The Law

of the

American Constitution

Its Origin and Development

By

Charles K. Burdick

Professor of Law in Cornell University

With Two Introductory Chapters

by

Francis M. Burdick

Late Dwight Professor of Law in Columbia University

G. P. Putnam's Sons

New York and London

The Knickerbocker Press

RM

First Printing, October, 1922
Second Printing, November, 1923
Third printing, February, 1926

Made in the United States of America

THIS BOOK IS INSCRIBED

WITH DEEPEST AFFECTION AND RESPECT

TO THE MEMORY OF

MY FATHER

PREFACE

THE American federal system is based upon the Constitution of the United States. That instrument was adopted to make "more perfect" the union which, having had its beginning in the common allegiance of the colonies to the British Crown during the war for independence, was welded closer by the necessity for common action, and found its first constitutional expression in the Articles of Confederation. Nineteen articles of amendment have been added to the Constitution in the hundred and thirty-four years since its adoption. It is hoped that in the first three chapters of this book a clear picture is given of the making of the Constitution, of the nature of the federal system which was set up, and of the principles which underlie the amending power.

The Constitution of the United States first of all establishes a national government, and sets off to it certain fields in which it shall be supreme, at the same time imposing upon it certain specific prohibitions and restrictions. It was, however, very far from the purpose of the framers of that instrument to do away with the separate States or to reduce them to mere administrative units. Yet the grants of powers to the national government did of necessity operate as limitations upon the previous sovereign powers of the States; and to these implied limitations were added others which are express. In the second part of this book, I have dealt with the national government in its executive, judicial, and legislative departments, discussing the powers which are granted to each of them, and the limitations which are placed upon their activities. In Part III are considered the restrictions placed upon the States, and the extent of the powers which may still be exercised by them.

It is believed that this is a logical method of treatment, and it is hoped that it will help to make clear the division of powers between the national and state governments under our federal system. No attempt has been made to treat of the powers of the States under their individual constitutions.

Among the most admirable features of the Constitution of the United States are its brevity, and the self-restraint shown by its authors in being content to lay down general principles of government, rather than attempting to deal in detail with the application of those principles. This has resulted of necessity in the development of a very large body of "unwritten" constitutional law—rules with regard to constitutional powers and limitations which cannot be found expressly set forth in the Constitution itself, but which have been held by the courts to result by reasonable implication from the express terms of that instrument. Such for example is the character of the law with regard to the powers of the President as Chief Executive, the power of the federal courts to annul congressional legislation, and the power of the national government to acquire and govern territories and to issue legal tender notes; with regard to the war powers of Congress, and the power of Congress to enact a body of police regulations under the commerce clause and the clause dealing with taxation; with regard to the meaning of the limitations put upon the national government in the Bill of Rights contained in the first eight amendments; and with regard to the limitations as to the impairment of contracts, as to due process of law, and as to the equal protection of the laws imposed upon the States. Naturally this book deals very largely with that body of constitutional law developed by judicial interpretation, and it has been my effort to make clear the nature and extent of that development.

This book makes no pretense of being a digest of all of the cases on constitutional law. It is believed, however, that the cases which have established or developed important constitutional principles are discussed and that sufficient

illustrative cases have been considered to make plain the various points which are dealt with. The records of the Constitutional Convention have been often referred to for the purpose of showing the history of various provisions in the Constitution, and frequent references have been made to treatises, to articles, and to notes in legal periodicals. Some comparisons are also drawn between our constitutional provisions and the provisions in the constitutions of the British Dominions.

My father, Francis M. Burdick, after his retirement from teaching, had had in plan the preparation of a book on the Constitution. I have used with very little alteration as the first two chapters of this book the only chapters completed by him. I have also in my possession the further notes which he had made, and acknowledge my indebtedness to them for a number of suggestions. I must, however, assume full responsibility for all of the chapters after the first two, since these are entirely the result of my independent labors. It is a very real satisfaction to have the last of my father's writing combined with my own in this volume, and to feel the mental companionship with him which comes from our having worked in the same field.

C. K. B.

CORNELL UNIVERSITY,
February, 1922.

CONTENTS

PART I

MAKING AND AMENDING THE CONSTITUTION

CHAPTER I

CHAPTER II

CHAPTER III

CHAPTER VI

CHAPTER VII

CHAPTER VIII

CHAPTER IX

CHAPTER X

CHAPTER XI

CHAPTER XII

CHAPTER XIII

CHAPTER XIV

CHAPTER XV

CHAPTER XVI

CHAPTER XVII

CHAPTER XXI

CHAPTER XXII

CHAPTER XXIII

CHAPTER XXIV

PAGE

The Law
of the
American Constitution

PART I

MAKING AND AMENDING THE CONSTITUTION

CHAPTER I

ORIGIN OF THE CONSTITUTION

§1. *The Constitution and its Framers.* Gladstone's contrast of the British Constitution as "the most subtle organism which has proceeded from progressive history" with the Constitution of the United States as "the most wonderful work ever struck off at a given time by the brain and purpose of man," is not altogether satisfactory. It suggests that the American Constitution is a manufacture rather than a growth.

In fact, each of these political organisms is the product of progressive history. It is true that the Convention of 1787 sent out a single document for adoption, while the written parts of Britain's fundamental law are embodied in several documents, which took form at different periods. It would be erroneous, however, to describe the frame of government, signed by Washington and his fellow-delegates at Philadelphia, as their invention. It is not so much a creation of political theorists as a codification by practical statesmen of doctrines which experience showed had worked well, or were needed for the well-working of government in their country.

Moreover, it did not fully satisfy any of its framers, and the discussion connected with its adoption disclosed a strong popular feeling that it ought to be supplemented by a formal bill of rights. Accordingly, various amendments were prepared and ten of these were ratified within two years after the original Constitution went into effect. All of these were suggested by political experience during the revolutionary and colonial periods, while some trace their origin back through English history to Magna Charta.

It is clear that the Convention which drafted our Constitution did not originate with political agitators whose heads were filled with new schemes of government. It resulted from the popular conviction that the existing federal system was a failure, a conviction which was voiced by Patrick Henry[1] and other champions of state sovereignty, as well as by those who "thought continentally." How slowly this conviction matured is shown in the stages by which public opinion advanced towards the goal of the Convention.

§2. *The Background of the Constitutional Convention.* As early as 1643 the colonies of Massachusetts, New Plymouth, Connecticut, and New Haven drew up "Articles of Confederation of the United Colonies of New England," driven thereto by the dangers which threatened them from the hostile Indians, and from the Dutch at New Amsterdam and Fort Orange (New York and Albany). The purpose of this confederation was principally that of mutual defense, and matters of internal affairs were expressly left to the several colonies, but nevertheless the commissioners were directed to

> "endeavoure to frame and establish agreements and orders in general cases of a civil nature wherein all the plantacons are interested for preserving peace among themselves, and preventing as much as may bee all occations of warr or difference with others."

Provision was also made for the return by each colony to the authorities of the others of runaway servants and escaped criminals. Control of the affairs of the confederation was put into the hands of eight commissioners, two from each colony, and in most matters action could be taken by the concurrence of six commissioners.[2] The confederation functioned actively until the conquest of New Nether-

[1] "He saw ruin inevitable unless something was done to give Congress a compulsory process on delinquent States." Bancroft's *History of the Constitution*, 162.

[2] For the text of the articles see Taylor, *The Origin and Growth of the American Constitution*, 477.

land in 1664, and there were occasional meetings of the commissioners for twenty years more, when the organization finally fell apart.

In 1684 representatives of Massachusetts, New York, Maryland, and Virginia met at Albany to provide for measures of defense against the Five Nations, and ten years later representatives from Massachusetts, New York, Connecticut, and New Jersey met at the same place to frame a treaty with the same Indian tribes. While in 1721 there was a gathering of New England governors at New London to consider matters involved in a proposed invasion of Canada.[1]

In 1697 William Penn proposed a plan of union of all the colonies[2] for the purposes of defense, regulation of commerce, and for concerted action for the prevention of the escape of debtors and criminals. There was to be a congress composed of two representatives from each colony, which was to be presided over by a commissioner appointed by the king. Nothing came of this proposal, nor of a somewhat similar one made in 1731.

An important gathering of commissioners from Massachusetts, New York, New Hampshire, Connecticut, Rhode Island, Maryland, and Pennsylvania was held at Albany in 1754, as a result of the impending danger to the American colonies from the French in the north and west. To these commissioners Benjamin Franklin proposed a plan of union, which was approved by all of the commissioners except those from Connecticut, and was sent to England in the hope that it would be put into effect by Act of Parliament, but it was there thought to give too much power to the colonial representatives, and no action on it was taken. It proposed a president-general to be appointed and supported by the Crown, and a council to be chosen by the colonial legislatures, the members to be apportioned among the colonies in proportion to taxes paid, but no colony to have less than two or more than seven. The assent of the presi-

[1] Taylor, *The Origin and Growth of the American Constitution*, 120.

[2] *Ibid.*, 483, for the text of this plan.

dent-general was to be necessary to every action by the council, and all laws were to be transmitted to the king in council for approval, but were to remain in force if not disapproved within three years. It was declared that the president-general and council should have power to make treaties with the Indians, to regulate Indian trade and purchases of land from the Indians, to provide for new settlements and to govern them until Parliament should act, to raise and equip soldiers and vessels, and for these purposes they were to have power to make laws and levy taxes. All military officers were to be appointed by the president-general with the approval of the council, and all civil officers were to be appointed by the council with the approval of the president-general.[1] In this scheme we see evidence that the colonists were beginning to seriously consider the advantages of union, and to show a strong desire to manage their own affairs.

The next occasion for a gathering of representatives of the American colonies was the passage of the Stamp Act, and of other acts extending the jurisdiction of admiralty and restricting colonial commerce. This gathering was held at New York, and met at the suggestion of Massachusetts in October, 1765. There were present representatives of all of the colonies except New Hampshire, Virginia, North Carolina, and Georgia. This "Stamp Act Congress" drew up a declaration of rights, and petitions to the king, the House of Lords, and the House of Commons. The declaration of rights set forth that the colonists were entitled to all of the rights and liberties of Englishmen in the mother country, that one of these rights was that no taxes should be imposed without the consent of the taxed given personally or through representatives, that because of their geographical position it was impossible for the American colonists to be represented in Parliament, that their only representation was in the colonial legislatures which alone had, and could constitutionally levy taxes in the colonies, that the colonists

[1] Taylor, *The Origin and Growth of the American Constitution*, 121 to 123, 485 to 494.

had an inherent right to trial by jury, and that the restrictions put upon their commerce was an unwarranted burden. The result of the colonists' protest was the repeal of the Stamp Act, but concurrently with this repeal Parliament declared its absolute right to pass any and all laws for the government of the colonies.[1]

In conformity with this declaration of Parliament that body in 1767 passed an act levying a tax upon the importation of certain goods into the colonies including tea. Great opposition to these taxes developed at once, culminating in the "Boston Tea Party." To punish the Massachusetts colonists for this defiance of law Parliament passed acts closing the port of Boston and transferring its trade to Salem, suspending the colonial charter, providing for the quartering of troops in the colony, and reviving an ancient statute for the trial in England of treason committed abroad. These acts aroused great indignation throughout the American colonies, and at the suggestion of Virginia, Massachusetts sent out a call for a meeting of delegates from all of the colonies at Philadelphia. Representatives of all of the colonies except Georgia met in that city in September, 1774, in what is known as the First Continental Congress. This Congress also drew up a bill of rights, embodying the substance of that of the Stamp Act Congress, and declaring that the colonists were entitled to life, liberty, and property, to all the rights and immunities of subjects born within the realm of England, to the common law of England, to the benefit of statutes in force when they emigrated and which they found applicable to their new conditions, and to the privileges and immunities provided for in their charters and laws; "that the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council"; and that the keeping of a standing army in the colonies without their consent in time of peace was unlawful. The document then went on to

[1] For the texts of the colonists, declaration of rights and of Parliament's reply, see Taylor, *The Origin and Growth of the American Constitution*, 495 to 497.

condemn the statutes which were the cause of the bad feeling in the colonies, and declaring that "Americans cannot submit" to them, state the intention of the colonists "to enter into a non-importation, non-consumption, and non-exportation agreement and association."[1] Congress then provided for another meeting in the following May.

The Second Continental Congress met in Philadelphia on May 10, 1775, with representatives present from all of the colonies. The battle of Lexington had already been fought and the battle of Bunker Hill was fought the next month. In fact the Revolution had started. It was apparent to all that concerted action was necessary, and it was intended that Congress should act in this crisis for all of the colonies. Most of the colonies expressly or by clear implication gave their representatives authority to bind them by any action they might take in concert with the representatives of the other colonies. Only in the cases of New Jersey and Delaware was there any intention apparent to require confirmation of the acts of the representatives in Congress.[2] The Second Continental Congress was clearly a revolutionary body exercising such powers as were necessary to meet the exigencies of the situation, and the whole War of Independence was conducted by it. Though it did not assume the power to legislate for the country at large, but instead recommended to the various States the legislation which it thought necessary, it nevertheless chose Washington commander-in-chief and authorized him to raise an army, made rules and orders for the navy, entered into treaties, borrowed money, issued paper currency, and most important of all adopted the Declaration of Independence, and drafted the Articles of Confederation. It seems that Franklin submitted Articles of Confederation to the Continental Congress in July, 1775, but no action was taken at that time. His sketch became the basis, however, of the

[1] For the text of this declaration of rights see Taylor, *The Origin and Growth of the American Constitution*, 498 to 501.

[2] John Randolph Tucker, *Constitution of the United States*, **vol. i**, pp. 215 to 217.

scheme reported on July 12, 1776, by the committee appointed for that purpose. This was debated and amended until November 17, 1777, when it was agreed to by Congress and submitted to the various States. It was not agreed to, however, by the last State, Maryland, until 1781.

Under the Articles of Confederation Congress had power over military and international affairs, to coin money, fix standards of weights and measures, control Indian affairs, conduct and regulate post-offices, and to settle disputes between the States. After the Articles of Confederation had been adopted, but as a result of an understanding arrived at as a condition to Maryland's adherence to those Articles, the vast northwest territory was transferred to the national government, and without express authorization in the Articles themselves Congress proceeded to enact the famous ordinance for its government. Congress, on the other hand, had no authority to levy taxes, but had to leave to each State to contribute the share of national expenses assigned to it, nor had it any power to act directly on individuals in any matter, or to regulate foreign or interstate commerce.

Legislation with regard to commerce was left to the States, subject to a few limitations. Provision was made that "the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, importations, and restrictions as the inhabitants thereof respectively." It was further declared that "no State shall lay any imposts or duties which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled."

As the result of disputes and conflicts of jurisdiction it very soon became important for States having common interests in the navigation of rivers, to reach definite agreements about them. Accordingly, Virginia and Maryland appointed commissioners to consider this topic with regard to the Potomac River. Upon the invitation of Washington they met at Mt. Vernon, where they had the benefit of his

counsel, and agreed not only upon a report in favor of uniform regulations on various subjects connected with their interests in interstate waters,[1] but in favor of a convention of all the States, "to take into consideration the trade and commerce" of the Confederation.

Such a convention was called and representatives from five States: Virginia, Pennsylvania, Delaware, New Jersey, and New York, met at Annapolis in September, 1786. Its purpose, as described in the Virginia resolution naming the delegates from that State, was

> "to examine the relative situations and trade of the United States, to consider how far a uniform system in their commercial regulations may be necessary to their permanent harmony; and to report to the several States such an act relative to this great object, as, when unanimously ratified by them, will enable the United States in Congress effectually to provide for the same."

Because of the small attendance, the Annapolis convention did not deem "it advisable to proceed on the business of their mission." They did compare views and they reached the definite conclusion that another attempt should be made to convene representatives from all of the States. This body, in their opinion, should undertake a broader task than had been assigned to them. This should include "other objects than those of commerce." It should extend to a careful examination of the defects in the existing system of government, and to "digesting a plan for supplying such defects as may be discovered." Accordingly, the Annapolis delegates suggested that a convention of representatives from all the States meet at Philadelphia, on the second Monday in May, 1787,

[1] This agreement was ratified by the two States and is still in force as a compact between them, except as to those provisions which conflict with the right of the federal government under the constitution to regulate commerce. Wharton *v.* Wise (1894) 153 U. S. 155. The terms of the compact are set forth in the opinion of Justice Field at pp. 163 to 165.

"to take into consideration the situation of the United States; to devise such further provisions as shall appear necessary to render the constitution of the federal government adequate to the exigencies of the Union, and to report such an act for that purpose to the United States in Congress assembled, as, when agreed to by them, and afterwards confirmed by the legislatures of every State, will effectually provide for the same."

Copies of this report were sent to the "United States in Congress," to the legislatures of the five States represented and to the executives of the other States.

In reviewing this period, Madison stresses the "ripening of the public mind for a salutary reform of the political system." In 1784, it was occupied only with thoughts of navigation between adjacent States. In 1785 its horizon had been widened to the regulation of commerce generally. By 1786, it had awakened to the necessity of radical changes in the government which was operating under the Articles of Confederation, in order that it might be adequate to the exigencies of the times and to the preservation of the Union.

§3. *The Constitutional Convention.* Congress only responded to popular sentiment in passing a resolution favoring the suggested convention to revise the existing system of government. Every State except Rhode Island sent delegates who took part in the proceedings. Various explanations of Rhode Island's abstention have been given. Madison declared that she was

"swayed by an obdurate adherence to an advantage which her position gave her, of taxing her neighbors through their consumption of imported supplies, an advantage which it was foreseen would be taken from her by a revisal of the Articles of Confederation."[1]

On the other hand her attitude has been ascribed to the influence of her agrarian and debtor classes.[2]

[1] Madison *Papers*, p. 709.

[2] Beard, *Economic Interpretation of the Constitution*, 237.

Although there was a settled conviction that the existing system was seriously defective, the delegates to the Philadelphia Convention did not receive very definite instructions for the task they were to perform.[1] Virginia had taken the lead in this movement, and her representatives prepared themselves to present a plan[2] for consideration at the opening of the Convention on May 25, 1787. Other plans were presented by the delegates from New Jersey,[3] by Mr. Pinckney from South Carolina,[4] and by Mr. Hamilton from New York.[5]

Discussion was directed chiefly to the Virginia and New Jersey plans, and when the Convention, on June 19th, expressed its preference for the former by the decisive vote of seven States to three, with one State divided,[6] it became apparent that the delegates were committed to the policy of drafting a new constitution as against attempts to revise the old Articles of Confederation.

This decision was not made public, however, until the work of the Convention was finished and the new frame of government was printed in the *Pennsylvania Packet and Daily Advertiser*, on September 18, 1787.

Not only was the new Constitution to supersede the Articles of Confederation, instead of amending them, in accordance with their provision for amendments, but it was to take effect when ratified by nine of the thirteen States. The Articles of Confederation had declared that they

> "shall be inviolably observed by every State and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such altera-

[1] Delaware seems to have been the only State which "tied the hands of her deputies by express directions." Letter of Geo. Mason, May 27, 1787; Madison's and Yates's Notes for May 25, 1787.

[2] Taylor, *The Origin and Growth of the American Constitution*, 550.

[3] *Ibid.*, 580.

[4] *Ibid.*, 562; Farrand, *The Records of the Federal Convention*, vol. iii, pp. 595 to 609.

[5] Taylor, *The Origin and Growth of the American Constitution*, 568.

[6] Mass., Conn., Pa., Va., N. C., S. C., and Ga. voted aye; N. Y., N. J., and Del. voted no and Md. was divided.

tion be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State."

§4. *The Adoption of the Constitution.* The opponents of the new system laid great stress upon what they styled usurpation of authority by the Convention. It had been convoked to amend the old constitution and had proceeded to make a new one. Madison's reply[1] was: (First) The authority of the Convention was not limited to proposing amendments if it discovered that these would not "render the Federal Constitution adequate to the exigencies of government and the preservation of the Union." (Second) The powers conferred upon the Convention were "merely advisory and recommendatory." That body was not to establish a form of government but to draft a constitution for submission to the people. The delegates had planned and proposed a document "which is to be of no more consequence than the paper on which it is written, unless it be stamped with the approbation of those to whom it is addressed." (Third) If any State were to complain that the "federal pact" had been dissolved without its consent, it would "find it a difficult task to answer the multiplied and important infractions with which" it might be confronted. (Fourth) The methods pursued and proposed by the Convention were consistent with the practices of the States in framing their several constitutions and in organizing the Union, during the revolutionary period. Government under the Articles of Confederation had broken down. A political situation had developed, which in the language of the Declaration of Independence gave the people the right to alter or abolish their existing system "and to institute a new government, laying its powers in such form as to them shall seem most likely to effect their safety and happiness."

After the new Constitution had been "laid before the United States in Congress assembled," and by Congress had been "submitted to a convention of delegates chosen in

[1] *The Federalist*, Nos. 40 to 43.

each State by the people thereof," except Rhode Island, which refused to call a convention, it was ratified by eleven States. Delaware was the first state to ratify, which it did by the unanimous vote of its convention on December 7, 1787.[1] Pennsylvania ratified by a vote of 46 to 23 on December 12th,[2] and New Jersey unanimously on the 18th.[3] On January 2d of the next year the Georgia Convention ratified unanimously,[4] and seven days later the Connecticut Convention voted by more than three to one for ratification.[5] The next State to accept the Constitution was Massachusetts, on February 6th. Ratification was only obtained here after a hard fight, and by the narrow margin of nineteen votes in a convention having a membership of three hundred and fifty-five. Many objections were taken to the Constitution as drafted, and a number of amendments were strongly urged, but its supporters were able to prevent these amendments being made a condition of acceptance. Instead the Constitution was unconditionally ratified, together with a recommendation that certain amendments be added to it by the means provided in the instrument itself.[6] On April 28th the Maryland Convention ratified after a short session by the overwhelming vote of 63 to 11.[7] In South Carolina the fight against the Constitution was more vigorous, its opponents being encouraged by the influential party in Virginia which was opposed to ratification, but here, too, the Constitution gained a decisive victory on May 23d, when the vote for ratification was 149 to 73.[8] The New Hampshire Convention, having waited to see what

[1] Elliot's *Debates*, vol. i, p. 319, vol. v, p. 569.

[2] *Ibid.* For the debates in the Pennsylvania Convention see Elliot's *Debates*, vol. ii, pp. 415 to 546.

[3] *Ibid.*, vol. i, p. 320.

[4] *Ibid.*, vol. i, p. 323; Stevens, *History of Georgia*, vol. ii, p. 387.

[5] Elliot's *Debates*, vol. i, p. 321. The vote was 128 to 40. See the partial report of the debate in the convention in Elliot's *Debates*, vol. ii, pp. 185 to 202.

[6] Elliot's *Debates*, vol. ii, pp. 1 to 183.

[7] *Ibid.*, vol. i, p. 324, vol. ii, pp. 547 to 556.

[8] *Ibid.*, vol. i, p. 325, vol. iv, pp. 253 to 342.

action Massachusetts would take, ratified the Constitution on June 21st in very much the same form as that adopted by Massachusetts.[1]

New Hampshire was the ninth State to ratify the Constitution, and by the terms of that instrument, "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same."[2] It is clear, however, that the Union could not have been put into successful operation if Virginia and New York had chosen to stay outside, and to assume the position of independent States. The Virginia Convention met on June 2, 1788, and in this convention the Constitution was most brilliantly debated. It had as its supporters such men as Madison, Marshall, and Randolph, while it was bitterly assailed by Patrick Henry and Mason. The supporters of the Constitution finally won the day on June 25th, by the narrow margin of ten votes.[3] It was only with the greatest difficulty that conditional ratification was avoided, and that there was substituted a mere recommendation of amendments which it was desired should be added to the fundamental law. When the vote was taken the Virginia Convention was ignorant of the fact that the ninth State, New Hampshire, had already ratified. The New York Convention met two weeks later than did the one which gathered in Virginia. It was presided over by Governor Clinton, who was strongly opposed to the Constitution, and he was supported by Yates and Lansing, who had been delegates from New York to the Convention which framed the Constitution, but who had withdrawn from that gathering and had refused to put their signatures to the document which it produced. The most brilliant work in support of the Constitution was done by Alexander Hamilton, who with Jay, Livingston, Morris, and others

[1] Elliot's *Debates*, vol. i, p. 325.

[2] Article VII.

[3] The full text of the debate will be found in Elliot's *Debates*, vol. iii. The story of the struggle for ratification in Virginia is most interestingly told in Beveridge's *Life of John Marshall*, vol. i, pp. 318 to 490.

finally carried it to victory.[1] As had been the case in Massachusetts and Virginia, so in New York it was only with difficulty that the Convention was prevented from making certain amendments conditions of ratification, and was prevailed upon to accept the Constitution unconditionally, while recommending amendments for future incorporation.

§5. *The Constitution Put into Operation.* When the Constitution had been ratified by eleven States Congress, which was still functioning though inefficiently under the Articles of Confederation, fixed the first Wednesday of January, 1789, as the day for choosing presidential electors, the first Wednesday in February for the meeting of electors, and the first Wednesday of March for the opening session of the new Congress. Owing to various delays, the new government did not "commence proceedings under the Constitution" until April 30, 1789. North Carolina did not ratify the Constitution until November 21, 1789, while Rhode Island did not join the Union until May 29, 1790.

During the latter part of 1788 and the early part of 1789, there was no federal government in operation. The Continental Congress "dissolved on the first of November, 1788, by the successive disappearance of its members. It existed potentially until the second of March, the day preceding that on which the members of the new Congress were directed to assemble"[2]; but from the first of November until the following thirtieth of April, the federal government performed only the functions incident to a winding up of its affairs.

§6. *The Revolutionary Character of the Constitution Adopted.* The procedure followed in adopting the new Constitution has been called unconstitutional. Undoubtedly, the mode prescribed by the Articles of Confederation had not been followed, and the method pursued can be justified only on the ground that public safety superseded

[1] See the report of the debate and of the vote in Elliot's *Debates*, vol. ii, pp. 205 to 414.

[2] Owens *v.* Speed (1820), 5 Wheaton 420, Opinion by Marshall, C. J.

the scruple arising from the lack of legal power in the Convention to frame a new Constitution. Lansing, who withdrew from the Convention as a delegate from New York, when it was decided that the old system was hopelessly defective, intimated that he would have dismissed the scruple had he agreed with Randolph and the great majority of his fellow delegates that public safety could not be secured under the old system.

Like the Articles of Confederation, the present Constitution of the United States rests upon the right of revolution. But to class the movement which resulted in its adoption with "a *coup d'état* of Julius or Napoleon"[1] is to stress unduly its legal irregularity. When Napoleon decided to supersede the Constitution of the year III, he had the legislative halls cleared by the soldiery, while Sieyès pulled from his pocket the new Constitution of the year VIII, and the revolution was accomplished. Even if it be granted that the Convention of 1787 was due to the "astute and politic Hamilton's ability to seize opportunities and manipulate occasions," the resultant Constitution was widely different from the plan which he presented for consideration. During the debates, he did not hesitate to express "his dislike of the government in general" which was to be set up under the projected Constitution, while supporting it as better than nothing.[2] Near the close of the proceedings he declared, "No man's ideas were more remote from the plan than his own were known to be; but is it possible," he asked, "to deliberate between anarchy and convulsion on one side, and the chance of good to be expected from the plan on the other?"[3]

The letter from the Convention to Congress, which accompanied the draft of the new Constitution, emphasized the fact that it was "the result of a spirit of amity, and of that mutual deference and concession

[1] Burgess, *Political Science and Constitutional Law*, vol. i, pp. 103–105; Beard, *Economic Interpretation of the Constitution*, 62.

[2] Farrand, *The Records of the Federal Convention*, vol. ii, p. 524.

[3] Farrand, *The Records of the Federal Convention*, vol. ii, pp. 645, 646.

which the peculiarity of our political situation rendered indispensable."[1]

Thereafter, this document was subjected to popular discussion for many months, while conventions were chosen in the various States to decide for or against its adoption. Neither the Congress which was to be displaced, nor the State conventions were overawed by soldiers. On the contrary, elections, discussions, and convention-voting proceeded in an orderly manner in accordance with established civil usage. To call a movement, which extended over such a period, which developed gradually under the influence of changing public opinion, and which terminated without resort to military violence, a *coup d'état*, is to wrench the term from its ordinary meaning and to rob it of all sinister suggestion. So applied, the term arrests attention, but is it really descriptive?[2]

§7. *The Constitution as a Product of Practical Experience.* Not only the history of its framing but the contents of the Constitution preclude the view that it is an achievement in political speculation. Its sponsors did not present it to their constituents as a brand-new conception. On the contrary, they were careful to point out that its "great principles may be conceived less as absolutely new, than as the expansion of principles which are found in the Articles of Confederation." They believed that those principles had been so enlarged and combined as to give greater efficiency to the central government. They had learned much from their experience under the old system, and had sought to remedy its defects.

Moreover, state constitutions and political practices furnished a valuable source of information. One of the strongest arguments in the Convention for superseding a

[1] Farrand, *The Records of the Federal Convention*, vol. ii, p. 667.

[2] "There is no English word for *coup d'état*, as, fortunately the thing described is alien to the history of English-speaking people. It is the seizure of the State, of power, by force and ruse, the overthrow of the form of government by violence, by arms." Hazen, *French Revolution and Napoleon*, p. 262.

single house with two houses of Congress, was found in the fact that the bi-cameral system had been adopted by almost every State and was working well. The name of President for the chief magistrate, the office of Vice-President, the names of the two branches of Congress, the great function of the judiciary in "construing the laws according to the spirit of the Constitution,"[1] were copied from state institutions.

On the other hand, the baleful experience of the States furnished the reasons for many of the prohibitions upon state action, such as emitting bills of credit, passing bills of attainder, and laws impairing the obligation of contracts.[2]

In short, there is little in the Constitution which is not accounted for by the conviction that there were serious defects in the Articles of Confederation, and that certain experiments in state legislation had proved harmful, or that certain forms of governmental machinery in the States had achieved success. The Convention had acted upon Dickinson's maxim, "Experience must be our only guide, Reason may mislead us."[3]

The members of the Convention never claimed that the Constitution was perfect. Each one had been obliged to surrender so many items of his governmental creed, that he could not champion this medley of compromises as an ideal document. The letter from the Convention to Congress, already referred to, modestly disclaimed the expectation that it would "meet the full and entire approbation of every State." The writers of *The Federalist* repudiated the idea of its being a faultless plan; admitted that "The convention as a body of men were fallible," and asked only that they and their work should receive a fair and candid consideration. "Allowances ought to be made for the difficulties inherent in the very nature of the undertaking," they insisted, and credit should be given them for providing "a

[1] Hamilton, in No. 81 of the *Federalist.*
[2] Madison, in No. 44 of the *Federalist.*
[3] Gilpin, p. 1312.

convenient mode of rectifying their own errors, as future experience may unfold them."[1]

§8. *The Critics of the Constitution.* "Once adopted," to quote from a modern writer,[2] "the Constitution succeeded beyond the hopes of its most ardent advocates. This of course was attributed to virtues inherent in the instrument itself. Respect and admiration developed and quickly grew into what has been well termed the 'worship of the Constitution.'"

This cult has not been without its opponents. The compromises in the Constitution on the subject of slavery induced radical abolitionists to denounce it as "a covenant with death and an agreement with hell." More recently it was subjected to criticism because of the supposed difficulty if not impossibility of amending it. But the comparative ease and speed with which the Sixteenth, Seventeenth, Eighteenth and Nineteenth Amendments were adopted, show the difficulty to have been exaggerated. Whenever a program of political or social reform commends itself to the people as one of vital importance, it is not an impossible task, it is not even a difficult task to make it a part of the Constitution, in case its object cannot be accomplished by ordinary legislation.

One of the latest discouragements to the worship of the Constitution is based upon the theory that it is an economic document; that the dynamic element in the movement for its adoption was the ownership of personality; that it was "drawn with superb skill by men whose property interests were immediately at stake; and as such it appealed directly and unerringly to identical interests in the country at large"; that the delegates who put it into form represented "distinct groups whose economic interests they understood and felt in concrete, definite form through their own personal experience with identical property rights," and that they were not "working merely under the guidance of abstract principles of political science."[3]

[1] Madison, in No. 37 of the *Federalist.*

[2] Farrand, *The Framing of the Constitution*, 208.

[3] Beard, *Economic Interpretation of the Constitution*, 51, 73, 152, 188.

This theory does not accord with Washington's view of the situation as disclosed in his confidential letters during that period. He did not find the delegates unified by the dynamic force of their common property interests.[1] On the contrary, they were so discordant, that he often despaired of their agreement.[2] He was discouraged by "the contrariety of sentiment" with which the convention was pervaded, the "diversity of ideas which prevailed."[3] While supporting the Constitution, as reported by the Convention, he seems oblivious of the claim that it was drawn with superb skill. He admitted that it was not free from imperfections,[4] that it contained some things that did not accord with his sentiments.[5] He recognized that many provisions were the result of compromise and he pointed to them as proof of the willingness of members to make mutual concessions and sacrifices. He insisted that the document had "as few radical defects as could well be expected, considering the heterogeneous mass of which the Convention was composed and the diversity of interests that were to be attended to." The existence of a solidarity of property interests among the members of the Convention, and of a desire to make a frame of government that should protect and advance these interests, upon which the economic document theory rests, seems as much at variance with the facts of history, as the exuberant language in which Jefferson described the Convention as "an assembly of demigods."[6]

When Necker was at the height of his fame as a French statesman, Gouverneur Morris wrote of him:

> "Though he understands man as a covetous creature, he does not understand mankind—a defect which is

[1] Jefferson's letter to Adams, Aug. 30, 1787, Farrand, *The Records of the Federal Convention*, vol. iii, p. 76.

[2] Washington to Hamilton, July 10, 1787, *ibid.*, vol. iii, p. 56.

[3] Washington to Knox, Aug. 19, 1787, *ibid.*, vol. iii, p. 70.

[4] Washington to Humphreys, Oct. 10, 1787, *ibid.*, vol. iii, p. 103.

[5] Washington to Newenham, July 20, 1788, *ibid.*, vol. iii, p. 339.

[6] Jefferson to Adams, Aug. 30, 1787, *ibid.*, vol. iii, p. 76.

remediless. He is utterly ignorant of politics, by which I mean politics in the great sense, or that sublime science which embraces for its object the happiness of mankind. Consequently he neither knows what constitution to form, nor how to obtain the consent of others to such as he wishes."

As we proceed with our consideration of the frame of government which Morris and his fellow delegates in Philadelphia set up, we shall find, I believe, that while they understood the cupidity of man, they also understood mankind; that the impelling force in their task was not class selfishness, but a patriotic purpose to form a government which would minister to human happiness; that they were practical statesmen as well as idealists, and that the Constitution, of whose shortcomings they were not ignorant, has exercised a great and beneficent influence for human progress.[1]

[1] For a recent criticism of our form of government and suggestions for its betterment, see McDonald, *A New Constitution for a New America.*

CHAPTER II

UNION UNDER THE CONSTITUTION

§9. *Union of the Colonies under the Crown.* A capital defect in the Articles of Confederation, as we have seen, was the imperfect bond of union between the States under their provisions. It is true, that the States had never been completely independent units. During the colonial period, they had been subject to the British government. They had been accustomed to appeal to it for protection against foreign enemies, as well as for the decision of controversies between themselves. Appeals had been taken also by individual citizens to the Privy Council from the action of colonial authorities. Some of the colonies were accustomed to send agents to London to watch and guard their interests when these came before various government boards.

And then, the colonies, while still acknowledging a common allegiance to the mother country, had instituted an informal union when sending delegates to the first Continental Congress. On October 14, 1774, this body issued a Declaration of Rights on behalf of "the inhabitants of the English Colonies in North America." These rights were rested on "The immutable laws of nature, the principles of the English Constitution, and the several charters or compacts." At the same time, Congress did not hesitate to pledge the assent of the people of the colonies

> "to the operation of such Acts of Parliament as are, *bona fide*, restricted to the regulation of our external commerce for the purpose of securing the commercial advantages of the whole empire to the mother country."

In short, this manifesto was not the several act of each colony but the act of a united body representing "the inhabitants of the Colonies."

§10. *Union for Defense.* In the following year, when the Second Continental Congress decided to throw off all allegiance to the British government, it referred to its act as the dissolution of the political bands which have connected one people with another; and its Declaration of Independence was sent out on behalf of the "Thirteen United States of America." It was "these United Colonies" which were declared to be free and independent, with "full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things, which Independent States may of right do."[1]

The Union as thus described, carried on the Revolutionary War, sent its diplomatic representatives to other governments, and entered into foreign alliances. Through Congress, it gave to several States, upon their request, advice as to the organization of their governments, in order that public affairs might be conducted by them in an orderly manner, but no longer in subordination to the British Crown.[2]

§11. *Union under the Articles of Confederation.* Congress also prepared Articles of Confederation with the avowed purpose of establishing a perpetual union between the States.[3] Under these Articles each State retained "its

[1] See Corwin, *National Supremacy*, 30.

[2] The preamble of the New York Constitution of 1777 recites that Parliament had excluded the inhabitants of these united colonies from the protection of the Crown; that the Continental Congress had advised the respective assemblies and conventions of the united colonies to adopt such government as shall,in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and of America in general. It recites the Declaration of Independence by Congress and approves of it.

The Constitution of Georgia of 1777 bears witness also to the fact that separation from the mother country was the act of the united colonies as a nation and not as separate political units.

[3] Although this document was signed by eight States on July 9, 1778, it did not become effective until the thirteenth State—Maryland—ratified it, March 1, 1781. Congress was organized under it the following day.

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," but no State was permitted, without the consent of Congress, to send or receive ambassadors, or to enter into any conference, agreement, alliance or treaty with any king, prince or State, or to lay any imposts which might interfere with treaties entered into by the Union, or to keep a navy or an army in time of peace, or to engage in war, except when actually invaded.

On the other hand, the Articles gave to the Union, "the sole and exclusive right and power of determining on peace and war," of "sending and receiving ambassadors, and of entering into treaties and alliances."

