which Congress has in its enactments recognized the fact that provisions intended for the States did not embrace the territories, unless specially mentioned. These are found in the laws prohibiting the slave trade with "the United States or territories thereof"; or equipping ships "in any port or place within the *jurisdiction* of the United States"; in the internal revenue laws, in the early ones of which no provision was made for the collection of taxes in the territory not included within the boundaries of the existing States, and others of which extended them expressly to the territories, or "within the exterior boundaries of the United States"; and in the acts extending the internal revenue laws to the Territories of Alaska and Oklahoma. It would prolong this opinion unnecessarily to set forth the provisions of these acts in detail. It is sufficient to say that Congress has or has not applied the revenue laws to the

territories, as the circumstances of each case seemed to require, and has specifically legislated for the territories whenever it was its intention to execute laws beyond the limits of the States. Indeed, whatever may have been the fluctuations of opinion in other bodies, (and even this court has not been exempt from them,) Congress has been consistent in recognizing the difference between the States and territories under the Constitution.

The decisions of this court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States. It may be remarked, upon the threshold of an analysis of these cases, that too much weight must not be given to general expressions found in several opinions that the power of Congress over territories is complete and supreme, because these words may be interpreted as meaning only supreme under the Constitution; nor upon the other hand, to general statements that the Constitution covers the territories as well as the States, since in such cases it will be found that acts of Congress had already extended the Constitution to such territories, and that thereby it subordinated not only its own acts, but those of the territorial legislatures, to what had become the supreme law of the land. . . .

[Here follows a consideration of the cases of Hepburn v. Ellzey, 2 Cranch, 445; New Orleans v. Winter, 1 Wheaton, 91; Scott v. Jones, 5 Howard, 343; Miners' Bank v. Iowa, 12 Howard, 1; Barney v. Baltimore City, 6 Wallace, 280; Hooe v. Jamieson, 166 U. S. 395; Loughborough v. Blake, 5 Wheaton, 317; Callan v. Wilson, 127 U. S. 540; Geofroy v. Riggs, 133 U. S. 258; American Insurance Co. v. Canter, 1 Peters, 511; Benner v. Porter, 9 Howard, 235; Clinton v. Englebrecht, 13 Wallace, 434; Good v. Martin, 95 U. S. 90; McAllister v. United States, 141 U. S. 174; McCulloch v. Maryland, 4 Wheaton, 316; United States v. Gratiot, 14 Peters, 526; Mormon Church v. United States, 136 U. S. 1; National Bank v. County of Yankton, 101 U. S. 129; Murphy v. Ramsey, 114 U. S. 15; Webster v. Reid, 11 Howard, 437; Reynolds v. United States, 98 U. S. 145; Ross's Case, 140 U. S. 453; American Publishing Co. v. Fisher, 166 U. S. 464; and Thompson v. Utah, 170 U. S. 343.]

Eliminating, then, from the opinion of this court all expres-

sions unnecessary to the disposition of the particular case, and gleaning therefrom the exact point decided in each, the following propositions may be considered as established:

1. That the District of Columbia and the territories are not States, within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different States;

2. That territories are not States, within the meaning of Revised Statutes, § 709, permitting writs of error from this court in cases where the validity of a *state* statute is drawn in question;

3. That the District of Columbia and the territories are States, as that word is used in treaties with foreign powers, with respect to the ownership, disposition and inheritance of property;

4. That the territories are not within the clause of the Constitution providing for the creation of a Supreme Court and such inferior courts as Congress may see fit to establish;

5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully provide for such trials before consular tribunals, without the intervention of a grand or petit jury;

6. That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith. . . .

[Here follows an analysis of the Dred Scott case.]

While there is much in the opinion of the Chief Justice [in the Dred Scott case] which tends to prove that he thought all the provisions of the Constitution extended of their own force to the territories west of the Mississippi, the question actually decided is readily distinguishable from the one involved in the case under consideration. The power to prohibit slavery in the territories is so different from the power to impose duties upon territorial products, and depends upon such different provisions of the Constitution, that they can scarcely be considered as analogous, unless we assume broadly that every clause of the Constitution attaches to the territories as well as to the States—a claim quite inconsistent with the position of the court in the Canter case. If the assumption be true, that slaves are indistinguishable from other property, the inference from the Dred Scott case is irresistible that Congress had no power to prohibit their introduction into a territory. . . . The difficulty with the Dred Scott case was that the court refused to make a distinction between property in general and a wholly exceptional class of property. Mr. Benton tersely stated the distinction by saying that the

Virginian might carry his slave into the territories, but he could not carry with him the Virginian law which made him a slave.

. . .

To sustain the judgment in the case under consideration it by no means becomes necessary to show that none of the articles of the Constitution apply to the Island of Porto Rico. 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 or 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 apply to the First Amendment, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; 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. Not only did the people in adopting the Thirteenth Amendment thus recognize a distinction between the United States and "any place subject to their jurisdiction," but Congress itself, in the act of March 27, 1804, c. 56, 2 Stat. 298, providing for the proof of public records, applied the provisions of the act not only to "every court and office within the United States," but to the "courts and offices of the respective territories of the United States and countries subject to the jurisdiction of the United States," as to the courts and offices of the several States. . . .

Unless these words are to be rejected as meaningless, we must treat them as a recognition by Congress of the fact that there may be territories subject to the jurisdiction of the United States, which are not *of* the United States.

In determining the meaning of the words of Art. I, § 6, "uniform throughout the United States," we are bound to consider not only the provisions forbidding preference being given to the ports of one State over those of another (to which attention has already been called), but the other clauses declaring that no tax or duty shall be laid on articles exported from any State, and that no State shall, without the consent of Congress, lay any imposts or duties upon imports or exports, nor any duty on tonnage. The object of all of these was to protect the States which united in forming the Constitution from discriminations by Congress, which would operate unfairly or injuriously upon some States and not equally upon others. . . . Thus construed together, the purpose is irresistible that the words "throughout the United States" are indistinguishable from the words "among or between the several States," and that these prohibitions were intended to apply only to commerce between ports of the several States as they then existed or should thereafter be admitted to the Union.

Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct. Notwithstanding its duty to "guarantee to every State in this Union a republican form of government," Art. IV, § 4, by which we understand, according to the definition of Webster, "a government in which the supreme power resides in the whole body of the people, and is exercised by representatives elected by them," Congress did not hesitate, in the original organization of the territories of Louisiana, Florida, the Northwest Territory, and its subdivisions of Ohio, Indiana, Michigan, Illinois and Wisconsin, and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British crown colony than a republican State of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend the Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, of bail, and of the privilege of the writ of habeas corpus, as well as other privileges of the bill of rights.

We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American Empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject; in the cases of Louisiana and Florida, by stipulating that "the inhabitants shall be incorporated into the Union of the United States and admitted as soon as possible . . . to the enjoyment of all the rights, advantages and immunities of citizens of the United States"; in the case of Mexico, that they should "be incorporated into the Union, and 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"; in the case of Alaska, that the inhabitants who remained three years, "with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights," etc.; and in the case of Porto Rico and the Philippines, "that the civil rights and political status of the native inhabitants . . . shall be determined by Congress." In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto. . . .

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 own 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 proc-

ess 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, to suffrage, Minor v. Happersett, 21 Wall. 162, 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. Yick Wo. v. Hopkins, 118 U. S. 356; Fong Yue Ting v. United States, 149 U. S. 698; Lem Moon Sing, 158 U. S. 538, 547; Wong Wing v. United States, 163 U. S. 228. 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. . . .

In passing upon the questions involved in this case and kindred cases, we ought not to overlook the fact that, while the Constitution was intended to establish a permanent form of government for the States which should elect to take advantage of its conditions, and continue for an indefinite future, the vast possibilities of that future could never have entered the minds of its framers. The States had but recently emerged from a war with one of the most powerful nations of Europe; were disheartened by the failure of the confederacy, and were doubtful as to the feasibility of a stronger union. Their territory was confined to a narrow strip of land on the Atlantic coast from Canada to Florida, with a somewhat indefinite claim to territory beyond the Alleghenies, where their sovereignty was disputed by tribes of hostile Indians supported, as was popularly believed, by the

British, who had never formally delivered possession under the treaty of peace. The vast territory beyond the Mississippi, which formerly had been claimed by France, since 1762 had belonged to Spain, still a powerful nation, and the owner of a great part of the Western Hemisphere. Under these circumstances it is little wonder that the question of annexing these territories was not made a subject of debate. The difficulties of bringing about a union of the States were so great, the objections to it seemed so formidable, that the whole thought of the convention centered upon surmounting these obstacles. The question of territories was dismissed with a single clause, apparently applicable only to the territories then existing, giving Congress the power to govern and dispose of them.

Had the acquisition of other territories been contemplated as a possibility, could it have been foreseen that, within little more than one hundred years, we were destined to acquire not only the whole vast region between the Atlantic and Pacific Oceans, but the Russian possessions in America and distant islands in the Pacific, it is incredible that no provision should have been made for them, and the question whether the Constitution should or should not extend to them have been definitely settled. If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them. If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitations should have been expressed. Instead of that, we find the Constitution speaking only to States, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them. The States could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory they had none to delegate in that connection. The logical inference from this is, that if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions. If, upon the other hand, we assume that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing

with them was intended to be restricted by any of the other provisions.

There is a provision that "new States may be admitted by the Congress into this Union." These words, of course, carry the Constitution with them, but nothing is said regarding the acquisition of new territories or the extension of the Constitution over them. The liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but there is nothing in the Constitution itself, and little in the interpretation put upon it, to confirm that impression. There is not even an analogy to the provisions of an ordinary mortgage for its attachment to after-acquired property, without which it covers only property existing at the date of the mortgage. In short, there is absolute silence upon the subject. The executive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired, and unless such interpretation be manifestly contrary to the letter or spirit of the Constitution, it should be followed by the judicial department. Cooley's Consti. Lim., secs. 81 to 85. Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 57; Field v. Clark, 143 U. S. 649, 691. . . .

We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

The judgment of the Circuit Court is therefore

Affirmed.

[Mr. Justice White delivered a concurring opinion, in which Mr. Justice Shiras and Mr. Justice McKenna joined. Mr. Justice Gray also delivered a concurring opinion. Mr. Chief Justice Fuller delivered a dissenting opinion in which Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham concurred. Mr. Justice Harlan also delivered a separate dissenting opinion.]

Note.—As to the operation of the guarantees of the Constitution in the court of an American consul in China, see In re Ross (1890), 140 U. S. 453;

in the government of an Indian tribe, see Talton v. Mayes (1896), 163 U. S. 376; in territory which has been made part of the United States, see Thompson v. Utah (1898), 170 U. S. 343; Rasmussen v. United States (1905), 197 U. S. 516; in territory not incorporated in the United States, see Hawaii v. Mankichi (1903), 190 U. S. 197, Dorr v. United States (1904), 195 U. S. 138.

CHAPTER II.

CITIZENSHIP IN THE UNITED STATES.

SECTION 1. WHO ARE CITIZENS.

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.

Constitution of the United States, Amendment XIV, sec. 1.

DRED SCOTT, PLAINTIFF IN ERROR, v. JOHN F. A. SANDFORD.

SUPREME COURT OF THE UNITED STATES. 1857.
19 Howard, 393; 15 Lawyers' Ed. 691.

This case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri. . . . [In 1834, Dred Scott, a negro slave belonging to Dr. Emerson, a surgeon in the United States army, was taken by his master from Missouri to Rock Island, Illinois, where slavery was prohibited by statute. Thence he was taken, in 1836, to Fort Snelling, in the territory of upper Louisiana. This post was situated on the west bank of the Mississippi, north of latitude 36° 30′, and north of Missouri, and hence within the territory in which slavery had been forbidden by the Missouri Compromise. In 1836, with the consent of their master, Dred and Harriet were married. In 1838, Dr. Emerson returned with his slaves to Missouri. In 1847, Dred brought suit in the Missouri circuit court to recover his freedom, having discovered that according to previous decisions of Missouri courts, residence in free territory conferred freedom. Judgment was rendered in his favor, but was reversed by the Missouri Supreme Court. Before the commencement of the present suit, Dred and his wife and two children were sold to Sandford, a citizen of New York. Scott having brought suit in trespass for assault and battery against Sandford in the Federal Circuit Court of Missouri, Sandford pleaded to the jurisdiction of the court that this could not be a suit between citizens of different States, because Scott was not a citizen of Missouri, but "a negro of pure African descent; his ancestors were of pure African blood and were brought into this country and sold as

negro slaves." To this Scott demurred and the demurrer was sustained. The defendant then pleaded in bar to the action that the plaintiff was his negro slave, and that he had only gently laid hands on him to restrain him, as he had a right to do. The judge instructed the jury that, "upon the facts in this case, the law is with the defendant." The plaintiff excepted to this instruction, and upon his exceptions the case was taken to the United States Supreme Court.]

MR. CHIEF JUSTICE TANEY delivered the opinion of the court.[1]

. . .

There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And

2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant, in the State of Missouri; and he brought this action in the Circuit Court of the United States for that district, to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood, and who were brought into this country and sold as slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court overruled the plea, and gave judgment that the defendant should answer over. And he thereupon put in sundry pleas in bar, upon which issues were joined; and at

[1] The reporter of the Court is in error in describing Chief Justice Taney's opinion as "the opinion of the court." Care should be taken to distinguish the opinion of the court from the judgment of the court. The Supreme Court consisted of nine judges, seven of whom concurred in the judgment announced by the Chief Justice, but only two of the seven, Justice Wayne and Justice Daniel, concurred entirely in the opinion of the Chief Justice. All the justices of the majority concurred in the opinion of Justice Nelson, which was originally prepared to stand as the opinion of the court.

the trial the verdict and judgment were in his favor. Whereupon the plaintiff brought this writ of error.

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated. . . . It is suggested, however, that this plea is not before us. . . . We think they [the plea and the judgment of the court upon it] are before us . . . and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States. . . .

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, privileges and immunities, guarantied by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution. . . . And this being the only matter in dispute on the pleadings, this court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves. . . .

The words "people of the United States" and "citizens" are synonymous 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 of abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their authority, and had

no rights or privileges but such as those who held the power and the Government might choose to grant them. . . .

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 citizen, and to endow him with all his 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 any one 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.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who are not intended to be embraced in this

new political family, which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country, or who might afterward be imported, who had then or should afterwards be made free in any State; and to put it in the power of a single State to make him a citizen of the United States, and endow him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri, within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guarantied to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards, by birthright or otherwise, become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great

Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. . . .

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.[1] . . .

The legislation of the different colonies furnishes positive and indisputable proof of this fact. . . . The language of the Declaration of Independence is equally conclusive. . . . This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions

[1] These statements of the Chief Justice as to the legal status of free negroes in the several States at the time of the adoption of the Constitution were not well founded, as was pointed out by Mr. Justice Curtis in his dissenting opinion. In New Hampshire, Massachusetts, New York, New Jersey, and even in the slave-holding State of North Carolina, all free native-born inhabitants, even though descended from slaves, were not only citizens but also voters. In State v. Manuel (1838), 4 Devereaux and Battle, 20, 25, the Supreme Court of North Carolina said, "It is a matter of universal notoriety that . . . . free persons, without regard to color claimed and exercised the franchise, until it was taken from free men of color a few years since [1835] by our amended Constitution." This change of attitude toward free negroes was not confined to North Carolina, and by the time the Dred Scott case was decided they were quite generally disfranchised, and in many States, especially those in which slavery existed, they were not recognized as citizens. This whole subject has been well treated by Gordon E. Sherman in "Emancipation and Citizenship," in the *Yale Law Journal*, XV, 263. See also *Report on Citizenship in the United States*, House Document, No. 326, 59th Congress, 2nd Session, and the learned Opinion of the Justices (1857), 44 Maine, 507, given in answer to an inquiry from the legislature as to whether free colored persons of African descent were authorized to vote under the constitution of Maine.

and language. . . . But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808, if it thinks proper. . . . And by the other provision the States pledge themselves to each other to maintain the right of property of the master, by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. . . .

The legislation of the States therefore shows, in a manner not to be mistaken, the inferior and subject condition of that race at the time the Constitution was adopted, and long afterwards, throughout the thirteen States by which that instrument was framed; and it is hardly consistent with the respect due to these States, to suppose that they regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; whom, as we are bound, out of respect to the State sovereignties, to assume they had deemed it just and necessary thus to stigmatize, and upon whom they had impressed such deep and enduring marks of inferiority and degradation; or, that when they met in convention to form the Constitution, they looked upon them as a portion of their constituents, or designed to include them in the provisions so carefully inserted for the security and protection of the liberties and rights of their citizens. It cannot be supposed that they intended to secure to them rights, and privileges, and rank, in the new political body throughout the Union, which every one of them denied within the limits of its own dominion. More especially, it cannot be believed that the large slave-holding States regarded them as included in the word citizens, or would have consented to a Constitution which might compel them to receive them in that character from another State. For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operation of the special laws and from the police regulations which they considered to be necessary for their own safety. It would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or

night without molestation, unless they committed some violation of law for which a white man would be punished; and it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went. And all this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State. . . .

To all this mass of proof we have still to add, that Congress has repeatedly legislated upon the same construction of the Constitution that we have given. . . .

The conduct of the Executive Department of the Government has been in perfect harmony upon this subject with this course of legislation. The question was brought officially before the late William Wirt, when he was the Attorney General of the United States, in 1821, and he decided that the words "citizens of the United States" were used in the acts of Congress in the same sense as in the Constitution; and that free persons of color were not citizens, within the meaning of the Constitution and laws; and this opinion has been confirmed by that of the late Attorney General, Caleb Cushing, in a recent case, and acted upon by the Secretary of State, who refused to grant passports to them as "citizens of the United States."

But it is said that a person may be a citizen, and entitled to that character, although he does not possess all the rights which may belong to other citizens; as, for example, the right to vote, or to hold particular offices; and that yet, when he goes into another State, he is entitled to be recognized there as a citizen, although the State may measure his rights by the rights which it allows to persons of a like character or class resident in the State, and refuse to him the full rights of citizenship.

This argument overlooks the language of the provision in the Constitution of which we are speaking.

Undoubtedly, a person may be a citizen, that is, a member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices. Women and minors, who form a part of the political family, cannot vote; and when a property qualification is required to vote or hold a particular office, those who have not the necessary qualification cannot vote or hold office, yet they are citizens.

So, too, a person may be entitled to vote by the law of the State, who is not a citizen even of the State itself. And in some of the States of the Union foreigners not naturalized are allowed to vote. And the State may give the right to free negroes and mulattoes, but that does not make them citizens of the State, and still less of the United States. And the provision in the Constitution giving privileges and immunities in other States, does not apply to them.

Neither does it apply to a person who, being the citizen of a State, migrates to another State. For then he becomes subject to the laws of the State in which he lives, and he is no longer a citizen of the State from which he removed. . . .

But so far as mere rights of persons are concerned, the provision in question is confined to citizens of a State who are temporarily in another State without taking up their residence there. It gives them no political rights in the State as to voting or holding office, or in any other respect. For a citizen of one State has no right to participate in the government of another. But if he ranks as a citizen in the State to which he belongs, within the meaning of the Constitution of the United States, then, whenever he goes into another State, the Constitution clothes him, as to the rights of person, with all the privileges and immunities which belong to citizens of the State. And if persons of the African race are citizens of a State, and of the United States, they would be entitled to all of these privileges and immunities in every State, and the State could not restrict them; for they would hold these privileges and immunities under the paramount authority of the Federal Government, and its courts would be bound to maintain and enforce them, the Constitution and laws of the State to the contrary notwithstanding. And if the States could limit or restrict them, or place the party in an inferior grade, this clause of the Constitution would be unmeaning, and could have no operation; and would give no rights to the citizen when in another State. He would have none but what the State itself chose to allow him. This is evidently not the construction or meaning of the clause in question. It guaranties rights to the citizen, and the State cannot withhold them. And these rights are of a character and would lead to consequences which make it absolutely certain that the African race were not included under the name of citizens of a State, and were not in the contemplation of the framers of the Constitution when these privileges and immunities were provided for the protection of the citizens in other States. . . .

What the construction [of the Constitution] was at that time [when it was framed], we think can hardly admit of doubt. We have the language of the Declaration of Independence and of the Articles of Confederation, in addition to the plain words of the Constitution itself; we have the legislation of the different States, before, about the time, and since, the Constitution was adopted; we have the legislation of Congress, from the time of its adoption to a recent period; and we have the constant and uniform action of the Executive Department, all concurring together, and leading to the same result. And if anything in relation to the construction of the Constitution can be regarded as settled, it is that which we now give to the word "citizen" and the word "people."

And upon a full and careful consideration of the subject, the court is of opinion, that, upon the facts stated in the plea in abatement, Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the United States, and not entitled as such to sue in its courts; and, consequently, that the Circuit Court had no jurisdiction of the case, and that the judgment on the plea in abatement is erroneous. . . . [Here follows a discussion of the judicial authority of the court to examine any question in the case other than that of the jurisdiction of the Circuit Court. The court determines that it has the requisite authority.]

We proceed, therefore, to inquire whether the facts relied on by the plaintiff entitled him to his freedom. . . .

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

We proceed to examine the first question.

The act of Congress, upon which the plaintiff relies, declares that slavery and involuntary servitude, except as a punishment for crime, shall be forever prohibited in all that part of the territory ceded by France, under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, and not included within the limits of Missouri. And the difficulty which meets us at the threshold of this part of the inquiry is, whether Congress was authorized to pass this law, under any of the powers granted to it by the Constitution; for if the authority is not given by that instrument, it is the duty of this court to declare

it void and inoperative, and incapable of conferring freedom upon any one who is held as a slave under the laws of any one of the States.

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. . . .

At the time when the Territory in question was obtained by cession from France, it contained no population fit to be associated together and admitted as a State; and it therefore was absolutely necessary to hold possession of it, as a Territory belonging to the United States, until it was settled and inhabited by a civilized community capable of self-government, and in a condition to be admitted on equal terms with the other States as a member of the Union. But, as we have before said, it was acquired by the General Government, as the representative and trustee of the people of the United States, and it must therefore be held in that character for their common and equal benefit; for it was the people of the several States, acting through their agent and representative, the Federal Government, who in fact acquired the Territory in question, and the Government holds it for their common use until it shall be associated with the other States as a member of the Union.

But until that time arrives, it is undoubtedly necessary that some Government should be established, in order to organize society, and to protect the inhabitants in their persons and property; and as the people of the United States could act in this matter only through the Government which represented them, and through which they spoke and acted when the Territory was obtained, it was not only within the scope of its powers, but it was its duty to pass such laws and establish such a Government as would enable those by whose authority they acted to reap the advantages anticipated from its acquisition, and to gather there a population which would enable it to assume the position to

which it was destined among the States of the Union. . . . But the power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of Government. The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself. . . . Thus the rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law. . . .

It seems, however, to be supposed, that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States. And the laws and usages of nations, and the writings of eminent jurists upon the relation of master and slave and their mutual rights and duties, and the powers which Governments may exercise over it, have been dwelt upon in the argument.

But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted. And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved. And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for

the protection of private property against the encroachments of the Government.

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. And the Government in express terms is pledged to protect it in all future time, if the slave escapes from his owner. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.

Upon these considerations, it is the opinion of the court that the act of Congress which prohibited a citizen from holding or owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident. . . .

But there is another point in the case which depends upon State power and State law. And it is contended, on the part of the plaintiff, that he is made free by being taken to Rock Island, in the State of Illinois, independently of his residence in the territory of the United States; and being so made free, he was not again reduced to a state of slavery by being brought back to Missouri.

Our notice of this part of the case will be very brief; for the principle on which it depends was decided in this court, upon much consideration, in the case of Strader et al. v. Graham, reported in 10th Howard, 82. In that case, the slaves had been taken from Kentucky to Ohio, with the consent of the owner, and afterwards brought back to Kentucky. And this court held that their status or condition, as free or slave, depended upon the laws of Kentucky, when they were brought back into that State, and not of Ohio; and that this court had no jurisdiction to revise the judgment of a State court upon its own laws. . . .

So in this case. As Scott was a slave when taken into the State of Illinois by his owner, and was there held as such, and brought

back in that character, his status, as free or slave, depended on the laws of Missouri, and not of Illinois.

It has, however, been urged in the argument, that by the laws of Missouri he was free on his return, and that this case, therefore, cannot be governed by the case of Strader et al. v. Graham, where it appeared, by the laws of Kentucky, that the plaintiffs continued to be slaves on their return from Ohio. But whatever doubts or opinions may, at one time, have been entertained upon this subject, we are satisfied, upon a careful examination of all the cases decided in the State courts of Missouri referred to, that it is now firmly settled by the decisions of the highest court in the State, that Scott and his family upon their return were not free, but were, by the laws of Missouri, the property of the defendant; and that the Circuit Court of the United States had no jurisdiction, when, by the laws of the State, the plaintiff was a slave, and not a citizen. . . .

Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us, that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction. . . .

MR. JUSTICE MCLEAN and MR. JUSTICE CURTIS dissented.

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NOTE.—The court which heard the Dred Scott case consisted of nine judges, all of whom delivered opinions, some of which were so discursive as to make it difficult to connect them with the questions which the court was asked to decide. Of the seven judges who concurred in the judgment announced by the Chief Justice, only three—Taney, Wayne, and Daniel,—held that the plea in abatement was open and hence that the question of the status of free negroes was before the court. Justice Catron held that the plea was not open. Justice Grier evaded the question, and Justices Nelson and Campbell based their opinions on grounds which made it unnecessary to pass upon the question. Of the two dissenting justices, Justice Curtis held that the plea was before the court and Justice McLean held that it was not. Six judges—Taney, Wayne, Daniel, Grier, Campbell and Catron—held that the Missouri Compromise was unconstitutional.

The historic importance of the Dred Scott case lies in the dicta in the opinion of the Chief Justice rather than in the decision of the court that it had no jurisdiction. Its immediate effect on public sentiment was largely due to a feeling that the court's action was partisan. It is now known that this feeling was well-founded. The case was twice argued. At the first hearing it appeared that the court would not consider the question of the

constitutionality of the Missouri Compromise, and the opinion of Justice Nelson was then prepared to stand as the opinion of the court. Curtis, *Life of Benjamin Robbins Curtis*, I, 80. But after the second argument the pro-slavery judges determined to effect if possible a permanent settlement of the status of slavery in the United States. The motive is clearly set forth by Justice Wayne who said in his opinion, "The case involves private rights of value, and constitutional principles of the highest importance, about which there had become such a difference of opinion, that the peace and harmony of the country required the settlement of them by judicial decision." 19 Howard, 454-5. The efforts of Wayne and Catron, the two judges who were most active in the attainment of this result, to win over some of their colleagues may be traced in *The Works of James Buchanan* (Moore, Ed.), X, 106 seq. For this reference I am indebted to Prof. E. S. Corwin's paper on The Dred Scott Decision. Contrary to the usual practice, the court or some members of it allowed its decision to become known in favored quarters before it was announced. The general scope of it was known to Alexander H. Stephens as early as January, 1857. Rhodes, *History of the United States*, II, 253. And Buchanan referred to the approaching decision in his inaugural in which he besought acquiescence in it, "whatever it might be." The decision was announced two days later and it has been charged that it was purposely held up in order that Buchanan might in a measure prepare public opinion for it. Although the charge has been several times brought against the Supreme Court that certain of its decisions were due to partisan considerations, this is the only authenticated instance of it. The decision of the Supreme Court of Missouri in Scott's first case is reported in 15 Mo. 682. George Ticknor Curtis' argument for Scott before the Federal Supreme Court is given in his *Constitutional History of the United States*, II, 499. For further accounts of the case and its consequences, see Nicolay and Hay, *Life of Lincoln*, II, ch. 4; Rhodes, *History of the United States*, II, 251; Hurd, *The Law of Freedom and Bondage in the United States*, I, 527; Benton, *Examination of the Dred Scott Decision*, and a learned note by the editor in Thayer, *Cases on Constitutional Law*, I, 493.

UNITED STATES v. WONG KIM ARK.

SUPREME COURT OF THE UNITED STATES. 1898.
169 U. S. 649; 42 Lawyers' Ed. 890.

Appeal from the District Court of the United States for the Northern District of California.

MR. JUSTICE GRAY . . . delivered the opinion of the court. . . .

The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes

at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution, "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."

I. In construing any act of legislation, whether a statute enacted by the legislature, or a constitution established by the people as the supreme law of the land, regard is to be had not only to all parts of the act itself, and of any former act of the same law-making power, of which the act in question is an amendment; but also to the condition, and to the history, of the law as previously existing, and in the light of which the new act must be read and interpreted.

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States," and "natural-born citizen of the United States." . . .

The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." 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; *Ex parte* Wilson, 114 U. S. 417, 422; Boyd v. United States, 116 U. S. 616, 624, 625; Smith v. Alabama, 124 U. S. 465. The language of the Constitution, as has been well said, could not be understood without reference to the common law. I Kent Com. 336; Bradley, J., in Moore v. United States, 91 U. S. 270, 274. . . .

II. The fundamental principle of the common law with regard to English nationality was birth within the allegiance, also called "ligealty," "obedience," "faith" or "power," of the King. The principle embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual—as expressed in the maxim, *protectio trahit subjectionem, et subjectio protectionem*—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects. But the children, born within the realm, of foreign ambassadors, or the children of alien enemies, born during and within their

hostile occupation of part of the King's domains, were not natural-born subjects, because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King. . . .

It thus clearly appears that by the law of England for the last three centuries, beginning before the settlement of this country, and continuing to the present day, aliens, while residing in the dominions possessed by the Crown of England, were within the allegiance, the obedience, the faith or loyalty, the protection, the power, the jurisdiction of the English Sovereign; and therefore every child born in England of alien parents was a natural-born subject, unless the child of an ambassador or other diplomatic agent of a foreign State, or of an alien enemy in hostile occupation of the place where the child was born.

III. The same rule was in force in all the English Colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the Constitution as originally established. . . .

IV. It was contended by one of the learned counsel for the United States that the rule of the Roman law, by which the citizenship of the child followed that of the parent, was the true rule of international law as now recognized in most civilized countries, and had superseded the rule of the common law, depending on birth within the realm, originally founded on feudal considerations. . . . [The court here examines the laws of the various European countries as to citizenship and finds that they greatly differed.]

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 or 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. . . .

Passing by questions once earnestly controverted, but finally put at rest by the Fourteenth Amendment of the Constitution, it is beyond doubt that, before the enactment of the Civil Rights Act of 1866 or the adoption of the Constitutional Amendment, all white persons, at least, born within the sovereignty of the United

States, whether children of citizens or of foreigners, excepting only children of ambassadors or public ministers of a foreign government, were native-born citizens of the United States.

V. In the forefront, both of the Fourteenth Amendment of the Constitution, and of the Civil Rights Act of 1866, the fundamental principle of citizenship by birth within the dominion was reaffirmed in the most explicit and comprehensive terms. . . .

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 from 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 citizens according to the law existing before its adoption. 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), 19 How. 393; 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. The Slaughterhouse Cases (1873), 16 Wall. 36, 73; Strauder v. West Virginia (1879), 100 U. S. 303, 306; *Ex parte* Virginia (1879), 100 U. S. 339, 345; Neal v. Delaware (1880), 103 U. S. 370, 386; Elk v. Wilkins (1884), 112 U. S. 94, 101. 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. . . .

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 a 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. Calvin's Case, 7 Rep. 1, 18*b*; Cockburn on Nationality, 7; Dicey, Conflict of Laws, 177; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 155; 2 Kent Com. 39, 42 . . .

From the first organization of the National Government under the Constitution, the naturalization acts of the United States in providing for the admission of aliens to citizenship by judicial proceedings, uniformly required every applicant to have resided for a certain time "within the limits and under the jurisdiction of the United States;" and thus applied the words "under the jurisdiction of the United States" to aliens residing here before they had taken an oath to support the Constitution of the United States, or had renounced allegiance to a foreign government. Acts of March 26, 1790, c. 3; January 29, 1795, c. 20, § 1; June 18, 1798, c. 54, §§ 1, 6; 1 Stat. 103, 414, 566, 568; April 14, 1802, c. 28, § 1; 2 Stat. 153; March 22, 1816, c. 32, § 1; 3 Stat, 258; May 24, 1828, c. 116, § 2; 4 Stat. 310; Rev. Stat. § 2165. And, from 1795, the provisions of those acts, which granted citizenship to foreign-born children of American parents, described such children as "born out of the jurisdiction and limits of the United States." Acts of January 29, 1795, c. 20, § 3; 1 Stat. 415; April 14, 1802, c. 28, § 4; 2 Stat. 155; February 10, 1855, c. 71; 10 Stat. 604; Rev. Stat. §§ 1993, 2172. Thus Congress, when dealing with the question of citizenship in that aspect, treated aliens residing in this country as "under the jurisdiction of the United States," and American parents residing abroad as "out of the jurisdiction of the United States."

The words "in the United States, and subject to the jurisdiction thereof," in the first sentence of the Fourteenth Amendment of the Constitution, must be presumed to have been understood and intended by the Congress which proposed the Amendment, and by the legislatures which adopted it, in the same sense in which the like words had been used by Chief Justice Marshall in the well known case of The Exchange; and as the equivalent of the words "within the limits and under the jurisdiction of the United States," and the converse of the words, "out of the limits and jurisdiction of the United States," as habitually used in the naturalization acts. This presumption is confirmed by the use of the word "jurisdiction" in the last clause of the same section of the Fourteenth Amendment, which forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." It is impossible to construe the words "subject to the jurisdiction thereof," in the opening sentence, as less comprehen-

sive than the words "within its jurisdiction," in the concluding sentence of the same section; or to hold that persons "within the jurisdiction" of one of the States of the Union are not "subject to the jurisdiction of the United States."

These considerations confirm the view, already expressed in this opinion, that the opening sentence of the Fourteenth Amendment is throughout affirmative and declaratory, intended to allay doubts and to settle controversies which had arisen, and not to impose any new restrictions upon citizenship. . . .

This sentence of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed—"born in the United States," "naturalized in the United States," and "subject to the jurisdiction thereof"—in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization.

The effect of the enactments conferring citizenship on foreign-born children of American parents has been defined, and the fundamental rule of citizenship by birth within the dominion of the United States, notwithstanding alienage of parents, has been affirmed, in well considered opinions of the executive departments of the Government, since the adoption of the Fourteenth Amendment of the Constitution. . . .

These opinions go to show that, since the adoption of the Fourteenth Amendment, the executive branch of the Government, the one charged with the duty of protecting American citizens abroad against unjust treatment by other nations, has taken the same view of the act of Congress of 1855, declaring children born abroad of American citizens to be themselves citizens, which, as mentioned in a former part of this opinion, the British Foreign Office has taken of similar acts of Parliament—holding that such statutes cannot, consistently with our own established rule of citizenship by birth in this country, operate extra-territorially so far as to relieve any person born and residing in a foreign country, and subject to its government, from his allegiance to that country. . . .

The foregoing considerations and authorities irresistibly lead us to these conclusions: the Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the

territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The Amendment, in clear words and in manifest intent, includes the children born, within the territory of the United States, of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and protection, and consequently subject to the jurisdiction of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in Calvin's Case, 7 Rep. 6*a*, "strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject;" and his child, as said by Mr. Binney in his essay before quoted, "if born in the country, is as much a citizen as the natural-born child of a citizen, and by operation of the same principle." It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides—seeing that, as said by Mr. Webster, when Secretary of State, in his Report to the President on Thrasher's Case in 1851, and since repeated by this court, "independently of a residence with intention to continue such residence; independently of any domiciliation; 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 stipulations." Ex. Doc. H. R. No. 10, 1st sess. 32d Congress, p. 4; 6 Webster's Works, 526; United States v. Carlisle, 16 Wall. 147, 155; Calvin's Case, 7 Rep. 6*a*; Ellesmere on Postnati, 63; 1 Hale P. C. 62; 4 Bl. Com. 74, 92.

To hold that the Fourteenth Amendment of the Constitution excludes from citizenship the children, born in the United States, of citizens or subjects of other countries, would be to deny citizenship to thousands of persons of English, Scotch, Irish, German or

other European parentage, who have always been considered and treated as citizens of the United States.

VI. Whatever considerations, in the absence of a controlling provision of the Constitution, might influence the legislative or the executive branch of the Government to decline to admit persons of the Chinese race to the status of citizens of the United States, there are none that can restrain or permit the judiciary to refuse to give full effect to the peremptory and explicit language of the Fourteenth Amendment, which declares and ordains that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."

Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are "subject to the jurisdiction thereof," in the same sense as all other aliens residing in the United States. Yick Wo v. Hopkins (1886), 118 U. S. 356; Law Ow Bew v. United States (1892), 144 U. S. 47, 61, 62; Fong Yue Ting v. United States (1893), 149 U. S. 698, 724; Lem Moon Sing v. United States (1895), 158 U. S. 538, 547; Wong Wing v. United States (1896), 163 U. S. 228, 238. . . .

The Fourteenth Amendment of the Constitution, in the declaration 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 States wherein they reside," contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory, or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.

The power of naturalization, vested in Congress by the Constitution, 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 under which a native might sue." Osborn v. United States Bank, 9 Wheat. 738, 827. 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 providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birth-right, 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 afterwards, 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 persons, to defeat the main purpose of the Constitutional Amendment.

The fact, therefore, that acts of Congress or treaties have not 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 evident intention, and the necessary effect, of the submis-

sion of this case to the decision of the court upon the facts agreed by the parties, were to present for examination the single question, stated at the beginning of this opinion, namely, whether a child born in the United States, of parents of Chinese descent, who, at the time of his birth, are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. For the reasons above stated, this court is of opinion that the question must be answered in the affirmative. *Order affirmed.*

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN, dissenting. . . .

NOTE.—The opinion in the principal case is a masterly exposition, unfortunately too long to be re-printed in full, of the law of citizenship in the United States, England, and the chief countries on the Continent. The whole merits careful study. The question of citizenship in the United States has been made much more complicated than in most countries because of the presence of large numbers of people belonging to races to which the dominant race was unwilling to accord the status of citizen. Antedating the whites themselves were the native Indians who have always occupied an anomalous position in American law. See Cherokee Nation v. Georgia (1831), 5 Peters, 1; Worcester v. Georgia (1832), 6 Peters, 515; Elk v. Wilkins (1884), 112 U. S. 94; The Cherokee Trust Funds (1886), 117 U. S. 288; United States v. Kagama (1886), 118 U. S. 375; Lone Wolf v. Hitchcock (1903), 187 U. S. 553; United States v. Sandoval (1913), 231 U. S. 28, and a learned paper by J. B. Thayer on "A People without Law," in his *Legal Essays*, 91. The introduction of African slaves and the gradual emancipation of members of that race created another difficult situation which is elaborately discussed in the case of Dred Scott v. Sandford (1857), 19 Howard, 393. Slaves of course were never recognized as citizens. Whether freedmen should be so recognized was a question variously answered in the different States until settled by the adoption of the Fourteenth Amendment. The annexation of Porto Rico and the Philippines has brought under the jurisdiction of the United States other groups of people who owe allegiance to the United States but who are not citizens thereof. Gonzales v. Williams (1904), 192 U. S. 1. It is now becoming common to apply the term "nationals" to all persons owing allegiance to a country whether or not they are recognized as citizens of that country.

Citizenship in the United States and citizenship in a State are distinct and may be separately acquired. United States v. Cruikshank (1876), 92 U. S. 542. A resident of the District of Columbia may be a citizen of the United States, but is not a citizen of any State, Hepburn v. Ellzey (1804), 2 Cranch. 445, and it would seem that one might be a citizen of a State without being a citizen of the United States. Hammerstein v. Lyne (1912), 200 Fed. 165, but *contra*, City of Minneapolis v. Reum (1893), 56 Fed. 576. A State cannot make an alien a citizen of the United States, Lang v. Randall

(1876), 4 Dill. 425, although it may confer upon an alien all the privileges which it confers upon its citizens. In the Federal laws no distinction is made between native-born and naturalized citizens except as to eligibility to the presidency and vice-presidency. Osborn v. Bank of the United States (1824), 9 Wheaton, 738; Boyd v. Thayer (1892), 143 U. S. 135; Luria v. United States (1913), 231 U. S. 9.

Naturalization is the process by which an alien is converted into a citizen. This is usually accomplished by the individual alien's conforming to the requirements of the Federal statute, but there are many instances of collective naturalization. On the conclusion of the treaty of peace of 1783 all persons then adhering to the United States, whether born in the country or not, were absolved of their allegiance to Great Britain, while adherents of Great Britain remained British subjects. McIlvaine v. Coxe's Lessee (1808), 4 Cranch. 209; Inglis v. Trustees (1830), 3 Peters, 99; Shanks v. Dumont (1830), 3 Peters, 242. The transfer of territory from one country to another necessarily involves a transfer of the allegiance of its inhabitants, but the latter do not necessarily become citizens of their new country. This is exemplified in the present status of the Porto Ricans and Filipinos. But all the citizens of the ceded territory may be made citizens at once, as was done in the case of Texas. Coutzen v. United States (1900), 179 U. S. 191. The admission of a Territory to the Union may also operate as a collective naturalization of its inhabitants. Boyd v. Thayer (1892), 143 U. S. 135. "All persons who were citizens of the Republic of Hawaii on August 12, 1898," the day of the formal transfer of sovereignty to the United States, were collectively "declared to be citizens of the United States and citizens of the Territory of Hawaii" by the act of Congress of April 30, 1900. 31 *Stat. at Large*, 141. For many other cases arising in connection with naturalization, see Moore, *Digest of International Law*, III, ch. x, a learned note in Scott, *Cases on International Law*, 397, and *A Report on Citizenship of the United States*, House Doc. 326, 59th Congress, 2d Session.

Section 2. Privileges and Immunities of Citizens of the United States.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Constitution of the United States, Amendment XIV, § 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.

Constitution of the United States, Amendment XV.

SLAUGHTER-HOUSE CASES.

Supreme Court of the United States. 1873.
16 Wallace, 36; 21 Lawyers' Ed. 394.

Error to the Supreme Court of Louisiana.

[The legislature of Louisiana enacted a law whereby it created a corporation, The Crescent City Live-Stock Landing and

Slaughter-House Company, to which it granted a monopoly within the City of New Orleans of the landing and slaughtering of animals intended for food. This company was required to permit any other person to slaughter animals in their slaughter-houses and a maximum charge for such service was fixed. The butchers of New Orleans contest the validity of the act on the ground that it is contrary to the Thirteenth and Fourteenth Amendments of the Constitution.]

MR. JUSTICE MILLER . . . delivered the opinion of the court. . . .

The plaintiffs in error accepting this issue, allege that the statute is a violation of the Constitution of the United States in these several particulars:

That it creates an involuntary servitude forbidden by the thirteenth article of amendment;

That it abridges the privileges and immunities of citizens of the United States;

That it denies to the plaintiffs the equal protection of the laws; and,

That it deprives them of their property without due process of law; contrary to the provisions of the first section of the fourteenth article of amendment.

This court is thus called upon for the first time to give construction to these articles. . . .

The first section of the fourteenth article, to which our attention is more specially invited, opens with a definition of citizenship—not only citizenship of the United States, but citizenship of the States. No such definition was previously found in the Constitution, nor had any attempt been made to define it by act of Congress. It had been the occasion of much discussion in the courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated Dred Scott case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest

statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed.

"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 first observation we have to make on this clause is, that it puts at rest both the questions which we stated to have been the subject of differences of opinion. It declares that persons may be citizens of the United States without regard to their 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.[1]

The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction 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.

We think this distinction and its explicit recognition in this amendment of great weight in this argument, because the next

[1] As to this dictum, compare the decision in United States v. Wong Kim Ark, 169 U. S. 649.

paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs rests wholly on the assumption that the citizenship is the same, and the privileges and immunities guaranteed by the clause are the same.

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of *the United States.*" It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment.

If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.

The first occurrence of the words "privileges and immunities" in our constitutional history, is to be found in the fourth of the articles of the old Confederation.

It declares "that the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the

same duties, impositions, and restrictions as the inhabitants thereof respectively."

In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the fourth article, in the following words: "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the article of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of Corfield v. Coryell, decided by Mr. Justice Washington in the Circuit Court for the District of Pennsylvania in 1823, 4 Washington's Circuit Court, 371.

"The inquiry," he says, "is, what are the privileges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." [The court then cites Ward v. The State of Maryland, 12 Wallace, 430, and Paul v. Virginia, 8 Wallace, 180.]

The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.

Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their

exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.

It would be the vainest show of learning to attempt to prove by citation of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal government. Was it the purpose of the fourteenth amendment, 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 power 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 legislation, 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. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. 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 relations of the State and Federal governments to each other and of both 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 the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.

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, 6 Wall. 36. It is said to be the right of the citizens 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 commerce 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 in 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 other citizens of that State. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

But it is useless to pursue this branch of the inquiry, since we are of opinion that the rights claimed by these plaintiffs in error, if they have any existence, are not privileges and immunities of citizens of the United States within the meaning of the clause of the fourteenth amendment under consideration. . . .

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the per-

vading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. 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.[1] It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist

[1] The learned judge proved to be a poor prophet. It is undoubtedly true that the protection of the newly-liberated negro was the dominant motive in the adoption of the Fourteenth Amendment, but it contains no mention of the negro, and its language is of universal application to all citizens and in some cases to all residents of the United States. A careful writer said in 1912: "Of the six hundred and four cases involving the Fourteenth Amendment in which the Supreme Court has delivered opinions since 1868, only twenty-eight deal with questions involving the negro race; that is to say, less than five per cent of the total litigation under the Amendment." Collins, *The Fourteenth Amendment and the States*, 46. Compare the dictum of Justice Miller with the language of the court in Yick Wo v. Hopkins, 118 U. S. 356.—Ed.

with many patriotic men until the breaking out of the late civil war. It was then discovered that the true danger of the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number, of those who believe in the necessity of a strong National government.

But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they may have thought proper to impose additional limitations on the States, and to confer additional power on that of the Nation.

But whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions require, has always held with a steady and even hand the balance between State and Federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or any of its parts.

The judgments of the Supreme Court of Louisiana in these cases are affirmed.

[Mr. Justice Field delivered a dissenting opinion in which Mr. Chief Justice Chase, Mr. Justice Bradley and Mr. Justice Swayne concurred. The last two also delivered separate dissenting opinions.]

Note.—It is interesting to compare with the principal case the view taken by Congress of the meaning and scope of the Fourteenth Amendment. The discussion is well summarized in Flack, *The Adoption of the Fourteenth Amendment*, ch. v. See also Guthrie, *Lectures on the Fourteenth Amendment*, and an acute discussion of the history and meaning of all the war amendments incorporated by Chief Justice Cooley in his edition of Story's *Commentaries*, II, 632-692.

TWINING v. STATE OF NEW JERSEY.

SUPREME COURT OF THE UNITED STATES. 1908.
211 U. S. 78; 53 Lawyers' Ed. 97.

Error to the Court of Errors and Appeals of the State of New Jersey.

[Twining and Cornell, plaintiffs in error, directors of a bank in New Jersey, were indicted for having knowingly exhibited a false paper to a State bank examiner with intent to deceive him as to the condition of the bank. At the trial the defendants called no witnesses and did not testify in their own behalf. In his charge to the jury the judge said: "Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him." The defendants were convicted and sentenced to imprisonment for six and four years respectively. This was affirmed by the Court of Errors and Appeals, and the case was then appealed on the ground that the charge to the jury deprived the defendants of rights and immunities which were protected by the Fourteenth Amendment.]

MR. JUSTICE MOODY . . . delivered the opinion of the court. . . .

The general question, therefore, is, whether such a law violates the Fourteenth Amendment, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their life, liberty or property without due process of law. In order to bring themselves within the protection of the Constitution it is incumbent on the defendants to prove two propositions: first, that the exemption from compulsory self-incrimination is guaranteed by the Federal Constitution against impairment by the States; and, second, if it be so guaranteed, that the exemption was in fact impaired in the case at bar. The first proposition naturally presents itself for earlier consideration. If the right here asserted is not a Federal right, that is the end of the case. We have no authority to go further and determine whether the State court has erred in the interpretation and enforcement of its own laws.

The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits. At the time

of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions. Five of the original thirteen States (North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire, 1784) had then guarded the principle from legislative or judicial change by including it in constitutions or bills of rights; Maryland had provided in her constitution (1776) that "no man ought to be compelled to give evidence against himself, in a common court of law, or in any other court, but in such cases as have been usually practiced in this State or may hereafter be directed by the legislature;" and in the remainder of those States there seems to be no doubt that it was recognized by the courts. The privilege was not included in the Federal Constitution as originally adopted, but was placed in one of the ten Amendments which were recommended to the States by the first Congress, and by them adopted. Since then all the States of the Union have, from time to time, with varying form but with uniform meaning, included the privilege in their constitutions, except the States of New Jersey and Iowa, and in those States it is held to be part of the existing law. State v. Zdanowicz, 69 N. J. L. 308; State v. Height, 117 Iowa, 650. It is obvious from this short statement that it has been supposed by the States that, so far as the state courts are concerned, the privilege had its origin in the constitutions and laws of the States, and that persons appealing to it must look to the State for their protection. Indeed, since by the unvarying decisions of this court the first ten Amendments of the Federal Constitution are restrictive only of National action, there was nowhere else to look up to the time of the adoption of the Fourteenth Amendment, and the State, at least until then, might give, modify or withhold the privilege at its will. . . .

The defendants contend, in the first place, that the exemption from self-incrimination is one of the privileges and immunities of citizens of the United States which the Fourteenth Amendment forbids the States to abridge. It is not argued that the defendants are protected by that part of the Fifth Amendment which provides that "no person . . . shall be compelled in any criminal case to be a witness against himself," for it is

recognized by counsel that by a long line of decisions the first ten Amendments are not operative on the States. Barron v. Baltimore, 7 Pet. 243; Spies v. Illinois, 123 U. S. 131; Brown v. New Jersey, 175 U. S. 172; Barrington v. Missouri, 205 U. S. 483. But it is argued that this privilege is one of the fundamental rights of National citizenship, placed under National protection by the Fourteenth Amendment, and it is specifically argued that the "privileges and immunities of citizens of the United States," protected against State action by that Amendment, include those fundamental personal rights which were protected against National action by the first eight Amendments; that this was the intention of the framers of the Fourteenth Amendment, and that this part of it would otherwise have little or no meaning and effect. These arguments are not new to this court and the answer to them is found in its decisions. The meaning of the phrase "privileges and immunities of citizens of the United States," as used in the Fourteenth Amendment, came under early consideration in the Slaughter-House Cases, 16 Wall. 36. . . .