The United States in Congress assembled was made "the last resort on appeal in all disputes and differences" between two or more States. To the federal government, also, was given the exclusive right of regulating the alloy and value of coin; of fixing the standard of weights and measures, of establishing and regulating interstate post-offices, of appointing all officers of the navy and all officers of the land forces, excepting regimental officers, and of making all rules for the government of land and naval forces.

Undoubtedly, the States, after their separation from the mother country, exercised a several sovereignty in all matters of domestic legislation. They confiscated property,[1] regulated its acquisition and transmission, invaded the contract rights of individuals,[2] and exercised general control

[1] Ware *v.* Hylton (1796) 3 Dallas 199, upholding a statute of Virginia which confiscated debts due to British subjects from the citizens of Virginia. At p. 231, several English cases are cited which recognized the validity of statutes of Georgia and of New York, which confiscated real and personal property.

[2] Owens *v.* Speed (1820) 5 Wheaton 420, sustaining the validity of a Virginia statute which vested in certain persons a tract of land, which the State had previously granted to others. It was admitted that the statute would have been invalid, as impairing the obligation of a contract, had it been passed after the adoption of the Constitution.

of all matters of internal police. But in their relations with other powers they were a political unit.[1]

§12. *Weaknesses of the Union under the Articles of Confederation.* So long as the Confederation was menaced by a common foe, there was little danger that the States would attempt the rôles of independent sovereignties. With the declaration of peace, however, external pressure was lessened, and the defective character of the bond of union was soon disclosed. For example, Congress had the constitutional right to incur charges for the common defense and general welfare, to be defrayed out of a common treasury, which should be supplied by the States. It had no power to compel the States to perform their obligations to supply funds to the central government. During the war, it had incurred a large indebtedness, and had made constitutional requisitions upon the States for their several quotas with which to discharge it, only to have its demands postponed or refused.

Early in 1787, Madison, then a delegate in Congress from Virginia, wrote to Governor Randolph:

> "Our situation is becoming every day more and more critical. No money comes into the Federal Treasury; no respect is paid to the Federal authority, and people of reflection unanimously agree that the existing confederacy is tottering to its foundation."

It was this feeling which led, as we have seen, to the Convention in Philadelphia, and induced that body to forego an attempt to amend the Articles of Confederation and to frame a new Constitution.

§13. *A "More Perfect Union" under the Constitution.* It is not surprising, therefore, that the Constitution places first among the objects it was intended to accomplish, the

[1] In *Respublica v. Sweers* (*1779*) *1 Dallas 41*, it was held that the United States were a body corporate from the moment of their association as States independent of Great Britain; and that the forgery of a receipt on behalf of the United States was a crime against them as such body corporate.

formation of a "more perfect Union." While the United States had come into existence as a political unit and had won recognition as a new member in the family of nations, it was organized with a weak and inefficient government.[1] In the language of Randolph, it could not secure the country against foreign invasion, for it could not control the conduct of the States, which might provoke war. It could not check the quarrels between States, nor a rebellion in any of them. It could not levy and collect imposts, nor make commercial regulations for its benefit. It could not defend itself against the encroachments of the States.

That this opinion was shared by the great majority of the Convention, is apparent from the first resolution passed by that body, "that a national government ought to be established, consisting of a supreme legislative, judiciary and executive." Although the word "national" was discarded by the Convention later, the supremacy of the new government remained unquestioned. The Constitution asserts that it was made by "the people of the United States" and "for the United States of America." It and all laws and treaties made in pursuance thereof are declared "to be the supreme law of the land."

Unlike its predecessor, the new government was to operate directly upon the individual. Full coercive power was given to it, but this power was to be exercised not against the States in their political capacity. The coercion was to be applied to persons who refused obedience to its laws. The States were not associated as a league of sovereignties, but were brought together in a closer union than before and under a national government. They were not destroyed as political units. Their constitutions and governmental machinery were not overturned. Most of their functions were not affected. But the people of the States, by adopting the Constitution, had bound themselves together as a

[1] "The Articles of Confederation created only a central government, and that, too, of the weakest character." Burgess, *Political Science and Constitutional Law*, vol. i, p. 101.

nation, and had established a government, which, within the sphere assigned to it, was to be supreme.

§14. *The Doctrine of States' Rights and Secession.* Later this doctrine of national supremacy was repudiated by the supporters of States' rights. It was argued that when the colonies threw off their allegiance to the British Crown, each became an independent and sovereign State; that it was entitled to do what was right in its own sight and did so act even when such conduct violated its obligations under the Articles of Confederation; that the Union of the States under the Constitution was the result of a compact between them; like any other compact it was dissoluble by one party when violated by the other, and each State was to be the judge of its right to withdraw from the Union or to nullify federal legislation.[1]

§15. *The Constitution Looks to an Indissoluble Union.* It seems unnecessary to further review this controversy which terminated in the Civil War. The student of our constitutional law finds an authoritative statement of the doctrine accepted by the Supreme Court of the United States in the following language:

> "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.

[1] These views are considered in Lodge's *Life and Letters of George Cabot*, and in the great debates in the United States Senate between Webster and Hayne in 1830 and between Webster and Calhoun in 1833. The different views with regard to the nature of the Union are fully presented in *Story on the Constitution* (5th ed.), chap. 3, and in J. R. Tucker's *Constitution of the United States*, chap. 5.

An early threat of secession came from New England. On January 14, 1811, when the act for the admission of Louisiana into the Union was before Congress, Josiah Quincy said: "It is my deliberate opinion, that, if this bill passes, the bonds of this Union are virtually dissolved; that the States which compose it are free from their moral obligations; and that, as it will be the right of all, so it will be the duty of some, to prepare definitely for a separation, amicably if they can, violently if they must." *3 Amer. Hist. Told by Contemporaries* (A. B. Hart), 410 to 414.

"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, 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 indissoluable 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 involves 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.'[1] 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

[1] County of Lane *v.* Oregon (1868) 7 Wallace 71, 76.

the National government. The Constitution in all 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 guaranties 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. . . ."[1]

[1] Chief Justice Chase in Texas *v.* White (1868) 7 Wallace 700, 724 to 726.

There is, of course, a "States' rights" position which is perfectly defensible and constitutional, namely, that which supports our dual

§16. *Some Comparisons with the Constitutions of Canada and Australia.* It is interesting to compare "the true federal model" as Lord Haldane[1] has styled our political system, with the Canadian Federation, under the British North American Act of 1867. Parliament enacted this legislation at the request of the three provinces of Canada, Nova Scotia, and New Brunswick. The preamble refers to their desire to be federally united into one Dominion, under the British Crown, "with a constitution similar to that of the United Kingdom." Unlike the thirteen States which adopted our Constitution these Provinces did not retain their legal individuality. On the contrary, they asked that one of them be divided so as to form two separate Provinces with the new names of Ontario and Quebec. Moreover, the Act provides not only a constitution for the federal government, but new constitutions for the provincial governments. Under this arrangement, the federal government has all legislative power not granted to the Provinces. The rule referred to by Chief Justice Chase as formulated in our Tenth Amendment is reversed in the Canadian Constitution. Accordingly, the Provinces possess no "powers of legislation either inherent in them or dating from a time anterior to the Federation Act. . . . Whatever is not hereby given to the provincial legislatures rests with the Dominion parliament."[2]

Moreover, the federal government in Canada has a veto power over provincial legislation. An authentic copy of every provincial act must be sent to the Governor-General in Council, who may disallow it, and, upon the signification of this decision in the prescribed manner, the act is annulled.

scheme of government, believing that local affairs should under the Constitution be controlled by the States, and earnestly defending local self-government by the States from encroachment at the hands of the central government. We shall see a strong trend toward the centralization of power in the national government, which is naturally arousing such advocates of States' rights to apprehension and remonstrance.

[1] Attorney-General & c. *v.* Colonial Sugar Company (1914) Appeal Cases 237, 253.

[2] Bank of Toronto *v.* Lambe (1887) 12 Appeal Cases 575.

The power is not exercised often. Requests for disallowance on the ground that an act unjustly interferes with vested rights were formerly granted, but the practice was changed, and it is said to be well settled now, "that the federal government will not disallow provincial acts on the ground that they are *ultra vires*, unless they are seriously injurious to Imperial or Dominion policies or interests."[1]

The intention of the framers of the Canadian Constitution to strengthen the power of the Central government at the expense of the Provinces, was formed during our Civil War,[2] with a view to silencing any claim on the part of the Provinces to annul federal legislation or to exercise a constitutional right of secession.[3]

After the integrity of our Union had been assured by the suppression of the rebellion, the colonies of Australia, under parliamentary sanction organized a federal government. They

> "adopted the principle established by the United States in preference to that chosen by Canada, . . . the principle which is federal in the strict sense of that term, namely, that the federating States, while agreeing to a delegation of a part of their powers to a common government preserved in other respects their individual constitutions unaltered."[4]

In other words, the federal government of Australia, like ours, is one of enumerated powers, while the state governments retain all powers not surrendered.

Moreover, the Australian Constitution not only has adopted the same federal principle as is embodied in ours, but, at times, it has copied its exact language. Hence we find the Australian courts citing and following our judicial de-

[1] LeFroy, *Canadian Federal System*, 40.

[2] *In re* Prohibition Liquor Laws (1894) 24 Canada Sup. Ct. 170, 205–207, 233.

[3] The British North American Act of 1867 was founded on the Quebec Resolutions of 1864. Atty.-General &c. *v.* Colonial Sugar Refining Co. (1914) Appeal Cases 237, 253.

[4] *Ibid.*, 237, 254.

cisions. While they are not bound by such decisions, they do give great weight to those especially which were rendered prior to the adoption of the Australian Constitution in 1900. This is upon the theory that when one of our constitutional provisions, which had received judicial construction, was adopted by the Australian Commonwealth, it was taken over with the interpretation thus put upon it.[1]

[1] Baxter *v.* Commissioners of Taxation (1907) 4 Commonwealth Law Reports 1087, 1122: "It ought to be inferred that the intention of the framers was that like provisions should receive like interpretations."

CHAPTER III

AMENDING THE CONSTITUTION

§17. *Methods of Changing Constitutions.* The form, the functions, and the powers of a government may be changed in either a legal or in an extra-legal manner. When the manner of making the change is extra-legal we call it revolutionary. When we speak of a revolution we generally think of a violent political upheaval, but there are peaceful revolutions as well as those which are accompanied with violence. Though the means adopted to bring about a change in government are not in accordance with the provisions of the law, if the revolution is successful, and the changes are acquiesced in by the people, the resulting government is in all respects authoritative, and its acts are binding upon its citizens. The government which was set up in this country under the Articles of Confederation was obviously revolutionary, but the treaty of peace entered into by that government with England was clearly valid. Furthermore, the constitutional government which has existed now in the United States for more than a century and a quarter was revolutionary in its origin. The Articles of Confederation declared, "nor shall any alteration at any time hereafter be made in any of them [the Articles of Confederation]; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State."[1] But instead of the course here provided for being followed in 1787, a new Constitution was then framed by a constitutional convention, and it was declared that it should be effective when ratified by nine States, and the new Constitution in fact went into effect

[1] Art. XIII.

before it was ratified by North Carolina and Rhode Island. The government set up by the Confederate States at the time of the Civil War was, of course revolutionary, but if the Southern States had won in that war, the government which they had set up, and which was acquiesced in by the people of the seceding States, would have acquired a valid status.

§18. *The Constitutional Provision for Amendment.* The Constitution of the United States makes careful provision for the amendment of that instrument, as follows[1]:

> "The Congress, whenever two thirds of both houses shall deem it necessary, shall propose amendments to the 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 amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

Since the federal government is one of limited powers it seems correct to assume that Congress cannot set any machinery in motion for the amendment of the Constitution except in one of the ways provided for in that instrument;[2] and in fact there would seem no reason for any attempt to use any other method, in view of the alternatives contained in Article Five, quoted above.

[1] Art. V.

[2] Jameson, *Constitutional Conventions* (4th ed.), sec. 575. The various methods by which state constitutions can be amended are outside the scope of this work, though they are interesting in themselves. See generally Jameson, *Constitutional Conventions* (4th ed.), and Dodd, *The Revision and Amendment of State Constitutions.*

. Until recently it has been thought that the amendment of the Constitution would be very difficult except in periods of crisis, such as followed the adoption of the Constitution and the Civil War. Four amendments, however, have been added with comparative ease and rapidity since 1909, so that the feeling on this point has probably been considerably modified. Still the feeling that has been spoken of has led from time to time to suggestions for changing the amending machinery. One of the simpler proposals is that the Constitution be so amended as to allow submission of future amendments to the electors in the several States as well as to the legislatures or to conventions, and that a six years' period of limitation be put upon the States' power of ratification. Another proposed change would require the submission to the voters of the several States every twenty years of the question as to whether a federal constitutional convention should be called. Other proposals would allow Congress to submit amendments by a majority vote, or would allow either House to submit amendments alone if twice rejected by the other House, or would require the submission of amendments upon the vote of the electors or legislatures of ten or some other number of States. Still other proposals would require the submission of amendments to the electors at large, and would make ratification depend upon a majority vote, plus a favorable vote in a majority of States or congressional districts.[1] Notwithstanding the many suggestions which have been made, it now seems unlikely that the amending machinery will be changed within the near future.

§19. *Proposal of Amendments.* There has never been an application by two thirds of the States for a Constitutional Convention for proposing amendments, all amendments having been, up to the present time, proposed by Congress. As we have seen the Constitution provides that

[1] W. F. Dodd, "Amending the Federal Constitution," 30 *Yale Law Journal*, 321, 350 to 353; Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of Its History*, 292 to 293.

"Congress, whenever two thirds of both Houses shall deem it necessary shall propose amendments to the Constitution."[1] In the *National Prohibition Cases*[2] the Supreme Court stated the rather obvious conclusion, but one which had been combated by counsel, that

> "the adoption by both Houses of Congress, each by a two-thirds vote, of a joint resolution proposing an amendment to the Constitution sufficiently shows that the proposal was deemed necessary by all who voted for it. An express declaration that they regarded it as necessary is not essential. None of the resolutions whereby prior amendments were proposed contained such a declaration."

In the same cases it was also very urgently insisted that the requirement of a two-thirds vote in each House meant two thirds of the whole membership, and that two thirds of a quorum was not sufficient. It is true that some sections of the Constitution expressly provide for congressional action by a named portion "of those present,"[3] and from this it was argued that when such expression is not used the framers intended that action should only be taken by the named portion of the whole House. On the other hand the Constitution provides that "a majority of each [House] shall constitute a quorum to do business,"[4] and the acts of a quorum are for all parliamentary purposes the acts of the body in question, unless otherwise provided. It would, therefore, follow that "two thirds of both houses," when used in the provision as to amendments means two thirds of a quorum. This view has been several times taken by the

[1] Art. V.

[2] (1920) 253 U. S. 350, 386. This case is peculiar in that no opinion was written on behalf of the majority of the court, but conclusions only were announced. Chief Justice White wrote a concurring opinion, and Justices McKenna and Clarke wrote dissenting opinions.

[3] Art. I, sec. 3, par. 6 (impeachments), art. I, sec. 5, par. 3 (recording of yeas and nays), art. II, sec. 2, par. 2 (concurrence of Senate in treaty making).

[4] Art. I, sec. 5, par. 1.

Houses of Congress,[1] and was finally declared to be the correct one in the *National Prohibition Cases*.[2]

Whether proposed amendments agreed to by Congress were intended by the framers of the Constitution to be submitted to the President for his approval is not entirely clear from the language of the Constitution. It is provided that

> "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."[3]

This is broad enough to cover joint resolutions for the submission of amendments. On the other hand such joint resolutions are not in any sense legislative, but their purpose is merely the submission of questions to the States for their determination; and since such resolutions must be passed in the first place by a two-thirds vote, the usual effect of a veto would not exist in their case. The view acted upon by Congress has been that such resolutions should not be submitted to the President,[4] and this practice is supported by the decision of the Supreme Court in *Hollingsworth v. Virginia*.[5] In that case the court merely rendered a short per curiam opinion to the effect that the Eleventh Amendment had been constitutionally adopted, but Justice Chase during the argument said, "the negative of the President applies only to the ordinary cases of legislation: he has nothing to do with the proposition or adoption of amendments to the Constitution."

[1] Ohio *v.* Cox (1919) 257 Fed. 334, 348.

[2] (1920) 253 U. S. 350, 386. The court in reaching its conclusion cites its decision rendered shortly before to the effect that the constitutional provision for passing bills over the President's veto by a two-thirds vote of each House means a two-thirds vote of a quorum present. Missouri Pac. Ry. Co. *v.* Kansas (1919) 248 U. S. 276. In the opinion in the *National Prohibition Cases* the court put the same interpretation upon the article as to amendments. See also Ohio *v.* Cox (1919), 257 Fed. 334.

[3] Art. I, sec. 7, par. 2.

[4] Jameson, *Constitutional Conventions* (4th ed.), 586 to 592.

[5] (1798) 3 Dallas 378, 381. And see Hawke *v.* Smith (1920) 253 U. S. 221, 229.

It seems safe to assert that Congress, having once submitted a proposed constitutional amendment to the States, cannot thereafter withdraw it from their consideration, although this is, at present and is likely to remain a merely academic question.

The Eighteenth Amendment contains two provisions not found in any of its predecessors. The first is that it shall not take effect until one year from ratification, and the other is contained in the third section of the amendment, which declares that,

> "This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by Congress."

Although Congress, under its power "to make all laws which shall be necessary and proper for carrying into execution the . . . powers vested by this Constitution in the Government of the United States,"[1] would seem to have been justified in its legislation which directs the Secretary of State to cause amendments to be promulgated when officially notified of their adoption according to the provisions of the Constitution,[2] there would seem to be no justification for Congress to attempt by legislation to control the method of ratification on the part of the States, the time within which they must ratify, or to postpone the operation of an amendment after its proper ratification. There seems no possible objection, however, to a provision in an amendment itself declaring when it shall take effect, since in this way is obtained an expression of the will of the people, and not merely of Congress. While it would clearly be objectionable for any State to append to its ratification of an amendment a condition that such ratification should not be effective unless the amendment was ratified by the requisite number of States within a given time, there seems no reason

[1] *Const. of U. S.*, art. I, sec. 8, par. 18.

[2] *U. S. Rev. Stat.*, sec. 205.

why a proposition for amending the Constitution submitted to all of the States should not contain such a limitation, or why the ratification by each State should not be controlled by such limitation.[1] It has been considered a possibility that a proposed amendment, not containing such a limitation, might finally be ratified by the requisite number of States fifty or a hundred years after its submission. The Supreme Court has put this fear at rest by holding that the Constitution necessarily implies a reasonable period for ratification.[2] Nevertheless, it seems desirable that proposed amendments should themselves contain a limitation upon the right of ratification, or that the Constitution should be amended so as to contain such a limitation. The Supreme Court has held that the provision on this subject in the Eighteenth Amendment is constitutional.[3] The provision in the Eighteenth Amendment to the effect that it should not become operative until a year after ratification, was acted upon without any question.

§20. *Ratification of Amendments.* The power given to Congress by the Constitution to submit proposed amendments to conventions in the various States has never been taken advantage of. As a matter of fact it would seem that the will of the people would be much more accurately expressed by conventions chosen for the purpose of considering a proposed amendment, than by State Legislatures. The only two alternatives open to Congress under the Constitution[4] are submission to state conventions or to the "legislatures" of the States. During recent years there have been introduced into many of the state constitutions provisions for the use of the referendum with regard to state legislation. State courts have differed as to whether such provisions are intended to apply to the act of ratifying

[1] Compare Jameson, *Constitutional Conventions* (4th ed.), 634, and W. F. Dodd, "Amending the Federal Constitution," *30 Yale L. Jour.*, 321, 339 to 341.

[2] Dillon *v.* Gloss (1921) 41 Supreme Ct. R. 510.

[3] *Ibid.* The amendment was ratified by the requisite number of States within the time specified.

[4] Art. V.

amendments to the Federal Constitution,[1] but, as such act is not properly speaking an act of legislation, it would seem that the correct view is that such provisions have no application to federal constitutional amendments. In Ohio, however, the state constitution was so amended as to reserve to the people "the legislative power of referendum on the action of the general assembly ratifying any proposed amendment to the Constitution of the United States." The Ohio Legislature ratified the Eighteenth Amendment and the federal government was notified of this action and Ohio was counted as one of the ratifying States. Later, the Ohio Secretary of State being about to prepare and print ballots for submission of a referendum to the electors of the State on the question of the ratification of the amendment, an action was brought to restrain him from doing so, which finally reached the Supreme Court of the United States.[2] As the court said, the real question was, "What did the framers of the Constitution mean in requiring ratification by '*Legislatures*'?" The argument advanced in favor of the validity of the Ohio constitutional provision was that "the Federal Constitution requires ratification by the legislative action of the States through the medium provided at the time of the proposed approval of an amendment." But the court immediately answered:

> "This argument is fallacious in this—ratification by a State of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the State to a proposed amendment."[3]

Furthermore, as the court points out, the framers of the Constitution distinguished in that instrument between the electors of a State and its legislature, and in the provision as to amendments clearly intended action to be taken by

[1] See W. F. Dodd, "Amending the Federal Constitution," *30 Yale L. Jour.*, 321, 344, for a collection of the state decisions on the point.

[2] Hawke *v.* Smith (1920) 253 U. S. 221.

[3] *Ibid.*, 229.

representatives of the people and not by the people themselves. The court, therefore, held that the Ohio constitutional provision in question was in conflict with the federal Constitution and so invalid.

The provision in the Constitution is that amendments shall be effective "when ratified by the legislatures of three-fourths of the States." This language would seem not to contemplate or, in fact, to countenance any participation by the governors of the States in the ratification or rejection of amendments. This conclusion, fairly drawn from the language of the Constitution, is strongly supported by a consideration of the nature of the act of ratification. The Supreme Court has, as we have seen in considering the proposal of amendments and the States' referendum provisions, declared that neither the proposal nor the ratification of an amendment to the Federal Constitution is a legislative act. Since the proposal of an amendment is not a legislative act, it has been held that the President should not participate in that part of the proceeding. It must be equally true, then, that, since the ratification of an amendment is not a legislative act, the governors should not share in the act of ratification or rejection. However, the practice on this point has varied in the different States. At a comparatively early date a governor vetoed the ratification of an amendment. This was done by the governor of New Hampshire in the case of the Twelfth Amendment. Sufficient States ratified besides New Hampshire, however, and the effect of the veto in that State was not considered.[1]

The Sixteenth Amendment, when ratified by the Arkansas Legislature, was submitted to the governor and vetoed, but the action of the state legislature was nevertheless transmitted to the Secretary of State, and Arkansas was counted among the ratifying States.[2]

It was also debated after the Civil War whether in the

[1] See Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of Its History*, 297.

[2] W. F. Dodd, "Amending the Federal Constitution," *30 Yale L. Jour.*, 321, 346.

article dealing with amendments to the Constitution three fourths of the States meant three fourths of the whole number of States, or three fourths of those which had not seceded and were at the time participating in the national government, and whether those which had seceded and were not yet reinstated in a participation in the national government might be counted in determining whether an amendment had been ratified. The Thirteenth Amendment was in fact declared ratified when the number of States ratifying had reached three fourths of the whole number of States, and in the number of States ratifying were counted a number of the States which had seceded and which were not yet participating in the federal government. Furthermore, the adoption of the Fourteenth and Fifteenth Amendments was procured by requiring ratification by States which had seceded as a condition precedent to their being allowed representation in Congress.[1]

There have been a good many instances when States which have rejected proposed federal amendments have later ratified these, and also when States which have ratified have later tried to withdraw their ratifications. There seems no objection to the former course of action. Refusal to ratify is, after all, only a negative sort of act, and there seems no reason why it should preclude subsequent ratification. States which have first rejected amendments and then ratified them have been counted in declaring the amendments adopted, and the amendments have never been attacked on this ground.[2] On the other hand the Constitution declares that an amendment shall become part of that instrument "when ratified by the legislatures of three fourths of the States," and this would seem to mean that the act of ratification is final in each case. It is clear, also,

[1] Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of Its History*, 298.

[2] Jameson, *Constitutional Conventions* (4th ed.), 624 to 626. And see the joint resolution of the two Houses of Congress declaring the validity of the ratification of the Fourteenth Amendment by three fourths of the States including North Carolina and South Carolina, which had previously rejected it. 15 Stat. 709 and 710.

that any other doctrine would lead to great confusion in determining when an amendment has in fact been adopted.[1] Although this question has not come before the courts, Congress has declared that a State cannot withdraw its ratification. Ohio and New Jersey, having ratified the Fourteenth Amendment, later attempted to withdraw their ratifications. The Secretary of State issued a certificate in which he declared that the amendment had been adopted provided that Ohio and New Jersey should be counted as having ratified. The next day Congress passed a concurrent resolution declaring the ratification valid.[2] New York, making one of the first twenty-nine States (three fourths at that time) which ratified the Fifteenth Amendment, attempted to withdraw her ratification, but at the time of the promulgation of the amendment another State, Georgia, had ratified.[3]

§21. *Express Limitations on Power to Amend.* The Fifth Article of the Constitution, dealing with amendments closes with the proviso

> "that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

The first part of this proviso has to do with certain constitutional provisions which deal in fact, though not expressly, with the institution of slavery. By its own terms, it was to become ineffective after 1808. It, therefore, has no longer any except an historical significance. The second part of the proviso was, of course, introduced to safeguard the equal representation of the smaller States in the Senate.[4]

[1] Jameson, *Constitutional Conventions* (4th ed.), 630 to 633.

[2] 15 Stat. 706 to 710.

[3] 16 Stat. 1131.

[4] "Mr. Govr. Morris moved to annex a further proviso—'that no State, without its consent shall be deprived of its equal suffrage in the Senate.'

It constitutes a limitation upon the amending power, which can itself only be changed by unanimous consent of the States. Each State in ratifying the Constitution, or in accepting it upon admission to the Union, has expressly excepted from the amending power the right to deprive it or any other State of its equal suffrage in the Senate. Therefore, any amendment which attempted to do away with equal representation in the Senate would be unconstitutional. That the question whether there had been a breach of the proviso in the Fifth Article would be considered a judicial one, and that the Supreme Court would take jurisdiction of it seems certain in view of the fact that that court, in cases growing out of the Eighteenth Amendment, took jurisdiction not only of questions as to whether the amendment had been properly proposed and properly ratified, but as to whether its terms did not overstep some implied limitations upon the amending power.[1]

§ 22. *Are There Implied Limitations upon the Power to Amend?* The Eighteenth Amendment was vigorously attacked in the *National Prohibition Cases*[2] by eminent counsel, including Elihu Root, and by writers in legal periodicals,[3] on the ground that it overstepped certain implied limitations upon the constitutional amending power. It is contended in the first place that the Eighteenth Amendment is not in fact an "amendment," for an amendment is an alteration or improvement of that which is already contained in the Constitution, and the term is not intended

---

"That motion being dictated by the circulating murmurs of the small States was agreed to without debate, no one opposing it, or on the question, saying no."

Farrand, *The Records of the Federal Convention*, vol. ii, p. 631.

[1] Hawke *v.* Smith (1920) 253 U. S. 221; National Prohibition Cases (1920) 253, U. S. 350.

[2] *Ibid.* See the briefs in Kentucky D. & W. Co. *v.* Gregory and in Rhode Island *v.* Palmer.

[3] See J. D. White, "Is There an Eighteenth Amendment?" *5 Cor. L. Quar.*, 113; W. L. Marbury, "The Limitations Upon the Amending Power," *33 Harv. L. Rev.* 223; G. D. Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment," *18 Mich. L. Rev.*, 213.

to include any addition of entirely new grants of power. Charles E. Hughes, in his brief on behalf of a number of States as *amici curiæ*,[1] pointed out at length from the records of the Constitutional Convention and of the ratifying state conventions that the framers of the Constitution contemplated that the framework of government which was being set up would be found imperfect, and that alterations of any kind, except those covered in the proviso, could be made at any time.[2] Again it is contended that the Eighteenth Amendment is not an amendment within the meaning of the Constitution because it is in its nature legislation; that an amendment to the Constitution can only affect the powers of government, and cannot act directly upon the rights of individuals, the latter power being essentially legislative. Answer is made to this argument that it is directed to the wisdom and not to the constitutionality of the amendment; that there is no such restriction in the Constitution upon the amending power; that as has been pointed out, the framers of that instrument apparently intended to give the widest power of amendment; and that in the Thirteenth Amendment we have a precedent for an amendment which acted directly upon individuals, and directly deprived them of their property in slaves.[3]

The final and fundamental argument against the Eighteenth Amendment is based upon the proposition that "the Constitution in all its parts looks to an indestructible nation composed of indestructible States."[4] It is insisted that this conception is the very basis of our Union; that the power of amendment was only given for the purpose of making alterations and improvements for the fulfilment of that

[1] Brief in Rhode Island *v.* Palmer, pp. 13 to 29.

[2] Mr. Hughes refers to Farrand, *The Records of the Federal Convention*, vol. i., pp. 22, 121–122, 202, 203, 231; vol. ii, pp. 84, 159, 174, 188, 467, 468, 557–559, 602, 623–631; vol. iii, p. 601; Elliot's *Debates*, vol. iii, pp. 636 and 637; vol. iv, pp. 176–178; the *Federalist*, No. 43.

[3] See Mr. Hughes' brief in Rhode Island *v.* Palmer, pp. 13 to 34, and his brief in Kentucky D. & W. Co. *v.* Gregory, pp. 51 and 52.

[4] Texas *v.* White (1868) 7 Wallace 700, 725.

purpose, and that any attempt to change the fundamental basis of the Union is beyond the power delegated by the Fifth Article. The conclusion from this argument is that the delegated power to amend does not extend to any provision of a class that could lead to the destruction of either the United States or the individual States. A general police power inheres in the States for the protection of the health, safety, morals, and general welfare of their inhabitants. Clearly prohibition is a subject which falls under the police power, and, without the Eighteenth Amendment, it is a subject upon which the States alone could legislate, except in connection with interstate commerce, or under the war power. The argument against the Eighteenth Amendment is that it transfers part of the police power from the States to the federal government; that if part of the police power can be so transferred the rest of it and other fundamental state powers may be similarly transferred; and that if this can be done the States can be substantially destroyed by constitutional amendment.[1] It is also contended that the first ten amendments were intended as a bill of rights which should even be a restriction upon the power to amend, and that since the Ninth and Tenth Amendments provide that, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people," and that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people," the Constitution cannot be amended so as to take powers from the States. The answer which is made to these contentions is that the framers of the Constitution did not intend to make an unalterable framework of government, in which only the details could be developed and changed by amendment, but that they meant to leave a way for any changes that might be deemed necessary in the future. In fact we find that in the Constitutional Convention—

[1] See J. D. White, "Is There an Eighteenth Amendment?" *5 Cor. L. Quar.*, 113.

"Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. . . . Mr. Sherman moved according to his idea above expressed to annex to the end of the article a further proviso 'that no State shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate.'"

This motion was lost, and then the proviso with regard to representation in the Senate was adopted.[1] The argument that the Ninth and Tenth Amendments are limitations upon the amending power seems clearly untenable. Those provisions simply became part of the Constitution like all of its original articles, and like them subject to amendment.[2] Certainly we have in the Fourteenth Amendment a very striking example of limitations put upon the police power of the States by constitutional amendment. Unfortunately the Supreme Court's decision in the *National Prohibition Cases*[3] was not accompanied by any opinion, but it is clear, nevertheless, that it found all of the contentions against the nature of the amendment invalid since it declared in its fourth conclusion that,

"The prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in the Eighteenth Amendment, is within the power to amend reserved by Article V of the Constitution."[4]

§23. *The Exercise of the Amending Power.* The result of the *National Prohibition Cases*[5] seems to be that there is

[1] Farrand, *The Records of the Federal Convention*, vol. ii, pp. 629 and 630.

[2] See Mr. Hughes' brief in Rhode Island *v.* Palmer, particularly pages 34 to 41.

[3] (1920) 253 U. S. 350.

[4] *Ibid.*, 386. For a careful analysis of the arguments for and against the Eighteenth Amendment see W. F. Dodd, "Amending the Federal Constitution," *30 Yale L. Jour.*, 321.

[5] (1920) 253 U. S. 350.

no limit to the power to amend the Constitution, except that a State may not without its consent be deprived of its equal suffrage in the Senate. To put the case most extremely, this means that by action of two thirds of both Houses of Congress and of the legislatures in three fourths of the States all of the powers of the national government could be surrendered to the States, or all of the reserved powers of the States could be transferred to the federal government. It is only public opinion acting upon these agencies which places any check upon the amending power. But the alternative to this result would be to recognize the power of the Supreme Court to veto the will of the people expressed in a constitutional amendment without any possibility of the reversal of the court's action except through revolution. Such a situation was clearly to be avoided unless necessitated by express constitutional mandate. Certainly, if a federal statute is to be held constitutional unless clearly in conflict with the fundamental law, an equally liberal rule should prevail with regard to constitutional amendments.

It is submitted, however, that the form of the Eighteenth Amendment is unfortunate. The objections leveled against it on the ground that it is legislative in character, though not proving its unconstitutionality, would seem to constitute a very valid criticism of the wisdom of Congress in submitting it in that form. A Constitution is essentially a framework of government, embodying grants of governmental powers, and restrictions upon such powers. The exercise of such powers, in the form of legislation operating directly upon personal and property rights, is normally left to the legislature, which is reasonably responsive to public opinion, and which may act only within constitutional limits. Such legislation as that embodied in the Eighteenth Amendment is enacted without any constitutional limitations, and having once been enacted as the result of a wave of popular opinion, cannot be repealed if popular opinion should change, as long as a fraction over one third of either House of Congress or a fraction over one quarter of the

States hold out against repeal. It is believed that in such a situation as resulted from the prohibition agitation it would be far better public policy to adopt a constitutional amendment giving Congress power to legislate on the subject in question, by force of which amendment Congress could legislate from time to time in conformity with contemporary public opinion.

PART II

THE NATIONAL GOVERNMENT

CHAPTER IV

THE PRESIDENT

§24. *Term and Qualifications of President and Vice-President.* The Constitution provides that the President "shall hold his office during the term of four years," and that the Vice-President shall be "chosen for the same term."[1] There was much discussion in the Constitutional Convention as to whether the President should be eligible to reëlection, and as to what the length of his term should be.[2] During the early part of the discussion the view of the majority seemed to be that he should be elected for seven years and that reëlection should be forbidden, but this proposition was gradually abandoned for that which was finally incorporated into the Constitution. There is, however, a very well-established tradition against a President's holding office for more than two terms. Washington laid its foundation by refusing to consider a third nomination, and Jefferson strengthened it by taking the same course, and by expressing himself very strongly against a longer tenure of office than eight years. A strong effort was made to nominate Grant for a third term but without success. Roosevelt having been elected Vice-President came to the presidency through the death of McKinley, and was then reëlected. After being out of office a term he was again nominated, but was not elected.

With regard to eligibility the Constitution provides:

[1] Art. II, sec. 1, par. 1.

[2] See Farrand, *The Records of the Federal Convention*, vol. i, pp. 63, 78, 88, 230, 292; vol. ii, pp. 23, 33, 50, 52, 58, 102, 107, 112, 116, 132, 134, 148, 171, 185, 493, 497, 572, 597, 657.

> "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."[1]

By reasonable implication the qualifications of the Vice-President are the same; certainly he could not succeed to the presidency without such qualifications. By the Twelfth Amendment any doubt on this point was set at rest by the provision that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States." It seems clear that the fourteen years of residence within the United States which are required of a candidate for the presidency need not be the fourteen years last preceding his nomination or election, but that any fourteen years of residence will be sufficient.[2]

[1] Art. II, sec. 1, par. 5.

[2] On July 24, 1787, a committee of five was elected by the Constitutional Convention "to report a constitution conformable to the resolutions passed by the Convention." On August 20th it was moved, "that the committee be instructed to report proper qualifications for the President." On August 22d the committee reported a proposal that the qualifications be that "he shall be of the age of thirty-five years, and a citizen of the United States, and shall have been an inhabitant thereof for twenty-one years." This provision was not debated, and on August 31st this and other proposals which had not been acted upon were referred to a committee of eleven, one member from each State. On September 4th this committee submitted the following provision: "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; nor shall any person be elected to that office who shall be under the age of thirty-five years, *and who has not been, in the whole, at least fourteen years a resident within the United States.*" On September 7th these provisions were agreed to without debate or dissent. On September 8th, "A committee was appointed by ballot to revise the style of, and arrange, the articles which had been agreed to." This committee reported the Constitution substantially as it was finally adopted. A residence qualification for eligibility to the office of President was first suggested when the only other qualifications proposed were as to age and citizenship. It was reasonable to provide

§25. *Election of President and Vice-President.* The framers of the Constitution had no great faith in the choice of the people as a whole, and therefore devised a scheme for the election of the President and Vice-President by an electoral college. The provision for the choice of this electoral college is as follows[1]:

"Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to

---

against the possibility of a person being elected to the high office of President who had but recently become a citizen and a resident, and who would, therefore, not be familiar with our institutions and traditions. The committee of eleven radically modified the original proposal of the committee of five by requiring that a person to be eligible to the office of President shall be "a native-born citizen, or a citizen of the United States at the time of the adoption of this Constitution." If these provisions had stood alone, it would still have been possible for a person who had become a citizen of one of the States just prior to the adoption of the Constitution to have been elected at any time thereafter to the presidency. It would also have been possible for one who was a native-born citizen, but who had lived practically all his life outside of the United States, to become a candidate for the presidency. To meet these possibilities it was further proposed by the committee of eleven that a person shall not be elected "who has not been, in the whole, at least fourteen years a resident within the United States." This was agreed to by the convention without alteration, discussion, or dissent. The committee which put the Constitution into final form was not authorized to make any changes in the substance of the provisions which had been adopted, but only "to revise the style of, and arrange, the articles which have been agreed to." The conclusion would seem, therefore, to be obvious. There is nothing in the wording of the Constitution which requires that a president shall have been a resident within the United States for the fourteen years next preceding his election. The Constitution simply requires that he shall have been "fourteen years a resident within the United States." Clearly any fourteen years of his life will satisfy the requirement. This conclusion is made doubly clear when we find that the committee on style used the words which we now find in the Constitution as synonymous with the provision proposed by the committee of eleven, and adopted by the Convention, that the President must have been "in the whole, at least fourteen years a resident within the United States." See Elliot's *Debates*, vol. v, pp. 363, 447, 462, 03, 507, 521, 530, and 562.

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

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."

This clearly gives the State Legislatures the power to appoint the electors themselves, and this practice continued in some States until quite recently; but they may also provide for the popular election of presidential electors, and such provision has now been made in all States. The word "appoint" in this connection is given a liberal construction, and has been held to even justify a provision for the election of presidential electors by districts instead of on a general ticket.[1] The presidential electors are state and not federal officers.[2]

The original provisions of the Constitution[3] directed each

[1] McPherson *v.* Blacker (1892) 146 U. S. 1.

[2] *In re* Green (1890) 134 U. S. 377.

[3] "The electors shall meet in their respective States and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed, and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the vote shall be taken by States, the representation from each State having one vote. A quorum, for this purpose, shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President." Art. II, sec. 1, par. 3.

elector to vote for two persons, and declared that the person receiving the highest number of votes should be President and the one receiving the next highest number of votes should be Vice-President. It was further provided that if two persons having each a majority of votes should be tied, the tie should be resolved by the House of Representatives, and that if no person should have a majority the House should choose a President from the five having the largest number of votes; and that after the election of a President, the person having the next highest number of votes should be Vice-President. It was early found that this arrangement was unsatisfactory, for a person might be elected Vice-President without receiving a majority of votes, as was true of John Adams in 1796, and persons of different parties might be President and Vice-President as in the case of Jefferson and Burr in 1800. To meet this situation the Twelfth Amendment was proposed in 1803 and was ratified by the requisite number of States in 1804. Its terms are as follows:

> "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 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 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, 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 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."

The Constitution also provides that "Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States."[1]

By federal statute it is ordered that presidential electors shall be appointed in each State on the Tuesday next after the first Monday in November in every fourth year, and that the electors of each State shall meet and vote on the second Monday in January at a place to be designated by the State Legislature.[2] Provision is made for the filling of vacancies among the electors according to rules to be

[1] Art. II, sec. 1, par. 4.

[2] U. S. Rev. Stat., sec. 131, and Act of Feb. 3, 1887, ch. 90, sec. 1.

adopted by each State, and for the transmission to the President of the Senate of the certificates of electoral votes.[1] The present law authorizes the States to determine controversies as to the appointment of electors, and provides that the votes shall be counted in the presence of both Houses of Congress by four tellers, two chosen by each House.[2] Votes may be rejected by concurrent action of both Houses of Congress on the ground that they have not been regularly given by electors whose appointment has been properly certified, and when two or more returns have been made from the same State the Houses shall by concurrent action determine which is the official return.[3]

§26. *When the Office of President Becomes Vacant.* The provisions in the Constitution on this point are as follows[4]:

> "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."

It is not entirely clear whether in the contingencies above referred to with regard to the death, etc., of the President the Vice-President was intended to become President or only to perform the duties of that office. In each case, however, when a President has died the Vice-President has at once assumed the office. This would probably also be done in case of the President's removal by impeachment,[5] or in case

[1] U. S. Rev. Stat., secs. 133, and 138 to 145.

[2] Act of Feb. 3, 1887, ch. 90, secs. 2 to 4.

[3] Act of Feb. 3, 1887, ch. 90, sec. 4. For criticisms which have been advanced of these provisions see Willoughby on the Constitution, secs. 661 to 663.

[4] Art. II, sec. 1, par. 6.

[5] See sec. 40.

of his resignation.[1] But in case of the President's inability to discharge the powers and duties of his office, is the Vice-President to assume the office of President, and, if so, what would happen upon the removal of the President's inability? No Vice-President has sought to assume the office or the powers and duties of President on the ground of the President's disability, but the question was much discussed during the illness of President Wilson at the end of his second term. It is also left in doubt as to who is to determine the inability of the President.[2]

In pursuance of the authority given to it by the constitutional provision quoted above Congress by act of March 1, 1792, declared that in case of the death, removal, resignation, or inability of both the President and Vice-President "the President of the Senate *pro tempore*, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives for the time being shall act as President of the United States until the disability be removed or a President shall be elected." The same statute also provided for the election of a President and Vice-President for a full term of four years before the expiration of the term of the previous incumbents.[3] If these provisions had ever been acted upon they might have resulted in the assumption of the functions of the presidential office by a person of a different party from that of the President who

[1] U. S. Rev. Stat., sec. 151, provides that "the only evidence of a refusal to accept, or of a resignation of the office of President or Vice-President shall be an instrument in writing, declaring the same, and subscribed by the person refusing to accept or resigning, as the case may be, and delivered into the office of the Secretary of State."

[2] See U. A. Lavery, "Presidential Inability," 8 *Amer. Bar Assoc. Jour.*, 13.

[3] It was moved in the Constitutional Convention that upon the death, etc., of the President and Vice-President the officer designated by law should act "until the time for electing a President shall arrive," but this, upon motion of Madison, was changed to read as we now find it in the Constitution, seeming to indicate that it was the intention of the framers of the Constitution that a presidential election could be held before the expiration of the term of the previously elected incumbent. Farrand, *The Records of the Federal Convention*, vol. ii, p. 535.

had been elected to office. They might also have resulted in presidential elections coming at a time different from the election of senators and representatives. This statute was repealed in 1886, and succession to the functions of President by members of the cabinet was provided for in the following order: Secretary of State, Secretary of the Treasury, Secretary of War, Attorney-General, Postmaster-General, Secretary of the Navy, and Secretary of the Interior, provided that the officer designated has been appointed by the advice and consent of the Senate, fulfills the eligibility requirements in the Constitution, and is not under impeachment. A member of the cabinet upon whom the presidential functions devolve is directed to convene Congress if it is not in session, and it is declared that he "shall act as President until the disability of the President or Vice-President is removed or a President shall be elected."[1] No provision is made for a presidential election before the expiration of the term of the previously elected incumbent, but the way is left open for Congress when convened to provide for such election. It would, however, seem unfortunate for Congress to adopt such a course.

§27. *Compensation and Oath of Office of President.* It is provided in the Constitution that "the President shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them."[2] The salary of the President is now $75,000, and provision is made for his traveling expenses not exceeding $25,000. The Vice-President receives a salary of $12,000.

Before the President enters upon his office he takes 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,

[1] Act of Jan. 19, 1886, ch. 4, 24 Stat. 1.

[2] Art. II, sec. 1, par. 7.

preserve, protect, and defend the Constitution of the United States."[1]

§28. *The President as Commander-in-Chief.* "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."[2] As Commander-in-Chief the President has entire power to direct the disposition of military and naval forces and to provide for the execution of military campaigns. On the other hand Congress is vested with the power to raise military and naval forces, to provide for their discipline and equipment, and to make appropriations for their maintenance.[3] The power to declare war is in Congress,[4] but treaties of peace are made by the President by and with the advice and consent of the Senate.[5] In case of the occupation of hostile foreign territory, or of hostile domestic territory, in the event of civil war, the entire governmental power is in the military authorities, and, therefore, ultimately in the President as Commander-in-Chief.[6] Upon the conclusion of peace the power of Congress over conquered territory becomes supreme, but the military government may remain in control until Congress makes other provision.[7] In such case, however, its powers are limited to the mere necessities of the situation, and it has

[1] *Const. of U. S.*, art. II, sec. 1, par. 8.

[2] *Ibid.*, art. II, sec. 2, par. 1. With regard to the militia see secs. 97 and 176.

[3] *Ex parte* Milligan (1866) 4 Wallace 2, 139. As to punishment of offenses committed by those in military service, see sec. 98.

[4] *Const. of U. S.*, art. I, sec. 8, par. 11.

[5] *Ibid.*, art. II, sec. 2, par. 2. See sec. 33. The Supreme Court recognized the power of the President by proclamation to declare a state of war to exist, and later to declare a state of peace, in the case of our Civil War. The Prize Cases (1862) 2 Black 635; The Protector (1871) 12 Wallace 700. But see Justice Nelson's dissent in the former case, and the criticism in Willoughby on the Constitution, sec. 714.

[6] New Orleans *v.* Steamship Co. (1874) 20 Wallace 387; Dooley *v.* United States (1901) 182 U. S. 222.

[7] Texas *v.* White (1868) 7 Wallace 700; Cross *v.* Harrison (1853) 16 Howard 164; Santiago *v.* Nogueras (1909) 214 U. S. 260.

no general authority to make laws for the territory in question.[1] The fact that the country is at war will not justify the military authorities in arrogating to themselves the powers of the civil authorities in friendly domestic territory, where the civil government is duly functioning. So it was held that during the Civil War a civilian could not be tried by court martial in loyal territory where the civil courts were functioning normally.[2]

§29. *The President's Power of Appointment and Removal.* One of the most important and at the same time one of the most arduous tasks which is put upon the chief executive results from the provision that

> "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."

In the next paragraph he is given "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."[3] Congress has not the power to make appointments except of its own officers,[4] nor to provide for appointment by others than those specified above,[5] but the powers and duties of any existing officer may be increased by Congress.[6] The Constitution does not define the term "inferior officers" as used in the provision above as to appointments, but Congress has never attempted to exercise

[1] Dooley *v.* United States (1901) 182 U. S. 222.

[2] *Ex parte* Milligan (1866) 4 Wallace 2.

[3] Art. II, sec. 2, pars. 2 and 3. In section 3 of the same article he is directed to commission all officers of the United States.

[4] United States *v.* Ferreira (1851) 13 Howard 40, 51.

[5] Ekiu *v.* United States (1892) 142 U. S. 651, 663.

[6] Shoemaker *v.* United States (1893) 147 U. S. 282.

the power given to it as to them except with regard to very subordinate offices.

The Constitution does not declare how federal officers are to be removed. It has been held that where Congress has vested the power to appoint "inferior officers" in the heads of departments it may limit the power of removal.[1] The question whether Congress could limit the power of the President to remove officers whom he has appointed alone or with the Senate's concurrence was ably debated in the First Congress, which finally expressly recognized the President's right of removal.[2] The President's right of removal was not thereafter interfered with by Congress until the passage of the tenure of office acts in 1867 and 1869 which did attempt to limit the President's power in that regard. These in turn were repealed in 1887, and since then the original practice has been resumed. At the very outset of our government the question was discussed as to whether the power of removal vested in the President or in the President and the Senate. Hamilton in the *Federalist*, speaking of the Senate, expressed the opinion that "the consent of that body would be necessary to displace as well as to appoint."[3] The view has been strongly expressed that the reasonable interpretation of the Constitution would put the power in the President and the Senate with regard to all officers appointed by their joint action.[4] However, as has

[1] United States *v.* Perkins (1886) 116 U. S. 483.

[2] Sergeant's *Constitutional Law*, 413; *Story on the Constitution* (5th ed.), sec. 1542. Story points out that this action was taken by the Senate by the casting vote of the Vice-President.

[3] *The Federalist*, No. 77. He goes on to say: "A change of the chief magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the Government as might be expected, if he were the sole disposer of offices. Where a man, in any station, had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable, by the apprehension that the discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon him."

[4] This view was strongly upheld in argument in the first Congress, though the majority finally took the opposite view. Sergeant's *Con-*

been pointed out, the President's sole authority in this regard was recognized by the First Congress, and this view has become thoroughly established. But is this power exercised merely by the acquiesence of Congress, and may Congress put limits upon it? It did do so by the tenure of office acts, and its right to do so has been strongly supported upon the ground that the power of removal is not by the Constitution vested in the President, but can only be implied from the fact that he is vested with general executive power, or from his duty to see that the laws are faithfully executed, while on the other hand Congress is expressly authorized[1] to make laws which shall be necessary and proper for carrying into execution all "powers vested by this Constitution in the government of the United States, or in any department or officer thereof."[2] The Supreme Court has not passed upon the validity of such congressional legislation.[3] It is very curious that this most potent power of removal, which is exercised by the President, should rest upon so unsubstantial a foundation, and that the right of Congress to control the exercise of this power should still be in doubt.

§30. *The President and His Cabinet.* No express provision is made in the Constitution for administrative departments or for a presidential cabinet, but the necessity of such departments is clearly contemplated where it is provided that the President "may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective

---

stitutional Law 413; *Story on the Constitution* (5th ed.), sec. 1542. See United States *v.* Avery (1867) Deady 204, 212, for the views expressed by Clay, Webster, and Calhoun. For the arguments in favor of the view which has been adopted see 1 *Kent's Comm.* 309 and 310.

[1] *Const. of U. S.*, art. I, sec. 8, par. 18.

[2] United States *v.* Avery (1867) Deady 204, quoting Calhoun's argument at length. See also 1 *Kent's Comm.* 311, note 1, *Story on the Constitution* (5th ed.), sec. 1543, note a, and Justice McLean's dissenting opinion in United States *v.* Guthrie (1854) 17 Howard 284, 305.

[3] See the discussion in Fairlie, "The Administrative Power of the President," *2 Mich. L. Rev.*, 191, 195 *et seq.*

offices."[1] It is left to Congress to create executive departments and to define their functions. The heads of these departments are, however, appointed by the President by and with the advice and consent of the Senate, and are removable by him at will.[2] They are, therefore, always of his political party, and normally his strong supporters. They have come to be known as the President's "cabinet," and it has become a thoroughly established practice, dating from Washington's administration, for the President to call these officers together for consultation and advice. The President is not bound by their advice, though they undoubtedly play an important part in determining his policies, but his power to control the administration of their departments has become thoroughly recognized.[3] The President's cabinet is at present made up as follows: the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Attorney-General, the Postmaster-General, the Secretary of the Navy, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, and the Secretary of Labor.

[1] Art II., sec. 2, par. 1. Peletiah Webster in his plan for a federal government, published in 1783, proposed that there should be ministers of finance, war, state and foreign affairs, who with three others to be appointed by Congress from New England, the Middle States, and the Southern States, respectively, should form an executive council, one of whose members should be appointed President. See *A Memorial in Behalf of the Architect of Our Federal Constitution;* by Hannis Taylor, pp. 36 and 43. In the Constitutional Convention it was proposed that there be an executive council instead of a single executive. When this idea was abandoned it was proposed that the Constitution provide for ministers of state who should act in an advisory capacity. It was finally decided that it was better not to seem to weaken the President's individual responsibility by making provision in the Constitution for advisors. Farrand, *The Records of the Federal Convention*, vol. i, pp. 66, 70, 74; vol. ii, pp. 329, 335, 342, 367, 543.

[2] See the preceding section.

[3] It probably was not originally intended that the President should be the directing head of the executive departments established by Congress, but through the fact that the heads of those departments are his appointees and are removable by him his control of their administration and policies has become secure. Goodnow, *Comparative Administrative Law* (student's ed.), vol. i, pp. 62 to 70.

§31. *The President as the Chief Executive.* The Constitution contains the following general provisions: "The executive power shall be vested in a President of the United States of America," and "he shall take care that the laws be faithfully executed."[1] The only other express provisions with regard to powers and duties which are devolved upon the President, besides those already considered, have to do with reprieves and pardons, treaties, giving of information to Congress with regard to the state of the Union, convening and adjourning Congress upon special occasions, and receiving ambassadors and ministers. It will be noticed that these powers are entirely military and political, except for the power of appointment of officers, which is shared by the Senate. It was probably the purpose of the framers of the Constitution that the President's powers should be essentially political and military, as enumerated in that document, and that he should not have the general direction of administrative affairs, but that the officers in charge of such affairs should be under the direction of, and accountable to Congress. In the very full discussion of the presidential office in the *Federalist* only those powers and duties which are expressly enumerated in the Constitution are considered.[2] Although Congress in organizing the departments of foreign affairs and of war, having to do with political and military affairs, put these departments under the direction of the President, when it came to the formation of the treasury department and the post office department it showed a clear purpose to keep their administration under its own direction.[3] But, as has been pointed out in the preceding paragraph, Congress at the very outset conceded to the President the power of removing administrative officers, and this, together with his function of nominating officers for appointment, and the close relations with heads of the administrative departments developed through

[1] Art. II, sec. 1, par. 1, and sec. 3.

[2] *The Federalist*, Nos. 67 to 77, particularly No. 69.

[3] See the discussion of this point in Goodnow, *Principles of the Administrative Law of the United States*, 70 to 82.

cabinet conferences, has resulted in the accretion to the presidential office of the power of general direction of all the vast administrative machinery. Furthermore Congress has itself by express direction conferred powers and imposed administrative duties upon the President in a very large number of instances.[1] At the present day the President's position as chief administrative officer of the federal government is thoroughly established. Moreover, the Supreme Court in interpreting his functions has held that, in his duty to see that the laws including treaties and the Constitution itself, are faithfully executed, he is not limited to their enforcement according to their express terms, but may direct such acts to be done as reasonably appear to be necessary for their enforcement in the absence of express direction. In the case before the court[2] it appeared that the President had directed an officer of the department of justice to protect a justice of the Supreme Court against threatened attack, although there was no statutory authorization for such direction. The court held that it was a reasonably inferable constitutional duty of the federal government to protect its officers, and that the President in the absence of statutory provision might legally give direction for such protection. In discussing the principle which was applied in the case the court said that it had no doubt that if robbery of the mail was threatened, or if injury to forests on the public domains was apprehended, the President, without any statutory authorization, could make provision for their protection.[3]

§32. *Reprieves and Pardons.* By the Constitution the power is given to the President "to grant reprieves and pardons for offenses against the United States except in cases of impeachment."[4] It is to be noted that it is only in cases of offenses against the United States that the Presi-

[1] Fairlie, "The Administrative Powers of the President," *2 Mich. L. Rev.* 190, 203.

[2] *In re* Neagle (1890) 135 U. S. 1.

[3] *Ibid.* 65.

[4] Art. II, sec. 2, par. 1.

dent may act under this provision. This power may not be limited by Congress.[1] The pardoning power may be exercised at any time after the offense has been committed, either before or after trial or conviction.[2] A pardon may be absolute or may take the form of the remission of part of the penalty, and it may be granted upon certain conditions.[3] The President may also grant general amnesties to classes of individuals.[4] This fact, however, is held not to exclude Congress from also passing acts of amnesty, which it has done in providing by legislation that evidence given by witnesses in certain proceedings shall not in any way be used against them.[5] It has also been the practice of Congress from the foundation of the government to authorize federal officers to remit penalties which have been incurred. The Supreme Court has refused to declare unjustified the long continued interpretation of the Constitution under which these congressional acts have been assumed to be valid.[6] In 1916, in the case of *Ex parte United States*,[7] the Supreme Court decided that there was no inherent power in the federal courts to suspend sentences, although that power had been exercised by those courts in a large number of cases. As a result of this decision President Wilson granted pardons to some five thousand persons. The court stated that for the power to suspend sentences "recourse must be had to Congress whose legislative power on the subject is in the very nature of things adequately complete."[8] A reprieve oper-

[1] *Ex parte* Garland (1866) 4 Wallace 333; United States *v.* Klein (1871) 13 Wallace 128.

[2] *Ex parte Garland* (1866) 4 Wallace 333, 380.

[3] *Ex parte* Wells (1855) 18 Howard 307.

[4] See "The Power of the President to Grant a General Pardon or Amnesty for Offenses Against the United States," *8 American L. Reg.* 512 and 577.

[5] Brown *v.* Walker (1896) 161 U. S. 591, 601.

[6] United States *v.* Morris (1825) 10 Wheaton 246; The Laura (1885) 114 U. S. 411.

[7] 242 U. S. 27.

[8] *Ibid.* 52. The State decisions on the question of the inherent power of courts to suspend sentences are conflicting. In the case just cited the court gives a full collection of the State decisions on both sides of the

ates in cases of capital punishment to defer to a certain day the time of execution.

§33. *The President's Treaty-Making Power.* The language of the Constitution on this subject is that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."[1] Under the Articles of Confederation[2] Congress possessed the sole power of making treaties, it being necessary for nine States to concur. In the Constitutional Convention there was difference of opinion as to whether the treaty-making power should be vested in the President, the Senate, Congress as a whole, or in the President and the Senate, but the latter view finally prevailed. There was also opinion favorable to a requirement that two thirds of the whole membership of the Senate should concur, but this did not meet with the approval of the majority of the Convention.[3] The difficulty which has often been experienced in getting treaties approved by the Senate after they have been negotiated may reasonably lead to the belief that even the provision which was adopted was too cautious, and that a provision for approval by a majority of the Senate would have been more reasonable and workable. There has been some variety of opinion as to what is meant by the provision that treaties shall be made by the President "by and with the advice and consent of the Senate." It is reasonably inferable that the drafters of the Constitution did intend that the Senate should have a part in advising with regard to the negotiation of treaties, and it is significant that President Washington did repeatedly ask the Senate's advice in negotiating treaties.[4] On the whole, however, the practice has been otherwise, and most

question. It has been held that the grant to a court of the power to suspend sentences is not an infringement upon the chief Executive's pardoning power. People *v.* Court of Sessions (1894) 141 N. Y. 288.

[1] Art. II, sec. 2, par. 2. The States have no such power. See sec. 171.

[2] Art. IX.

[3] *Story on the Constitution* (5th ed.), sec. 1506.

[4] W. H. Dewhurst, "Does the Constitution Make the President Sole Negotiator of Treaties?" *30 Yale L. Jour.* 478.

treaties have been presented to the Senate at the conclusion of negotiations, the Senate being then left to either reject, or to consent unconditionally or with accompanying reservation or interpretations, or to advise as to such changes as that body may think desirable. The President may at any time withdraw a treaty from the Senate's consideration. If changes are advised the President may then enter into further negotiations with regard to them, or may refuse to ratify the treaty with such changes.[1]

§ 34. *The Scope of the Treaty-Making Power.*[2] That the President and Senate cannot by a treaty change the framework of government established by the Constitution seems obvious since the Constitution itself provides how it shall be amended. It also seems clear that the national government cannot do by means of a treaty what it is expressly forbidden in the Constitution to do at all. Thus it would seem that it could not by treaty abolish the writ of habeas corpus, or institute bills of attainder, or levy a capitation tax except in proportion to the census, or tax exports from a State, or give a preference to the ports of one State over those of another, or provide for titles of nobility.[3] Nor could it by treaty establish a state church, or provide for promiscuous searches, or do away with indictments or jury trials in criminal cases, or do any of the other things forbidden in the first eight amendments.[4]

It has never been attempted to directly appropriate public funds by treaty, but when treaties have called for the pay-

[1] *Story on the Constitution* (5th ed.), sec. 1523. Haver *v.* Yaker (1869) 9 Wallace 32.

[2] For a fuller treatment of this subject see Crandall, *Treaties, Their Making and Enforcement* (2d ed.); Butler, *Treaty-Making Power of the United States;* Tucker, *Limitations on the Treaty-Making Power;* Willoughby on the Constitution, chaps. 24 and 25.

[3] Art. I, sec. 9.

[4] "It would not be contended that it [the treaty-making power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter without its consent." Geofrey *v.* Riggs (1890) 133 U. S. 258, 267.

ment of sums of money, as in the cases of the Jay treaty, the treaty for the purchase of Louisiana, and the treaty for the purchase of Alaska, there has been much discussion as to whether it is a matter of duty or of discretion on the part of Congress to make the appropriation called for. The House of Representatives has consistently held that it is a matter of discretion[1]; and even though it should be viewed as a matter of duty there is no constitutional method for its enforcement. The same situation exists when a treaty contains any other obligation which is not self-executing but which calls for congressional action.

But how far may the President and Senate go in incorporating into a treaty, which is in terms self-executing, provisions of a character to be within the ordinary field of congressional legislation, such as provisions with regard to interstate commerce, the tariff, immigration, and naturalization? It is provided in the Constitution that "all bills for raising revenue shall originate in the House of Representatives."[2] It has been insisted by the House of Representatives that this excludes all tariff provisions from the treaty-making powers, and that when treaties contain such provisions congressional action is necessary to put them into effect, and in this position the House has been supported by the Senate. It is now the practice to insert in treaties making modifications in existing tariffs a clause making such changes dependent upon congressional action.[3]

Outside at least, of provisions with regard to appropriations and taxation it seems clear that treaties may contain stipulations on subjects with regard to which Congress may legislate, and that, when such stipulations are so framed as to go into effect without congressional action, they have the full force of law, for the Constitution expressly provides that treaties, as well as laws passed by Congress, "shall be the supreme law of the land."[4] Furthermore, it necessarily

[1] Crandall, *Treaties, Their Making and Enforcement*, chap. 12.
[2] Art. I, sec. 7.
[3] Crandall, *Treaties, Their Making and Enforcement*, chap. 13.
[4] Art. VI, par. 2.

follows that, since congressional statutes and treaties stand upon a parity, the provisions of a treaty which conflict with the provisions of a previous statute supersede the statutory provisions. "That it was competent for the two countries by treaty to have superseded a prior act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode provided by that instrument, shall be the supreme law of the land, would not have due effect."[1] But, of course, if a treaty and federal statute relate to the same subject, the court will, if possible, give effect to both.[2] If a treaty may supersede a federal statute, it follows conversely that a federal statute may abrogate the provisions of a treaty. This has been repeatedly determined by the Supreme Court.[3] The result of such action is to replace the treaty provisions by the statute as the law of the land, but the international obligation created by the treaty still exists, and its nonfulfillment may, of course, lead to international complications.

The Articles of Confederation[4] forbade the individual States to enter into any treaty without the consent of the United States, and gave to Congress "the sole and exclusive right and power of . . . entering into treaties and alliances." Nevertheless, the treaty of peace which was made by Congress with Great Britain was not fully observed by the States, and Congress was reduced to requesting the States to repeal their legislation which was inconsistent with its terms. When the Constitution was adopted it was determined to meet this situation, and this was done by declaring that "treaties made, or which shall be made, under

[1] United States *v.* Lee Yen Tai (1902) 185 U. S. 213, 220. See also Foster *v.* Neilson (1829) 2 Peters 253, 314; Cherokee Tobacco Case (1870) 11 Wallace 616, 621; Whitney *v.* Robertson (1888) 124 U. S. 190, 194; Johnson *v.* Browne (1907) 205 U. S. 309, 321.

[2] See the two cases last above cited.

[3] Head Money Cases (1884) 112 U. S. 580; Whitney *v.* Robertson (1888) 124 U. S. 190; Chinese Exclusion Cases (1889) 130 U. S. 581; Butler, *Treaty-Making Power of the United States*, sec. 378.

[4] Articles VI and IX.

the authority of the United States, shall be the supreme law of the land, and the judges in each State shall be bound thereby, anything in the Constitution and laws of any State to the contrary notwithstanding."[1] It will be noticed that this constitutional provision applied to existing treaties as well as treaties which might be made in the future; and it was almost at once decided by the Supreme Court that its effect was to make void, without the necessity of any legislative act by the State, all state legislation inconsistent with the terms of treaties entered into by the federal government.[2]

Furthermore, the federal government has undoubtedly much greater power to affect the internal affairs of the States by means of treaties than by means of legislation, notwithstanding some early dicta to the contrary.[3] Treaties made by Congress under the Articles of Confederation dealt with matters which by the Constitution are excluded from the field of congressional action, such as the right of aliens to inherit, to dispose of property, and the like,[4] and the framers of the Constitution undoubtedly had these provisions in mind when they drafted the clause of the Constitution quoted above. The control of the right of aliens to dispose of or to inherit property is outside the jurisdiction of Congress and within the jurisdiction of the several States, but the Supreme Court decided at an early day that treaties on these subjects would supersede conflicting State legislation,[5] and numerous later cases have confirmed this decision.[6] A treaty with an Indian tribe by which land is

[1] Art. VI, par 2.

[2] Ware *v.* Hylton (1796) 3 Dallas 199; Fairfax *v.* Hunter (1813) 7 Cranch 603; Chirac *v.* Chirac (1817) 2 Wheaton 259; Hauenstein *v.* Lynham (1879) 100 U. S. 483.

[3] The License Cases (1847) 5 Howard 504, 613; Passenger Cases (1849) 7 Howard 283, 465; Cherokee Tobacco Case (1870) 11 Wallace 616, 620.

[4] Crandall, *Treaties, Their Making and Enforcement* (2d ed.), 266.

[5] Fairfax *v.* Hunter (1813) 7 Cranch 603.

[6] See the large number of cases both federal and state collected in Crandall, *Treaties, Their Making and Enforcement* (2d ed.), 248 and 250.

ceded by the Indians and becomes part of the territory of a State may prohibit the introduction of liquor into such territory, and to that extent prevent state legislation on the subject within that territory.[1] In 1913 a federal statute was passed regulating the killing of migratory birds.[2] This statute was held unconstitutional in the federal district courts.[3] An appeal from these decisions was heard by the Supreme Court, but decision was suspended pending negotiation of a treaty on the subject with Great Britain. In 1916 a treaty was made with Great Britain by which Great Britain and the United States agreed to enact legislation for the protection of the migratory birds which pass back and forth between the United States and Canada. Legislation ancillary to this treaty was passed by Congress which is substantially the same as the statute of 1913. In 1920 the case of *Missouri v. Holland*[4] came before the Supreme Court, in which the State of Missouri sought to enjoin the enforcement of the legislation ancillary to the treaty on the ground that it was unconstitutional. In upholding the statute Justice Holmes said in part[5]:

> ". . . Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well-being

[1] United States *v.* Forty-three Gallons of Whiskey (1876) 93 U. S. 188; Dick *v.* United States (1908) 208 U. S. 340; Clairmount *v.* United States (1912) 225 U. S. 551.

[2] Act of March 4, 1913, 37 Stat. 828.

[3] United States *v.* Shauver (1914) 214 Fed. 154; United States *v.* McCullagh (1915) 221 Fed. 288.

[4] 252 U. S. 416.

[5] *Ibid.*, 433 to 435.

that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found. *Andrews v. Andrews*, 188 U. S. 14, 33. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. . . . The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

. . . . . .

"Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any power to deal with. We see nothing in the Constitution that compels the government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld."

The sound doctrine with regard to the treaty power seems to be this, that the national government may by treaty deal with any matter which is an appropriate subject of international agreement, as long as it does not contravene any express prohibition in the Constitution, and that such a treaty and legislation in pursuance of it are the supreme law of the land, though they deal with matters which are ordinarily reserved to the States, and to which the ordinary pow-

ers of Congress do not extend. If this were not so such matters could not be adequately dealt with, since the States are expressly excluded from the field of international relations. In the early days of the Republic Calhoun, who became so strong a States' Rights advocate, in the course of congressional debate, expressed himself on the subject of the treaty-making power with great force and lucidity, as follows[1]:

> "The enumeration of legislative powers in the Constitution has relation then, not to the treaty power, but to the powers of the State. In our relation to the rest of the world the case is reversed. Here the State disappears. Divided within, we present the exterior of undivided sovereignty. The wisdom of the Constitution appears conspicuous. When enumeration was needed, there we find the powers enumerated and exactly defined; when not, we do not find what would be vain and pernicious. Whatever, then, concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty power; can only be regulated by it; and it is competent to regulate all such subjects; provided, and here are its true limits, such regulations are not inconsistent with the Constitution. If so they are void. No treaty can alter the fabric of our government, nor can it do that which the Constitution has expressly forbade to be done; nor can it do that differently which is directed to be done in a given mode, and all other modes prohibited."

§35. *The President's Power to Direct International Affairs.*[2] The President as chief executive of the nation has exclusive control of diplomatic relations with foreign nations, which are carried on through the Secretary of

[1] Annals, 14th Cong., 1st Sess., 531. See Crandall, *Treaties, Their Making and Enforcement* (2d ed.), 246.

[2] For fuller treatment of this subject see Butler, *Treaty-Making Power of the United States;* Crandall, *Treaties, Their Making and Enforcement* (2 ed.), chaps 8 and 9; Moore, "Treaties and Executive Agreements," *20 Political Sc. Quart.* 385.

State. This vests in him the power to largely shape our foreign policy and our relations with other countries. Also, as commander-in-chief of the army and navy he necessarily has power to deal with other governments with regard to military affairs. Under this latter authority he can make agreements with other powers with whom we are coöperating as to the disposition of military forces. Under this authority, also, the President has entered into agreements with Great Britain with regard to the reduction of naval forces on the Great Lakes, and with Mexico for reciprocal rights to cross the international boundary in pursuit of hostile Indian bands.[1] Under his military power the President clearly has the right to agree to terms of armistice, and to make preliminary arrangements for the negotiation of treaties. Such preliminary arrangements may of themselves be of the greatest importance, as where, at the close of the war with Spain, it was agreed, as a preliminary to the negotiation of the treaty of peace, that Spain should relinquish its claim to sovereignty over Cuba, and cede Porto Rico to the United States. At the close of the Boxer uprising in China the whole situation was adjusted by a "protocol" as a condition of the withdrawal of military forces without any subsequent formal treaty. To this protocol the United States was a party. It is probable that in this instance the President overstepped his constitutional powers, the international situation being so complicated as to make the negotiation of formal treaties practically impossible. Under his general power as chief executive the President may meet a particular exigency by an informal arrangement for a *modus vivendi*, pending formal action by treaty.[2] The President has frequently, under his general power to conduct diplomatic correspondence entered into agreement for the settlement of claims by American citizens against foreign countries, though he has not attempted in this way to settle claims of foreigners against the United

[1] Crandall, *Treaties, Their Making and Enforcement* (2d ed.), 102 and 105.

[2] Butler, *Treaty-Making Power of the United States*, vol. ii, p. 369.

States, nor of the United States Government against other countries.[1]

Treaties themselves may provide for the settlement by executive agreement of certain questions which may arise under them, or for final action by the President in consummation of the treaty. This has occurred with special frequency in connection with treaties for the settlement of boundary disputes.[2] So arbitration treaties may leave to the President the submission of controversies to arbitration, and the arrangements for their settlement. In 1904 and 1905 Mr. Hay negotiated a number of arbitration treaties containing provisions that in each case "the high contracting parties before appealing to the permanent court of arbitration, shall conclude a special agreement defining clearly the matter in dispute and the scope of the power of the arbitrators, and fixing the period for the formation of the arbitral tribunal and the several stages of the procedure." The Senate changed the word "agreement" to "treaty," because it was not willing to have matters submitted to arbitration without its concurrence, and President Roosevelt refused to submit the treaties in their altered form to the other contracting parties on the ground that nothing would be gained, since in each case a treaty for submission to arbitration would have to be negotiated.[3]

Subjects which are within the legislative jurisdiction of Congress may frequently touch upon or affect international relations, and in such cases it is competent for Congress to delegate to the President power with regard to such relations. So in dealing with international commerce Congress may give to the President authority to declare embargoes, and in levying tariffs it may vest in the President the power to suspend or enforce duties in his discretion in order to procure reciprocal benefits in other countries. Congress has

[1] Moore, "Treaties and Executive Agreements," *20 Political Sc. Quart.* 385, 408 to 414.

[2] Crandall, *Treaties, Their Making and Enforcement* (2d ed.), 117.

[3] *Ibid.*, 119; Moore, "Treaties and Executive Agreements," *20 Political Sc. Quart.* 385.

given the President authority to make agreements with other governments as to copyrights and patents, and has authorized the Postmaster General, under the President's direction to enter into postal agreements.[1] It is thus apparent that the President has extensive power not only to affect international policy, but to enter into agreements with regard to international relations without the concurrence of the Senate.

§36. *International Extradition.* The State authorities have no constitutional right to surrender fugitives demanded by foreign governments. Such matters are within the field of international relations, and should therefore be dealt with by the national government.[2] Where there is no treaty involved the surrender of fugitives is not a matter of duty recognized by international law, but merely a matter of comity.[3] Without a treaty or legislation on the subject the President has held himself unauthorized to make such a surrender,[4] and it is the general view that he has no such inherent power.[5] Treaties on the subject are now very general. In *United States v. Rauscher*[6] there was presented to the Supreme Court of the United States the question whether, when a person has under a treaty been extradicted from a foreign country charged with a certain crime, he may be tried for a different crime. The decisions in the lower federal courts and in the State courts had been conflicting, although most of them had answered the question in the negative. A negative answer had also been given by most of the writers on the subject. Extradition treaties are part of the law of the land, and the court held that the fair intent

[1] See the full discussion of this subject in Crandall, *Treaties, Their Making and Enforcement*, chap. 9.

[2] See sec. 208.

[3] Moore, *Extradition*, secs. 9 to 15; W. E. Hall, *International Law* (7th ed.), 58 to 60; Stockton, *Outlines of International Law*, 189; Hershey, *Essentials of International Law*, 263 to 264.

[4] Holmes *v.* Jennison (1840) 14 Peters 540, 541.

[5] Moore, *Extradition*, secs. 16 to 27; Butler, *Treaty-Making Power of the United States*, secs. 433 to 435.

[6] (1886) 119 U. S. 407.

of such treaties is that the fugitive "shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition."[1] But the court also decided at the same session that if a fugitive has been kidnapped in a foreign country and brought into the State against whose laws he has offended, although there is an extradition treaty with the country from which he was taken, the federal courts can give him no relief, for no constitutional, statutory, or treaty rights are thereby violated.[2]

§37. *The President's Part in Law Making.* The Constitution directs that the President "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."[3] We have as a result of this direction the "presidential messages" submitted by our chief executive to Congress. Washington and John Adams read or spoke their messages, but Jefferson started the practice of sending his messages to be read by the clerk, and this practice was continued by all subsequent Presidents until Wilson reverted to the practice of delivering his messages in person. Although the President plays no direct part in initiating legislation, the part he plays in suggesting necessary laws is very important. Also, through his power of appointment he can do much to bring pressure to bear upon members of Congress in favor of legislation which he desires.

It is, however, through the veto power that the President exerts a direct, and by far the greatest influence upon law making. On this point the Constitution provides[4]:

[1] *Ibid.*, 424. Followed in Cosgrove *v.* Winney (1899) 174 U. S. 64. Compare with the law under interstate rendition, sec. 213.

[2] Ker *v.* Illinois (1886) 119 U. S. 436. Compare with the law under interstate rendition, sec. 212.

[3] Art. II, sec. 3.

[4] Art. I, sec. 7, pars. 2 and 3.

"Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered; and if approved by two thirds of that House it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return; in which case it shall not be a law.

"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 the House of Representatives, according to the rules and limitations prescribed in the case of a bill."

This provision does not apply to proposed amendments to the Constitution,[1] nor has the second paragraph quoted been interpreted as applying to any action of Congress except such as is "necessary" to legislation.[2] In the

[1] See sec. 19.

[2] *Story on the Constitution* (5th ed.), sec. 892; Willoughby on the Constitution, sec. 254; 25 *R. C. L.* 886.

Constitutional Convention it was debated whether the veto of the President should be absolute or qualified, whether the veto power should be vested in the President alone or in the President and the Supreme Court, and whether, if a qualified power of veto were to be vested in the President, it should be overcome by a two thirds or a three fourths vote of Congress.[1] The provision which was finally adopted is moderate, and has, on the whole, proved wise and useful. Though the first Presidents exercised the power only when they thought that the legislation in question was unconstitutional, Presidents since the day of Jackson have not hesitated to veto measures which they thought were unwise. President Grant in his annual message of December 1, 1873, recommended an amendment to the Constitution permitting the President to veto part of a bill without vetoing all of it. This recommendation was not acted upon by Congress, but the agitation for such a change in the Constitution continues, and such an amendment is most desirable. A number of our state constitutions contain such a provision.

As is shown by the constitutional provision quoted above, a congressional enactment may become a law without the concurrence of the President if he fails to return it within ten days, Sundays excepted, unless Congress has adjourned within that period, in which case the act does not become a law through the President's inaction. It has been held by the Supreme Court that the President may constitutionally sign a bill during a congressional recess.[2] The court in that case expressly declined to pass upon the question whether a bill may be signed by the President after Congress has adjourned. Lincoln did in fact sign a bill after Congress had adjourned, but the Judiciary Committee of the House of Representatives expressed its view that this was contrary to the intention of the Constitution. The House, however, took no action on this committee report, but at the next session Congress passed an amendment to the law so signed ap-

[1] *Story on the Constitution* (5th ed.) secs. 881 to 891.

[2] La Abra Silver Mining Co. *v.* United States (1899) 175 U. S. 423.

parently recognizing its validity.[1] Monroe and Cleveland both decided not to sign bills after adjournment, which had been overlooked while Congress was in session.[2] President Wilson, however, upon the advice of his Attorney-General signed eight bills after the adjournment of Congress in June, 1920.[3] State constitutions often make provision for the signing of bills by the governor within a given period after the State Legislature has adjourned, but where there is no such provision the preponderant view is that a signing after adjournment is valid.[4]

§38. *The President's Power to Convene and Adjourn the Houses of Congress.* The Constitution declares that "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."[5] No different day has been appointed. It is further provided, however, that the President "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 may think proper."[6] The President's power to adjourn Congress is confined to the single contingency named, and has never been exercised. On the other hand, his power to summon Congress in special session has been frequently made use of.

§39. *Suspension of the Writ of Habeas Corpus.* Among the prohibitions contained in the first article of the Constitution is one to the effect that "the privilege of the writ of

[1] An elaborate argument in favor of the validity of statutes signed by the President after the adjournment of Congress will be found in the decision in United States *v.* Alice Weil (1894) 29 Ct. Cl. 526.

[2] Renick, "The Power of the President to Sign Bills after the Adjournment of Congress," 32 *American L. Rev.* 208.

[3] See F. Rogers, "The Power of the President to Sign Bills after Congress Has Adjourned," *30 Yale L. Jour.* 1, for a defense of this procedure.

[4] Barnett, "The Executive Control of Legislation," *41 American L. Rev.*, 215, 230 *et seq.*

[5] Art. I, sec. 4, par. 2.

[6] Art. II, sec. 3.

habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[1] Since this provision is contained in the article dealing with the legislative branch of the government, it is fair to presume that the right to suspend the use of the writ was intended to be vested in Congress. During the Civil War Lincoln was advised by his attorney-general that he might suspend the privilege of the writ by executive order, and he proceeded to do so. Chief Justice Taney of the Supreme Court expressed his opinion as being against the right of the President to exercise this power, and his view has been generally accepted as correct, although the contrary view had its strong supporters at the time.[2]

§40. *Impeachment.*[3] The provisions of the Constitution relative to impeachment are as follows:

> "The House of Representatives . . . shall have the sole power of impeachment.[4]
>
> "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.
>
> "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

[1] Art I, sec. 9, par. 2.

[2] *Ex parte* Merryman (1861) Taney's Rep. 246. See also *Ex parte* Benedict (1862) Fed. Case No. 1, 292. *Story on the Constitution* (5th ed.), sec. 1342, n.; Willoughby on the Constitution, sec. 738, and articles there cited.

[3] See for fuller discussions of this subject *Rawle on the Constitution*, 209 to 219; *Story on the Constitution* (5th ed.), secs. 781 to 813; D. Y. Thomas, "The Law of Impeachment in the United States," *2 Amer. Pol. Sc. Rev.* 378; W. Brown, "The Impeachment of the Federal Judiciary," *26 Harv. L. Rev.* 684; W. A. Estrich, "The Law of Impeachment," *20 Case and Comment* 454; Beveridge's *Life of John Marshall*, vol. iii, chap. 4, with regard to the trial of Justice Chase.

[4] Art. I, sec. 2, par. 5.

the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.[1]

"The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors."[2]

According to the English practice at the time of the adoption of the Constitution any subject of the king was liable to impeachment, whether he occupied an official position or not. It seems probable, however, that the Constitution, in declaring that "the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment," was intended to limit this proceeding to such officers.[3] Senator Blount was impeached in 1797, but before his impeachment he had been expelled from the Senate. He pleaded to the jurisdiction of the Senate on the ground that Senators are not civil officers within the meaning of the Constitution, and that, furthermore, he was no longer a member of the Senate. His plea to the jurisdiction was upheld, and this vote has been interpreted as a declaration that members of Congress are not subject to impeachment.[4] This position is supported by the fact that the Constitution itself distinguishes members of Congress from civil officers, where it declares that "no Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house

[1] Art. I, sec. 3, pars. 6 and 7.

[2] Art. II, sec. 4.

[3] *The Federalist*, No. 65.

[4] Sergeant, *Constitutional Law*, 376; D. Y. Thomas, "The Law of Impeachment in the United States," *2 Amer. Pol. Sc. Rev.*, 378, 386; W. A. Estrich, "The Law of Impeachment," *20 Case and Comment*, 454, 459.

during his continuance in office."[1] It seems equally clear that officers of the army and navy are not civil officers within the intendment of the constitutional provisions as to impeachment.

The first grounds for impeachment which were agreed to by the Constitutional Convention were "malconduct or neglect in the execution of his office."[2] The Committee of Detail seems to have favored using the words "treason, bribery, or corruption."[3] In debate "treason, bribery, and maladministration" was suggested, but this was thought to be too indefinite, and finally the present words, "treason, bribery, or other high crimes and misdemeanors" were agreed to.[4] It is clear from the impeachment trials which have been held that it is not necessary to charge the defendant with acts which would constitute indictable offenses under the federal statutes. What are such high crimes and misdemeanors as to justify conviction is a question which the Senate will determine in each case, and from their determination there is no appeal. However, it seems safe to say that, on the one hand, there should not be a conviction except upon proof of wilful or corrupt misconduct in office, or of acts which are otherwise criminal in character, but that on the other hand, under English parliamentary precedents the acts charged need not be such as to duplicate any crime previously defined and punished by courts of law.[5]

Although most of the acts charged in the nine impeachment trials held under our Federal Constitution[6] are acts of official misconduct, it is safe to say that failure on the part of an officer to perform his official duties, or acts outside of

[1] Art. I, sec. 6, par. 2.

[2] Farrand, *The Records of the Federal Convention*, vol. i, p. 90.

[3] *Ibid.*, vol. ii, p. 172.

[4] *Ibid.*, vol. ii, p. 550.

[5] *Story on the Constitution* (5th ed.), secs. 796 to 800; W. Brown, "The Impeachment of the Federal Judiciary," *26 Harv. L. Rev.*, 684, 689 to 699; D. Y. Thomas, "The Law of Impeachment in the United States," *2 Amer. Pol. Sc. Rev.*, 378.

[6] For a synopsis of these cases see W. Brown, "The Impeachment of the Federal Judiciary," *26 Harv. L. Rev.*, 684, 699 to 705.

his official duties, which meet the test suggested above and show an unfitness for office, are sufficient to support an impeachment.[1]

William W. Belknap when Secretary of War was accused of accepting part of the profits of an army post tradership from a trader whom he had appointed. He resigned, and his resignation was accepted by the President before he was impeached. When impeached he pleaded to the jurisdiction of the Senate on the ground that at the time of impeachment he was no longer a civil officer of the United States. This point was decided against him by a majority of less than two thirds,[2] but upon the final vote he was acquitted, a majority of the Senators voting for acquittal doing so on the ground that in their opinion the Senate had no jurisdiction. In 1912 Judge Archbald of the United States Circuit Court, designated a member of the Commerce Court, was impeached by the House, the first six articles setting forth

[1] Senator Blount was charged with conspiracy to promote hostile expeditions against Spanish possessions, and to stir up certain Indian tribes. One of the charges against President Johnson was that he made inflammatory speeches against Congress. Judge Humphreys was convicted on charges not only of treasonable conduct, but of refusing to perform the functions of his office. One of the charges against Judge Swayne was that he resided outside of his judicial district in violation of the statute. In the impeachment of Judge Archbald one of the counts was that he made a trip abroad at the expense of a magnate of large corporate interests. To be sure the only ones among these persons who were convicted were Judge Humphreys and Judge Archbald, and the latter was not convicted on the charge referred to, but in none of the cases does it appear that the charges noted were held to be outside of the scope of impeachment proceedings. See W. Brown, "The Impeachment of the Federal Judiciary," *26 Harv. L. Rev.*, 684, 692 and 699 to 705.

[2] The presiding officer ruled that the Senate's jurisdiction was sustained. Upon a resolution to proceed with the trial as upon a plea of not guilty the result was 21 yeas, 16 nays, 36 not voting. In the trial of President Johnson evidence was admitted fifteen times when less than two thirds voted for its admission. D. Y. Thomas, "The Law of Impeachment in the United States," *2 Amer. Pol. Sc. Rev.*, 378, 389, 390. It seems to be a fair deduction that questions preliminary to the final vote may be decided by a majority instead of a two thirds vote.

alleged misconduct while a member of the Commerce Court, and counts seven to twelve being based upon acts alleged to have been done while a United States District Judge, an office held by him immediately before he was appointed circuit judge. Though he was convicted on the first six counts and on the thirteenth (a blanket) count, he was acquitted on all of the counts charging misconduct while a district judge. The conduct of the Senate in these two trials would seem to show a persistent feeling in that body that a person is not impeachable after his term of office has come to an end by expiration or resignation.[1] Whether an officer can be convicted upon impeachment for acts done before he entered upon his office is a question which has not been raised in federal proceedings. Governor Sulzer of New York, however, notwithstanding the strenuous objections of his counsel, was convicted and removed from office on counts charging him with having made and verified an incorrect statement of his campaign receipts and expenditures before entering upon his office.[2]

[1] As to the precedents in State trials see D. Y. Thomas, "The Law of Impeachment in the United States," *2 Amer. Pol. Sc. Rev.*, 378, 390; W. A. Estrich, "The Law of Impeachment," *20 Case and Comment*, 454, 459.

[2] W. A. Estrich, "The Law of Impeachment," *20 Case and Comment*, 454, 458. The possibility of a President's corrupting his electors was particularly mentioned in the Constitutional Convention as a reason for impeachment. Farrand, *The Records of the Federal Convention*, vol. ii, p. 69.

CHAPTER V

THE JUDICIARY

§41. *Constitution and Tenure of the Federal Judiciary.* The third article of the Constitution deals with the judiciary, and the first section of that article is as follows:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office.[1]

[1] Article IX of the Articles of Confederation contained the following provisions:

> "The United States in Congress assembled, shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.
>
> "The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; . . ."

Then follow rather elaborate provisions for the choosing of a court in each instance for the hearing of such disputes. Similar provision was also made for the settlement, after the determination of the jurisdiction over territory claimed by two States, of the right of individuals claiming title to the same land under grants from the different States. For an enumeration of the cases and disputes which arose under these provisions see 131 U. S., Appendix, pp. xix to lxiii.

The Constitution expressly vests in the President, by and with the advice and consent of the Senate, the power to appoint Justices of the Supreme Court.[1] As we have seen he is also given like authority to appoint all other officers of the United States, except that "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 heads of departments."[2] It is very doubtful if the latter provision would apply to any members of the federal judiciary,[3] and certainly there has never been any attempt to apply it to them. The original Judiciary Act of 1789 provided for a Supreme Court to be composed of a Chief Justice and five Associate Justices. In 1807 the appointment of a sixth Associate Justice was authorized, in 1837 the President was authorized to appoint two additional Associate Justices, and in 1863 he was authorized to increase the number of Associate Justices to nine. In 1866 it was provided by statute that the number of Associate Justices should be reduced to six by not filling vacancies as they should occur. After two Justices had died it was enacted in 1869 that the Supreme Court should thereafter consist of a Chief Justice and eight Associate Justices, and this statute is still in force.[4] The members of the federal judiciary hold their positions during good behavior, and are only removable by impeachment.[5]

The original Judiciary Act of 1789 divided the country into thirteen districts with a District Court in each, and grouped these districts into three circuits, providing that a Circuit Court should be held twice yearly in each district, which should be held by two Justices of the Supreme Court and by the District Judge. Since that time the number of districts has increased to nearly eighty, and the number of circuits has been increased to nine, each member of the Supreme Court being assigned to a circuit. Just before Jefferson took office the Federalist Congress passed an act

[1] Art. II, sec. 2, par. 2.
[2] See sec. 29.
[3] *Ibid.*
[4] 131 U. S., Appendix, p. xi.
[5] See sec. 40.

for the rearrangement of circuits, and for the appointment of a Circuit Judge for each circuit, thus relieving the Supreme Court Justices of the duty of sitting as Circuit Judges. Among the last of President Adams's duties was the filling of these judicial positions. However, immediately after Jefferson took office, supported by a Republican Congress, this act was repealed.[1] Later legislation provided for at least one Circuit Judge in each circuit. The Circuit Courts had both original and appellate jurisdiction. In 1891 Circuit Courts of Appeals were established in each circuit in order to relieve the Supreme Court of a part of its ever increasing burden. This court has only appellate jurisdiction. In 1911 the Circuit Courts were abolished.[2] At present, therefore, the federal judicial machinery consists of the Supreme Court, the Circuit Courts of Appeals and the District Courts, together with the Court of Claims, and the Supreme Court and Court of Appeals of the District of Columbia.[3]

§42. *Original Jurisdiction of the Supreme Court of the United States.* The Constitution provides 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."[4] By statute the Supreme Court is given exclusive jurisdiction of suits against ambassadors or other public ministers and their domestics, and original but not exclusive jurisdiction of all suits brought by ambassadors or other public ministers, or to which a consul or vice-consul is a party.[5]

[1] See the very interesting account in Beveridge's *Life of John Marshall*, vol. iii, chap. 2.

[2] A Commerce Court was provided for by act of June 18, 1910, 36 Stat. 539, but was abolished by act of Oct. 22, 1913, chap. 32, 38 Stat. 208.

[3] Such tribunals as the District Courts of Alaska, the Canal Zone, Hawaii, and Porto Rico, the Supreme Court of the Philippines, The United States Court for China, and the Interstate Commerce Commission, are not treated as federal courts to which the constitutional provisions apply, but rather as agencies of Congress. American Ins. Co. *v.* Cantor (1828) 1 Peters 511.

[4] Art. III, sec. 2, par. 2.

[5] Judicial Code, sec. 233.

It was thoroughly established at the time of the adoption of the Constitution that the States could not be sued without their consent.[1] When it was provided in the Constitution that "the judicial power shall extend . . . to controversies . . . between a State and citizens of another State,"[2] and the Supreme Court was given jurisdiction of cases to which a State is a party, there was probably no intention to allow a State to be sued by a citizen of another State. Neither Hamilton[3] nor Marshall[4] thought that such a right was given. Very soon after the foundation of our government, however, the Supreme Court took the opposite view and upheld an action against the State of Georgia.[5] This led to wide popular protest which resulted in the adoption in 1798 of the Eleventh Amendment, which is as follows:

> "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."

The clear purpose of this Amendment cannot be evaded by citizens of one State, having claims against another State, assigning such claims to their own State, as long as the citizens remain the real parties in interest, and the assignment is made merely to constitute the State the nominal party of record.[6] Though the Constitution con-

[1] *The Federalist*, No. 81. Though technically the British king is not suable, the *petition de droit* and the *monstrans de droit* do in fact give the subject complete redress. *Black. Comm.*, vol. i, p. 243; vol. iii, p. 256.

[2] Art. III, sec. 2, par. 1.

[3] *The Federalist*, No. 81.

[4] 3 Elliot's *Debates*, 555. See Madison's view to the same effect, *ibid.*, 533.

[5] Chisholm *v.* Georgia (1793) 2 Dallas 419, Justice Iredell dissenting.

[6] New Hampshire *v.* Louisiana (1883) 108 U. S. 76. The fact that a State is a stockholder in a defendant corporation does not prevent suit being brought against such corporation. Bank of United States *v.* Planters Bank of Georgia (1824) 9 Wheaton 904.

tains no statement on the subject, it is well established that the United States cannot be sued without its consent either by a citizen,[1] or by a State,[2] and that a State cannot be sued by one of its own citizens even when a constitutional point is raised.[3]

Even though a State impairs the obligation of a contract or takes property without due process of law it cannot be sued. On the other hand the mere fact that a person is an officer of a State does not protect him from liability for the infraction of the law. But suppose an officer acts or refuses to act under authority of a state statute which it is claimed is unconstitutional, does a resulting action against him infringe the Eleventh Amendment? It was early decided that an action against a governor in his official capacity to compel him to act upon behalf of the State is forbidden.[4] An action against a state officer has been treated as in effect an action against the State when its result would be to compel the State to specifically perform a contract.[5] The same is true when the action is against an officer in possession of property, but its result will be to determine the *title* to such property, which is claimed by the State and by the plaintiff.[6]

But the Supreme Court has said that a suit against officers of a State

> "whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages or in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus in a like case, to enforce upon the defendant the performance of a plain legal duty, purely min-

[1] United States *v.* Clarke (1834) 8 Peters 436. United States *v.* Lee (1882) 106 U. S. 196, 205 *et seq.*

[2] Kansas *v.* United States (1907) 204 U. S. 331, 341, 342.

[3] Hans *v.* Louisiana (1889) 134 U. S. 1.

[4] Governor of Georgia *v.* Madroza (1828) 1 Peters 110.

[5] Louisiana *v.* Jumel (1882) 107 U. S. 711.

[6] Stanley *v.* Schwalbey (1896) 162 U. S. 255.

isterial, is not within the meaning of the Eleventh Amendment an action against the State."[1]

On the principle here stated officers have been enjoined from enforcing statutory rates which were unconstitutional,[2] and from enforcing rates under a statute which imposed such heavy penalties for breaches of its provisions that it was held to deny the equal protection of the laws,[3] and from cancelling as directed by statute certificates of sale of swamp land previously legally acquired from the State.[4] In *Hartman v. Greenhow*[5] the Supreme Court held that mandamus would issue to compel the treasurer of Virginia to receive coupons in payment of taxes. In *Poindexter v. Greenhow*[6] the plaintiff was allowed to recover damages in trespass for property taken by an officer of the State under the authority of an unconstitutional statute, and in the early case of *United States v. Peters*[7] recovery was allowed of money in the hands of a state officer which had been improperly taken by him. It has been held that an action of ejectment may be maintained against an agent of the government for land which he claims to hold on behalf of the State, as long as the action will not conclude the question of the State's title.[8]

It has been declared that when the federal government brings an action against an individual it so far waives its exemption from suit that legal and equitable set-offs may be presented by the defendant[9]; and when a State brings suit in a state court against an individual and gets judgment, an appeal in such action may be taken by the defendant to the Supreme Court on constitutional points.[10]

[1] Pennoyer *v.* McConnaughy (1891) 140 U. S. 1, 10.

[2] Reagan *v.* Farmers' L. & T. Co. (1894) 154 U. S. 362; Smyth *v* Ames (1898) 169 U. S. 466.

[3] *Ex parte* Young (1908) 209 U. S. 123.

[4] Pennoyer *v.* McConnaughy (1891) 140 U. S. 1.

[5] (1880) 102 U. S. 672. [6] (1884) 114 U. S. 270.

[7] (1809) 5 Cranch 115.

[8] United States *v.* Lee (1882) 106 U. S. 196.

[9] The Siren *v.* United States (1868) 7 Wallace 152.

[10] Cohens *v.* Virginia (1821) 6 Wheaton 264.

By force of the Judicial Code[1] the Supreme Court has

> "exclusive jurisdiction of all controversies of a civil nature where a State is a party except between a State and its citizens, or between a State and citizens of other States or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction."

The Supreme Court has not jurisdiction of a suit brought by a State to which one of its citizens is a party,[2] nor has it jurisdiction of a suit by a State against a citizen of the District of Columbia.[3] It has jurisdiction of a suit brought by the United States against a State.[4]

Under the Articles of Confederation the jurisdiction of disputes between States was given to Congress,[5] but by the Constitution of the United States original jurisdiction of such disputes is vested in the Supreme Court, and, as has just been pointed out, such jurisdiction is by statutory provision exclusive. A very considerable number of actions of this character have come before the court, particularly since the Civil War. No attempt will be made to cite them all or to discuss them at length. They will be found collected under the title *Judicial Settlement of Controversies between States of the American Union*, published by the Carnegie Endowment for International Peace.[6] The largest number of these cases have dealt with boundary disputes, and many of them have been submitted by mutual consent. The jurisdiction of the court to entertain such a suit was declared in *Rhode Island v. Massachusetts* in 1838.[7] States also have sued each other for debts owed by one to the other.

[1] Sec. 233.

[2] California *v.* Southern Pac. Co. (1894) 157 U. S. 229; Minnesota *v.* Northern Securities Co. (1902) 184 U. S. 199.

[3] *In re* Massachusetts (1905) 197 U. S. 482.

[4] United States *v.* Texas (1892) 143 U. S. 621.

[5] See note to sec. 41.

[6] Edited by James Brown Scott. See also the very useful summary and discussion of these cases in *The American Supreme Court as an International Tribunal*, by Herbert A. Smith.

[7] 12 Peters 657.

Such a proceeding is the famous case of *Virginia v. West Virginia*[1] which was seven times before the Supreme Court. In *South Dakota v. North Carolina*[2] it was held that a State, to which its citizens had assigned obligations of another State, reserving no interest in such obligations, might sue the debtor State to collect the amount due.[3] In two very interesting cases the Supreme Court took jurisdiction to settle disputes between States brought to protect the citizens of the plaintiff States from injurious conduct of the defendant States. In the first the dispute was over the discharge of sewage into a river[4]; in the second it was claimed that water was being improperly extracted from a river by the defendant State for irrigation.[5] Judgments rendered in actions between States have always been acquiesced in by the losing party, though not always promptly.[6] In some of the earlier cases the question of the court's power to enforce its judgments against States was debated by counsel, and touched upon by the court itself, but in the case of *Virginia v. West Virginia* the Supreme Court found itself compelled to squarely face the problem, for it looked for a time as if West Virginia was not going to voluntarily comply with the court's judgment. When West

[1] The reports of this proceeding in its various stages are brought together in *Judicial Settlement of Controversies between States of the American Union*, 1650 *et seq.* They may be found in 220 U. S. 1, 222 U. S. 17, 231 U. S. 89, 234 U. S. 117, 238 U. S. 202, 241 U. S. 531, 246 U. S. 566.

[2] (1904) 192 U. S. 286.

[3] To be distinguished from New Hampshire *v.* Louisiana (1883) 108 U. S. 76, on the ground that in the latter case the citizens were still the real parties in interest.

[4] Missouri *v.* Illinois (1901) 180 U. S. 208, (1906) 200 U. S. 496, (1906) 202 U. S. 600.

[5] Kansas *v.* Colorado (1902) 185 U. S. 125, (1907) 206 U. S. 46.

[6] In the case of Chisholm *v.* Georgia (1793) 2 Dallas 419, a case in which a judgment was rendered against the State of Georgia in favor of a citizen of another State before the adoption of the Eleventh Amendment (see *supra*) the State refused to comply with the judgment and feeling ran very high. The adoption of the Eleventh Amendment was the result.

Virginia separated from Virginia it agreed to pay a just proportion of Virginia's public debt. By judgment of the Supreme Court in 1915 West Virginia was directed to pay $12,393,929.50, but for several years failed to do so. Virginia sought a writ of mandamus directed to the West Virginia Legislature directing it to levy the necessary tax to pay the judgment. The court concluded that a State can be compelled to comply with a judgment rendered against it; that in the case before it this might be accomplished by action on the part of Congress, or by appropriate judicial action. The court, however, refused to say what that appropriate judicial action would be, hoping that it would not be necessary to take any action.[1] As a matter of fact the West Virginia Legislature later took action to pay the judgment by taxation.

In the famous case of *Marbury v. Madison*[2] the Supreme Court had presented to it the question whether a federal statute was valid which invested the Supreme Court with authority to issue a writ of mandamus to federal officers. The court held that this was an attempt to add to its original jurisdiction as set forth in the Constitution, and that this was beyond the power of Congress, and that the statute was, therefore, invalid. From the date of the case the view therein expressed has been accepted as settled,[3] though at an earlier day a contrary view seems to have prevailed.[4]

§43. *Appellate Jurisdiction of the Supreme Court of the United States.* In all cases to which the federal judicial power extends,[5] and of which the Supreme Court is not given original jurisdiction, it has according to the Constitution "appellate jurisdiction both as to law and fact,

[1] 246 U. S. 565. See T. R. Powell, "Coercing a State to Pay a Judgment: Virginia *v.* West Virginia," 17 Mich. L. Rev. 1.

[2] (1803) 1 Cranch 137.

[3] See Baltimore & O. R. R. Co. *v.* Interstate Com. Com. (1909) 215 U. S. 216.

[4] See note to United States *v.* Ferriera (1851) 13 Howard 40, 53.

[5] See the next section.

with such exceptions and under such regulations as the Congress shall make."[1] It is to be noticed that while the appellate jurisdiction of the Supreme Court cannot be enlarged by Congress, that body may fail to make provision for appeals to the Supreme Court, or may take away from that court the right to hear appeals which had previously vested in it.[2]

> "In all cases in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."[3]

Since decisions of the Circuit Court of Appeals are declared to be final in cases of diversity of citizenship, in patent, trade-mark and copyright cases, in cases under the revenue laws and criminal laws, and in admiralty cases,[4] this appellate jurisdiction of the Supreme Court is not great. The Circuit Court of Appeals may, however, certify any question that it desires to the Supreme Court,[5] and the Supreme Court may by certiorari require that court to certify any case to it.[6]

An appeal may be taken to the Supreme Court from the Court of Claims whenever the judgment is adverse to the United States, or by the plaintiff when the amount involved is over three thousand dollars, or when his claim has been declared forfeited for fraud.[7] Appeals may be taken to the Supreme Court of the United States from the Supreme Courts of Hawaii and Porto Rico under the same circumstances that would justify a case going up from the highest court of a State. The Supreme Court may also by certiorari

[1] Art. III, sec. 2, par. 2.

[2] A striking example of this latter power is seen in *Ex parte* McCardle (1868) 7 Wallace 506.

[3] Judicial Code, sec. 241.

[4] *Ibid.*, sec. 128.

[5] *Ibid.*, sec. 239.

[6] *Ibid.*, sec. 240.

[7] Judicial Code, sec. 242.

direct any cases to be certified to it by those courts.[1] There is no appeal to the Supreme Court from the Supreme Court of the Philippines, but the Supreme Court may by certiorari direct that court to certify any case to it.[2] Any final judgment or decree in the Court of Appeals of the District of Columbia may be reëxamined in the Supreme Court of the United States upon appeal or writ of error under the same circumstances which would allow cases from the District Courts to be reëxamined (see the next paragraph), or "in cases in which the validity of any authority exercised under the United States, or the existence or scope of any power or duty of an officer of the United States is drawn in question," or "in cases in which the construction of any law of the United States is drawn in question by the defendant." The Supreme Court may also by writ of certiorari direct the Court of Appeals of the District of Columbia to certify any case to it.[3] The Supreme Court has, besides, appellate jurisdiction in bankruptcy cases.[4]

The Judicial Code further provides:

> "Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii and the United States District Court for Porto Rico, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the constitution or law of a State is claimed

[1] Judicial Code, sec. 246.

[2] Act of Sept. 6, 1916, chap. 448, sec. 5, 39 Stat. 726.

[3] Judicial Code, secs. 250 and 251.

[4] Judicial Code, sec. 252, and Act of Sept. 6, 1916, chap. 448, sec. 3, 39 Stat. 726.

to be in contravention of the Constitution of the United States."[1]

When the highest court of a State in which a decision can be had has decided against the validity of a treaty or statute of, or an authority exercised under the United States, or has decided in favor of a statute of, or an authority exercised under a State, which has been attacked as being repugnant to the Constitution, treaties or statutes of the United States, the decision may be reviewed by the Supreme Court upon writ of error. If in one of the cases just mentioned the decision in the state court has *upheld* the validity of the federal treaty, statute or authority, which has been called in question, or has held *invalid* the state statute or authority which has been attacked, the Supreme Court may, nevertheless, review the decision by certiorari. It may also require a cause to be certified to it "where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is either in favor of or against" such title, right, privilege, or immunity set up by either party.[2]

The Supreme Court exercises a jurisdiction which is in its nature appellate through the writs of prohibition[3] and mandamus,[4] as well as through the writ of certiorari, which has already been considered. The power to issue writs of habeas corpus is expressly given to the Supreme Court as well as to the District Courts.[5] The Supreme Court will use this power, however, only in its appellate character after a person has been deprived of his liberty by some inferior tribunal,[6]

[1] Judicial Code, sec. 238, and see sec. 247 for appeals and writs of error from the district court for the district of Alaska.

[2] Judicial Code, sec. 237.

[3] Foster's *Federal Practice* (5th ed.), sec. 456.

[4] *Ibid.*, sec. 457.

[5] Rev. Stat., sec. 751; and see the annotations to the section in 3 Fed. Stat. Ann. (2d ed.), 428. For the control of State action by the use of the writ of habeas corpus see sec. 44.

[6] *Ex parte* Clarke (1879) 100 U. S. 399; *Ex parte* Hung Hang (1883) 108 U. S. 552.

except in cases affecting ambassadors, other public ministers or consuls, and those to which a State is a party; and, unless special circumstances are shown, it will not issue the writ where application might be made to a lower federal court.[1]

§44. *Jurisdiction of District Courts.* The Constitution of the United States provides as follows[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, 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."

For the purposes of this provision of the Constitution corporations are practically considered citizens of the State of their incorporation, under the conclusive presumption that all of the stockholders are citizens of that State.[3] Except insofar as the Constitution gives original jurisdiction to the Supreme Court, which subject we have already dealt with, original jurisdiction under the federal judicial power is exercised entirely by the District Courts. These courts, however, are created by Congress, not by the Constitution, and have only so much judicial power as is given to them by Congress. Their jurisdiction is exclusive of that of the state courts in cases of crimes against the United States[4]; of

[1] *Ex parte* Mirzan (1887) 119 U. S. 584. [2] Art. III, sec. 2, par. 1.

[3] Ohio & Miss. R. R. Co. *v.* Wheeler (1861) 1 Black 286. Early cases required it to be proved that all of the members of the corporation were citizens of States different from the adverse parties. Bank of United States *v.* Deveaux (1809) 5 Cranch 61.

[4] The personal guarantees for the protection of those accused of crimes contained in Article III, sec. 2, par. 3, and in Amendments Five, Six and Eight are dealt with in Chap. 15.

suits for penalties and forfeitures under the laws of the United States; of civil causes of admiralty and maritime jurisdiction (suitors retaining any common law remedy which they may have); of seizures under the laws of the United States, and prize cases; of patent and copyright cases; of bankruptcy proceedings; and of suits against consuls and vice-consuls.[1] The District Courts also have jurisdiction, but not exclusive of the state courts in the following cases among others: suits by the United States or its officers; suits involving more than three thousand dollars arising under the Constitution, treaties or federal laws, or between citizens of different States, or between citizens of a State and foreign States or citizens; suits under the postal laws; suits under legislation as to interstate commerce; suits for acts done under the laws of the United States; suits against national banking associations; certain suits, concurrently with the Court of Claims, against the United States; and suits by aliens for torts.[2]

An action which might have been brought in a District Court, but which was in fact brought in a court of one of the States, cannot thereafter be removed into a federal court except by authority of a federal statute.[3] There is, however, no doubt that statutory provision for such removal is constitutional.[4] The following actions may be removed from a state court to a District Court: any civil suit arising under the Constitution, laws or treaties of the United States of which District Courts have original jurisdiction; any suit of which District Courts have original jurisdiction may be removed by the defendant if he is a non-resident of the

[1] Judicial Code, sec. 256.

[2] *Ibid.*, sec. 24. The District Courts have appellate jurisdiction from orders of the United States commissioners in cases arising under the Chinese exclusion laws, and in cases of felonies where conviction is had before the commissioner for the Yellowstone National Park. Judicial Code, secs. 25 and 26.

[3] Gold Washing & W. Co. *v.* Keyes (1877) 96 U. S. 199; Kentucky *v.* Powers (1906) 201 U. S. 1.

[4] Home Life Ins. Co. *v.* Dunn (1873) 19 Wallace 214; Tennessee *v.* Davis (1879) 100 U. S. 257.

State; in any suit of which District Courts have original jurisdiction, where any controversy is wholly between citizens of different States, and can be fully determined between them, any defendant interested in such controversy may remove it to the District Court; in any suit between a citizen of the State where the suit is brought and a citizen of another State, a defendant, being a citizen of another State, may remove the suit into the District Court by making it appear that because of prejudice or local feeling he could not obtain justice in the courts of the State[1]; any suit between citizens of the same State claiming title to property under grants of different States, where the value of the property in dispute exceeds three thousand dollars[2]; any civil suit or criminal prosecution where the defendant is denied the equal civil rights of a citizen of the United States secured to him by law, or any such proceedings against any officer or person for an act done in pursuance of any law providing for equal rights, or for refusal to act on the ground that action would be inconsistent with such law[3]; any civil suit or criminal prosecution against an officer or one acting under him on account of any act done under a revenue law of the United States, or against a person holding property derived from such officer, or against any officer of a federal court for an act done in his official capacity, or against an officer of either House of Congress in executing an order of such House[4]; any action brought by an alien against a civil officer of the United States, not a resident of the State where the action is brought, jurisdiction having been obtained by personal service in the State.[5]

[1] Judicial Code, sec. 28. This section provides that no action brought in a state court under the Federal Employers Liability Act may be removed into a District Court; and that no action may be so removed which is brought for delay, loss of or injury to property under section 20 of the Interstate Commerce Act, where the amount in controversy does not exceed $3,000.

[2] *Ibid.*, sec. 30.

[3] *Ibid.*, sec. 31.

[4] *Ibid.*, sec. 33.

[5] *Ibid.*, sec. 34.

In actions in personam the action must be brought in the district in which the defendant resides, unless there are two or more defendants living in different districts in the same State, in which it may be brought in the district of the residence of any one.[1] Original judicial process in civil suits may not be served outside of the district in which issued except in the case just noted, when it may be served in the districts where the other defendants reside, and except in suits of a local nature, when it may issue to any other district in the State where defendants reside.[2] Provision is made for service by publication in actions in rem when personal service cannot be made.[3]

The District Courts are given power "to issue all writs not specifically provided for by statute," which may be necessary for the exercise of their jurisdiction, agreeably to the usages and principles of law.[4] Special authorization is given to District Courts as well as to the Supreme Court to issue writs of habeas corpus.[5] This power may even be exercised when a person is in jail in custody of a state officer or of a state court when he

> "is in custody for an act done or omitted in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof

[1] Judicial Code, secs. 51 and 52. See also sec. 53.

[2] *Ibid.*, secs. 51, 52, and 54. See also sec. 55.

[3] *Ibid.*, sec. 57.

[4] *Ibid.*, sec. 262. As to the use of the various writs see the annotations to this section in 5 Fed. Stat. Ann. (2d ed.), 929, *et seq.*; Foster's *Federal Practice* (5th ed.), secs. 456 to 460.

[5] Judicial Code, sec. 751.

depend upon the law of nations; or . . . it is necessary to bring the prisoner into court to testify."[1]

Under the first clause quoted above it was held *In re Neagle*[2] that the writ might issue, not only when the person has been imprisoned for something done under the authority of a statute of the United States, but for acts done under direction of the President, the latter himself acting in giving the directions under power inferable from the Constitution to protect the members of the federal judiciary. The second clause quoted above, allowing the writ to be issued when a person is in custody "in violation of the Constitution or of a law or treaty of the United States," is far the most inclusive of the provisions since this would cover any case where a person is deprived of his liberty without due process, contrary to the Fourteenth Amendment.[3] The third clause quoted, with regard to citizens and subjects of foreign states, grew out of a case where a person was arrested in New York charged with murder. The person arrested was a British soldier who had made an attack upon a ship in New York waters, during the Canadian rebellion of 1837, and the British government assumed responsibility for his acts, and demanded that the prisoner be released. The federal government requested the New York authorities to release him, but they refused to do so, and the federal courts found themselves without authority to free him.[4] The issuing of the writ is discretionary with the court, and where the grounds of the petition are the infringement of personal rights under the Constitution or laws of the United States the court will ordinarily allow the proceedings to go forward in the state court, assuming that the defendant's rights will

[1] Judicial Code, sec. 753. State courts may not use the writ to interfere with federal authorities. Ableman *v.* Booth (1858) 21 Howard 506; United States *v.* Tarble (1871) 13 Wallace 397.

[2] (1890) 135 U. S. 1. See the case discussed in sec. 31.

[3] For a consideration of the due process clause see chaps. 28 to 32.