There can be no doubt, so far as the decision in the Slaughter House Cases has determined the question, that the civil rights sometimes described as fundamental and inalienable, which before the war Amendments were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the Fourteenth Amendment. Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others. On the other hand, if the views of the minority had prevailed it is easy to see how far the authority and independence of the States would have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the National Government. But we need not now inquire into the merits of the original dispute. This part at least of the Slaughter-House Cases has been steadily adhered to by this court, so that it was said of it, in a case where the same clause of the amendment was under consideration (Maxwell v. Dow, 176 U. S. 581, 591), "The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court." The distinction between National and state citizenship and their respective privileges there drawn has come to

be firmly established. And so it was held that the right of peaceable assembly for a lawful purpose (it not appearing that the purpose had any reference to the National Government) was not a right secured by the Constitution of the United States, although it was said that the right existed before the adoption of the Constitution of the United States, and that "it is and always has been one of the attributes of citizenship under a free government." United States v. Cruikshank, 92 U. S. 542, 551. And see Hodges v. United States, 203 U. S. 1. In each case the Slaughter-House Cases were cited by the court, and in the latter case the rights described by Mr. Justice Washington were again treated as rights of state citizenship under state protection. If, then, it be assumed, without deciding the point, that an exemption from compulsory self-incrimination is what is described as a fundamental right belonging to all who live under a free government, and incapable of impairment by legislation or judicial decision, it is, so far as the States are concerned, a fundamental right inherent in state citizenship, and is a privilege or immunity of that citizenship only. Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the National Government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. Slaughter-House Cases, 16 Wall. 70; In re Kemmler, 136 U. S. 436, 448; Duncan v. Missouri, 152 U. S. 377, 382.

Thus among the rights and privileges of National citizenship recognized by this court are the right to pass freely from State to State, Crandall v. Nevada, 6 Wall. 35; the right to petition Congress for a redress of grievances, United States v. Cruikshank, 92 U. S. 542; the right to vote for National officers, Ex parte Yarbrough, 110 U. S. 651; Wiley v. Sinkler, 179 U. S. 58; the right to enter the public lands, United States v. Waddell, 112 U. S. 76; the right to be protected against violence while in the lawful custody of the United States marshal, Logan v. United States, 144 U. S. 263; and the right to inform the United States authorities of violation of its laws, In re Quarles, 158 U. S. 532. Most of these cases were indictments against individuals for conspiracies to deprive persons of rights secured by the Constitution of the United States, and met with a different fate in this court from the indictments in United States v. Cruikshank and Hodges v. United States, because the rights in the latter cases were rights of state and not of National citizenship. But assuming it to be true that the exemption from self-

incrimination is not, as a fundamental right of National citizenship, included in the privileges and immunities of citizens of the United States, counsel insist that, as a right specifically granted or secured by the Federal Constitution, it is included in them. This view is based upon the contention which must now be examined, that the safeguards of personal rights which are enumerated in the first eight Articles of amendment to the Federal Constitution, sometimes called the Federal Bill of Rights, though they were by those Amendments originally secured only against National action, are among the privileges and immunities of citizens of the United States, which this clause of the Fourteenth Amendment protects against state action. This view has been, at different times, expressed by justices of this court (Mr. Justice Field in O'Niel v. Vermont, 144 U. S. 323, 361; Mr. Justice Harlan in the same case, 370, and in Maxwell v. Dow, 176 U. S. 606, 617) and was undoubtedly that entertained by some of those who framed the Amendment. It is, however, not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court. The right of trial by jury in civil cases, guaranteed by the Seventh Amendment (Walker v. Sauvinet, 92 U. S. 90), and the right to bear arms guaranteed by the Second Amendment (Presser v. Illinois, 116 U. S. 252), have been distinctly held not to be privileges and immunities of the United States guaranteed by the Fourteenth Amendment against abridgement by the States, and in effect the same decision was made in respect of the guarantee against prosecution, except by indictment of a grand jury, contained in the Fifth Amendment (Hurtado v. California, 110 U. S. 516), and in respect to the right to be confronted with witnesses contained in the Sixth Amendment. West v. Louisiana, 194 U. S. 258. In Maxwell v. Dow, *supra,* where the plaintiff in error had been convicted in a state court of a felony upon information, and by a jury of eight persons, it was held that the indictment, made indispensable by the Fifth Amendment, and the trial by jury guaranteed by the Sixth Amendment were not privileges and immunities of citizens of the United States, as those words were used in the Fourteenth Amendment. . . .

We conclude, therefore, that the exemption from compulsory self-incrimination is not a privilege or immunity of National citizenship guaranteed by this clause of the Fourteenth Amendment against abridgement by the States. . . .

[The remaining portion of this opinion, dealing with the meaning of the phrase "due process of law," is given *post,* page 319.]

NOTE.—The Supreme Court has never attempted any full and exact definition of the phrase "privileges and immunities of citizens" as used in the Constitution, art. IV, sec. 2, and in the Fourteenth Amendment. As to what is comprehended in the term see Butchers' Union Slaughter House Co. v. Crescent City Live-Stock Landing Co. (1884), 111 U. S. 746 (the right to pursue any of the ordinary occupations); United States v. Reese (1875), 92 U. S. 214 (right to be free from discrimination in the exercise of the franchise); Minor v. Happersett (1874), 21 Wallace, 162 (right to vote); Bradwell v. Illinois (1873), 16 Wallace, 130; In re Lockwood (1894), 154 U. S. 116 (right to practice law); Bartemeyer v. Iowa (1873), 16 Wallace, 130 (right to sell liquor). The protection of the Fourteenth Amendment is afforded only against acts of the States, and not against acts of individuals. United States v. Cruikshank (1876), 92 U. S. 542; Virginia v. Rives (1879), 100 U. S. 313; Civil Rights Cases (1883), 109 U. S. 3; Hodges v. United States (1906), 203 U. S. 1. The same rule applies to the Fifteenth Amendment. James v. Bowman (1903), 190 U. S. 127.

GUINN AND BEAL v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1915.
238 U. S. 347; 59 Lawyers' Ed.

Certificate from the Circuit Court of Appeals.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

This case is before us on a certificate drawn by the court below as the basis of two questions which are submitted for our solution in order to enable the court correctly to decide issues in a case which it has under consideration. Those issues arose from an indictment and conviction of certain election officers of the State of Oklahoma (the plaintiffs in error), of the crime of having conspired unlawfully, wilfully and fraudulently to deprive certain negro citizens, on account of their race and color, of a right to vote at a general election held in that State in 1910, they being entitled to vote under the state law and which right was secured to them by the Fifteenth Amendment to the Constitution of the United States. . . .

Suffrage in Oklahoma was regulated by § 1, Article III of the Constitution under which the State was admitted into the Union. Shortly after the admission there was submitted an amendment to the Constitution making a radical change in that article which was adopted prior to November 8, 1910. At an election for members of Congress which followed the adoption of this Amendment, certain election officers in enforcing its provisions refused to allow certain negro citizens to vote who were clearly entitled

to vote under the provision of the Constitution under which the State was admitted, that is, before the amendment, and who, it is equally clear, were not entitled to vote under the provision of the suffrage amendment if that amendment governed. The persons so excluded based their claim of right to vote upon the original Constitution and upon the assertion that the suffrage amendment was void because in conflict with the prohibitions of the Fifteenth Amendment and therefore afforded no basis for denying them the right guaranteed and protected by that Amendment. And upon the assumption that this claim was justified and that the election officers had violated the Fifteenth Amendment in denying the right to vote, this prosecution, as we have said, was commenced. . . .

The questions which the court below asks are these:

"1. Was the amendment to the constitution of Oklahoma, heretofore set forth, valid?

"2. Was that amendment void in so far as it attempted to debar from the right or privilege of voting for a qualified candidate for a Member of Congress in Oklahoma, unless they were able to read and write any section of the constitution of Oklahoma, negro citizens of the United States who were otherwise qualified to vote for a qualified candidate for a Member of Congress in that State, but who were not, and none of whose lineal ancestors was, entitled to vote under any form of government on January 1, 1866, or at any time prior thereto, because they were then slaves?"

As these questions obviously relate to the provisions concerning suffrage in the original constitution and the amendment to those provisions which forms the basis of the controversy, we state the text of both. The original clause so far as material was this:

"The qualified electors of the State shall be male citizens of the United States, male citizens of the State, and male persons of Indian descent native of the United States, who are over the age of twenty-one years, who have resided in the State one year, in the county six months, and in the election precinct thirty days, next preceding the election at which any such elector offers to vote."

And this is the amendment:

"No person shall be registered as an elector of this State or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or at any time

prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. . . ."

The argument of the Government in substance says: No question is made by the Government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment and therefore cannot be here assailed either by disregarding the State's power to judge on the subject or by testing its motive in enacting the provision. The real question involved, so the argument of the Government insists, is the repugnancy of the standard which the amendment makes, based on the conditions existing on January 1, 1866, because on its face and inherently considering the substance of things, that standard is a mere denial of the restrictions imposed by the prohibitions of the Fifteenth Amendment and by necessary result re-creates and perpetuates the very conditions which the Amendment was intended to destroy. From this it is urged that no legitimate discretion could have entered into the fixing of such standard which involved only the determination to directly set at naught or by indirection avoid the commands of the Amendment. And it is insistent that nothing contrary to these propositions is involved in the contention of the Government that if the standard which the suffrage amendment fixes based upon the conditions existing on January 1, 1866, be found to be void for the reasons urged, the other and literacy test is also void, since that contention rests, not upon any assertion upon the part of the Government of any abstract repugnancy of the literacy test to the prohibitions of the Fifteenth Amendment, but upon the relation between that test and the other as formulated in the suffrage amendment and the inevitable result which it is deemed must follow from holding it to be void if the other is so declared to be. . . .

The questions then are: (1) Giving to the propositions of the Government the interpretation which the Government puts upon them and assuming that the suffrage provision has the significance which the Government assumes it to have, is that provision as a matter of law repugnant to the Fifteenth Amendment? which leads us of course to consider the operation and effect of the Fifteenth Amendment. (2) If yes, has the assailed amendment in so far as it fixes a standard for voting as of January 1, 1866,

the meaning which the Government attributes to it? which leads us to analyze and interpret that provision of the amendment. (3) If the investigation as to the two prior subjects establishes that the standard fixed as of January 1, 1866, is void, what if any effect does that conclusion have upon the literacy standard otherwise established by the amendment? which involves determining whether that standard, if legal, may survive the recognition of the fact that the other or 1866 standard has not and never had any legal existence. Let us consider these subjects under separate headings.

1. *The operation and effect of the Fifteenth Amendment.*

[Here follows the text of the Fifteenth Amendment.]

(a) Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and of the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

(b) But it is equally beyond the possibility of question that the Amendment in express terms restricts the power of the United States or the States to abridge or deny the right of a citizen of the United States to vote on account of race, color or previous condition of servitude. The restriction is coincident with the power and prevents its exertion in disregard of the command of the Amendment. But while this is true, it is true also that the Amendment does not change, modify or deprive the States of their full power as to suffrage except of course as to the subject with which the Amendment deals, and to the extent that obedience to its command is necessary. Thus the authority over suffrage which the States possess and the limitation which the Amendment imposes are coördinate and one may not destroy the other without bringing about the destruction of both.

(c) While in the true sense, therefore, the Amendment gives no right of suffrage, it was long ago recognized that in operation its prohibition might measurably have that effect; that is to say, that as the command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed, the result might arise that as a

consequence of the striking down of a discriminating clause a right of suffrage would be enjoyed by reason of the generic character of the provision which would remain after the discrimination was stricken out. Ex parte Yarbrough, 110 U. S. 651; Neal v. Delaware, 103 U. S. 370. A familiar illustration of this doctrine resulted from the effect of the adoption of the Amendment on state constitutions in which at the time of the adoption of the Amendment the right of suffrage was conferred on all white male citizens, since by the inherent power of the Amendment the word white disappeared and therefor all male citizens without discrimination on account of race, color or previous condition of servitude came under the generic grant of suffrage made by the State.

With these principles before us how can there be room for any serious dispute concerning the repugnancy of the standard based upon January 1, 1866 (a date which preceded the adoption of the Fifteenth Amendment), if the suffrage provision fixing that standard is susceptible of the significance which the Government attributes to it? Indeed, there seems no escape from the conclusion that to hold that there was even possibility for dispute on the subject would be but to declare that the Fifteenth Amendment not only had not the self-executing power which it has been recognized to have from the beginning, but that its provisions were wholly inoperative because susceptible of being rendered inapplicable by mere form of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the prohibitions of the Amendment by creating a standard of voting which on its face was in substance but a revitalization of conditions which when they prevailed in the past had been destroyed by the self-operative force of the Amendment.

2. *The standard of January 1, 1866, fixed in the suffrage amendment and its significance.*

The inquiry of course here is, Does the amendment as to the particular standard which this heading embraces involve the mere refusal to comply with the commands of the Fifteenth Amendment as previously stated? This leads us for the purpose of the analysis to recur to the text of the suffrage amendment. Its opening sentence fixes the literacy standard which is all inclusive since it is general in its expression and contains no word of discrimination on account of race or color or any other reason. This, however, is immediately followed by the provisions creating the standard based upon the condition existing on January 1, 1866, and carving out those coming under that standard from the

inclusion in the literacy test which would have controlled them but for the exclusion thus expressly provided for. The provision is this:

"But no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution."

We have difficulty in finding words to more clearly demonstrate the conviction we entertain that this standard has the characteristics which the Government attributes to it than does the mere statement of the text. It is true it contains no express words of an exclusion from the standard which it establishes of any person on account of race, color, or previous condition of servitude prohibited by the Fifteenth Amendment, but the standard itself inherently brings that result into existence since it is based purely upon a period of time before the enactment of the Fifteenth Amendment and makes that period the controlling and dominant test of the right of suffrage. In other words, we seek in vain for any ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the Fifteenth Amendment was adopted and the continuance of which the Fifteenth Amendment prohibited, proposed by in substance and effect lifting those conditions over to a period of time after the Amendment to make them the basis of the right to suffrage conferred in direct and positive disregard of the Fifteenth Amendment. And the same result, we are of opinion, is demonstrated by considering whether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated. We say this because we are unable to discover how, unless the prohibitions of the Fifteenth Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the Fifteenth Amendment. Certainly it cannot be said that there was any peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless the Fifteenth Amendment was in view.

While these considerations establish that the standard fixed on the basis of the 1866 test is void, they do not enable us to reply even to the first question asked by the court below, since to do so we must consider the literacy standard established by

the suffrage amendment and the possibility of its surviving the determination of the fact that the 1866 standard never took life since it was void from the beginning because of the operation upon it of the prohibitions of the Fifteenth Amendment. And this brings us to the last heading:

3. *The determination of the validity of the literacy test and the possibility of its surviving the disappearance of the 1866 standard with which it is associated in the suffrage amendment.*

. . .

We are of opinion that neither forms of classification nor methods of enumeration should be made the basis of striking down a provision which was independently legal and therefore was lawfully enacted because of the removal of an illegal provision with which the legal provision or provisions may have been associated. We state what we hold to be the rule thus strongly because we are of opinion that on a subject like the one under consideration involving the establishment of a right whose exercise lies at the very basis of government a much more exacting standard is required than would ordinarily obtain where the influence of the declared unconstitutionality of one provision of a statute upon another and constitutional provision is required to be fixed. . . . In our opinion the very language of the suffrage amendment expresses, not by implication nor by forms of classification nor by the order in which they are made, but by direct and positive language the command that the persons embraced in the 1866 standard should not be under any conditions subjected to the literacy test, a command which would be virtually set at naught if on the obliteration of the one standard by the force of the Fifteenth Amendment the other standard should be held to continue in force. . . .

We answer the first question, No, and the second question, Yes.

And it will be so certified.

CHAPTER III.

THE JURISDICTION OF THE FEDERAL COURTS.

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.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Constitution of the United States, Art. III, § 2.

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.

Constitution of the United States, Amendment XI.

CHISHOLM, EXECUTOR v. GEORGIA.

SUPREME COURT OF THE UNITED STATES. 1792.
2 Dallas, 419; 1 Lawyers' Ed. 440.

[This was an action of assumpsit against the State of Georgia, which made a written protest against the court's taking jurisdiction of the cause, but otherwise took no part in the argument. The judges delivered their opinions *seriatim*. Only that of the Chief Justice is here printed.]

JAY, C. J. . . . Let us now proceed to inquire whether Georgia has not, by being a party to the national compact, consented to be suable by individual citizens of another State. This inquiry naturally leads our attention, 1st. To the design of the constitution. 2d. To the letter and express declaration in it.

Prior to the date of the constitution, the people had not any national tribunal to which they could resort for justice; the distribution of justice was then confined to State judicatories, in whose institution and organization the people of the other States had no participation, and over whom they had not the least control. There was then no general court of appellate jurisdiction by whom the errors of State courts, affecting either the nation at large or the citizens of any other State, could be revised and corrected. Each State was obliged to acquiesce in the measure of justice which another State might yield to her or to her citizens; and that even in cases where State considerations were not always favorable to the most exact measure. There was danger that from this source animosities would in time result; and as the transition from animosities to hostilities was frequent in the history of independent States, a common tribunal for the termination of controversies became desirable, from motives both of justice and of policy.

Prior also to that period the United States had, by taking a place among the nations of the earth, become amenable to the laws of nations, and it was their interest as well as their duty to provide that those laws should be respected and obeyed; in their national character and capacity the United States were responsible to foreign nations for the conduct of each State, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to State courts, and particularly to the courts of delinquent States, became apparent. While all the States were bound to protect each and the citizens of each, it was highly proper and reasonable that they should be in a capacity not only to cause justice to be done to each, and the citizens of each, but also to cause justice to be done by each, and the citizens of each, and that, not by violence and force, but in a stable, sedate, and regular course of judicial procedure.

These were among the evils against which it was proper for the nation, that is, the people of all the United States, to provide by a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation.

Let us now turn to the constitution. The people therein declare that their design in establishing it comprehended six objects. 1st. To form a more perfect union. 2d. To establish justice. 3d. To insure domestic tranquillity. 4th. To provide for the common defense. 5th. To promote the general welfare. 6th.

To secure the blessings of liberty to themselves and their posterity. . . .

It may be asked, what is the precise sense and latitude in which the words "to establish justice," as here used, are to be understood? The answer to this question will result from the provisions made in the constitution on this head. They are specified in the second section of the third article, where it is ordained that the judicial power of the United States shall extend to ten descriptions of cases, namely: 1st. To all cases arising under this constitution; because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them. 2d. To all cases arising under the laws of the United States; because as such laws, constitutionally made, are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3d. To all cases arising under treaties made by their authority; because, as treaties are compacts made by, and obligatory on the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation. 4th. To all cases affecting ambassadors, or other public ministers and consuls; because, as these are officers of foreign nations, whom this nation is bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. 5th. To all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privileges relative thereto are regulated by the laws of nations and treaties, such cases necessarily belong to national jurisdiction. 6th. To controversies to which the United States shall be a party; because, in cases in which the whole people are interested it would not be equal or wise to let any one State decide and measure out the justice due to others. 7th. To controversies between two or more States; because domestic tranquillity requires that the contentions of States should be peaceably terminated by a common judicatory; and, because, in a free country, justice ought not to depend on the will of either of the litigants. 8th. To controversies between a State and citizens of another State; because, in case a State (that is, all the citizens of it) has demands against some citizens of another State, it is better that she should prosecute their demands in a national court, than in a court of the State to which those citizens belong; the danger of irritation and criminations arising from apprehensions and suspicions of par-

tiality being thereby obviated; because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due to the latter; and true republican government requires that free and equal citizens should have free, fair, and equal justice. 9th. To controversies between citizens of the same State, claiming lands under grants of different States; because, as the rights of the two States to grant the land are drawn into question, neither of the two States ought to decide the question. 10th. To controversies between a State or the citizens thereof and foreign States, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations, or people, ought to be ascertained by, and depend on, national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty, and the equal right of the people.

The question now before us renders it necessary to pay particular attention to that part of the second section which extends the judicial power "to controversies between a State and citizens of another State." It is contended that this ought to be construed to reach none of these controversies, excepting those in which a State may be plaintiff. The ordinary rules for construction will easily decide whether those words are to be understood in that limited sense.

This extension of power is remedial, because it is to settle controversies. It is, therefore, to be construed liberally. It is politic, wise, and good, that not only the controversies in which a State is plaintiff, but also those in which a State is defendant, should be settled; both cases, therefore, are within the reason of the remedy; and ought to be so adjudged, unless the obvious, plain, and literal sense of the words forbid it. If we attend to the words, we find them to be express, positive, free from ambiguity, and without room for such implied expressions: "The judicial power of the United States shall extend to controversies between a State and citizens of another State." If the constitution really meant to extend these powers only to those controversies in which a State might be plaintiff, to the exclusion of those in which citizens had demands against a State, it is inconceivable that it should have attempted to convey that meaning in words not only so incompetent, but also repugnant to it; if it

meant to exclude a certain class of these controversies, why were they not expressly excepted; on the contrary, not even an intimation of such intention appears in any part of the constitution. It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, that there is no controversy between them. If it is a controversy between them, then it clearly falls not only within the spirit, but the very words of the constitution. What is it to the cause of justice, and how can it affect the definition of the word controversy, whether the demands which cause the dispute are made by a State against citizens of another State, or by the latter against the former? When power is thus extended to a controversy, it necessarily, as to all judicial purposes, is also extended to those between whom it subsists. . . .

We find the same general and comprehensive manner of expressing the same ideas in a subsequent clause, in which the constitution ordains that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the supreme court shall have original jurisdiction." Did it mean here party plaintiff? If that only was meant, it would have been easy to have found words to express it. Words are to be understood in their ordinary and common acceptation, and the word party being in common usage applicable both to plaintiff and defendant, we cannot limit it to one of them in the present case. We find the legislature of the United States expressing themselves in the like general and comprehensive manner; they speak, in the thirteenth section of the judicial act, of controversies where a State is a party, and as they do not impliedly or expressly apply that term to either of the litigants in particular, we are to understand them as speaking of both. In the same section they distinguish the cases where ambassadors are plaintiffs, from those in which ambassadors are defendants, and make different provisions respecting those cases; and it is not unnatural to suppose that they would, in like manner, have distinguished between cases where a State was plaintiff and where a State was defendant, if they had intended to make any difference between them, or if they had apprehended that the constitution had made any difference between them.

I perceive, and therefore candor urges me to mention, a circumstance, which seems to favor the opposite side of the question. It is this: The same section of the constitution which extends the judicial power to controversies "between a State and the citizens of another State," does not extend that power to con-

troversies to which the United States are a party. Now it may be said, if the word party comprehends both plaintiff and defendant, it follows that the United States may be sued by any citizen, between whom and them there may be a controversy. This appears to me to be fair reasoning; but the same principles of candor which urge me to mention this objection, also urge me to suggest an important difference between the two cases. It is this: In all cases of actions against States or individual citizens the national courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid. From this distinction important conclusions are deducible, and they place the case of a State, and the case of the United States, in very different points of view. . . .

For the reasons before given, I am clearly of opinion that a State is suable by citizens of another State; but lest I should be understood in a latitude beyond my meaning, I think it necessary to subjoin this caution, namely, That such suability may nevertheless not extend to all the demands, and to every kind of action; there may be exceptions. For instance, I am far from being prepared to say that an individual may sue a State on bills of credit issued before the constitution was established, and which were issued and received on the faith of the State, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated. . . .

[Mr. Justice Wilson, Mr. Justice Cushing and Mr. Justice Blair delivered concurring opinions. Mr. Justice Iredell delivered a dissenting opinion.]

Note.—While the Constitution was pending before the States, Hamilton (*The Federalist*, No. 81), Marshall (Elliot's *Debates*, III, 555), and Madison (*Ib.*, III, 522), had expressed the opinion that the Federal courts were given no jurisdiction of a suit by an individual against a State. The feeling aroused in Georgia by the decision in the principal case was most bitter, as was evidenced by a bill passed by the Georgia House but not adopted by the Senate which provided that any Federal marshal attempting to carry the judgment of the Supreme Court into execution "shall be guilty of felony, and shall suffer death, without benefit of clergy, by being hanged." Phillips, "Georgia and State Rights," *Annual Report of the American Historical Association for 1901*, II, 27. Many of the States shared Georgia's feeling, but expressed themselves more temperately. Two days after the decision was announced, the Eleventh Amendment was proposed in Congress. Since its adoption every State is exempt from suit in the Federal courts by an individual, whether the suit be brought against the State *eo nomine* or

against an officer of the State standing in such a relation to the controversy that the suit is in reality against the State. An officer acting under color of an invalid law is personally liable for his acts and a suit against him is not a suit against the State. Poindexter v. Greenhow (1884), 114 U. S. 270; Reagan v. Farmers' Loan & Trust Co. (1894), 154 U. S. 362; Tindal v. Wesley (1897), 167 U. S. 204; Smyth v. Ames (1898), 169 U. S. 466; Ex parte Young (1908), 209 U. S. 123. Good recent discussions of the exemption of the States from suit are Hopkins v. Clemson Agricultural College (1911), 221 U. S. 636, and Lankford v. Platte Iron Works (1915), 235 U. S. 461. For an important interpretation of the Eleventh Amendment, see Cohens v. Virginia (1821), 6 Wheaton, 264, and Osborn v. Bank of the United States (1824), 9 Wheaton, 738. For a criticism of the principal case see Hans v. Louisiana (1890), 134 U. S. 1, and for an estimate of the political importance of the question involved see Chief Justice Cooley's lecture in *Constitutional History as Seen in American Law*, 48.

COHENS v. THE STATE OF VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1821.
6 Wheaton, 264; 5 Lawyers' Ed. 257.

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the court of Hustings, for the borough of Norfolk, on an information for selling lottery tickets, contrary to an act of the legislature of Virginia. In the state court, the defendant claimed the protection of an act of congress. A case was agreed between the parties, which states the act of assembly on which the prosecution was founded, and the act of congress on which the defendant relied, and concludes in these words: "If upon this case the court shall be of opinion that the acts of congress before mentioned were valid, and, on the true construction of those acts, the lottery tickets sold by the defendants as aforesaid, might lawfully be sold within the State of Virginia, notwithstanding the act or statute of the general assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. And if the court should be of opinion that the statute or act of the general assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of congress, then judgment to be entered that the defendants are guilty, and that the commonwealth recover against them one hundred dollars and costs."

Judgment was rendered against the defendants; and the court in which it was rendered being the highest court of the State in which the cause was cognizable, the record has been brought into this court by writ of error.

The defendant in error moves to dismiss this writ, for want of jurisdiction.

In support of this motion, three points have been made, and argued with the ability which the importance of the question merits. These points are:—

1. That a State is a defendant.

2. That no writ of error lies from this court to a state court.

3. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said that jurisdiction was not given by the Judiciary Act. The court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the state court, because neither the constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the first two points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every State in the Union. That the constitution, laws, and treaties, may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry, affirms that the decision he asks does not depend on inquiry.

If such be the constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the constitution, it is equally the duty of this court to say so; and

to perform that task which the American people have assigned to the judicial department.

1. The first question to be considered is, whether the jurisdiction of this court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State?

The 2d section of the third article of the constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "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." This clause extends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

In the second class, the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more States, between a State and citizens of another State," "and between a State and foreign states, citizens, or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

The counsel for the defendant in error have stated that the cases which arise under the constitution must grow out of those provisions which are capable of self-execution; examples of which are to be found in the 2d section of the 4th article, and in the 10th section of the first article.

A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the powers given in the constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this expression of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the constitution, from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construc-

tion too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution, in the 25th section of the Judiciary Act; and we perceive no reason to depart from that construction.

The jurisdiction of the court, then, being extended by the letter of the constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim on the spirit and true meaning of the constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign independent State is not suable, except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If upon a just construction of that instrument, it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has intrusted that power to a tribunal in whose impartiality it confides.

The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective States, adopted the present constitution.

If it could be doubted whether, from its nature, it 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, anything in the constitution or laws of any State to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the States. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there by any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given "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."

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases, of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State, in relation to each other; the nature of our constitution, the subordination of the state governments to the constitution; the great

purpose for which jurisdiction over all cases arising under the constitution and laws of the United States, is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those cases in which a State may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case. . . .

It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one. . . .

We think, then, that as the constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party.

This leads to a consideration of the 11th amendment.

It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of any foreign State."

It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State legislatures. That its motive was not

to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign state. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation.

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Under the Judiciary Act, 1 Stats. at Large, 73, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a State obtains a judgment against an individual, and the court rendering such judgment overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the supreme court, for the sole purpose of inquiring whether the judgment violates the constitution of the United States, can, with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim

against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. . . . He only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the Union. . . .

The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union, has been well illustrated by a reference to the course of this court in suits instituted by the United States. The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits. Yet writs of error, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have like those in favor of an individual, been re-examined, and affirmed or reversed. It has never been suggested that such a writ of error was a suit against the United States, and therefore not within the jurisdiction of the appellate court.

It is, then, the opinion of the court, 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 a violation of the constitution or laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion where the effect of the writ may be to restore the party to the possession of a thing which he demands.

But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another State, or by a citizen or subject of any foreign state." It is not then within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen that, in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.[1]

2. The second objection to the jurisdiction of the court is, that its appellate power cannot be exercised, in any case, over the judgment of a state court.

This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire independence of each other. The

[1] See Hans v. Louisiana (1890), 134 U. S. 1, 20.

argument considers the federal judiciary as completely foreign to that of a State; and as being no more connected with it, in any respect whatever, than the court of a foreign state. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the constitution, the argument fails with it.

This hypothesis is not founded on any words in the constitution, which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it; and on the incompatibility of the application of the appellate jurisdiction to the judgments of state courts, with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests, in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all the powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire,—for some purposes sovereign, for some purposes subordinate.

In a government so constituted, is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a state tribunal enforcing such unconstitu-

tional law? Is it so very unreasonable as to furnish a justification for controlling the words of the constitution?

We think it is not. We think 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.

The propriety of intrusting the construction of the constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question. It seems to be a corollary from this political axiom, that the federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgments rendered in them by the state tribunals. If the federal and state courts have concurrent jurisdiction in all cases arising under the constitution, laws, and treaties of the United States; and if a case of this description brought in a state court cannot be removed before judgment, nor revised after judgment, then the construction of the constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the state courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts), "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion, that any motives which may not be fairly avowed, or which ought not to exist, can ever influence a State or its courts, the necessity of uniformity, as well as correctness in expounding the constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the general and state governments, from construing the words of the constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the supreme court appellate jurisdiction in all

cases arising under the constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. . . . Let the nature and objects of our Union be considered; let the great fundamental principles on which the fabric stands be examined; and we think the result must be that there is nothing so extravagantly absurd in giving to the court of the nation the power of revising the decisions of local tribunals, on questions which affect the nation, as to require that words which import this power should be restricted by a forced construction. . . .

Motion denied.

The cause was thereupon argued on the merits. . . .

Judgment affirmed.

NOTE.—The constitutionality of the twenty-fifth section of the Judiciary Act of 1789 had been upheld by Justice Story in Martin v. Hunter's Lessee (1816), 1 Wheaton, 304.

THE CHEROKEE NATION v. THE STATE OF GEORGIA.

SUPREME COURT OF THE UNITED STATES. 1831.
5 Peters, 1; 8 Lawyers' Ed. 25.

This was an original bill filed in this court by the Cherokee nation against the State of Georgia, and also a supplemental bill by the same complainant against the same defendant, upon which the complainant moved for a subpœna to the State, and also for a temporary injunction to restrain the State from enforcing the laws of Georgia within the territory alleged to belong exclusively to the complainants. . . .

The bill set forth the complainants to be "the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to any State of this Union, nor to any prince, potentate, or state, other than their own."

"That from time immemorial, the Cherokee nation have composed a sovereign and independent state, and in this character have been repeatedly recognized, and still stand recognized, by the United States, in the various treaties subsisting between their nation and the United States." And it proceeds to state when these were made, and their substance, and shows how certain laws of Georgia are repugnant thereto. . . .

No counsel appeared for the State of Georgia.

MARSHALL, C. J., delivered the opinion of the court.

This bill is brought by the Cherokee nation, praying an injunction to restrain the State of Georgia from the execution of certain laws of that State, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force. . . .

Before we can look into the merits of the case, a preliminary inquiry presents itself. Has this court jurisdiction of the cause?

The 3d article of the constitution describes the extent of the judicial power. The 2d section closes an enumeration of the cases to which it is extended, with "controversies" "between a State or the citizens thereof and foreign states, citizens, or subjects." A subsequent clause of the same section gives the supreme court original jurisdiction in all cases in which a State shall be a party. The party defendant may, then, unquestionably be sued in this court. May the plaintiff sue in it? Is the Cherokee nation a foreign state in the sense in which that term is used in the constitution?

The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state from the settlement of our country. The numerous treaties made by them with the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.

A question of much more difficulty remains. Do the Cherokees constitute a foreign state in the sense of the constitution?

The counsel have shown conclusively that they are not a State of the Union, and have insisted that individually they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a state must, they say, be a foreign state. Each individual being foreign, the whole must be foreign.

This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term foreign nation is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

The Indian territory is admitted to form a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, 7 Statutes at Large, 18, which preceded the constitution, "to send a deputy of their choice, whenever they think proper, to congress." Treaties were made with some tribes by the State of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that State, taking back a limited grant to themselves, in which they admit their dependence.

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the land they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may be 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 dependent 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 great father. They and their country are considered by foreign nations, as well as by our-

selves, as being so completely under the sovereignty 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.

In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbors, ought not to be entirely disregarded. At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had, perhaps, never entered the mind of an Indian or his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such that we should feel much difficulty in considering them as designated by the term foreign state, were there no other part of the constitution which might shed light on the meaning of these words. But we think that in construing them, considerable aid is furnished by that clause in the 8th section of the 1st article, which empowers congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In this clause they are as clearly contradistinguished by a name appropriate to themselves, from foreign nations, as from the several States composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several States, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

The counsel for the plaintiffs contend that the words "Indian tribes" were introduced into the article empowering congress to

regulate commerce, for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the 9th article of the confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly, and omitted those qualifications which embarrassed the exercise of it as granted in the confederation. This may be admitted without weakening the construction which has been intimated. Had the Indian tribes been foreign nations, in the view of the convention, this exclusive power of regulating intercourse with them might have been, and most probably would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several States." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.

It has also been said that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument; their meaning is controlled by the context. This is undoubtedly true. In common language, the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. This may not be equally true with respect to proper names. Foreign nations, is a general term, the application of which to Indian tribes, when used in the American constitution, is at best extremely questionable. In one article, in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other. We perceive plainly that the constitution, in this article, does not comprehend Indian tribes in the general term "foreign nations;" not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign states" is introduced, we cannot impute to the convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that construction upon us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign

state, in the sense of the constitution, and cannot maintain an action in the courts of the United States.

A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a State from the forcible exercise of legislative power over a neighboring people, asserting their independence; their right to which the State denies. On several of the matters alleged in the bill, for example on the laws making it criminal to exercise the usual powers of self-government in their own country by the Cherokee nation, this court cannot interpose; at least in the form in which those matters are presented.

That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be within the proper province of the judicial department. But the opinion on the point respecting parties, makes it unnecessary to decide this question.

If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

The motion for an injunction is denied.

[Mr. Justice Johnson and Mr. Justice Baldwin delivered concurring opinions. Mr. Justice Thompson delivered a dissenting opinion in which Mr. Justice Story concurred.]

Note.—For many interesting details as to the circumstances giving rise to this case and the later case of Worcester v. Georgia (1832), 6 Peters, 515, and the effectual nullification of the decision in the latter by President Jackson and the authorities of Georgia, see Phillips, "Georgia and State Rights," *Annual Report of the American Historical Association for 1901*, vol. II. A valuable account of the subsequent dealings of the Federal Government with the Cherokee tribe is given in Heckman v. United States (1912), 224 U. S. 413.

LUTHER v. BORDEN.

SUPREME COURT OF THE UNITED STATES. 1848.
7 Howard, 1; 12 Lawyers' Ed. 581.

TANEY, C. J., delivered the opinion of the court.

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther, the plaintiff in error, against Luther M. Borden and other defendants, in the circuit court of the United States for the district of Rhode Island, for breaking and entering the plaintiff's house. The defendants justify upon the ground that large numbers of men were assembled in different parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State; that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law; that the plaintiff was engaged in the insurrection; and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damage as possible. The plaintiff replied, that the trespass was committed by the defendants of their own proper wrong, and without any such cause; and upon the issue joined on this replication, the parties proceeded to trial. . . . The existence and authority of the government under which the defendants acted, was called in question; and the plaintiff insists, that, before the acts complained of were committed, that government had been displaced and annulled by the people of Rhode Island, and that the plaintiff was engaged in supporting the lawful authority of the State, and the defendants themselves were in arms against it. . . .

The fourth section of the fourth article of the constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the constitution it rests with congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, congress must necessarily decide what government is

established in the State before it can determine 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. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

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 fulfill 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, and no doubt wisely; and by the act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive, when the legislature cannot be convened, to call forth such number of militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, 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. He is to act upon the application of the legislature, or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government, cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. 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 the act of congress.

After the President has acted and called out the militia, 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 was 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 power is, at that time, bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority, if it should be found necessary for the general government to interfere; and it is admitted in the argument that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government, or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of congress to the sovereign States of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe,

and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. 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.

A question very similar to this arose in the case of Martin v. Mott, 12 Wheat. 29-31. The first clause of the first section of the act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a state government. The power given to the President in each case is the same, with this difference only, that it cannot be exercised by him in the latter case, except upon the application of the legislature or executive of the State. The case above mentioned arose out of a call made by the President, by virtue of the power conferred by the first clause; and the court said that "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The ground upon which that opinion is maintained are set forth in the report, and, we think, are conclusive. The same principle applies to the case now before the court. Undoubtedly, if the President, in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of congress to apply the proper remedy. But the courts must administer the law as they find it. . . .

Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the state sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them

respectively by the constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not, by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

The judgment of the circuit court must, therefore, be affirmed.

WOODBURY, J., dissenting. . . .

NOTE.—For an account of the events out of which this case arose see Mowry, *Dorr's Rebellion.* As to what is a republican form of government see In re Duncan (1891), 139 U. S. 461, Taylor and Marshall v. Kentucky (1900), 178 U. S. 548, and Pacific Telephone Co. v. Oregon (1912), 223 U. S. 118. As to what is a political question, see United States v. Holliday (1866), 3 Wallace, 407, Lone Wolf v. Hitchcock (1903), 187 U. S. 553 (tribal relations of a group of Indians); Cherokee Nation v. Georgia (1831), 5 Peters, 1 (relation of an Indian tribe to a State); Tiger v. Western Investment Co. (1911), 221 U. S. 286 (when Indian guardianship shall cease); United States v. Realty Company (1896), 163 U. S. 427 (recognition of claims against the United States); Martin v. Mott (1827), 12 Wheaton, 19 (necessity of calling out the militia); Georgia v. Stanton (1868), 6 Wallace, 50 (the corporate rights of a State). All questions touching the international relations of the country are within the peculiar province of the political departments of the government. See The Nereide (1815), 9 Cranch. 388 (whether retaliatory measures toward another country shall be adopted); Gelston v. Hoyt (1818), 3 Wheaton, 246, United States v. Palmer (1818), 3 Wheaton, 610, The Divina Pastora (1819), 4 Wheaton, 52, The Santissima Trinidad (1822), 7 Wheaton, 283, Kennett v. Chambers (1852), 14 Howard, 38, The Three Friends (1897), 166 U. S. 1 (the recognition of the belligerency or independence of a foreign community); Foster v. Nielson (1829), 2 Peters, 253, United States v. Arredondo (1832), 6 Peters, 691; Garcia v. Lee (1838), 12 Peters, 511, Ex parte Cooper (1892), 143 U. S. 472 (the boundaries of the United States); Williams v. Suffolk Insurance Co. (1839), 13 Peters, 415, Jones v. United States (1890), 137 U. S. 202, Pearcy v. Stranahan (1907), 205 U. S. 257 (who is sovereign of foreign territory); Doe v. Braden (1854), 16 Howard, 635 (whether a treaty with another country has been sufficiently ratified by that country); Terlinden v. Ames (1901), 184 U. S. 270 (whether a treaty is still in force); Neeley v. Henkel (1901), 180 U. S. 109 (how long the military occupation of a foreign country shall

continue); In re Baiz (1890), 135 U. S. 432 (status of one claiming to be the diplomatic representative of another country). In The Pelican (1809), Edw. Adm., app. D, Sir William Grant said, "It always belongs to the government of the country to determine in what relation any other country stands to it; that is a point upon which courts of justice cannot decide."

SOUTH DAKOTA v. NORTH CAROLINA.

SUPREME COURT OF THE UNITED STATES. 1904.
192 U. S. 286; 48 Lawyers' Ed. 448.

ORIGINAL.

[In 1866 the State of North Carolina authorized the issue of bonds to complete the Western North Carolina Railway, with the proviso that such bonds should be secured by mortgages of equivalent amounts on the stock owned by the State in another railway. In 1901 the owners of a large part of the outstanding bonds presented ten of them to the State of South Dakota, which then filed a bill asking that North Carolina be required to pay the amount due on the bonds and that in default of payment the railway shares on the security of which the bonds were issued might be sold.]

MR. JUSTICE BREWER . . . delivered the opinion of the court.

There can be no reasonable doubt of the validity of the bonds and mortgages in controversy. There is no challenge of the statutes by which they were authorized. . . . Neither can there be any question respecting the title of South Dakota to these bonds. They are not held by the State as representative of individual owners, as in the case of New Hampshire v. Louisiana, 108 U. S. 76, for they were given outright and absolutely to the State. . . .

The title of South Dakota is as perfect as though it had received these bonds directly from North Carolina. We have, therefore, before us the case of a State with an unquestionable title to bonds issued by another State, secured by a mortgage of railroad stock belonging to that State, coming into this court and invoking its jurisdiction to compel payment of those bonds and a subjection of the mortgaged property to the satisfaction of the debt.

Has this court jurisdiction of such a controversy, and to what extent may it grant relief? Obviously, that jurisdiction is not

affected by the fact that the donor of these bonds could not invoke it. . . . Obviously, too, the subject-matter is one of judicial cognizance. If anything can be considered as justiciable it is a claim for money due on a written promise to pay and if it be justifiable, does it matter how the plaintiff acquires title, providing it be honestly acquired? . . .

Coming now to the right of South Dakota to maintain this suit against North Carolina, we remark that it is a controversy between two States; that by § 2, art. III of the Constitution this court is given original jurisdiction of "controversies between two or more States," In Missouri v. Illinois and the Sanitary District of Chicago, 180 U. S. 208, Mr. Justice Shiras, speaking for the court, reviewed at length the history of the incorporation of this provision into the Federal Constitution, and the decisions rendered by this court in respect to such jurisdiction, closing with these words (p. 240):

"The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State."

The present case is one "directly affecting the property rights and interests of a State."

Although a repetition of this review is unnecessary, two or three matters are worthy of notice. The original draft of the Constitution reported to the convention gave to the Senate jurisdiction of all disputes and controversies "between two or more States, respecting jurisdiction or territory," and to the Supreme Court jurisdiction of "controversies between two or more States, except such as shall regard territory or jurisdiction." A claim for money due being a controversy of a justiciable nature, and one of the most common of controversies, would seem to naturally fall within the scope of the jurisdiction thus intended to be conferred upon the Supreme Court. In the subsequent revision by the convention the power given to the Senate in respect to controversies between the States was stricken out, as well as the limitation upon the jurisdiction of this court, leaving to it in the language now found in the Constitution jurisdiction without any limitation of "controversies between two or more States."

The Constitution as it originally stood also gave to this court jurisdiction of controversies "between a State and citizens of another State." Under that clause Chisholm v. Georgia, 2 Dall. 419, was decided, in which it was held that a citizen of one State might maintain in this court an action of assumpsit against

another State. In consequence of that decision the Eleventh Amendment was adopted, which provides that 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." It will be perceived that this amendment only granted to a State immunity from suit by an individual, and did not affect the jurisdiction over controversies between two or more States. . . .

In Rhode Island v. Massachusetts, 12 Pet. 657, this court sustained its jurisdiction of a suit in equity brought by one State against another to determine a dispute as to boundary, and, in the course of the opinion, by Mr. Justice Baldwin, said in respect to the immunity of a sovereign from suit by an individual (p. 720):

"Those States, in their highest sovereign capacity, in the convention of the people thereof, . . . adopted the Constitution, by which they respectively made to the United States a grant of judicial power over controversies between two or more States. By the Constitution, it was ordained that this judicial power, in cases where a State was a party, should be exercised by this court as one of original jurisdiction. The States waived their exemption from judicial power, (6 Wheat. 378, 380,) as sovereigns by original and inherent right, by their own grant of its exercise over themselves in such cases, but which they would not grant to any inferior tribunal. By this grant, this court has acquired jurisdiction over the parties in this cause, by their own consent and delegated authority; as their agent for executing the judicial power of the United States in the cases specified."

And, again, in reference to the extent of the jurisdiction of this court (p. 721):

"That it is a controversy between two States cannot be denied; and though the Constitution does not, in terms, extend the judicial power to all controversies between two or more States, yet it, in terms, excludes none, whatever may be their nature or subject."

In United States v. North Carolina, 136 U. S. 211, we took jurisdiction of an action brought by the United States against North Carolina to recover interest on bonds, and decided the case upon its merits. It is true there was nothing in the opinion in reference to the matter of jurisdiction, but as said in United States v. Texas, 143 U. S. 621, 642: . . .

"But it did not escape the attention of the court, and the

judgment would not have been rendered except upon the theory that this court has original jurisdiction of a suit by the United States against a State."

See also United States v. Michigan, 190 U. S. 379, decided at the last term, in which a bill in equity for an accounting and a recovery of money was sustained. . . .

Without noticing in detail the other cases referred to by Mr. Justice Shiras in Missouri v. Illinois et al., 180 U. S. 208, it is enough to say that the clear import of the decisions of this court from the beginning to the present time is in favor of its jurisdiction over an action brought by one State against another, to enforce a property right. Chisholm v. Georgia was an action of assumpsit; United States v. North Carolina, an action of debt; United States v. Michigan, a suit for an accounting; and that which was sought in each was a money judgment against the defendant State.

But we are confronted with the contention that there is no power in this court to enforce such a judgment, and such lack of power is conclusive evidence that, notwithstanding the general language of the Constitution, there is an implied exception of actions brought to recover money. The public property held by any municipality, city, county, or State is exempt from seizure upon execution, because it is held by such corporation, not as a part of its private assets, but as a trustee for public purposes. Meriwether v. Garrett, 102 U. S. 472, 513. As a rule, no such municipality has any private property subject to be taken upon execution. A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature.

In Rees v. City of Watertown, 19 Wall. 107, 116, 117, we said:

"We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority, at once so delicate and so important." . . .

Further, in this connection may be noticed Gordon v. United States, 117 U. S. 697, in which this court declined to take jurisdiction of an appeal from the Court of Claims, under the statute as it stood at the time of the decision, on the ground that there

was not vested by the act of Congress power to enforce its judgment. We quote the following from the opinion, which was the last prepared by Chief Justice Taney (pp. 702, 704):

"The award of execution is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. . . . Indeed, no principle of constitutional law has been more firmly established or constantly adhered to than the one above stated,—that is, that this court has no jurisdiction in any case where it cannot render judgment in the legal sense of the term; and when it depends upon the legislature to carry its opinion into effect or not at the pleasure of Congress." See also *In re* Sanborn, 148 U. S. 222, and La Abra Silver Mining Co. v. United States, 175 U. S. 423, 456.

We have, then, on the one hand the general language of the Constitution, vesting jurisdiction in this court over "controversies between two or more States," the history of that jurisdictional clause in the convention, the cases of Chisholm v. Georgia, United States v. North Carolina, and United States v. Michigan, (in which this court sustained jurisdiction over actions to recover money from a State,) the manifest trend of other decisions, the necessity of some way of ending controversies between States, and the fact that this claim for the payment of money is one justiciable in its nature; on the other, certain expression of individual opinions of justices of this court, the difficulty of enforcing a judgment for money against a State by reason of its ordinary lack of private property subject to seizure upon execution, and the absolute inability of a court to compel a levy of taxes by the legislature. Notwithstanding the embarrassments which surround the question, it is directly presented, and may have to be determined before the case is finally concluded, but for the present it is sufficient to state the question with its difficulties.

There is in this case a mortgage of property, and the sale of that property under a foreclosure may satisfy the plaintiff's claim. If that should be the result, there would be no necessity for a personal judgment against the State. That the State is a necessary party to the foreclosure of the mortgage was settled by Christian v. Atlantic & N. C. R. Co., 133 U. S. 233. Equity is satisfied by a decree for a foreclosure and sale of the mortgaged property, leaving the question of a judgment over for any deficiency to be determined when, if ever, it arises. And surely if,

as we have often held, this court has jurisdiction of an action by one State against another to recover a tract of land, there would seem to be no doubt of the jurisdiction of one to enforce the delivery of personal property.

A decree will, therefore, be entered, which, after finding the amount due on the bonds and coupons in suit to be twenty-seven thousand four hundred dollars ($27,400), (no interest being recoverable, United States v. North Carolina, 136 U. S. 211), and that the same are secured by 100 shares of the stock of the North Carolina Railroad Company, belonging to the State of North Carolina, shall order that the said State of North Carolina pay said amount with costs of suit to the State of South Dakota on or before the 1st Monday of January, 1905, and that in default of such payment an order of sale be issued to the Marshal of this court, directing him to sell at public auction all the interests of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company, such sale to be made at the east front door of the Capitol Building in this city, public notice to be given of such sale by advertisements once a week for six weeks in some daily paper published in the City of Raleigh, North Carolina, and also in some daily paper published in the City of Washington.

And either of the parties to this suit may apply to the court upon the foot of this decree, as occasion may require.

MR. JUSTICE WHITE, with whom concurred MR. CHIEF JUSTICE FULLER, MR. JUSTICE MCKENNA, and MR. JUSTICE DAY, dissenting. . . .