[4] People *v.* McLeod (1841) 1 Hill (N. Y.) 377. The defendant was later acquitted by the state court. See *In re Neagle* (1890) 135 U. S. 1.

be there protected, and, if they are not, leaving the defendant to his remedy of having his case reviewed in the Supreme Court by writ of error.[1]

The Judicial Code declares[2] that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." However, this has been interpreted as not prohibiting federal courts from issuing such injunctions for the protection of their own jurisdiction. When a federal court takes original jurisdiction, or where a suit is removed into a federal court in accordance with the federal statute, or where a case is carried up to the Supreme Court on writ of error from a state court, the federal courts may, in support of the jurisdiction so obtained, issue injunctions to state courts to prevent acts on their part interfering with such jurisdiction.[3]

§45. *Admiralty and Maritime Jurisdiction.* After the Declaration of Independence the various States established admiralty courts. The Articles of Confederation[4] gave Congress power to establish rules for deciding the legality of captures and for the division of prizes. They also gave to Congress authority to establish a court of final appeal in all cases of capture, and Congress acted upon the authority. By the Constitution the judicial power of the federal government extends "to all cases of admiralty and maritime

[1] *Ex parte* Royall Nos. 1 and 2 (1886) 117 U. S. 241; *Ex parte* Royall (1886) 117 U. S. 254; Urquhart *v.* Brown (1907) 205 U. S. 179. And see Drury *v.* Lewis (1906) 200 U. S. 1, where the petitioner claimed that he was in custody for an act done under federal authority, but was left to be dealt with by the state court. State courts cannot by writ of habeas corpus take a person from the custody of one who holds him under claim of federal authority. United States *v.* Tarble (1871) 13 Wallace 397.

[2] Sec. 265.

[3] French, Trustee *v.* Hay (1874) 22 Wallace 250; Deitzsch *v.* Huidekoper (1880) 103 U. S. 494; Julian *v.* Central Trust Co. (1904) 193 U. S. 93; *Ex parte* Simon (1905) 208 U. S. 144.

[4] Art. IX.

jurisdiction."[1] This is held to exclude the state courts from entertaining any action which is peculiar to admiralty jurisdiction, such, for instance, as an action in rem against a vessel.[2] It is expressly provided, however, by federal statute that there shall be saved to suitors in all cases "the right of a common law remedy, where the common law is competent to give it."[3]

Since the federal courts are vested with exclusive admiralty and maritime jurisdiction, and Congress is given power to establish the federal courts below the Supreme Court, it follows that Congress may determine the law to be administered in these courts within the boundaries fixed by the Constitution. In legislating in this field Congress does not do so by force of the commerce clause, but by force of the judiciary article.[4] But the determination of the extent of the admiralty and maritime jurisdiction is for the judiciary.[5]

Rather anomalously it has been held that the state

[1] Art. III, sec. 2, par. 1. The Supreme Court has described the admiralty and maritime jurisdiction as follows:

"Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jure belli*, and seizure on water for municipal and revenue forfeiture.

"(1) Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in admiralty.

"(2) Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts.

"Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon locality. Mistakes need not be made if these rules are observed; but contracts to be performed on waters not navigable, are not maritime any more than those made to be performed on land. Nor are torts cognizable in the admiralty unless committed on waters within the admiralty and maritime jurisdiction, as defined by law." The Belfast (1868) 7 Wallace 624, 637.

[2] The Moses Taylor (1866) 4 Wallace 411.

[3] Judicial Code, sec. 256.

[4] *In re* Garnett (1891) 141 U. S. 1. For a discussion of the differences of legislative power under the commerce clause and the judiciary article see The Genesee Chief (1851) 12 Howard 443.

[5] The Lottawana (1874) 21 Wallace 558.

legislatures may provide for liens for the enforcement of maritime contracts which will be given effect in the federal courts, though unenforceable in the courts of the States.[1] It is suggested in the case just cited that the practice grew up from the fact that before the adoption of the Constitution the state courts exercised admiralty jurisdiction, and that the early federal judges, who had frequently sat previously in the state courts, continued without much thought to apply the law which they had applied in the state tribunals.

According to the English law the admiralty jurisdiction was confined to the high seas or to streams in which the tide ebbed and flowed, and following these precedents the same doctrine was applied in the early cases in this country.[2] But the Supreme Court later changed its view, overruling the earlier cases, and declaring that in the case of "public navigable water, on which commerce is carried on between different States and nations, the reason for the jurisdiction is precisely the same" as on tide water.[3] Upon this doctrine the court held that the Great Lakes are within the admiralty jurisdiction. The court points out that in England navigable water and tide water are synonymous, which accounts for the doctrine there established. In this country, however, that is not true, and the uniformity contemplated by the Constitution is better effected by abandoning that doctrine for a more logical one. The fact that a tort is committed on water, within the territorial limits of a State, or that a contract of water carriage is to be entirely performed within the limits of a State, does not take such transactions out of the admiralty jurisdiction.[4]

[1] The Lottawana (1874) 21 Wallace 558.

[2] The Thomas Jefferson (1825) 10 Wheaton 428; Orleans *v.* Phœbus (1837) 11 Peters 175.

[3] The Genesee Chief (1851) 12 Howard 443. This doctrine has been extended to canals, *Ex parte* Boyer (1884) 109 U. S. 629; The Robert W. Parsons (1903) 191 U. S. 17. A State, however, is not ousted of its general jurisdiction over such water within its borders. United States *v.* Bevans (1818) 3 Wheaton 336.

[4] Waring *v.* Clark (1847) 5 Howard 441; The Belfast (1868) 7 Wallace 624.

§46. *Jurisdiction of Circuit Courts of Appeals.* The Circuit Courts of Appeals have no original jurisdiction. They have appellate jurisdiction of suits brought in the District Courts (including those for Hawaii and Porto Rico) in all cases except those in which appeals and writs of error may be taken directly to the Supreme Court.[1] The judgments and decrees of the Circuit Courts of Appeals are final

> "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the trade-mark laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases,"

except where a Circuit Court of Appeals certifies a question to the Supreme Court, or where the Supreme Court chooses to review a decision of the Circuit Court of Appeals by writ of certiorari.[2] Appeals may also be taken to the Circuit Courts of Appeals from interlocutory orders in proceedings for injunctions and the appointment of receivers.[3] The Circuit Courts of Appeals have final appellate jurisdiction[4] in all cases under the Bankruptcy Act, and under the federal statutes known as the Employers' Liability Act,[5] the Hours of Service Act,[6] the Ash Pan Act,[7] and the Safety Appliance Act.[8] Appeals from the United States Court for China are taken to the Circuit Court of Appeals for the ninth circuit, and the same rules as to finality of judgments apply as in cases going up to the Circuit Courts of Appeals from the

[1] For the appellate jurisdiction of the Supreme Court, see sec. 43.

[2] Judicial Code, sec. 128. With regard to review by the Supreme Court under the circumstances last named, see sec. 43.

[3] Judicial Code, sec. 129.

[4] Act of Sept. 6, 1916, 39 Stat. 726.

[5] Act of Apr. 22, 1908, 35 Stat. 65.

[6] Act of March 4, 1907, 34 Stat. 1415.

[7] Act of May 30, 1908, 35 Stat. 476.

[8] Act of March 2, 1893, 27 Stat. 531.

District Courts.[1] Appeals from the District Court of Alaska lie to the Circuit Court of Appeals for the ninth circuit, when an appeal will not lie direct to the Supreme Court,[2] in all criminal cases, and in civil cases involving more than $500, and judgment of the Circuit Court of Appeals in such a case is final, except that it may in its discretion certify any question involved in such a case to the Supreme Court.[3]

§47. *Jurisdiction of the Court of Claims.*[4] As we have seen the United States cannot be sued except with its consent, but in 1855 the federal government established the Court of Claims, with jurisdiction of certain classes of claims against the United States.[5] The court is given jurisdiction of

> "all claims (except for pensions) founded upon the Constitution of the United States[6] or any law of Congress,[7] upon any regulation of an Executive Department,[8] upon any contract, express or implied, with the Government of the United States,[9] or for damages, liquidated or unliquidated, in cases not sounding in tort,[10] in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable."[11]

[1] Act of June 30, 1906, 34 Stat. 814.

[2] When such appeal will lie, see sec. 43.

[3] Judicial Code, sec. 134. [4] Sec. 42.

[5] As we have seen just above the District Courts are given concurrent jurisdiction in certain cases of claims against the United States.

[6] Storall, Admin. *v.* United States (1891) 26 Ct. Cl. 226.

[7] Foster *v.* United States (1897) 32 Ct. Cl. 184, contains a full classification of the cases falling under this clause.

[8] Maddux *v.* United States (1885) 20 Ct. Cl. 199; United States *v.* Fitch (1895) 70 Fed. 578.

[9] Salomon *v.* United States (1873) 19 Wallace 17; United States *v.* Great Falls Mfg. Co. (1884) 112 U. S. 645; Coleman *v.* United States (1894) 152 U. S. 96; United States *v.* Edmondston (1901) 181 U. S. 500.

[10] Schillinger *v.* United States (1894) 155 U. S. 163; Juragua Iron Co. *v.* United States (1909) 212 U. S. 297; Basso *v.* United States (1916) 239 U. S. 602.

[11] Judicial Code, sec. 145. In such proceedings the court is authorized to consider set-offs and counterclaims on the part of the United States.

The court may also take jurisdiction of claims of disbursing officers of the United States, or their personal representatives for relief from responsibility for loss, while in line of duty, of government funds, vouchers, records or papers.[1] A debtor of the United States who has applied to the proper department to have his indebtedness adjusted and has gotten no such adjustment within three years after his application, may bring the matter before the Court of Claims for final adjustment, with right of appeal to the Supreme Court as in other cases.[2] The head of any executive department may refer to the court any claim or matter pending before the department, which involves controverted questions of fact or law, and the court shall report back its findings and conclusions. But if the claimant consents to the reference to the court, or if the facts are such as to bring the claim within the court's jurisdiction, it may render a final judgment. Upon the certificate of any auditor or the Comptroller of the Treasury the Secretary of the Treasury may refer to the court for final adjudication any claim of which it might have taken jurisdiction upon the voluntary action of the claimant.[3] When any bill is pending in either House of Congress for the payment of any claim, or for a grant, gift or bounty to any person, that House may refer the matter to the Court of Claims for investigation and report; but if the subject-matter of the bill is such as to bring the claim within the jurisdiction of the court, it may proceed to render final judgment.[4] Claims growing out of treaties are not cognizable by the Court of Claims.[5] Aliens who are subjects of any government which allows United States citizens to prosecute claims against such government in its courts, may prosecute in the Court of Claims any claim against the United States which falls within the jurisdiction of the court.[6]

§48. *Is There a Common Law of the United States?* After some conflicting decisions in the lower federal courts it was

[1] Judicial Code, sec. 145.
[2] *Ibid.*, sec. 180.
[3] *Ibid.*, sec. 148.
[4] *Ibid.*, sec. 151.
[5] *Ibid.*, sec. 153.
[6] *Ibid.*, sec. 155.

decided by the Supreme Court that there is no criminal common law of the United States.[1] The arguments in support of this position are that there was no common law of the States as a unit which could be held to persist after the formation of the new government, and that all of the power of the judiciary is to be found in the Constitution, which confers no such jurisdiction. There is as clearly no general common law of the United States on the civil side so as to give a person a right to bring a contract or a tort action, for which he would have a remedy at common law, in a federal court, on the ground that it is a case arising "under the laws of the United States." But when parties get into a federal court on the ground of diversity of citizenship what law is to govern? By the Judiciary Act of 1789, which is still on the statute book,[2] it is declared that,

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

In an early case brought to recover on certain bills of exchange, we find this brief statement by the court[3]: "We are unanimously of opinion, that under the laws, and the practical construction of the courts of Rhode Island, the judgment of the Circuit Court ought to be affirmed." And appended is this note: "Chase, Justice, observed that he concurred in the opinion of the court; but that it was on common law principles, and not in compliance with the laws and practice of the State." In the early cases, the Supreme Court did repeatedly hold itself bound by the decisions of the highest courts of the States as to what the law of those States was.[4] Practically all of these cases,

[1] See sec. 133.

[2] Judicial Code, sec. 721.

[3] Brown *v.* Van Braam (1797) 3 Dallas 344.

[4] See the cases collected in 5 *Fed. Stat. Ann.* 1128, and in *Story on the Constitution* (5th ed.), sec. 1795, note (b).

however, will be found to involve the construction of state legislation, or the determination of the law with regard to real estate. In the case of *Jackson v. Chew*[1] the court said that,

> "whether these rules of land title grow out of the statutes of a State, or principles of the common law adopted and applied to such titles, can make no difference. There is the same necessity and fitness in preserving uniformity of decisions in the one case as in the other."

The court in one case[2] went so far as to overrule a previous decision of its own because the highest court of the State had intermediately put an interpretation upon a state statute which was at variance with the interpretation previously put upon it by that court and by the Supreme Court. The arguments in this and others of the earlier cases lay stress upon the friction and uncertainty which would result from variant interpretations of the state laws by the courts of a State and by the federal courts sitting in the State.

This argument would seem to apply not only to the interpretation to be put upon State statutes, and to the common law of the States with regard to real property, but also to the common law of the States governing commercial transactions and the liability for torts. However, in *Swift v. Tyson*[3] the Supreme Court, speaking through Justice Story, refused to recognize the binding effect of the decisions of state courts as to the common law in the field of commercial transactions. That case was an action on commercial paper, and the question was whether the plaintiff was a holder in due course, having taken the instrument for a preëxisting debt. Although the Supreme Court did not think that the highest court of New York had settled the question, yet, for the purposes of the decision, it assumed that it had been decided by the New York court that taking in payment of

[1] (1827) 12 Wheaton 153, 168.
[2] Green *v.* Neal (1832) 6 Peters 291.
[3] (1842) 16 Peters 1.

a preëxisting debt would not make one a holder for value. The court then proceeded[1]:

". . . It is observable that the courts of New York do not found their decisions upon this point upon any local statute, or positive, fixed or ancient usage; but they deduce the doctrine from the general principles of commercial law. It is, however, contended, that the thirty-fourth section of the Judiciary Act of 1789, ch. 20, furnishes a rule obligatory upon this court to follow the decisions of the state tribunals in all cases to which they apply. That section provides 'that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' In order to maintain the argument, it is essential, therefore, to hold that the word 'laws,' in this section includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are and are not of themselves laws. They are often reëxamined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real

[1] Swift *v.* Tyson (1842) 16 Peters 1, 18.

estate, and other matters immovable and intra-territorial in their nature and character. It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning, and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to and will receive the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

Although the doctrine of this case has been often criticized, and state courts have chafed under its operation, it has been consistently followed by the Supreme Court, and has been applied not only to negotiable paper and to contracts and commercial transactions generally, but also to liability for negligence and other torts, and to all questions growing out of the relationship of master and servant.[1] If the state courts felt an obligation to follow the decisions

[1] See the excellent and exhaustive treatment of this subject, and collection of authorities in Black, *Law of Judicial Precedents*, chap. 16.

of the federal tribunals in these fields, the federal practice might lead to uniformity in the common law of the States, but since the state courts have felt constrained by no such obligation, the result has rather been to add to the confusion by having different rules of common law administered within the States by the state and federal courts.

§49. *Judicial Review of Legislation.* The "Virginia Plan," introduced into the Constitutional Convention by Edmund Randolph, included a proposition for a council of revision, to consist of the national executive and judiciary, who should exercise a qualified veto on national legislation.[1] This, as we have seen,[2] was rejected in favor of a veto by the President. No express provision was proposed in the Convention for the review by the judiciary of federal legislation, but it is quite clear from different parts of the debates in the Convention, and from later expressions of opinion by members of that body, that the framers of the Constitution believed that the judiciary would have the power to declare void any federal legislation which might be in conflict with the Constitution.[3] Hamilton, in supporting the Constitution, deals at length with this subject, and his statements are clear and unequivocal. He says in part[4]:

> "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.
>
> . . . . . .

[1] Farrand, *The Records of the Federal Convention*, vol. i, p. 21.

[2] Sec. 37.

[3] For an interesting and convincing presentation of this material see Beard, *The Supreme Court and the Constitution*, chap. 2.

[4] *The Federalist*, No. 78.

"There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid.

. . . . . .

". . . 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, therefore, belongs 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; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

In 1803 the case of *Marbury v. Madison*[1] presented to the Supreme Court an opportunity to pronounce an opinion upon the powers of the federal judiciary with regard to unconstitutional federal legislation, which was at once grasped by Chief Justice Marshall. He declared that the judiciary may pronounce a federal statute unconstitutional, and, therefore, ineffective, and all the other members of the court agreed with him. His opinion on this point covers only a little more than four pages, but it presents in a masterly and lucid manner the arguments in support of his conclusion. He points out first that the Constitution of the United States not only grants certain powers of government but also establishes certain express limitations upon the government. "To what purpose," he asks, "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?" Either the Constitution

[1] 1 Cranch 137. For an interesting sketch of the political background of this case see Beveridge's *Life of John Marshall*, vol. iii, chaps 2. and 3.

controls the Legislature or it does not. "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." The province of the judiciary is to interpret and apply the law, and if two laws conflict it is the duty of a court to decide which one shall be given effect. So if the Constitution and a law conflict, a court must apply the law and ignore the Constitution, or apply the Constitution and hold the statute invalid. If it were to follow the former course the power of Congress, which the Constitution expressly limits, would nevertheless be limitless, and the clear intention of the people would be frustrated. But Marshall found in the Constitution itself further support for the conclusion which he had reached. In the first place it is provided that "the judicial power shall extend to all cases, in law and equity, arising under the Constitution."[1] In the second place it is directed that judicial officers shall "be bound by oath or affirmation to support this Constitution."[2] In the third place the fundamental law declares that[3] "this Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land."[4]

The opinion of Chief Justice Marshall in *Marbury v. Madison* did not lay down a doctrine which was new in the judicial annals of this country. In a number of States the state courts had, both before and after the adoption of the Federal Constitution, held state statutes invalid which were

[1] Art. III, sec. 2, par. 1.

[2] Art VI, par. 3.

[3] Art. VI, par. 2.

[4] If a statute is constitutional in part and unconstitutional in part and the two parts are separable and independent, so that it may fairly be presumed that the legislature would have part stand though the other part fell, the constitutional part will be given effect. Otherwise the whole statute will be declared invalid. Pollock *v.* Farmer's L. & T. Co. (1895) 158 U. S. 601; Employers Liability Cases (1908) 207 U. S. 463; El Paso & N. E. Ry. Co. *v.* Gutienez (1909) 215 U. S. 87.

in conflict with the State constitutions.[1] In 1796 a case was brought before the Supreme Court in which a federal statute was attacked as unconstitutional. Upon careful consideration the statute was upheld, but no doubt was expressed of the court's power to pass upon the question of constitutionality.[2] In 1792 Congress passed an act for the relief of certain classes of pension claimants, and directed the Circuit Courts to hear such claims, giving a power of review to the Secretary of War and to Congress. The Circuit Courts for the districts of New York, Pennsylvania, and North Carolina, in which courts sat at the time as Circuit Judges five out of the six Justices of the Supreme Court, declared the statute to be an unconstitutional attempt to impose non-judicial functions upon the courts,[3] and that they could not, therefore, in their judicial capacity hear the claims presented. The members of one of the courts consented, however, to sit as commissioners for the purposes of the act.[4] A writ of mandamus was sought from the Supreme Court to compel the Circuit Courts to act, but before the final hearing on this application the statute in question was repealed.[5] In 1795 Justice Patterson of the Supreme Court, while sitting as Circuit Judge, in supporting the power of the court to declare a state statute unconstitutional which conflicted with the constitution of the State, used arguments very similar to those used later by Marshall in *Marbury v. Madison.*[6]

[1] See these cases collected in Beveridge's *Life of John Marshall*, vol. iii, Appendix C.

[2] Hylton *v.* United States, 3 Dallas 171. And see Calder *v.* Bull (1798) 3 Dallas 386, particularly Justice Iredell's statement, p. 399; and the statement of Justice Chase in Cooper *v.* Telfair (1800) 4 Dallas 14, 19.

[3] We shall later consider the validity of this objection. See sec. 54.

[4] The Supreme Court later decided that they had no authority to do so. See the note to United States *v.* Ferriera (1851) 13 Howard 40, 52.

[5] Hayburn's Case and notes (1792) 2 Dallas 409.

[6] Vanhorne's Lessee *v.* Dorrance (1795) 2 Dallas 304. When a federal court has jurisdiction of a case it is competent for it to decide when the State statute conflicts with the State constitution, as was done in the case just cited. Loan Association *v.* Topeka (1875) 20 Wallace 655. A

The framers of the Constitution left no room for doubt that they intended that the courts should treat as invalid any state legislation which was repugnant to the Federal Constitution. That instrument declares 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."[1]

This is an express mandate to the state courts. While there is not in the Constitution any similar express direction to the federal courts to set aside state legislation which conflicts with the Constitution, the language above quoted, together with the provision that "the judicial power shall extend to all cases, in law and equity, arising under this Constitution,"[2] clearly imply such authority.[3] In 1798 a state statute was attacked before the Supreme Court as being invalid because in conflict with the Federal Constitution. The members of the court had no doubt of its power to declare the statute inoperative if in conflict with the fundamental law, but in fact held it to be constitutional.[4] In 1809 a writ of mandamus was sought from the Supreme Court directing a district judge to issue an attachment to enforce obedience to a sentence of the District Court in an admiralty case. In his return the district judge set up as a reason for not acting a state statute passed subsequent to the admiralty proceedings, requiring the governor to demand the funds sought to be reached in the admiralty

---

State court may pass upon the validity of federal legislation but an adverse decision is ground for taking the case to the Supreme Court on writ of error. Judicial Code, sec. 237.

[1] Art. VI, par. 2.

[2] Art. III, sec. 2, par 1.

[3] See *The Federalist*, No. 80.

[4] Calder *v.* Bull, 3 Dallas 386.

proceedings, and to use any means necessary to protect such funds from process issuing out of the federal court. The Supreme Court determined that the federal court had jurisdiction in the original proceeding, and that the Supreme Court had jurisdiction to entertain this mandamus proceeding, and that "the Act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question."[1] But the decisive case was that of *Fletcher v. Peck*[2] in which the Supreme Court held unconstitutional and void a Georgia statute which attempted to revoke an executed grant, and which, therefore, impaired the obligation of a contract, contrary to the express provision of the Constitution.[3]

It is only proper that the federal courts, in passing upon the acts of a coördinate branch of the national government, should presume that that branch knew the limits of its own power and had been careful to confine itself within them. The federal courts, therefore, entertain a very strong presumption that congressional legislation is constitutional, and require to be clearly convinced that it is unconstitutional before they will declare it invalid. State courts take the same attitude with regard to state legislation attacked as in conflict with state constitutions.[4] When state legislation is attacked in the federal courts as impinging upon the sphere of government delegated by the Constitution to the federal government, there seems no reason why the federal courts should entertain any special presumption in favor of

[1] United States *v.* Peters, 5 Cranch 115.

[2] (1810) 6 Cranch 37. It was also decided in this case that the fact that the state legislature had acted corruptly was no ground for holding the legislation invalid.

[3] The principle of judicial review of legislation does not exist under the constitutions of France, Germany, Belgium, or Switzerland, but it does prevail under the constitutions of the British Dominions. Moore, *The Commonwealth of Australia*, 233 *et seq.*; Hall's *Cases on Constitutional Law*, 31, note. British courts have no power to set aside legislation of the British Parliament. I *Black. Comm.* 160; Dicey's *Law of the Constitution* (8th ed.), 39 *et seq.*

[4] Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harv. L. Rev.*, 129, 138 to 152, and cases cited.

constitutionality.[1] But when the state legislation which is under consideration is within the sphere of state action, being attacked as contravening one of the limitations put upon the States by the Federal Constitution, the federal courts entertain a strong presumption in favor of constitutionality.[2]

It has been said that an unconstitutional act "is, in legal contemplation, as inoperative as if it had never been passed."[3] This is undoubtedly true as long as it contra-

[1] *Ibid.*, 154.

[2] The following cases among others illustrate the tendency of the Supreme Court to resolve doubts as to the constitutionality of state legislation in favor of such enactments: Hurtado *v.* California (1884) 110 U. S. 516 (doing away with indictment in criminal cases); Twining *v.* New Jersey (1908) 211 U. S. 78 (taking away the protection against self-incrimination); Powell *v.* Pennsylvania (1887) 127 U. S. 678 (prohibiting the sale of oleomargarine); Marcus Brown Holding Co. *v.* Feldman (1921) 41 Sup. Ct. 465 (restricting the rights of landlords against hold-over tenants). State statutes will not be declared invalid except at the suit of a person whose constitutional rights are invaded. Hatch *v.* Reardon (1907) 204 U. S. 152.

The federal courts are liberal in allowing the Attorney-General to be heard and to file briefs as *amicus curiæ* in proceedings where the United States is not a party, but in which the constitutionality of a federal statute is attacked. Also others, not parties but interested in the results of suits, have been allowed the same privilege. See 20 Law Notes 67.

[3] Norton *v.* Shelby County (1886) 118 U. S. 425, 442. Judges acting in their judicial capacity are relieved from civil liability for injuries resulting from their mistakes, and so are clearly relieved when they act under an unconstitutional statute. Burdick on Torts (3d ed.) 35. Jurisdictions differ as to whether ministerial officers are relieved from civil liability when acting under judicial process fair on its face issuing from a tribunal of competent jurisdiction though the proceeding was had under an unconstitutional law. *Ibid.*, 278. When ministerial officers act under unconstitutional laws, and not in pursuance of judicial process, issuing from a tribunal of competent jurisdiction they are liable to civil action. Campbell *v.* Sherman (1874) 35 Wis. 103; Warren *v.* Kelley (1888) 80 Me. 512. Though mistake or ignorance of law is no excuse for criminal acts, it would seem that a person acting under an unconstitutional law should not be criminally liable. A mistake of law shared by the legislative branch of the government should surely be an excuse. State *v.* Goodwin (1898) 123 N. C. 697. But see Flaucher *v.* Camden (1893) 56 N. J. L. 244.

venes the Constitution, but, if it has not been repealed, may it later become constitutional, and so become effective? The Supreme Court has declared that a state insolvency law, passed while a national bankruptcy act is in force and inconsistent with it, though ineffective while the national act is on the statute books, goes into force upon the repeal of the national act[1]; and that a state law forbidding the sale of liquor whether imported or not, though ineffective as to imported liquor because an interference with interstate commerce, becomes effective upon the passage of a federal statute removing such goods from the protection of interstate commerce.[2] It has been decided in several cases that unconstitutional statutes may be expressly validated by later constitutional provisions.[3] When legislation is unconstitutional at the time that it is enacted but the Constitution is amended so that the statute no longer conflicts with it, such state decisions as there are seem generally to hold that such legislation is not thereafter effective.[4] The better view, however, would seem to be that the operation of legislation in conflict with constitutional provisions is suspended during such conflict, but that, when such conflict is brought to an end by amendment to the Constitution, such legislation becomes effective.[5] Legislation, which is constitutional when enacted, may become unconstitutional

[1] Tua *v.* Carriere (1886) 117 U. S. 201, 210.

[2] *In re* Rahrer (1891) 140 U. S. 545. To the same effect is Cominino *v.* Clarke & Son (1918) 172 N. Y. Supp. 478.

[3] 38 *L. R. A.* (*N. S.*) 77, note.

[4] *Ibid.*

[5] People *v.* Roberts (1896) 148 N. Y. 360. The court in that case, speaking of a provision of the Civil Service Act, said: "The section of the Constitution with which it was then found to be in conflict, and which had the effect to suspend its operation as to that department, having been since modified in such a manner that both the organic law and the general statute are in harmony, each expressing the same general policy and directing the same thing to be done, the suggestion that, in order to make the general law operate upon this case, the Legislature must reënact it, has no reasonable or just foundation, and, so far as I am aware, is not sustained by authority" (p. 368). See also Allison *v.* Corker (1902) 67 N. J. L. 596, 600.

as a result of changed circumstances. This is true, for instance, when a statute regulating rates is valid when passed, but because of the great increase in operating expenses later becomes confiscatory.[1]

§50. *Judicial Control of Executive Action.* It is now well settled that executive officers, aside, at least, from the chief executive, are civilly liable for illegal or unconstitutional acts done in their official capacity.[2] They may also be enjoined from doing illegal acts and from acting under unconstitutional statutes[3]; and mandamus will lie against them to compel the doing of non-discretionary, ministerial acts, and to compel the exercise of discretion, but not for the purpose of directing the way in which their discretion shall be exercised.[4]

In the case of *Mississippi v. Johnson*[5] an injunction was sought to restrain the President from putting the Reconstruction Acts into effect in Mississippi, on the ground that

[1] Municipal Gas Co. *v.* Public Serv. Comm. (1919) 225 N. Y. 89, 96. See also Anderson *v.* Pacific Coast S. S. Co. (1912) 225 U. S. 187, 196 (regulation of pilotage); *In re* Nelson (1895) 69 Fed. 712 (territorial legislation superseded by federal legislation again becomes operative when the territory is admitted as a State, adopting by its Constitution the laws of the territory as the laws of the State).

[2] With the exceptions pointed out in a note to the last paragraph with regard to judicial officers and those executing judicial process. United States *v.* Lee (1882) 106 U. S. 196; Cunningham *v.* Macon & B. R. R. Co. (1883) 109 U. S. 446, 452; Poindexter *v.* Greenhow (1884) 114 U. S. 270; 29 *Cyc.* 1440 and 1448. The fact that one acts under directions of a superior is no defense, except when a military officer gives a command to a subordinate which does not clearly on its face show its illegality, *In re* Fair (1900) 100 Fed. 149, Clark and Marshall, *The Law of Crimes* (2d ed.), 120, or where an officer does purely ministerial acts in executing an order of a superior, fair on its face. 29 *Cyc.* 1441.

[3] Allen *v.* Baltimore & O. R. R. Co. (1884) 114 U. S. 311; Pennoyer *v.* McConnaughy (1891) 140 U. S. 1; *Ex parte* Young (1908) 209 U. S. 123; 22 *Cyc.* 879 *et seq.*

[4] Marbury *v.* Madison (1803) 1 Cranch 137, 166 (Secretary of State); Kendall *v.* United States (1838) 12 Peters 524 (Postmaster General); United States *v.* Black (1888) 128 U. S. 40 (Commissioner of Pensions); 26 *Cyc.* 227 *et seq.*

[5] (1866) 4 Wallace 475.

the statutes were unconstitutional, but the Supreme Court refused to allow the bill to be filed. Part of the argument of the court went upon the ground that the execution of the statute in question required the exercise of discretion on the part of the President, and that a court will not control the exercise of discretion. This argument seems very questionable. When an officer is enjoined from enforcing a law, his discretion in the administration of the law is not controlled, in the sense in which it would be if a writ of mandamus were issued directing him how he should administer it, that is, the court's discretion is not substituted for that of the officer as to how the law shall be administered. It has been asserted that the President has a discretionary right to refuse to enforce a statute duly passed on the ground that he thinks it unconstitutional.[1] But it would seem that the President's power in this regard is exhausted when he has exercised his right of veto.[2] If this is true, then to enjoin him from enforcing a statute is not controlling his discretion. However, the decision of the Supreme Court in refusing to enjoin the President seems correct and eminently wise. If the President refused to obey the court's direction the only way to compel obedience would be to imprison him for contempt. To say that this would be undesirable would be to put the case very mildly. But the court would not be able to enforce its decree against the President, since he controls the entire executive machinery, and is commander-in-chief of the army. Furthermore, if the President obeyed the court's injunction, and refused to enforce the statute in question, he might well be brought into conflict with Congress, with the possible consequence of impeachment.[3]

Clearly a writ of mandamus should not issue for the purpose of controlling the President's discretion. The Supreme Court has not had presented to it the question whether it

[1] Meigs, "The Independence of the Departments of Government," *23 Amer. L. Rev.* 594.

[2] Willoughby on the Constitution, sec. 767.

[3] Mississippi *v.* Johnson (1866) 4 Wallace 475, 501.

will issue such a writ to compel the President to do a merely ministerial act, or to exercise his discretion when it is his duty to do so, but it is believed that the court would not issue such a writ even under those circumstances, since the very cogent arguments against issuing an injunction, based upon the possibility of a clash between the President and the court, would also apply in such a case.[1]

Similar arguments of public policy and convenience would seem to point to the propriety of denying the right to an injunction against the President even to prevent a private wrong.[2] In an action for damages brought against the President process would issue against his property and not against his person, but it is at least questionable whether public policy should allow the President to be distracted from public business to settle private disputes during his term of office.[3]

§51. *The Supreme Court's Attitude Towards Political Questions.* The legislative and executive branches of

[1] And see Kendall *v.* United States (1838) 12 Peters 524, 609.

[2] In the famous trial of Aaron Burr for treason Chief Justice Marshall issued one and perhaps two *subpœnas duces tecum* directed to President Jefferson. Jefferson refused to obey or answer them on the ground that the President could not be taken from his executive duties by such judicial process and Marshall intimated that for such refusal the President would not be punishable as for a contempt. See Beveridge's *Life of John Marshall*, vol. iii, pp. 444 to 447, 454 and 455, 522; Goodnow, *Principles of the Administrative Law of the United States*, 91.

[3] The state courts are irreconcilably divided on the question whether the governor can be compelled by mandamus to do a purely ministerial act, the majority however being against the exercise of such a power. See the elaborate notes reviewing the cases in 6 *L. R. A.* (*N. S.*) 750, and 32 *L. R. A.* (*N. S.*) 355. It seems that state courts generally will not enjoin the governor. Frost *v.* Thomas (1899) 26 Colo. 222; State *v.* Huston (1910) 27 Okl. 606; Cooley, *Constitutional Limitations* (7th ed.), 162, n. Compare Ekern *v.* McGovern (1913) 154 Wis. 157, 204 to 220, and Hatfield *v.* Graham (1914) 73 W. Va. 759.

The Supreme Court in Kentucky *v.* Dennison (1860) 24 Howard 66, refused to issue a writ of mandamus to a state governor to compel interstate rendition, though admitting that he was derelict in a non-discretionary duty. (See secs. 208 and 209.) The federal courts have, however, frequently enjoined a state board of which the governor was a member. See Hall's *Cases on Constitutional Law*, 112, n.

government are essentially the political branches, and with the exercise of their distinctively political powers the judiciary will not interfere. On this point Chief Justice Marshall said[1]:

"By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

"In such cases their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the Act of Congress for establishing the department of foreign affairs. This officer as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by which that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts."

Foremost among these political powers, as suggested by Marshall, are those which have to do with our foreign relations. The determination of the executive department is conclusive upon the courts on the question whether diplomatic or consular agents of foreign countries are to be recognized or not.[2] When there is dispute between foreign governments as to which has jurisdiction over certain territory, the courts are controlled by the decision of the executive department on this point[3]; and this is all the more

[1] Marbury *v.* Madison (1803) 1 Cranch 137, 167.

[2] *Ex parte* Baiz (1890) 135 U. S. 403.

[3] Williams *v.* Suffolk Ins. Co. (1839) 13 Peters 415.

true when the dispute arises between the United States and a foreign government.[1] The courts will also follow without question the decision of the political departments that a state of war exists to which the United States is a party and as to when it begins and ends[2]; as well as the decision of the executive department that a state of war exists between foreign nations, and that a former part of a foreign country is now an independent political entity.[3] When questions arise as to the validity of the ratification of a treaty by a foreign government, or as to whether a treaty is still in force, the courts will adopt the conclusions reached on these points by the political departments.[4]

In *Luther v. Borden*[5] a case was presented to the federal courts in which it appeared that two separate governments had claimed to wield constitutional authority in Rhode Island, and it was sought to have the courts determine which had in fact been the real government. The Circuit Court and the Supreme Court refused to examine the evidence on the subject, declaring that it was a question for the political, and not the judicial branch of the federal government. Primarily it was declared to be a question for Congress. Since each House is "the judge of the elections, returns, and qualifications of its own members,"[6] a dispute as to which is the constitutional government in a State might be determined by the determination of those questions. The Rhode Island dispute never reached this stage, however, since, before such a question could arise, a new Constitution was adopted in the State, which was recognized by all factions. But it is further provided in the Constitution that,

[1] Foster *v.* Neilson (1829) 2 Peters 253.

[2] The Prize Cases (1862) 2 Black 635; The Protector (1871) 12 Wallace 700; The Pedro (1899) 175 U. S. 354.

[3] United States *v.* Palmer (1818) 3 Wheaton 610. And see the proclamation adopted by Congress with regard to Cuba, The Pedro (1899) 175 U. S. 354, 355.

[4] Doe *v.* Braden (1853) 16 Howard 635.

[5] (1849) 7 Howard 1.

[6] Art. I, sec. 5, par. 1.

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence."[1]

The court in *Luther v. Borden* said that this duty also rested primarily upon Congress, although it might be delegated by Congress to some other branch of the government. This had been done to the extent of authorizing the President to use the militia of the States and the military forces of the United States to put down insurrection in a State, upon the request of the legislature of the State, or of the state executive, when the state legislature cannot be convened.[2] Acting under this authority, the President had responded to the request for military aid of the charter government in Rhode Island, thus recognizing that as the constitutional government of the State. The court held that it was concluded by this determination.

Acting upon the same principle, the Supreme Court has refused to consider the question whether a State has or has not a republican form of government. In an action brought to recover a state tax the defense was that the tax was unconstitutional, taking the defendant's property without due process, since the state constitution made provision for legislation by initiative and referendum, and, the State, therefore, had not a republican form of government.[3] Again in a later case it was contended that the passage of a State Workmen's Compensation Act constituted a departure from a republican form of government, and consequently, was unconstitutional.[4] In each case the court declared that this was not a question for judicial determination, but a political question within the exclusive jurisdiction of the political side of the government.

[1] Art. IV, sec. 4.

[2] Rev. St., sec. 5297. See 3 Fed. Stat. Ann. 929 and 930.

[3] Pacific States T. & T. Co. *v.* Oregon (1912) 223 U. S. 118.