NOTE.—Of the later history of this case, Justice Brewer said: "If the amount received from the sale of the stock had not paid the bonds, the question would have been presented whether we could render a money judgment against a State; and, if so, how it could be enforced. We could not compel the Legislature of North Carolina to meet and pass an act; the marshal could not levy upon the public buildings of the State; what would be the significance of a judgment which the court was powerless to enforce? You may remember as an historical fact that Andrew Jackson once said, 'John Marshall has rendered a judgment, now let him enforce it if he can.'

"The day before that fixed for the sale of those bonds the Attorney-General of North Carolina came to my house, for I was the organ of the court in delivering the opinion, and said that he had been sent by the Governor to pay the full amount that we had found to be due; that the State did not intend to raise any question as to what could or should be done in case of a deficiency after the sale of the stock, and that inasmuch as the court created by the Constitution and charged with the duty of determining controversies between the States had declared that a certain sum was due from North Carolina to South Dakota he was directed by the State to pay

that; every dollar, as well as the cost of the case. And then and there he did so."—*Report of the Thirteenth Annual Meeting of the Lake Mohonk Conference on International Arbitration, 1907*, pp. 170-171.

For the settlement of controversies between the States under the Articles of Confederation, see 131 U. S. Appendix, I, lxiii. Most of the suits between States which have arisen since the adoption of the Constitution have related to boundary disputes. See New Jersey v. New York (1831), 5 Peters 284; Missouri v. Iowa (1849), 7 Howard, 660; Florida v. Georgia (1850), 11 Howard, 293; Florida v. Georgia (1855), 17 Howard, 478; Alabama v. Georgia (1860), 23 Howard, 505; Virginia v. West Virginia (1870), 11 Wallace, 39; South Carolina v. Georgia (1876), 93 U. S. 4; Indiana v. Kentucky (1890), 136 U. S. 479; Virginia v. Tennessee (1895), 158 U. S. 267; Louisiana v. Mississippi (1902), 202 U. S. 158; Iowa v. Illinois (1906), 202 U. S. 59. For a suit involving a pecuniary demand, see Virginia v. West Virginia (1907), 206 U. S. 290, (1908), 209 U. S. 514, (1911), 220 U. S. 1, (1914), 234 U. S. 117, (1915), 238 U. S. 202. While the language of the Constitution conferring upon the Federal courts jurisdiction over suits between States is unqualified, it has been held that not all controversies between States are justifiable in their nature. Wisconsin v. Pelican Insurance Co. (1888), 127 U. S. 265, Louisiana v. Texas (1900), 176 U. S. 1. In suits between States it must appear that the plaintiff State is not a mere cloak for the real party in interest, New Hampshire v. Louisiana (1883), 108 U. S. 76, but a State may sue when the interest involved is that of a considerable number of its citizens rather than that of the State itself. Missouri v. Illinois & Chicago District (1901), 180 U. S. 208. The law governing suits between States is fully discussed in Kansas v. Colorado (1902), 185 U. S. 125, same case at a later stage (1907), 206 U. S. 46. These opinions merit careful study.

As to suits by the United States against a State, see United States v. North Carolina (1890), 136 U. S. 211, United States v. Texas (1891), 143 U. S. 621, and United States v. Michigan (1903), 190 U. S. 379. As to suits by a State against the United States, see United States v. Lee (1882), 106 U. S. 196; Minnesota v. Hitchcock (1902), 185 U. S. 373; Oregon v. Hitchcock (1906), 202 U. S. 60; Kansas v. United States (1907), 204 U. S. 331.

CHAPTER IV.

THE IMPAIRMENT OF CONTRACTS.

No State shall . . . pass any . . . law impairing the obligation of contracts.

Constitution of the United States, Art. I, sec. 10.

SECTION 1. WHAT IS A "CONTRACT."

THE TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD.

SUPREME COURT OF THE UNITED STATES. 1819.
4 Wheaton, 518; 4 Lawyers' Ed. 629.

Error to the superior court of the State of New Hampshire.

MARSHALL, C. J., delivered the opinion of the court. . . .

This is an action of trover brought by the Trustees of Dartmouth College against William H. Woodward, in the state court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June, and on the 18th of December, 1816, be valid, and binding on the trustees without their assent, and not repugnant to the constitution of the United States; otherwise it finds for the plaintiffs.

The superior court of judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the constitution of the United States?

This court can be insensible neither to the magnitude nor to the delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a State is to be revised; an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches

the consideration of such questions; and has declared that, in no doubtful case, would it pronounce a legislative act to be contrary to the constitution. But the American people have said, in the constitution of the United States, that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument they have also said, "that the judicial power shall also extend to all cases in law and equity arising under the constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled "An act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the State, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The president of the senate, the speaker of the house of representatives of New Hampshire, and the governor and lieutenant-governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the governor and council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the

crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are,

1. Is this contract protected by the constitution of the United States?

2. Is it impaired by the acts under which the defendant holds?

1. On the first point it has been argued that the word "contract," in its broadest sense, would comprehend the political relations between the government and its citizens, would extend to offices held within a State for state purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That as the framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt, and to restrain the legislature in future from violating the right to property. That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which

some individual could claim a right to something beneficial to himself; and that since the clause in the constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice. It has never been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When any State legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it creates a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain

such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever, may not assert all the rights which they possessed while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law, as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character.[1] . . .

From this review of the charter, it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property be-

[1] In the passages here omitted occurs Marshall's famous description of a corporation: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities that corporations were invented and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."

stowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution, which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the constitution intended to withdraw from the power of State legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being, the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but for something, in their opinion, of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated, is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected by the corporation. They were as com-

pletely out of the donors, at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

According to the theory of the British constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the crown, (to whose rights and obligations New Hampshire succeeds,) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the constitution, when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be

governed by the rule, when established, unless some plain and strong reason for excluding it can be given. 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 farther, 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 operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the constitution, not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration as to compel us, or rather permit us to say, that these words, which were introduced to give stability to contracts, and which, in their plain import, comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees, and their rights are to be defended and maintained by them. Religion, charity, and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States, that contracts for their benefit must be excluded from the protection of words which, in their natural import, include them? Or do such

contracts so necessarily require new modelling, by the authority of the legislature, that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves that they are not. The framers of the constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science by reserving to the government of the Union the power "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." They have so far withdrawn science and the useful arts from the action of the State governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature, as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the constitution, neither, as we conceive, is the policy of leaving them subject to legislative alteration, so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind, to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable. It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers

of our constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it. . . .

The opinion of the court, after mature deliberation, is, that this is a contract, the obligation of which cannot be impaired, without violating the constitution of the United States. This opinion appears to us to be equally supported by reason, and by the former decisions of this court.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the legislature of New Hampshire, to which the special verdict refers. . . .

On the effect of this law, two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder, expressed in the charter, to the executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted, not merely for the perpetual application of the funds which they gave, to the objects for which those funds were given; they contracted also, to secure that application by the constitution of the corporation. They contracted for a system, which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner, as to convert a literary institution, molded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of

the donors, and is subversive of that contract, on the faith of which their property was given. . . .

It results from this opinion, that the acts of the legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the state court must, therefore, be reversed.

[MR. JUSTICE WASHINGTON and MR. JUSTICE STORY delivered concurring opinions. MR. JUSTICE JOHNSON concurred for the reasons stated by the Chief Justice. MR. JUSTICE LIVINGSTON concurred for the reasons stated by the Chief Justice and by Justices Washington and Story. MR. JUSTICE DUVALL dissented.]

NOTE.—No other decision of the Supreme Court, except possibly that in the Dred Scott case, has provoked so much criticism as has that in the Dartmouth College case, and yet Chief Justice Waite said of it, "The doctrines of Trustees of Dartmouth College v. Woodward announced by this court more than sixty years ago have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself." Stone v. Mississippi (1879), 101 U. S. 814, 816. The point of view of some of the opponents of the decision is set forth in these words of a distinguished jurist:

> It is under the protection of the decision in the Dartmouth College Case that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large, and upon the legislation of the country, than the States to which they owe their corporate existence. Every privilege granted or right conferred—no matter by what means or on what pretence—being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the Federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil.
>
> Cooley, *Constitutional Limitations* (6 ed.), 335n.

The evils of which Chief Justice Cooley speaks have been greatly mitigated by the almost universal practice of reserving in every charter granted the right of amendment and repeal, and also by the court's insistence upon clear proof of the actual existence of a contract with the State. Miller, *Lectures on the Constitution*, 393. Many charters have also been limited by the police power held to be inherent in the States and which they can not grant away. Northwestern Fertilizer Co. v. Hyde Park (1878), 97 U. S. 659. The doctrine of the principal case does not apply to the charters of public corporations. Laramie County v. Albany County (1875), 92 U. S. 307.

The Dartmouth College case has given rise to a voluminous literature. Among the most important discusions of it are Shirley, *The Dartmouth College Causes* ("valuable but ill-digested," J. B. Thayer); Chief Justice Doe, "A New View of the Dartmouth College Case," *Harvard Law Review*, VI, 161, 213; Lodge, *Daniel Webster* (a good history of the case by an eminent statesman); Wheeler, *Daniel Webster, Expounder of the Constitution* (criticism by a distinguished lawyer).

As to what contracts are protected by the Federal Constitution against impairment by the States see Church v. Kelsey (1887), 121 U. S. 282 (a State constitution); Fletcher v. Peck (1810), 6 Cranch, 87 (a conveyance); State of New Jersey v. Wilson (1812), 7 Cranch, 164; Providence Bank v. Billings (1830), 4 Peters, 514; Piqua Branch of State Bank of Ohio v. Knoop (1853), 16 Howard, 369 (exemption from taxation); Green v. Biddle (1823), 8 Wheaton, 1 (contract between States for the benefit of individuals); Maynard v. Hill (1888), 125 U. S. 190 (contract of marriage); The Binghampton Bridge (1865), 3 Wallace, 51; New Orleans Water Co. v. Rivers (1885), 115 U. S. 674; Vicksburg v. Vicksburg Water Co. (1906), 202 U. S. 453 (exclusive franchises); Los Angeles v. City Water Co. (1900), 177 U. S. 558 (contracts as to rates of public service companies); Louisiana v. New Orleans (1883), 109 U. S. 285 (judgment for damages collectible in an action of contract); Illinois Central Ry. v. Illinois (1892), 146 U. S. 387 (how far governmental powers can be made the subject of irrepealable contracts).

Section 2. The Construction of Grants from a State.

THE PROPRIETORS OF THE CHARLES RIVER BRIDGE v. THE PROPRIETORS OF THE WARREN BRIDGE et al.

Supreme Court of the United States. 1837.
11 Peters, 420; 9 Lawyers' Ed. 773.

Error to the supreme judicial court of the commonwealth of Massachusetts. . . .

[In 1650 the legislature of Massachusetts granted to the President of Harvard College "the liberty and power" to dispose of the ferry over the Charles River from Charlestown to Boston, and under this grant Harvard College received the profits of this ferry until 1785, when the legislature incorporated "The Proprietors of the Charles River Bridge," and authorized the company to construct a bridge at the place where the ferry then was. Provision was made for compensating Harvard College for the impairment of the value of its ferry franchise. In 1828 the legislature incorporated a company by the name of "The Proprietors of the Warren Bridge," and authorized it to construct another

bridge so near to the Charles River bridge that in Charlestown the termini of two bridges would be only sixteen rods apart and in Boston about fifty rods apart. The Charles River Bridge Company then sought to enjoin the construction of the Warren bridge on the ground that the act for the erection of the Warren bridge impaired the obligation of the contract between the petitioners and the Commonwealth of Massachusetts.]

TANEY, C. J., delivered the opinion of the court. . . .

The plaintiffs in error insist, mainly, upon two grounds: 1. That by virtue of the grant of 1650, Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive; and that the legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; and that these rights, upon the erection of the bridge in the place of the ferry, under the charter of 1785, were transferred to, and became vested in "the proprietors of the Charles River Bridge;" and that under, and by virtue of this transfer of the ferry right, the rights of the bridge company were as exclusive in that line of travel, as the rights of the ferry. 2. That independently of the ferry right, the acts of the legislature of Massachusetts of 1785, and 1792, by their construction, necessarily implied that the legislature would not authorize another bridge, and especially a free one, by the side of this, and placed in the same line of travel, whereby the franchise granted to the "Proprietors of the Charles River Bridge" should be rendered of no value; and the plaintiffs in error contend that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the State; and that the law authorizing the erection of the Warren Bridge, in 1828, impairs the obligation of one or both of these contracts. . . .

This brings us to the act of the legislature of Massachusetts, of 1785, by which the plaintiffs were incorporated by the name of "The Proprietors of the Charles River Bridge;" and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument, of the principles of construction by which this law is to be expounded, and what undertakings, on the part of the State, may be implied. The court think there can be no serious difficulty on that head. It is the

grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England, and by the decision of our own tribunals. In 2 Barn. & Adol. 793, in the case of the proprietors of the Stourbridge Canal v. Wheeley and others, the court say, "The canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction, in all such cases, is now fully established to be this; that any ambiguity in the terms of the contract must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants, to a very considerable extent, in transporting large quantities of coal. The rights of all persons to navigate the canal were expressly secured by the act of parliament; so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks; and the statute, in giving the right to exact toll, had given it for articles which passed "through any one or more of the locks," and had said nothing as to toll for navigating one of the levels; the court held that the right to demand toll, in the latter case, could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation, and for an implied grant; if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter.

Borrowing, as we have done, our system of jurisprudence from the English law; and having adopted, in every other case, civil and criminal, its rules for the construction of statutes; is there anything in our local situation, or in the nature of our political institutions, which should lead us to depart from the principle

where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and, by implication, make the terms of a charter in one of the States, more unfavorable to the public, than upon an act of parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle, and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law, in every other case, without exception? We think not; and it would present a singular spectacle, if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of the community, than would be done in a like case in an English court of justice. . . .

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785 to the proprietors of the Charles River Bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no exclusive privilege given to them over the waters of Charles River above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement from the State that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied, simply from the nature of the grant, and cannot be inferred from the words by which the grant is made.

The relative position of the Warren Bridge has already been described. It does not interrupt the passage over the Charles

River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation have been revoked by the legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren Bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren Bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order then to entitle themselves to relief, it is necessary to show that the legislature contracted not to do the act of which they complain; and that they impaired, or, in other words, violated that contract by the erection of the Warren Bridge.

The inquiry then is, Does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands, that there is none,—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description, no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to the Providence Bank. 4 Pet. 514. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity by providing safe, convenient, and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the State, unless it shall appear by plain words that it was intended to be done. . . .

Indeed, the practice and usage of almost every State in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part

of the plaintiffs in error. Turnpike roads have been made in succession, on the same line of travel; the later ones interfering materially with the profits of the first. These corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless, that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporations supposed that their privileges were invaded, or any contract violated on the part of the State. Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither States, nor individuals, nor corporations, ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. We cannot deal thus with the rights reserved to the States, and by legal intendments and mere technical reasoning, take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well-being and prosperity.

And what would be the fruits of this doctrine of implied contracts on the part of the States, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it, in the various acts which have been passed, within the last forty years, for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies; and

which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling, and you will soon find the old turnpike corporations awakening from their sleep and calling upon this court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants, and to the exclusive rights of ferries, by prescription, between towns; and are prepared to decide that when a turnpike road from one town to another had been made, no railroad or canal, between these two points, could afterwards be established. This court are not prepared to sanction principles which must lead to such results.

. . .

The judgment of the supreme judicial court of the commonwealth of Massachusetts, dismissing the plaintiffs' bill, must therefore, be affirmed, with costs.

[MR. JUSTICE MCLEAN delivered an opinion in which he argued that the case should be dismissed for want of jurisdiction. MR. JUSTICE STORY delivered a dissenting opinion, in which MR. JUSTICE THOMPSON concurred.]

NOTE.—For an excellent history of the principal case, with criticism of the decision by Webster, Kent and other eminent lawyers of the day, see Warren, *History of the Harvard Law School*, I, ch. 24.

For examples of the construction of public grants, see Skaneateles Water Works Co. v. Skaneateles (1902), 184 U. S. 354; Joplin v. Southwest Missouri Light Co. (1903), 191 U. S. 150 (city having granted a franchise to a private company constructed water and light works of its own); Railroad Commission Cases (1886), 116 U. S. 307; Owensboro v. Owensboro Waterworks Co. (1903), 191 U. S. 358; Southern Pacific Co. v. Campbell

(1913), 230 U. S. 537 (State or municipality fixed the charges of public service companies authorized to determine their charges); Jetton v. University of the South (1908), 208 U. S. 489 (taxation of leasehold interests in lands exempt from taxation); Picard v. East Tennessee, Va. & Ga. Ry. (1889), 130 U. S. 637; Norfolk & Western Ry. v. Pendleton (1895), 156 U. S. 667; Rochester Railway Co. v. Rochester (1907), 205 U. S. 236 (property exempt from taxation when transferred to a new owner); but compare Choate v. Trapp (1912), 224 U. S. 665 (liberal construction of tax exemptions of Indians).

Section 3. What is an Impairment of the Obligation of a Contract.

STURGES v. CROWNINSHIELD.

Supreme Court of the United States. 1819.
4 Wheaton, 122; 4 Lawyers' Ed. 529.

This was an action of assumpsit, brought in the circuit court of Massachusetts, against the defendant, as the maker of two promissory notes, both dated at New York, on the 22d of March, 1811, for the sum of $771.86 each, and payable to the plaintiff, one on the 1st of August, and the other on the 15th of August, 1811. The defendant pleaded his discharge under "An act for the benefit of insolvent debtors and their creditors," passed by the legislature of New York, the 3d day of April, 1811. After stating the provisions of the said act, the defendant's plea averred his compliance with them, and that he was discharged, and a certificate given to him the fifteenth day of February, 1812. To this plea there was a general demurrer, and joinder. At the October term of the circuit court, 1817, the cause came on to be argued and heard on the said demurrer, and the following questions arose, to wit:— . . .

3. Whether the act aforesaid is an act or law impairing the obligation of contracts, within the meaning of the constitution of the United States? . . .

Marshall, C. J., delivered the opinion of the court. . . .

We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts, within the meaning of the constitution of the United States? This act liberates the person of the debtor, and discharges him from all liability for any debt

previously contracted, on his surrendering his property in the manner it prescribes. In discussing the question whether a State is prohibited from passing such a law as this, our first inquiry is into the meaning of words in common use. What is the obligation of a contract? and what will impair it?

It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation, must in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it.

The words of the constitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract, an engagement between man and man, for the payment of money, which has been entered into by these parties. Yet the opinion that this law is not within the prohibition of the constitution, has been entertained by those who are entitled to great respect, and has been supported by arguments which deserve to be seriously considered.

It has been contended, that as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it.

But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity, constitute a fund which is as confidently trusted as property itself. Future acquisitions are, therefore, liable for contracts; and to release them from this liability impairs their obligation.

It has been argued, that the States are not prohibited from passing bankrupt laws, and that the essential principle of such laws is to discharge the bankrupt from all past obligations; that the States have been in the constant practice of passing insolvent laws, such as that of New York, and if the framers of the constitution had intended to deprive them of this power, insolvent laws would have been mentioned in the prohibition; that the pre-

vailing evil of the times, which produced this clause in the constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant installments. Laws of this description, not insolvent laws, constituted, it is said, the mischief to be remedied; and laws of this description, not insolvent laws, are within the true spirit of the prohibition.

The constitution does not grant to the States the power of passing bankrupt laws, or any other power; but finds them in possession of it, and may either prohibit its future exercise entirely, or restrain it so far as national policy may require. It has so far restrained it as to prohibit the passage of any law impairing the obligation of contracts. Although, then, the States may, until that power shall be exercised by Congress, pass laws concerning bankrupts, yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt has entered into. It is not admitted that without this principle, an act cannot be a bankrupt law; and if it were, that admission would not change the constitution, nor exempt such acts from its prohibitions.

The argument drawn from the omission in the constitution to prohibit the States from passing insolvent laws, admits of several satisfactory answers. It was not necessary, nor would it have been safe, had it even been the intention of the framers of the constitution to prohibit the passage of all insolvent laws, to enumerate particular subjects to which the principle they intended to establish should apply. The principle was the inviolability of contracts. This principle was to be protected in whatsoever form it might be assailed. To what purpose enumerate the particular modes of violation which should be forbidden, when it was intended to forbid all? Had an enumeration of all the laws which might violate contracts been attempted, the provision must have been less complete, and involved in more perplexity than it now is. The plain and simple declaration, that no State shall pass any law impairing the obligation of contracts, includes insolvent laws and all other laws, so far as they infringe the principle the convention intended to hold sacred, and no further.

But a still more satisfactory answer to this argument is, that the convention did not intend to prohibit the passage of all insolvent laws. To punish honest insolvency by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity which will not readily be imputed to the

illustrious patriots who framed our constitution, nor to the people who adopted it. The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation. . . .

The argument which has been pressed most earnestly at the bar, is, that, although all legislative acts which discharge the obligation of a contract without performance, are within the very words of the constitution, yet an insolvent act, containing this principle, is not within its spirit, because such acts have been passed by colonial and state legislatures from the first settlement of the country, and because we know from the history of the times, that the mind of the convention was directed to other laws, which were fraudulent in their character, which enabled the debtor to escape from his obligation, and yet hold his property; not to this, which is beneficial in its operation. . . .

The fact is too broadly stated. The insolvent laws of many, indeed, of by far the greater number of the States, do not contain this principle. They discharge the person of the debtor, but leave his obligation to pay in full force. To this the constitution is not opposed.

But, were it even true that this principle had been introduced generally into those laws, it would not justify our varying the construction of the section. Every State in Union, both while a colony and after becoming independent, had been in the practice of issuing paper money; yet this practice is, in terms, prohibited. If the long exercise of the power to emit bills of credit did not restrain the convention from prohibiting its future exercise, neither can it be said that the long exercise of the power to impair the obligation of contracts, should prevent a similar prohibition. It is not admitted that the prohibition is more express in the one case than in the other. It does not, indeed, extend to insolvent laws by name, because it is not a law by name, but a principle which is to be forbidden; and this principle is described in as appropriate terms as our language affords.

Neither, as we conceive, will any admissible rule of construction justify us in limiting the prohibition under consideration, to the particular laws which have been described at the bar, and which furnished such cause for general alarm. What were those laws?

We are told they were such as grew out of the general distress following the war in which our independence was established. To relieve this distress paper money was issued; worthless lands, and other property of no use to the creditor, were made a tender in payment of debts; and the time of payment, stipulated in the contract, was extended by law. These were the peculiar evils of the day. So much mischief was done, and so much more was apprehended, that general distrust prevailed, and all confidence between man and man was destroyed. To laws of this description therefore it is said, the prohibition to pass laws impairing the obligation of contracts ought to be confined.

Let this argument be tried by the words of the section under consideration. Was this general prohibition intended to prevent paper money? We are not allowed to say so, because it is expressly provided, that no State shall "emit bills of credit;" neither could these words be intended to restrain the States from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, because for that subject also particular provision is made. Nothing but gold and silver coin can be made a tender in payment of debts. . . .

The fair, and we think, the necessary construction of the sentence ["No State shall pass any law impairing the obligation of contracts"] requires, that we should give these words their full and obvious meaning. A general dissatisfaction with that lax system of legislation which followed the war of our Revolution, undoubtedly directed the mind of the convention to this subject. It is probable that laws such as those which have been stated in argument, produced the loudest complaints, were most immediately felt. The attention of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The

convention appears to have intended to establish a great principle, that contracts should be inviolable. The constitution, therefore, declares, that no State shall pass "any law impairing the obligation of contracts."

If, as we think, it must be admitted that this intention might actuate the convention; that it is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject; that the words used are well adapted to the expression of it; that violence would be done to their plain meaning by understanding them in a more limited sense; those rules of construction, which have been consecrated by the wisdom of ages, compel us to say, that these words prohibit the passage of any law discharging a contract without performance.

By way of analogy, the statutes of limitations, and against usury, have been referred to in argument; and it has been supposed that the construction of the constitution, which this opinion maintains, would apply to them also, and must therefore be too extensive to be correct.

We do not think so. Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish, that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance. If, in a State where six years may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality.

So with respect to the laws against usury. If the law be, that no person shall take more than six per centum per annum for the use of money, and that, if more be reserved, the contract shall be void, a contract made thereafter reserving seven per cent., would have no obligation in its commencement; but if a law should declare that contracts already entered into, and reserving the legal interest, should be usurious and void, either in the whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional.

This opinion is confined to the case actually under consideration. It is confined to a case in which a creditor sues in a court, the proceedings of which the legislature, whose act is pleaded, had not a right to control, and to a case where the creditor had not proceeded to execution against the body of his debtor, within the State whose law attempts to absolve a confined insolvent debtor from his obligation. When such a case arises, it will be considered.

It is the opinion of the court, that the act of the State of New York, which is pleaded by the defendant in this cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned, is contrary to the constitution of the United States, and that the plea is no bar to the action. . . .

NOTE.—As to the operation of the bankruptcy laws of the States, see Ogden v. Saunders (1827), 12 Wheaton, 213; Cook v. Moffatt, et al. (1847), 5 Howard, 295, and Baldwin v. Hale (1863), 1 Wallace, 223.

"By the obligation of a contract is meant the means which, at the time of its creation, the law affords for its enforcement." Field, J., in Nelson v. St. Martin's Parish (1884), 111 U. S. 716. Any form of State law which impairs the obligation of a contract is invalid. Murray v. Charleston (1877), 96 U. S. 432; New Orleans Waterworks Co. v. Louisiana Sugar Refining Co. (1888), 125 U. S. 18 (a municipal ordinance); Grand Trunk Western Ry. v. Railroad Commission of Indiana (1911), 221 U. S. 400 (administrative order of a State commission); Ross v. Oregon (1913), 227 U. S. 150 (a State constitution). The restraint operates only upon a State's legislative power, not upon the decisions of its courts. Calder v. Bull (1798), 3 Dallas, 386; Fletcher v. Peck (1810), 6 Cranch, 87; Commercial Bank v. Buckingham's Executors (1847), 5 Howard, 317; Central Land Company v. Laidley (1895), 159 U. S. 103; Moore-Mansfield Construction Co. v. Electrical Installation Co. (1914), 234 U. S. 619; but see Gelpcke v. Dubuque (1863), 1 Wallace, 175; Township of Pine Grove v. Talcott (1874), 19 Wallace, 666; Douglas v. County of Pike (1880), 101 U. S. 677; Louisiana v. Pilsbury (1881), 105 U. S. 278. When a State gives effect to later legislation on the ground that the earlier legislation did not create a contract, it is for the Federal Supreme Court to determine whether or not a contract existed. Russell v. Sebastian (1914), 233 U. S. 195; Louisiana Railway & Navigation Co. v. New Orleans (1914), 235 U. S. 164. As to what constitutes an impairment of the obligation of a contract, see Livingston v. Moore (1833), 7 Peters, 469; Walker v. Whitehead (1872), 16 Wallace, 314; Tennessee v. Sneed (1877), 96 U. S. 69; New Orleans &c. Ry. v. New Orleans (1895), 157 U. S. 219 (changes in remedy); Gunn v. Barry (1873), 15 Wallace, 610; Edwards v. Kearzey (1878), 96 U. S. 595 (material extension of exemption laws); Bronson v. Kinzie (1843), 1 Howard, 311; Barvitz v. Beverley (1896), 163 U. S. 118 (statutes altering mortgagor's right of redemption); Penniman's Case (1881), 103 U. S. 714 (abolition of imprisonment for debt); Wheeler v. Jackson (1890), 137 U. S. 245 (alteration in statute of limitations).

CHAPTER V.

MONEY.

SECTION 1. BILLS OF CREDIT.

No State shall . . . emit bills of credit.
Constitution of the United States, Art. I, sec. 9.

CRAIG ET AL. v. THE STATE OF MISSOURI.

SUPREME COURT OF THE UNITED STATES. 1830.
4 Peters, 410; 7 Lawyers' Ed. 903.

[Writ of error to the Supreme Court of Missouri. The legislature of Missouri in 1821 passed an act entitled "An act for the establishment of loan-offices." It provided for the issue by the State of certificates ranging in value from fifty cents to ten dollars in the following form: "This certificate shall be receivable at the treasury, or any of the loan-offices of the State of Missouri, in the discharge of taxes or debts due to the State, for the sum of $——, with interest for the same, at the rate of two per centum per annum from this date, the ——— day of ———, 182—." Such certificates were made receivable for all taxes or other debts due to the State, or to any county or town therein, and all officers in the State, both civil and military, were required to receive them in payment of salaries. Provision was also made for the loan of the certificates. The present action was a suit on a promissory note given for such a loan. The defendants entered a plea of non-assumpsit on the ground that the consideration for which the note was given was invalid.]

MARSHALL, C. J., delivered the opinion of the court. . . .

This brings us to the great question in the cause: Is the act of the legislature of Missouri repugnant to the constitution of the United States?

The counsel for the plaintiffs in error maintain that it is repugnant to the constitution, because its object is the emission of bills of credit, contrary to the express prohibition contained in the tenth section of the first article. . . .

The clause in the constitution which this act is supposed to

violate is in these words: "No State shall" "emit bills of credit."

What is a bill of credit? What did the constitution mean to forbid?

In its enlarged, and perhaps its literal sense, the term "bill of credit" may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limits the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit," conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes, as money, which paper is redeemable at a future day. This is the sense in which the terms have been always understood.

At a very early period of our colonial history, the attempt to supply the want of the precious metals by a paper medium was made to a considerable extent; and the bills emitted for this purpose have been frequently denominated bills of credit. During the war of our Revolution, we were driven to this expedient; and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning; and "bills of credit" signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared in their constitution, that no State should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a State government, for the purpose of common circulation.

What is the character of the certificates issued by authority of the act under consideration? What office are they to perform?

Certificates signed by the auditor and treasurer of the State, are to be issued by those officers to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents. The paper purports on its face to be receivable at the treasury, or at any loan-office of the State of Missouri, in discharge of taxes or debts due to the State.

The law makes them receivable in discharge of all taxes, or debts due to the State, or any county or town therein; and of all salaries and fees of office, to all officers civil and military within the State; and for salt sold by the lessees of the public salt works. It also pledges the faith and funds of the State for their redemption.

It seems impossible to doubt the intention of the legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denominations of the bills, from ten dollars to fifty cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation; that is, emitted by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character; and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the constitution.

And can this make any real difference? Is the proposition to be maintained that the constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself.

But it is contended that though these certificates should be deemed bills of credit, according to the common acceptation of the term, they are not so in the sense of the constitution, because they are not made a legal tender.

The constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of

credit, not to bills of a particular description. That tribunal must be bold, indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case, because the same clause of the constitution contains a substantive prohibition to the enactment of tender laws. The constitution, therefore, considers the emission of bills of credit, and the enactment of tender laws, as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one, because it is not also the other; to say that bills of credit may be emitted, if they be not made a tender in payment of debts,—is, in effect, to expunge that distinct independent prohibition, and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

The history of paper money has been referred to, for the purpose of showing that its great mischief consists in being made a tender; and that therefore the general words of the constitution may be restrained to a particular intent.

Was it even true, that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves either that being made a tender in payment of debts is an essential quality of bills of credit, or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition.

We learn from Hutchinson's History of Massachusetts, vol. i., p. 402, that bills of credit were emitted for the first time in that colony in 1690. An army returning unexpectedly from an expedition against Canada, which had proved as disastrous as the plan was magnificent, found the government totally unprepared to meet their claims. Bills of credit were resorted to, for relief from this embarrassment. They do not appear to have been made a tender; but they were not on that account the less bills of credit, nor were they absolutely harmless. The emission, however, not being considerable, and the bills being soon redeemed, the experiment would have been productive of not much mischief, had it not been followed by repeated emissions to a much larger amount. The subsequent history of Massachusetts abounds with proofs of the evils with which paper money is fraught, whether it be or be not a legal tender.

Paper money was also issued in other colonies, both in the

North and South; and whether made a tender or not, was productive of evils in proportion to the quantity emitted. In the war which commenced in America in 1755, Virginia issued paper money at several successive sessions, under the appellation of treasury notes. This was made a tender. Emissions were afterwards made in 1769, in 1771, and in 1773. These were not made a tender; but they circulated together; were equally bills of credit; and were productive of the same effects. In 1775, a considerable emission was made for the purposes of the war. The bills were declared to be current but were not made a tender. In 1776, an additional emission was made, and the bills were declared to be a tender. The bills of 1775 and 1776 circulated together; were equally bills of credit; and were productive of the same consequences.

Congress emitted bills of credit to a large amount; and did not, perhaps could not, make them a legal tender. This power resided in the States. In May, 1777, the legislature of Virginia passed an act for the first time making the bills of credit issued under the authority of congress a tender so far as to extinguish interest. It was not until March, 1781, that Virginia passed an act making all the bills of credit which had been emitted by congress, and all which had been emitted by the State, a legal tender in payment of debts. Yet they were in every sense of the word bills of credit, previous to that time; and were productive of all the consequences of paper money. We cannot, then, assent to the proposition, that the history of our country furnishes any just argument in favor of that restricted construction of the constitution, for which the counsel for the defendant in error contends.

The certificates for which this note was given, being in truth "bills of credit" in the sense of the constitution, we are brought to the inquiry:—Is the note valid of which they form the consideration?

It has been long settled, that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the constitution of the United States, which is the supreme law, is against law. Now the constitution forbids a State to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them while they lie in the loan-offices, but the issuing of them, the putting them into circulation, which is the act of emission, the act that is forbidden by the constitution. The consideration of this note is the emission of bills of credit

by the State. The very act which constitutes the consideration, is the act of emitting bills of credit, in the mode prescribed by the law of Missouri; which act is prohibited by the constitution of the United States. . . .

The judgment of the supreme court of the State of Missouri for the first judicial district is reversed, and the cause remanded, with directions to enter judgment for the defendants.

[Mr. Justice Johnson, Mr. Justice Thompson and Mr. Justice M'Lean delivered dissenting opinions.]

JOHN BRISCOE AND OTHERS v. THE PRESIDENT AND DIRECTORS OF THE BANK OF THE COMMONWEALTH OF KENTUCKY.

Supreme Court of the United States. 1837.
11 Peters, 257; 9 Lawyers' Ed. 709.

[Writ of error to the Court of Appeals of Kentucky. The legislature of Kentucky enacted a law providing for the incorporation of the Bank of Kentucky. The president and board of directors were elected by joint ballot of the two houses of the legislature and all the capital stock of the bank was the exclusive property of the State of Kentucky. The bank was authorized to issue notes which were made payable to the bearer in gold and silver on demand, and were receivable in payment of taxes and other debts due to the State. This action was brought on a promissory note given to the bank by John Briscoe and others, who set up the plea that the bank bills which were the consideration for which their note was given were invalid.]

M'Lean, J., delivered the opinion of the court. . . .

The federal government is one of delegated powers. All powers not delegated to it, or inhibited to the States, are reserved to the States, or to the people. A State cannot emit bills of credit; or, in other words, it cannot issue that description of paper to answer the purposes of money, which was denominated, before the adoption of the constitution, bills of credit. But a State may grant acts of incorporation for the attainment of those objects which are essential to the interests of society. This power is incident to sovereignty; and there is no limitation in

the federal constitution on its exercise by the States, in respect to the incorporation of banks.

At the time the constitution was adopted, the Bank of North America, and the Massachusetts Bank, and some others, were in operation. It cannot, therefore, be supposed that the notes of these banks were intended to be inhibited by the constitution, or that they were considered as bills of credit within the meaning of that instrument. In fact, in many of their most distinguishing characteristics, they were essentially different from bills of credit, in any of the various forms in which they were issued.

If, then, the powers not delegated to the federal government, nor denied to the States, are retained by the States or the people, and by a fair construction of the terms bills of credit, as used in the constitution, they do not include ordinary bank notes, does it not follow that the power to incorporate banks to issue these notes may be exercised by a State? A uniform course of action, involving the right to the exercise of an important power by the state government for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised. But this inquiry, though embraced in the printed argument, does not belong to the case, and is abandoned at the bar.

A State cannot do that which the federal constitution declares it shall not do. It cannot coin money. Here is an act inhibited in terms so precise that they cannot be mistaken. They are susceptible of but one construction. And it is certain that a State cannot incorporate any number of individuals, and authorize them to coin money. Such an act would be as much a violation of the constitution as if the money were coined by an officer of the State, under its authority. The act being prohibited cannot be done by a State, either directly or indirectly.

And the same rule applies as to the emission of bills of credit by a State. The terms used here are less specific than those which relate to coinage. Whilst no one can mistake the latter, there are great differences of opinion as to the construction of the former. If the terms in each case were equally definite, and were susceptible of but one construction, there could be no more difficulty in applying the rule in the one case than in the other.

The weight of the argument is admitted, that a State cannot, by any device that may be adopted, emit bills of credit. But the question arises, what is a bill of credit within the meaning of the constitution? On the answer to this must depend the constitutionality or unconstitutionality of the act in question.

A State can act only through its agents; and it would be absurd to say that any act was not done by a State which was done by its authorized agents.

To constitute a bill of credit within the constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State; and is so received and used in the ordinary business of life.

The individual or committee who issue the bill must have the power to bind the State; they must act as agents; and, of course, do not incur any personal responsibility, nor impart, as individuals, any credit to the paper. These are the leading characteristics of a bill of credit, which a State cannot emit. . . .

Were these notes issued by the State?

Upon their face they do not purport to be issued by the State, but by the president and directors of the bank. They promise to pay to bearer on demand the sums stated. Were they issued on the faith of the State? The notes contain no pledge of the faith of the State in any form. They purport to have been issued on the credit of the funds of the bank, and must have been so received in the community.

But these funds, it is said, belonged to the State; and the promise to pay on the face of the notes was made by the president and directors as agents of the State. They do not assume to act as agents, and there is no law which authorizes them to bind the State. As in, perhaps, all bank charters, they had the power to issue a certain amount of notes; but they determined the time and circumstances which should regulate these issues.

When a State emits bills of credit, the amount to be issued is fixed by law, as also the fund out of which they are to be paid, if any fund be pledged for their redemption; and they are issued on the credit of the State, which, in some form, appears upon the face of the notes, or by the signature of the person who issues them.

As to the funds of the Bank of the Commonwealth, they were, in part only, derived from the State. The capital, it is true, was to be paid by the State; but in making loans the bank was required to take good securities, and these constituted a fund, to which the holders of the notes could look for payment, and which could be made legally responsible.

In this respect the notes of this bank were essentially different from any class of bills of credit which are believed to have been issued.

The notes were not payable in gold and silver on demand, but there was a fund, and, in all probability, a sufficient fund, to redeem them. This fund was in possession of the bank, and under the control of the president and directors. But whether the fund was adequate to the redemption of the notes issued, or not, is immaterial to the present inquiry. It is enough that the fund existed, independent of the State, and was sufficient to give some degree of credit to the paper of the bank.

The question is not whether the Bank of the Commonwealth had a large capital or a small one, or whether its notes were in good credit or bad, but whether they were issued by the State, and on the faith and credit of the State. The notes were received in payment of taxes, and in discharge of all debts to the State; and this, aided by the fund arising from notes discounted, with prudent management, under favorable circumstances, might have sustained, and, it is believed, did sustain, to a considerable extent, the credit of the bank. The notes of this bank which are still in circulation are equal in value, it is said, to specie.

But there is another quality which distinguished these notes from bills of credit. Every holder of them could not only look to the funds of the bank for payment, but he had in his power the means of enforcing it.

The bank could be sued; and the records of this court show that while its paper was depreciated, a suit was prosecuted to judgment against it by a depositor, and who obtained from the bank, it is admitted, the full amount of his judgment in specie. . . . [Here follows a description of bills issued by Maryland and South Carolina.]

If the leading properties of the notes of the Bank of the Commonwealth were essentially different from any of the numerous classes of bills of credit, issued by the States or colonies; if they were not emitted by the State, nor upon its credit, but on the credit of the funds of the bank; if they were payable in gold and silver on demand, and the holder could sue the bank; and if to constitute a bill of credit it must be issued by a State, and on the credit of the State, and the holder could not, by legal means, compel the payment of the bill, how can the character of these two descriptions of paper be considered as identical? They were both circulated as money; but in name, in form, and in substance, they differ. . . .

It is admitted by the counsel for the plaintiffs that a State may become a stockholder in a bank; but they contend that it cannot become the exclusive owner of the stock. They give no

rule by which the interest of a State in such an institution shall be graduated, nor at what point the exact limit shall be fixed. May a State own one-fourth, one-half, or three-fourths of the stock? If the proper limit be exceeded, does the charter become unconstitutional; and is its constitutionality restored if the State recede within the limit? The court are as much at a loss to fix the supposed constitutional boundary of this right as the counsel can possibly be.

If the State must stop short of owning the entire stock, the precise point may surely be ascertained. It cannot be supposed that so important a constitutional principle as contended for exists without limitation. If a State may own a part of the stock of a bank, we know of no principle which prevents it from owning the whole. As a stockholder, in the language of this court, above cited, it can exercise no more power in the affairs of the corporation than is expressly given by the incorporating act. It has no more power than any other stockholder to the same extent. . . .

If these positions be correct, is there not an end to this controversy? If the Bank of the Commonwealth is not the State, nor the agent of the State; if it possess no more power than is given to it in the act of incorporation, and precisely the same as if the stock were owned by private individuals, how can it be contended that the notes of the bank can be called bills of credit, in contradistinction from the notes of other banks? If, in becoming an exclusive stockholder in this bank, the State imparts to it none of its attributes of sovereignty; if it holds the stock as any other stockholder would hold it, how can it be said to emit bills of credit? Is it not essential to constitute a bill of credit within the constitution, that it should be emitted by a State? Under its charter the bank has no power to emit bills which have the impress of the sovereignty, or which contain a pledge of its faith. It is a simple corporation, acting within the sphere of its corporate powers, and can no more transcend them than any other banking institution. The State, as a stockholder, bears the same relation to the bank as any other stockholder.

The funds of the bank and its property, of every description, are held responsible for the payment of its debts, and may be reached by legal or equitable process. In this respect, it can claim no exemption under the prerogatives of the States. And if, in the course of its operations, its notes have depreciated like the notes of other banks, under the pressure of circumstances,

still it must stand or fall by its charter. In this its powers are defined, and its rights, and the rights of those who give credit to it, are guaranteed. And even an abuse of its powers, through which its credit has been impaired and the community injured, cannot be considered in this case.

We are of the opinion that the act incorporating the Bank of the Commonwealth was a constitutional exercise of power by the State of Kentucky, and, consequently, that the notes issued by the bank are not bills of credit within the meaning of the federal constitution. The judgment of the court of appeals is therefore affirmed, with interest and costs. . . .

THOMPSON, J., concurring. . . . STORY, J., dissenting. . . .

NOTE.—Accord: Woodruff v. Trapnall (1851), 10 Howard, 190; Darrington v. Bank of Alabama (1851), 13 Howard, 12. Compare Poindexter v. Greenhow (1885), 114 U. S. 270; Houston &c. Ry. v. Texas (1900), 177 U. S. 66. The principal case was first argued in 1834, when three of the five judges who heard it thought it was controlled by Craig v. Missouri. Among the three were Marshall and Story. It was the rule of the Court not to pronounce a State law invalid unless a majority of the Court should concur. Hence no decision was rendered. When the case came up again in 1837, Marshall had died and two new judges had been appointed. The second argument proceeded on exactly the same ground as the first, but only Story adhered to the original view of the majority of the Court. See his strong dissenting opinion. For an interesting discussion of the connection of the decision with wild-cat banking and the legal tender question, see Sumner, *Jackson*, ch. VI.

SECTION 2. LEGAL TENDER NOTES.

The Congress shall have power . . .
To borrow money on the credit of the United States; . . .
To coin money, regulate the value thereof, and of foreign coin.
Constitution of the United States, Art. I, sec. 8.

No State shall . . . coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts.
Constitution of the United States, Art. I, sec. 9.

JUILLIARD v. GREENMAN.

SUPREME COURT OF THE UNITED STATES. 1884.
110 U. S. 421; 28 Lawyers' Ed. 204.

[By the acts of February 25, 1862, July 11, 1862, and March 3, 1863, Congress authorized the issue of notes which should "be

lawful money and a legal tender in payment of all debts, public and private, within the United States," except for duties on imports and interest on the public debt. By the act of January 14, 1875, the Secretary of the Treasury was authorized to redeem the legal tender notes then outstanding. By the act of May 31, 1878, entitled "An act to forbid the further retirement of United States legal tender notes," it was provided:

"From and after the passage of this act it shall not be lawful for the Secretary of the Treasury or other officer under him to cancel or retire any more of the United States legal tender notes. And when any of said notes may be redeemed or be received into the Treasury under any law from any source whatever and shall belong to the United States, they shall not be retired, cancelled, or destroyed, but they shall be reissued and paid out again and kept in circulation."

The defendant in the present action, being indebted to the plaintiff in the sum of $5,122.90, offered in payment thereof $22.90 in gold and silver coin and $5,100 in legal tender notes which had been redeemed and reissued in pursuance of the act of 1878. The plaintiff refused to receive the notes and brought suit for the sum due. The Circuit Court gave judgment for the defendant, whereupon the plaintiff sued out a writ of error.]

Mr. Justice Gray delivered the opinion of the court. . . .

The manifest intention of this act is that the notes which it directs, after having been redeemed, to be reissued and kept in circulation, shall retain their original quality of being a legal tender.

The single question, therefore, to be considered, and upon the answer to which the judgment to be rendered between these parties depends, is whether notes of the United States, issued in time of war, under acts of Congress declaring them to be a legal tender in payment of private debts, and afterwards in time of peace redeemed and paid in gold coin at the Treasury, and then reissued under the act of 1878, can, under the Constitution of the United States, be a legal tender in payment of such debts.

. . .

By the Articles of Confederation of 1777, the United States in Congress assembled were authorized "to borrow money or emit bills on the credit of the United States;" but it was declared that "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." Art. 2, art. 9, § 5; 1 Stat., 4, 7. Yet, upon the question whether, under those articles, Congress, by virtue of the power to emit bills on the credit of the United States, had the power to make bills so emitted a legal tender, Chief Justice Marshall spoke very guardedly, saying: "Congress emitted bills of credit to a large amount, and did not, perhaps could not, make them a legal tender. This power resided in the States." Craig v. Missouri, 4 Pet. 410, 435. But in the Constitution, as he had before observed in McCulloch v. Maryland, "there is no phrase which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;' thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments." 4 Wheat. 406, 407. . . .

Such reports as have come down to us of the debates in the Convention that framed the Constitution afford no proof of any general concurrence of opinion upon the subject before us. The adoption of the motion to strike out the words "and emit bills" from the clause "to borrow money and emit bills on the credit of the United States" is quite inconclusive. The philippic delivered before the Assembly of Maryland by Mr. Martin, one of the delegates from that State, who voted against the motion, and who declined to sign the Constitution, can hardly be accepted as satisfactory evidence of the reasons or the motives of the majority of the Convention. See 1 Elliot's Debates, 345, 370, 376. Some of the members of the Convention, indeed, as appears by Mr. Madison's minutes of the debates, expressed the strongest opposition to paper money. And Mr. Madison has disclosed the grounds of his own action, by recording that "this vote in the affirmative by Virginia was occasioned by the acquiescence of Mr. Madison, who became satisfied that striking out the words would not disable the government from the use of public notes, so far

as they could be safe and proper; and would only cut off the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts." But he has not explained why he thought that striking out the words "and emit bills" would leave the power to emit bills, and deny the power to make them a tender in payment of debts. And it cannot be known how many of the other delegates, by whose vote the motion was adopted, intended neither to proclaim nor to deny the power to emit paper money, and were influenced by the argument of Mr. Gorham, who "was for striking out, without inserting any prohibition," and who said: "If the words stand, they may suggest and lead to the emission." "The power, so far as it will be necessary or safe, will be involved in that of borrowing." 5 Elliot's Debates, 434, 435, and note. And after the first clause of the tenth section of the first article had been reported in the form in which it now stands, forbidding the States to make anything but gold or silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts, when Mr. Gerry, as reported by Mr. Madison, "entered into observations inculcating the importance of public faith, and the propriety of the restraint put on the States from impairing the obligation of contracts, alleging that Congress ought to be laid under the like prohibitions," and made a motion to that effect, he was not seconded. Ib., 546. As an illustration of the danger of giving too much weight, upon such a question, to the debates and the votes in the Convention, it may also be observed that propositions to authorize Congress to grant charters of incorporation for national objects were strongly opposed, especially as regarded banks, and defeated. Ib., 440, 543, 544. The power of Congress to emit bills of credit, as well as to incorporate national banks, is now clearly established by decisions to which we shall presently refer.

The words "to borrow money," as used in the Constitution, to designate a power vested in the national government, for the safety and welfare of the whole people, are not to receive that limited and restricted interpretation and meaning which they would have in a penal statute, or in an authority conferred, by law or by contract, upon trustees or agents for private purposes.

The power "to borrow money on the credit of the United States" is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the govern-

ment. It includes the power to issue, in return for the money borrowed, the obligations of the United States in any appropriate form, of stock, bonds, bills, or notes; and in whatever form they are issued, being instruments of the national government, they are exempt from taxation by the governments of the several States. Weston v. Charleston City Council, 2 Pet. 449; Banks v. Mayor, 7 Wall. 16; Bank v. Supervisors, 7 Wall. 26. Congress has authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business. In order to promote and facilitate such circulation, to adapt them to use as currency, and to make them more current in the market, it may provide for their redemption in coin or bonds, and may make them receivable in payment of debts to the government. So much is settled beyond doubt, and was asserted or distinctly admitted by the judges who dissented from the decision in the Legal Tender Cases, as well as by those who concurred in that decision. Veazie Bank v. Fenno, 8 Wall. 533, 548; Hepburn v. Griswold, 8 Wall. 616, 636; Legal Tender Cases, 12 Wall. 543, 544, 560, 582, 610, 613, 637.

It is equally well settled that Congress has the power to incorporate national banks, with the capacity, for their own profit as well as for the use of the government in its money transactions, of issuing bills which under ordinary circumstances pass from hand to hand as money at their nominal value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of the tender. United States Bank v. Bank of Georgia, 10 Wheat. 333, 347; Ward v. Smith, 7 Wall. 447, 451. The power of Congress to charter a bank was maintained in McCulloch v. Maryland, 4 Wheat. 316, and in Osborn v. United States Bank, 9 Wheat. 738, chiefly upon the ground that it was an appropriate means for carrying on the money transactions of the government. But Chief Justice Marshall said: "The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution." 9 Wheat. 864. And Mr. Justice Johnson, who concurred with the rest of the court in upholding the power to incorporate a bank, gave the further reason that it tended to give effect to "that power over the cur-

rency of the country, which the framers of the Constitution evidently intended to give to Congress alone." Ib., 873.