[4] Mountain Timber Co. *v.* Washington (1917) 243 U. S. 219.

In *Georgia v. Stanton*[1] an injunction was sought to restrain the Secretary of War and Generals Grant and Pope from enforcing the Reconstruction Acts in Georgia, on the ground that such enforcement

> "would annul, and totally abolish the existing state government of Georgia, and establish another and different one in its place; in other words, would overthrow and destroy the corporate existence of the State, by depriving it of all the means and instrumentalities whereby its existence might, and, otherwise would, be maintained."[2]

The court held that here was involved merely a political controversy between the State of Georgia and the United States, and that over such a question the court had no jurisdiction. In the words of the court, "the rights for the protection, of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its constitutional powers and privileges."[3] The court relied quite largely upon the earlier case of *Cherokee Nation v. Georgia,*[4] in which the Cherokee Nation, asserting their independence sought to restrain the State of Georgia from exercising legislative power over them. The court held that it had no original jurisdiction of that case because the Cherokee Nation was not a foreign nation within the meaning of the Judiciary Article of the Constitution[5]; but the judges also declared that the controversy with regard to the legislative control of the Indian nation by the State of Georgia was purely political, and, therefore, not a proper one for a court to entertain.[6]

[1] (1867) 6 Wallace 50. [2] *Ibid.*, 76.

[3] *Ibid.*, 77. This decision was followed without opinion in Mississippi *v.* Stanton (1867) 154 U. S. 554.

[4] (1831) 5 Peters 1. [5] Art. III, sec. 2.

[6] In Rhode Island *v.* Palmer, one of the cases passed upon under the title of the National Prohibition Cases (1920) 253 U. S. 350, the State of Rhode Island attacked the Eighteenth Amendment as unconstitutional because it deprived the State of its inherent police power. Mr. Charles E. Hughes, previously a Justice of the Supreme Court, and afterwards Secretary of State, in a brief in support of the amendment contended

It is, however, suggested in both of the cases just discussed that if personal or property rights had been involved in a case between proper parties the constitutionality of the legislation in question might have been considered.[1] Personal political rights can be vindicated by action, as for instance the right to vote[2]; and the right to hold political office may be inquired into by *quo warranto*.[3] So the Supreme Court has held that the validity of a state statute for the choosing of presidential electors may be inquired into at the suit of nominees for that office[4]; and state courts have generally held that the validity of apportionment acts may be passed upon by the courts.[5]

§52. *Judicial Functions Confined to "Cases" and "Controversies."* In 1907, certain federal statutes having been passed which affected the rights of the Cherokee Indians in lands allotted to them, Congress passed an act permitting suits to be brought in the Court of Claims to test the validity of those statutes, with a right of appeal to the Supreme Court. The Court of Claims upheld the statutes in question, and upon appeal to the Supreme Court that tribunal considered the question of its jurisdiction.[6] The Constitution declares that "the judicial power shall extend to all cases, in law and equity," under the Constitution, laws, and treaties of the United States, or which may affect ambassadors, ministers, and consuls; "to all cases of admiralty and maritime jurisdiction"; and to "controversies" to which the United States or a State is a party, or where there is diverse citizenship, or where land is claimed under grants

---

that the court had no jurisdiction of this question, as it involved a purely political controversy. The amendment was upheld, but no opinion was rendered in the case. See the consideration of the case in sec. 22.

[1] Cherokee Nation *v.* Georgia (1831) 5 Peters 1, 19; Georgia *v.* Stanton (1867) 6 Wallace 50, 77.

[2] 15 *Cyc.*, 314 and cases there cited.

[3] 15 *Cyc.*, 393 and cases there cited.

[4] McPherson *v.* Blacker (1892) 146 U. S. 1.

[5] State *v.* Cunningham (1892) 81 Wis. 440, and cases cited from other States.

[6] Muskrat *v.* United States (1911) 219 U. S. 346.

of different States.[1] If, then, a proceeding before a court is not a "case" or a "controversy" it is not judicial in character. The court in the case just referred to accepted the definition of these terms by Justice Field at circuit in an earlier case,[2] as follows:

> "The judicial article of the Constitution mentions cases and controversies. The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. Chisholm *v.* Georgia, 2 Dall. 431, 432; 1 Tuck. Bl. Comm. App., 420, 421. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication."

The court held that the proceedings authorized by the statute in question to be brought before the Court of Claims, with a right of appeal to the Supreme Court, was not a case or controversy, because there were no adverse parties whose rights were to be settled, but the proceedings were planned merely to get a determination as to the constitutionality of certain legislation.[3] Applying the same principle, the Supreme Court has held that when the decision of a tribunal is subject to review by an administrative officer or by Con-

[1] Art. III, sec. 2, par. 1.

[2] *In re* Pacific Railway Commission (1887) 32 Fed. 241, 255.

[3] With regard to the constitutionality of statutes providing for declaratory judgments see notes in *30 Yale L. Jour.*, 161; *19 Mich. L. Rev.*, 88; *21 Columbia L. Rev.*, 168. With regard to the practice in England and Canada see Ridell, "Declaratory Judgments in Canada," *25 Law Notes*, 46.

gress it is not judicial in character, for a judicial proceeding is one in which a court renders final decision, subject only to review by an appellate court.[1] Also, when in a criminal trial the defendant has been acquitted and cannot, therefore, be further tried because of the constitutional provision against double jeopardy,[2] a review of the proceedings in the lower court for the purpose of establishing a precedent for the future is not in its nature judicial.[3]

§53. *Control by Congress of the Jurisdiction of the Supreme Court.* We have seen that Congress has power to restrict the appellate jurisdiction of the Supreme Court below the full scope of that jurisdiction which is permitted to it by the Constitution.[4] But Congress may not add to the Supreme Court's original jurisdiction,[5] and obviously may not cut it down.

In the cases considered in the last preceding section the court was dealing with statutes whereby Congress sought to invest the court with appellate jurisdiction in proceedings which the court held to be nonjudicial. In each case the court came to the conclusion that, since it was created by the Constitution, and the limits of its appellate jurisdiction were set by that instrument and extended only to judicial cases and controversies as defined by the court, Congress had no authority to enlarge that jurisdiction, and the court refused to hear the appeals.

From very early days the Crown and the House of Lords have called upon the English judges for advisory or "consultative" opinions.[6] In Canada the Governor-General in Council, and with certain limitations the Senate and House of Commons may refer questions to the Supreme Court.[7] In Australia the judiciary is not under a duty to give ad-

[1] United States *v.* Ferreira (1851) 13 Howard 40; Gordon *v.* United States (1864) 2 Wallace 561 and 117 U. S. 697.

[2] See sec. 142.

[3] United States *v.* Evans (1909) 213 U. S. 297.

[4] Sec. 43. [5] Sec. 42. [6] Thayer, *Legal Essays*, 46.

[7] Moore, *The Commonwealth of Australia*, 241. Upon such reference all parties in interest are heard, and from the decision there is an appeal to the King in Council. This is practically a declaratory judgment.

visory opinions.[1] It was proposed in the Constitutional Convention of 1787 that

> "Each branch of the Legislature, as well as the Supreme Executive shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law, and upon solemn occasions."[2]

Nothing came of this suggestion, however. In 1793 President Washington, through Jefferson, his Secretary of State, inquired of the Supreme Court whether their advice would be available to the executive on matters with regard to the interpretation of treaties and laws. The justices answered

> "that in consideration of the lines of separation drawn by the Constitution between the three departments of government, and being judges of a court of last resort, afforded strong arguments against the propriety of extra-judicially deciding the questions alluded to, and expressing the view that the power given by the Constitution to the President of calling on heads of departments for opinions 'seems to have been purposely, as well as expressly, united to the executive departments.' *Correspondence and Public Papers of John Jay*, vol. iii, p. 486."[3]

Here we find the Supreme Court very early expressing the view that its duties are definitely limited by the terms of the Constitution, and are not to be enlarged beyond those limits.[4]

[1] Except with regard to certain questions under the Local Government Act, 1888, in which cases the opinions have no binding authority. Moore, *The Commonwealth of Australia*, 242.

[2] Farrand, *The Records of the Federal Convention*, vol. ii, p. 341. The suggested provision is practically identical with that put into the Massachusetts constitution of 1780, and copied into that of New Hampshire of 1784. The provision introduced into the Massachusetts constitution was undoubtedly intended as an adaptation of the English practice. *The Opinion of the Justices* (1879) 126 Mass. 557, 561.

[3] Muskrat *v.* United States (1911) 219 U. S. 346, 354. See also Marshall's *Life of Washington*, vol. v, p. 441.

[4] With regard to advisory opinions by state courts see Thayer, *Legal Essays*, 42 to 59; Hall's *Cases on Constitutional Law*, 44 and 45.

§54. *Imposing Nonjudicial Functions upon the Lower Federal Courts.* The lower federal courts unlike the Supreme Court, are not created, and do not have their jurisdiction defined by the Constitution. The Constitution vests in Congress the authority to establish the federal courts below the Supreme Court and to define their jurisdiction.[1] It may increase or decrease their judicial functions or abolish them altogether.[2] But may it impose upon them nonjudicial functions?

In 1792 Congress passed an act for the relief of certain classes of pension claimants, and directed the Circuit Courts to hear such claims, giving a power of review to the Secretary of War and to Congress. The Circuit Courts for the districts of New York, Pennsylvania, and North Carolina, in which courts sat at the time as Circuit Judges five out of the six Justices of the Supreme Court, declared the statute to be an unconstitutional attempt to impose nonjudicial functions upon the courts, and that they could not, therefore, in their judicial capacity hear the claims presented. Since the courts were not empowered to render final judgment in the proceedings in question, those proceedings were clearly not judicial in character. The position taken by the judges was that the Circuit Courts were among those courts which Congress was authorized to establish by the Judiciary Article of the Constitution, which declared that the judicial power of the United States shall be vested in those courts and in the Supreme Court, and then defines judicial power

[1] Sec. 41.

[2] It seems very doubtful whether, after a federal judge has been appointed, he can be ousted from office by the abolition of the court of which he was a member, or by the repeal of the statute providing for his appointment, because of the constitutional provision (art. III, sec. 1) that federal judges shall hold office during good behavior. This was done, however, when the statute remodelling the judiciary, which was passed at the end of John Adams administration, was repealed when Jefferson took office. (See sec. 41.) When the Circuit Courts were abolished the Circuit Judges continued to act as members of the Circuit Courts of Appeals, and when the Commerce Court was done away with other provision was made for the members of that court. (As to the abolition of these courts see sec. 41.)

in such a way as to exclude the proceedings in question; and that such courts having been established, they could not be compelled to entertain jurisdiction outside of that provided for in the Constitution. A writ of mandamus was sought from the Supreme Court to compel one of the Circuit Courts to entertain a proceeding under the act, but the objections of the judges had been communicated to the President, and before any decision was reached in the Supreme Court the statute in question was repealed.[1] In one of the circuits the judges consented to consider themselves appointed individually as commissioners to hear the claims,[2] but the Supreme Court later decided, apparently unanimously, that this was not intended, and that they had no authority to act in that capacity under the statute.[3]

By statutes of 1823 and 1834 Congress directed the Territorial Court of Florida to hear claims for damages caused to Spanish inhabitants and officers by the American army before the cession of Florida to the United States, and to report its findings to the Secretary of the Treasury, who was to pay them if satisfied that they were just and equitable. In 1849 congressional legislation directed the District Court for the northern district of Florida to hear similar claims. This the District Court did, and it was sought to take an appeal from such a determination to the Supreme Court. As we have seen just above, the Supreme Court refused to entertain this appeal on the ground that the proceeding was nonjudicial. In doing so the court expressed its opinion that the District Court had erred in assuming that the hearing of the claim in question came under its judicial duties, and approved the position taken by the judges under the statute of 1792 that such duties cannot be imposed by Congress upon a court established under the direction of the Judiciary Article of the Constitution.[4]

[1] The opinions of the judges will be found in a note to Hayburn's Case (1792) 2 Dallas 409. [2] *Ibid.*

[3] See the note to United States *v.* Ferreira (1851) 13 Howard 40, 52.

[4] United States *v.* Ferreira (1851) 13 Howard 40. See also Gordon *v.* United States (1864) 117 U. S. 697, 703.

By act of February 24, 1855,[1] Congress established the Court of Claims. By this act the court was directed to investigate claims founded upon petitions, or referred to it by either House of Congress. It had, however no authority to render final judgments, but was directed in each case to report to Congress, and, when it believed the claim to be valid, it was directed to frame for the consideration of Congress an appropriate bill for the payment of such claim. In 1863 this law was amended,[2] and "final judgments and decrees" were provided for, with a right of appeal to the Supreme Court, but since it was further provided that money on such claims should not be paid "till after an appropriation therefor shall be estimated for by the Secretary of the Treasury," it was held that the proceedings under the act were not judicial, and the Supreme Court, therefore, refused to entertain an appeal.[3] By act of 1883 the Houses of Congress and their committees, and any executive department, before which a claim is pending are authorized to refer such claims to the Court of Claims, not, however, for adjudication, but merely for the purpose of obtaining a report.[4] By later legislation, however, the Court of Claims is given power to render final judgment with regard to claims founded upon the Constitution or laws of the United States (except for pensions), or upon regulations of the executive departments, or upon contracts express or implied with the government, or for damages in cases not sounding in tort, where the claimant would be entitled to redress in a court of law, equity or admiralty if the United States were suable.[5] When acting under these provisions the court is clearly acting judicially.[6] It may still,

[1] 10 Stat. 612.

[2] Act of March 3, 1863, 12 Stat. 765.

[3] Gordon *v.* United States (1864) 2 Wallace 561, and 117 U. S. 697.

[4] Act of March 3, 1883, 22 Stat. 485.

[5] Act of March 3, 1887, 24 Stat. 505.

[6] It has also from time to time been given authority to act in a judicial capacity by special legislation, and where it acts judicially the Supreme Court will entertain an appeal. DeGroot *v.* United States (1866) 5 Wallace 419.

however, be called upon by Congress or the executive departments for reports outside of the above sphere of action and in making such reports it as clearly acts nonjudicially. No objection has been made to investing this tribunal, originally nonjudicial in character, with judicial functions, and it would seem that the only objection which might be made would be that the members of the court being originally in their nature commissioners should be newly commissioned as judges. In *United States v. Ferreira*[1] the court raised, though it did not answer the question whether Congress might authorize judges to act as commissioners to hear claims, on the ground that Congress has no authority to make appointments of government officers. Under the earlier Act of 1792, however, all of the judges seemed to think that if Congress had intended the judges to act as commissioners they might legally have done so.[2] It would seem that an officer already duly appointed may be vested by Congress with added powers,[3] although there might be some question as to whether he was bound to exercise them.

§55. *Legislative Control of Pending Actions.* The doctrine of the "separation of powers" of the executive, legislative and judicial branches of the government is fundamental in the American theory of constitutional government.[4] This does not mean an absolute separation, for we find the President taking part in legislation through his veto and his recommendations to the legislature, the legislature acting as a court in impeachment proceedings, and the courts reviewing the acts of the legislature and of administrative officers, but it does mean that no branch of the government, except as permitted by the Constitution, shall usurp any of the essential functions of any other branch. Therefore, "legislatures cannot set aside the judgments of courts, compel them to grant new trials, order

[1] (1851) 13 Howard 40.

[2] Notes to Hayburn's Case (1792) 2 Dallas 409, and to United States *v.* Ferreira (1851) 13 Howard 40, 52.

[3] Shoemaker *v.* United States (1893) 147 U. S. 282.

[4] See the full discussion of this doctrine in *The Federalist*, Nos. 47 to 51.

the discharge of offenders, or direct what steps shall be taken in the progress of a judicial inquiry."[1] But the court in the same sentence went on to say that "the grant of a new remedy by way of review has been often sustained."[2] So after final judgment an appeal to an existing tribunal may be provided for or a new tribunal may be created for the purpose of reviewing a given class of cases.[3] While the granting a new trial is essentially a judicial function, the providing that an appeal may be taken in a certain class of cases is not. On the other hand, of course, the hearing of an appeal would be. Appellate jurisdiction may be taken from a court in which it has previously been vested, and this is true even with regard to the Supreme Court, and as to a proceeding already pending.[4]

§56. *Punishment of Contempts.* The Supreme Court has said:

> "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and conse-

[1] Stephens *v.* Cherokee Nation (1899) 174 U. S. 445; and see Cooley's *Constitutional Limitations* (7th ed.), 137 *et seq.*, for state decisions on these points.

[2] Citing Calder *v.* Bull (1798) 3 Dallas 386; Sampayreac *v.* United States (1833) 7 Peters 222; Freeborn *v.* Smith (1864) 2 Wallace 160; Garrison *v.* City of New York (1874) 21 Wallace 196; Freeland *v.* Williams (1889) 131 U. S. 405; Essex Pub. Rd. Board *v.* Skinkle (1891) 140 U. S. 334.

[3] Wallace *v.* Adams (1907) 204 U. S. 415. Where a right of appeal existed and has expired or where there was no right of appeal, some state courts have held that a right of appeal cannot thereafter be granted by the legislature, which would affect a judgment for damages or otherwise with regard to property, since this would be contrary to the due process clause. See Germania Savings Bk. *v.* Suspension Bridge (1899) 159 N. Y. 362; Hill *v.* Sunderland (1831) 3 Vt. 507. But the Supreme Court would seem to consider any orderly judicial method for the righting of an erroneous judgment to constitute due process. Sampayreac *v.* United States (1833) 7 Peters 222; Freeland *v.* Williams (1889) 131 U. S. 405. See also Page *v.* Matthews (1867) 40 Ala. 547.

[4] *Ex parte* McCardle (1868) 7 Wallace 506.

quently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."[1]

By a statute passed in 1831[2] the power of the federal courts to summarily punish for contempts is restricted to cases

"of misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

In *ex parte* Robinson[3] the court held that since Congress creates the inferior federal courts and defines their jurisdiction, it may limit their authority to summarily punish for contempt. The court, however, throws out this important hint: "The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt."[4] This question has not been more definitely passed upon, but it is interesting to note that in a comparatively recent statute amending the Anti-Trust Law,[5] in which certain limitations are placed upon the power to summarily punish for contempts, the operation of the statute is by its terms restricted to the District Courts and to the courts of the District of Columbia.[6]

[1] *Ex parte* Robinson (1873) 19 Wallace 505, 510.

[2] The provisions of this statute are now incorporated in Judicial Code, sec. 268.

[3] (1873) 19 Wallace 505. [4] *Ibid.*, 510.

[5] Act of Oct. 15, 1914, chap. 323, secs. 21 to 25, 38 Stat. 738.

[6] The majority of cases in the state courts have held that the legislature cannot restrict or take away the inherent power of the courts to punish for contempts, though some have recognized the validity of such legislation, generally without giving the question much consideration. Most of these latter cases deal with lower courts which are not of con-

§57. *Judicial Power to Suspend Sentences.* The question whether a court may in a criminal case suspend sentence during good behavior, so as to permanently exempt from punishment, is one as to which different opinions have been expressed by the state courts. The right has recently been passed upon adversely by the Supreme Court of the United States, as far as federal courts are concerned.[1] That tribunal declared that there is no such right inherent in a court of law, but that the right to create crimes and establish punishments is under the Federal Constitution a legislative right. It was pointed out that the English courts under the common law never exercised such a right—the farthest that they went was to suspend sentence temporarily if justice seemed to demand further legal proceedings or an appeal to executive clemency. It is shown in a full review of the state decisions that a majority of state courts deny the right contended for, though a few have recognized it. The only case which had been decided in the lower federal courts denied the rights,[2] but the court admitted that some of the federal courts had, nevertheless, engaged extensively in the practice. It is interesting that as a result of this decision President Wilson granted some five thousand pardons to persons who had been released under suspended sentences by federal courts.

---

stitutional creation. The distinction between constitutional and non-constitutional courts, suggested by the Supreme Court, will reconcile many of the cases, though frequently not referred to in them. See notes in *36 L. R. A.* 254, and *4 Col. L. Rev.* 65. Courts generally recognize the right of the legislature to regulate the punishment for contempts. See note in *6 Col. L. Rev.* 199.

[1] *Ex parte* United States (1916) 242 U. S. 27.

[2] United States *v.* Wilson (1891) 46 Fed. 748; though the existence of the power had been maintained in the District of Columbia. Miller *v.* United States (1913) 41 App. D. C. 52.

CHAPTER VI

GENERAL CHARACTER AND ORGANIZATION OF CONGRESS

§58. *Legislative Power and the Separation of Powers.* The First Article of the Constitution of the United States is concerned with the legislative branch of the national government, and the first section of that article declares that "all legislative powers herein granted shall be vested in a Congress of the United States." The principle of the "separation of powers" of the executive, legislative, and judicial branches of the government is fundamental in the American theory of constitutional government.[1] With it, to be sure, goes also a system of checks of one branch of government upon the others, as, for instance, the President's power to veto legislation and to appoint federal judges, the power of Congress to impeach the President and the members of the judiciary, and the power of the federal courts to declare legislation unconstitutional, and to restrain executive officers from doing unconstitutional or illegal acts. Notwithstanding this certain degree of intermingling of spheres of action, no branch of the government, except as permitted by the Constitution itself, may constitutionally usurp any of the essential functions of any other branch. As we have seen, Congress cannot make appointments except as expressly authorized in the Constitution,[2] nor can it interfere with the essential judicial functions of the courts.[3] On the other hand it is equally clear that neither the President nor the federal judiciary has constitutional authority to enact

[1] See the full discussion of this doctrine in *The Federalist*, Nos. 47 to 51. See also W. Jethro Brown, "The Separation of Powers in British Jurisdictions," 31 *Yale L. Jour.*, 24.

[2] Sec. 29. [3] Sec. 55.

laws.[1] We not infrequently hear the term "judge-made law" applied when a court decides some new point, and especially when a decision is thought to embody a departure from preëxisting practices or theories. But in such cases judges never purport, at least, to establish new principles of conduct, but always declare that they are but applying existing principles to new facts. It cannot be denied, that frequent repetition of this process does often result in a development of the principles relied upon by the courts to cover situations not within their original purview. Still there is nothing startlingly new in this fact. It is but a continuation of the process by which the whole body of the English common law has been built up. Legislation, on the other hand, is the avowed and authoritative promulgation of new principles or rules to be applied to future conduct.

§59. *Implied Powers and Constitutional Interpretation.* The Articles of Confederation contained the provision that, "Each State retains . . . every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."[2] The Constitution when adopted contained no such provision. Instead it incorporated a number of prohibitions of state action, an enumeration of powers which were to vest in the federal government, and certain limitations which were to rest upon this new government. If it had stopped here it seems clear that the States would have retained such of their original powers as had not been prohibited to them, or transferred by the Constitution to the federal government, and that, on the other hand, the federal government would have had all incidental powers reasonably necessary to carry out the broad powers expressly granted.[3] These matters, however, were not left in doubt. The Tenth Amendment,

[1] Reagon *v.* Farmers' L. & T. Co. (1894) 154 U. S. 362, 400; Express Cases (1886) 117 U. S. 1, 29; Atchison T. & S. F. R. Co. *v.* Denver & N. O. R. Co. (1884) 110 U. S. 667, 682; Interstate Com. Com. *v.* Cincinnati N. O. & T. P. R. Co. (1897) 167 U. S. 479, 499.

[2] Art. II.

[3] *The Federalist*, Nos. 33 and 44; *Story on the Constitution* (5th ed.) sec. 1237.

adopted immediately after the Constitution went into effect, declares that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people," while the implied powers of Congress gained express recognition in the body of the Constitution, as follows:

> "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 this Constitution in the Government of the United States or in any department or officer thereof."[1]

This latter provision was brought forward in the Constitutional Convention by the Committee of Detail, and was accepted without dissent. There was not even any discussion raised by it except in the form of a suggestion made by Madison and Pinckney that the power to "establish all offices" should be included, "it appearing to them liable to cavil that the latter was not included in the former." But other members urged that the amendment was not necessary, and it was voted down.[2] When the Constitution went to the state conventions for ratification this provision did, however, stir up very violent criticism, being pointed to as giving powers to the national government which would make possible all sorts of tyranny and usurpations. These critics were answered with some impatience by Hamilton in *The Federalist*.[3] He pointed out that the paragraph in question did nothing more than express what would have been implied without it, and that the only alternative provisions would have been an enumeration of all of the detailed powers which were to be exercised in carrying out the main provisions which would have been humanly impossible,[4] or an enumeration of all of the powers which were

[1] Art. I, sec. 8, par. 18.

[2] Farrand, *The Records of the Federal Convention*, vol. ii, p. 345.

[3] No. 33, and again in No. 44.

[4] See also on this point the statement of Chief Justice Marshall in M'Culloch *v.* Maryland (1819) 4 Wheaton 316, 407.

not to be exercised, which would have been as impracticable, or to limit Congress to those powers elsewhere expressly given, which if literally interpreted as not giving them any incidental powers to carry out those fundamental powers would have entirely tied the hands of the government.

The Constitution having been adopted, those who feared the central government fell back upon a strict construction of the grants of power which it contains, and insisted particularly that, when Congress was given power to "make all laws which shall be necessary and proper" for carrying out the fundamental powers which were enumerated, it was only intended to invest Congress with such incidental powers as were absolutely necessary to the exercise of the other powers expressly granted. This contention came before the Supreme Court in the case of *M'Culloch v. Maryland*[1] in 1819, was brilliantly argued by Webster, Pinckney, Wirt, Luther Martin, Hopkinson, and Walter Jones, and the decision upon it was written by Chief Justice Marshall for a unanimous court. Congress had authorized the incorporation of the second bank of the United States, which had a branch in Baltimore, while Maryland had levied a tax upon all banks established without authority from the State. The two questions were whether Congress had authority to establish such a bank, and whether Maryland could tax it. It was contended that the word "necessary" controlled the whole sentence, and limited the power to pass laws for the execution of the granted powers "to such as are indispensable, and without which the power would be nugatory." Marshall pointed out that the paragraph in question was not put among the limitations upon legislative powers, but among the granting provisions, and, therefore, could not have been meant to give Congress less power than would have been possessed without it; that "necessary" in common parlance does not mean "absolutely necessary,"[2] but

[1] 4 Wheaton, 316. The story of this litigation and its setting are graphically presented in Beveridge's *Life of John Marshall*, vol. iv, chap. 6.

[2] The Constitution does in another place contain this phrase, where it

"needful," "conducive to"; and that the word necessary is, furthermore, coupled with the word "proper," as being a word of similar import.

> "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. . . . 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."[1]

As a result of this construction the court held that it was within the power of Congress to incorporate a bank for the purpose of carrying out its fiscal operations.

The power vested in Congress to "make all laws which shall be necessary and proper" for carrying into effect the powers elsewhere expressly granted, is, of course, open to abuse, but so are all of the other powers. When Congress oversteps its legitimate bounds the public may make their disapproval effective through the ballot, while any patent abuse will be nullified by the Supreme Court through its power to refuse recognition to unconstitutional legislation. Where the language of the Constitution is clear and unequivocal, the court will enforce its terms even though the result may not be that which was contemplated by its framers,[2] but, where a term or phrase is open to different interpretations, the meaning intended to be attached to it

---

prohibits States from laying "imposts, or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Art. I, sec. 10.

[1] M'Culloch *v.* Maryland (1819) 4 Wheaton 316, 420, 421.

[2] Chisholm *v.* Georgia (1793) 2 Dallas 419, in which it was held that a citizen of one State might sue another State, notwithstanding that the contrary view was expressed in *The Federalist.* See sec. 42.

by its framers,[1] or the purposes intended to be effected by it,[2] will be taken into consideration. When, however, exigencies arise which were not in the contemplation of the framers of the Constitution, the fact that they had no affirmative intention that it should cover such a case will not prevent such a case being brought within it. Since it was intended not only for the period in which it was adopted, but for the future also, it should in such cases be interpreted according to the view which reasonable men would take of it in the light of existing circumstances.[3]

[1] Cohens *v.* Virginia (1821) 6 Wheaton 264, 418.

[2] Prigg *v.* Pennsylvania (1842) 16 Peters 539, 610, 611.

[3] In M'Culloch *v.* Maryland (1819) 4 Wheaton 316, 407, 415, Chief Justice Marshall said: "In considering this question, then, we must never forget, that it is *a constitution* we are expounding. 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." See also the statement of Marshall in Dartmouth College *v.* Woodward (1819) 4 Wheaton 518, 644, and the statement of Justice Story in Martin *v.* Hunter's Lessee (1816) 1 Wheaton 304, 326, and that of Justice Holmes in Missouri *v.* Holland (1920) 252 U. S. 416, 433.

President Roosevelt gave his support to the proposition, advanced by James Wilson of Pennsylvania in the early days of American history, that the federal government must have by implication power over any subject from which it is not expressly excluded, and which is not expressly given to the States, if it cannot be adequately dealt with by the States. See Willoughby on the Constitution, sec. 27. Such a doctrine has been held to be contrary to the Tenth Amendment. Kansas *v.* Colorado (1907) 206 U. S. 46. It has also been urged that powers expressly denied to the States belong to the United States by reasonable implication, though not expressly given. Tiedeman, *The Unwritten Constitution of the United States*, chap. 11. But in the case last cited the court said that "all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States," by force of the Tenth Amendment. The Legal Tender Cases are, however, rather hard to reconcile with this proposition. See sec. 83.

At the time of the Revolution the doctrine of natural rights held strong sway, and it is not surprising that in some early cases it is suggested that legislation not otherwise forbidden might be unconstitutional if in conflict with such rights. (See, for instance, Calder *v.* Bull (1798) 3 Dallas 386, 387 to 389.) It has also been suggested at times that legislation might be unenforceable because in conflict with the spirit of the

No exhaustive attempt will be made to enumerate here the cases in which the doctrine of implied powers has been applied, but the following quotation will give some illustrative examples[1]:

"And it is important to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story in his *Commentaries on the Constitution*, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capital or a presidential mansion, and so also is the penal code. . . .

". . . Under the power to establish post offices and postroads Congress has provided for carrying the mails, punishing theft of letters, and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, breakwaters and buoys, the registry, enrollment, and construction of ships, and a code has been enacted for the government of seamen."

Many other examples will be noted as we proceed with our general discussion.[2]

§60. *Delegation of Legislative Power.* It is universally recognized as a fundamental principle of American con-

---

Constitution. (See, for instance, Legal Tender Cases (1870) 12 Wallace 457, 544.) Probably in none of these cases, however, was either doctrine advanced as the sole ground of decision, and both have quite lost favor in recent years. Probably all that was ever really intended by either is now sufficiently safeguarded by the due process clauses of the Fifth and Fourteenth Amendments.

[1] Legal Tender Cases (1870) 12 Wallace 457, 535 to 537.

[2] Perhaps the most extreme examples are to be found in the issue of legal tender notes (see sec. 83), and the acquisition of territory by purchase (see sec. 100).

stitutional law that the legislative branch of the government cannot delegate its essential legislative function to any other agency.[1] This results from the clear declarations in our constitutions, both federal and state, that all legislative power shall vest in the law-making bodies which are thereby created.

This does not mean, however, that Congress, for instance, cannot delegate any of the powers which it has the right to exercise. A distinction is drawn between those powers which are essentially legislative, and those which are not. As said by Chief Justice Marshall:

> "It will not be contended that Congress can delegate to the courts, or to any other tribunal powers which are strictly or exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself."[2]

The establishment of principles or rules of conduct is the essential function of a law-making body, and this power cannot be delegated, but the power to apply principles and rules, once established by the legislature, to facts as they may arise may be vested by the legislature in some other governmental agency, notwithstanding the fact that the legislature might itself have made such application.

> "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."[3]

[1] Since the English Parliament is unfettered by any constitutional limitations it follows of course that it may delegate such of its legislative functions as it pleases to other agencies. It is also held that the dominion legislatures may delegate their legislative functions. Moore, *The Commonwealth of Australia*, 130.

[2] Wayman *v.* Southard (1825) 10 Wheaton 1, 42.

[3] Field *v.* Clark (1892) 143 U. S. 649, 693, quoting from Cincinnati W. & Z. R. R. Co. *v.* Commissioners (1852) 1 Ohio St. 77, 88.

There is, however, one exception to the rule against the delegation of legislative power which is as widely recognized as the rule itself. This exception is in favor of the grant of the power of local self-government to municipalities.[1] Its real basis is historical, resting upon the immemorial Anglo-Saxon practice of leaving to each local community the control of local affairs. This practice is conceived to be so integral a part of the Anglo-Saxon system of government as to justify the grant to municipalities of the control of local affairs, in the absence of any express constitutional prohibition. By force of this doctrine congressional delegation of very extensive powers of self-government to the District of Columbia and the territories has been upheld.[2] Municipalities have, however, no inherent power of local self-government, but must show an actual grant of such power from the State.[3]

In conformity with the principle stated above it is constitutional for Congress to enact legislation with a proviso either that its operation shall be suspended, or that its provisions shall only go into effect upon the happening of certain specified events, which are to be ascertained by some administrative officer. The non-intercourse Act of 1809 was an example of the former sort of proviso. By its terms importation from France and Great Britain was forbidden, but if either nation ceased to violate the neutral commerce of the United States the President was authorized to make proclamation to that effect, after which intercourse with the nation in question would be lawful. This statute was up-

[1] Cooley's *Constitutional Limitations* (7th ed.), 261 to 265; Dillon, *Municipal Corporations* (5th ed.), sec. 573. And it is generally held that this may be accomplished by leaving to the electors of a locality the determination by popular vote as to whether a statute affecting local affairs shall apply in that locality, Dillon, *Municipal Corporations* (5th ed.), sec. 69. See a note in *3 Cor. L. Quar.*, 277, for discussion and collection of authorities.

[2] Hornbuckle *v.* Toombs (1874) 18 Wallace 648; Stoutenburgh *v.* Hennick (1889) 129 U. S. 141; see further secs. 101 and 105.

[3] Cooley's *Constitutional Limitations* (7th ed.), 266; Dillon, *Municipal Corporations* (5th ed.), sec. 587.

held by the Supreme Court in *The Brig Aurora*.[1] By the Tariff Act of 1890 it was declared that, in order to secure reciprocal trade with countries producing and exporting sugar, molasses, coffee, tea, and hides, or any of these articles, the free importation of such goods therein provided for should be suspended, whenever the President was satisfied that the exporting countries were imposing duties upon American products which were reciprocally unequal and unreasonable, and that under such circumstances certain duties specified should be imposed upon the goods named. This was attacked as a delegation of legislative authority to the President, but the Supreme Court refused to adopt this view, saying[2]:

> ". . . Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself as it left the hands of Congress that the provisions, full and complete in themselves, permitting the free introduction of sugars, molasses, coffee, tea, and hides, from particular countries, should be suspended, in a given contingency, and that in case of such suspensions certain duties should be imposed."

Present day conditions with their great complexity of personal and economic relations, together with the rapidly increasing governmental supervision of personal, and especially of corporate conduct in the interest of the community at large, have made it practically impossible for legislatures to provide for all the detailed application of the rules and regulations which they adopt. Furthermore, such application can be much more satisfactorily made by persons who are experts in given fields, and who devote their

[1] (1813) 7 Cranch 382.

[2] Field *v.* Clark (1892) 143 U. S. 649, 683.

time to the consideration of the problems within those fields. These considerations have led legislatures to delegate a great deal of the power that they might exercise to administrative officers and commissions, and this they may constitutionally do as long as they lay down the guiding principles, and leave only to the administrative agency the application of such principles to facts as they arise.

The authority so delegated may be very extensive, and the guiding principles which are to govern may be laid down in very broad terms. In *Union Bridge Company v. United States*[1] it was held that Congress in pursuance of its control of interstate commerce might prohibit bridges over navigable streams which constituted an impediment to their navigation, and might leave to the Secretary of War to determine in each case whether a bridge in question was an unreasonable obstruction of commerce. The Supreme Court has also upheld legislation for the establishment and management of forest reservations upon public lands, which provided that the Secretary of Agriculture might make regulations for the occupancy and use of the lands in question, and for the purpose of preserving the forests on such reservations from destruction.[2] When the Interstate Commerce Commission was established it was not given power to formulate rates and rules of conduct for interstate carriers.[3] By a later amendment of the Interstate Commerce Act, however, this power was given, the act providing merely in broad terms that interstate carriers should not charge unreasonable rates or practice unreasonable discrimination, and leaving to the commission to declare what rates and practices should be considered reasonable. Here, certainly, extensive power is vested in the commission which might have been exercised by Congress, and yet the

[1] (1907) 204 U. S. 364.

[2] United States *v.* Grimaud (1910) 220 U. S. 506. See also *in re* Kollock (1897) 165 U. S. 526, and Butterfield *v.* Stranahan (1904) 192 U. S. 470.

[3] Interstate Comm. Comm. *v.* Cincinnati, N. O. & T. P. Ry. Co. (1897) 167 U. S. 479.

legislation was unhesitatingly upheld by the Supreme Court.[1]

§61. *Congress a Bicameral Legislature.* The Continental Congress, established under the Articles of Confederation, consisted of but one house, to which delegates were appointed annually in such manner as the legislatures of each State directed, and in which each State had a single vote.[2] The legislatures of the various States, however, were bicameral, modelled upon the English Parliament, except that membership in the upper houses was not hereditary. Pelatiah Webster, in his plan of government, published in 1783, approved of a national legislature of two chambers.[3] This feature was also contained in the so-called Virginia, Pinckney, and Hamilton plans, presented to the Constitutional Convention.[4] Only the so-called New Jersey plan contained a proposal for the continuation of the old Congress with its single chamber.[5] In the Constitutional Convention there was some support for the New Jersey plan on this point,[6] but the majority was from the first in favor

[1] Interstate Comm. Comm. *v.* Illinois Cent. R. R. Co. (1910) 215 U. S. 452; Interstate Comm. Comm. *v.* Chicago, R. I. & P. Ry. Co. (1910) 218 U. S. 88.