The constitutional authority of Congress to provide a currency for the whole country is now firmly established. In Veazie Bank v. Fenno, 8 Wall. 533, 548, Chief Justice Chase, in delivering the opinion of the court, said: "It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government, and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit." Congress, having undertaken to supply a national currency, consisting of coin, of treasury notes of the United States, and of the bills of national banks, is authorized to impose on all State banks, or national banks, or private bankers, paying out the notes of individuals or of State banks, a tax of ten per cent. upon the amount of such notes so paid out. Veazie Bank v. Fenno, above cited; National Bank v. United States, 101 U. S. 1. The reason for this conclusion was stated by Chief Justice Chase, and repeated by the present Chief Justice, in these words: "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 on 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." 8 Wall. 549; 101 U. S. 6.

By the Constitution of the United States, the several States are prohibited from coining money, emitting bills of credit, or making anything but gold and silver coin a tender in payment of debts. But no intention can be inferred from this to deny to Congress either of these powers. Most of the powers granted to Congress are described in the eighth section of the first article; the limitations intended to be set to its powers, so as to exclude certain things which might otherwise be taken to be included in the general grant, are defined in the ninth section; the tenth section is addressed to the States only. This section prohibits the States from doing some things which the United States are expressly prohibited from doing, as well as from doing some

things which the United States are expressly authorized to do, and from doing some things which are neither expressly granted nor expressly denied to the United States. Congress and the States equally are expressly prohibited from passing any bill of attainder or *ex post facto* law, or granting any title of nobility. The States are forbidden, while the President and Senate are expressly authorized, to make treaties. The States are forbidden, but Congress is expressly authorized to coin money. The States are prohibited from emitting bills of credit; but Congress, which is neither expressly authorized nor expressly forbidden to do so, has, as we have already seen, been held to have the power of emitting bills of credit, and of making every provision for their circulation as currency, short of giving them the quality of legal tender for private debts—even by those who have denied its authority to give them this quality.

It appears to us to follow, as a logical and necessary consequence, that Congress has the power to issue the obligations of the United States in such form, and to impress upon them such qualities as currency for the purchase of merchandise and the payment of debts, as accord with the usage of sovereign governments. 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. This power has been distinctly recognized in an important modern case, ably argued and fully considered, in which the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary. Austria v. Day, 2 Giff. 628, and 3 D. F. & J. 217. The power of issuing bills of credit, and making them, at the discretion of the legislature, a tender in payment of private debts, had long been exercised in this country by the several Colonies and States; and during the Revolutionary War the States, upon the recommendation of the Congress of the Confederation, had made the bills issued by Congress a legal tender. See Craig v. Missouri, 4 Pet. 435, 453;

Briscoe v. Bank of Kentucky, 11 Pet. 257, 313, 334-336; Legal Tender Cases, 12 Wall. 557, 558, 622; Phillips on American Paper Currency, passim. 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.

This position is fortified by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money and regulating the value of domestic and foreign coin, and also with the paramount power of regulating foreign and interstate commerce. Under the power to borrow money on the credit of the United States, and to issue circulating notes for the money borrowed, its power to define the quality and force of those notes as currency is as broad as the like power over a metallic currency under the power to coin money and to regulate the value thereof. Under the two powers, taken together, Congress is authorized to establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes, as regards the national government or private individuals.

The power of making the notes of the United States a legal tender in payment of private debts, being included in the power to borrow money and to provide a national currency is not defeated or restricted by the fact that its exercise may affect the value of private contracts. If, upon a just and fair interpretation of the whole Constitution, a particular power or authority appears to be vested in Congress, it is no constitutional objection to its existence, or to its exercise, that the property or the contracts of individuals may be incidentally affected. The decisions of this court, already cited, afford several examples of this.

Upon the issue of stock, bonds, bills, or notes of the United States, the States are deprived of their power of taxation to the extent of the property invested by individuals in such obligations, and the burden of State taxation upon other private property is correspondingly increased. The ten per cent. tax, imposed by Congress on notes of State banks and of private bankers, not only lessens the value of such notes, but tends to drive them, and all State banks of issue, out of existence. The priority given to debts due to the United States over the private debts of an insolvent debtor diminishes the value of these debts, and the amount which their holders may receive out of the debtor's estate.

So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold by the act of June 28, 1834, c. 95, and with regard to silver by the act of February 28, 1878, c. 20) issue coins of the same denominations as those already current by law, but of less intrinsic value than those, by reason of containing a less weight of the precious metals, and thereby enable debtors to discharge their debts by the payment of coins of the less real value. A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made. 1 Hale P. C. 192-194; Bac. Ab. Tender, B. 2; Pothier, Contract of Sale, No. 416; Pardessus, Droit Commercial, Nos. 204, 205; Scaright v. Calbraith, 4 Dall. 324. As observed by Mr. Justice Strong, in delivering the opinion of the court in the Legal Tender Cases, "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power." 12 Wall. 549.

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."

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 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. To quote once more from the judgment in McCulloch v. Maryland: "Where the law is not prohibited, and is really calculated to effect any one of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." 4 Wheat. 423.

It follows that the act of May 31, 1878, c. 146, is constitutional and valid; and that the Circuit Court rightly held that the tender in treasury notes, reissued and kept in circulation under that act, was a tender of lawful money in payment of the defendant's debt to the plaintiff. *Judgment affirmed.*

Mr. Justice Field, dissenting. . . .

Note.—The legal tender question was before the Supreme Court in three important cases. The first one, Hepburn v. Griswold (1870), 8 Wallace, 603, involved the validity of the legal tender acts as applied to the payment of debts contracted before their passage. The opinion holding the acts invalid was written by Chief Justice Chase, who was himself, as Secretary of the Treasury, the author of the acts in question. The opinion contains a valuable resumé of the financial legislation of the Civil war. When the question came before the Court again in the Legal Tender Cases (1871), 12 Wallace, 457, the previous decision was overruled, and the legal tender acts, which were passed in the midst of the Civil war, were held to be a valid exercise of the war power, and to apply to debts contracted both before and after their enactment. There were four dissenting justices, among them Chief Justice Chase. The concurring opinion of Justice Bradley, part of which is quoted *ante* page 37, foreshadows the opinion in the principal case.

As to the effect of the legal tender acts on contracts specifically providing for payment in coin, see Bronson v. Rodes (1869), 7 Wallace, 229, and Trebilcock v. Wilson (1871), 12 Wallace, 687. As to their effect on State laws requiring payment of taxes in coin, see Lane County v. Oregon (1869), 7 Wallace, 71. For a valuable discussion of the legal tender question in both its historical and legal aspects, see J. B. Thayer, "Legal Tender," in *Harvard Law Review*, I, 73, reprinted in his *Legal Essays*, 60, and partly in his *Cases on Constitutional Law*, II, 2267.

CHAPTER VI.

TAXATION.

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.

Constitution of the United States, Art. I, sec. 8.

No tax or duty shall be laid on articles exported from any State.

Constitution of the United States, Art. I, sec. 9.

No State shall, without the consent of 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 review and control of Congress.

Constitution of the United States, Art. I, sec. 10.

SECTION 1. WHAT IS A TAX.

LOAN ASSOCIATION v. TOPEKA.

SUPREME COURT OF THE UNITED STATES. 1874.
20 Wallace, 655; 22 Lawyers' Ed. 455.

Error to the Circuit Court for the District of Kansas.

[Acting under authority of an act of the legislature of Kansas, the City of Topeka issued its bonds to the amount of $100,000 which it presented to a company for the purpose of encouraging it in its design of establishing a manufactory of iron bridges in that city. The interest coupons first due were paid out of a fund raised by taxation for that purpose. Afterward the Citizens Saving and Loan Association of Cleveland, Ohio, purchased the bonds, and brought suit for interest due thereon. The city demurred, and this raised for consideration the question of the authority of the legislature of Kansas to enact the statute under

NOTE.—At this point the student should be reminded that the subject matter of this and the following chapters is closely related, and a question arising under any of these heads may require consideration from the standpoint of one or more of the others.

which the city acted. The court below sustained the demurrer, and to its judgment a writ of error was taken.]

Mr. Justice Miller delivered the opinion of the court. . . .

We find ample reason to sustain the demurrer on the second ground on which it is argued by counsel and sustained by the Circuit Court.

That proposition is that the act authorizes the towns and other municipalities to which it applies, by issuing bonds or loaning their credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which are not of a public character, thus perverting the right of taxation, which can only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

The proposition as thus broadly stated is not new, nor is the question which it raises difficult of solution.

If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with quasi-legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if in the given case no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it.

If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The

validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose. Sharpless v. Mayor of Philadelphia, 21 Pa. St. 147, 167; Hanson v. Vernon, 27 Iowa, 28; Allen v. Inhabitants of Jay, 60 Maine, 127; Lowell v. Boston, Mass., 111 Mass. 454; Whiting v. Fond du Lac, 25 Wis. 188.

It is, therefore, to be inferred that when the legislature of the State authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.

With these remarks and with the reference to the authorities which support them, we assume that unless the legislature of Kansas had the right to authorize the counties and towns in that State to levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void. We proceed to the inquiry whether such a power exists in the legislature of the State of Kansas.

We have already said the question is not new. The subject of the aid voted to railways 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 constitutions, 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. The State v. Wapello Co., 9 Iowa, 308; Hanson v. Vernon, 27 Id. 28; Sharpless v. Mayor, etc., 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 pur-

pose 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 or towns, 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 purposes 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 individual 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.

We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the State legislature to tax the people, but conceded that where the purpose for which the tax was to be issued, could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right. Olcott v. Supervisors, 16 Wall. 689; People v. Salem, 20 Mich. 452; Jenkins v. Andover, 103 Mass. 94; Dillon on Municipal Corporations, § 587; 2 Redfield's Laws of Railways, 398, rule 2.

It must be conceded that there are such rights in every free

government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. Whiting v. Fond du Lac, 25 Wis. 188; Cooley on Constitutional Limitations, 129, 175, 487; Dillon on Municipal Corporations, § 587.

Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. It is true that express limitation on the amount of tax to be levied or the things to be taxed may be imposed by constitution or statute, but in most instances for which taxes are levied, as the support of government, the prosecution of war, the National defense, any limitation is unsafe. The entire resources of the people should in some instances be at the disposal of the government.

The power to tax is therefore, the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of McCulloch v. The State of Maryland,

4 Wheat. 431, that the power to tax is the power to destroy.[1] A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms. . . .

We have established, we think, beyond cavil that there can be no lawful tax which is not laid for *a public purpose.* It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not.

It is undoubtedly the duty of the legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent. And in deciding whether, in the given case, the object for which the taxes are assessed falls upon one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation.

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

[1] The learned judge does not quote Marshall correctly. What the Chief Justice said was, "The power to tax involves the power to destroy."—Ed.

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 innkeeper, 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. . . .

Judgment affirmed.

MR. JUSTICE CLIFFORD, dissenting. . . .

NOTE.—Accord: Parkersburg v. Brown (1882), 106 U. S. 487; Cole v. La Grange (1884), 113 U. S. 1, and Missouri Pacific Ry. v. Nebraska (1896), 164 U. S. 403. Examples of a public purpose are found in Fallbrook Irrigation District v. Bradley (1896), 164 U. S. 112 (establishment of an irrigation district); Moore v. Sanford (1890), 151 Mass. 285 (improvement of Boston harbor and construction of public wharves); Olcott v. Fond du Lac County (1872), 16 Wallace, 678 (construction of a railway) but *contra*, People v. Salem (1870), 20 Mich. 452; Prince v. Crocker (1896), 166 Mass. 347 (construction of a subway for passenger traffic); North Dakota v. Nelson County (1890), 1 No. Dak. 88 (loans to farmers for purchase of seed-grain in counties where there had been successive failures of crops), but *contra*, State v. Osawkee Township (1875), 14 Kansas, 418; Burlington Township v. Beasley (1876), 94 U. S. 310 (bonds in aid of a grist mill operated by water-power), but *contra*, Osborne v. Adams County (1883), 106 U. S. 181 (where the grist mill was operated by steam); Van Sicklen v. Burlington (1854), 27 Vt. 70 (maintenance of fire companies); Daggett v. Colgan (1891), 92 Cal. 53, annotated in 14 L. R. A. 475 (appropriation for a State exhibit at a world's fair). Levies were held not to be for a public purpose in State ex rel v. Snitzler (1898), 143 Mo. 287 (tax to be expended for support of needy students at the State university); Dodge v. Mission Township (1901), 46 C. C. A. 661 (support of a public sorghum mill); MacKenzie v. Wooley (1888), 39 La. Ann. 944 (aid in building a public cotton compress); Lowell et al v. Boston (1873), 111 Mass. 454 (loans to land owners whose buildings had been destroyed in the Boston fire); Michigan Sugar Co. v. Auditor General (1900), 124 Mich. 674 (payment of a sugar bounty); Deal v. Mississippi County (1891), 107 Mo. 464 (aid in planting trees on private land); Attorney-General v. Eau Claire (1875), 37 Wis. 400 (construction of a dam for purpose of selling water power to manufacturers).

See Cooley, *A Treatise on the Law of Taxation*, ch. iv; Gray, *Limitations of the Taxing Power*, ch. iv; Judson, *A Treatise on the Power of Taxation*, ch. xii.

Section 2. The Taxation of Agencies of Government.

McCULLOCH v. THE STATE OF MARYLAND et al.

Supreme Court of the United States. 1819.
4 Wheaton, 316; 4 Lawyers' Ed. 579.

[The statement of facts and the first part of the opinion are given *ante,* page 12.]

Marshall, C. J., delivered the opinion of the court. . . .

It being the opinion of the court, that the act incorporating the bank is constitutional; and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire:—

2. Whether the State of Maryland may, without violating the constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied. But, such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a State from the exercise of its taxing power on imports and exports; the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law, absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used.

On this ground, the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.

This great principle is, that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be

controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1. That a power to create implies a power to preserve. 2. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to creat and preserve. 3. That where this repugnancy exists, the authority which is supreme must control, not yield, to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and, both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

The power of congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion; and is no longer to be considered as questionable.

That the power of taxing it by the States may be exercised so as to destroy it, is too obvious to be denied. But taxation is said to be an absolute power, which acknowledges no other limits than those expressly prescribed in the constitution, and like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to, and may be controlled by, the constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction, no principle not declared, can be admissible, which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the constitution.

The argument on the part of the State of Maryland, is, not that the States may directly resist a law of congress, but that they may exercise their acknowledged power upon it, and that the constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject

it to the test of the constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. It is admitted that 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 government 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 their property, and as the exigencies of government cannot be limited, they prescribe no limits 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 them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the legislature, which claim the right to tax them, but by the people of all the States. They are given by all, for the benefit of all; and, upon theory, should be subjected to that government only which belongs to all.

It may be objected to this definition, that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction.

This is true. But to what source do we trace this right? It is obvious, that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a State 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. Those 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 constitution, are declared to be supreme. Consequently, the people of a single State cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a State, by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources, and which places beyond its reach, all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty; from interfering powers; from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up; from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power. The attempt to use it on the means employed by the government of the Union, in pursuance of the constitution, is in itself an abuse, because it is the usurpation of a power, which the people of a single State cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union, for the execution of its powers. The right never existed, and the question whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with a fair construction of the constitution?

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is

said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which, would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.

If we apply the principle for which the State of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the State.

If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other 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 process; 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 States.

Gentlemen say, they do not claim the right to extend State taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it. They contend that the power of taxation has no other limit than is found in the 10th section of the 1st article of the constitution; that, with respect to everything else, the power of the States is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable, is

merely arbitrary, and can never be sustained. This is not all. If the controlling power of the States be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation.

In the course of the argument, the Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them which exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, a right to judge of their correctness must be retained; and, to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. The subject of those numbers, from which passages have been cited, is the unlimited power of taxation which is vested in the general government. The objection to this unlimited power, which the argument seeks to remove, is stated with fulness and clearness. It is "that an indefinite power of taxation in the latter (the government of the Union) might, and probably would, in time, deprive the former (the government of the States) of the means of providing for their own necessities; and would subject them entirely to the mercy of the national legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the national government might at any time abolish the taxes imposed for State objects, upon the pretense of an interference with its own. It might allege a necessity for doing this, in order to give efficacy to the national revenues; and thus all the resources of taxation might, by degrees, become the subjects of federal monopoly, to the entire exclusion and destruction of the state governments."

The objections to the constitution which are noticed in these numbers, were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from State taxation. The consequences apprehended from this

undefined power were, that it would absorb all the objects of taxation, "to the exclusion and destruction of the state governments." The arguments of the Federalist are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of State taxation. Arguments urged against these objections, and these apprehensions, are to be understood as relating to the points they mean to prove. Had the authors of those excellent essays been asked, whether they contended for that construction of the constitution, which would place within the reach of the States those measures which the government might adopt for the execution of its powers; no man, who has read their instructive pages, will hesitate to admit, that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the general and state governments is acknowledged to be concurrent, every argument which would sustain the right of the general government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the general government.

But the two cases are not on the same reason. The people of all the States have created the general government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole; between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of congress to tax the state banks, and could not prove the right of the States to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate con-

sideration. 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 consequence of that supremacy which the constitution has declared.

We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void.

This opinion does not deprive the States 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. But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

JUDGMENT. This cause came on to be heard on the transcript of the record of the court of appeals of the State of Maryland, and was argued by counsel. On consideration whereof, it is the opinion of this court that the act of the legislature of Maryland is contrary to the constitution of the United States, and void.

. . .

NOTE.—The power of the States to tax the Bank of the United States was re-examined and the doctrine of the principal case was affirmed in Osborn v. Bank of the United States (1824), 9 Wheaton, 738. The exemption of Federal agencies from State taxation is subject to limitations some of which are suggested in National Bank v. Commonwealth (1870), 9 Wallace, 353, 361:

> 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. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that 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 convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legiti-

mate 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 service which interferes with the discharge of his official duties, because those exemptions are essential in order 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 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 law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.

See also Thompson v. Union Pacific Ry. (1870), 9 Wallace, 579; Union Pacific Ry. v. Peniston (1873), 18 Wallace, 5; Owensboro National Bank v. City of Owensboro (1899), 173 U. S. 664. As to the taxation of Federal securities see Weston v. Charleston (1829), 2 Peters, 450; Van Allen v. Assessors (1866), 3 Wallace, 573; Bank of Commerce v. New York City (1862), 2 Blach. 620; The Banks v. The Mayor (1868), 7 Wallace, 16; The Bank v. The Supervisors (1868), 7 Wallace, 26; Hibernia Savings and Loan Society v. San Francisco (1906), 200 U. S. 310; Home Savings Bank v. Des Moines (1907), 205 U. S. 503.

VEAZIE BANK v. FENNO.

SUPREME COURT OF THE UNITED STATES. 1869.
8 Wallace, 533; 19 Lawyers' Ed. 482.

On certificate of division for the Circuit Court of Maine.

The CHIEF JUSTICE delivered the opinion of the court. . . .

The general question now before us is, whether or not the tax of ten per cent., imposed on State banks or National banks paying out the notes of individuals or State banks used for circulation, is repugnant to the Constitution of the United States.

In support of the position that the act of Congress, so far as it provides for the levy and collection of this tax, is repugnant to the Constitution, two propositions have been argued with much force and earnestness.

The first is that the tax in question is a direct tax, and has not been apportioned among the States agreeably to the Constitution.

The second is that the act imposing the tax impairs a franchise granted by the State, and that Congress has no power to pass any law with that intent or effect.

The first of these propositions will be first examined. . . .

Much diversity of opinion has always prevailed upon the question, what are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with little reference to their speculations. . . . We are obliged therefore to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government, and means of knowledge, warranted them in speaking with authority. And considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear. It is, as we think, distinctly shown in every act of Congress on the subject.

In each of these acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several States, according to their respective number of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum. . . . In each instance, the total sum was apportioned among the States, by the constitutional rule, and was assessed at prescribed rates, on the subjects of the tax. These subjects, in 1798, 1 Stat. at Large, 586; 1813, 3 Ib. 26; 1815, Id. 166; 1816, Id. 255, were lands, improvements, dwelling-houses, and slaves; and in 1861, lands, improvements, and dwelling-houses only. Under the act of 1798, slaves were assessed at fifty cents on each; under the other acts, according to valuation by assessors. This review shows that personal property, contracts, occupations, and the like, have never been regarded by Congress as proper subjects of direct tax. . . .

[After a discussion of Hylton v. U. S. (1796), 3 Dallas, 171, in which the validity of a Federal tax on carriages was involved, the court continues:]

It may be safely assumed, therefore, as the unanimous judgment of the court, that a tax on carriages is not a direct tax. And it may further be taken as established upon the testimony of Paterson, that the words direct taxes, as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.

It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of Pacific Insurance Company v. Soule, 7 Wallace, 434, held not to be a direct tax.

Is it, then, a tax on a franchise granted by a State, which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect? 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, seem to be as properly objects of taxation as any other property.

But in the case before us the object of taxation is not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issues freight receipts, bills of lading, and passenger tickets; and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issue them; and both, as we think, may properly be made contributory to the public revenue.

It is insisted, however, that the tax in the case before us is excessive, and so execessive as to indicate a purpose on the part

of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here, to decide whether the quality of legal tender in payment of debts, can be constitutionally imparted to these bills; it is enough to say, that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the national banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank, as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

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 on 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. The three questions certified from the Circuit Court of the District of Maine must, therefore, be answered *Affirmatively.*

Mr. Justice Nelson, with whom concurred Mr. Justice Davis, dissenting. . . .

THE COLLECTOR v. DAY.

Supreme Court of the United States. 1870.
11 Wallace, 113; 20 Lawyers' Ed. 122.

Error to the Circuit Court for the District of Massachusetts.

Mr. Justice Nelson delivered the opinion of the court.

The case presents the question whether or not it is competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State?

In Dobbins v. The Commissioners of Erie County, 16 Peters, 435, it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. The decision was placed mainly upon the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the government, which could not be interfered with by taxation or otherwise by the States, and that the salary or compensation for the service of the officer was inseparably connected with the office; that if the officer, as such, was exempt, the salary assigned for his support or maintenance while holding the office was also, for like reasons, equally exempt.

The cases of McCulloch v. Maryland, 4 Wheaton, 316, and Weston v. Charleston, 2 Peters, 449, were referred to as settling the

principle that governed the case, namely, "that the State governments cannot lay a tax upon the constitutional means employed by the government of the Union to execute its constitutional powers." . . .

It is conceded in the case of McCulloch v. Maryland, that the power of taxation by the States was not abridged by the grant of a similar power to the government of the Union; that it was retained by the States, and that the power is to be concurrently exercised by the two governments; and also that there is no express constitutional prohibition upon the States against taxing the means or instrumentalities of the general government. But it was held, and we agree properly held, to be prohibited by necessary implication; otherwise, the States might impose taxation to an extent that would impair, if not wholly defeat, the operations of the Federal authorities when acting in their appropriate sphere.

These views, we think, abundantly establish the soundness of the decision of the case of Dobbins v. The Commissioners of Erie, which determined that the States were prohibited, upon a proper construction of the Constitution, from taxing the salary or emoluments of an officer of the government of the United States. And we shall now proceed to show that, upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of the judicial officer of a State.

It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the States respectively, or, to the people." The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment,

"reserved," are as independent of the general government as that government within its sphere is independent of the States.

The relations existing between the two governments are well stated by the present Chief Justice in the case of Lane County v. Oregon, 7 Wallace, 76. "Both the States and the United States," he observed, "existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a National government, acting with ample powers directly upon the citizens, instead of the Confederate government, which acted with powers greatly restricted, only upon the States. But, in many of the articles of the Constitution, the necessary existence of the States, and within their proper spheres, the independent authority of the States, are distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them, and to the people, all powers, not expressly delegated to the National government, are reserved." Upon looking into the Constitution, it will be found that but few of the articles in that instrument could be carried into practical effect without the existence of the States.

Two of the great departments of the government, the executive and legislative, depend upon the exercise of the powers, or upon the people of the States. The Constitution guarantees to the States a republican form of government, and protects each against invasion or domestic violence. Such being the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which is so indispensable, that, without them, the general government itself would disappear from the family of nations, it would seem to follow, as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired, should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence. A despotic government might.

We have said that one of the reserved powers was that to establish a judicial department; it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the thirteen States were in the possession of this power, and had exercised it at the adoption of the Constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the States by their constitutions, which remained unaltered and unimpaired, and in respect to which the State is as independent of the general government as that government is independent of the States.

The supremacy of the general government, therefore, so much relied on in the argument of the counsel for the plaintiff in error, in respect to the question before us, cannot be maintained. The two governments are upon an equality, and the question is whether the power "to lay and collect taxes" enables the general government to tax the salary of a judicial officer of the State, which officer is a means or instrumentality employed to carry into execution one of its most important functions, the administration of the laws, and which concerns the exercise of a right reserved to the States?

We do not say the mere circumstance of the establishment of the judicial department, and the appointment of officers to administer the laws, being among the reserved powers of the State, disables the general government from levying the tax, as that depends upon the express power "to lay and collect taxes," but it shows that it is an original inherent power never parted with, and, in respect to which, the supremacy of that government does not exist, and is of no importance in determining the question; and further, that being an original and reserved power, and the judicial officers appointed under it being a means or instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government stand upon as solid a ground, and are maintained by principles and reasons as cogent, as those which led to the exemption of the Federal officer in Dobbins v. The Commissioners of Erie from taxation by the State; for, in this respect, that is, in respect to the reserved powers, the State is as sovereign and independent as the general government. And if the means and instrumentalities employed by that 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 exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?

But we are referred to the Veazie Bank v. Fenno, 8 Wallace, 533, in support of this power of taxation. That case furnishes a strong illustration of the position taken by the Chief Justice in McCulloch v. Maryland, namely, "That the power to tax involves the power to destroy."

The power involved was one which had been exercised by the States since the foundation of the government, and had been, after the lapse of three-quarters of a century, annihilated from excessive taxation by the general government, just as the judicial office in the present case might be, if subject at all to taxation by that government. But, notwithstanding the sanction of this taxation by a majority of the court, it is conceded, in the opinion, 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." This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain.

Judgment affirmed.

Mr. Justice Bradley dissenting. . . .

Note.—On a similar state of facts the High Court of Australia reached the same result. See D'Emden v. Pedder (1904), 1 Commonwealth Law Reports, 91, and Baxter v. Commissioners of Taxation (1907), 4 Commonwealth Law Reports, part II, 1087.

SOUTH CAROLINA v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1905.
199 U. S. 437; 50 Lawyers' Ed. 261.

Appeal from the Court of Claims.

By several statutes, the State of South Carolina established dispensaries for the wholesale and retail sale of liquor, and prohibited sale by other than the dispensers. The United States demanded the license taxes prescribed by the internal revenue act for dealers in intoxicating liquors, and the dispensers filed the statutory applications for such licenses. The State, sometimes in cash and sometimes by warrant on its treasury, paid the taxes. No protest was made in reference to these payments prior to April 14, 1901. On that day a formal protest by the state dispensary commissioner was filed with the United States collector of internal revenue at Columbia, South Carolina. . . .

The dispensers had no interest in the sales, and received no profit therefrom. The entire profits were appropriated by the State. . . . In the year 1901 the profits arising from these sales amounted to $545,248.12. While the laws of South Carolina prohibited the sale of liquor by individuals other than the dispensers, of 373 special license stamps issued in that State by the United States internal revenue collector, only 112 were to dispensers, while 260 were to private individuals. Three separate actions were commenced in the Court of Claims by the State of South Carolina to recover the amounts paid for these license taxes. These actions were consolidated. Upon a hearing, findings of fact were made and a judgment entered for the United States. 39 Court of Claims Reports, 257. Whereupon the State appealed to this court.

MR. JUSTICE BREWER, . . . delivered the opinion of the court:

The important question in this case is, whether persons who are selling liquor are relieved from liability for the internal revenue tax by the fact that they have no interest in the profits of the business, and are simply the agents of a State which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors. . . .

The right of South Carolina to control the sale of liquor by the dispensary system has been sustained. Vance v. W. A. Vandercook Co., No. 1, 170 U. S. 438. The profits from the business in the year 1901, as appears from the findings of fact, were over half a million of 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 tax. If one State finds it thus profitable, other States may follow, and the whole body of internal revenue tax be thus stricken down.

More than this. There is a large and growing movement in the country in favor of the acquisition and management by the public of what are termed "public utilities," including not merely therein the supply of gas and water, but also the entire railroad system. Would the State, by taking into possession these public utilities, lose its republican form of government?

We may go even a step further. There are some insisting that the State shall become the owner of all property and the manager of all business. Of course, this is an extreme view, but its advocates are earnestly contending that thereby the best interests of all citizens will be subserved. If this change should be made in any State, how much would that State contribute to the revenue of the nation? If this extreme action is not to be counted among the probabilities, consider the result of one much less so. Suppose a State assumes, under its police power, the control of all those matters subject to the internal revenue tax, and also engages in the business of importing all foreign goods. The same argument which would exempt the sale by a State of liquor, tobacco, etc., from a license tax, would exempt the importation of merchandise by a State from import duty. While the State might not prohibit importations, as it can the sale of liquor, by private individuals, yet, paying no import duty, it could undersell all individuals, and so monopolize the importation and sale of foreign goods.

Obviously, if the power of the State is carried to the extent suggested, and at the same time relieved from all Federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government. If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National Government, we may turn to the opinion of Mr. Chief Justice Marshall in M'Culloch v. Maryland, 4 Wheat. 431, for a complete answer:

"But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most in-

significant operations of their state government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone are all represented. The legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures which concern all, in the confidence that it will not be abused."

In other words, we are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any State.

There is something of a conflict between the full power of the Nation in respect to taxation and the exemption of the State from Federal taxation in respect to its property and a discharge of all its functions. Where and how shall the line between them be drawn? We have seen that the full power of collecting license taxes is in terms granted to the National Government, with only the limitations of uniformity and the public benefit. The exemption of the State's property and its functions from Federal taxation is implied from the dual character of our Federal system and the necessity of preserving the State in all its efficiency. In order to determine to what extent that implication will go we must turn to the condition of things at the time the Constitution was framed. What, in the light of that condition, did the framers of the convention intend should be exempt? Certain it is that modern notions as to the extent to which the functions of a State may be carried had then no hold. Whatever Utopian theories may have been presented by any writers were regarded as mere creations of fancy, and had no practical recognition. It is true that monopolies in respect to certain commodities were known to have been granted by absolute monarchs, but they were not regarded as consistent with Anglo-Saxon ideas of government. The opposition to the Constitution came not from any apprehension of danger from the extent of power reserved to the States, but, on the other hand, entirely through fear of what might result from the exercise of the powers granted to the central government. While many believed that the liberty of the people depended on the preservation of the rights of the States, they had no thought that those States would extend their functions beyond their then recognized scope, or so as to imperil the life of the nation. As well said by Chief Justice Nott, de-

livering the opinion of the Court of Claims in this case (39 C. Cl. 284):

"Moreover, at the time of the adoption of the Constitution, there probably was not one person in the country who seriously contemplated the possibility of government, whether State or National, ever descending from its primitive plane of a body politic to take up the work of the individual or body corporate. The public suspicion associated government with patents of nobility, with an established church, with standing armies, and distrusted all governments. Even in the high intelligence of the convention, there were men who trembled at the power given to the President, who trembled at the power which the Senate might usurp, who feared that the life tenure of the judiciary might imperil the liberties of the people. Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, 'a legion of mercenaries,' had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's amendments."

Looking, therefore, at the Constitution in the light of the conditions surrounding it at the time of its adoption, it is obvious that the framers, in granting full power over license taxes to the National Government, meant that the power should be complete, and never thought that the States, by extending their functions, could practically destroy it.

If we look upon the Constitution in the light of the common law, we are led to the same conclusion. All the avenues of trade were open to the individual. The Government did not attempt to exclude him from any. Whatever restraints were put upon him were mere police regulations to control his conduct in the business, and not to exclude him therefrom. The Government was no competitor, nor did it assume to carry on any business which ordinarily is carried on by individuals. Indeed, every attempt at monopoly was odious in the eyes of the common law, and it mattered not how that monopoly arose, whether from grant of the sovereign or otherwise. The framers of the Constitution were not anticipating that a State would attempt to monopolize any business heretofore carried on by individuals.

Further, it may be noticed 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. In this it is not unlike

the taxes sustained in United States v. Perkins, 163 U. S. 625, and Snyder v. Bettman, 190 U. S. 249. . . .

It is also worthy of remark that the cases in which the invalidity of a Federal tax has been affirmed were those in which the tax was attempted to be levied upon property belonging to the State, or one of its municipalities, or was a charge upon the means and instrumentalities employed by the State, in the discharge of its ordinary functions as a government. . . . [The court here considers Veazie Bank v. Fenno, 8 Wall. 533, The Collector v. Day, 11 Wall. 113, United States v. Railroad Co., 17 Wall. 322, and Ambrosini v. United States, 187 U. S. 1.]

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 which are used by the State in the carrying on of an ordinary private business.

In this connection may be noticed the well-established distinction 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 different responsibility resulting in case of negligence in respect to the discharge of those duties. The Supreme Court of Massachusetts, speaking by Mr. Justice Gray (afterwards an Associate Justice of this court), in Oliver v. Worcester, 102 Mass. 489, 499, 500, observed:

"The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public.

"To render municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns and cities alike, and from the performance of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. . . ."

"But this rule does not exempt towns and cities from the liability to which other corporations are subject, for negligence in managing or dealing with property or rights held by them for their own advantage or emolument." . . . [See also Lloyd v. New York, 5 N. Y. 369; Maxmilian v. New York, 62 N. Y. 160, 164;

Brown v. Vinalhaven, 65 Me. 402; Mead v. New Haven, 40 Conn. 72; Petersburg v. Applegarth, 28 Gratt. 321, 343; Eastman v. Meredith, 36 N. H. 285; Western Saving Fund Society v. Philadelphia, 31 Pa. St. 175; Bailey v. The Mayor, 3 Hill, 531; 1 Dillon, Mun. Corp., 4th ed., sec. 66.]

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

For these reasons we think that the license taxes charged by the Federal Government upon persons selling liquor are not invalidated by the fact that they are the agents of the State, which has itself engaged in that business.

The judgment of the Court of Claims is *Affirmed.*

Mr. Justice White, with whom concur Mr. Justice Peckham and Mr. Justice McKenna, dissenting. . . .

Section 3. Direct Taxes.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

Constitution of the United States, Art. I, § 9.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Constitution of the United States, Amendment XVI.

HYLTON v. THE UNITED STATES.

Supreme Court of the United States. 1796.
3 Dallas, 171; 1 Lawyers' Ed. 556.

Writ of error to the Circuit Court of the United States for the District of Virginia.[1]

[1] Prior to the appointment of Marshall as Chief Justice, it was customary for all the members of the Supreme Court to render opinions in all cases of

[The question involved was the constitutionality of the act of Congress of June 5, 1794, 1 U. S. Stat. at Large, 373, entitled "An Act to lay duties upon carriages for the conveyance of persons."]

PATERSON, J. . . . What are direct taxes within the meaning of the constitution? The constitution declares that a capitation tax is a direct tax; and both in theory and practice, a tax on land is deemed to be a direct tax. In this way, the terms direct taxes, and capitation and other direct tax, are satisfied. It is not necessary to determine, whether a tax on the product of land be a direct or indirect tax. Perhaps the immediate product of land, in its original and crude state, ought to be considered as the land itself; it makes part of it, or else the provision made against taxing exports would be easily eluded. Land, independently of its produce, is of no value. When the produce is converted into a manufacture it assumes a new shape; its nature is altered, its original state is changed, it becomes quite another subject, and it will be differently considered. Whether direct taxes, in the sense of the constitution, comprehend any other tax than a capitation tax, and 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 the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears, by 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. Local considerations, and the particular circumstances and relative situation of the States, naturally led to this view of the subject. The provision was made in favor of the southern States. They possessed a large number of slaves; they had extensive tracts of territory,

importance. In the present case Mr. Chief Justice Ellsworth and Mr. Justice Cushing did not render opinions because they had been but recently appointed and had not heard the arguments, and Mr. Justice Wilson rendered no opinion because he had heard the case in the Circuit Court. The opinion of Mr. Justice Chase is omitted since the same ground is covered in the other two opinions.

thinly settled and not very productive. A majority of the States had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The Southern States, if no provision had been introduced in the constitution, would have been wholly at the mercy of the other States. Congress in such case might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure; so much a head in the first instance, and so much an acre in the second. To guard them against imposition, in these particulars, was the reason of introducing the clause in the constitution which directs that representatives and direct taxes shall be apportioned among the States according to their respective numbers. . . .

All taxes on expense or consumption are indirect taxes. A tax on carriages is of this kind, and of course is not a direct tax. Indirect taxes are circuitous modes of reaching the revenue of individuals, who generally live according to their income. In many cases of this nature the individual may be said to tax himself. . . .

I am, therefore, of opinion that the judgment rendered in the circuit court of Virginia ought to be affirmed.

IREDELL, J. I agree in opinion with my brothers, who have already expressed theirs, that the tax in question is agreeable to the constitution; and the reasons which have satisfied me can be delivered in a very few words, since I think the constitution itself affords a clear guide to decide the controversy.

The congress possess the power of taxing all taxable objects, without limitation, with the particular exception of a duty on exports.

There are two restrictions only on the exercise of this authority—

1. All direct taxes must be apportioned.
2. All duties, imposts and excises must be uniform.

If the carriage tax be a direct tax, within the meaning of the constitution, it must be apportioned. If it be a duty, impost, or excise, within the meaning of the constitution, it must be uniform.

If it can be considered as a tax, neither direct within the meaning of the constitution, nor comprehended within the term duty, impost, or excise; there is no provision in the constitution, one way or another, and then it must be left to such an operation of the power, as if the authority to lay taxes had been given

generally in all instances, without saying whether they should be apportioned or uniform; and in that case, I should presume the tax ought to be uniform; because the present constitution was particularly intended to affect individuals, and not States, except in particular cases specified; and this is the leading distinction between the articles of confederation and the present constitution.

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. Suppose ten dollars contemplated as a tax on each chariot, or post chaise, in the United States, and the number of both in all the United States be computed at one hundred and five, the number of representatives in congress,—this would produce in the whole one thousand and fifty dollars; the share of Virginia, being 19-105 parts, would be one hundred and ninety dollars; the share of Connecticut, being 7-105 parts, would be seventy dollars; then suppose Virginia had fifty carriages, Connecticut two, the share of Virginia being one hundred and ninety dollars, this must of course be collected from the owners of carriages, and there would therefore be collected from each carriage three dollars and eighty cents; the share of Connecticut being seventy dollars, each carriage would pay thirty-five dollars.

If any State had no carriages, there could be no apportionment at all. This mode is too manifestly absurd to be supported, and has not even been attempted in debate. . . .[1]

There is no necessity or propriety in determining what is, or is not a direct or indirect tax in all cases.

Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the constitution, can mean nothing but a tax on something inseparably annexed to

[1] On this point MR. JUSTICE CHASE 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 certainly create great inequality and injustice, it is unreasonable to say that the constitution intended such tax should be laid by that rule." 3 Dallas, 174.

the soil, something capable of apportionment under all such circumstances.

A land or a poll tax may be considered of this description.

The latter is to be considered so particularly under the present constitution, on account of the slaves in the southern States, who give a ratio in the representation in the proportion of three to five.

Either of these is capable of apportionment. In regard to other articles, there may possibly be considerable doubt.

It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform.

I am clearly of opinion this is not a direct tax in the sense of the constitution, and, therefore, that the judgment ought to be affirmed. . . .

By The Court. Let the judgment of the circuit court be affirmed.

POLLOCK v. FARMERS' LOAN AND TRUST COMPANY. (Rehearing.)

HYDE v. CONTINENTAL TRUST COMPANY. (Rehearing.)

Supreme Court of the United States. 1895.
158 U. S. 601; 39 Lawyers' Ed. 1108.

Appeal from the Circuit Court of the United States for the Southern District of New York.

[This was a bill filed by Charles Pollock, a citizen of the State of Massachusetts, on behalf of himself and all other stock-holders of the defendant company similarly situated, against the Farmers' Loan and Trust Co., a corporation of the State of New York. The bill alleged that the defendant claimed authority under the provisions of the act of Congress of August 15, 1894, to pay to the United States a tax of two per centum on the net profits of said company, including the income derived from real estate and bonds of the City of New York owned by it. The bill further alleged that such a tax was unconstitutional, null, and void, in that it was a direct tax with respect to the income from real estate, and in that the income from stocks and bonds of the States of the United States and counties and municipalities therein is not subject to the taxing power of Congress. The

bill prayed that the provisions known as the income tax incorporated in the act of Congress of August 15, 1894, might be adjudged unconstitutional, null, and void, and that the defendants might be restrained from voluntarily complying with such provisions. On April 8, 1895, the Court, one justice being absent, decided:

"A tax on the rents or income of real estate is a direct tax, within the meaning of that term as used in the Constitution of the United States.

"A tax upon incomes derived from the interest of bonds issued by a municipal corporation is a tax upon the power of the State and its instrumentalities to borrow money, and is consequently repugnant to the Constitution of the United States.

"Upon each of the other questions argued at bar, to wit: 1. Whether the void provision as to rent and income from real estate invalidates the whole act? 2. Whether as to the income from personal property as such, the act is unconstitutional, as laying direct taxes? 3. Whether any part of the tax, if not considered as a direct tax, is invalid for want of uniformity on either of the grounds suggested?—The Justices who heard the argument are equally divided, and, therefore, no opinion is expressed." (157 U. S., 429.)

Inasmuch as the cases had not been heard by a full court, and since the question upon which the court was equally divided still lacked authoritative determination, the appellants were granted a rehearing.]

MR. CHIEF JUSTICE FULLER delivered the opinion of the court. . . .

Our previous decision was confined to the consideration of the validity of the tax on the income from real estate, and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; and the court went no farther, as to the tax on the incomes from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct; while as to the income from municipal bonds, that could not be taxed because of want of power to tax the source, and no reference was made to the nature of the tax being direct or indirect.

We are now permitted to broaden the field of inquiry, and determine to which of the two great classes a tax upon a per-

son's entire income, whether derived from rents, or products, or otherwise, of real estate, or from bonds, stocks or other forms of personal property, belongs; and we are unable to conclude that the enforced subtraction from the yield of all the owner's real or personal property, in the manner prescribed, is so different from a tax upon the property itself, that it is not a direct, but an indirect tax, in the meaning of the Constitution. . . .

Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds?

There can be only one answer, unless the constitutional restriction is to be treated as utterly illusory and futile, and the object of its framers defeated. We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself.

Nor can we conceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country, and all its invested personal property, are open to the direct operation of the taxing power if an apportionment be made according to the Constitution. The Constitution does not say that no direct tax shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power, or any reason why an apportioned direct tax cannot be laid and assessed, as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, "upon the same objects of taxation on which the direct taxes levied under the authority of the State are laid and assessed." . . .

Nor are we impressed with the contention that, because in the four instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist,

that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it.

The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, nor a crop tax, nor a bond tax; that it is an assessment upon the taxpayer on account of his money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source whence it is derived.

This was the view entertained by Mr. Pitt, as expressed in his celebrated speech on introducing his income-tax law of 1799, and he did not hesitate to carry it to its logical conclusion. The English loan acts provided that the public dividends should be paid "free of all taxes and charges whatsoever;" but Mr. Pitt successfully contended that the dividends for the purposes of the income tax were to be considered simply in relation to the recipient as so much income, and that the holder had no reason to complain. And this, said Mr. Gladstone, fifty-five years after, was the rational construction of the pledge. Financial Statements, 32. . . .

We have unanimously held in this case that, so far as this law operates on the receipts from municipal bonds, it cannot be sustained, because it is a tax on the power of the States, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it should have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real estate and personal property equally exists as to the revenue therefrom.

Admitting that this act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is

necessarily a direct tax in the meaning of the Constitution. . . .

Being direct, and therefore to be laid by apportionment, is there any real difficulty in doing so? Cannot Congress, if the necessity exist of raising thirty, forty, or any other number of million dollars for the support of the government, in addition to the revenue from duties, imposts, and excises, apportion the quota of each State upon the basis of the census, and thus advise it of the payment which must be made, and proceed to assess that amount on all the real or personal property and the income of all persons in the State, and collect the same if the State does not in the meantime assume and pay its quota and collect the amount according to its own system and in its own way? Cannot Congress do this, as respects either or all these subjects of taxation, and deal with each in such manner as might be deemed expedient, as indeed was done in the act of July 14, 1798, c. 75, 1 Stat., 597? Inconveniences might possibly attend the levy of an income tax, notwithstanding the listing of receipts, when adjusted, furnishes its own valuation; but that it is apportionable is hardly denied, although it is asserted that it would operate so unequally as to be undesirable. . . .

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

Being of opinion that so much of the sections of this law as lays a tax on income from real and personal property is invalid, we are brought to the question of the effect of that conclusion upon these sections as a whole.

It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected. And in the case before us there is no question as to the validity of this act, except sections twenty-seven to thirty-seven, inclusive, which relate to the subject which has been under discussion; and as to them we think that the rule laid down by Chief Justice Shaw in Warren v. Charlestown, 2 Gray, 84, is applicable, that if the different parts "are so mutually connected with and dependent on each other, as conditions, considerations or compensations for

each other, as to warrant the belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them."

. . .

[The court also cited Poindexter v. Greenhow, 114 U. S. 270, 304, and Spraigue v. Thompson, 118 U. S. 90, 95.]

According to the census, the true valuation of real and personal property in the United States in 1890 was $65,037,091,197, of which real estate with improvements thereon made up $39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed four thousand dollars; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance a tax on occupations and labor. We cannot believe that such was the intention of Congress. We do not mean to say that such an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments, and vocations. But this is not such an act; and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act, which became a law without the signature of the President on August 28, 1894, are wholly inoperative and void.

Our conclusions may, therefore, be summed up as follows:

First. We adhere to the opinion already announced, that, taxes on real estate being indisputably direct taxes, taxes on the rents or incomes of real estate are equally direct taxes.

Second. We are of opinion that taxes on personal property, or on the income of personal property, are likewise direct taxes.

Third. The tax imposed by sections twenty-seven to thirty-

seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.

The decrees hereinbefore entered in this court will be vacated; the decrees below will be reversed, and the cases remanded, with instructions to grant the relief prayed.

[MR. JUSTICE HARLAN, MR. JUSTICE BROWN, MR. JUSTICE JACKSON, and MR. JUSTICE WHITE delivered dissenting opinions.]

CHAPTER VII.

THE REGULATION OF COMMERCE.

The Congress shall have power. . .

To regulate commerce with foreign nations, among the several States, and with the Indian tribes.

Constitution of the United States, Art. I, sec. 8.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

Constitution of the United States, Art. I, sec. 9.

SECTION 1. WHAT IS COMMERCE.

GIBBONS v. OGDEN.

SUPREME COURT OF THE UNITED STATES. 1824.
9 Wheaton, 1; 6 Lawyers' Ed. 23.

ERROR to the court for the trial of impeachments and correction of errors of the State of New York. Aaron Ogden filed his bill in the court of chancery of that State, against Thomas Gibbons, setting forth the several acts of the legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which has not yet expired; and authorizing the chancellor to award an injunction, restraining any person whatever from navigating those waters with boats of that description. The bill stated an assignment from Livingston and Fulton to one John R. Livingston, and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown, and other places in New Jersey, and the city of New York; and that Gibbons, the defendant below, was in possession of two steamboats, called The Stoudinger and The Bellona, which were actually employed in running between New York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant, and praying an injunction to restrain the

said Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New York. The injunction having been awarded, the answer of Gibbons was filed, in which he stated that the boats employed by him were duly enrolled and licensed, to be employed in carrying on the coasting trade, under the act of Congress, passed the 18th of February, 1793, c. 8 (1 Stats. at Large, 305), entitled, "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." And the defendant insisted on his right, in virtue of such licenses, to navigate the waters between Elizabethtown and the city of New York, the said acts of the legislature of the State of New York to the contrary notwithstanding. At the hearing, the chancellor perpetuated the injunction, being of the opinion that the said acts were not repugnant to the constitution and laws of the United States, and were valid. This decree was affirmed in the court for the trial of impeachments and correction of errors, which is the highest court of law and equity in the State, before which the cause could be carried, and it was thereupon brought to this court by writ of error. . . .

MARSHALL, C. J., delivered the opinion of the court, and, after stating the case, proceeded as follows:—

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains are repugnant to the constitution and laws of the United States.

They are said to be repugnant,—

1. To that clause in the constitution which authorizes congress to regulate commerce.

2. To that which authorizes congress to promote the progress of science and useful arts.

The State of New York maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges, have repeatedly concurred in this opinion. It is supported by great names,—by names which have all the titles to consideration that virtue, intelligence, and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence

which the people of the United States expect from this department of the government.

As preliminary to the very able discussions of the constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a legislature; empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

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 for 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 construction, 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 is 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.

The words are: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more,—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling or of barter.

If commerce does not include navigation, the government of

the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself. It is a rule of construction acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted, —that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word "commerce." Gentlemen have said, in argu-

ment, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade. That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case an embargo is no more a war measure than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen.

When congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war, measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility, will not be imputed to those who were arrayed in opposition to this. Yet they never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation, of commerce. In terms, they admitted the applicability of the words used in the constitution to vessels; and that, in a case which produced a degree and an extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "com-

merce." . . . [The remaining portion of the opinion is printed *post*, page 263.]

NOTE.—The inability of the Congress under the Confederation to enforce the commercial treaties which it had made with other countries and the dire straits to which interstate commerce had been reduced by the hostile legislation of the several States led to the summoning of a convention at Annapolis in September, 1786, "to take into consideration the trade of the United States," and to report such an act as would "enable the United States in Congress effectually to provide for the same." Elliot's *Debates*, I, 115. The principle upon which any effective remedy must be framed had already been stated by Washington in a letter to Jay, August 1, 1786:

> I do not conceive we can exist long as a nation without having lodged somewhere a power which will pervade the whole Union in as energetic a manner as the authority of the State governments extends over the several States.
>
> Evans, *Writings of Washington*, 263.