The breach of an administrative rule may be made by statute a criminal offense, *in re* Kollock (1897) 165 U. S. 526, though such intention must clearly appear from the legislative enactment. United States *v.* Eaton (1892) 144 U. S. 677. To make the breach of an administrative rule a crime, and to punish it as such without a judicial trial would be unconstitutional, Wong Wing *v.* United States (1896) 163 U. S. 228. But it was held in Oceanic Navigation Co. *v.* Stranahan (1909) 214 U. S. 320, that a statute might constitutionally provide for the imposition by an administrative officer of a penalty for the breach of an administrative rule to secure the efficient performance of such rule, when the act was not intended to be made criminal.

[2] Art. V.

[3] "A Dissertation on the Political Union and Constitution of the Thirteen United States of North America," contained in *A Memorial in Behalf of the Architect of Our Federal Constitution*, p. 33.

[4] Taylor, *The Origin and Growth of the American Constitution*, 550, 563, 568, 570.

[5] *Ibid.*, 580.

[6] Farrand, *The Records of the Federal Convention*, vol. i, pp. 336 to 350.

of a bicameral legislature,[1] and, therefore, wrote into the Constitution the provision that Congress should "consist of a Senate and House of Representatives."[2]

§62. *Powers of the Two Houses.* In all legislative matters except the raising of revenue the houses are equal, for a measure may be introduced in either house, each must pass a bill by majority vote, and in case of a presidential veto each must pass the bill again by a two thirds vote.[3] But with regard to bills for raising revenue it is provided that they "shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills."[4] This provision constituted part of the arrangement arrived at between the large and small States which resulted in equal representation in the Senate,[5] and which originally provided that bills for raising and appropriating money and for fixing salaries should originate in the lower house and should not be amended in the Senate.[6] It was, however, modified to its present form in the later stages of the Convention. As it appears in the Constitution it is not really a substantial limitation upon the Senate because of that body's right to amend. As we shall see shortly, in all matters of organization and discipline, of immunities and privileges the two houses are on the same footing, except that the House of Representatives elects its own presiding officer, while the Vice-President presides over the Senate. In impeachment proceedings the House impeaches and the Senate sits as a court to try the impeachment.[7] The Senate alone participates with the President in the making of treaties,[8] and in the filling of offices.[9] The houses participate equally in the amending of the Constitution.[10]

[1] *Ibid.*, vol. i, pp. 20, 46, 48, 225, 228, 235, 349, 350, 353.
[2] Art. I, sec. 1.
[3] See sec. 37.
[4] *Const. of U. S.*, art. I, sec. 7, par. 1.
[5] See sec. 66.
[6] Farrand, *The Records of the Federal Convention*, vol. i, pp. 523, 526, 539; vol. ii, pp. 13 to 16.
[7] See sec. 40.
[8] See sec. 33.
[9] See sec. 29.
[10] See Chap. 3.

§63. *Election of Representatives.*[1] Although proposals for the election of members of the House of Representatives by the state legislatures,[2] or in such manner as the state legislatures should direct,[3] had their supporters in the Constitutional Convention, the plan for the popular election of representatives was generally accepted from the first.[4] It was, therefore, provided in the Constitution that,

> "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."[5]

[1] It is interesting to compare the provisions in this and the next section with those on the same subjects in the laws of the British Dominions. In Canada the House of Commons is elected for five years by the people of the province in proportion to population, with provision for decennial readjustments. The qualifications are fixed by the provinces, and the electors are the same as those for the provincial legislature. (British North American Act 1867, secs. 37 to 41.) In Australia there is direct election of the members of the House of Representatives in each State in proportion to population, and so that the House shall be twice as large as the Senate. Representatives are elected for three years, it being required that they be qualified electors, twenty-one years of age and native-born citizens or five years naturalized. The qualification of electors are the same as for the most numerous branch of the state legislatures. (Australian Constitution Act, secs. 24, 26 to 31, 34, 43.) In South Africa the members of the House of Assembly are directly elected, membership being distributed among the States in proportion to the number of European male adults in each, with provision for periodical readjustments. The electors are those for the legislature in each province until changed by the Dominion Parliament. Members must be qualified electors in their States, residents of the Union for five years, and British subjects of European descent. (South African Act 1909, secs. 32–36, 44.)

[2] Farrand, *The Records of the Federal Convention*, vol. i, pp. 28, 57, 353, 360.

[3] *Ibid.*, vol. i, pp. 364 and 365.

[4] *Ibid.*, vol. i, pp. 20, 54, 60, 225, 235, 353, 360.

[5] Art. I, sec. 2, par. 1. Each territory has a delegate to Congress with the right of participating in debates but not of voting. U. S. Rev. St., secs. 1862 and 1863. Such delegates were provided for in the famous Ordinance for the government of the Northwestern Territory of

It is to be noted that while the right to vote for representatives is a constitutional right, the definition of those in whom that right inheres is left to the States.[1]

One of the important compromises of the Constitution, required in order to get the support of the delegates from the slaveholding States, was contained in the provision that,

> "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons."[2]

The "all other persons" here referred to were, of course, the negro slaves. The effects of this compromise came to an end when slavery was abolished by the Thirteenth Amendment,[3] and the second section of the Fourteenth Amendment contains the following provision:

> "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

---

1787, sec. 12. They do not occupy constitutional offices, but are merely the creation of Congress. Biddle *v.* Richards (1823) Clarke & Hall, Contested Elections, 407. Congress may at any time by a majority vote withdraw the right to limited membership from a territorial delegate. Cannon *v.* Campbell (1882) 2 Ellsworth's Digest of Contested Elections, 604.

[1] *Ex parte* Yarborough (1884) 110 U. S. 651.

[2] Art. I, sec. 1, par. 3.

[3] See Secs. 159 and 219.

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."

The provision contained in this section of the amendment for the reduction of representation in Congress has never been put into effect.

The Constitution called for an enumeration or census within three years after the first meeting of Congress, and within every subsequent term of ten years. It also declared that, "The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative."[1] Under the census of 1910 there was one Representative for every 212,407 inhabitants, and the number of inhabitants for each Representative will probably be increased under the 1920 census.[2]

The Constitution declares that,

"The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."[3]

[1] Art. I, sec. 2, par. 3. This paragraph further provided that "until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantation 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."

[2] Although a new census shows a State's right to a change in the number of Representatives, until Congress makes a new apportionment a State must get on with the old number. *In re* Lowe (1863) 1 Bartlett's Contested Elections, 418; State *v.* Boyd (1893) 36 Neb. 181. State districts for the election of Representatives are fixed by state legislation, but are to be composed of contiguous compact territory containing as nearly as possible an equal number of inhabitants. Act of Aug. 8, 1891, 37 Stat. 13. Redistricting may by state constitution be subjected to referendum. Davis *v.* Ohio (1916) 241 U. S. 565.

[3] Art. I, sec. 4, par. 1.

Congressional legislation now decrees that Representatives shall be elected in even years on the Tuesday next after the first Monday in November, and that vacancies may be filled by elections as prescribed by the laws of each State.[1] All votes for Representatives must be by written or printed ballots or by voting machine.[2]

§64. *Qualifications of Representatives.*

> "No person shall be a Representative who shall not have attained the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen."[3]

The age limit incorporated into this section was agreed to in the Convention without much discussion,[4] and, although there was difference of opinion as to whether the term of a Representative should be one, two, or three years, two years was quite early agreed upon.[5] It was first suggested that a candidate for Representative should have been a citizen for three years, but this was later increased to seven, although the question was frequently debated, and several different periods were advocated.[6] Different property and financial qualifications were strongly urged, but the Convention did not seem able to agree upon any of them, and they were finally left out.[7] Custom has established the practice of electing only Representatives who reside in the districts from which they are returned, and the statutes of several States add this qualification to those provided for in the Constitution. Other qualifications have also been

[1] "When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." *Const. of U. S.*, art. I, sec. 2, par. 4.

[2] U. S. Rev. Stat., secs. 25 to 27.

[3] *Const. of U. S.*, art. I, sec. 2, par. 2.

[4] Farrand, *The Records of the Federal Convention*, vol. i, pp. 221, 370, 375.

[5] *Ibid.*, vol. i, pp. 214, 220.

[6] *Ibid.*, vol. ii, pp. 213, 216, 265, 268 to 272, 281.

[7] *Ibid.*, vol. ii, 121 to 126, 225.

enacted by State legislation.[1] Such limitations have been held, however, not to be effective.[2] This view is undoubtedly correct. It is clearly the intention of the Constitution that all persons not disqualified by the terms of that instrument should be eligible to the federal office of Representative.

§65. *Choice of Speaker and Other Officers by the House of Representatives.* "The House of Representatives shall choose their Speaker and other officers. . . ."[3] The title "Speaker" used for the presiding officer of the House of Representatives is, of course, taken from the title given to the officer who presides over the English House of Commons. The House has also provided for a clerk, sergeant-at-arms, doorkeeper, postmaster, and chaplain. Each party chooses in caucus the nominees for these offices, and the nominees of the dominant party are elected. The Constitution does not define the powers and duties of the Speaker, but under the rules of the House his powers over legislation have been very great, and though they have been somewhat curtailed they are still very important in the matter of the appointment of committees and their chairmen, and in the power he has to recognize or to refuse to recognize those who desire to speak on any measure. He is an avowed partisan, and in this he differs from the Speaker of the House of Commons, who though put in office by a party maintains an impartial attitude, and is customarily reëlected at the beginning of each successive Parliament, even though the opposition may have come into power.[4]

[1] "The Legal Qualifications of Representatives," *3 Amer. L. Rev.*, 410 and 411.

[2] See the article just referred to, and Barney *v.* McCreery (1808) Clarke & Hall's Contested Elections, 167; Turney *v.* Marshall (1856) 1 Bartlett's Contested Elections, 167; Ohio *v.* Russell (1900) 10 Ohio Dec. 255.

[3] *Const. of U. S.*, art. I, sec. 2, par. 5. This section also gives the House the sole power of impeachment. This subject is dealt with elsewhere, see sec. 40.

[4] Dicey's *Law of the Constitution*, Introduction, p. liv.

§66. *Election and Terms of Senators.*[1] The problem of the constitution of the Senate was one of the most difficult which came before the Constitutional Convention, and there was long debate, fraught with very strong feeling, before the following statement, which seems to us so simple, was agreed to: "The Senate of the United States shall be composed of two Senators from each State, chosen by the legislatures thereof, for six years; each Senator shall have one vote."[2]

Four proposals for the choice of Senators were advanced: (1) That they should be chosen by the State Legislatures[3]; (2) that they should be chosen by the people, the country being divided into districts for this purpose[4]; (3) that they should be elected by the House of Representatives from persons nominated by the State Legislatures[5]; (4) that they

[1] It is interesting to compare the provisions in this and the next section with those on the same subjects in the laws of the British Dominions. In Canada the Senate represents equally the three divisions of Ontario, Quebec, and the Maritime Provinces. The Senators are appointed by the Governor-General for life. They must be thirty years of age, citizens having certain property qualifications, and residents of the province which they represent. They vote per capita. (British North American Act 1867, secs. 21 to 36.) In Australia there are six Senators from each State. They were formerly elected by the State Legislatures but are now elected at large in each State. The term of a Senator is six years, half of the Senators from each State retiring every three years. The qualifications of Senators and of their electors are the same as for Representatives. (See note *supra*, p. 156.) They vote per capita and not by States. (Australian Constitution Act, secs. 7, 13, 14, 16, 23.) The South African Act provided that eight Senators should be appointed by the Governor-General, and that eight should be elected by the Legislature of each State, each to hold office for ten years; that at the expiration of that time the South African Parliament might provide the method of election, but that if no such provision was made the original method be continued. Senators must be thirty years of age, electors in their States, resident in the Union for five years, and a British subject of European descent. They vote per capita. (South African Act 1909, secs. 24 to 26, 31.)

[2] Art. I, sec. 3, par 1.

[3] Farrand, *The Records of the Federal Convention*, vol. i, pp. 51, 58, 149.

[4] *Ibid.*, vol. i, pp. 52, 58, 149.

[5] *Ibid.*, vol. i, pp. 20, 46, 55, 61.

should be appointed by the President from persons similarly nominated.[1] The last proposition had no seconder, and the third early received an adverse vote. The relative advantages of popular election and election by state legislatures were fully debated,[2] but the feeling was very strong that a sufficient concession was being made to popular representation in the lower house, that the sovereignty of the States should be recognized in the method adopted for the election of Senators, and that in one house the sentiment of the States as distinguished from that of the people as a whole should be reflected. The result was a determination that Senators should be chosen by the legislatures of the several States.[3] During the century and a quarter which followed the adoption of the Constitution there was a complete change of sentiment on this subject and in favor of a popular choice of Senators. This sentiment first found expression in state laws or regulations of party organizations providing that the people should by popular vote indicate the choice of persons which they wished the legislatures to make for the senatorial office. This change in sentiment culminated, however, in the Seventeenth Amendment, adopted in 1913, which is as follows:

> "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof for six 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 Legislature."

The great battle in the Convention with regard to the Senate was waged over the question whether the representation in that House should be proportional, or whether the States should be equally represented. This question occupied the convention almost continuously from June

[1] Farrand, *The Records of the Federal Constitution*, vol. i, p. 151.

[2] *Ibid.*, vol. i, pp. 150 to 160, 404 to 408, 410 to 415.

[3] *Ibid.*, vol. i, pp. 149, 156, 157, 160, 480, for the votes cast on this proposition.

29th to July 16th, and stirred the delegates very deeply.[1] Proportional representation was desired by the large States, and in the votes taken during the early part of the debate obtained a bare majority.[2] From the outset, however, the small States declared that they would never agree to any plan except upon the basis of equal representation in the Senate.[3] The deadlock was finally broken by conceding equal representation in the Senate, but requiring that bills for raising and appropriating money and for fixing salaries should originate in the House of Representatives, and should not be amended in the Senate.[4] It was later agreed that two Senators should be chosen from each State,[5] and that they should vote per capita and not by States.[6] The term of Senators which was first proposed was seven years, but as the idea of rotation gained favor, it was proposed that the term should be four, six, or nine years. It was even urged by some that Senators should hold office during good behavior. Finally six years was agreed upon.[7]

Rotation in office of Senators was obtained by the following provision:

> "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

[1] Farrand, *The Records of the Federal Convention*, vol. i, p. 460 to vol. ii, p. 20.

[2] *Ibid.*, vol. i, pp. 151, 152, 155, 193, 201.

[3] *Ibid.*, vol. i, p. 201.

[4] *Ibid.*, vol. ii, pp. 13 to 16. This latter provision was later modified to provide that, "All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills." Art. I, sec. 7, par. 1.

[5] *Ibid.*, vol. ii, pp. 85, 94.

[6] *Ibid.*, vol. ii, pp. 95, 243.

[7] *Ibid.*, vol. i, pp. 218, 291, 396, 408, 409, 418, 420 to 434.

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."[1]

As we have seen above in connection with Representatives, it is provided in the Constitution that, "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."[2] Congress did in 1866 enact regulations for the election of Senators,[3] but these were superseded by the Seventeenth Amendment. The only congressional statute now in force on the subject is that at the regular election held in a State next preceding the expiration of the term of one of its Senators, his successor shall be chosen.[4] In 1910 a Corrupt Practices Act was passed by Congress which forbade candidates for the House or the Senate to contribute or cause to be contributed more than a specified amount in procuring their nomination or election. In *Newberry v. United States*[5] the Supreme Court in the trial of Senator Newberry held that the Constitution gives Congress no control of nominations but only of elections of Representatives and Senators, and that the Statute in question was unconstitutional.

§67. *Qualifications of Senators.* "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

[1] Art. I, sec. 3, par. 2. The last part of this paragraph is changed by section 2 of the Seventeenth Amendment, as follows: "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."

[2] Art. I, sec. 4, par. 1.

[3] Act of July 26, 1866, 14 Stat. 243.

[4] Act of June 4, 1914, chap. 103, 38 Stat. 384.

[5] (1921) 41 Sup. Ct. R. 469.

who shall not, when elected, be an inhabitant of that State for which he shall be chosen."[1] The age limit of thirty years was adopted without debate. Different property and financial qualifications were suggested, but the Convention did not seem able to agree upon any of them, and they were finally dropped.[2] It was first proposed that a Senator should be a citizen of the United States. Then the period of four years was suggested. Next it was proposed to increase this period to fourteen years, and then to ten, both of which proposals were defeated. After considerable debate nine years were agreed upon, it being felt that the period should be longer than that fixed for Representatives.[3] It is as clear that States have no more right to add to the constitutional qualifications of Senators than they have to add to those for Representatives.[4]

§68. *Officers of the Senate.* The Senate, unlike the House of Representatives, does not elect its presiding officer, the Constitution providing that, "The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided."[5] The Vice-President has no vote on ordinary occasions, does not appoint committees, and has no part in the general business of the Senate. His position is a peculiar one; he

[1] Art. I, sec. 3, par. 3.

[2] Farrand, *Records of the Federal Convention*, vol. ii, pp. 121 to 126.

[3] *Ibid.*, vol. ii, pp. 141, 155, 228, 235 to 239, 266, 272. This qualification of citizenship prevented Albert Gallatin from occupying the seat in the Senate to which he was elected in 1793. Taft's Senate Election Cases, 57. It was held in the case of H. L. Revels (1870) Taft's Senate Election Cases, 312, that notwithstanding the decision in the Dred Scott case (1857) 19 Howard 393, a person of partly African blood could qualify in the Senate without waiting for the lapse of nine years after the adoption of the Fourteenth Amendment.

[4] See *supra*, sec. 64, and see the case of Trumball (1856) Taft's Senate Election Cases, 148.

[5] Art. I, sec. 3, par. 4. See *The Federalist*, No. 68, and *Story on the Constitution* (5th ed.), secs. 735 to 740. The first time when a Vice-President cast a deciding vote was in the first Congress on the question of the President's right of removal of federal officers. See sec. 29. The power has proved important on a number of occasions.

has very little part in the government unless he succeeds to the presidential office, when he at once gains great power and importance. It has been urged that he should sit as a member of the cabinet, and President Harding upon his election decided to act upon this suggestion. It is further provided that, "The Senate shall choose their 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."[1]

§69. *Legislative Sessions of Congress.* The Constitution requires that, "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 another day."[2] Congress has not passed such a law, and a Congress which is elected in November does not meet in regular session until the December of the year following. The President, however, has power "on extraordinary occasions" to "convene both houses or either of them,"[3] and under this authority Presidents often do summon new Congresses in special session before the time fixed by the Constitution.

The Constitution declares that, "a majority of each [house] 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."[4] The Constitution leaves to each house to provide how the presence of a quorum shall be determined, and the Supreme Court has held that it is proper to accomplish this end by having the clerk of the house note and record in the Journal the names of those who are present but who do not vote.[5] In providing for compelling the

[1] Art. I, sec. 3, par. 5. The next two paragraphs give to the Senate the power to try impeachments. The subject of impeachments is dealt with in sec. 40.

[2] Art. I, sec. 4, par. 2.

[3] Art. II, sec. 3.

[4] Art. I, sec. 5, par. 1.

[5] United States *v.* Ballin (1892) 144 U. S. 1.

attendance of members the delegates to the Constitutional Convention undoubtedly had in mind the difficulty which the Continental Congress experienced in procuring the attendance of sufficient members to transact business.

"Each house may determine the rules of its proceedings . . ."[1] This clause gives to each house the power to make any rules for the conduct of its business which are not in conflict with constitutional provisions, and which are not wholly unreasonable for the attainment of the results sought.[2] Under this authority the appointment of committees, the discussion of pending legislation, and all the other proceedings of both houses are regulated.

In order to keep the public informed of what is going on in Congress it is required that,[3] "each house shall keep a Journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy . . ." The original suggestion of the Committee of Detail was that the House should keep and publish a Journal of its proceedings but that the Senate should only keep such a Journal when acting in a legislative capacity, and in debate it was suggested that both houses should keep a Journal of their proceedings, but that the Senate should not be required to publish its proceedings when not acting in its legislative capacity. Finally, however, the provisions were made uniform, leaving it to the judgment of each house to determine what parts of its Journal should be published.[4]

The same paragraph goes on to declare that, "the yeas and nays of the members of either house on any question shall, at the desire of one fifth of those present, be entered on the Journal." The object of this provision is, of course, to put the votes of the members on record. At times it is a distinct

[1] Art. I, sec. 5, par. 2.

[2] United States *v.* Ballin (1892) 144 U. S. 1.

[3] Art. I, sec. 5, par. 3.

[4] Farrand, *The Records of the Federal Convention*, vol. ii, pp. 156, 166, 247, 255, 259. The Articles of Confederation, art. IX, called for the publication of the Journal of Congress monthly, "except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy."

advantage for the public to know just how the various members have voted, but this provision has undoubtedly been frequently abused, being taken advantage of for the sole purpose of causing delay.[1]

§70. *Determination of Elections, Returns and Qualifications of Members.* The Constitution makes each house "the judge of the elections, returns, and qualifications of its own members."[2] Obviously there must be vested in some tribunal the authority to examine into the validity of elections. The only question is whether that authority should be confided to the legislative body itself or to the courts. In confiding to the houses of Congress the right to judge of the elections and qualifications of their own members the framers of the Constitution were following the practice of the English House of Commons,[3] but in 1868 that practice was abolished in England, and the jurisdiction in election contests was transferred to the courts.[4] The argument in favor of the constitutional provision is that each house is naturally most zealous for its own purity, and so will be most likely to carefully enforce the constitutional and statutory provisions with regard to the qualifications and elections of its members.[5] A slight consideration of the subject, however, would seem to justify the conclusion that all election contests would much better be confided to the jurisdiction of the judiciary. In the first place the consideration of election contests by the houses of Congress consumes time which should be devoted to legislative business, and their constitution is not such as to make them as

[1] By the Articles of Confederation, art. IX, any delegate could call for a record of the yeas and nays. A similar provision was suggested in the Constitutional Convention but voted down. It was also suggested that the provision be struck out entirely, and also that one fifth of the House might call for the yeas and nays, and that in the Senate any member might record his dissent. Farrand, *The Records of the Federal Convention*, vol. ii, pp. 246, 255.

[2] Art. I, sec. 5, par. 1.

[3] 1 *Black Com.*, 163, 178.

[4] See *The Laws of England*, vol. xii, p. 408 *et seq.*

[5] *Story on the Constitution* (5th ed.), sec. 833.

well qualified as a court to examine and determine questions of fact. Furthermore the determination of an election contest by the legislative body is much too apt to be affected by the party affiliation of the person in question.[1] A transfer of these functions, however, to the judiciary could only be accomplished by an amendment to the Constitution.[2]

§71. *Punishment of Members and of Those Guilty of Contempts.* "Each house may . . . punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member."[3] That each house of Congress should have the power to maintain order among its own members is clear, and the houses are, therefore, very properly vested with power to punish their members for disorderly behavior. The Supreme Court has said: "We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order."[4] The proposal with regard to the expulsion of members as it came from the Committee of Detail would have allowed such expulsion by a majority vote, but the clause was changed to its present form to prevent the expulsion of an opponent by a faction of either house.[5] There are no limitations put upon this power by the Constitution, and proceedings for expulsion have been based upon various allegations of misconduct. William Blount was expelled from the Senate in 1797 for stirring up the Indians and interfering with the work of the government

[1] *Miller on the Constitution of the United States*, 193.

[2] In Canada election contests were originally heard by a committee of the House of Commons, but are now tried in the courts. Egerton, *Federations and Unions in the British Empire*, 133, note. Questions as to the qualifications of Senators in Canada are heard by the Senate. British North American Act 1867, sec. 33. In Australia election contests were originally determined by each house, but now are tried in the High Court. Australia Constitution Act, sec. 47; Egerton, *Federations and Unions in the British Empire*, 199, note.

[3] *Const. of U. S.*, art. I, sec. 5, par. 2.

[4] Kilbourn *v.* Thompson (1880) 103 U. S. 168, 189.

[5] Farrand, *The Records of the Federal Convention*, vol. ii, pp. 156, 166, 246, 254.

agents among them.[1] Thirteen Senators were expelled during the Civil War for adhering to, or supporting the Confederacy.[2] Proceedings were brought in 1808 to expel John Smith from the Senate for being a party to Aaron Burr's schemes for which the latter was tried for treason. Burr having been acquitted, however, two thirds of the Senate could not be brought to concur in Smith's expulsion.[3] Proceedings were instituted in 1862 to expel James F. Simmons from the Senate for corrupt practices in connection with government contracts, but he resigned before the Senate could act, and the proceedings were dropped.[4]

In the Case of *Anderson v. Dunn*[5] action was brought against the Sergeant-at-Arms of the House of Representatives for assault and battery and false imprisonment, to which he pleaded that he had arrested the plaintiff under an order of the House declaring that the plaintiff had been guilty of "a breach of the privileges of the House, and of a high contempt of the dignity and authority of the same"; that he had brought the plaintiff before the bar of the House; that the plaintiff had been found guilty, and was ordered reprimanded by the Speaker and discharged, which was done. Upon demurrer this plea was held good, the Supreme Court declaring that the only question was "whether the House of Representatives can take cognizance of contempts committed against themselves under any circumstances?" The nature of the plaintiff's acts do not appear, and all that was decided was that it is not true that there are no circumstances under which a person not a member may be punished for contempt by the houses of Congress. In the case of *Kilbourn v. Thompson*[6] the power of the houses of Congress to punish non-members for contempt was much more fully discussed. The court expressed the opinion that in election disputes or in im-

[1] Taft's Senate Election Cases, 74. With regard to the impeachment of Blount see sec. 40.

[2] *Ibid.*, 197, 198, 213, 215, 217.

[3] *Ibid.*, 79.

[4] *Ibid.*, 237.

[5] (1821) 6 Wheaton 204.

[6] (1880) 103 U. S. 168.

peachment trials, in which it would be proper for the house in question to call witnesses, witnesses would probably be subject to the same liability for contempts as they would be before a judicial tribunal, but the court declared that,

> "Whether the power of punishment in either house by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either house, unless his testimony is required in a matter into which the house has jurisdiction to inquire and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen."[1]

Kilbourn's alleged contempt consisted of his refusal to answer certain questions before a committee of the House which was investigating the affairs of a business concern of which the United States was a creditor. Since the only method of enforcing the government's claim would be through the courts, and there seemed no legislative object to be served by the committee's investigation, the Supreme Court held that the House had no authority to punish Kilbourn for contempt.[2]

[1] Kilbourn *v.* Thompson (1880) 103 U. S. 190.

[2] In support of the right of the House to punish in this case, was urged the authority exercised in this regard by the English Parliament. The court pointed out that both the House of Lords and the House of Commons are but branches of the ancient High Court of Parliament, which exercised both legislative and judicial functions, and have as such exercised the right of punishing for contempts, while the houses of Congress have only such powers as are expressly or by reasonable implication granted by the Constitution, and are expressly forbidden to deprive any person of liberty without due process of law. Furthermore the court pointed out that even the power of the houses of Parliament to punish for contempt extends only to matters of which it has jurisdiction, and that the question of its jurisdiction is a question for the courts. Stockdale *v.* Hansard (1839) 9 Ad. & Ell. 1. It is interesting to note, as pointed out by the Supreme Court (pp. 186 to 189) that the Privy Council has held that the dominion legislatures have not all the powers of Parliament, but only the powers granted to them, and that the power to punish for contempt is not necessarily inherent in a legislative body

By federal statute it is made a misdemeanor for a person called as a witness by either house to wilfully make default or to refuse to answer questions put to him. A witness having refused to testify in the course of a senatorial investigation into the alleged misconduct of certain members of that body, which investigation might have led to expulsion, was indicted and held for trial. Upon petition for a writ of habeas corpus it was refused.[1] The Supreme Court held that the Senate had the right to conduct such an investigation under its power to expel members, and could, therefore, have punished the recalcitrant witness for contempt, but that Congress might also make such a refusal to testify a misdemeanor.

In the case of *Marshall v. Gordon*[2] the question of the implied power of the houses of Congress to punish for contempt was fully considered by Chief Justice White, and it was held that "from the power to legislate given by the Constitution to Congress there was to be implied the right of Congress to preserve itself, that is, to deal by way of contempt with direct obstructions to its legislative duties."[3] The instances of punishment by the houses of Congress for contempt, which are approved by the court, are instances of "either physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel."[4] It would seem, then, from this opinion, although it is nowhere stated in so many words, that refusal to testify before a

---

and does not belong to the dominion legislatures. Kielly *v.* Carson (1841) 4 Moore's P. C. 63; Fenton *v.* Hampton (1858) 11 Moore's P. C. 347; Doyle *v.* Falconer (1866) L. R. 1 P. C. 328.

[1] *In re* Chapman (1897) 166 U. S. 661.

[2] (1917) 243 U. S. 521.

[3] *Ibid.*, 537.

[4] *Ibid.*, 543.

congressional committee, which is investigating for the purpose of framing legislation, may be punished as a contempt. It is declared,[1] however, that the power even when applied to subjects which justify its exercise "is limited to imprisonment and such imprisonment may not be extended beyond the session of the body in which the contempt occurred."[2]

§72. *Adjournment.* "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."[3] The reason for this provision is obvious. If either house could, without the consent of the other, adjourn for an indefinite period the legislative business of the government could by the act of one house be brought to a standstill. The length of a congressional session lies entirely in the discretion of Congress, except that in case of disagreement between the two houses with respect to the time of adjournment, the President may adjourn them to such time as he shall think proper.[4] The President may also, as we have seen, convene either house or both houses in special session.[5]

§73. *Compensation of Members of Congress.* Two questions with regard to compensation of members of Congress were debated at some length in the Constitutional Convention, namely, whether such compensation should come from the States, as was true under the Articles of Confederation,[6] or from the federal treasury, and whether the amount of compensation should be fixed by the Constitution, or left to be determined from time to time by law.[7] There was strong support in the Convention for the proposal to have members

[1] Marshall *v.* Gordon (1917) 243 U. S. 542.

[2] With regard to the attitude of the state courts on the subject of the legislative power to punish for contempts see *6 R. C. L.*, 521; *7 Ann. Cas.* 877, note.

[3] *Const. of U. S.*, art. I, sec. 5, par. 4.

[4] *Ibid.*, art. II, sec. 3. This power has never been exercised.

[5] *Ibid.*

[6] Art. V.

[7] Farrand, *The Records of the Federal Convention*, vol. i, pp. 371 to 375, vol. ii, pp. 290 to 293.

of Congress paid by their respective States,[1] but the arguments that this would make them too dependent on the States, and that it would lead to unfortunate differences in their salaries, finally prevailed. Also the practical difficulties of fixing by constitutional provision the compensation of members of Congress in such a way as not to become wholly inadequate in the future, led to a decision to leave the matter of compensation to Congress itself. The constitutional provision finally adopted is as follows: "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."[2]

§74. *Immunities of Members of Congress.* The early English law recognized in the members of Parliament not only a privilege of speech, and a personal immunity from arrest, but also an equal immunity of their domestics from arrest, and an immunity of their lands and goods from legal process. These latter immunities of domestics, lands and goods were taken away by statute in 1770, and personal immunity never extended to cover arrest for crime. Personal immunity from arrest extended not only during the sessions of Parliament, but for a reasonable time before and after each session.[3] The privilege of speech was guarantied in the Bill of Rights where it was declared, "that the freedom of speech, and debates, and proceedings in parliament, ought not to be impeached or questioned in any court or

[1] See particularly the records of votes on different dates, Farrand, *The Records of the Federal Convention*, vol. i, pp. 383, 385, 391, 428, 433, and the report of the "Committee of Detail," *ibid.*, vol. ii, pp. 166, 180. It was even suggested that Senators should receive no compensation as it was desired that they should be drawn from persons having substantial fortunes. *Ibid.*, vol. i, p. 219.

[2] Art. I, sec. 6, par. 1. For the statutory provisions for compensation of Senators and Representatives at different periods, see *Watson on the Constitution*, 305.

[3] I *Black. Comm.*, 164 to 167. Blackstone says that the immunity from arrest extended for forty days before and after each session, but see the criticism of this statement in Hoppin *v.* Jenckes (1867) 8 R. I 453.

place out of parliament."[1] The privileges of speech and of person were guarantied to delegates to the Continental Congress,[2] and it was natural that they should be incorporated into the Constitution. They are provided for in these words:

> "They [Senators and Representatives] shall, in all cases except treason, felony, and breach of the peace, be privileged from arrest, during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place."[3]

The provision as to privilege from arrest applies as soon as a person is elected to Congress and before he takes his seat.[4] It is effective during a reasonable time before and after a session of Congress, during which a member is going to or returning from the seat of government.[5] The privilege is not now of great importance since "treason, felony, and breach of the peace" have been declared to cover all criminal offenses,[6] and there is comparatively little provi-

[1] This declaration in the Bill of Rights was the culmination of a long struggle between Crown and Parliament, in which the latter consistently claimed the privilege in question, which, however, was often violated by the Crown, particularly during the period of the Tudors. This history is most interestingly sketched in "Absolute Immunity in Defamation: Legislative and Executive Proceedings," by Van Vechten Veeder, 10 *Col. L. Rev.* 131, 132 to 134. The legislative bodies in Canada and Australia have the same privileges as attach to the British Parliament. *Ibid.*, 134 n. Similar privileges are guarantied in practically all other civilized countries. *Ibid.*, 131 n.

[2] "Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace." Art. V.

[3] Art. I, sec. 6, par. 1.

[4] *Story on the Constitution* (5th ed.), sec. 864.

[5] *Ibid.*; Dunton *v.* Halstead (1840) 2 Pa. L. J. R. 450; Miner *v.* Markham (1886) 28 Fed. 387.

[6] Williamson *v.* United States (1908) 207 U. S. 425.

sion in the law at present for arrest in civil actions. Although there has been some variety of opinion as to whether the constitutional privilege extends to the service of a summons in a civil suit, it would seem clear that it was not intended to do so.[1]

The privilege of freedom of speech in legislative assemblies is clearly one of the prime essentials to a free government, and it has been declared that the constitutional guaranty of this privilege should be liberally construed.[2] It, therefore, covers reports, resolutions, and votes, as well as ordinary speeches and debates, and whether occurring in the full assembly or in committee.[3] It does not, however, protect acts or words, otherwise illegal, though done or spoken by a member of the legislature within the legislative halls, if not in relation to business before it,[4] and it would seem not to give immunity for the publication by a member outside of libelous matter which was privileged within the legislative chamber.[5]

§75. *Disability of Members of Congress to Hold other Offices.* The propriety of members of Congress holding other offices was much debated in the Constitutional Convention, and resulted in several close divisions. After some discussion in the Committee of the Whole that committee reported to the Convention a resolution that members of both houses of Congress be

> "ineligible to any office established by a particular State or under the authority of the United States (except those peculiarly belonging to the functions of the first branch)

[1] Kimberly *v.* Butler (1869) Fed. Cas. No. 7,777; Merrick *v.* Giddings (1879) 1 M. & M. (Dist. of Col.) 56.

[2] Coffin *v.* Coffin (1808) 4 Mass. 1. Kilbourn *v.* Thompson (1880) 103 U. S. 168.

[3] *Ibid.*

[4] Coffin *v.* Coffin (1808) 4 Mass. 1, approved in Kilbourn *v.* Thompson (1880) 103 U. S. 168, 203.

[5] *Story on the Constitution* (5th ed.), sec. 866; Veeder, "Absolute Immunity in Defamation: Legislative and Executive Proceedings," *10 Col. L. Rev.*, 131, 136.

during the term of service, and under the national government for the space of one year after its expiration."[1]

This was undoubtedly suggested by the similar provision in the plan proposed by Randolph.[2] A sharp difference of opinion at once arose as to the wisdom of any plan for disqualifying members of Congress for holding office. On the one hand such men as Gorham, Wilson, Hamilton, and Pinckney felt that any such provision would discourage good men from entering the legislature, and would constitute an unjustifiable reflection upon the integrity of members of Congress, while on the other hand men such as Mason, Butler, Gerry, and Sherman thought such a safeguard necessary against corruption and intrigue.[3] A motion to strike out this whole provision was lost by an even division, though upon a later vote to retain it its supporters gained a substantial majority.[4] After some consideration the prohibition to hold offices under state governments was struck out by a vote of eight States to three.[5] Later the Committee of Detail, to which the subject had been referred reported a provision making members of Congress ineligible to any office under the United States during their respective terms, and, in case of Senators, for one year after the expiration of their terms.[6] The subject was further debated, and one suggestion in particular was made, namely, that the proposed wording would prevent members of Congress being appointed to military and naval positions in times of emergency.[7] Consideration of the whole matter was postponed, however, and finally referred to the Committee of Eleven, which proposed that members of Congress should be ineligible to hold civil offices under the United States during their terms and that no person holding any office under the United States

[1] Farrand, *The Records of the Federal Convention*, vol. i, p. 228.
[2] *Ibid.*, p. 20.
[3] *Ibid.*, vol. i, pp. 375, 379, vol. ii, pp. 283 to 289, 489 to 492.
[4] *Ibid.*, vol. i, pp. 377, 390.
[5] *Ibid.*, vol. i, pp. 383, 391, 419, 429, 434.
[6] *Ibid.*, vol. ii, p. 180.
[7] *Ibid.*, pp. 282, 289.

should be a member of Congress while continuing to hold office under the United States,[1] thus giving effect to the suggestion with regard to military and naval offices, and eliminating the special restriction upon Senators contained in the previous report.[2] Upon consideration of this proposed provision by the Convention it was amended so as to restrict ineligibility of members of Congress to appointment to civil offices under the United States which are created, or whose emoluments are increased during the respective terms of the members.[3] As put into shape by the Committee of Style and adopted by the Convention the provision on this subject reads:

> "No Senator or Representative shall, during the time for which he was elected be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office."[4]

When President Taft was elected he wanted Senator Knox to act as his Secretary of State, but the salaries of members of the Cabinet had been increased while Senator Knox was a member of the upper house. To meet this difficulty the salary of the Secretary was by law reduced to the figure at which it stood when Mr. Knox entered the Senate. It is believed that this was within the letter, as well as being clearly within the spirit of the constitutional regulation. It is, of course, clear from the language of the Constitution that a Senator or Representative is, after the expiration of his term, eligible to any office, even though it was created or its emoluments were increased while he was

[1] Farrand, *The Records of the Federal Convention*, vol. ii, p. 483.