It was upon this principle that the Federal Convention framed the new Constitution, and no part of that instrument has contributed so much toward welding the several States into a national unit as has the commerce clause. The principal case was the first decision of the Federal Supreme Court in which it was interpreted, and it is a significant indication of the change which has come over the economic and social life of the country that a clause which was not invoked for thirty-five years after the adoption of the Constitution is now the source of more litigation than any other part of that instrument. The framers of the Constitution felt that it was necessary to vest Congress with power to regulate interstate commerce in order to make its control over foreign commerce effective. See Hamilton's argument in *The Federalist*, No. 22, and Madison's in No. 42. For the history of the adoption and interpretation of the commerce clause see Bancroft, *History of the Constitution of the United States*, I, 184-209, 249-51, 267-278; Brown, *The Commercial Power of Congress;* Calvert, *The Regulation of Commerce under the Federal Constitution;* Cooke, *The Commerce Clause of the Constitution; The Federalist*, Nos. 7, 11, 22, 42; Fiske, *The Critical Period of American History*, ch. iv; Judson, *The Law of Interstate Commerce;* McLaughlin, *The Confederation and the Constitution;* Prentice and Egan, *The Commerce Clause of the Federal Constitution;* Story, *Commentaries*, secs. 1054-1101; Willoughby, *The Constitutional Law of the United States*, II, 629-773. For an excellent account of the economic background of the decision in Gibbons v. Ogden, see Prentice, *The Federal Power over Carriers and Corporations*, ch. iii.

PAUL v. VIRGINIA.

SUPREME COURT OF THE UNITED STATES. 1868.
8 Wallace, 168; 19 Lawyers' Ed. 357.

Error to the Supreme Court of Appeals of the State of Virginia.

[The legislature of Virginia passed an act providing that no insurance company not incorporated in that State should carry on its business in that State without first depositing certain bonds of a specified character with the State treasurer and receiving from him a license to do business. The plaintiff, agent in Virginia for several insurance companies incorporated in New York, was indicted, convicted and sentenced to pay a fine for failure to comply with the requirements of the statute. One of the defenses set up by him was that the Virginia statute was a regulation of interstate commerce and hence was void.]

Mr. Justice Field . . . delivered the opinion of the court. . . .

We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence which acquired, from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations.

There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities

to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.

In Nathan v. Louisiana, 8 Howard, 73, this court held that a law of that State imposing a tax on money and exchange brokers, who dealt entirely in the purchase and sale of foreign bills of exchange, was not in conflict with the constitutional power of Congress to regulate commerce. The individual thus using his money and credit, said the court, "is not engaged in commerce, but in supplying an instrument of commerce. He is less connected with it than the shipbuilder, without whose labor foreign commerce could not be carried on." And the opinion shows that, although instruments of commerce, they are the subjects of State regulation, and, inferentially, that they may be subjects of direct State taxation. . . .

If foreign bills of exchange may thus be the subject of State regulation, much more so may contracts of insurance against loss by fire.

We perceive nothing in the statute of Virginia which conflicts with the Constitution of the United States; and the judgment of the Supreme Court of Appeals of that State must, therefore, be *Affirmed.*

NOTE.—The ruling in the principal case as to a contract of fire insurance was afterward applied to a contract of marine insurance (Hooper v. California [1895], 155 U. S. 647) and to a contract of mutual life insurance (New York Life Insurance Co. v. Cravens [1900], 178 U. S. 389). The principal case has been much criticized, but has been steadily followed. Its doctrine was reexamined in the light of subsequent decisions and was reaffirmed in New York Life Insurance Co. v. Deer Lodge County (1913), 231 U. S. 495. The same result was reached by the House of Lords in Citizen's Insurance Co. v. Parsons (1881), 7 L. R. Appeal Cases, 96, 111. As to the power of a State to tax the business of a foreign insurance company done within its limits, see Equitable Life Assurance Society v. Pennsylvania (1915), 238 U. S. 143.

PENSACOLA TELEGRAPH COMPANY v. WESTERN UNION TELEGRAPH COMPANY.

SUPREME COURT OF THE UNITED STATES. 1877.
96 U. S. 1; 24 Lawyers' Ed. 708.

Appeal from the Circuit of the United States for the Northern District of Florida. . . . [The Pensacola Telegraph Co. was incorporated in 1866 by the State of Florida, and granted the exclusive right to establish and maintain telegraph lines in certain counties of Florida. Later, in 1874, the legislature of Florida empowered a railroad company to erect a telegraph line within the territory of the exclusive grant to the Pensacola Company. In 1866, prior to the passage of the first of these acts, Congress had enacted that telegraph lines might be established "through and over any portion of the public domain of the United States, over and along any of the military and post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams and waters of the United States." In June, 1867, the defendants had filed with the Postmaster-General their acceptance of the terms of the act, as required by law. In 1874 the railroad company above mentioned authorized the defendant to erect a telegraph line upon its right of way, whereupon the plaintiff sought to enjoin the construction and use of the line.]

MR. CHIEF JUSTICE WAITE delivered the opinion of the court . . .

Since the case of Gibbons v. Ogden (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal system known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad,

and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were entrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly as against hostile State legislation. In fact, from the beginning, it seems to have been assumed that Congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by Congress for that purpose (5 Stat. 618); and large donations of land and money have since been made to aid in the construction of other lines (12 Stat. 489, 772; 13 id. 365; 14 id. 292). It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate

legislation, to prevent the States from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all.

The State of Florida has attempted to confer upon a single corporation the exclusive right of transmitting intelligence by telegraph over a certain portion of its territory. This embraces the two westernmost counties of the State, and extends from Alabama to the Gulf. No telegraph line can cross the State from east to west, or from north to south, within these counties, except it passes over this territory. Within it is situated an important seaport, at which business centers, and with which those engaged in commercial pursuits have occasion more or less to communicate. The United States have there also the necessary machinery of the national government. They have a navy-yard, forts, custom-houses, courts, post-offices, and the appropriate officers for the enforcement of the laws. The legislation of Florida, if sustained, excludes all commercial intercourse by telegraph between the citizens of the other States and those residing upon this territory, except by the employment of this corporation. The United States cannot communicate with their own officers by telegraph except in the same way. The State, therefore, clearly has attempted to regulate commercial intercourse between its citizens and those of other States, and to control the transmission of all telegraphic correspondence within its own jurisdiction.

It is unnecessary to decide how far this might have been done if Congress had not acted upon the same subject, for it has acted. The statute of July 24, 1866, in effect, amounts to a prohibition of all State monopolies in this particular. It substantially declares, in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as State interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one State for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction, if they accept the terms proposed by the national govern-

ment for this national privilege. To this extent, certainly, the statute is a legitimate regulation of commercial intercourse among the States, and is appropriate legislation to carry into execution the powers of Congress over the postal service. It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect the necessary structures for its business; but it does provide, that, whenever the consent of the owner is obtained, no State legislation shall prevent the occupation of post-roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges.

It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is, "Through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States." There is nothing to indicate an intention of limiting the effect of the words employed, and they are, therefore, to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads, and the navigable waters of the United States. These are all within the domain of the national government to the extent of the national powers, and are, therefore, subject to legitimate congressional regulation. No question arises as to the authority of Congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted. If private property is required, it must, so far as the present legislation is concerned, be obtained by private arrangement with its owner. No compulsory proceedings are authorized. State sovereignty under the Constitution is not interfered with. Only national privileges are granted.

The State law in question, so far as it confers exclusive rights upon the Pensacola Company, is certainly in conflict with this legislation of Congress. To that extent it is, therefore, inoperative as against a corporation of another State entitled to the privileges of the act of Congress. Such being the case, the charter of the Pensacola Company does not exclude the Western Union Company from the occupancy of the right of way of the

Pensacola and Louisville Railroad Company under the arrangement made for that purpose. . . . *Decree affirmed.*

Mr. Justice Field and Mr. Justice Hunt dissented. . . .

UNITED STATES v. E. C. KNIGHT CO.

Supreme Court of the United States. 1895.
156 U. S. 1; 39 Lawyers' Ed. 325.

[This was a bill filed by the United States against the E. C. Knight Company and four other corporations and charged that they had entered into contracts for the purchase by the American Sugar Refining Company of the shares of stock and the property of the other companies, and the issuance in exchange to the other companies of shares of stock in the said American Sugar Refining Company; that these contracts were entered into for the purpose of obtaining control by the last named company of the price of sugar in the United States and monopolizing the manufacture and sale of refined sugar therein; and that such contracts were in violation of the provisions of an act of Congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," 26 Stat. 209, providing "that every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade and commerce among the several States is illegal, and that persons who shall monopolize or shall attempt to monopolize, or combine or conspire with other persons to monopolize trade and commerce among the several States, shall be guilty of a misdemeanor." The petitioner prayed that the agreements referred to be cancelled and declared void and that the defendants be enjoined from carrying them out and from violating said act.]

Mr. Chief Justice Fuller . . . delivered the opinion of the court.

By the purchase of the stock of the four Philadelphia refineries, with shares of its own stock, the American Sugar Refining Company acquired nearly complete control of the manufacture of refined sugar within the United States. The bill charged that the contracts under which these purchases were made constituted combinations in restraint of trade, and that in entering into them the defendants combined and conspired to restrain the trade

and commerce in refined sugar among the several States and with foreign nations, contrary to the act of Congress of July 2, 1890. . . .

The fundamental question is, whether conceding that the existence of a monopoly in manufacture is established by the evidence, that monopoly can be directly suppressed under the act of Congress in the mode attempted by this bill. . . .

The argument is that the power to control the manufacture of refined sugar is a monopoly over a necessary of life, to the enjoyment of which by a large part of the population of the United States interstate commerce is indispensable, and that, therefore, the general government in the exercise of the power to regulate commerce may repress such monopoly directly and set aside the instruments which have created it. But this argument cannot be confined to necessaries of life merely, and must include all articles of general consumption. Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed or whenever the transaction is itself a monopoly of commerce. . . .

It will be perceived how far-reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the general government whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce and not to matters of internal police. Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the States, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce. The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.

This was so ruled in Coe v. Errol, 116 U. S. 517, 525, in which the question before the court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the State of Maine were liable to be taxed like other property in the State of New Hampshire. Mr. Justice Bradley, delivering the opinion of the court, said: "Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. . . . There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the State of their origin to that of their destination."

And again, in Kidd v. Pearson, 128 U. S. 1, 20, 21, 22, where the question was discussed whether the right of a State to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the State and belonged to commerce, and that, therefore, the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, did not constitute an unauthorized interference with the right of Congress to regulate commerce. And Mr. Justice Lamar remarked: "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. . . . If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in

short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest or the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management. . . . The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case, that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." And see Veazie v. Moor, 14 How. 568, 574. . . .

Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but

the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy.

. . .

It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such; or to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons in the acquisition and control of property which the States of their residence or creation sanctioned or permitted. Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfil its function. Sugar was refined for sale, and sales were probably made at Philadelphia for consumption, and undoubtedly for resale by the first purchasers throughout Pennsylvania and other States, and refined sugar was also forwarded by the companies to other States for sale. Nevertheless it does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree. The subject-matter of the sale was shares of manufacturing stock, and the relief sought was the sur-

render of property which had already passed and the suppression of the alleged monopoly in manufacture by the restoration of the *status quo* before the transfers; yet the act of Congress only authorized the Circuit Courts to proceed by way of preventing and restraining violations of the act in respect of contracts, combinations, or conspiracies in restraint of interstate or international trade or commerce.

The Circuit Court declined, upon the pleadings and proofs, to grant the relief prayed, and dismissed the bill, and we are of opinion that the Circuit Court of Appeals did not err in affirming that decree. *Decree affirmed.*

MR. JUSTICE HARLAN, dissenting. . . .

NOTE.—Compare Montague & Co. v. Lowry (1904), 193 U. S. 38, which deals with a combination between manufacturers of tiles and dealers therein.

The term commerce not only includes navigation (Pennsylvania v. Wheeling Bridge Co. [1852], 13 Howard, 519; Gilman v. Philadelphia [1865], 3 Wallace, 713; Head Money Cases [1884], 112 U. S. 580), but the transportation by whatever agencies of commodities (United States v. Trans-Missouri Freight Association [1897], 166 U. S. 290), or of passengers (The Passenger Cases [1849], 7 Howard, 283), even on foot (Covington Bridge Co. v. Kentucky [1894], 154 U. S. 204), or the transmission of ideas (International Text-Book Co. v. Pigg [1910], 217 U. S. 91), and it is immaterial whether such transportation is connected with a sale (Hanley v. Kansas City Southern Ry. [1903], 187 U. S. 617). Included in the term transportation are all the services in connection with the receipt of the property transported (Houston & Texas Central Ry. v. Mayes [1906], 201 U. S. 321).

A contract may or may not be a transaction of interstate commerce. If it is in the form of a bill of lading, it is (Almy v. California [1860], 24 Howard, 169; Woodruff v. Parham [1870], 8 Wallace, 123), but if in the form of a bill of exchange (Nathan v. Louisiana [1850], 8 Howard, 73) or of a contract to perform labor outside the State (Williams v. Fear [1900], 179 U. S. 270), or of a contract for future delivery to be executed in another State (Ware & Leland v. Mobile County [1908], 209 U. S. 405), or of the contract of a private banker with his depositors (Engel v. O'Malley [1911], 219 U. S. 128), it is not.

SECTION 2. FEDERAL JURISDICTION OVER COMMERCE.

GIBBONS v. OGDEN.

SUPREME COURT OF THE UNITED STATES. 1824.
9 Wheaton, 1; 6 Lawyers' Ed. 23.

[The statement of facts and the first part of the opinion are given *ante*, page 245.]

To what commerce does this power extend? The constitution

informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes." It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely in-

ternal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of congress may be exercised within a State.

This principle is, if possible, still more clear when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods by land between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, what is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been

understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of congress, then, comprehends navigation within the limits of every State in the Union, so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness that, although the power of congress to regulate commerce with foreign nations, and among the several States, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the States may severally exercise the same power within their respective jurisdictions. In support of this argument, it is said that they possessed it as an inseparable attribute of sovereignty before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the constitution, to legislative acts, and judicial decisions; and have drawn arguments from

all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and, a power in one to take what is necessary for certain purposes, is not in its nature incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to congress, and is doing the very thing which congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to congress, or is retained until congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which congress deemed it proper to make are now

in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States while congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section as supporting their opinion. . . .

These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the constitution as being passed in the exercise of a power remaining with the States.

That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to a general government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

No direct general power over these objects is granted to congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers,—that, for example, of regulating commerce with foreign nations and among the States,—may use means that may also be employed by a State in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the power expressly granted to congress, and implies no claim of a direct power to regulate the purely internal commerce of

a State, or to act directly on its system of police. So if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

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

The acts of congress, passed in 1796 and 1799, 1 Stats. at Large, 474, 619, empowering and directing the officers of the general government to conform to, and assist in, the execution of the quarantine and health laws of a State, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations, or among the States; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by, the laws of the United States made for the regulation of commerce, congress, in that spirit of harmony and conciliation which ought always to

characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object by making provisions in aid of those of the States. But in making these provisions the opinion is unequivocally manifested that congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce.

The act passed in 1803, 3 Stats. at Large, p. 529, prohibiting the importation of slaves into any State which shall itself prohibit their importation, implies, it is said, an admission that the States possessed the power to exclude or admit them; from which it is inferred that they possess the same power with respect to other articles.

If this inference were correct; if this power was exercised, not under any particular clause in the constitution, but in virtue of a general right over the subject of commerce, to exist as long as the constitution itself,—it might now be exercised. Any State might now import African slaves into its own territory. But it is obvious that the power of the States over this subject, previous to the year 1808, constitutes an exception to the power of congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the pre-existing right of the States to admit or exclude for a limited period. The words are, "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 1808." The whole object of the exception is, to preserve the power to those States which might be disposed to exercise it; and its language seems to the court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the act of August 7, 1789, 1 Stats. at Large, 54, acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with congress to regulate commerce with foreign nations and amongst the States. But this inference is not, we think, justified by the fact. Although congress cannot enable a State to legislate, congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the

regulation of its pilots in full force in every State. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the States until congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things unless expressly applied to it by congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular State. The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; and the adoption of its system by congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary, being only "until further legislative provision shall be made by congress," shows conclusively an opinion that congress could control the whole subject, and might adopt the system of the States, or provide one of its own.

A State, it is said, or even a private citizen, may construct lighthouses. But gentlemen must be aware that if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States, or individuals who own lands, may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained if exercised so as to produce a public mischief.

These acts were cited at the bar for the purpose of showing an opinion in congress that the States possess, concurrently with the legislature of the Union, the power to regulate commerce with foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the States retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to congress.

It has been contended by the counsel for the appellant that,

as the word to "regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress, and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. . . .

In pursuing this inquiry at the bar, it has been said that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to congress the power to regulate it. In the exercise of this power, congress has passed "An act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

It will at once occur that when a legislature attaches certain privileges and exemptions to the exercise of a right over which

its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. It would be contrary to all reason and to the course of human affairs to say that a State is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the State of New York cannot prevent an enrolled and licensed vessel proceeding from Elizabethtown, in New Jersey, to New York, from enjoying, in her course and on her entrance into port, all the privileges conferred by the act of congress, but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another State. To the court it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies unequivocally an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act.

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steamboat Bellona to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of

the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act than in the license itself.

The word "license" means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license. Would the validity or effect of such an instrument be questioned by the respondent if executed by persons claiming regularly under the laws of New York?

The license must be understood to be what it purports to be,—a legislative authority to the steamboat Bellona "to be employed in carrying on the coasting trade for one year from this date."

It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified; but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it; and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.

Notwithstanding the decided language of the license, it has also been maintained that it gives no right to trade, and that its sole purpose is to confer the American character.

The answer given to this argument, that the American character is conferred by the enrollment and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrollment of vessels designed for the coasting trade corresponds precisely with the registration of vessels designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burden of twenty tons and upwards, and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do; that is, to give permission to a vessel already proved by her enrollment to be American to carry on the coasting trade.

But if the license be a permit to carry on the coasting trade,

the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers, and this is no part of that commerce which congress may regulate.

If, as our whole course of legislation on this subject shows, the power of congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct; and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen and respecting ownership, are as applicable to vessels carrying men as to vessels carrying manufactures; and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar rests on the foundation that the power of congress does not extend to navigation as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution, or by reason, for discriminating between the power of congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the constitution, the inference to be drawn from it is rather against the distinction. The section which restrains congress from prohibiting the migration or importation of such persons as any of the States may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary arrivals; and so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men who

pass from place to place voluntarily, and to those who pass involuntarily.

If the power reside in congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed, to a greater or less extent, in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The Duty act, sections 23 and 46, 1 Stats. at Large, 644, 661, contains provisions respecting passengers, and shows that vessels which transport them have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business within those provisions which were intended for vessels generally; and on the 2d of March, 1819, passed "An act regulating passenger ships and vessels." 3 Stats. at Large, 488. This wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them which may interest the government, to the department of State, but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of congress (if, indeed, any evidence to that point could be required), that the pre-existing regulations comprehended passenger ships among others; and in prescribing the same duties, the legislature must have considered them as possessing the same rights.

If, then, it were even true, that The Bellona and The Stoudinger were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these

vessels can be drawn into question in the case before the court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the United States permit them to enter and deliver in New York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law, is the bill of the plaintiff in the State court. The bill does not complain that The Bellona and The Stoudinger carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers, or otherwise." The answer avers only that they are employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passengers, but from being moved through the waters of New York by steam, for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself, is that the laws of congress for the regulation of commerce, do not look to the principle of which vessels are moved. That subject is left entirely to individual discretion; and in that vast and complex system of legislative enactment concerning it, which embraces everything which the legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act, 2 Stats. at Large, 694, granting a particular privilege to steamboats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the

instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And, if the occupation of steamboats be a matter of such general notoriety that the court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history, that, in our western waters, their principal employment is the transportation of merchandise; and all know, that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the court to be put completely at rest, by the act already mentioned, entitled, "An act for the enrolling and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of congress, that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a State inhibiting the use of either to any vessel having a license under the act of congress, comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the constitution which empowers congress to promote the progress of science and the useful arts. . . .

[Mr. Justice Johnson delivered a concurring opinion.]

Note.—In the exercise of its power to regulate interstate and foreign commerce, Congress has enacted several statutes which not only restrain the States, but act directly upon individuals and corporations engaged in such

commerce and impose restrictions or create affirmative duties. Among the most important are the following:

THE INTERSTATE COMMERCE ACT, first enacted in 1887, and many times amended. The predominant purpose of its enactment was to prevent unreasonable and discriminatory rates (Texas & Pacific Ry. v. Interstate Commerce Commission [1896], 162 U. S. 197, 211), but the Interstate Commerce Commission, the organ created for the administration of the Act, was not empowered to fix rates (Cincinnati, New Orleans & Texas Ry. v. Interstate Commerce Commission [1896], 162 U. S. 184). By the Hepburn Act of 1906 this power was conferred upon the Commission, transportation companies were forbidden to transport their own commodities (United States v. Delaware & Hudson Ry. [1909], 213 U. S. 366), the giving of free passes was regulated, pipe lines, express companies and sleeping car companies were brought within the provisions of the Act, and the supervisory powers of the Commission were much enlarged. In 1910 the jurisdiction of the Commission was extended over telegraph and telephone companies, and it was empowered to suspend advances in rates. By the Panama Act of 1912 the power of the Commission was extended to transportation by both water and rail, but not over commerce that moved wholly by water. In 1913 the Commission was directed to undertake a physical valuation of all the property owned by every carrier subject to its jurisdiction.

THE ANTI-TRUST ACT of 1890 provided that "every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." This act has been applied to combinations among transportation companies (United States v. Trans-Missouri Freight Association [1897], 166 U. S. 290); to holding companies which interfere with the freedom of interstate commerce (United States v. Northern Securities Co. [1904], 193 U. S. 197); to combinations of manufacturers for the purpose of controlling the course of trade (Addystone Pipe & Steel Co. v. United States [1899], 175 U. S. 211; Montague v. Lowry [1904], 193 U. S. 38); and to labor unions conducting a boycott which interfered with interstate commerce (Loewe v. Lawler [1908], 208 U. S. 274).

THE EMPLOYERS' LIABILITY ACT of 1906 considerably modified the fellow-servant rule of the common law as applied to the employees of carriers. As the act applied to persons in both intrastate and interstate commerce, it was declared unconstitutional in respect to the former in Employers' Liability Cases (1908), 207 U. S. 463, but was held valid as to carriers in the District of Columbia and the Territories in El Paso & Northeastern Ry. v. Gutierrez (1909), 215 U. S. 87. In order to meet the objections raised by the Supreme Court, Congress, in 1908, passed a second act which is confined to persons actually engaged in interstate commerce. This was sustained in Second Employers' Liability Cases (1912), 223 U. S. 1.

THE FEDERAL SAFETY APPLIANCE ACTS, enacted in 1893 and the years following, requiring interstate trains to be equipped with certain safety devices, were upheld in St. Louis & Iron Mountain Ry. v. Taylor (1908), 210 U. S. 281.

THE HOURS OF SERVICE ACT of 1907, restricting the hours of labor of railway employees operating trains moving in interstate commerce, was upheld in Baltimore & Ohio Ry. v. Interstate Commerce Commission (1911), 221 U. S. 612.

THE FEDERAL TRADE COMMISSION ACT of 1914 creates the Federal Trade Commission. The gist of the act is contained in the provision "that unfair methods of competition in commerce are hereby declared unlawful." The meaning of this phrase yet remains to be determined.

THE CLAYTON ANTI-TRUST ACT of 1914 undertakes to prevent all persons engaged in interstate commerce from discriminating in prices between different purchasers of commodities or to accord preferential treatment to one person over another. Corporations engaged in interstate commerce are forbidden to purchase the stock of another corporation when such purchase would substantially diminish competition, and the right of individuals to act as director in more than one corporation is restricted. The relation between carriers and the corporations from which they obtain service or supplies is also regulated.

BROWN ET AL. v. THE STATE OF MARYLAND.

SUPREME COURT OF THE UNITED STATES. 1827.
12 Wheaton, 419; 6 Lawyers' Ed. 678.

ERROR to the Court of Appeals of Maryland.

MARSHALL, C. J., delivered the opinion of the court.

This is a writ of error to a judgment rendered in the court of appeals of Maryland, affirming a judgment of the city court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the 2d section of that act, which is in these words: "And be it enacted that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c., and other persons selling the same by wholesale, bale or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them, on demurrer, for the penalty which the act prescribes for the offense; and that judgment is now before this court.

This cause depends entirely on the question whether the legislature of a State can constitutionally require the importer of

foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported.

It has been truly said, that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the constitution of the United States.

1. To that which declares that "no State shall, without the consent of Congress, lay any imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon States "to lay any imposts or duties on imports or exports." The counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope.

In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts, or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports"? The lexicons inform us they are "things imported." If we appeal to usage for the meaning of the word, we shall receive

the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is, "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the subject, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different States of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment upon it, was so far abridged as to forbid them to touch imports or exports, with

the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of congress. Whether the prohibition to "lay imposts, or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular State. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The States will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any State would act so unwisely. But we do not place the question on that ground.

These arguments apply with precisely the same force against the whole prohibition. It might, with the same reason, be said

that no State would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought this a power which no State ought to exercise. Conceding, to the full extent which is required, that every State would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded that each would respect the interests of others. A duty on imports is a tax on the article which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was with a single and slight exception, taken from the States. When we are inquiring whether a particular act is within this prohibition, the question is not, whether a State may so legislate as to hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already been shown, that a tax on the article in the hands of the importer, is within its words; and we think it too clear for controversy, that the same tax is within its mischief. We think it unquestionable, that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it while entering the port.

The counsel for the State of Maryland, insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the States, to an extent which has never yet been suspected, and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitations; and, if this be admitted, they insist that entering the country is the point of time when the prohibition ceases, and the power of the State to tax commences.

It may be conceded, that the words of the prohibition ought not to be pressed to their utmost extent; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But, while we admit that sound principles of construction ought to

restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure; that there must be a point of time when the prohibition ceases, and the power of the State to tax commences; we cannot admit that this point of time is the instant that the article enters the country. It is, we think, obvious that this construction would defeat the prohibition.

The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it constitutes the motive for paying the duties; and if the United States possesses the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and land-

ed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the State cannot regulate it. He may sell by retail, at auction, or as an itinerant peddler. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

These objections to the principle, if well founded, would certainly be entitled to serious consideration. But we think they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer, for selling a package of dry goods in the form in which it was imported, without a license. This state of things is changed if he sells them, or otherwise mixes them with the general property of the State, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the State. In the last cases, the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he has purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So, if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as

little object to paying for this service, as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the State to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property does not interfere with the necessary power of taxation which is acknowledged to reside in the States, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the constitution no further than to prevent the States from doing that which it was the great object of the constitution to prevent.

But if it should be proved, that a duty on the article itself would be repugnant to the constitution, it is still argued that this is not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to

the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution.

In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words export and import. As, to export, it is said, means only to carry goods out of the country; so, to import, means only to bring them into it. But, suppose we extend this comparison to the two prohibitions. The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the constitution which declares that "no State shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the constitution which empowers "congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes?"

The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests, and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, in-

deed, possessed the power of making treaties; but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several States?

This question was considered in the case of Gibbons v. Ogden, 9 Wheat. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a State, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse: one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing,

then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be the meaning of an act of congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument, to say, that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not, how far will it be probably abused? The power claimed by the State is, in its nature, in conflict with that given to congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

We think, then, that if the power to authorize a sale exists in congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power of congress to regulate commerce, since an essential part of that regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported and on

the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a State to tax its own citizens, or their property within its territory.

We admit this power to be sacred; but cannot admit that it may be used so as to obstruct the free course of a power given to congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the States must have some limits. It cannot reach and restrain the action of the national government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one part to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing through it, from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up and considered with great attention, in McCulloch v. The State of Maryland, 4 W. 316, the decision in which case is, we think, entirely applicable to this.

It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the court of appeals of the State of Maryland, in affirming the judgment of the Baltimore city court, because the act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the constitution of the United States, and, consequently, void. The judgment is to be reversed, and the cause remanded to that court, with instructions to enter judgment in favor of the appellants.

THOMPSON, J., dissented. . . .

NOTE.—The "original package doctrine," which was first formulated in the principal case, has been much criticized. See The License Cases (1847), 5 Howard, 504, 615; Brown v. Houston (1885), 114 U. S. 622; and Prentice and Egan, *The Commerce Clause of the Federal Constitution*, 66. In Woodruff v. Parham (1869), 8 Wallace, 123, it was held that it did not apply to interstate shipments, but this ruling was reversed in Bowman v. Chicago & Northwestern Ry. (1888), 125 U. S. 465, which represents the prevailing rule. For the application of the rule to shipments of liquor see the note to Leisy v. Hardin (1890), 135 U. S. 100, *post*, 382.

As to what constitutes an original package, see May & Co. v. New Orleans (1900), 178 U. S. 496; Austin v. Tennessee (1900), 179 U. S. 343; Cook v. Marshall County (1905), 196 U. S. 261; and Purity Extract Co. v. Lynch (1912), 226 U. S. 192.

As to the power of the States to tax interstate commerce, see Case of the State Freight Tax (1873), 15 Wallace, 232; Robbins v. Shelby County Taxing District (1887), 120 U. S. 489; Leloup v. Port of Mobile (1888), 127 U. S. 640; and as to their power to tax property employed in interstate commerce see Gloucester Ferry Co. v. Pennsylvania (1885), 114 U. S. 196; Adams Express Co. v. Ohio (1897), 165 U. S. 194. As to when interstate shipments begin and terminate, see The Daniel Ball (1871), 10 Wallace, 557; Coe v. Errol (1886), 116 U. S. 517; Rhodes v. Iowa (1898), 170 U. S. 412; Kelley v. Rhoads (1903), 188 U. S. 1; Diamond Match Co. v. Ontonagon (1903), 188 U. S. 82; American Express Co. v. Iowa (1905), 196 U. S. 133; General Oil Co. v. Crain (1908), 209 U. S. 211.

Chief Justice Taney was counsel for the State of Maryland in the principal case. In the License Cases (1847), 5 Howard, 504, 575, he said:

> I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the supreme court is a just and safe one, and, perhaps, the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them.

COOLEY v. THE BOARD OF WARDENS OF THE PORT OF PHILADELPHIA.

SUPREME COURT OF THE UNITED STATES. 1851.
12 Howard, 299; 13 Lawyers' Ed. 996.

CURTIS, J., delivered the opinion of the court.

These cases are brought here by writs of error to the supreme court of the commonwealth of Pennsylvania.

They are actions to recover half-pilotage fees under the 29th section of the act of the legislature of Pennsylvania, passed on the second day of March, 1803. The plaintiff in error alleges that the highest court of the State has decided against a right claimed by him under the constitution of the United States. That right is, to be exempted from the payment of the sums of money, demanded pursuant to the state law above referred to, because that law contravenes several provisions of the constitution of the United States.

The particular section of the state law drawn in question is as follows: "That every ship or vessel arriving from, or bound to any foreign port or place, and every ship or vessel of the burden of seventy-five tons or more, sailing from, or bound to any port not within the River Delaware, shall be obliged to receive a pilot. And it shall be the duty of the master of every such ship or vessel, within thirty-six hours next after the arrival of such ship or vessel at the city of Philadelphia, to make report to the master-warden of the name of such ship or vessel, her draught of water, and the name of the pilot who shall have conducted her to port. And when any such vessel shall be outward bound, the master of such vessel shall make known to the wardens the name of such vessel, and of the pilot who is to conduct her to the capes, and her draught of water at that time. And it shall be the duty of the wardens to enter every such vessel in a book to be by them kept for that purpose, without fee or reward. And if the master of any ship or vessel shall neglect to make such report, he shall forfeit and pay the sum of $60. And if the master of any such ship or vessel shall refuse or neglect to take a pilot, the master, owner, or consignee of such vessel shall forfeit and pay to the warden aforesaid a sum equal to the half-pilotage of such ship or vessel, to the use of the Society for the Relief, etc., to be recovered as pilotage in the manner hereinafter directed: Provided always, that where it shall appear to the warden that in case of an inward bound vessel, a pilot did not offer before she had reached Reedy Island: or, in case of an

outward bound vessel, that a pilot could not be obtained for twenty-four hours after such vessel was ready to depart, the penalty aforesaid, for not having a pilot, shall not be incurred." This is one section of "An Act to establish a Board of Wardens for the Port of Philadelphia, and for the Regulation of Pilots and Pilotages, &c.," and the scope of the act is, in conformity with the title, to regulate the whole subject of the pilotage of that port.

We think this particular regulation concerning half-pilotage fees, is an appropriate part of a general system of regulations of this subject. Testing it by the practice of commercial States and countries legislating on this subject, we find it has usually been deemed necessary to make similar provisions. Numerous laws of this kind are cited in the learned argument of the counsel for the defendant in error; and their fitness, as part of a system of pilotage, in many places, may be inferred from their existence in so many different States and countries. . . .

It remains to consider the objection that it is repugnant to the third clause of the eighth section of the first article. "The congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

That the power to regulate commerce includes the regulation of navigation, we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensations bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to the conclusion, that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the constitution.

The power to regulate navigation is the power to prescribe rules in conformity with which navigation must be carried on. It extends to the persons who conduct it, as well as to the instruments used. Accordingly, the first congress assembled under the constitution passed laws requiring the masters of ships and vessels of the United States to be citizens of the United States, and established many rules for the government and regulation of officers and seamen. 1 Stats. at Large, 55, 131. These have

been from time to time added to and changed, and we are not aware that their validity has been questioned. . . .

A majority of the court are of opinion that a regulation of pilots is a regulation of commerce, within the grant to congress of the commercial power, contained in the third clause of the eighth section of the first article of the constitution.

It becomes necessary, therefore, to consider whether this law of Pennsylvania, being a regulation of commerce, is valid.

The act of congress of the 7th of August, 1789, § 4, is as follows:

"That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress."

If the law of Pennsylvania, now in question, had been in existence at the date of this act of congress, we might hold it to have been adopted by congress, and thus made a law of the United States, and so valid. Because this act does, in effect, give the force of an act of congress, to the then existing state laws on this subject, so long as they should continue unrepealed by the State which enacted them.

But the law on which these actions are founded was not enacted till 1803. What effect then can be attributed to so much of the act of 1789 as declares that pilots shall continue to be regulated in conformity "with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by congress"?

If the States were divested of the power to legislate on this subject by the grant of the commercial power to congress, it is plain this act could not confer upon them power thus to legislate. If the constitution excluded the States from making any law regulating commerce, certainly congress cannot regrant, or in any manner reconvey to the States that power. And yet this act of 1789 gives its sanction only to laws enacted by the States. This necessarily implies a constitutional power to legislate; for only a rule created by the sovereign power of a State acting in its legislative capacity, can be deemed a law enacted by a State; and if the State has so limited its sovereign power that it no longer extends to a particular subject, manifestly it cannot, in any proper sense, be said to enact laws thereon. Entertaining these views, we are brought directly and unavoidably to the

consideration of the question, whether the grant of the commercial power to congress, did *per se* deprive the States of all power to regulate pilots. This question has never been decided by this court, nor, in our judgment, has any case depending upon all the considerations which must govern this one, come before this court. 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. If it were conceded on the one side, that the nature of this power, like that to legislate for the District of Columbia, is absolutely and totally repugnant to the existence of similar power in the States, probably no one would deny that the grant of the power to congress, as effectually and perfectly excludes the States from all future legislation on the subject, as if express words had been used to exclude them. And on the other hand, if it were admitted that the existence of this power in congress, like the power of taxation, is compatible with the existence of a similar power in the States, then it would be in conformity with the contemporary exposition of the constitution, (Federalist, No. 32), and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to congress, did not imply a prohibition on the States to exercise the same power; that it is not the mere existence of such a power, but its exercise by congress, which may be incompatible with the exercise of the same power by the States, and that the States may legislate in the absence of congressional regulations. Sturges v. Crowninshield, 4 Wheat. 193; Houston v. Moore, 5 Wheat. 1; Wilson v. Blackbird Creek Co., 2 Pet. 251.

The diversities of opinion, therefore, which have existed on this subject, have arisen from the different views taken of the nature of this power. But when the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by congress. Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in

question, as imperatively demanding that diversity which alone can meet the local necessities of navigation.

Either absolutely to affirm, or deny that the nature of this power requires exclusive legislation by congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. The act of 1789 contains a clear and authoritative declaration by the first congress, that the nature of this subject is such that until congress should find it necessary to exert its power, it should be left to the legislation of the States; that it is local and not national; that it is likely to be the best provided for, not by one system, or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits.

Viewed in this light, so much of this act of 1789 as declares that pilots shall continue to be regulated "by such laws as the States may respectively hereafter enact for that purpose," instead of being held to be inoperative, as an attempt to confer on the States a power to legislate, of which the constitution had deprived them, is allowed an appropriate and important signification. It manifests the understanding of congress, at the outset of the government, that the nature of this subject is not such as to require its exclusive legislation. The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject when examined is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants. How, then, can we say that, by the mere grant of power to regulate commerce, the States are deprived of all the power to legislate on this subject, because from the nature of the power the legislation of congress must be exclusive? This would be to affirm that the nature of the power is, in this case, something different from the nature of the subject to which, in such case, the power extends, and that the nature of the power necessarily demands, in all cases, exclusive legislation by congress, while the nature of one of the subjects of that power, not

only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the States, in conformity with the circumstances of the ports within their limits. In construing an instrument designed for the formation of a government, and in determining the extent of one of its important grants of power to legislate, we can make no such distinction between the nature of the power and the nature of the subject on which that power was intended practically to operate, nor consider the grant more extensive, by affirming of the power, what is not true of its subject now in question.

It is the opinion of a majority of the court that the mere grant to congress of the power to regulate commerce did not deprive the States of power to regulate pilots, and that although congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined. It does not extend to the question what other subjects, under the commercial power, are within the exclusive control of congress, or may be regulated by the States in the absence of all congressional legislation; nor to the general question, how far any regulation of a subject by congress may be deemed to operate as an exclusion of all legislation by the States upon the same subject. We decide the precise questions before us, upon what we deem sound principles, applicable to this particular subject in the State in which the legislation of congress has left it. We go no further.

We have not adverted to the practical consequences of holding that the States possess no power to legislate for the regulation of pilots, though in our apprehension these would be of the most serious importance. For more than sixty years this subject has been acted on by the States, and the systems of some of them created and of others essentially modified during that period. To hold that pilotage fees and penalties demanded and received during that time have been illegally exacted, under color of void laws, would work an amount of mischief which a clear conviction of constitutional duty, if entertained, must force us to occasion, but which could be viewed by no just mind without deep regret. Nor would the mischief be limited to the past. If congress were now to pass a law adopting the existing state laws, if enacted without authority, and in violation of the constitution, it would seem to us to be a new and questionable mode of legislation.

If the grant of commercial power in the constitution has deprived the States of all power to legislate for the regulation of pilots, if their laws on this subject are mere usurpations upon the exclusive power of the general government, and utterly void, it may be doubted whether congress could, with propriety, recognize them as laws, and adopt them as its own acts; and how are the legislatures of the States to proceed in future, to watch over and amend these laws, as the progressive wants of a growing commerce will require, when the members of those legislatures are made aware that they cannot legislate on this subject without violating the oaths they have taken to support the constitution of the United States?

We are of opinion that this state law was enacted by virtue of a power, residing in the State to legislate, that it is not in conflict with any law of congress; that it does not interfere with any system which congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action; that this law is therefore valid, and the judgment of the supreme court of Pennsylvania in each case must be affirmed.

M'LEAN, J., and WAYNE, J., dissented; and DANIEL, J., although he concurred in the judgment of the court, yet dissented from its reasoning. . . .

NOTE.—The rule of the principal case, which has been generally adhered to since this decision, was first formulated in the Supreme Court by Mr. Justice Woodbury in The License Cases (1846), 5 Howard, 504, 624, where he said:

> There is much in connection with foreign commerce which is local within each State, convenient for its regulation and useful to the public, to be acted on by each till the power is abused or some course is taken by Congress conflicting with it. Such are the deposit of ballast in harbours, the extension of wharves into tidewater, the supervision of the anchorage of ships, the removal of obstructions, the allowance of bridges with suitable draws, and various other matters that need not be enumerated, besides the exercise of numerous police and health powers, which are also by many claimed upon different grounds. . . . The States, not conflicting with any uniform and general regulations by Congress as to foreign commerce, must for convenience, if not necessity, from the very nature of the power, not be debarred from any legislation of a local and detailed character on matters connected with that commerce omitted by Congress. And to hold the power of Congress as to such topics exclusive, in every respect, and prohibitory to the States, though never exercised by Congress, as fully as when in

active operation, which is the opposite theory, would create infinite inconvenience, and detract much from the cordial cooperation and consequent harmony between both governments, in their appropriate spheres. It would nullify numerous useful laws and regulations in all the Atlantic and commercial States in the Union.

At a still earlier date, Daniel Webster, as counsel for the appellant in Gibbons v. Ogden (1824), 9 Wheaton, 1, 14, had said:

> It should be repeated, that the words used in the constitution, "to regulate commerce," are so very general and extensive, that they might be construed to cover a vast field of legislation, part of which has always been occupied by State laws; and, therefore, the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires.

The pilotage laws of the United States are well summarized and the doctrine of the principal case is affirmed in Anderson v. Pacific Coast Steamship Co. (1912), 225 U. S. 187.

IN RE DEBS, PETITIONER.

SUPREME COURT OF THE UNITED STATES. 1895.
158 U. S. 564; 39 Lawyers' Ed. 1092.

[This case grew out of the situation created by the railway strike in Chicago in the summer of 1894. By direction of the Attorney-General of the United States, the district attorney for the Northern District of Illinois filed a bill of complaint in the Circuit Court of the United States in which it was averred that the twenty-two railroads named therein were engaged in the business of interstate commerce and in the transportation of the the United States mails; that four of the defendants, officers of the American Railway Union, had combined with others to compel an adjustment of a dispute between the Pullman Palace Car Company and its employees by boycotting the cars of the company; that to make the boycott effective, they had prevented certain of the railroads running out of Chicago from operating their trains, and were combining to extend such boycott against the Pullman cars by causing strikes among employees of all roads attempting to haul the same; that the defendants and others unknown proceeded by collecting together in large numbers, by threats, intimidation, force and violence, to prevent the said railways from employing other persons to fill the vacancies aforesaid; that the defendants and others unknown did with

force and violence obstruct, derail, and wreck the engines and trains of the said railways, both passenger and freight, engaged in interstate commerce and in carrying the United States mails. Following these allegations was a prayer for an injunction. The court thereupon ordered an injunction commanding the defendants "and all persons combining and conspiring with them, and all other persons whomsoever absolutely to desist and refrain from" doing the unlawful acts specified in the bill. The injunction was served on those of the defendants who are here as petitioners. On December 14, these petitioners were found guilty of contempt and sentenced to imprisonment in the county jail for terms varying from three to six months. Having been committed to jail, they on January 14, 1895, applied to this court for a writ of error and also a writ of habeas corpus. The former was denied on the ground that the order of the Circuit Court was not a final judgment or decree. The latter is now to be considered.]

Mr. Justice Brewer . . . delivered the opinion of the court.

The case presented by the bill is this: The United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, is forcibly obstructed, and that a combination and conspiracy exists to subject the control of such transportation to the will of the conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. Two questions of importance are suggested: First. Are the relations of the general government to interstate commerce and the transportation of the mails such as to authorize a direct interference to prevent a forcible obstruction thereof? Second. If authority exists, as authority in government implies both power and duty, has a court of equity jurisdiction to issue an injunction in aid of the performance of such duty.

First. What are the relations of the general government to interstate commerce and the transportation of the mails? They are those of direct supervision, control, and management. While under the dual system which prevails with us the powers of government are distributed between the State and the Nation, and while the latter is properly styled a government of enumerated powers, yet within the limits of such enumeration it has all the attributes of sovereignty, and, in the exercise of those enu-

merated powers, acts directly upon the citizen, and not through the intermediate agency of the State. . . .

Among the powers expressly given to the national government are the control of interstate commerce and the creation and management of a post-office system for the nation. . . . [Here follows a consideration of the statutes passed in the exercise of these powers.]

Obviously these powers given to the national government over interstate commerce and in respect to the transportation of the mails were not dormant and unused. Congress had taken hold of these two matters, and by various and specific acts had assumed and exercised the powers given to it, and was in full discharge of its duty to regulate interstate commerce and carry the mails. The validity of such exercise and the exclusiveness of its control had been again and again presented to this court for consideration. It is curious to note the fact that in a large proportion of the cases in respect to interstate commerce brought to this court the question presented was of the validity of state legislation in its bearings upon interstate commerce, and the uniform course of decision has been to declare that it is not within the competency of a State to legislate in such a manner as to obstruct interstate commerce. If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?

As, under the Constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and Congress by virtue of such grant has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of Congress to prescribe by legislation that any interference with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce, and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it. By article 3, section 2, clause 3, of the Federal Constitution it is provided: "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 crime shall have been

committed." If all the inhabitants of a State, or even a great body of them, should combine to obstruct interstate commerce or the transportation of the mails, prosecutions for 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 that single State.

But there is no such impoteney 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 entrusted by the Constitution to its care. The strong arm of the national 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.

But passing to the second question, is there no other alternative than the use of force on the part of the executive authorities whenever obstructions arise to the freedom of interstate commerce or the transportation of the mails? Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated either at the instance of the authorities, or by any individual suffering private damage therefrom, the existence of this right of forcible abatement is not inconsistent with nor does it destroy the right of appeal in an orderly way to the courts for a judicial determination, and an exercise of their powers by writ of injunction and otherwise to accomplish the same result. . . .

So, in the case before us, the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights

and powers and the correlative obligations of those against whom it made complaint. And it is equally to the credit of the latter that the judgment of those tribunals was by the great body of them respected, and the troubles which threatened so much disaster terminated.

Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit. It is said that equity only interferes for the protection of property, and that the government has no property interest. A sufficient reply is that the United States have a property in the mails, the protection of which was one of the purposes of this bill. . . .

We do not care to place our decision upon this ground alone. Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligation which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it standing in the court. [Here follows a discussion of United States v. San Jacinto Tin Co., 125 U. S. 273, 285, and United States v. Bell Telephone Company, 128 U. S. 315, 367.]

It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties.

The national government, given by the Constitution power to regulate interstate commerce, has by express statute assumed jurisdiction over such commerce when carried upon railroads. It is charged, therefore, with the duty of keeping those highways of interstate commerce free from obstruction, for it has always been recognized as one of the powers and duties of a

government to remove obstructions from the highway under its control. . . .

It is said that the jurisdiction heretofore exercised by the national government over highways has been in respect to waterways—the natural highways of the country—and not over artificial highways such as railroads; but the occasion for the exercise by Congress of its jurisdiction over the latter is of recent date. Perhaps the first act in the course of such legislation is that heretofore referred to, of June 14, 1866, but the basis upon which rests its jurisdiction over artificial highways is the same as that which supports it over the natural highways. Both spring from the power to regulate commerce. The national government has no separate dominion over a river within the limits of a State; its jurisdiction there is like that over land in the same State. Its control over the river is simply by virtue of the fact that it is one of the highways of interstate and international commerce. The great case of Gibbons v. Ogden, 9 Wheat. 1, 197, in which the control of Congress over inland waters was asserted, rested that control on the grant of the power to regulate commerce. . . .

See also Gilman v. Philadelphia, 3 Wall. 713, 725, in which it was said: "Wherever 'commerce among the States' goes, the power of the nation, as represented in this court, goes with it to protect and enforce its rights."

Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on 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, the railroad train and the steamship. 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 today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop. . . .

The petition for a writ of *habeas corpus* is

Denied.

HOUSTON, EAST AND WEST TEXAS RAILWAY CO. v. UNITED STATES.

TEXAS AND PACIFIC RAILWAY CO. v. UNITED STATES.

[THE SHREVEPORT CASE.]

SUPREME COURT OF THE UNITED STATES. 1914.
234 U. S. 342; 58 Lawyers' Ed. 1341.

Appeals from the Commerce Court.

[Complaint was made to the Interstate Commerce Commission that a carrier operating between Dallas, Texas, and Shreveport, Louisiana, made rates eastward from Dallas to other Texas points much lower than the rates from Shreveport to those points, although the distance from Shreveport might be considerably less. For instance, the rate on wagons from Dallas to Marshall, Texas, a distance of 147.7 miles, was 36.8 cents, while from Shreveport to Marshall, a distance of 42 miles, it was 56 cents. The Commission had already declared the interstate rates from Shreveport to be reasonable, but in order to correct the discrimination against Shreveport growing out of the lower rates between Texas points, the Commission ordered the carriers to charge no higher rate from Shreveport to Dallas or any intermediate points than it charged from Dallas toward Shreveport for an equal distance. The railways refused to comply on the ground that their rates between Texas points were fixed by the Texas Railway Commission and that the Interstate Commerce Commission could have no jurisdiction over them. The action of the Commission having been sustained by the Commerce Court (205 Fed. Rep. 380), the railways appealed.]

MR. JUSTICE HUGHES delivered the opinion of the court. . . .

The point of the objection to the order is that, as the discrimination found by the Commission to be unjust arises out of the

relation of intrastate rates, maintained under state authority, to interstate rates that have been upheld as reasonable, its correction was beyond the Commission's power. Manifestly, the order might be complied with, and the discrimination avoided, either by reducing the interstate rates from Shreveport to the level of the competing intrastate rates, or by raising these intrastate rates to the level of the interstate rates, or by such reduction in the one case and increase in the other as would result in equality. But it is urged that, so far as the interstate rates were sustained by the Commission as reasonable, the Commission was without authority to compel their reduction in order to equalize them with the lower intrastate rates. The holding of the Commerce Court was that the order relieved the appellants from further obligation to observe the intrastate rates and that they were at liberty to comply with the Commission's requirements by increasing these rates sufficiently to remove the forbidden discrimination. The invalidity of the order in this aspect is challenged upon two grounds:

(1) That Congress is impotent to control the intrastate charges of an interstate carrier even to the extent necessary to prevent injurious discrimination against interstate traffic; and

(2) That, if it be assumed that Congress has this power, still it has not been exercised, and hence the action of the Commission exceeded the limits of the authority which has been conferred upon it.

First. It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control. Gibbons v. Ogden, 9 Wheat. 1, 196, 224; Brown v. Maryland, 12 Wheat. 419, 446; County of Mobile v. Kimball, 102 U. S. 691, 696, 697; Smith v. Alabama, 124 U. S. 465, 473;

Second Employers' Liability Cases, 223 U. S. 1, 47, 53, 54; Minnesota Rate Cases, 230 U. S. 352, 398, 399.

Congress is empowered to regulate,—that is, to provide the law for the government of interstate commerce; to enact "all appropriate legislation" for its "protection and advancement." (The Daniel Ball, 10 Wall. 557, 564); to adopt measures "to promote its growth and insure its safety" (County of Mobile v. Kimball, *supra*); "to foster, protect, control and restrain" (Second Employers' Liability Cases, *supra*). Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance. As it is competent for Congress to legislate to these ends, unquestionably it may seek their attainment by requiring that the agencies of interstate commerce shall not be used in such manner as to cripple, retard or destroy it. The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the State, and not the Nation, would be supreme within the national field. Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission, 221 U. S. 612, 618; Southern Railway Co. v. United States, 222 U. S. 20, 26, 27; Second Employers' Liability Cases, *supra*, pp. 48, 51; Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 205, 213; Minnesota Rate Cases, *supra*, p. 431; Illinois Central Railroad Co. v. Behrens, 233 U. S. 473. . . .

While these decisions sustaining the Federal power relate to measures adopted in the interest of the safety of persons and property, they illustrate the principle that Congress in the exercise of its paramount power may prevent the common instru-

mentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce. This is not to say that Congress possesses the authority to regulate the internal commerce of a State, as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled.

This principle is applicable here. We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms. That an unjust discrimination in the rates of a common carrier, by which one person or locality is unduly favored as against another under substantially similar conditions of traffic, constitutes an evil is undeniable; and where this evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line, the authority of Congress to prevent it is equally clear. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates. The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention. Nor can the attempted exercise of state authority alter the matter, where Congress has acted, for a State may not authorize a carrier to do that which Congress is entitled to forbid and has forbidden.

It is also to be noted—as the Government has well said in its argument in support of the Commission's order—that the power to deal with the relation between the two kinds of rates, as a relation, lies exclusively with Congress. It is manifest that the States cannot fix the relation of the carriers interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority. . . . It is for Congress to supply the needed correction where the relation between interstate and intrastate rates presents the evil to be corrected, and this it may do completely by reason of its control over the interstate carrier in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

It is also clear that, in removing the injurious discriminations against interstate traffic arising from the relation of intrastate

to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action by interstate carriers which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes.

Having this power, Congress could provide for its execution through the aid of a subordinate body; and we conclude that the order of the Commission now in question cannot be held invalid upon the ground that it exceeded the authority which Congress could lawfully confer. . . .

Affirmed.

MR. JUSTICE LURTON and MR. JUSTICE PITNEY dissent.

NOTE.—As to the jurisdiction of Congress over commerce between points in the same State which at some intermediate stage passes outside the State, see Lord v. Steamship Co. (1880), 102 U. S. 541, and Wilmington Transportation Co. v. California Railroad Commission (1915), 236 U. S. 151 (navigation on the high seas between two ports in California), and Hanley v. Kansas City Southern Ry. (1903), 187 U. S. 617 (transportation between two points in Arkansas by a line of railroad which passed outside the State).

SECTION 3. WHAT IS A REGULATION OF COMMERCE.

THE ADDYSTONE PIPE & STEEL COMPANY v. UNITED STATES.

SUPREME COURT OF THE UNITED STATES. 1899.
175 U. S. 211; 44 Lawyers' Ed. 136.

Appeal from the Court of Appeals for the Sixth Circuit.

This proceeding was commenced in behalf of the United States, under the so-called anti-trust act of Congress, of July 2, 1890, c. 647, 26 Stat. 209, . . . for the purpose of obtaining an injunction perpetually enjoining the six corporations, who were made defendants, and who were engaged in the manufacture, sale and transportation of iron pipe at their respective places of business in the States of their residence, from further acting under or carrying on the combination alleged in the petition to

have been entered into between them, and which was stated to be an illegal and unlawful one, under the act above mentioned, because it was in restraint of trade and commerce among the States, etc. . . .

MR. JUSTICE PECKHAM . . . delivered the opinion of the court. . . .

Assuming, for the purpose of the argument, that the contract in question herein does directly and substantially operate as a restraint upon and as a regulation of interstate commerce, it is yet insisted by the appellants at the threshold of the inquiry that by the true construction of the Constitution, the power of Congress to regulate interstate commerce is limited to its protection from acts of interference by state legislation or by means of regulations made under the authority of the State by some political subdivision thereof, including also Congressional power over common carriers, elevator, gas and water companies, for reasons stated to be peculiar to such carriers and companies, but that it does not include the general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object, and result in a direct and substantial obstruction to or regulation of that commerce.

This argument is founded upon the assertion that the reason for vesting in Congress the power to regulate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation; and the further assertion that the Constitution guarantees liberty of private contract to the citizen at least upon commercial subjects, and to that extent the guaranty operates as a limitation on the power of Congress to regulate commerce. Some remarks are quoted from the opinions of Chief Justice Marshall . . . and from the opinions of other justices of this court, . . . all of which are to the effect that the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation. The further remark is quoted from Railroad Company v. Richmond, 19 Wall. 584, that the power of Congress to regulate commerce was never intended to be exercised so as to interfere with private contracts not designed at the time they were made to create impediments to such commerce. . . .

The reasons which may have caused the framers of the Constitution to repose the power to regulate interstate commerce in

Congress do not, however, affect or limit the extent of the power itself. . . .

Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned.

The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law. It has been held that the word "liberty," as used in the Constitution, was not to be confined to the mere liberty of person, but included, among others, a right to enter into certain classes of contracts for the purpose of enabling the citizen to carry on his business. Allgeyer v. Louisiana, 165 U. S. 578; United States v. Joint Traffic Association, 171 U. S. 505, 572. But it has never been, and in our opinion ought not to be, held that the word included the right of an individual to enter into private contracts upon all subjects, no matter what their nature and wholly irrespective (among other things) of the fact that they would, if performed, result in the regulation of interstate commerce and in the violation of an act of Congress upon that subject. The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the States. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and

substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States. . . .

The private contracts may in truth be as far reaching in their effect upon interstate commerce as would the legislation of a single State of the same character. . . .

What sound reason can be given why Congress should have the power to interfere in the case of the State, and yet have none in the case of the individual? Commerce is the important subject of consideration, and anything which directly obstructs and thus regulates that commerce which is carried on among the States, whether it is state legislation or private contracts between individuals or corporations, should be subject to the power of Congress in the regulation of that commerce. . . .

To the extent that the present decree includes in its scope the enjoining of defendants . . . from combining in regard to contracts for selling pipe in their own State, it is modified, and limited to that portion of the combination or agreement which is interstate in its character. As thus modified, the decree is *Affirmed.*

LOTTERY CASE.

CHAMPION v. AMES.

SUPREME COURT OF THE UNITED STATES. 1903.
188 U. S. 321; 47 Lawyers' Ed. 492.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

[By an act of Congress of March 2, 1895, entitled "An act for the suppression of lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction and laws of the United States," it was provided "That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one State to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert or similar enterprises, offering prizes dependent upon lot or chance, to be

brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one State to another in the same, shall be punishable in [for] the first offense by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both, and in the second and after offenses by such imprisonment only." W. F. Champion was arrested in Chicago and held for trial in the District Court of the Northern District of Texas for having deposited with the Wells-Fargo Express Company for transmission from Dallas, Texas, to Fresno, California, a package containing lottery tickets issued by the Pan-American Lottery Company. Whereupon he sued out a writ of habeas corpus upon the theory that the act of 1895, under which it was proposed to try him, was unconstitutional and void.]

MR. JUSTICE HARLAN delivered the opinion of the court. . . .

We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from State to State, at least by independent carriers, is a regulation of commerce among the several States.

But it is said that the statute in question does not regulate the carrying of lottery tickets from State to State, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one State to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit*, but only to *regulate*. This view was earnestly pressed at the bar by learned counsel, and must be examined.

It is to be remarked that the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In Gibbons v. Ogden it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress in prescribing a particular rule, has exceeded its power under the Constitution. . . .

We have said that the carrying from State to State of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from State to

State is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce,* is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States?

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2, 1895, to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In Phalen v. Virginia, 8 How. 163, 168, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of government, this court said: "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no State may bargain away its power to protect the public morals, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so. Stone v. Mississippi, 101 U. S. 814; Douglas v. Kentucky, 168 U. S. 488.

If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the States is plenary, is complete in itself, and is subject to no limitations

except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one State to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from State to State except the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Constitution embraces the right to be free in the enjoyment of one's faculties; "to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper." Allgeyer v. Louisiana, 165 U. S. 578, 589. But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the States an element that will be confessedly injurious to the public morals.

If it be said that the act of 1895 is inconsistent with the Tenth Amendment, reserving to the States respectively, or to the people, the powers not delegated to the United States, the answer is that the power to regulate commerce among the States has been expressly delegated to Congress.

Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State, but has in view only commerce of that kind among the several States. It has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns the people of the United States. As a State may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those States—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It

said, in effect, that it would not permit the declared policy of the States, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. What was said by this court upon a former occasion may well be here repeated: "The framers of the Constitution never intended that the legislative power of the Nation should find itself incapable of disposing of a subject-matter specifically committed to its charge." *In re* Rahrer, 140 U. S. 545, 562. If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute, and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right. . . .

It is said, however, that if, in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce, that principle leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the States any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one State to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the States. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as are prescribed by the Con-

stitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several States. But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in Gibbons v. Ogden, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments." . . .

The judgment is *Affirmed.*

Mr. Chief Justice Fuller, with whom concur Mr. Justice Brewer, Mr. Justice Shiras, and Mr. Justice Peckham, dissenting. . . .

Note.—For other examples of prohibition as a means of regulation, see United States v. Brig William (1808), 2 Hall's Law Journal, 255 (the Embargo Act); United States v. Holliday (1866), 3 Wallace, 407 (commerce with Indians); Buttfield v. Stranahan (1904), 192 U. S. 470 (exclusion of merchandise); United States v. Delaware & Hudson Ry. (1909), 213 U. S. 366 (carriers forbidden to transport their own products); Hope v. United States (1913), 227 U. S. 308 (transportation of women for immoral purposes).

CHAPTER VIII.

DUE PROCESS OF LAW.

No person shall be . . . deprived of life, liberty, or property without due process of law.

Constitution of the United States, Amendment V.

No State shall . . . deprive any person of life, liberty or property without due process of law.

Constitution of the United States, Amendment XIV, sec. 1.

SECTION 1. GENERAL CONCEPTION OF DUE PROCESS.

TWINING v. STATE OF NEW JERSEY.

SUPREME COURT OF THE UNITED STATES. 1908.
211 U. S. 78; 53 Lawyers' Ed. 97.

Error to the Court of Errors and Appeals of the State of New Jersey.

[The statement of facts and the first part of the opinion are given *ante*, p. 114.]

MR. JUSTICE MOODY . . . delivered the opinion of the court. . . .

The defendants, however, do not stop here. They appeal to another clause of the Fourteenth Amendment, and insist that the self-incrimination, which they alleged the instruction to the jury compelled, was a denial of due process of law. This contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against State action, because a denial of them would be a denial of due process of law. Chicago, Burlington & Quincy Railroad v. Chicago, 166 U. S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. Few phrases of the law are so elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American juris-

prudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise. There are certain general principles well settled, however, which narrow the field of discussion and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words "due process of law" are equivalent in meaning to the words "law of the land," contained in that chapter of Magna Carta, which provides that "no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by lawful judgment of his peers or by the law of the land." Murray v. Hoboken Land Co., 18 How. 272; Davidson v. New Orleans, 96 U. S. 97; Jones v. Robbins, 8 Gray, 329; Cooley, Const. Lim. (7th ed.) 500; McGehee, Due Process of Law, 16. From the consideration of the meaning of the words in the light of their historical origin this court has drawn the following conclusions:

First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. . . . "A process of law," said Mr. Justice Matthews, . . . "which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country." Hurtado v. California, 110 U. S. 516, 528.

Second. It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment. That, said Mr. Justice Matthews, in the same case, p. 529, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." Holden v. Hardy, 169 U. S. 366, 388; Brown v. New Jersey, 175 U. S. 172, 175.

Third. But, consistently with the requirements of due process,

no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government. . . .

The question under consideration may first be tested by the application of these settled doctrines of this court. If the statement of Mr. Justice Curtis, as elucidated in Hurtado v. California, is to be taken literally, that alone might almost be decisive. For nothing is more certain, in point of historical fact, than that the practice of compulsory self-incrimination in the courts and elsewhere existed for four hundred years after the granting of Magna Carta, continued throughout the reign of Charles I (though then beginning to be seriously questioned), gained at least some foothold among the early colonists of this country, and was not entirely omitted at trials in England until the eighteenth century. Wigmore on Evidence, Sec. 2250 (see for the Colonies, note 108); Hallam's Constitutional History of England, ch. VIII, 2 Widdleton's American ed. 37 (describing the criminal jurisdiction of the Court of Star Chamber); Bentham's Rationale of Judicial Evidence, book IX, ch. III, § IV. . . .

The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, state or National, for they are secured otherwise, but the rights fundamental in due process and therefore an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? It has already appeared that, prior to the formation of the American Constitutions, in which the exemption from compulsory self-incrimination was specifically secured, separately, independently, and side by side with the requirement of due process, the doctrine was formed, as other doctrines of the law of evidence have been formed, by the

course of decision in the courts covering a long period of time. Searching further, we find nothing to show that it was then thought to be other than a just and useful principle of law. None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Carta (1215) and could not have been implied in the "law of the land" there secured. The Petition of Right (1629), though it insists upon the right secured by Magna Carta to be condemned only by the law of the land, and sets forth by way of grievance divers violations of it, is silent upon the practice of compulsory self-incrimination, though it was then a matter of common occurrence in all the courts of the realm. The Bill of Rights of the first year of the reign of William and Mary (1689) is likewise silent, though the practice of questioning the prisoner at his trial had not then ceased. The negative argument which arises out of the omission of all reference to any exemption from compulsory self-incrimination in these three great declarations of English liberty (though it is not supposed to amount to a demonstration) is supported by the positive argument that the English Courts and Parliaments, as we have seen, have dealt with the exemption as they would have dealt with any other rule of evidence, apparently without a thought that the question was affected by the law of the land of Magna Carta, or the due process of law which is its equivalent.

We pass by the meager records of the early colonial time, so far as they have come to our attention, as affording light too uncertain for guidance. See Wigmore, § 2250, note 108; Henning's Stat. at Large, 422 (Va., 1677); 1 Winthrop's History of New England, 47, Provincial Act, 4 W. & M. Ancient Charters, Massachusetts, 214. Though it is worthy of note that neither the declaration of rights of the Stamp Act Congress (1765) nor the declaration of rights of the Continental Congress (1774) nor the ordinance for the government of the Northwestern Territory included the privilege in their enumeration of fundamental rights.

But the history of the incorporation of the privilege in an amendment to the National Constitution is full of significance in this connection. . . . The nine States requisite to put the Constitution in operation ratified it without a suggestion of incorporating this privilege. . . .

Thus it appears that four only of the thirteen original States insisted upon incorporating the privilege in the Constitution, and they separately and simultaneously with the requirement of due process of law, and that three States proposing amendments were silent upon this subject. It is worthy of note that two of these four States did not incorporate the privilege in their own constitutions, where it would have had a much wider field of usefulness, until many years after. New York in 1821 and Rhode Island in 1842 (its first constitution). This survey does not tend to show that it was then in this country the universal or even general belief that the privilege ranked among the fundamental and inalienable rights of mankind; and what is more important here, it affirmatively shows that the privilege was not conceived to be inherent in due process of law, but on the other hand a right separate, independent and outside of due process. Congress, in submitting the amendments to the several States, treated the two rights as exclusive of each other. Such also has been the view of the States in framing their own constitutions, for in every case, except in New Jersey and Iowa, where the due process clause or its equivalent is included, it has been thought necessary to include separately the privilege clause. Nor have we been referred to any decision of a state court save one (State v. Height, 117 Iowa, 650), where the exemption has been held to be required by due process of law. The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried.

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. We are not here concerned with due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction, Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S.

34; Old Wayne Life Association v. McDonough, 204 U. S. 8, and that there shall be notice and opportunity for hearing given the parties, Hovey v. Elliott, 167 U. S. 409; Roller v. Holly, 176 U. S. 398; and see Londoner v. Denver, 210 U. S. 373. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has up to this time sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law. Walker v. Sauvinet, 92 U. S. 90; Re Converse, 137 U. S. 624; Caldwell v. Texas, 137 U. S. 692; Leeper v. Texas, 139 U. S. 462; Hallinger v. Davis, 146 U. S. 314; McNulty v. California, 149 U. S. 645; McKane v. Durston, 153 U. S. 684; Iowa Central v. Iowa, 160 U. S. 389; Lowe v. Kansas, 163 U. S. 81; Allen v. Georgia, 166 U. S. 138; Hodgson v. Vermont, 168 U. S. 262; Brown v. New Jersey, 175 U. S. 172; Bolln v. Nebraska, 176 U. S. 83; Maxwell v. Dow, 176 U. S. 581; Simon v. Craft, 182 U. S. 427; West v. Louisiana, 194 U. S. 258; Marvin v. Trout, 199 U. S. 212; Rogers v. Peck, 199 U. S. 425; Howard v. Kentucky, 200 U. S. 164; Rawlins v. Georgia, 201 U. S. 638; Felts v. Murphy, 201 U. S. 123.

Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases proceed upon the theory that, given a court of justice which has jurisdiction and acts, not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. . . .

It is impossible to reconcile the reasoning of these cases and the rule which governed their decision with the theory that an exemption from compulsory self-incrimination is included in the conception of due process of law. Indeed, the reasoning for including indictment by a grand jury and trial by a petit jury in that conception, which has been rejected by this court in Hurtado v. California and Maxwell v. Dow, was historically and in principle much stronger. Clearly appreciating this, Mr. Jus-

tice Harlan, in his dissent in each of these cases, pointed out that the inexorable logic of the reasoning of the court was to allow the States, so far as the Federal Constitution was concerned, to compel any person to be a witness against himself. In Missouri v. Lewis, 101 U. S. 22, Mr. Justice Bradley, speaking for the whole court, said, in effect, that the Fourteenth Amendment would not prevent a State from adopting or continuing the civil law instead of the common law. This dictum has been approved and made an essential part of the reasoning of the decision in Holden v. Hardy, 169 U. S. 387, 389, and Maxwell v. Dow, 176 U. S. 598. The statement excludes the possibility that the privilege is essential to due progress, for it hardly need be said that the interrogation of the accused at his trial is the practice in the civil law.

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient. See Wigmore, Sec. 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before constitutions themselves. Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of National citizenship, but, as has been shown, the decisions of this court have foreclosed that view. There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The States had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not

to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands. They may, if they choose, alter it by legislation, as the people of Maine did when the courts of that State made the same ruling. State v. Bartlett, 55 Maine, 200; State v. Lawrence, 57 Maine, 574; State v. Cleaves, 59 Maine, 298; State v. Banks, 78 Maine, 490, 492; Rev. Stat. ch. 135, § 19.

We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. . . . The authorities upon the question are in conflict. We do not pass upon the conflict because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution. *Judgment affirmed.*

MR. JUSTICE HARLAN, dissenting. . . .

NOTE.—Many writers have sought to trace the phrase "due process of law" to this thirty-ninth (twenty-ninth of Henry III's reissue of 1225) chapter of Magna Charta:

> No freeman shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

Coke's identification of the term "due process" with the term "law of the land" as found in Magna Charta has been generally followed by the courts, though its correctness as a matter of history has been challenged by several scholars. As to the history and meaning of this section of Magna Charta, see Bémont, *Chartes des Libertés Anglaises;* McKechnie, *Magna Carta;* Harcourt, *His Grace the Steward and Trial of Peers;* Adams, *The Origin of the English Constitution;* Pollock and Maitland, *History of English Law Before the Time of Edward I;* Bigelow, *History of Procedure in England.* For an acute and convincing criticism of the older view of Magna Charta see C. H. McIlwain, "Due Process of Law in Magna Charta," *Columbia Law Review,* xiv 27. Whatever the historical relation of the phraseology of Magna Charta and the Fourteenth Amendment may have been, their interpretation has radically differed in that while Magna Charta has been regarded as a restriction upon the executive and the courts, the Fourteenth Amendment was at first thought to be an inhibition only on the State legislatures. It was not until the decision in *Ex parte* Virginia (1880),

100 U. S. 339, that it was clearly held applicable to any agent through which the State might act.

The phrase "due process of law" has also been associated with the doctrine of fundamental rights, operating as an inherent limitation on all legislative power and which was given currency by Lord Coke in Dr. Bonham's Case (1610), 8 Rep. 118*a*:

> It appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void: for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.

This was approved by Lord Hobart in Day v. Savadge (1623), Hobart, 87, where he said:

> Even an Act of Parliament, made against natural equity, as to make a man judge in his own case, is void in itself, for *jura naturæ sunt immutabilia*, and they are *leges legum*.

This dictum, even though supported by the great name of Lord Coke, seems never to have been made the ground for annulling an act of Parliament, and the doctrine itself was expressly disavowed by Mr. Justice Willes, who said in Lee v. Bude and Torrington Ry. (1871), L. R. 6 C. P. 576, 582, that the "dictum stands as a warning rather than as an authority to be followed." In America the doctrine proved useful to the leaders of the Revolution as a justification of resistance to the laws of Parliament, and after the establishment of government under the Constitution courts not infrequently asserted that the legislative power was subject to certain inherent limitations to be found in the fundamental laws of nature or in the maxims of free government. In Calder v. Bull (1798), 3 Dallas, 386, Mr. Justice Chase said:

> I cannot subscribe to the omnipotence of a State Legislature, or think it is absolute and without controul, although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to 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 social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. . . . 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 principles of the social compact, cannot be considered a rightful exercise of legislative authority.

In Fletcher v. Peck (1810), 6 Cranch, 87, 135, Chief Justice Marshall said:

> It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

The same view was expressed by Justice Story in Wilkinson v. Leland (1829), 2 Peters, 627, 657:

> That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.

This doctrine of a supreme fundamental law seems to have been in the mind of the court in Webster v. Reid (1851), 11 Howard, 437, and in Hays v. Pacific Mail Steamship Co. (1854), 17 Howard, 596. In neither case was the decision based on any constitutional provision, and in Webster v. Reid, counsel for the appellant expressly argued that the statute involved "was made in subversion of principles of common right, and therefore void." 11 Howard, 453. Since the adoption of the Fourteenth Amendment the doctrine of fundamental right has often been referred to by the Supreme Court, but has seldom been made the basis of decision. It has been merged in the conception of due process of law. A legislative act which would formerly have been condemned as a violation of natural right would now be condemned because contrary to the due process clause of the Federal Constitution. For examples of the present treatment of such cases as Webster v. Reid, see Dewey v. Des Moines (1899), 173 U. S. 193, and Roller v. Holly (1900), 176 U. S. 398. The older writers frequently mentioned the transfer of A's property to B by a legislative enactment as an example of an act that would be void because against common right and the fundamental law. In Davidson v. New Orleans (1877), 96 U. S. 77, 102, the Supreme Court considered such a statute and said, with cautious timidity, that "it seems to us" that it "would, if effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision." But as the court became more familiar with the idea, it adopted a bolder tone, until finally, in Chicago, Burlington & Quincy Ry. v. Chicago (1897), 166 U. S. 226, 241, it said:

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument.

The phrase "due process of law" occurs in both the Fifth and Fourteenth Amendments. The first eight amendments apply only to the Federal Government, Barron v. Baltimore (1833), 7 Peters, 243, but the Fourteenth Amendment has been held to furnish the same protection against arbitrary action by the States as is afforded by the Fifth Amendment against similar action by the Federal Government. Hibben v. Smith (1903), 191 U. S. 310, 325. The fact that other personal rights, such as the right to compensation for private property taken for a public use, are specifically enumerated in the Fifth Amendment does not exclude them from the term "due process" as used in the Fourteenth Amendment. Chicago, Burlington & Quincy Ry. v. Chicago (1897), 166 U. S. 226.

The courts have been as reluctant to undertake a comprehensive definition of the phrase "due process of law" as of the phrase "privilege and immunities of citizens." In numerous decisions they have cited the much-quoted passage from Daniel Webster's argument in the Dartmouth College Case, 4 Wheaton, 518, 581:

> By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land.

INTERNATIONAL HARVESTER COMPANY OF AMERICA v. COMMONWEALTH OF KENTUCKY.

SUPREME COURT OF THE UNITED STATES. 1914.
234 U. S. 216; 58 Lawyers' Ed. 1284.

Error to the Court of Appeals of the State of Kentucky.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was prosecuted, convicted and fined in three different counties for having entered into an agreement with other named companies for the purpose of controlling the price of harvesters, etc., manufactured by them and of enhancing it above their real value; and for having so fixed and enhanced the price, and for having sold their harvesters, etc., at a price in excess of their real value, in pursuance of the agreement alleged. The judgments were affirmed by the Court of Appeals. 147 Kentucky, 564. Id. 795. 148 Kentucky, 572. The plaintiff in error saved its rights under the Fourteenth Amendment and brought the cases here. . . .

When the Court of Appeals came to deal with the act of 1890,

the constitution of 1891, and the act of 1906, it reached the conclusion, which now may be regarded as the established construction of the three taken together, that by interaction and to avoid questions of constitutionality, they were to be taken to make any combination for the purpose of controlling prices lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article. Owen County Burley Tobacco Society v. Brumback, 128 Kentucky, 137, 151. Commonwealth v. International Harvester Co. of America, 131 Kentucky, 551, 568, 571-573. International Harvester Co. of America v. Commonwealth, 137 Kentucky, 668. . . .

The plaintiff in error contends that the law as construed offers no standard of conduct that it is possible to know. To meet this, in the present and earlier cases, the real value is declared to be "its market value under fair competition, and under normal market conditions." 147 Kentucky, 566. Commonwealth v. International Harvester Co. of America, 131 Kentucky, 551, 576. International Harvester Co. of America v. Commonwealth, 137 Kentucky, 668, 677, 678. We have to consider whether in application this is more than an illusory form of words, when nine years after it was incorporated, a combination invited by the law is required to guess at its peril what its product would have sold for if the combination had not existed and nothing else violently affecting values had occurred. It seems that since 1902 the price of the machinery sold by the plaintiff in error has risen from ten to fifteen per cent. The testimony on its behalf showed that meantime the cost of materials used had increased from 20 to 25 per cent and labor 27½ per cent. Whatever doubt there may be about the exact figures we hardly suppose the fact of a rise to be denied. But in order to reach what is called the real value, a price from which all effects of the combination are to be eliminated, the plaintiff in error is told that it cannot avail itself of the rise in materials because it was able to get them cheaper through one of the subsidiary companies of the combination, and that the saving through the combination more than offset all the rise in cost.

This perhaps more plainly concerns the justice of the law in its bearing upon the plaintiff in error, when compared with its operation upon tobacco raisers who are said to have doubled or trebled their prices, than on the constitutional question proposed. But it also concerns that, for it shows how impossible it is to think away the principal facts of the case as it exists and say

what would have been the price in an imaginary world. Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would seem with exclusion also of any increased efficiency in the machines but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand. . . .

If business is to go on, men must unite to do it and must sell their wares. To compel them to guess on peril of indictment what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess. *Judgments reversed.*

Mr. Justice McKenna and Mr. Justice Pitney dissent.

Section 2. Due Process in Procedure.

HURTADO v. CALIFORNIA.

Supreme Court of the United States. 1884.
110 U. S. 516; 28 Lawyers' Ed. 232.

In error to the Supreme Court of California.

The Constitution of the State of California, adopted in 1879, in article 1, section 8, provides as follows:

"Offenses heretofore required to be prosecuted by indictment

shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county." . . .

[Hurtado, having been charged with murder by an information filed with the District Attorney, was tried by jury, convicted, and sentenced to be hanged. Thereupon he filed certain objections to the execution of the sentence, one of which recited "that the said plaintiff in error had been held to answer for the said crime of murder by the district attorney of the said county of Sacramento, upon an information filed by him, and had been tried and illegally found guilty of the said crime, without any presentment or indictment of any grand or other jury, and that the judgment rendered upon the alleged verdict of the jury in such case was and is void, and if executed would deprive the plaintiff in error of his life or liberty without due process of law."]

Mr. Justice Matthews delivered the opinion of the court. After reciting the facts in the foregoing language, he continued:

It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the Fourteenth Article of Amendment of the Constitution of the United States which is in these words:

"Nor shall any State deprive any person of life, liberty, or property without due process of law."

The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that "due process of law," when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the Constitution of the United States, and which accordingly it is forbidden to the States respectively to dispense with in the administration of criminal law. . . . [Here follow citations from Kalloch v. Superior Court, 56 Cal. 229, and Rowan v. The State, 30 Wis. 129.]

On the other hand, it is maintained on behalf of the plaintiff in error that the phrase "due process of law" is equivalent to "law of the land," as found in the 29th chapter of Magna Charta; that by immemorial usage it has acquired a fixed, definite, and technical meaning; that it refers to and includes, not only the general principles of public liberty and private right, which lie at the foundation of all free government, but the very

institutions which, venerable by time and custom, have been tried by experience and found fit and necessary for the preservation of those principles, and which, having been the birthright and inheritance of every English subject, crossed the Atlantic with the colonists and were transplanted and established in the fundamental laws of the State; that, having been originally introduced into the Constitution of the United States as a limitation upon the powers of the government, brought into being by that instrument, it has now been added as an additional security to the individual against oppression by the States themselves; that one of these institutions is that of the grand jury, an indictment or presentment by which against the accused in cases of alleged felonies is an essential part of due process of law, in order that he may not be harassed or destroyed by prosecutions founded only upon private malice or popular fury.

. . .

The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues. And while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that code which survived the Roman Empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice,—*suum cuique tribuere.* There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.

The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament; so that bills of attainder, *ex post facto* laws, laws declaring forfeitures of

estates, and other arbitrary acts of legislation which occur so frequently in English history, were never regarded as inconsistent with the laws of the land; for notwithstanding what was attributed to Lord Coke in Bonham's Case, 8 Rep. 115, 118a, the omnipotence of Parliament over the common law was absolute, even against common right and reason. The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments, and the provisions of Magna Charta were incorporated into Bills of Rights. They were limitations upon all the powers of government, legislative as well as executive and judicial.

It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

Restraints that could be fastened upon executive authority with precision and detail, might prove obstructive and injurious when imposed on the just and necessary discretion of legislative power; and, while in every instance, laws that violated express and specific injunctions and prohibitions might, without embarrassment, be judicially declared to be void, yet, any general principle or maxim, founded on the essential nature of law, as a just and reasonable expression of the public will and of government, as instituted by popular consent and for the general good, can only be applied to cases coming clearly within the scope of its spirit and purpose, and not to legislative provisions merely establishing forms and modes of attainment. Such regulations, to adopt a sentence of Burke's, "may alter the mode and application but have no power over the substance of original justice." Tract on the Popery Laws, 6 Burke's Works, ed. Little & Brown, 323.

Such is the often-repeated doctrine of this court. . . . [Here are given quotations from Munn v. Illinois, 94 U. S. 113; Walker v. Sauvinet, 92 U. S. 90; Kennard v. Louisiana, 92 U. S. 480; Davidson v. New Orleans, 96 U. S. 97.]

We are to construe this phrase in the Fourteenth Amendment by the *usus loquendi* of the Constitution itself. The same words are contained in the Fifth Amendment. That article makes specific and express provision for perpetuating the institution of the grand jury, so far as relates to prosecutions for the more aggravated crimes under the laws of the United States. It declares that:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be witness against himself." [It then immediately adds]: "Nor be deprived of life, liberty, or property without due process of law."

According to a recognized canon of interpretation, especially applicable to formal and solemn instruments of constitutional law, we are forbidden to assume, without clear reason to the contrary, that any part of this most important amendment is superfluous. The natural and obvious inference is, that in the sense of the Constitution, "due process of law" was not meant or intended to include, *ex vi termini*, the institution and procedure of a grand jury in any case. The conclusion is equally irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent; and that if in the adoption of that amendment it had been part of its purpose to perpetuate the institution of the grand jury in all the States, it would have embodied, as did the Fifth Amendment, express declarations to that effect. Due process of law in the latter refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the Fourteenth Amendment, by parity of reason, it refers to that law of the land in each State which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of lib-

erty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. . . .

But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, "the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its objects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government. . . .

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law. . . .

Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment

by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law. It is, as we have seen, an ancient proceeding at common law, which might include every case of an offense of less grade than a felony, except misprision of treason; and in every circumstance of its administration, as authorized by the statute of California, it carefully considers and guards the substantial interest of the prisoner. It is merely a preliminary proceeding, and can result in no final judgment, except as a consequence of a regular judicial trial, conducted precisely as in cases of indictments.

In reference to this mode of proceeding at the common law, and which he says "is as ancient as the common law itself," Blackstone adds (4 Com. 305):

"And as to those offenses in which informations were allowed as well as indictments, so long as they were confined to this high and respectable jurisdiction, and were carried on in a legal and regular course in his Majesty's Court of King's Bench, the subject had no reason to complain. The same notice was given, the same process was issued, the same pleas were allowed, the same trial by jury was had, the same judgment was given by the same judges, as if the prosecution had originally been by indictment."

For these reasons, finding no error therein, the judgment of the Supreme Court of California is

Affirmed.

MR. JUSTICE HARLAN, dissenting. . . .

NOTE.—The requirement of due process does not necessitate the adoption of any particular form of procedure, but leaves to each State a wide latitude of choice, "subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." Brown v. New Jersey (1899), 175 U. S. 172, 175. The procedure may vary with the nature of the case. For the collection of taxes and other debts due to the government, the summary process sanctioned by long usage in England and the United States has been held valid, Murray v. Hoboken Land Co. (1856), 18 Howard, 272; King v. Mullins (1898), 171 U. S. 404; but a summary process must not be an arbitrary one, McMillen v. Anderson (1877), 95 U. S. 37. Duties of a quasi-judicial character may be devolved upon administrative boards, for "due process is not necessarily judicial process," Reetz v. Michigan (1903), 188 U. S. 505, 507. So the determination of a question of sanity (Nobles v. Georgia [1897], 168 U. S. 398), or of the citizenship of a person desiring to enter the United States (United States v. Ju Toy [1905], 198 U. S. 253), or whether a given importation of tea is entitled to

admission to the country (Buttfield v. Stranahan [1904], 192 U. S. 470), or whether the mail of a given business house may be excluded from the post-office because of fraud (Public Clearing House v. Coyne [1904], 194 U. S. 497), may be entrusted to the decision of an administrative board or officer, and such decision, if based upon evidence (American School of Magnetic Healing v. McAnnulty [1902], 187 U. S. 94) may be final. But an appeal may always be taken to the courts to determine whether the action taken was within the jurisdiction conferred and whether the fundamental principles inherent in the conception of due process of law have been observed. Yamataya v. Fisher, (1903), 189 U. S. 86. On the conclusiveness of the determinations of administrative officials, see an excellent treatment by Powell in "Conclusiveness of Administrative Determinations in the Federal Government," *American Political Science Review*, I, 583, and Willoughby, *The Constitutional Law of the United States*, II, ch. lxiv.

What evidence may be received (Adams v. New York [1904], 192 U. S. 585); whether an appeal to a higher court shall be permitted (McKane v. Durston [1894], 153 U. S. 684); whether the accused may demand to be confronted by the witnesses against him (West v. Louisiana [1904], 194 U. S. 258); whether a jury trial shall be by a common law jury or by a lesser jury (Maxwell v. Dow [1900], 176 U. S. 581); or apparently whether there need be a jury trial at all in a State court (Hawaii v. Mankichi [1903], 190 U. S. 197; Dorr v. United States [1904], 195 U. S. 138), are all questions to be determined by the several States.

A good general statement as to procedural requirements was made by Mr. Justice Field in Hagar v. Reclamation District (1884), 111 U. S. 701, 708:

> By due process of law is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means therefore that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.

Section 3. Due Process as to Liberty and Property.

WADLEY SOUTHERN RAILWAY COMPANY v. GEORGIA.

Supreme Court of the United States. 1915.
235 U. S. 651; 59 Lawyers' Ed. 00.

Error to the Supreme Court of the State of Georgia.

[The legislature of Georgia enacted a law creating a Railroad Commission and providing a penalty of not more than five

thousand dollars for the violation by any person or corporation of any lawful order of the Commission. Each day that the violation continued was declared to be a separate offense. The Wadley Southern Railway Company was ordered by the Commission on March 12, 1910, to desist from certain discriminations between shippers, and a copy of the order was delivered to it on March 14. The company took no steps to test the validity of the order in the courts, but on April 4 it notified the Commission that it would decline to comply therewith on the ground that it was void. On May 26, 1910, the State instituted proceedings to enforce the penalty. The company's defense is indicated in the opinion.]

MR. JUSTICE LAMAR . . . delivered the opinion of the court. . . .

The Wadley Southern insists, however, that even if the Commission had the power to make the order, the judgment imposing a fine of $1,000 for its violation should nevertheless be set aside for the reason that the statute—authorizing so enormous a penalty as $5,000 a day for violating lawful orders of the Commission—operated to prevent an appeal to the courts by the carrier for the purpose of determining whether the order was lawful, and therefore binding; or arbitrary and unreasonable, and therefore invalid. In support of this contention it cites Ex parte Young, 209 U. S. 123, 163; Willcox v. Consolidated Gas Co., 212 U. S. 19, 53. . . .

This contention would have been well founded if this and other hearings of a like nature before the Commission had resulted in orders which had the characteristics of a final judgment. But this was not so, for they were not conclusive. Chicago &c. Ry. v. Minnesota, 134 U. S. 418, 458. Their lawfulness was treated by the Georgia court in the present case as open to inquiry, when the Company was sued for the penalty. The question of their validity was also open to inquiry, in equity proceedings, in the state court, where they would have been set aside if found to be arbitrary and unreasonable, or to have violated some statutory or constitutional right. Railroad Commission v. Louis. & Nash. R. R., 140 Georgia, 817 (6a), 836; State of Georgia v. Western & Atlantic R. R., 138 Georgia, 835; Southern Ry. v. Atlanta Sand Co., 135 Georgia, 35, 50. Such orders were also subject to attack in the Federal courts on the ground that the party affected had been unconstitutionally deprived of property. Louis. & Nash. R. R. v. Garrett, 231 U. S. 298, 313, and cases

cited. And this right to a judicial determination exists whether the deprivation is by a rate statute—passed without a hearing (as in the Young and Consolidated Gas Cases); or by administrative orders of a Commission made after a hearing (as in the Garrett Case, *supra*). For rates made by the General Assembly or administrative orders made by a Commission are both legislative in their nature (Garrett Case, *supra;* Grand Trunk R. R. Co. v. Indiana Railroad Commission, 221 U. S. 400, 403) and any party affected by such legislative action is entitled, by the due process clause, to a judicial review of the question as to whether he has been thereby deprived of a right protected by the Constitution. Chicago &c. Ry. v. Minnesota, 134 U. S. 418, 458; Chicago &c. Ry. v. Tompkins, 176 U. S. 167, 174; Prentis v. Atlantic Coast Line, 211 U. S. 210; Missouri Pacific Ry. v. Nebraska, 217 U. S. 196, 207; Oregon R. R. & Nav. Co. v. Fairchild, 224 U. S. 510; San Joaquin Co. v. Stanislaus County, 233 U. S. 459; Bacon v. Rutland R. R., 232 U. S. 134; Detroit &c. R. R. v. Michigan R. R. Com., 235 U. S. 402.

The methods by which this right to a judicial review are secured vary in different jurisdictions. . . . But in whatever method enforced, the right to a judicial review must be substantial, adequate, and safely available; but that right is merely nominal and illusory if the party to be affected can appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality rather than to ask for the protection of the law. . . .

As statutes establishing Railroad Commissions and providing penalties for violations of legislative orders are of recent origin, the cases discussing the subject are comparatively few. See Mercantile Trust Co. v. Tex. & Pacif. Ry., 51 Fed. Rep. 529 (4), 549 (14-15) (1892); Louis. & Nash. R. R. v. McChord, 103 Fed. Rep. 216, 225 (1900); Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 101 (1901); Consolidated Gas. Co. v. Mayer, 146 Fed. Rep. 150, 154 (1906); Ex parte Wood, 155 Fed. Rep. 190 (1907); Consolidated Gas Co. v. New York, 157 Fed. Rep. 849 (1907); Ex parte Young, 209 U. S. 123 (1908); Willcox v. Consolidated Gas Co., 212 U. S. 19, 53 (1909); Missouri Pacific Ry. v. Nebraska, 217 U. S. 196, 207 (1910) (building spur tracks); Missouri Pacific Ry. v. Tucker, 230 U. S. 340, 349 (1913); Bonnett v. Vallier, 136 Wis. 193 (15, 16); Coal & Coke Ry. v. Conley, 67 W. Va. 129, 132, and the present case of Wadley Southern Ry. v. State of Georgia, 137 Ga. 497.

These cases do not proceed upon the idea that there is any

want of power to prescribe penalties heavy enough to compel obedience to administrative orders, but they are all based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. Their legality is not apparent on the face of such orders, but depends upon a showing of extrinsic facts. A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality is, in its nature, somewhat akin to an *ex post facto* law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid. . . .

The matter was elaborately discussed, most carefully considered, and finally decided in Ex parte Young, 209 U. S. 123, where a statute fixed rates, and, though it afforded no opportunity for a judicial hearing to determine whether the rates were confiscatory, yet imposed heavy and cumulative penalties for collecting other than those statutory rates. . . .

It was in the light of the fact that the penalty was imposed for charging other than those statutory rates, whose reasonableness was a matter of doubt and uncertainty, that this court in the Young Case, speaking through Mr. Justice Peckham, pointed out that a law which in terms or by the operation of deterrent penalties made statutes or orders of a commission conclusive as to the sufficiency of rates would be unconstitutional. He summed up the discussion as follows (209 U. S. p. 147): "It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the Company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the Company from seeking judicial construction of laws which deeply affect its rights."

Like views were expressed as to the invalidity of the heavy penalties involved in Willcox v. Consolidated Gas Co., 212 U. S. 19, 53. . . .

In the light of this unbroken line of authorities, therefore, a statute like the one here involved (under which penalties of $5,000 a day could be imposed for violating orders of the Commission) would be void if access to the courts to test the constitutional validity of the requirement was denied; or, if the right of review actually given was one of which the carrier could not safely avail itself. . . .

Giving then Sec. 2625 that construction which makes it constitutional and it appears that the laws of Georgia gave to the Wadley Southern R. R. Co. the right to a judicial review of the order of March 12, 1910, by a suit against the Commission.

The only question then left for determination is whether in view of such right, the penalty can be collected for the violation of an order not known to be valid at the date of the disobedience sought to be punished. On that question, little can be found in the books. But on principle, and on the authority of all that has been said on the subject, there is no room to doubt the power of the State to impose a punishment heavy enough to secure obedience to such orders after they have been found to be lawful; nor to impose a penalty for acts of disobedience, committed after the carrier had ample opportunity to test the validity of administrative orders and failed so to do. . . .

If the Wadley Southern Railroad Company had availed itself of that right, and—with reasonable promptness—had applied to the courts for a judicial review of the order, and if, on such hearing, it had been found to be void, no penalties could have been imposed for past or future violations. If, in that proceeding, the order had been found to be valid, the carrier would thereafter have been subject to penalties for any subsequent violations of what had thus been judicially established to be a lawful order—though not so in respect of violations prior to such adjudication.

But, where, as here, after reasonable notice of the making of the order, the carrier failed to resort to the safe, adequate and available remedy by which it could test in the courts its validity, and preferred to make its defense by attacking the validity of the order when sued for the penalty, it is subject to the penalty when that defense, as here, proved to be unsuccessful.

The judgment of the Supreme Court of Georgia is

Affirmed.

NOTE.—As to the historical meaning of the word liberty, see an article by C. E. Shattuck on "The Meaning of the Term 'Liberty' in Federal and State Constitutions" in *Harvard Law Review*, iv, 365. As to the judicial interpretation of the word, see Allgeyer v. Louisiana (1897), 165 U. S. 578, where the cases are well summarized, and Jacobson v. Massachusetts (1905), 197 U. S. 11, an excellent discussion of the relation of personal liberty and the police power. See also Freund, *The Police Power*, chs. xxi-xxiii, and Cooley, *Constitutional Limitations*.

COPPAGE v. STATE OF KANSAS.

SUPREME COURT OF THE UNITED STATES. 1915.
236 U. S. 1; 59 Lawyers' Ed. 00.

Error to the Supreme Court of the State of Kansas.

[The legislature of Kansas in 1903 passed an act making it unlawful for any individual, firm, or corporation, or any agent thereof "to coerce, require, demand or influence any person or persons to enter into any agreement . . . not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such individual, firm or corporation." Hedges, a switchman in the employ of the Frisco Railway, having refused to sign an agreement to withdraw from the Switchmen's Union while he remained in the service of the Frisco Company was dismissed by his superintendent, Coppage, who was thereupon fined for violation of the statute. His conviction was sustained by the Supreme Court of Kansas, 87 Kansas, 752, two judges dissenting.]

MR. JUSTICE PITNEY delivered the opinion of the court. . . .

In Adair v. United States, 208 U. S. 161, this court had to deal with a question not distinguishable in principle from the one now presented. Congress in Sec. 10 of an act of June 1, 1898, entitled "An Act concerning carriers engaged in interstate commerce and their employés" (c. 370, 30 Stat. 424, 428), had enacted "That any employer subject to the provisions of this Act and any officer, agent, or receiver of such employer who shall require any employé or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or verbal, not to become or remain a member of any labor corporation, association or organization; or shall

threaten any employé with loss of employment, or shall unjustly discriminate against any employé because of his membership in such labor corporation, association or organization . . . is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof . . . shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars." Adair was convicted upon an indictment charging that he, as agent of a common carrier subject to the provisions of the Act, unjustly discriminated against a certain employé by discharging him from the employ of the carrier because of his membership in a labor organization. The court held that portion of the Act upon which the conviction rested to be an invasion of the personal liberty as well as of the right of property guaranteed by the Fifth Amendment, which declares that no person shall be deprived of liberty or property without due process of law. Speaking by Mr. Justice Harlan the court said (208 U. S. p. 174): "While, as already suggested, the right of liberty and property guaranteed by the Constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person, against his will, to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employé. . . . In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

Unless it is overruled, this decision is controlling upon the present controversy; for if Congress is prevented from arbitrary interference with the liberty of contract because of the "due process" provision of the Fifth Amendment, it is too clear for argument that the States are prevented from the like interference by virtue of the corresponding clause of the Fourteenth

Amendment; and hence if it be unconstitutional for Congress to deprive an employer of liberty or property for threatening an employé with loss of employment or discriminating against him because of his membership in a labor organization, it is unconstitutional for a State to similarly punish an employer for requiring his employé, as a condition to securing or retaining employment, to agree not to become or remain a member of such an organization while so employed.

It is true that, while the statute that was dealt with in the Adair Case contained a clause substantially identical with the Kansas act now under consideration—a clause making it a misdemeanor for an employer to require an employé or applicant for employment, as a condition of such employment, to agree not to become or remain a member of a labor organization,—the conviction was based upon another clause, which related to discharging an employé because of his membership in such an organization; and the decision, naturally, was confined to the case actually presented for decision. . . .

The constitutional right of the employer to discharge an employé because of his membership in a labor union being granted, can the employer be compelled to resort to this extreme measure? May he not offer to the employé an option, such as was offered in the instant case, to remain in the employment if he will retire from the union; to sever the former relationship only if he prefers the latter? Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate upon what terms only he will consent to the inception, or to the continuance, of that relationship? . . . Can the right of making contracts be enjoyed at all, except by parties coming together in an agreement that requires each party to forego, during the time and for the purpose covered by the agreement, any inconsistent exercise of his constitutional rights?

These queries answer themselves. The answers, as we think, lead to a single conclusion: Under constitutional freedom of contract, whatever either party has the right to treat as sufficient ground for terminating the employment, where there is no stipulation on the subject, he has the right to provide by insisting that a stipulation respecting it shall be a *sine qua non* of the inception of the employment, or of its continuance if it be terminable at will. It follows that this case can not be distinguished from Adair v. United States. . . .

We are now asked, in effect, to overrule it; and in view of the importance of the issue we have re-examined the question from

the standpoint of both reason and authority. As a result, we are constrained to reaffirm the doctrine there applied. Neither the doctrine nor this application of it is novel; we will endeavor to re-state some of the grounds upon which it rests. The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money.

An interference with this liberty so serious as that now under consideration, and so disturbing of equality of right, must be deemed to be arbitrary, unless it be supportable as a reasonable exercise of the police power of the State. But, notwithstanding the strong general presumption in favor of the validity of state laws, we do not think the statute in question, as construed and applied in this case, can be sustained as a legitimate exercise of that power. To avoid possible misunderstanding, we should here emphasize, what has been said before, that so far as its title or enacting clause expresses a purpose to deal with coercion, compulsion, duress, or other undue influence, we have no present concern with it, because nothing of that sort is involved in this case. . . . But, in this case, the Kansas court of last resort has held that Coppage, the plaintiff in error, is a criminal punishable with fine or imprisonment under this statute simply and merely because, while acting as the representative of the Railroad Company and dealing with Hedges, an employé at will and a man of full age and understanding, subject to no restraint or disability, Coppage insisted that Hedges should freely choose whether he would leave the employ of the Company or would agree to refrain from association with the union while so employed. This construction is, for all purposes of our jurisdiction, conclusive evidence that the State of Kansas intends by this legislation to punish conduct such as that of Coppage, although entirely devoid of any element of coercion, compulsion, duress, or undue influence, just as certainly as it intends to punish coercion and the like. But, when a party appeals to this

court for the protection of rights secured to him by the Federal Constitution, the decision is not to depend upon the form of the state law, nor even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the State; and upon these matters this court cannot, in the proper performance of its duty, yield its judgment to that of the state court. St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362, and cases cited. Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. "Its true character cannot be changed by its collocation," as Mr. Justice Grier said in the Passenger Cases, 7 How. 283, 458. It is equally clear, we think, that to punish an employer or his agent for simply proposing certain terms of employment, under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose of repressing coercion, duress, and undue influence. Nor can a State, by designating as "coercion" conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard. . . .

Laying aside, therefore, as immaterial for present purposes, so much of the statute as indicates a purpose to repress coercive practices, what possible relation has the residue of the Act to the public health, safety, morals or general welfare? None is suggested, and we are unable to conceive of any. The Act, as the construction given to it by the state court shows, is intended to deprive employers of a part of their liberty of contract, to the corresponding advantage of the employed and the upbuilding of the labor organizations. But no attempt is made, or could reasonably be made, to sustain the purpose to strengthen these voluntary organizations, any more than other voluntary associations of persons, as a legitimate object for the exercise of the police power. They are not public institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare. If they were, a different question would be presented.

As to the interest of the employed, it is said by the Kansas Supreme Court (87 Kansas, p. 759) to be a matter of common

knowledge that "employés, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts of purchase thereof." No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employé. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question of whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a State shall not "deprive any person of life, liberty or property without due process of law," gives to each of these an equal sanction; it recognizes "liberty" and "property" as co-existent human rights, and debars the States from any unwarranted interference with either. . . .

We need not refer to the numerous and familiar cases in which this court has held that the police power may properly be exercised for preserving the public health, safety, morals, or general welfare, and that such police regulations may reasonably limit the enjoyment of personal liberty, including the right of making contracts. . . . An evident and controlling distinction is this: that in those cases it had been held permissible for the States to adopt regulations fairly deemed necessary to secure some object directly affecting the public welfare, even though the enjoyment of private rights of liberty and property be thereby incidentally hampered; while in that portion of the Kansas statute which is now under consideration—that is to say, aside from coercion, etc.—there is no object or purpose, expressed or implied, that is claimed to have reference to health, safety, morals, or public welfare, beyond the supposed desirability of leveling inequalities of fortune by depriving one who has property of some part of what is characterized as his "financial inde-

pendence." . . . The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare," and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment. . . .

Of course we do not intend to say, nor to intimate, anything inconsistent with the right of individuals to join labor unions, nor do we question the legitimacy of such organizations so long as they conform to the laws of the land as others are required to do. Conceding the full right of the individual to join the union, he has no inherent right to do this and still remain in the employ of one who is unwilling to employ a union man, any more than the same individual has a right to join the union without the consent of that organization. Can it be doubted that a labor organization—a voluntary association of working men—has the inherent and constitutional right to deny membership to any man who will not agree that during such membership he will not accept or retain employment in company with non-union men? Or that a union man has the constitutional right to decline proffered employment unless the employer will agree not to employ any non-union men? . . . And can there be one rule of liberty for the labor organization and its members, and a different and more restrictive rule for employers? We think not; and since the relation of employer and employé is a voluntary relation, as clearly as is that between the members of a labor organization, the employer has the same inherent right to prescribe the terms upon which he will consent to the relationship, and to have them fairly understood and expressed in advance. . . .

The liberty of making contracts does not include a liberty to procure employment from an unwilling employer, or without a fair understanding. Nor may the employer be foreclosed by legislation from exercising the same freedom of choice that is the right of the employé.

To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment upon any other; for "It takes two to make a bargain." Having accepted employment on those terms, the man is still free to join the union when the period of employment expires; or, if employed at will, then at any time upon simply quitting the employment. And, if

bound by his own agreement to refrain from joining during a stated period of employment, he is in no different situation from that which is necessarily incident to term contracts in general. For constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he is not free to break it without accountability. Freedom of contract, from the very nature of the thing, can be enjoyed only by being exercised; and each particular exercise of it involves making an engagement which, if fulfilled, prevents for the time any inconsistent course of conduct. . . .

Judgment reversed. . . .

MR. JUSTICE HOLMES, dissenting. . . .

MR. JUSTICE DAY, with whom MR. JUSTICE HUGHES concurs, dissenting. . . .

NOTE.—Accord: United States v. Scott (1906), 148 Fed. 431; Goldfield Consolidated Mines Co. v. Goldfield Miners' Union (1908), 159 Fed. 500; State v. Julow (1895), 129 Mo. 163; State ex rel. Zillmer v. Kreutzberg (1902), 114 Wis. 530; State ex rel. Smith v. Daniels (1912), 118 Minn. 155; In re Berger (1912), 33 Ohio C. C. 289.

CHAPTER IX.

THE EQUAL PROTECTION OF THE LAWS.

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
Constitution of the United States, Amendment XIV, sec 1.

Section 1. Race Discrimination.

STRAUDER v. WEST VIRGINIA.

Supreme Court of the United States. 1879.
100 U. S. 303; 25 Lawyers' Ed. 664.

Error to the Supreme Court of Appeals of the State of West Virginia.

[The plaintiff in error, a colored man, was indicted for murder in the Circuit Court of Ohio County, in West Virginia, on the 20th of October, 1874, and upon trial was convicted and sentenced, and his conviction was affirmed by the Supreme Court of the State. The present case is a writ of error to that court, the chief assignment of error being that the prisoner was convicted without due process of law since the laws of West Virginia excluded the members of his race from jury service.]

Mr. Justice Strong delivered the opinion of the court. . . .

In this court, several errors have been assigned, and the controlling questions underlying them all are, first, whether, by the Constitution and laws of the United States, every citizen of the United States has a right to a trial of an indictment against him by a jury selected and impaneled without discrimination against his race or color, because of race or color; and, second, if he has such a right, and is denied its enjoyment by the State in which he is indicted, may he cause the case to be removed into the Circuit Court of the United States?

It is to be observed that the first of these questions is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color, but it is

whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury. . . .

This [the Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the Slaughter-House Cases (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. Their training had left them mere children, and as such they needed the protection which a wise government extends to those who are unable to protect themselves. They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. . . . [Here follow citations from the Slaughter-House Cases, 16 Wallace, 36.]

If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make

or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

That the West Virginia statute respecting juries—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men. If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

The right to a trial by jury is guaranteed to every citizen of

West Virginia by the Constitution of that State, and the constitution of juries is a very essential part of the protection such a mode of trial is intended to secure. The very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds. Blackstone, in his Commentaries, says, "The right of trial by jury, or the country, is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the Great Charter." It is also guarded by statutory enactments intended to make impossible what Mr. Bentham called "packing juries." It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection.

In view of these considerations, it is hard to see why the statute of West Virginia should not be regarded as discriminating against a colored man when he is put upon trial for an alleged criminal offense against the State. It is not easy to comprehend how it can be said that while every white man is entitled to a trial by a jury selected from persons of his own race or color, or, rather, selected without discrimination against his color, and a negro is not, the latter is equally protected by the law with the former. Is not protection of life and liberty against race or color prejudice a right, a legal right, under the constitutional amendment? And how can it be maintained that

compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?

We do not say that within the limits from which it is not excluded by the amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the Fourteenth Amendment was ever intended to prohibit this. Looking at its history, it is clear it had no such purpose. Its aim was against discrimination because of race or color. As we have said more than once, its design was to protect an emancipated race, and to strike down all possible legal discriminations against those who belong to it. To quote further from 16 Wall. *supra:* "In giving construction to any of these articles [amendments], it is necessary to keep the main purpose steadily in view." "It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other." We are not now called upon to affirm or deny that it had other purposes.

The Fourteenth Amendment makes no attempt to enumerate the rights it designed to protect. It speaks in general terms, and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality of legal protection, either for life, liberty, or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution. . . .

The judgment of the Supreme Court of West Virginia will be reversed, and the case remitted with instructions to reverse the judgment of the Circuit Court of Ohio County: and it is

So ordered.

[MR. JUSTICE FIELD and MR. JUSTICE CLIFFORD dissented.]

NOTE.—While an accused person is entitled to a jury from which the members of his race have not been excluded by law, he is not entitled to a trial by a jury of his own race. Virginia v. Rives (1880), 100 U. S. 313; Martin v. Texas (1906), 200 U. S. 316. An act valid on its face may be so administered as to be obnoxious to the Fourteenth Amendment. Ex parte Virginia (1880), 100 U. S. 339. As to various forms of race discrimination see Plessy v. Ferguson (1896), 163 U. S. 537; Chiles v. Chesa-

peake & Ohio Ry. (1910), 218 U. S. 71; McCabe v. A. T. & S. F. Ry. (1914), 235 U. S. 151 (separate but equal accommodations in railway trains); Berea College v. Kentucky (1908), 211 U. S. 45 (prohibiting private educational institutions from teaching blacks and whites at the same time and place); Li Sing v. United States (1901), 180 U. S. 486 (discrimination against the Chinese as witnesses); Pace v. Alabama (1883), 106 U. S. 583 (punishing fornication committed by persons of different races more severely than when committed by persons of the same race).

YICK WO v. HOPKINS.

SUPREME COURT OF THE UNITED STATES. 1886.
118 U. S. 356; 30 Lawyers' Ed. 220.

Error to the Supreme Court of the State of California.

[The board of supervisors of San Francisco enacted an ordinance providing that no one should carry on a laundry "within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." Yick Wo, a subject of the Emperor of China, petitioned for a license to carry on a laundry in the same building in which he had been doing so for twenty-two years. His application was refused, and he was then arrested and fined for continuing in business without the necessary license. It was admitted that all applications for a license made by Chinese persons, more than 200 in number, were refused, while the petitions of all others, with one exception, were granted.]

MR. JUSTICE MATTHEWS delivered the opinion of the court. . . .

The ordinance drawn in question in the present case . . . does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are

those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature.

The rights of the petitioners, as affected by the proceedings of which they complain, are not less, because they are aliens and subjects of the Emperor of China. . . .

The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "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." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, or color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws. . . .

It is contended on the part of the petitioners, that the ordinances for violations of which they are severally sentenced to imprisonment, are void on their face, as being within the prohibitions of the Fourteenth Amendment; and, in the alternative, if not so, that they are void by reason of their administration, operating unequally, so as to punish in the present petitioners what is permitted to others as lawful, without any distinction of circumstances—an unjust and illegal discrimination, it is claimed, which, though not made expressly by the ordinances, is made possible by them.

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty

itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. . . .

In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. 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 equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in Henderson v. Mayor of New York, 92 U. S. 259; Chy

Lung v. Freeman, 92 U. S. 275; Ex parte Virginia, 100 U. S. 339; Neal v. Delaware, 103 U. S. 370; and Soon Hing v. Crowley, 113 U. S. 703.

The present cases, as shown by the facts disclosed in the record, are within this class. It appears that both petitioners have complied with every requisite, deemed by the law or by the public officers charged with its administration, necessary for the protection of neighboring property from fire, or as a precaution against injury to the public health. No reason whatever, except the will of the supervisors, is assigned why they should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood. And while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions. The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged. To this end,

The judgment of the Supreme Court of California in the case of Yick Wo, and that of the Circuit Court of the United States for the District of California in the case of Wo Lee, are severally reversed, and the cases remanded, each to the proper court, with directions to discharge the petitioners from custody and imprisonment.

NOTE.—Indians are entitled to the protection of the guaranties of the Constitution to the same extent as are other residents or citizens of the United States. Jones v. Meehan (1899), 175 U. S. 1; Cherokee Nation v. Hitchcock (1902), 187 U. S. 294; In re Heff (1905), 197 U. S. 488; Choate v. Trapp (1912), 224 U. S. 665. Corporations are persons within the meaning of the Fourteenth Amendment. Santa Clara County v. Southern Pacific Ry. (1886), 118 U. S. 396; Gulf, Colo. & Santa Fe Ry. v. Ellis (1897), 165 U. S. 150; but compare, as to foreign corporations, Blake v. McClung (1898), 172 U. S. 239. As to municipal corporations, see Hunter v. Pittsburgh (1907), 207 U. S. 161.

SECTION 2. LEGISLATION FOR CLASSES.

BARBIER v. CONNOLLY.

SUPREME COURT OF THE UNITED STATES. 1885.
113 U. S. 27; 28 Lawyers' Ed. 923.

In error to the Superior Court of the city and county of San Francisco, State of California.

[The Board of Supervisors of the city and county of San Francisco, the legislative authority of that municipality, believing that the indiscriminate establishment of public laundries endangered the public health and the public safety, enacted ordinances, the fourth section of which provided that no person owning or employed in a public laundry within certain prescribed limits should wash or iron clothes between the hours of ten in the evening and six in the morning, or upon any portion of Sunday. The petitioner, having been convicted of a violation of the fourth section and committed to the county jail, moved for his discharge on the ground that the fourth section was in conflict with the Fourteenth Amendment to the Federal Constitution in that it discriminated between laborers engaged in the laundry business and those engaged in other kinds of business, and between laborers beyond the designated limits and those within them, and that it deprived the petitioner of the right to labor and hence of the right to acquire property, and that it was unreasonable in its requirements and beyond the powers of the Board of Supervisors.]

MR. JUSTICE FIELD delivered the opinion of the court. . . .

In this case we can only consider whether the fourth section of the ordinance of the city and county of San Francisco is in conflict with the Constitution or laws of the United States. We cannot pass upon the conformity of that section with the requirements of the Constitution of the State. Our jurisdiction is confined to a consideration of the federal question involved, which arises upon an alleged conflict of the fourth section in question with the first section of the Fourteenth Amendment of the Constitution of the United States. No other part of the amendment has any possible application.

That fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses,

within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock in the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a federal tribunal should undertake to supervise such regulations. It may be a necessary measure of precaution in a city composed largely of wooden buildings like San Francisco, that occupations, in which fires are constantly required, should cease after certain hours at night until the following morning; and of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such matters can come only from State legislation or State tribunals. The same municipal authority which directs the cessation of labor must necessarily prescribe the limits within which it shall be enforced, as it does the limits in a city within which wooden buildings cannot be constructed. There is no invidious discrimination against any one within the prescribed limits by such regulations. There is none in the regulation under consideration. The specification of the limits within which the business cannot be carried on without the certificates of the health officer and Board of Fire Wardens is merely a designation of the portion of the city in which the precautionary measures against fire and to secure proper drainage must be taken for the public health and safety. It is not legislation discriminating against any one. All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.

The Fourteenth Amendment, in declaring that no State "shall 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," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforce-

ment of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory, and expensive, yet, if no discrimination against any one be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State. In the case before us the provisions requiring certificates from the health officer and the Board of Fire Wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome,

but, as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any substantial right of the individual.

Judgment affirmed.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY v. MAY.

SUPREME COURT OF THE UNITED STATES. 1904.
194 U. S. 267; 48 Lawyers' Ed. 971.

Error to the County Court of Bell County, State of Texas.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action to recover a penalty of twenty-five dollars, brought by the owner of a farm contiguous to the railroad of the plaintiff in error, on the ground that the latter has allowed Johnson grass to mature and go to seed upon its road. The penalty is given to contiguous owners by a Texas statute of 1901, ch. 117, directed solely against railroad companies for permitting such grass or Russian thistle to go to seed upon their right of way, subject, however, to the condition that the plaintiff has not done the same thing. The case is brought here on the ground that the statute is contrary to the Fourteenth Amendment of the Constitution of the United States.

It is admitted that Johnson grass is a menace to crops, that it is propagated only by seed, and that a general regulation of it for the protection of farming would be valid. It is admitted also that legislation may be directed against a class when any fair ground for the discrimination exists. But it is said that this particular subjection of railroad companies to a liability not imposed on other owners of land on which Johnson grass may grow is so arbitrary as to amount to a denial of the equal protection of the laws. There is no dispute about general principles. The question is whether this case lies on one side or the other of a line which has to be worked out between cases differing only in degree. With regard to the manner in which such a question should be approached, it is obvious that the legislature is the only judge of the policy of a proposed discrimination. The principle is similar to that which is established with regard to a decision of Congress that certain means are necessary and proper to carry out one of its express powers. McCulloch v. Maryland,

4 Wheat. 316. When a state legislature has declared that in its opinion policy requires a certain measure, its action should not be disturbed by the courts under the Fourteenth Amendment, unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.

Approaching the question in this way, we feel unable to say that the law before us may not have been justified by local conditions. It would have been more obviously fair to extend the regulation at least to highways. But it may have been found, for all that we know, that the seed of Johnson grass is dropped from the cars in such quantities as to cause special trouble. It may be that the neglected strips occupied by railroads afford a ground where noxious weeds especially flourish, and that whereas self-interest leads the owners of farms to keep down pests, the railroad companies have done nothing in a matter which concerns their neighbors only. Other reasons may be imagined. Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts. *Judgment affirmed.*

Mr. Justice Brewer concurs in the judgment.

Mr. Justice Brown, dissenting. . . .

Mr. Justice White and Mr. Justice McKenna also dissented.

CENTRAL LUMBER COMPANY v. STATE OF SOUTH DAKOTA.

Supreme Court of the United States. 1912.
226 U. S. 157; 57 Lawyers' Ed. 164.

Error to the Supreme Court of the State of South Dakota.

Mr. Justice Holmes delivered the opinion of the court.

The plaintiff in error was found guilty of unfair discrimination under Session Laws of South Dakota for 1907, c. 131, and was sentenced to a fine of two hundred dollars and costs. It objected in due form that the statute was contrary to the Fourteenth Amendment, but on appeal the judgment of the trial court was sustained. 24 So. Dak. 136. By the statute anyone "Engaged in the production, manufacture or distribution of any

commodity in general use, that intentionally, for the purpose of destroying the competition of any regular, established dealer in such commodity, or to prevent the competition of any person who in good faith intends and attempts to become such dealer, shall discriminate between different sections, communities, or cities of this state, by selling such commodity at a lower rate in one section . . . than such person . . . charges for such commodity in another section, . . . after equalizing the distance from the point of production," &c., shall be guilty of the crime and liable to the fine.

The subject-matter, like the rest of the criminal law, is under the control of the legislature of South Dakota, by virtue of its general powers, unless the statute conflicts as alleged with the Constitution of the United States. The grounds on which it is said to do so are that it denies the equal protection of the laws, because it affects the conduct of only a particular class—those selling goods in two places in the State—and is intended for the protection of only a particular class—regular established dealers; and also because it unreasonably limits the liberty of people to make such bargains as they like.

On the first of these points it is said that an indefensible classification may be disguised in the form of a description of the act constituting the offense, and it is urged that to punish selling goods in one place lower than at another in effect is to select the class of dealers that have two places of business for a special liability, and in real fact is a blow aimed at those who have several lumber yards along a line of railroad, in the interest of independent dealers. All competition, it is added, imports an attempt to destroy or prevent the competition of rivals, and there is no difference in principle between the prohibited act and the ordinary efforts of traders at a single place. The premises may be conceded without accepting the conclusion that this is an unconstitutional discrimination. If the legislature shares the now prevailing belief as to what is public policy and finds that a particular instrument of trade war is being used against that policy in certain cases, it may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 81; Missouri Pacific Ry. Co. v. Mackey, 127 U. S. 205.

This is not the arbitrary selection that is condemned in such cases as Southern Ry. Co. v. Greene, 216 U. S. 400. The Four-

teenth Amendment does not prohibit legislation special in character. Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 294. It does not prohibit a State from carrying out a policy that cannot be pronounced purely arbitrary, by taxation or penal laws. Orient Insurance Co. v. Daggs, 172 U. S. 557, 562; Quong Wing v. Kirkendall, 223 U. S. 59, 62. If a class is deemed to present a conspicuous example of what the legislature seeks to prevent, the Fourteenth Amendment allows it to be dealt with although otherwise and merely logically not distinguishable from others not embraced in the law. Carroll v. Greenwich Ins. Co., 199 U. S. 401, 411. We must assume that the legislature of South Dakota considered that people selling in two places made the prohibited use of their opportunities and that such use was harmful, although the usual efforts of competitors were desired. It might have been argued to the legislature with more force than it can be to us that recoupment in one place of losses in another is merely an instance of financial ability to compete. If the legislature thought that that particular manifestation of ability usually came from great corporations whose power it deemed excessive and for that reason did more harm than good in their State, and that there was no other cause of frequent occurrence where the same could be said, we cannot review their economics or their facts. That the law embodies a widespread conviction appears from the decisions in other States. State v. Drayton, 82 Neb. 254; State v. Standard Oil Co., 111 Minn. 85; . . . State v. Fairmont Creamery, 153 Iowa, 702; . . . State v. Bridgeman & Russell Co., 117 Minn. 186. . . .

What we have said makes it unnecessary to add much on the second point, if open, that the law is made in favor of regular established dealers—but the short answer is simply to read the law. It extends on its face also to those who intend to become such dealers. If it saw fit not to grant the same degree of protection to parties making a transitory incursion into the business, we see no objection. But the Supreme Court says that the statute is aimed at preventing the creation of a monopoly by means likely to be employed, and certainly we should read the law as having in view ultimately the benefit of buyers of the goods.

Finally, as to the statute's depriving the plaintiff in error of its liberty because it forbids a certain class of dealings, we think it enough to say that as the law does not otherwise encounter the Fourteenth Amendment, it is not to be disturbed on this ground. The matter has been discussed so often in this court

that we simply refer to Chicago, Burlington & Quincy R. R. Co. v. McGuire, 219 U. S. 549, 567, 568, and the cases there cited to illustrate how much power is left in the States. See also Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 442; Lemieux v. Young, 211 U. S. 489, 496; Otis v. Parker, 187 U. S. 606, 609.

Judgment affirmed.

PATSONE v. COMMONWEALTH OF PENNSYLVANIA.

SUPREME COURT OF THE UNITED STATES. 1914.
232 U. S. 138; 58 Lawyers' Ed. 539.

Error to the Supreme Court of the Commonwealth of Pennsylvania.

MR. JUSTICE HOLMES delivered the opinion of the court.

The plaintiff in error was an unnaturalized foreign born resident of Pennsylvania and was complained of for owning or having in his possession a shotgun, contrary to an act of May 8, 1909. Laws, 1909, No. 261, p. 466. This statute makes it unlawful for any unnaturalized foreign born resident to kill any wild bird or animal except in defense of person or property, and "to that end" makes it unlawful for such foreign born person to own or be possessed of a shotgun or rifle; with a penalty of twenty-five dollars and a forfeiture of the gun or guns. The plaintiff in error was found guilty and was sentenced to pay the above mentioned fine. The judgment was affirmed on successive appeals. 231 Pa. St. 46. He brings the case to this court on the ground that the statute is contrary to the Fourteenth Amendment and also is in contravention of the treaty between the United States and Italy, to which latter country the plaintiff in error belongs.

Under the Fourteenth Amendment the objection is two-fold; unjustifiably depriving the alien of property, and discrimination against such aliens as a class. But the former really depends upon the latter, since it hardly can be disputed that if the lawful object, the protection of wild life (Geer v. Connecticut, 161 U. S. 519), warrants the discrimination, the means adopted for making it effective also might be adopted. The possession of rifles and shotguns is not necessary for other purposes not within the statute. It is so peculiarly appropriated to the forbidden use that if such a use may be denied to this class, the pos-

session of the instruments desired chiefly for that end also may be. The prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense. So far, the case is within the principle of Lawton v. Steele, 152 U. S. 133. See, further, Silz v. Hesterberg, 211 U. S. 31; Purity Extract Co. v. Lynch, 226 U. S. 192.

The discrimination undoubtedly presents a more difficult question. But we start with the general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil is mainly to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 80, 81. The State "may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." Central Lumber Co. v. South Dakota, 226 U. S. 157, 160; Rosenthal v. New York, 226 U. S. 260, 270; L'Hote v. New Orleans, 177 U. S. 587. See further Louisville & Nashville R. R. Co. v. Melton, 218 U. S. 36. The question therefore narrows itself to whether this court can say that the Legislature of Pennsylvania was not warranted in assuming as its premise for the law that resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. Barrett v. Indiana, 229 U. S. 26, 29.

Obviously the question so stated is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts. Adams v. Milwaukee, 228 U. S. 572, 583. If we might trust popular speech in some States it was right—but it is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong. See Trageser v. Gray, 73 Maryland, 250; Commonwealth v. Hana, 195 Massachusetts, 262. . . .

Judgment affirmed.

The CHIEF JUSTICE dissents.

NOTE.—As to the relation of legislation for classes to the equal protection of the laws, see Adams v. Milwaukee (1913), 228 U. S. 572 (inspection of milk cows within and without a city governed by different rules); Sturges & Burn Mfg. Co. v. Beauchamp (1913), 231 U. S. 320 (statute applicable

only to laborers under 16 years of age); Baltic Mining Co. v. Massachusetts (1913), 231 U. S. 68 (discriminatory tax on foreign corporations); Baccus v. Louisiana (1914), 232 U. S. 334 (prohibition of sale of drugs by peddlers); Ohio Tax Cases (1914), 232 U. S. 576 (imposition of an excise tax on railway earnings only); Eberle v. Michigan (1914), 232 U. S. 700 (permitting sale of liquor only by druggists); Missouri, K. & T. Ry. v. Cade (1914), 233 U. S. 642 (statute for facilitating settlement of small claims); Kansas City Southern Ry. v. Anderson (1914), 233 U. S. 325 (imposition of double damages on railways and not on other defendants); Smith v. Texas (1914), 233 U. S. 630 (requiring a conductor to have had two years' experience as a brakeman); Keokee Coke Co. v. Taylor (1914), 234 U. S. 224 (requiring a certain method of paying laborers in some industries and not in others); Easterling Lumber Co. v. Pierce (1914), 235 U. S. 380 (classification of employees based on use of engines in a statute abolishing the fellow-servant rule); Jeffrey Manufacturing Co. v. Blagg (1915), 235 U. S. 571 (similar statute where classification is based on number of employees); Miller v. Wilson (1915), 236 U. S. 373 (restrictions on women's hours of labor); Bosley v. McLaughlin (1915), 236 U. S. 385 (provisions as to graduate nurses not applied to other nurses).

CHAPTER X.

THE POLICE POWER.

What are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law or a law to punish offenses, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion.

Chief Justice Taney in *The License Cases*, 5 Howard, 504, 584.

Discussions of what is called the "police power" are often uninstructive, from a lack of discrimination. It is common to recognize that the subject is hardly susceptible of definition, but very often, indeed, it is not perceived that the real question in hand is that grave, difficult, and fundamental matter,—what are the limits of legislative power in general? In talking of the "police power," sometimes the question relates to the limits of a power admitted and fairly well-known, as that of taxation or eminent domain; sometimes to the line between the local legislative power of the States and the Federal legislative power; sometimes to legislation as settling the details of municipal affairs, and local arrangements for the promotion of good order, health, comfort, and convenience; sometimes to that special form of legislative action which applies the maxim of *Sic utere tuo ut alienum non lædas*, adjusts and accommodates interests that may conflict, and fixes specific limits for each. But often, the discussion turns upon the true limits and scope of legislative power in general,—in whatever way it may seek to promote the general welfare.

James B. Thayer, *Cases on Constitutional Law*, I, 693.

SECTION 1. THE PROTECTION OF HEALTH.

RAILROAD COMPANY v. HUSEN.

SUPREME COURT OF THE UNITED STATES. 1877.
95 U. S. 465; 24 Lawyers' Ed. 527.

Error to the Supreme Court of the State of Missouri. . . .

MR. JUSTICE STRONG delivered the opinion of the court.

Five assignments of error appear in this record; but they raise only a single question. It is, whether the statute of Missouri,

upon which the action in the State court was founded, is in conflict with the clause of the Constitution of the United States that ordains "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The statute, approved January 23, 1872, by its first section, enacted as follows: "No Texas, Mexican, or Indian cattle shall be driven or otherwise conveyed into, or remain, in any county in this State, between the first day of March and the first day of November in each year, by any person or persons whatsoever." A later section is in these words: "If any person or persons shall bring into this State any Texas, Mexican, or Indian cattle, in violation of the first section of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by said cattle." Other sections make such bringing of cattle into the State a criminal offense, and provide penalties for it. It was, however, upon the provisions we have quoted that this action was brought against the railroad company that had conveyed the cattle into the county. It is noticeable that the statute interposes a direct prohibition against the introduction into the State of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not. It is true a proviso to the first section enacts that "when such cattle shall come across the line of the State, loaded upon a railroad car or steamboat, and shall pass through the State without being unloaded, such shall not be construed as prohibited by the act; but the railroad company or owners of a steamboat performing such transportation shall be responsible for damages which may result from the disease called the Spanish or Texas fever, should the same occur along the line of transportation; and the existence of such disease along the line of such route shall be *prima facie* evidence that such disease has been communicated by such transportation." This proviso imposes burdens and liabilities for transportation through the State, though the cattle be not unloaded, while the body of the section absolutely prohibits the introduction of any such cattle into the State, with the single exception mentioned.

It seems hardly necessary to argue at length, that, unless the statute can be justified as a legitimate exercise of the police power of the State, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a State over commerce that is completely internal, it

can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive. That the transportation of property from one State to another is a branch of interstate commerce is undeniable, and no attempt has been made in this case to deny it.

The Missouri statute is a plain interference with such transportation, an attempted exercise over it of the highest possible power,—that of destruction. . . .

We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the State. We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police power. What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. . . .

But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the national government. It was said in Henderson et al. v. Mayor of the City of New York et al., 92 U. S. 259, to "be clear, from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to powers conceded to belong to the States." Substantially the same thing was said by Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1. Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. Many acts of a State may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule of conduct. There is no such difficulty in the present case. While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the

State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. . . .

Tried by this rule, the statute of Missouri is a plain intrusion upon the exclusive domain of Congress. It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, "You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle, between March 1 and Dec. 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities." Such a statute, we do not doubt, it is beyond the power of the State to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure. . . .

Judgment reversed. . . .

NOTE.—For general discussions of the nature of the police power, see Tiedeman, *The Police Power;* Freund, *The Police Power,* chapters i, ii, and iii; Cooley, *Constitutional Limitations,* ch. xvi; McGehee, *Due Process of Law,* ch. ix; Commonwealth v. Alger (1851), 7 Cushing (Mass.), 53; Thorpe v. Rutland & Burlington Ry. (1855), 27 Vt. 140; Lawton v. Steele (1894), 152 U. S. 133. As to the power of the States to enter into contracts limiting its exercise of the police power, see Beer Company v. Massachusetts (1877), 97 U. S. 25; but compare Stone v. Farmers' Loan & Trust Co. (1886), 116 U. S. 307 and Georgia Railroad and Banking Co. v. Smith (1888), 128 U. S. 174.

As to State regulations for the protection of the public health, see Kimmish v. Ball (1889), 129 U. S. 217, Rasmussen v. Idaho (1901), 181 U. S. 198, and Reid v. Colorado (1902), 187 U. S. 137 (acts for preventing importation of infected live stock); Austin v. Tennessee (1900), 179 U. S. 343, and Cook v. Marshall County (1905), 196 U. S. 261 (sale of cigarettes); Powell v. Pennsylvania (1888), 127 U. S. 678, Schollenberger v. Pennsylvania (1898), 171 U. S. 1, and Collins v. New Hampshire (1898), 171 U. S. 30 (sale of oleomargarine); New York v. Van De Carr (1905), 199 U. S. 552 (sale of milk); Fertilizing Co. v. Hyde Park (1879), 97 U. S. 659 (maintenance of a nuisance); California Reduction Co. v. Sanitary Reduction Works (1905), 199 U. S. 306 (disposal of garbage).

HOLDEN v. HARDY.

SUPREME COURT OF THE UNITED STATES. 1898.
169 U. S. 366; 42 Lawyers' Ed. 780.

Error to the Supreme Court of the State of Utah.

[The legislature of Utah enacted a law providing that workmen should not be employed in underground mines or smelters or other institutions for the reduction of ores or metals for more than eight hours per day except in certain cases of emergency. Violation of the statute was made a misdemeanor. The plaintiff in error having been convicted thereunder set up that the statute was contrary to the Fourteenth Amendment.]

MR. JUSTICE BROWN . . . delivered the opinion of the court. . . .

The validity of the statute in question is . . . challenged upon the ground of an alleged violation of the Fourteenth Amendment to the Constitution of the United States, in that it abridges the privileges or immunities of citizens of the United States; deprives both the employer and the laborer of his property without due process of law, and denies to them the equal protection of the laws. . . . [Here follows an elaborate examination and classification of the decisions of the Supreme Court in interpreting the Fourteenth Amendment.]

The latest utterance of this court upon this subject is contained in the case of Allgeyer v. Louisiana, 165 U. S. 578, 591, in which it was held that an act of Louisiana which prohibited individuals within the State from making contracts of insurance with corporations doing business in New York, was a violation of the Fourteenth Amendment. In delivering the opinion of the court, Mr. Justice Peckham remarked: "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, must be embraced the right to make all proper contracts in relation thereto, and, although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State, may be regulated and sometimes prohibited, when the contracts or business conflict with the policy of the State as contained in its statutes, yet the power does not and cannot extend to prohibiting a citizen from making contracts of the nature involved in this case outside of the limits and jurisdiction of the State, and which are also to be performed outside of such jurisdiction."

This right of contract, however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employés as to demand special precautions for their well-being and protection, or the safety of adjacent property. . . .

While this power is necessarily inherent in every form of government, it was, prior to the adoption of the Constitution, but sparingly used in this country. As we were then almost purely an agricultural people, the occasion for any special protection of a particular class did not exist. Certain profitable employments, such as lotteries and the sale of intoxicating liquors, which were then considered to be legitimate, have since fallen under the ban of public opinion, and are now either altogether prohibited or made subject to stringent police regulations. . . .

While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives; but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the States designed to meet these exigencies and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theaters, factories and other large buildings, a municipal inspection of boilers, and appliances designed to secure passengers upon railways and steamboats against the dangers necessarily incident to these methods of transportation. In States where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, elevator shafts and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shor-

ing up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signalling the surface, for the supply of fresh air and the elimination, as far as possible, of dangerous gases, for safe means of hoisting and lowering cages, for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the top of shafts, besides other similar precautions. . . .

But if it be within the power of a legislature to adopt such means for the protection of the lives of its citizens, it is difficult to see why precautions may not also be adopted for the protection of their health and morals. It is as much for the interest of the State that the public health should be preserved as that life should be made secure. With this end in view quarantine laws have been enacted in most if not all of the States; insane asylums, public hospitals, and institutions for the care and education of the blind established, and special measures taken for the exclusion of infected cattle, rags, and decayed fruit. In other States laws have been enacted limiting the hours during which women and children shall be employed in factories; and while their constitutionality, at least as applied to women, has been doubted in some of the States, they have been generally upheld. Thus, in the case of Commonwealth v. Hamilton Manufacturing Co., 120 Mass. 383, it was held that a statute prohibiting the employment of all persons under the age of eighteen, and of all women laboring in any manufacturing establishment more than sixty hours per week, violates no contract of the Commonwealth implied in the granting of a charter to a manufacturing company nor any right reserved under the Constitution to any individual citizen, and may be maintained as a health or police regulation.

Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employés, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.

While the general experience of mankind may justify us in believing that men may engage in ordinary employments more

than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting. . . .

We are of opinion that the act in question was a valid exercise of the police power of the State, and the judgments of the Supreme Court of Utah are, therefore, *Affirmed.*

Mr. Justice Brewer and Mr. Justice Peckham dissented.

Sec. 2. The Protection of Morals.

MUGLER v. KANSAS.

Supreme Court of the United States. 1887.
123 U. S. 623; 31 Lawyers' Ed. 205.

Error to the Supreme Court of the State of Kansas.

The constitution of the State of Kansas contains the following article, being art. 15 of § 10, which was adopted by the people November 2, 1880:

"The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific, and mechanical purposes."

The legislature of Kansas enacted a statute to carry this into effect. . . .

The plaintiff in error, Mugler, the proprietor of a brewery in Saline County, Kansas, was indicted in the District Court in that county in November, 1881, for offenses against this statute. . . .

Mugler was adjudged to be guilty, and was sentenced to pay a fine of one hundred dollars and costs, and motions for a new trial and in arrest of judgment were overruled. This judgment being affirmed by the Supreme Court of the State on appeal, the cause was brought here by writ of error on his motion.[1] . . .

[1] The case of Kansas v. Zeibold, which was appealed from the Circuit Court of the United States for the District of Kansas, was heard at the same time.

MR. JUSTICE HARLAN delivered the opinion of the court.

These cases involve an inquiry into the validity of certain statutes of Kansas relating to the manufacture and sale of intoxicating liquors. . . .

The general question in each case is, whether the foregoing statutes of Kansas are in conflict with that 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; nor shall any State deprive any person of life, liberty, or property, without due process of law." . . .

In Foster v. Kansas, 112 U. S. 201, 206, the court said that the question as to the constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court. . . .

It is, however, contended that, although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, "no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others." The argument made in support of the first branch of this proposition, briefly stated, is, that in the implied compact between the State and the citizen certain rights are reserved by the latter, which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the State cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the State may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself.

It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community, it follows, from the very premises stated, that society has the power to protect itself, by legislation, against the injurious consequences of that business. As

was said in Munn v. Illinois, 94 U. S. 113, 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another."

But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional

rights; for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil. . . .

It is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property; or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose; the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law. In other words, although the State, in the exercise of her police powers, may lawfully prohibit the manufacture and sale, within her limits, of intoxicating liquors to be used as a beverage, legislation having that object in view cannot be enforced against those who, at the time, happen to own property, the chief value of which consists in its fitness for such manufacturing purposes, unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments.

This interpretation of the Fourteenth Amendment is inadmissible. It cannot be supposed that the States intended, by adopting that Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community. In respect to contracts, the obligations of which are protected against hostile state legislation, this court in Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 751, said that the State could not, by any contract, limit the exercise of her power to the prejudice of the public health and the public morals. So, in Stone v. Mississippi, 101 U. S. 814, 816, where the Constitution was invoked against the repeal by the State of a charter, granted to a private corporation, to conduct a lottery, and for which that corporation paid to the State a valuable consideration in money, the court said: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. . . . Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them." Again, in New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 672: "The

constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations."

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. Beer Co. v. Massachusetts, 97 U. S. 25, 32; Commonwealth v. Alger, 7 Cush. 53. An illustration of this doctrine is afforded by Patterson v. Kentucky, 97 U. S. 501. . . .

[The court also cites United States v. Dewitt, 9 Wall. 41; License Tax Cases, 5 Wall. 462; Pervear v. Commonwealth, 5 Wall. 475; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 667; Pumpelly v. Green Bay Co., 13 Wall. 166; Transportation Co. v. Chicago, 99 U. S. 635.]

A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law. The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the con-

dition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. . . .

For the reasons stated, we are of opinion that the judgments of the Supreme Court of Kansas have not denied to Mugler, the plaintiff in error, any right, privilege, or immunity secured to him by the Constitution of the United States, and its judgment, in each case, is, accordingly, affirmed.

[Mr. Justice Field delivered a separate opinion.]

Note.—As to other legislation for the protection of morals, see L'Hote v. New Orleans (1900), 177 U. S. 587 (regulation of prostitution); Booth v. Illinois (1902), 184 U. S. 425, Otis v. Parker (1903), 187 U. S. 606, Gatewood v. North Carolina (1906), 203 U. S. 531 (speculation); Ah Lin v. Wittman (1905), 198 U. S. 500, Marvin v. Trout (1905), 199 U. S. 212 (gambling).

LEISY v. HARDIN.

Supreme Court of the United States. 1890.
135 U. S. 100; 34 Lawyers' Ed. 128.

Error to the Supreme Court of the State of Iowa.

[The plaintiffs, who were brewers doing business at Peoria, Illinois, had shipped beer in sealed packages to Keokuk, Iowa, where it was offered for sale in the original packages. A certain quantity of the beer was seized by Hardin, the city marshal of Keokuk under color of authority of the statutes of Iowa which forbade the manufacture or sale of intoxicating liquors, or keeping them with intent to sell, except for medicinal, chemical,

pharmaceutical and sacramental purposes as allowed in the act. The plaintiffs brought replevin against Hardin to recover the beer seized, and the local court gave judgment for the plaintiffs on the ground that the State enactment was invalid. This judgment was reversed by the Supreme Court of Iowa.]

MR. CHIEF JUSTICE FULLER . . . delivered the opinion of the court. . . .

While, by virtue of its jurisdiction over persons and property within its limits, a State may provide for the security of the lives, limbs, health and comfort of persons, and the protection of property so situated, yet a subject-matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action. Henderson v. Mayor of New York, 92 U. S. 259; Railroad Co. v. Husen, 95 U. S. 465; Walling v. Michigan, 116 U. S. 466; Robbins v. Shelby Taxing District, 120 U. S. 489. The power to regulate commerce among the States is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them with a view to local needs and circumstances, until Congress otherwise directs; but the power thus exercised by the States is not identical in its extent with the power to regulate commerce among the States. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, health laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the States, except so far as falling within the scope of a power confided to the general government. Where the subject-matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States; but where, in relation to the subject matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but are simply local powers, which have full operation until or unless circumscribed by the action of Congress in effectuation of the general power. Cooley v. Port Wardens of Philadelphia, 12 How. 299.

It was stated in the 32d number of the Federalist that the States might exercise concurrent and independent power in all cases but three: First, where the power was lodged exclusively in the federal constitution; second, where it was given to the United States and prohibited to the States; third, where, from the nature and subjects of the power, it must be necessarily exercised by the national government exclusively. But it is easy to see that Congress may assert an authority under one of the granted powers, which would exclude the exercise by the States upon the same subject of a different but similar power, between which and that possessed by the general government no inherent repugnancy existed.

Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, this is not only not a concession that the powers reserved by the States may be exerted as if the specific power had not been elsewhere reposed, but, on the contrary, the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled. County of Mobile v. Kimball, 102 U. S. 691; Brown v. Houston, 114 U. S. 622, 631; Wabash, St. Louis, etc., Railway v. Illinois, 118 U. S. 557; Robbins v. Shelby Taxing District, 120 U. S. 489, 493.

That ardent spirits, distilled liquors, ale and beer, are subjects of exchange, barter and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of courts, is not denied. Being thus articles of commerce, can a State, in the absence of legislation on the part of Congress, prohibit their importation from abroad or from a sister State? or when imported prohibit their sale by the importer? If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control? . . .

Although the precise question before us was not ruled in Gib-

bons v. Ogden and Brown v. Maryland, yet we think it was virtually involved and answered, and that this is demonstrated, among other cases, in Bowman v. Chicago & Northwestern Railway Co., 125 U. S., 465. In the latter case, section 1553 of the Code of the State of Iowa as amended by c. 143 of the acts of the twentieth General Assembly in 1886, forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first being furnished with a certificate as prescribed, was declared invalid, because essentially a regulation of commerce among the States, and not sanctioned by the authority, express or implied, of Congress. The opinion of the court, delivered by Mr. Justice Matthews, the concurring opinion of Mr. Justice Field, and the dissenting opinion by Mr. Justice Harlan, on behalf of Mr. Chief Justice Waite, Mr. Justice Gray, and himself, discussed the question involved in all its phases; and while the determination of whether the right of transportation of an article of commerce from one State to another includes by necessary implication the right of the consignee to sell it in unbroken packages at the place where the transportation terminates was in terms reserved, yet the argument of the majority conducts irresistibly to that conclusion, and we think we cannot do better than repeat the grounds upon which the decision was made to rest. It is there shown that the transportation of freight or of the subjects of commerce, for the purpose of exchange or sale, is beyond all question a constituent of commerce itself; that this was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States; that the power to prevent embarrassing restrictions by any State was the end desired; that the power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations; and that it would be absurd to suppose that the transmission of the subjects of trade from the State of the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade, either with foreign nations or among the States. It is explained that where State laws alleged to be regulations of commerce among the States, have been sustained, they were laws which related to bridges or dams across streams, wholly within the State, or police or health laws, or to subjects of a kindred nature, not strictly of commercial regulation. But the transportation of passengers or of merchandise from one State to another is in its nature national, admitting of but one

regulating power; and it was to guard against the possibility of commercial embarrassments which would result if one State could directly or indirectly tax persons or property passing through it, or prohibit particular property from entrance into the State, that the power of regulating commerce among the States was conferred upon the federal government. . . .

The observations of Mr. Justice Catron, in The License Cases, 5 How. 504, 599, are quoted to the effect that what does not belong to commerce is within the jurisdiction of the police power of the State, but that which does belong to commerce is within the jurisdiction of the United States; that to extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the State to bring within the police power "any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety, as malt liquors, and the products of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded in effect by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing." And Mr. Justice Matthews thus proceeds, p. 493: "For the purpose of protecting its people against the evils of intemperance, it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective—until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be. . . . Can it be supposed that by omitting any express declaration on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the

importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the divers exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States." . . .

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in Bowman v. Chicago, etc., Railway Co., *supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to

be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create. Undoubtedly, there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of Mr. Justice Johnson, in Gibbons v. Ogden, 9 Wheat. 1, 238, in "a frank and candid co-operation for the general good."

The legislation in question is to the extent indicated repugnant to the third clause of section 8 of Art. I of the Constitution of the United States, and therefore the judgment of the Supreme Court of Iowa is

Reversed and the cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE GRAY, with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE BREWER, dissenting. . . .

NOTE.—The adjustment between the police power of the States and the power of Congress to regulate interstate and foreign commerce has led to several conflicts as to which should control the traffic in intoxicating liquors. In the License Cases (1847), 5 Howard, 504, the court held that in the absence of any assertion of the paramount authority of Congress the police power of the States should govern; but when the principal case was decided the doctrine of "the silence of Congress" had developed and the License Cases were overruled. Had the court chosen to hold that the police power of the State continued to control until it conflicted with the superior authority of some express enactment of Congress, its view would have been supported by the uniform attitude of organized society toward the liquor traffic as far back as historic records run. In the oldest laws known, the Babylonian Code of Hammurabi (about 2250 B. C.) secs. 108-110, there are police regulations concerning the sale of liquor. The decision in the principal case was followed by the enactment of the Wilson Act of 1890, 26 Stat. at Large, 313, by which intoxicating liquors transported in interstate commerce were made subject to the police power of the States immediately "upon their arrival" therein. The constitutionality of this act was sustained in In re Rahrer (1891), 140 U. S. 545, but its effectiveness was much restricted, from the standpoint of the States seeking to exclude the traffic in liquor, by the court's decision in Rhodes v. Iowa (1898), 170 U. S. 412, that the word "arrival" meant actual delivery to the consignee and not merely actual arrival within the State of destination. See also Rossi v. Pennsylvania (1915), 238 U. S. 62. Dissatisfaction with this result led to the enactment in 1913 of the Webb-Kenyon Act, 37 Stat. at Large, 699, which prohibits the shipment into a State of any intoxicating liquor which "is intended by any person interested therein to be received, possessed,

sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State." The act was vetoed by President Taft in his message of February 28, 1913, the substance of which appears in this paragraph:

> One of the main purposes of the union of the States under the Constitution was to relieve the commerce between the States of the burdens which local State jealousies and purposes had in the past imposed upon it; and the interstate commerce clause in the Constitution was one of the chief reasons for its adoption. The power was there conferred upon Congress. Now, if to the discretion of Congress is committed the question whether in interstate commerce we shall return to the old methods prevailing before the Constitution or not, it would seem to be conferring upon Congress the power to amend the Constitution by ignoring or striking out one of its most important provisions. It was certainly intended by that clause to secure uniformity in the regulation of commerce between the States. To suspend that purpose and to permit the States to exercise their old authority before they became States, to interfere with commerce between them and their neighbors, is to defeat the constitutional purpose.

The act was passed over the President's veto. Its validity has not yet been determined, but it has been held that it applies only to shipments of liquor intended to be held or sold in violation of the laws of the States into which it is sent. Adams Express Co. v. Kentucky (1915), 238 U. S. 190. Liquor kept in a State to be disposed of exclusively by means of mail orders from other States is under the protection of the commerce clause. Heyman v. Hays (1915), 236 U. S. 178.

Section 3. The Preservation of Safety and Order.

ESCANABA COMPANY v. CHICAGO.

Supreme Court of the United States. 1882.
107 U. S. 678; 27 Lawyers' Ed. 442.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

[The Escanaba and Lake Michigan Transportation Company, a corporation formed under the laws of Michigan, owns and operates a line of steamers plying between various ports on Lake Michigan, but principally between Escanaba, Mich., and docks on the south branch of the Chicago river. The navigable part of this stream lies almost wholly within the city of Chicago, and consists of a main stream and two branches which divide the city into three parts known locally as the North Side, South Side and West Side. The most important part of the business district lies

on the South Side, and is reached from the other sections by numerous bridges over which there is a constant stream of traffic, and which are provided with draws through which vessels navigating the river may pass. In order to prevent undue delay, particularly at the beginning and close of business, the city of Chicago, duly authorized thereto by the State of Illinois, enacted ordinances providing that between the hours of 6 and 7 in the morning and 5:30 and 6:30 in the evening, Sundays excepted, the draws should not be opened, while between 7 A. M. and 5:30 P. M. no bridge should be opened for a longer period than ten minutes, and when closed it should be kept closed for at least ten minutes, if necessary, in order to enable foot-passengers and vehicles in waiting to pass over.]

MR. JUSTICE FIELD delivered the opinion of the court. . . .

The limitation of ten minutes for the passage of the draws by vessels seems to have been eminently wise and proper for the protection of the interests of all parties. Ten minutes is ample time for any vessel to pass the draw of a bridge, and the allowance of more time would subject foot-passengers, teams, and other vehicles to great inconvenience and delays.

The complainant principally objects to this ten minutes' limitation, and to the assignment of the morning and evening hour to pedestrians and vehicles. It insists that the navigation of the river and its branches should not be thus delayed; and that the rights of commerce by vessels are paramount to the rights of commerce by any other way.

But in this view the complainant is in error. The rights of each class are to be enjoyed without invasion of the equal rights of others. Some concession must be made on every side for the convenience and the harmonious pursuit of different occupations. Independently of any constitutional restrictions, nothing would seem more just and reasonable, or better designed to meet the wants of the population of an immense city, consistently with the interests of commerce, than the ten minutes' rule, and the assignment of the morning and evening hours which the city ordinance has prescribed.

The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the States or with foreign

countries. The Daniel Ball, 10 Wall. 557. Such is the case with the Chicago River and its branches. The common-law test of the navigability of waters, that they are subject to the ebb and flow of the tide, grew out of the fact that in England there are no waters navigable in fact, or to any great extent, which are not also affected by the tide. That test has long since been discarded in this country. Vessels larger than any which existed in England, when that test was established, now navigate rivers and inland lakes for more than a thousand miles beyond the reach of any tide. That test only becomes important when considering the rights of riparian owners to the bed of the stream, as in some States it governs in that matter.

The Chicago River and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation.

But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the States than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and ap-

proved in repeated cases, the most notable of which are Willson v. The Blackbird Creek Marsh Co., 2 Pet. 245, decided in 1829, and Gilman v. Philadelphia, 3 Wall. 713, decided in 1865. . . . [Here follow citations from these cases and from Pound v. Turck, 95 U. S. 459.]

The doctrine declared in these several decisions is in accordance with the more general doctrine now firmly established, that the commercial power of Congress is exclusive of State authority only when the subjects upon which it is exercised are national in their character, and admit and require uniformity of regulation affecting alike all the States. Upon such subjects only that authority can act which can speak for the whole country. Its non-action is therefore a declaration that they shall remain free from all regulation. Welton v. State of Missouri, 91 U. S. 275; Henderson v. Mayor of New York, 92 id., 259; County of Mobile v. Kimball, 102 id., 691.

On the other hand, where the subjects on which the power may be exercised are local in their nature or operation, or constitute mere aids to commerce, the authority of the State may be exerted for their regulation and management until Congress interferes and supersedes it. As said in the case last cited: "The uniformity of commercial regulations which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where, from the nature of the subject or the sphere of its operations, the case is local and limited, special regulations, adapted to the immediate locality, could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done in respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act they may be regulated by State authority."

Bridges over navigable streams, which are entirely within the limits of a State, are of the latter class. The local authority can better appreciate their necessity, and can better direct the manner in which they shall be used and regulated than a government at a distance. It is, therefore, a matter of good sense and practical wisdom to leave their control and management with the States, Congress having the power at all times to interfere and

supersede their authority whenever they act arbitrarily and to the injury of commerce.

It is, however, contended here that Congress has interfered, and by its legislation expressed its opinion as to the navigation of Chicago River and its branches; that it has done so by acts recognizing the ordinance of 1787, and by appropriations for the improvement of the harbor of Chicago.

The ordinance of 1787 for the government of the territory of the United States northwest of the Ohio River, contained in its fourth article a clause declaring that, "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor."

The ordinance was passed July 13, 1787, one year and nearly eight months before the Constitution took effect; and although it appears to have been treated afterwards as in force in the territory, except as modified by Congress, and by the act of May 7, 1800, c. 41, creating the Territory of Indiana, and by the act of February 3, 1809, c. 13, creating the Territory of Illinois, the rights and privileges granted by the ordinance are expressly secured to the inhabitants of those Territories; and although the act of April 18, 1818, c. 67, enabling the people of Illinois Territory to form a constitution and State government, and the resolution of Congress of Dec. 3, 1818, declaring the admission of the State into the Union, refer to the principles of the ordinance according to which the constitution was to be formed, its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst 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. The language of the resolution admitting her is "on an equal footing with the original States *in all respects whatever.*" 3 Stat. 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new. Illinois, therefore, as was well observed by counsel, could after-

wards exercise the same power over rivers within her limits that Delaware exercised over Black Bird Creek, and Pennsylvania over the Schuylkill River. Pollard's Lessee v. Hagan, 3 How. 212; Permoli v. First Municipality, id. 589; Strader v. Graham, 10 id. 82.

But aside from these considerations, we do not see that the clause of the ordinance upon which reliance is placed materially affects the question before us. That clause contains two provisions: one that the navigable waters leading into the Mississippi and the St. Lawrence shall be common highways to the inhabitants; and the other, that they shall be forever free to them without any tax, impost, or duty therefor. The navigation of the Illinois River is free, so far as we are informed, from any tax, impost, or duty, and its character as a common highway is not affected by the fact that it is crossed by bridges. All highways, whether by land or water, are subject to such crossings as the public necessities and convenience may require, and their character as such is not changed, if the crossings are allowed under reasonable conditions, and not so as to needlessly obstruct the use of the highways. In the sense in which the terms are used by publicists and statesmen, free navigation is consistent with ferries and bridges across a river for the transit of persons and merchandise as the necessities and convenience of the community may require. . . .

As to the appropriations by Congress, no money has been expended on the improvement of the Chicago River above the first bridge from the lake, known as Rush Street Bridge. No bridge, therefore, interferes with the navigation of any portion of the river which has been thus improved. But, if it were otherwise, it is not perceived how the improvement of the navigability of the stream can affect the ordinary means of crossing it by ferries and bridges. The free navigation of a stream does not require an abandonment of those means. To render the action of the State invalid in constructing or authorizing the construction of bridges over one of its navigable streams, the general government must directly interfere so as to supersede its authority and annul what it has done in the matter. . . .

From any view of this case, we see no error in the action of the court below, and this decree must accordingly be

Affirmed.

CITY OF CHICAGO v. STURGES.

SUPREME COURT OF THE UNITED STATES. 1911.
222 U. S. 313; 56 Lawyers' Ed. 215.

Error to the Supreme Court of the State of Illinois.

MR. JUSTICE LURTON delivered the opinion of the court.

The only question under this writ of error is as to the validity of a statute of the State of Illinois entitled "An Act to indemnify the owners of property for damages occasioned by mobs and riots." Laws of 1887, p. 237. . . .

It was urged in the Illinois courts that the act violated the guarantee of due process of law and the equal protection of the law as provided by the Fourteenth Amendment of the Constitution of the United States.

By the provisions of the statute referred to, a city is made liable for three-fourths of the damage resulting to property situated therein, caused by the violence of any mob or riotous assemblage of more than twelve persons, not abetted or permitted by the negligent or wrongful act of the owner, etc. If the damage be to property not within the city, then the county in which it is located is in like manner made responsible. . . .

It is said that the act denies to the city due process of law, since it imposes liability irrespective of any question of the power of the city to have prevented the violence, or of negligence in the use of its power. This was the interpretation placed upon the act by the Supreme Court of Illinois. Does the law as thus interpreted deny due process of law? That the law provides for a judicial hearing and a remedy over against those primarily liable narrows the objection to the single question of legislative power to impose liability regardless of fault.

It is a general principle of our law that there is no individual liability for an act which ordinary human care and foresight could not guard against. It is also a general principle of the same law that a loss from any cause purely accidental must rest where it chances to fall. But behind and above these general principles which the law recognizes as ordinarily prevailing, there lies the legislative power, which, in the absence of organic restraint, may for the general welfare of society, impose obligations and responsibilities otherwise non-existent.

Primarily, governments exist for the maintenance of social order. Hence it is that the obligation of the government to

protect life, liberty and property against the conduct of the indifferent, the careless and the evil-minded may be regarded as lying at the very foundation of the social compact. A recognition of this supreme obligation is found in those exertions of the legislative power which have as an end the preservation of social order and the protection of the welfare of the public and of the individual. If such legislation be reasonably adapted to the end in view, affords a hearing before judgment, and is not forbidden by some other affirmative provision of constitutional law, it is not to be regarded as denying due process of law under the provisions of the Fourteenth Amendment.

The law in question is a valid exercise of the police power of the State of Illinois. It rests upon the duty of the State to protect its citizens in the enjoyment and possession of their acquisitions, and is but a recognition of the obligation of the State to preserve social order and the property of the citizen against the violence of a riot or a mob.

The State is the creator of subordinate municipal governments. It vests in them the police powers essential to the preservation of law and order. It imposes upon them the duty of protecting property situated within their limits from the violence of such public breaches of the peace as are mobs and riots. This duty and obligation thus entrusted to the local subordinate government is by this enactment emphasized and enforced by imposing upon the local community absolute liability for property losses resulting from the violence of such public tumults.

The policy of imposing liability upon a civil subdivision of government exercising delegated police power is familiar to every student of the common law. We find it recognized in the beginning of the police system of Anglo-Saxon people. Thus, "The Hundred," a very early form of civil subdivision, was held answerable for robberies committed within the division. By a series of statutes, beginning possibly in 1285, in the statutes of Winchester, 13 Edw. I, c. 1, coming on down to the 27th Elizabeth, c. 13, the Riot Act of George I (1 Geo. I, St. 2) and Act of 8 George II, c. 16, we may find a continuous recognition of the principle that a civil subdivision entrusted with the duty of protecting property in its midst and with police power to discharge the function, may be made answerable not only for negligence affirmatively shown, but absolutely as not having afforded a protection adequate to the obligation. Statutes of a similar character have been enacted by several of the States and held

valid exertions of the police power. Darlington v. Mayor, etc., of New York, 31 N. Y. 164; Fauvia v. New Orleans, 20 La. Ann. 410; County of Allegheny v. Gibson, etc., 90 Pa. St. 397. The imposition of absolute liability upon the community when property is destroyed through the violence of a mob is not, therefore, an unusual police regulation. Neither is it arbitrary, as not resting upon reasonable grounds of policy. Such a regulation has a tendency to deter the lawless, since the sufferer must be compensated by a tax burden which will fall upon all property, including that of the evildoers as members of the community. It is likewise calculated to stimulate the exertions of the indifferent and the law-abiding to avoid the falling of a burden which they must share with the lawless. In that it directly operates on and affects public opinion, it tends strongly to the upholding of the empire of the law.

There remains the contention that the act discriminates between cities and villages or other incorporated towns.

The liability is imposed upon the city if the property be within the limits of a city; if not, then upon the county. The classification is not an unreasonable one. A city is presumptively the more populous and better organized community. As such it may well be singled out and made exclusively responsible for the consequence of riots and mobs to property therein.

The county, which includes the city and other incorporated subdivisions, is, not unreasonably, made liable to all sufferers whose property is not within the limits of a city.

The power of the State to impose liability for damage and injury to property from riots and mobs includes the power to make a classification of the subordinate municipalities upon which the responsibility may be imposed. It is a matter for the exercise of legislative discretion, and the equal protection of the law is not denied where the classification is not so unreasonable or extravagant as to be a mere arbitrary mandate.

The cases upon this subject are so numerous as to need no further elucidation.

Among the later cases are Williams v. Arkansas, 217 U. S. 79; Watson v. Maryland, 218 U. S. 173; Chicago, B. & Q. R. R. Co. v. McGuire, 219 U. S. 549; House v. Mayes, 219 U. S. 270.

Judgment affirmed.

BARRETT, PRESIDENT OF ADAMS EXPRESS CO. v. CITY OF NEW YORK.

CITY OF NEW YORK v. BARRETT, PRESIDENT OF ADAMS EXPRESS CO.

SUPREME COURT OF THE UNITED STATES. 1914.
232 U. S. 14; 58 Lawyers' Ed. 483.

Appeal and cross-appeal from the Circuit Court of the United States for the Southern District of New York.

MR. JUSTICE HUGHES delivered the opinion of the court.

This suit was brought to restrain the enforcement against the Adams Express Company of a group of ordinances of the Board of Aldermen of the City of New York, upon the ground that, as applied to that company, these ordinances constitute an unconstitutional interference with interstate commerce and deny to it the equal protection of the laws. The ordinances are contained in Chapter 7 of the Code of Ordinances adopted in the year 1906, as amended. . . .

The chapter relates to specified businesses in which no one is permitted to engage except under an annual license granted by the Mayor and revocable by him. Among these is the business of "expressmen" (§§ 305, 306). It is provided that no person is to be licensed "except a citizen of the United States or one who has regularly declared intention to become a citizen" (§ 307). The license fee is "for each express wagon," five dollars, and "for each driver of any licensed vehicle," fifty cents, with provision for renewal at one-half these rates (§ 308). Every person driving a licensed "express" is to be "licensed as such driver, and every application for such license shall be indorsed, in writing, by two reputable residents of The City of New York testifying to the competence of the applicant" (§ 315). Every vehicle "kept or used for the conveyance of baggage, packages, parcels, and other articles within or through The City of New York for pay" is to be deemed a public express (§ 330). It is to bear a designation according with its official number (§ 331). Its owner is to give a bond to the State for "every vehicle licensed in a penal sum of $100, with sufficient surety, approved by the Mayor or Chief of the Bureau of Licenses, conditioned for the safe and prompt delivery" of all articles (§ 332). Provision is also made for the regular inspection of "all licensed vehicles and places of business" (§ 374), the report of any change of residence to the Bureau of Licenses (id.), the exhibition of licenses

upon demand (§ 375), and the display of the prescribed letters and numbers (§ 376). Penalties are provided for the violation of these requirements, and any person carrying on any business regulated by the ordinance, without license, is guilty of a misdemeanor (§§ 307, 315, 379).

The Adams Express Company, an unincorporated association organized under the laws of New York, has been engaged in interstate commerce, as a common carrier of packages, since the year 1854. It transacts its business in many States; and in the City of New York it handles daily about 50,000 interstate shipments, employing 341 wagons and 68 automobiles. About one-half of these wagons are stabled in Jersey City. . . . The interstate business, however, in the number of packages, comprises ninety-eight per cent of the total business transacted in New York City, and, it being impracticable to effect a separation, the local and the other intrastate shipments are handled in the same vehicles, and by the same men, that are employed in connection with the interstate transportation. It was not until recently that the City sought to compel the Company, in the transaction of this business, to comply with its license ordinances, although there have been ordinances requiring licenses for both express wagons and their drivers for over fifty years. . . . In the fall of 1910, however, at a time when the business of the Company was interrupted by a strike of its drivers, and it was endeavoring to replace those who had stopped work, the City through its officers undertook to enforce the ordinances with respect to all the wagons and drivers of the Company, threatening to arrest unlicensed drivers of unlicensed wagons notwithstanding they might be engaged in interstate transportation, and to remove, if necessary, unlicensed wagons from the streets. This was the occasion of the present suit.

The Circuit Court held that sections 305 and 306 were inoperative so far as they purported to require the complainant to obtain a local license for transacting its interstate business, and further, that the requirement of licenses as to express automobiles and chauffeurs had been superseded by a state statute (Laws of 1910, c. 374). To this extent the City, and its officers who were codefendants, were enjoined. But with respect to the payment of license fees for express wagons and drivers, and the other regulations which we have briefly described, the court held that the enactments were valid and an injunction was refused. 189 Fed. Rep. 268. Both parties appeal, the Company

insisting that it was entitled to the entire relief sought, and the City, that no relief whatever should have been granted.

In restraining the enforcement of sections 305 and 306, as stated, we think that the court was right. . . . If the above-mentioned sections are to be deemed to require that a license must be obtained as a condition precedent to conducting the interstate business of an express company, we are of the opinion that, so construed, they would be clearly unconstitutional. It is insisted that, under the authority of the State, the ordinances were adopted in the exercise of the police power. But that does not justify the imposition of a direct burden upon interstate commerce. Undoubtedly, the exertion of the power essential to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to Federal legislation. Smith v. Alabama, 124 U. S. 465; Hennington v. Georgia, 163 U. S. 299; N. Y., N. H. & H. R. R. Co. v. New York, 165 U. S. 628; Lake Shore & M. S. Ry. Co. v. Ohio, 173 U. S. 285. It must, however, be confined to matters which are appropriately of local concern. It must proceed upon the recognition of the right secured by the Federal Constitution. Local police regulations cannot go so far as to deny the right to engage in interstate commerce, or to treat it as a local privilege and prohibit its exercise in the absence of a local license. Crutcher v. Kentucky, 141 U. S. 47, 58; Robbins v. Taxing Dist., 120 U. S. 489, 496; Leloup v. Mobile, 127 U. S. 640, 645; Stoutenburgh v. Hennick, 129 U. S. 141, 148; Rearick v. Pennsylvania, 203 U. S. 507; International Text Book Co. v. Pigg, 217 U. S. 91, 109; Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, 260; Buck Stove & Range Co. v. Vickers, 226 U. S. 205, 215; Crenshaw v. Arkansas, 227 U. S. 389; Minnesota Rate Cases, 230 U. S. 352, 401. As was said by this court in Crutcher v. Kentucky, 141 U. S. p. 58, "a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

The requirements of sections 305 and 306, with the schedule of fees in section 308, cannot be regarded as imposing a fee, or tax, for the use of the streets; if they were such, the question would at once arise as to the validity of the discrimination involved in such an exaction. Nor can they be considered as a regulation in the interest of safety in street traffic. Other ordinances provide for the "rules of the road" to which wagons of

express companies, as well as those of other persons, are subject (Code of Ordinances, c. 12). The sections now under consideration constitute a regulation of the express "business." Article I is entitled, "Business Requiring a License;" section 305, containing the enumeration, provides that "the following businesses must be duly licensed;" and section 306 that "no person shall engage in or carry on any such business without a license therefor" under a stated penalty. . . . The right of public control, in requiring such a license, is asserted by virtue of the character of the employment, but while such a requirement may be proper in the case of local or intrastate business, it cannot be justified as a prerequisite to the conduct of the business that is interstate. Not only is the latter protected from the action of the State, either directly or through its municipalities, in laying direct burdens upon it, but, in the present instance, Congress has exercised its authority and has provided its own scheme of regulation in order to secure the discharge of the public obligations that the business involves. Act of June 29, 1906, c. 3591, 34 Stat. 584; Adams Express Co. v. Croninger, 226 U. S. 491, 505; United States v. Adams Express Co., 229 U. S. 381.

It would seem to follow, necessarily, that the annual license fees prescribed by section 308 . . . cannot be exacted, so far as the interstate business is concerned. They cannot be regarded as coming within the category of inspection fees, which are sustained when fairly commensurate with the cost of local supervision of such matters as are under local control. (Western Union Tel. Co. v. New Hope, 187 U. S. 419, 425; Atlantic, etc., Tel. Co. v. Philadelphia, 190 U. S. 160, 164.) The provisions of section 308 are inseparably connected with those of sections 305 and 306. The sums fixed "for each express wagon" and "for each driver" measure the amount to be exacted for the granting of the license required for the carrying on of business. And it is difficult to see how the payment can be enforced as to the interstate business if the taking out of the license therefor cannot be compelled.

Similar considerations are controlling with respect to the provision of section 332 for the giving of license bonds. This in terms is related to the requirement of section 305. It is provided that a bond shall be given "for each and every vehicle licensed" and it is to be conditioned "for the safe and prompt delivery of all baggage, packages," etc., entrusted to the owner or driver "of any such licensed express." As applied to the Company's business of interstate transportation, it must fall with the pro-

vision regarding the license, and, further, it must be regarded as repugnant to the exclusive control asserted by Congress in occupying the field of regulation with regard to the obligations to be assumed by interstate express carriers. (Adams Express Co. v. Croninger, supra; Southern Ry. Co. v. Reid, 222 U. S. 424; Same v. Reid & Beam, id., 444, 447.)

Section 315 provides for separate licenses for drivers. We may assume the propriety of suitable provision to insure careful driving over the city streets and the existence of ample power to meet this local necessity. It is also clear that regulations for this purpose, when the movement of interstate traffic is involved, should be entirely reasonable and should not arbitrarily restrict the facilities upon which it must depend. If the provision of section 315 could be regarded as severable from the requirement of a license for the conduct of business, we should still have great difficulty in sustaining it as a reasonable regulation with regard to drivers employed in the interstate transportation which has been described. Reading section 315 in connection with section 307, as we understand the City contends it should be read, no driver can be licensed except a citizen of the United States or one who has regularly declared intention to become a citizen, and the assurance of his qualifications does not depend simply upon the applicant's ability to meet appropriate tests so as to satisfy the official judgment, but the application must be accompanied by the indorsement in writing of two reputable residents of the city testifying to his competence. When the importance to the entire country of promptness and facility in the conduct of the business of the express companies in New York City, and the obvious convenience of their being able to secure drivers in Jersey City as well as in New York, are considered, the provision would seem to be unnecessarily burdensome. We are not called upon, however, to decide this point. Section 315 relates exclusively to drivers of a "licensed hack or express." There is no such provision as to drivers of wagons generally. While the driver's license is separate, the ordinance refers only to such drivers as are employed in the business for the carrying on of which a license may be required. Whatever might otherwise be the City's power as to the regulation of drivers, this provision cannot be divorced from the license scheme of which it is a part. . . .

We conclude that the complainant was entitled to an injunction restraining the enforcement of the ordinances in question against the Company with respect to the conduct of its interstate business

and its wagons and drivers employed in interstate commerce. In this view it is unnecessary to consider whether the ordinances have been superseded, as to automobiles, by the state statute.

The decree of the Circuit Court is reversed and the case is remanded to the District Court, with direction to enter a decree in favor of the complainant in conformity with this opinion.

It is so ordered.

ATLANTIC COAST LINE RAILROAD COMPANY v. STATE OF GEORGIA.

SUPREME COURT OF THE UNITED STATES. 1914.
234 U. S. 280; 58 Lawyers' Ed. 1312.

Error to the Court of Appeals of the State of Georgia.

MR. JUSTICE HUGHES delivered the opinion of the court.

The Atlantic Coast Line Railroad Company, the plaintiff in error, was convicted of violating a statute of the State of Georgia known as the "headlight law." Pub. Laws (Ga.), 1908, pp. 50, 51; Civil Code, §§ 2697, 2698. In defense it was insisted that the act contravened the commerce clause and the Fourteenth Amendment of the Constitution of the United States. . . .

The material portions of the statute are as follows:

"Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, That all railroad companies are hereby required to equip and maintain each and every locomotive used by such company to run on its main line after dark with a good and sufficient headlight which shall consume not less than three hundred watts at the arc, and with a reflector not less than twenty-three inches in diameter, and to keep the same in good condition. The word main line as used herein means all portions of the railway line not used solely as yards, spurs, and side tracks." . . .

The contention is made that this act deprives the company of its liberty of contract, and of its property, without due process of law. It compels the disuse of a material part of the company's present equipment and the substitution of a new appliance. The use of locomotive headlights, however, is directly related to safety in operation. It cannot be denied that the protective power of government, subject to which the carrier conducts its business and manages its property, extends as well to the regu-

lation of this part of the carrier's equipment as to apparatus for heating cars or to automatic couplers. The legislature may require an adequate headlight, and whether the carrier's practice is properly conducive to safety, or a new method affording greater protection should be substituted, is a matter for the legislative judgment. But it is insisted that the legislature has gone beyond the limits of its authority in making the specific requirements contained in the act as to the character and power of the light and the dimensions of the reflector. This argument ignores the established principle that if its action is not arbitrary—is reasonably related to a proper purpose—the legislature may select the means which it deems to be appropriate to the end to be achieved. It is not bound to content itself with general directions when it considers that more detailed measures are necessary to attain a legitimate object. Particularization has had many familiar illustrations in cases where there has been a conviction of the need of it, as, for example, in building regulations and in provisions for safeguarding persons in the use of dangerous machinery. So far as governmental power is concerned, we know of no ground for an exception in the case of a locomotive headlight.

It cannot be said that the legislature acted arbitrarily in prescribing electric light, in preference to others, or that, having made this selection, it was not entitled to impose minimum requirements to be observed in the use of the light. . . . Assuming that there is room for differences of opinion, this fact does not preclude the exercise of the legislative discretion. So far as the question was one simply of expediency—as to the best method to provide the desired security—it was within the competency of the legislature to decide it. N. Y. & N. E. R. R. Co. v. Bristol, 151 U. S. 556, 571; C. B. & Q. Ry. Co. v. Drainage Com'rs, 200 U. S. 561, 583, 584; McLean v. Arkansas, 211 U. S. 539, 547, 548; C. B. & Q. Ry. Co. v. McGuire, 219 U. S. 549, 568, 569, and cases there cited. . . .

We conclude that there is no valid objection to the statute upon the ground that it deprives the carrier of liberty or property without due process of law. . . .

Finally, it is urged that the statute constitutes an unwarrantable interference with interstate commerce. The locomotive, with respect to which the accusation was made, was at the time being regularly used in the hauling of interstate freight trains over the company's main line of railroad and was equipped with an oil headlight. The statute, as the Supreme Court of the

State said, was not directed against interstate commerce, but it was held that it incidentally applied to locomotives used in hauling interstate trains while these were moving on the main line in the State of Georgia. This being so, the act is said to be repugnant to the exclusive power of Congress. It is argued that if Georgia may prescribe an electric headlight, other States through which the road runs may require headlights of a different sort; that, for example, some may demand the use of acetylene, and that others may require oil; and that, if state requirements conflict, it will be necessary to carry additional apparatus and to make various adjustments at state lines which would delay and inconvenience interstate traffic.

The argument is substantially the same as that which was strongly presented to the court in New York, New Haven & Hartford R. R. Co. v. New York, 165 U. S. 628, where the plaintiff in error was held subject to penalty for the violation of a New York statute which in substance made it unlawful for any steam railroad doing business in that State to heat its passenger cars, on any other than mixed trains, by any stove or furnace kept inside of the car or suspended therefrom. The railroad company was a Connecticut corporation having but a few miles of road within the State of New York and operating through trains from New York through Connecticut to Massachusetts. As this court said in its opinion, the argument was made that "a conflict between state regulations in respect of the heating of passenger cars used in interstate commerce would make safe and rapid transportation impossible; that to stop an express train on its trip from New York to Boston at the Connecticut line in order that passengers may leave the cars heated as required by New York, and get into other cars heated in a different mode in conformity with the laws of Connecticut, and then at the Massachusetts line to get into cars heated by still another mode as required by the laws of that Commonwealth, would be a hardship on travel that could not be endured." But the court ruled that these "possible inconveniences" could not affect "the question of power in each State to make such reasonable regulations for the safety of passengers on interstate trains as, in its judgment, all things considered, is appropriate and effective." 165 U. S. 632, 633.

In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though

such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal action, the use of such agencies, which, unless carefully guarded, was fraught with danger to the community, should go unregulated, and that the States should be without authority to secure needed local protection. The requirements of a State, of course, must not be arbitrary or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another State, in the exercise of a similar power, may not impose the same regulation. We may repeat what was said in Smith v. Alabama, 124 U. S. 465, 481, 482: "It is to be remembered that railroads are not natural highways of trade and commerce. . . . The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. . . . The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution." See also Nashville, etc., Rwy. Co. v. Alabama, 128 U. S. 96; Hennington v. Georgia, 163 U. S. 299; N. Y., N. H. & H. R. R. Co. v. New York, *supra;* Lake Shore & M. S. Rwy. Co. v. Ohio, 173 U. S. 285; Missouri Pacific Rwy. Co. v. Larabee Mills, 211 U. S. 612; Missouri Pacific Rwy. Co. v. Kansas, 216 U. S. 262; Chicago, R. I. & Pacific Rwy. Co. v. Arkansas, 219 U. S. 453; Minnesota Rate Cases, 230 U. S. 352, 402, 410.

If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced—if there appears to be need of standardization of safety appliances and of providing rules of operation which will govern the entire interstate road irrespective of state boundaries—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the State, in the absence of conflicting Federal action, of its

power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress in its control of interstate commerce to establish such regulations as in its judgment may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway. . . .

The judgment is affirmed. *Affirmed.*

NOTE.—As to regulations for the preservation of safety and order, see Wabash Ry. v. Defiance (1897), 167 U. S. 88 (street grades at railway crossings); Laclede Gas Light Co. v. Murphy (1898), 170 U. S. 78 (placing of electric light wires); Minnesota Iron Co. v. Kline (1905), 199 U. S. 593 (abrogation of fellow-servant rule among railway employees); Chicago, Milwaukee & St. Paul Ry. v. Minneapolis (1914), 232 U. S. 430 (railway to build bridge over its right of way at its own expense); Plymouth Coal Co. v. Pennsylvania (1914), 232 U. S. 531 (regulation of working of coal mines); Atlantic Coast Line Ry. v. Goldsboro (1914), 232 U. S. 548 (ordinances regulating operation of railway trains within city limits); Hendrick v. Maryland (1915), 235 U. S. 610 (regulation of motor vehicles).

SECTION 4. THE PROMOTION OF THE GENERAL WELFARE.

PLUMLEY v. MASSACHUSETTS.

SUPREME COURT OF THE UNITED STATES. 1894.
155 U. S. 461; 39 Lawyers' Ed. 223.

Error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

[The State of Massachusetts enacted a law entitled "An act to prevent deception in the manufacture and sale of imitation butter," which forbade the manufacture or sale of "any article, product or compound made wholly or partly out of any fat, oil or oleaginous substance or compound thereof, not produced from unadulterated milk or cream from the same, which shall be in imitation of yellow butter produced from pure unadulterated milk or cream of the same," but "nothing in this act shall be construed to prohibit the manufacture or sale of oleomargarine in a separate and distinct form, and in such a manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter." The plaintiff in error was convicted in the Municipal Court of Boston of hav-

ing sold oleomargarine colored in imitation of butter, contrary to the provisions of the statute just cited. That conviction was sustained by the Supreme Judicial Court of Massachusetts (156 Mass. 236).]

MR. JUSTICE HARLAN delivered the opinion of the court. . . .

The vital question in this case is, . . . whether, as contended by the petitioner, the statute under examination in its application to sales of oleomargarine brought into Massachusetts from other States is in conflict with the clause of the Constitution of the United States investing Congress with the power to regulate commerce among the several States. . . .

It will be observed that the statute of Massachusetts which is alleged to be repugnant to the commerce clause of the Constitution does not prohibit the manufacture or sale of all oleomargarine, but only such as is colored in imitation of yellow butter produced from pure unadulterated milk or cream of such milk. If free from coloration or ingredient that "causes it to look like butter," the right to sell it "in a separate and distinct form, and in such manner as will advise the consumer of its real character," is neither restricted nor prohibited. It appears, in this case, that oleomargarine, in its natural condition, is of "a light yellowish color," and that the article sold by the accused was artificially colored "in imitation of yellow butter." Now, the real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. If any one thinks that oleomargarine, not artificially colored so as to cause it to look like butter, is as palatable or as wholesome for purposes of food as pure butter, he is, as already observed, at liberty under the statute of Massachusetts to manufacture it in that State or to sell it there in such a manner as to inform the customer of its real character. He is only forbidden to practice, in such matters, a fraud upon the general public. The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be

that the Constitution of the United States secures to any one the privilege of manufacturing an article of food in such a manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country? . . .

If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. For, as said by this court in Sherlock v. Alling, 93 U. S. 99, 103: "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." . . .

But the case most relied on by the petitioner to support the proposition that oleomargarine, being a recognized article of commerce, may be introduced into a State and there sold in original packages, without any restriction being imposed by the State upon such sale, is Leisy v. Hardin, 135 U. S. 100. . . .

It is sufficient to say of Leisy v. Hardin that it did not in form or in substance present the particular question now under consideration. The article which the majority of the court in that case held could be sold in Iowa in original packages, the statute of the State to the contrary notwithstanding, was beer manufactured in Illinois and shipped to the former State to be there sold in such packages. So far as the record disclosed, and so far as the contentions of the parties were concerned, the article there in question was what it appeared to be, namely, genuine beer, and not a liquid or drink colored artificially so as to cause it to look like beer. . . .

We are of opinion that it is within the power of a State to exclude from its markets any compound manufactured in another State, which has been artificially colored or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The Constitution of the United States does not secure to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society; and the States are as competent to protect their people against such offenses or wrongs as they are to protect them against crimes or wrongs of more serious character. And this protection may be given without violating any right secured by the national Constitution, and without infringing the authority of the general government. A State enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor, in any just sense, interfere with the freedom of commerce among the several States. It is legislation which "can be most advantageously exercised by the States themselves." Gibbons v. Ogden, Wheat. 1, 203. . . . *Judgment affirmed.*

Mr. Justice Fuller, with whom concurred Mr. Justice Field and Mr. Justice Brewer, dissenting. . . .

SLIGH v. KIRKWOOD, SHERIFF OF ORANGE COUNTY, FLORIDA.

Supreme Court of the United States. 1915.
237 U. S. 52; 59 Lawyers' Ed. —.

Error to the Supreme Court of the State of Florida.

Mr. Justice Day delivered the opinion of the court.

A statute of the State of Florida undertakes to make it unlawful for anyone to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption.

Plaintiff in error, S. J. Sligh, was charged by information containing three counts in the Criminal Court of Record in Orange County, Florida, with violation of this statute. One

of the counts charged that Sligh delivered to an agent of the Seaboard Air Line Railway Company, a common carrier, for shipment to Winecoff & Adams, Birmingham, Alabama, one car of oranges, which were citrus fruits, then and there immature and unfit for consumption. . . .

The single question is: Was it within the authority of the State of Florida to make it a criminal offense to deliver for shipment in interstate commerce citrus fruits,—oranges in this case,—then and there immature and unfit for consumption?

It will be observed that the oranges must not only be immature, but they must be in such condition as renders them unfit for consumption; that is, giving the words their ordinary signification, unfit to be used for food. Of course, fruits of this character, in that condition, may be deleterious to the public health, and, in the public interest, it may be highly desirable to prevent their shipment and sale. Not disputing this, the contention of the plaintiff in error is that the statute contravenes the Federal Constitution in that the legislature has undertaken to pass a law beyond the power of the State, because of the exclusive control of Congress over commerce among the States, under the Federal Constitution.

That Congress has the exclusive power to regulate interstate commerce is beyond question. . . .

While this proposition seems to be conceded, and the competency of the State to provide local measures in the interest of the safety and welfare of the people is not doubted, although such regulations incidentally and indirectly involve interstate commerce, the contention is that this statute is not a legitimate exercise of the police power, as it has the effect to protect the health of people in other States who may receive the fruits from Florida in a condition unfit for consumption; and however commendable it may be to protect the health of such foreign peoples, such purpose is not within the police power of the State.

The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. At an early day it was held to embrace every law or statute which concerns the whole or any part of the people, whether it related to their rights or duties, whether it respected them as men or citizens of the State, whether in their public or private relations, whether it related to the rights of persons or property of the public or any individual within the State. New York v. Miln, 11 Pet. 102, 139. The police power, in its broadest sense, includes all legislation and almost every function of civil

government. Barbier v. Connolly, 113 U. S. 27. It is not subject to definite limitations, but is co-extensive with the necessities of the case and the safeguards of public interest. Camfield v. United States, 167 U. S. 518, 524. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health. Chicago etc., Railway v. Drainage Commissioners, 200 U. S. 561, 592. In one of the latest utterances of this court upon the subject, it was said: "Whether it is a valid exercise of the police power is a question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends, we have said, not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity. . . . And further, 'It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.' " Eubank v. Richmond, 226 U. S. 137, 142.

The power of the State to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. . . .

Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the State. . . .

Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of state regulation.

We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the State of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other States wherein such fruits find their most extensive market. The shipment of fruits, so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of

such business within the State. The protection of the State's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose. . . .

We find no error in the judgment of the Supreme Court of Florida, and it is *Affirmed.*

NOTE.—For police regulations for the promotion of the public convenience or general welfare, see Dent v. West Virginia (1889), 129 U. S. 114 (requiring licenses for physicians); Miller v. Texas (1894), 153 U. S. 535 (regulating the carrying of concealed weapons); Davis v. Massachusetts (1897), 167 U. S. 43 (requiring a license to speak in a public place); Wilson v. Eureka City (1899), 173 U. S. 32 (regulating the moving of buildings on public streets); Lake Shore & Michigan Southern Ry. v. Ohio (1899), 173 U. S. 285 (requiring three trains per day to stop at certain stations); Ohio Oil Co. v. Indiana (1900), 177 U. S. 190 (prohibiting waste of natural gas); Chicago, Burlington & Quincy Ry. v. Drainage Commissioners (1906), 200 U. S. 561 (removal of railway bridges in order to permit drainage of land); Bacon v. Walker (1907), 204 U. S. 311 (regulating the grazing of public lands); Western Turf Association v. Greenberger (1907), 204 U. S. 359 (admission of ticket-holders to public places of amusement); McLean v. Arkansas (1909), 211 U. S. 539 (method of payment of coal-miners); Welch v. Swasey (1909), 214 U. S. 91 (restricting height of buildings); Griffith v. Connecticut (1910), 218 U. S. 563 (loans at interest of more than 15 per cent); Noble State Bank v. Haskell (1911), 219 U. S. 104 (creation of fund for guaranty of bank deposits); Chicago, Burlington & Quincy Ry. v. McGuire (1911), 219 U. S. 549 (contracts by employees limiting liability for injuries in contravention of statute governing such liability); Fifth Avenue Coach Co. v. New York (1911), 221 U. S. 467 (regulation of advertising on street vehicles); Mutual Loan Co. v. Martell (1911), 222 U. S. 225 (regulating assignments of wages); Erie Ry. v. Williams (1914), 233 U. S. 685 (semi-monthly payment of employees in certain industries); Mutual Film Corporation v. Industrial Commission of Ohio (1915), 236 U. S. 230 (censorship of moving picture films); Chicago & Alton Ry. v. Tranbarger (1915), 238 U. S. 67 (railroads required to maintain outlets for water across their rights of way).

SECTION 5. THE REGULATION OF PUBLIC CALLINGS.

MUNN v. ILLINOIS.

SUPREME COURT OF THE UNITED STATES. 1876.
94 U. S. 113; 24 Lawyers' Ed. 77.

Error to the Supreme Court of the State of Illinois. . . .

MR. CHIEF JUSTICE WAITE delivered the opinion of the court. The question to be determined in this case is whether the gen-

eral assembly of Illinois can, under the limitations upon the legislative powers of the States imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved."

It is claimed that such a law is repugnant—

1. To that part of sect. 8, art. I, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several States;"

2. To that part of sect. 9 of the same article, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;" and

3. To that part of amendment 14 which ordains that no State shall "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."

We will consider the last of these objections first. . . .

The Constitution contains no definition of the word "deprive," as used in the Fourteenth Amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several States of the Union. By the Fifth Amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the Fourteenth, as a guaranty against any encroachments upon an acknowledged right of citizenship by the legislatures of the States.

When the people of the United Colonies separated from Great Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their State constitutions, or other forms of social compact, undertook to give

practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective States, unless in express terms or by implications reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the States and of the people of the States was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the States, so that now the governments of the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, Thorpe v. R. & V. Railroad Co., 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim, *sic utere tuo ut alienum non laedas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the License Cases, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within

any of the constitutional prohibitions against interference with private property. With the Fifth Amendment in force, Congress in 1820, conferred power upon the city of Washington "to regulate . . . the rates of wharfage at private wharves, . . . the sweeping of chimneys, and to fix the rates of fees therefor, . . . and the weight and quality of bread," 3 Stat. 587, sect. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 id. 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the States from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what is without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris,* 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

. . .

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit:—

"And whereas divers wagoners and other carriers, by com-

bination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," &c. 3 W. & M. c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. v. Merchants' Bank, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaintiffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. . . . Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. . . . The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators, because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. . . . In this way the trade in grain is carried on by the inhabitants of seven or eight of the great States of the West with four or five of the States lying on the sea-shore, and forms the largest part of interstate commerce in these States. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. . . . They are located with the river harbor on one side and the railway tracks on the other; and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given

rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great States of the West" must pass on the way "to four or five of the States on the sea-shore" may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he . . . take but reasonable toll." Certainly, if any business can be clothed "with a public interest and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly

to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, &c., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here.

. . .

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted. . . .

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the State Tax on Railway Gross Receipts, 15 Wall. 293, that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a State, under the form of regulating its own affairs, has encroached upon the exclusive domain of Congress, in respect to interstate commerce, but we do say that, upon the facts as they are represented to us in this record, that has not been done. . . . *Judgment affirmed.*

MR. JUSTICE FIELD and MR. JUSTICE STRONG dissented. . . .

NOTE.—The doctrine of the principal case was re-examined and affirmed in Budd v. New York (1892), 143 U. S. 517, and was given an even wider application in Brass v. North Dakota (1894), 153 U. S. 391. As to what businesses besides those mentioned in the principal case are affected with a public interest, see Boone County v. Patterson (1878), 98 U. S. 403 (log driving); Spring Valley Water Works v. Schottler (1884), 110 U. S. 347 (water works); Express Cases (1886), 117 U. S. 1 (express companies); Sands v. Manistee River Improvement Co. (1887), 123 U. S. 288 (river improvements); Gibbs v. Consolidated Gas Co. (1889), 130 U. S. 396 (gas light companies); Covington etc. Turnpike Road Co. v. Sandford (1896), 164 U. S. 578 (turn pikes); San Diego Land Co. v. National City (1899), 174 U. S. 739 (irrigation); Western Union Telegraph Co. v. Call Publishing Co. (1901), 181 U. S. 92 (telegraph companies); Cotting v. Kansas City Stockyards Co. (1901), 183 U. S. 79 (stockyards); Chesapeake & Potomac Telephone Co. v. Manning (1902), 186 U. S. 238 (telephone companies); Capital City Light & Fuel Co. v. Tallahassee (1902), 186 U. S. 401 (electric light companies); Board of Trade v. Christie Grain & Stock Co. (1905), 198 U. S. 236 (ticker service companies); German Alliance Insurance Co. v. Lewis (1914), 233 U. S. 389 (fire insurance); The Pipe Line Cases (1914), 234 U. S. 548 (pipe lines); Searles v. Mann Co. (1891), 45 Fed. 330 (sleep-

ing car companies); United States v. Ormsbee (1896), 74 Fed. 207 (canal companies); Milwaukee Electric Ry. v. Milwaukee (1898), 87 Fed. 577 (street railways); Baillie v. Larson (1905), 138 Fed. 177 (mining tunnels); Walker v. Shasta Power Co. (1908), 160 Fed. 856 (electric power transmission line); Dalles Lumbering Co. v. Urquhart (1888), 18 Oregon, 67 (lumber flumes); State v. Edwards (1893), 88 Maine, 102 (saw mills); State v. Jacksonville Terminal Co. (1899), 41 Fla. 363 (railway terminal companies); Inter-Ocean Publishing Co. v. Associated Press (1900), 184 Ill. 438 (news collecting agency); People v. Hartford Life Insurance Co. (1911), 252 Ill. 398 (life insurance companies).

The whole law governing business affected with a public interest is fully and admirably treated in Wyman, *Public Service Corporations*. See also an able article by C. K. Burdick, on "The Origin of the Peculiar Duties of Public Service Corporations" in *Columbia Law Review*, xi, 515, 616, 743.

NORTHERN PACIFIC RAILWAY COMPANY v. STATE OF NORTH DAKOTA.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY v. SAME.

SUPREME COURT OF THE UNITED STATES. 1915.
236 U. S. 585; 59 Lawyers' Ed. —.

Error to the Supreme Court of the State of North Dakota.

[The legislature of North Dakota in 1907 fixed maximum intrastate rates graduated according to distance for the transportation of coal in carload lots. In practice these rates applied almost solely to lignite coal. By judicial proceedings in the courts of North Dakota, sustained in 216 U. S. 579, the carriers were compelled to give the new rates a trial. In the fiscal year ending June 30, 1911, the total revenue received by the Northern Pacific Railway on the intrastate carriage of lignite coal was $58,953.07, on which it made a net profit of $847, while the same business was conducted by the Minneapolis, St. Paul & Sault Ste. Marie Railway at an actual loss of from $9,000 to $12,000, even when no allowance was made to it for interest on the investment in its property. The entire intrastate business of the carriers as a whole produced a fair return, but they contended that the act by which they were compelled to carry any commodity for less than a reasonable return deprived them of property without due process of law.]

MR. JUSTICE HUGHES delivered the opinion of the court. . . .

The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms, and it must serve without unjust discrimination. These duties are properly called public duties, and the State within the limits of its jurisdiction may enforce them. The State may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like cases, and to promote safety, good order and convenience.

But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. . . .

We have, then, to apply these familiar principles to a case where the State has attempted to fix a rate for the transportation of a commodity under which, taking the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost or without substantial compensation in addition to cost. We say this, for we entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it

must be considered. We find no basis for distinguishing in this respect between so-called "out-of-pocket costs," or "actual" expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry. The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost the entire cost must be taken into account.

It should be said, further, that we find nothing in the record before us, and nothing in the facts which have been set forth with the most careful elaboration by the state court, that can be taken to indicate the existence of any standard whatever by reference to which the rate in question may be considered to be reasonable. It does not appear that there has been any practice of the carriers in North Dakota which affords any semblance of support to a rate so low. Whatever inference may be deduced from coal rates in other States, as disclosed by the record, is decidedly against the reasonableness of the rate. . . .

The State insists that the enactment of the statute may be justified as "a declaration of public policy." In substance, the argument is that the rate was imposed to aid in the development of a local industry and thus to confer a benefit upon the people of the State. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the State, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it

would be a very different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly, it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action. We cannot reach the conclusion that the rate in question is to be supported upon the ground of public policy if, upon the facts found, it should be deemed to be less than reasonable.

The legislature, undoubtedly, has a wide range of discretion in the exercise of the power to prescribe reasonable charges, and it is not bound to fix uniform rates for all commodities or to secure the same percentage of profit on every sort of business. There are many factors to be considered, differences in the articles transported, the care required, the risk assumed, the value of the service, and it is obviously important that there should be reasonable adjustments and classifications. Nor is its authority hampered by the necessity of establishing such minute distinctions that the effective exercise of the rate-making power becomes impossible. It is not bound to prescribe separate rates for every individual service performed, but it may group services by fixing rates for classes of traffic. As repeatedly observed, we do not sit as a revisory board to substitute our judgment for that of the legislature, or its administrative agent, as to matters within its province. San Diego Land & Town Co. v. Jasper, 189 U. S. 439; Louisville & Nashville R. R. v. Garrett, 231 U. S. 298, 313. The court, therefore, is not called upon to concern itself with mere details of a schedule; or to review a particular tariff or schedule which yields substantial compensation for the services it embraces, when the profitableness of the intrastate business as a whole is not involved.

But a different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial com-

pensation even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the assumption of reasonableness is rebutted. If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear. As has been said, it does not appear here. Frequently attacks upon state rates have raised the question as to the profitableness of the entire intrastate business under the State's requirements. But the decisions in this class of cases furnish no ground for saying that the State may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate. . . .

The judgments, respectively, are reversed and the cases are remanded for further proceedings not inconsistent with this opinion. *It is so ordered.*

MR. JUSTICE PITNEY dissents.

NOTE.—Accord: Norfolk & Western Ry. v. West Virginia (1915), 236 U. S. 605. A carrier may be required to furnish a facility which it is part of its general duty to furnish even though this entails a loss, Atlantic Coast Line Ry. v. North Carolina Corporation Commission (1907), 206 U. S. 1, but to require it to furnish a facility which it is not its duty to furnish deprives it of property without due process of law. Great Northern Ry. v. Minnesota (1915), 238 U. S. 340.

Most of the legislation adopted for the regulation of transportation and other public service companies has to do with the making of rates, authority over which has been generally vested in commissions. The function of rate-making is of a legislative character, Knoxville v. Knoxville Water Co. (1909), 212 U. S. 1, 8, and to vest it in a commission seemed a violation of the maxim that legislative power cannot be delegated, but the validity of such a delegation is no longer questioned. Interstate Commerce Commission v. Goodrich Transit Co. (1912), 224 U. S. 194. Rate regulation is subject to the constitutional provisions for the protection of property, Reagan v. Farmers' Loan & Trust Co. (1894), 154 U. S. 362. Hence any regulation of rates which all things considered makes impossible a fair return is invalid. San Diego Land & Town Co. v. Jasper (1903), 189 U. S. 439; Willcox v. Consolidated Gas Co. (1909), 212 U. S. 19. Whether a rate fixed by a legislature or a commission prevents a fair return or not is a judicial question, and any attempt to debar an appeal to the courts is a deprivation of due process of law. Chicago, Milwaukee & St. Paul Ry. v. Minnesota (1890), 134 U. S. 418; Ex parte Young (1908), 209 U. S. 123. The cases on this point are collected in Evans, "Judicial Control of Commission Rate-Making," *Case and Comment*, xxi, 895.

Rates fixed by public authority must not only comply with the due process requirement of the Fifth and Fourteenth Amendments, but a rate fixed by a State must also be confined to the intrastate business of the carrier in order to avoid infraction of the power of Congress over interstate commerce. In practice this has proved the most difficult feature of the regulation of rates since practically all carriers are engaged in both intrastate and interstate commerce and the two kinds of business cannot be separated. Under the decision in Smyth v. Ames (1897), 169 U. S. 466, holding that rates fixed by the States on intrastate business must yield a reasonable return on that business, some separation must be attempted in order to determine whether they do yield such a return. The practical difficulties in the way of such a separation led the court to suggest in the Minnesota Rate Cases (1913), 230 U. S. 352, 432-3, that the two kinds of commerce were so inextricably blended as perhaps to make it necessary for Congress to regulate both in order to have an effective regulation of that which has been specifically subjected to its control.

While it is admitted that a public service company is entitled to a fair return, there is much difference of opinion as to the factors entering into the value on which the return should be measured. In a much quoted passage in Smyth v. Ames (1897), 169 U. S. 466, 546, the Supreme Court said:

> We hold, however, that the basis of all calculations as to reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered are reasonably worth.

The best discussion of rate-making to be found in the reports is the masterly opinion of Justice Hughes in the Minnesota Rate Cases (1913), 230 U. S. 352. As to the various factors which may enter into the value upon which the carriers are entitled to a fair return, see Cleveland, C. C. & St. L. Ry. v. Backus (1894), 154 U. S. 439; Cumberland Telephone & Telegraph Co. v. Memphis (1908), 187 Fed. 875 (original investment); Illinois Central Ry. v. Interstate Commerce Commission (1907), 206 U. S. 441 (expenditure for permanent improvements); Railroad Commission of Louisiana v. Cumberland Telephone & Telegraph Co. (1909), 212 U. S. 414 (depreciation fund as part of capital); Omaha v. Omaha Water Co. (1910), 218 U. S. 180; Cumberland Telephone & Telegraph Co. v. Louisville (1911), 187 Fed. 637 (going value); Consolidated Gas Co. v. City of New York (1907),

157 Fed. 849 (franchise value); San Diego Land & Town Co. v. Jasper (1903), 189 U. S. 439; Public Service Gas Co. v. Public Utility Board (1913), 84 N. J. Law, 463 (present value of plant); Knoxville v. Knoxville Water Co. (1909), 212 U. S. 1; Willcox v. Consolidated Gas Co. (1909), 212 U. S. 19; C. H. Venner Co. v. Urbana Waterworks (1909), 174 Fed. 348; Steenerson v. Great Northern Ry. (1897), 69 Minn. 353 (present cost of reproduction).

The regulation of rates, particularly of carriers, is comprehensively treated in Beale and Wyman, Railroad Rate Regulation (2nd edition). On the making of rates, see Noyes, *American Railroad Rates;* Hammond, *Rate Theories of the Interstate Commerce Commission.* On questions of valuation see Floy, *Valuation of Public Utility Properties;* Foster, *Engineering Valuation of Public Utilities and Factories;* Hayes, *Public Utilities: Their Cost New and Depreciation;* Wyer, *Regulation, Valuation, and Depreciation of Public Utilities;* and Whitten, *Valuation of Public Service Corporations,* and *Supplement.*

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