[2] *Ibid.*, vol. i, pp. 383, 391, 419, 429, 434 for consideration by the Convention of the advisability of extending ineligibility beyond the end of a member's term.

[3] *Ibid.*, vol. ii, p. 487. This change was first suggested by Madison. *Ibid.*, vol. i, p. 386.

[4] Art. I, sec. 6, par. 2.

in Congress. Though there is no prohibition of the appointment of a member of Congress to a military or naval office, his acceptance of such a commission vacates his seat in the house of which he was a member, since no person holding any office under the United States may be a member of Congress.[1] The House of Representatives has declared in the case of a contested election that a person does not become a member of Congress upon election, but only upon being sworn in and taking his seat, and that, therefore, one who has been elected to Congress need not resign another office held under the United States until he takes his seat.[2] It seems that a position to constitute an "office" in the constitutional sense must have a tenure of some duration, with emoluments and substantial duties, and that positions which are merely transient, occasional, or incidental are not within the term and so are not constitutionally incompatible with service in Congress.[3]

[1] The Case of Archibald Yell (1847) Bartlett's Contested Elections in Congress, 92.

[2] Hammond *v.* Herrick (1817) Clarke & Hall's Contested Elections in Congress, 287. The House gave extended consideration to this case and the votes taken were very close.

[3] House Report No. 2205, 55th Cong. 3d sess.; Willoughby on the Constitution, sec. 231.

CHAPTER VII

TAXATION AND OTHER FISCAL POWERS OF CONGRESS

§76. *Power to Tax.* One of the principal weaknesses of the national government under the Articles of Confederation was its lack of power to levy taxes. National expenses were to be defrayed out of a common treasury, which was to be supplied by the several States in proportion to the occupied land in each State, upon requisition by Congress, but the States expressly reserved the right to levy the taxes for this purpose,[1] and were in fact very delinquent in making their contributions.[2] To remedy this situation the important provision was placed in the Constitution to the effect that "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."[3] This gives the national government the power to act directly upon individuals in the raising of money, instead of being compelled to act through the States, and the terms used are sufficiently inclusive to cover all forms of taxation. Except for specific constitutional limitations put upon the taxing power, Congress may lay taxes upon any individual, any property, and any occupation or privilege, and there is apparently no limit to the amount which the government may take in taxes. Marshall declared, using the words which had just been spoken by Webster as counsel: "The power to tax involves the power to destroy."[4]

[1] Articles of Confederation, art. VIII.

[2] *The Federalist*, Nos. 15, 30.

[3] Art. I, sec. 8, par. 1.

[4] M'Culloch *v.* Maryland (1819) 4 Wheaton 316, 431 (Marshall), 327 (Webster).

"The only security against the abuse of this power is found in the structure of the government itself."[1]

§77. *Constitutional Purposes of Taxation.*[2] It might at first be considered reasonable that the power of the national government to tax, and to use money raised by taxation should be exercised only in connection with those other powers which are delegated to it by the Constitution. President Monroe, in a memorandum submitted by him in connection with one of his vetos,[3] tells us that this was originally his opinion, but that upon further consideration he had come to the conclusion that "Congress have an unlimited power to raise money, and that in its appropriation they have a discretionary power, restricted only by the duty to appropriate it to purposes of common defense and of general not local, national, not state, benefit." There seems no ground to doubt that this conclusion was correct in light of the declaration in the Constitution that Congress can raise money by taxation "to pay the debts and provide for the common defense and general welfare of the United States," and no doubt has been expressed on this point by the Supreme Court.

On the other hand it is clear that Congress has no constitutional right to levy taxes except for public purposes. It would seem to be the obvious meaning of the constitutional provision quoted above that the power of taxation is only given for the purpose of paying the debts and providing for the common defense and general welfare of the United States. But aside from the reasonableness of this interpretation there is the more fundamental consideration that the taxing power is vested in the state for the benefit of the public, and, therefore, can only be used for a

[1] M'Culloch *v.* Maryland (1819) 4 Wheaton 316, 428.

[2] Debts contracted under the Confederation were made binding on the United States by the Constitution (art. VI, par. 1), and the Constitution declares that debts incurred by the United States for the suppression of rebellion at the time of the Civil War, including pensions and bounties, shall not be questioned. (Fourteenth Amendment, sec. 4.)

[3] President Monroe's views are quoted at length in Willoughby on the Constitution, 589 to 592.

public purpose. As is said by Judge Cooley: "Taxes are defined to be burdens or charges imposed by the legislative power upon persons or property, to raise money for public purposes." "Taxation having for its only legitimate object the raising of money for public purposes and the proper needs of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized."[1] To take property by federal taxation for a private purpose would clearly be a taking "without due process of law," contrary to the Fifth Amendment.[2] This principle has been often applied with regard to the States under an identical provision in the Fourteenth Amendment.[3] Federal taxation is, however, not generally vulnerable at this point since taxes are generally not levied by the United States for particular purposes, but to be applied to the expenses of the government as a whole. Some appropriations by the national government might, perhaps, be open to attack as putting money raised by taxation to a private purpose, but there has seemed to be no inclination to bring such attacks before the courts. The courts are undoubtedly prepared to allow to Congress the widest discretion in this regard. In a case where money had been appropriated by Congress to the payment of claims not legal in their character, but based merely upon moral or honorary considerations, the Supreme Court held that "debts," for which Congress may lay taxes, include such claims, and declared that the decision of Congress "recognizing such a claim and appropriating money for its payment can rarely, if ever, be the subject of review by the judicial branch of the government."[4]

[1] *Constitutional Limitations* (7th ed.), 678, 696.

[2] "No person . . . shall be deprived of life, liberty, or property without due process of law."

[3] See sec. 249.

[4] United States *v.* Realty Co. (1896) 163 U. S. 427, 444. In this case the court says (p. 440): "It is unnecessary to hold here that Congress has power to appropriate the public money in the treasury to any purpose whatever which it may choose to say is in payment of a debt or for purposes of the general welfare. A decision of that question may be

§78. *Taxation for Regulation.* Clearly the theory of taxation is that it is for the purpose of raising revenue to meet public expenses, but it is also used frequently for purposes of regulation. Even though a tax is obviously levied for the main or sole purpose of regulating a business, if Congress might, under one of its other powers, have regulated the business directly, there is no constitutional objection to its accomplishing the desired regulation through the instrumentality of taxation. So in *Veazie Bank v. Fenno*[1] the Supreme Court upheld a prohibitive tax on the notes of state banks, on the ground that Congress having,

> "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. . . . Viewed in this light, . . . we cannot doubt the constitutionality of the tax under consideration."

In a later case a tax of fifty cents levied upon owners of vessels for every passenger brought from a foreign port was attacked on the ground that its purpose was not to raise money for the common defense or for the general welfare, but the Supreme Court replied that

> "the true answer to all these questions is, that the power exercised in this instance is not the taxing power. The burden imposed on the ship-owner by this statute is the mere incident of the regulation of commerce, of that branch of foreign commerce which is involved in immigration. . . . If this is an expedient regulation of

postponed until it arises." In Field *v.* Clark (1892) 143 U. S. 649, 695, the question was raised as to whether bounties constituted an unconstitutional use of national funds, but was not decided. With regard to the right of Congress to attach conditions to appropriations of money for the payment of private claims, see Capital Trust Co. *v.* Calhoun (1919) 250 U. S. 208, Calhoun *v.* Massie (1920) 253 U. S. 170.

[1] (1869) 8 Wallace 533, 549.

commerce by Congress, and the end to be attained is one falling within that power, the Act is not void because, within a loose and more extended sense than was used in the Constitution, it is called a tax."[1]

It is clear that protective features in tariffs might be justified under this doctrine even if it were shown that they were enacted purely for protection and not at all for revenue.

But this doctrine will not apply in cases where the regulation in question is of a transaction whose regulation could not be justified under any constitutional power of the national government other than that of taxation—as, for instance, the manufacture of oleomargarine, or the dealing in futures. In *McCray v. United States*[2] the court had before it the question of the constitutionality of a federal statute imposing a tax of ten cents a pound upon oleomargarine colored to look like butter. There is no power under which Congress can directly prohibit the manufacture of such an article, and it was contended that the tax imposed would prevent such manufacture, that this was its purpose, and that the statute was therefore unconstitutional. The court, however, held that the manufacture of oleomargarine is a legitimate subject of an excise tax, and that it had no authority to inquire into the motive with which Congress imposes a tax, and, further, that no lack of due process can result from the selection made of the subjects of such taxation. In a later case in a lower federal court it was said of a federal tax on cotton futures that

"everyone who has studied the investigations, reports, and discussions preceding and producing the passage of the act knows that nothing was further from the intent or desire of the lawmakers than the production of revenue."

[1] Head Money Cases (1884) 112 U. S. 580, 595, 596.

For a somewhat similar position with regard to state legislation see a note to sec. 175, with regard to charges based upon tonnage.

[2] (1904), 195 U. S. 27.

Yet a revenue was produced and apparently counsel on both sides agreed that the law was a revenue law within the constitutional meaning. The district judge compared the case with *McCray v. United States*, and seemed to think that the latter case would be a controlling authority for holding the statute under consideration to be within the constitutional power of Congress to enact.[1] The statute was held unconstitutional, however, because it was a revenue measure and originated in the Senate contrary to the constitutional prohibition.

The Supreme Court has now before it the question whether a federal tax of 10 per cent. of the net profits received for the sale of products of establishments employing child labor is constitutional,[2] the statute being obviously for the purpose of preventing the employment of children in manufacturing establishments. It would seem difficult to distinguish the case from *McCray v. United States*.

§79. *Direct Taxes.* It is provided in the Constitution that, "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."[3] A capitation or poll tax is one levied directly upon persons. The determination of the question what taxes are direct has run an interesting course through the decisions of the Supreme Court. In an early case it was declared that a tax on carriages was not a direct

[1] Hubbard *v.* Lowe (1915) 226 Fed. 135, 137.

[2] Act of Feb. 28, 1919, 40 Stat. 1138. This statute is particularly interesting in view of the fact that Congress attempted to mitigate the child labor evil which exists in some of our States under its power over interstate commerce, but its attempt was held unconstitutional. Hammer *v.* Dagenhart (1918) 247 U. S. 251. See sec. 91.

[3] Art. I, sec. 9, par. 4. It was also originally provided (art. I, sec. 2, par. 3) that, "Representatives and direct taxes shall be apportioned among the several States . . . according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other persons." The latter part of the provision, of course, lost its significance when the Thirteenth Amendment abolished slavery.

tax.[1] It was said that, since direct taxes are to be apportioned according to population as shown by the census, the Constitution could only have been meant to class as direct taxes such as are apportionable, and that the subject taxed must, therefore, be the determining factor in each case. Since apportionment could not reasonably be applied in a tax on carriages the court held that a tax on carriages was not a direct tax. Further the suggestion was made that probably the only direct taxes are taxes on land and capitation taxes. In *Scholey v. Rew*[2] the Supreme Court held that a tax on succession to real estate was not a direct tax but was in the nature of an excise upon the privilege of taking by inheritance. In the case of *Springer v. United States*[3] an income tax was upheld by a unanimous court on the ground that it was not a direct tax, the basis of the court's decision being "that *direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate."[4] However, in *Pollock v. Farmers' Loan and Trust Company*[5] the question of the constitutionality of a federal income tax not levied in proportion to the census came again before the Supreme Court, and was elaborately argued, Joseph H. Choate, James C. Carter, and W. D. Guthrie being among the counsel. The court reviewed the whole subject of taxation with the greatest care, and came to the conclusion that a tax upon personal property is a direct tax as well as a tax upon realty, thus in effect overruling *Hylton v. United States*, *supra*, and that a tax upon the income from realty and a tax upon the income from personalty are in fact taxes upon

[1] Hylton *v.* United States (1796) 3 Dallas 171.

[2] (1874) 23 Wallace 331.

[3] (1880) 102 U. S. 586.

[4] *Ibid.*, 602. The court in reaching this conclusion relied upon Hylton *v.* United States, *supra*, and upon Pacific Ins. Co. *v.* Soule (1868) 7 Wallace 433, and also Veazie Bank *v.* Fenno (1869) 8 Wallace 533, in which by use of the same definition taxes, respectively, upon the receipts of insurance companies, and upon bank notes of state banks, were held not to be direct.

[5] (1895) 157 U. S. 429 and (1895) 158 U. S. 602.

the property from which the income is derived, and so a direct tax. Two justices dissented from the decision with regard to income from real estate, and four justices dissented from the decision with regard to income from personal property. Here we have a striking reversal by the Supreme Court of its position with regard to the meaning of "direct taxes," and one of very great importance.

Within a short time the court had occasion to point out the distinction between a direct tax and an excise in the case of *Nicol v. Ames.*[1] That case involved the validity of a tax upon each sale or contract to sell at any exchange or board of trade measured by the value of the sale. The court held that this was not a tax upon the thing sold, nor upon the income from such sale, but an excise upon the privilege of selling at the places mentioned. In this decision the court was unanimous.[2] Somewhat later the court had before it a case involving the constitutionality of a federal corporation tax measured by the income of each corporation involved, and the court was unanimously of the opinion that this was not a direct tax but an excise upon the privilege of doing business in a corporate capacity.[3] Distinguishing its earlier decision that an income tax is a direct tax, the court said[4]:

> "The *Pollock* case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal,

[1] (1899) 173 U. S. 509.

[2] In Spreckles Sugar Ref. Co. *v.* McClain (1904) 192 U. S. 397, it was held that a tax of one quarter of one per cent. of the gross earnings of sugar refineries having a gross income of over $250,000, was an excise levied on the business, and not a tax upon the property or upon the income.

[3] Corporation Tax Cases (1911) 220 U. S. 107.

[4] *Ibid.*, 150.

but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way."

The inconvenience to the national government of the decision that taxes on incomes are direct taxes, and so can only be levied in proportion to population, led to the adoption in 1913 of the Sixteenth Amendment, which declares:

"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."

It was feared by some when the Sixteenth Amendment was before the country that the words "from whatever source derived" would give the amendment a wider scope than merely withdrawing income taxes from the class of direct taxes, and would allow income taxes to be levied which for other reasons would have been previously unconstitutional.[1] It was declared, however, by the late Chief Justice White for a unanimous court that the Sixteenth Amendment was not intended to give to Congress any power of taxation not formerly possessed.[2] In the same case the court made it clear that as a result of the amendment all federal income taxes are now to be considered excises.

In 1920 the Supreme Court by a five to four vote decided that a stock dividend is capital and not income, and that, therefore, a tax upon such dividends is a direct tax, and, notwithstanding the Sixteenth Amendment, must be levied in proportion to population.[3] The position of the majority is that in a stock dividend nothing is separated from the assets of the corporation and delivered to the stockholder, but that as the result of the delivery to him of new certi-

[1] *E.g.*, taxes on the incomes of state officials, and incomes from state bonds. See sec. 82.

[2] Brushaber *v.* Union Pac. R. R. (1916) 240 U. S. 1.

[3] Eisner *v.* Macomber (1920) 252 U. S. 189.

ficates his new and old certificates represent the same interest in the assets of the corporation as did his old certificates before the transaction. Mr. Justice Holmes and Mr. Justice Day admit that this is so in principle, but claim that "income" was used in the amendment in a non-technical sense which would cover stock dividends. Mr. Justice Brandeis and Mr. Justice Clarke thought that the issuing of a stock dividend is equivalent to the issuing of a cash dividend with a preferential opportunity to subscribe for a new issue of stock.

As we have seen the Supreme Court held in 1873 in the case of *Scholey v. Rew*[1] that a tax on the succession to real estate was not a direct tax. In the course of the argument in that case the court said that an inheritance tax was not distinguishable from an income tax. An income tax having been held in the *Pollock* case to be a direct tax, a federal tax on the succession to personal property not levied in proportion to the census was in *Knowlton v. Moore*[2] attacked as unconstitutional on the ground that it was direct. The Supreme Court in that case, however, declared that a tax on succession to property is not a tax on property solely because of ownership, as an income tax was held to be, but is a tax on the privilege of the beneficiary to succeed to property, and so is an excise and not a direct tax. The court pointed out that *Scholey v. Rew* was not overruled or disapproved in the *Pollock* case, but that it was there distinguished on the ground that what was involved in the earlier inheritance tax case was an excise. In *Knowlton v. Moore* the court took considerable pains to show that the tax was not levied upon the right of the deceased to transmit his estate, but was a tax upon the privilege of each beneficiary to take the particular share to which he was entitled. Earlier federal statutes had contained a probate tax upon the whole estate,[3] as well as an inheritance tax upon the distributive shares, but the probate tax feature was not contained in the later statute. Whether a tax upon

[1] 23 Wallace 331.
[2] (1900) 178 U. S. 41. [3] *Ibid.*, 51.

the whole estates of deceased persons is a direct tax or an excise, has not been decided by the Supreme Court. It would approach more closely a tax on the property because of ownership, than would an inheritance tax, and yet there seems no reason why it should not be viewed as a tax upon the privilege of transmitting property at death, measured by the amount of the property transmitted.

§80. *Uniformity in Taxation.* As is pointed out elsewhere the "equal protection" clause of the Fourteenth Amendment constitutes a limitation upon the taxing power of the States, requiring that classification based upon geographical areas, or upon subject-matter, or upon the persons subject to a tax be reasonable.[1] But the Fourteenth Amendment applies only to the States, and there is no equal protection clause as a limitation upon the national government. It has been suggested that a classification for federal taxation might be so arbitrary as to show that the statute was not enacted for revenue, but merely to oppress certain persons or interests, and that under such circumstances the taking of property, though in the form of taxation, might not constitute due process under the Fifth Amendment.[2] There is, however, an important constitutional limitation upon federal taxation, besides that which has just been discussed with regard to direct taxes, and which applies to all taxes which are not direct, namely, that "all duties, imposts and excises shall be uniform throughout the United States."[3] The term "excises" has generally the meaning of taxes on a privilege such as that of being a corporation, or on some act or transaction, such as consumption, sale, or manufacture. The terms "imposts" and "duties," though sometimes used to include all taxes, are more properly applied to taxes on exports and imports. They were clearly used in the narrower and more usual sense in the constitutional clause just quoted, for they are there set over against direct taxes.

[1] See chap. 33.

[2] Sec. 157.

[3] Art. I, sec. 8, par. 1.

The meaning of the constitutional provision that duties, imposts, and excises shall be "uniform throughout the United States," was not finally passed upon until the graduated inheritance tax, contained in the War Revenue Act of 1898,[1] was upheld in *Knowlton v. Moore.*[2] That statute exempted legacies under $10,000, classified the rate of tax according to relationship, and provided for a rate progressing according to the amount of the legacy. The court summarized the opposing views of the meaning of the constitutional command as follows:

> "The two contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost or excise which is not intrinsically equal and uniform in its operation upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform."[3]

The argument of those who impeached the statute was based, first, upon the interpretation of provisions in state constitutions, requiring that taxes be equal and uniform, to the effect that such constitutional provisions require that the burden of taxes shall rest with substantial equality upon all persons,[4] and, second, that in *Hylton v. United States*[5]

[1] Act of June 13, 1898, chap. 448, 30 Stat. 448.

[2] (1900) 178 U. S. 41.

[3] *Ibid.*, 84.

[4] Stimson, *Federal and State Constitutions of the United States*, 274; State *v.* Gorman (1889) 40 Minn. 232; State *v.* Ferris (1895) 53 Ohio 314; State *v.* Switzler (1898) 143 Mo. 287.

[5] (1796) 3 Dallas 171. Justice Patterson said (p. 180): "Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to States, and is at once easy, certain and efficacious." Justice Iredell said (p. 181) that if there were a tax which was neither direct nor a duty, impost or excise, "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 *United States v. Singer*[1] the Supreme Court had declared in favor of intrinsic uniformity.

As the court pointed out, the language in the *Hylton* case does not justify the interpretation put upon it. The judges there were merely contrasting the purpose of the Constitution to allow Congress to tax individuals directly, with the provisions of the Articles of Confederation, which limited Congress to the making of requisitions or assessments upon the various States. In the *Singer* case, though the word "equal" is used, it seems clear that what the court was emphasizing was that the treatment under the statute was equal in all localities—*i.e.*, that the tax was geographically uniform. The court set over against these most equivocal citations in support of intrinsic uniformity the following language of Mr. Justice Miller in the *Head Money Cases*[2]:

> "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, is uniform, and operates precisely alike in every

[1] (1872) 15 Wallace 111, 121: "The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be uniform throughout the United States. The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits, wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

[2] (1884) 112 U. S. 580, 594. It was sought to discount the authoritativeness of this language by insisting that in the Head Money Cases the question of taxation was not involved, but only the constitutional provision that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." But the court pointed out that this clause against preference and the uniformity clause as to taxation originally stood together, and were adopted together as part of one general scheme for geographical uniformity, and were only separated after adoption. Knowlton *v.* Moore (1900) 178 U. S. 41, 105.

port of the United States, where such passengers can be landed."

The court in an elaborate review of the whole question presents the following considerations in support of geographical, as opposed to intrinsic uniformity[1]: If the requirement that duties, imposts,and excises be "uniform," means that they shall rest equally upon all persons, then the words "throughout the United States" are mere surplusage, but they are the appropriate words to use to indicate geographical uniformity. At the time of the adoption of the Constitution the idea of limiting the power of levying duties, imposts,and excises by an intrinsic rule of uniformity had not been suggested, much less acted upon, in England or in any of the United States. It is of great importance that such a rule has never been applied by Congress in federal legislation under the constitutional clause in question, but that on the contrary, from the time of the first administration to the present time taxes have been levied without question which have not conformed to that rule, but only to a rule of geographical uniformity. One of the great weaknesses of the government under the Articles of Confederation was its lack of power to tax. Congress attempted without success to obtain from the States the grant of such a power which should operate generally throughout the United States. When in the Constitutional Convention it was proposed to give to the national government control of foreign commerce and the power to tax imports, it was feared that one group of States might procure legislation which would favor the ports of some States over those of others. To meet this possibility it was proposed that no "privilege or immunity be granted to any vessel on entering or clearing out, or paying duties or imposts in one State in preference to another." The proposal was later put into the following form, and in that form agreed to; except that the word "tonnage" was struck out:

[1] Knowlton *v.* Moore (1900) 178 U. S. 41, 86 to 106.

"Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another, or oblige vessels bound to or from any State to enter, clear, or pay duties in another; and all tonnage duties, imposts and excises, laid by the legislature, shall be uniform throughout the United States."

Thus it is clear that both of these provisions, which were later separated in order to put the taxation clauses together, were adopted to quiet the fear of the States that there might be discrimination in national legislation between different localities.

Eleven years later in the *Corporation Tax Cases*[1] the court said:

"As we have seen, the only limitation upon the authority conferred is uniformity in laying the tax, and uniformity does not require the equal application of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States. This subject was fully discussed and set at rest in *Knowlton v. Moore*, 178 U. S. 41, *supra*, and we can add nothing to the discussion contained in that case."

§81. *Taxes on Exports.* One of the explicit constitutional limitations upon the national government is contained in the provision that, "No tax or duty shall be laid on articles exported from any State."[2] The somewhat similar provision 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,"

has been interpreted as applying only to imports and exports to and from foreign countries and not to imports

[1] (1911) 220 U. S. 107.
[2] Art. I, sec. 9, par. 5.

and exports moving between States.[1] But it is to be noted that the prohibition which is directed against the national government applies to exports "from any State," and in the case which held that the States are not prohibited to tax goods moving from State to State, by the clause quoted above, it was assumed that Congress could not tax goods exported from one State to another.[2] In the case of *Dooley v. United States*[3] where the Supreme Court had before it the constitutionality of an act of Congress imposing a tax upon goods imported into Porto Rico from the United States, Mr. Justice Brown, delivering the opinion of the court, although declaring that "it is not intended by this opinion to intimate that Congress may lay an export tax upon merchandise carried from one State to another," seems to be of the opinion that the restriction upon the power of Congress to tax exports applies only to exports to foreign countries. The decision of the court, however, appears actually to be based upon the theory that the tax was not upon exports from the United States, but upon imports into Porto Rico. Mr. Justice White in concurring seems to be clear that Congress can tax exports from State to State. The Chief Justice wrote a dissenting opinion, concurred in by three other members of the court, in which he strongly asserted that it is the purpose of the Constitution to prohibit the imposition by Congress of a tax upon the exports from any State to any point outside of the State. This case would not seem to settle the question, but it is clear from the discussion in the preceding section that, if a tax on exports from State to State is constitutional, it must be levied uniformly in all of the States.

The provision against the taxation of exports does not prevent the levy of a tax upon goods or upon the manufacture of goods simply because a part of them are destined for subsequent export, as long as the tax is not laid upon them because they are to be exported, and as long as the

[1] Woodruff *v.* Parham (1868) 8 Wallace 123. See sec. 175.
[2] *Ibid.*, 132.
[3] (1901) 182 U. S. 222.

process of exportation has not begun; and the process of exportation does not begin until they are started in course of transportation, or are delivered to a common carrier for that purpose.[1]

The Supreme Court has also held that, when a tax is placed upon tobacco manufactured for domestic consumption, and tobacco manufactured for export is exempted from this tax, but it is required that tobacco for export be stamped, twenty-five cents being paid for the stamp, this amount to be collected merely to cover the expense of administering the law, this is not a tax on exports, but a legitimate method of preventing the government's being defrauded of the tax properly levied on tobacco destined for domestic consumption.[2] On the other hand decisions show that the constitutional prohibition "requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation."[3] In conformity with this principle it was held that

> "a stamp tax on a bill of lading, which evidences the export is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export."[4]

So a stamp tax on charter parties for the carriage of cargoes to foreign ports has been held an unconstitutional burden upon exportation,[5] and a tax on policies of marine insurance on articles being exported has also been condemned as in conflict with the Constitution.[6]

[1] Turpin *v.* Burgess (1886) 117 U. S. 504; Cornell *v.* Coyne (1904) 192 U. S. 418.

[2] Pace *v.* Burgess (1875) 92 U. S. 372.

[3] Fairbank *v.* United States (1901) 181 U. S. 283, 293.

[4] *Ibid.*

[5] United States *v.* Hvoslef (1915) 237 U. S. 1.

[6] Thames & Mersey Mar. Ins. Co. *v.* United States (1915) 237 U. S. 19. A statute requiring exporters to take out a license, paying a fee therefor, would probably be unconstitutional. Brown *v.* Maryland (1827) 12 Wheaton 419, 445.

In *Peck & Company v. Lowe*[1] it appeared that an income tax was levied upon a domestic corporation, more than two thirds of whose income was derived from the purchase of goods in the United States and their shipment to foreign countries for sale. It was contended that the tax on so much of its income as was derived from that source was unconstitutional. The court said[2]:

> "The tax in question is unlike any of those heretofore condemned. It was not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes, . . . At most exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid, and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins."

§82. *Miscellaneous Limitations.* In *Collector v. Day*[3] the Supreme Court had presented to it the question whether the federal government has the power to tax the salaries of state judges, and decided that it has not. The court admitted that there is no express prohibition of such a tax, but rested its decision upon what it declared to be a necessary implication from our dual form of government under the Constitution. The States are sovereign except insofar as they have surrendered powers to the central government, and one of their sovereign rights is the maintenance of an independent judiciary. It is inconsistent with the sovereign independence of the States that the federal government should have the power to levy a tax upon such governmental agencies as the members of the state judiciary, or upon the salaries received by the state judges for their official

[1] (1918) 247 U. S. 165.
[2] *Ibid.*, 174.
[3] (1870) 11 Wallace 113.

services.[1] In a later case the court generalizes on this subject saying:

> "The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed, if any interference is permitted."[2]

In this case the court held that municipal corporations are governmental agencies of the States, and that the federal government, therefore, cannot tax the income of such corporations. Somewhat later it was held that a tax on income from securities issued by municipal corporations is unconstitutional as a tax on the power of the States and their instrumentalities to borrow money.[3] By the application of the same principle it was held unconstitutional to levy a federal tax on bonds, given to procure licenses to sell liquor, and issued by a municipality, since the granting of such licenses is a governmental function, and the giving of the bonds is part of the same transaction.[4]

It has been held, however, that, when a State engages in the business of selling liquor, its agents may constitutionally be subjected to a federal internal revenue tax, since such a tax does not interfere with the discharge by the State of the ordinary functions of government.[5] Three justices dis-

[1] Conversely it has been held that the States may not tax the salaries of officers of the United States. Dobbins *v.* Commissioners of Erie County (1842) 16 Peters 435.

[2] United States *v.* Railroad Company (1872) 17 Wallace 322.

[3] Pollock *v.* Farmers' L. & T. Co. (1895) 157 U. S. 429, 586, 158 U. S. 601, 630.

[4] Ambrosini *v.* United States (1902) 187 U. S. 1.

[5] South Carolina *v.* United States (1905) 199 U. S. 437.

sented on the ground that the selling of liquor was simply a method adopted by the State in question for the regulation of the liquor traffic under its police power, and that to allow a federal tax under the circumstances was inconsistent with the previous decisions of the court.

The right of the national government to levy inheritance taxes was attacked in *Knowlton v. Moore*[1] on the ground that the privilege of transmitting property is entirely under the control of the States, and that if the right of Congress to tax this privilege is recognized it may go so far as to take all inheritances by means of taxation and so wipe out the States' power of control. The court, however, held that the tax did not cast a burden upon the power of the States to tax, but is a burden cast upon the recipient of property, and that as such it is constitutional. In *Synder v. Bettman*[2] it was held by a court divided six to three that the federal government may constitutionally levy an inheritance tax upon the transmission of property by legacy to States or to municipal corporations, the argument being that this was not a tax levied upon the property of the State or municipality, nor does it interfere with the exercise of a governmental function, but that it is a tax upon the right to succeed to property.[3]

In the *Corporation Tax Cases*[4] the court denied that the fact that a corporation derives its existence from state action prevents the imposition of a federal corporation tax, declaring that such a tax does not come within the principle that the federal government cannot levy a tax which interferes with the discharge of ordinary governmental functions by the States.

[1] (1900) 178 U. S. 41.

[2] (1903) 190 U. S. 249.

[3] The court relied largely upon United States *v.* Perkins (1896) 163 U. S. 625, in which it was held that a State may levy an inheritance tax upon a legacy to the United States. The minority distinguished this case on the ground that the States control the devolution of property, and so have a basis for inheritance taxes which does not exist in the case of the federal government.

[4] (1911) 220 U. S. 107, 158.

A decision of some interest was rendered in 1920 in the case of *Evans v. Gore.*[1] The court held that, because of the constitutional provision that federal judges shall receive "a compensation which shall not be diminished during their continuance in office,"[2] a federal income tax cannot be levied upon the net income of a federal judge in which is included his judicial salary. The same reasoning would apply to exclude the salary of the President from a federal income tax.[3] It has been suggested that the doctrine of the case would not apply to a judge appointed, or to a President elected after the passage of the income tax law.[4]

§83. *Power to Borrow Money, Coin Money, and Issue Legal Tender Notes.* One of the express powers granted to Congress by the Constitution is "to borrow money on the credit of the United States."[5] As suggested by the Committee of Detail the clause read "to borrow money and emit bills on the credit of the United States."[6] After a short debate the words "and emit bills" were striken out. The debate showed a considerable feeling that the national government should not have the power to emit bills at all. Part of the delegates seemed to be in favor of eliminating the words in order that their presence might not seem to encourage the emission of bills by the national government, while being of the opinion that the power to borrow money would carry with it the power to emit bills when necessary. Madison held the opinion that the power would exist though the words "and emit bills" were taken out, and, therefore, though he finally voted for eliminating them, he saw no real reason for doing so, suggesting, instead, that a prohibition to make bills legal tender would be sufficient.[7]

[1] 253 U. S. 245.

[2] Art. III, sec. 1.

[3] Art. II, sec. 1, par. 7.

[4] Thomas Reed Powell, "Constitutional Law in 1919–1920," *19 Mich. L. Rev.*, 117.

[5] Art. I, sec. 8, par. 2.

[6] Farrand, *The Records of the Federal Convention*, vol. ii, p. 168. Congress had this power under the Articles of Confederation. Art IX.

[7] *Ibid.*, pp. 308 to 310.

Congress is also given power "to coin money, regulate the value thereof, and of foreign coin."[1]

As we have already seen,[2] the Supreme Court held in *M'Culloch v. Maryland*[3] that, in order to carry out its express fiscal powers, the federal government under its power to "make all laws which shall be necessary and proper" to carry out the powers expressly conferred, has the right to establish and conduct a bank. It appears from the statement of the case that the bank issued bank notes, as well as doing other ordinary banking business, but no question was made as to the right of the government to issue such notes. In fact Madison's view seems always to have been tacitly accepted, that the national government may issue bills of credits as part of its power to borrow money. However, when the national government sought to give to its notes the character of a legal tender, a much more difficult question was raised. In *Hepburn v. Griswold*[4] the Supreme Court, three justices dissenting, held that federal legislation which attempted to make government notes a legal tender for the payment of existing debts between private individuals was unconstitutional. The legislation was enacted during the Civil War. The court admitted that there might be an element of convenience in making the notes issued a legal tender, but asserted that the government's borrowing power could be made entirely effective if the notes issued by it did not have that character, and declared that it would be contrary to the spirit of justice which pervaded the whole Constitution, would be taking private property for a private use, and would be depriving persons of property without due process of law, if creditors could be compelled to take these notes in payment of private debts in place of gold and silver coin.

[1] Art. I, sec. 8, par. 5. States may not coin money, emit bills of credit, or make anything but gold and silver legal tender. Art. I, sec. 10, par. 1. See sec. 173. Power is given to the national government to punish counterfeiting. Art I, sec. 8, p. 6. See sec. 133.

[2] Sec. 59.

[3] (1819) 4 Wheaton 316.

[4] (1869) 8 Wallace 603.

A year later, there being two new justices on the supreme bench, *Hepburn v. Griswold* was overruled by a court divided five to four.[1] In the first place the court declared that an implied power under the Constitution

> "may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is permissible to group together any number of them and infer from them all that the power claimed has been conferred."[2]

The court then proceeded to deduce the power exercised from the power to carry on war, and from the power to coin money. In this latter connection the court laid stress upon the fact that governments normally have the power to declare what is money, that this power is expressly denied to the States, and that generally when powers are denied to the States it is in order that the federal power may be more complete. The court held that to make government notes legal tender was a helpful and appropriate method of financing the war, which was not precluded by the fact that some other method might have been devised. The court denied that the obligations of debtors' contracts were impaired, since they were obligated still to pay in money, and also denied that the federal government was forbidden to impair contracts. As to the argument that the legislation was in conflict with the due process clause of the Fifth Amendment, the court said: "It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals,"—citing tariff and embargo laws, and the reduction in the weight of gold coins.

Some years later this decision was affirmed, only one justice dissenting, and its application extended to peace time legislation.[3] The court, reviewing the case of *M'Culloch v. Maryland*,[4] declared that the words of the

[1] Legal Tender Cases (Knox *v.* Lee; Parker *v.* Davis) (1870) 12 Wallace 457.

[2] *Ibid.*, 534.

[3] Legal Tender Case (Juilliard *v.* Greenman) (1884) 110 U. S. 421.

[4] (1819) 4 Wheaton 316.

Constitution giving Congress power to make laws "necessary and proper" for carrying out the powers given elsewhere in the Constitution

> "are not limited to such measures as are absolutely and indispensably necessary, without which the powers granted must fail of execution; but they include all appropriate means which were conducive or adapted to the end to be accomplished, and which in the judgment of Congress will most advantageously effect it."[1]

The court then concludes that the exercise of the power to issue legal tender notes, "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."[2] Congress being empowered to borrow money on the credit of the United States, and it being admitted that for that purpose it might issue bills or notes of credit, the court felt that it could not say that the making of such notes a legal tender was not an appropriate means, conducive or adapted to the end to be accomplished, especially in view of the fact that all sovereign States, including the States of the Union before they were prohibited by the Constitution, have exercised the power of determining what shall be a legal tender. The court admitted that some members of the Constitutional Convention were much opposed to paper money, but did not feel concluded by this consideration, in view of the fact that no prohibition was embodied in the Constitution. The court felt that its position was fortified rather than weakened by the fact that Congress is vested with the exclusive exercise of the analogous power of coining money.[3]

[1] Legal Tender Case (1884) 110 U. S. 421, 440.

[2] *Ibid.*, 448.

[3] The court seems perhaps rather to confuse than to clarify the grounds of its decision by the following summary (p. 449): "Congress, as the legislature of a sovereign nation 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

We have undoubtedly in the cases just discussed a liberal application of the doctrine of implied powers, and one which has not escaped strong criticism.[1] But it is to be noted that the court in upholding the legal tender legislation, though adverting to the fact that the power to make bills or notes a legal tender is denied to the States, and also to the fact that the power to determine what shall be a legal tender normally resides in sovereign states, does not rest the national power on either of these facts, but is careful to base it upon other powers expressly given.

§84. *Publicity in the Expenditure of Public Moneys.* The Constitution provides that,

> "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."[2]

Franklin proposed that moneys should only be drawn from the public treasury upon appropriation originating in the lower house. This suggestion was carried into 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.'"

[1] See for example Tucker's *Constitution of the United States*, vol. i, pp. 508 *et seq.*; Tiedeman, *The Unwritten Constitution of the United States*, 135 and 136.

[2] Art. I, sec. 9, par. 7.

report of the Committee of Detail, but upon consideration by the Convention received a negative vote, though no discussion on it is reported. The Committee of Eleven proposed the present wording of the first clause, which was accepted by the Committee of Style and by the Convention. The second clause was added at the end of the session with little debate.[1] The purposes of the section are obvious—first, that Congress shall be made responsible for all expenditures, and shall only make them by a regularly enacted law subject to the President's veto, and, second, that publicity shall be given to expenditures, so that the country may know how its money is being used.

[1] Farrand, *The Records of the Federal Convention*, vol. i, pp. 523, 539, vol. ii, pp. 178, 280, 505, 568, 618.

CHAPTER VIII

INTERSTATE AND FOREIGN COMMERCE

§85. *The Commerce Clause.*[1] As has been pointed out in the first chapter the real moving cause of the Constitutional Convention was the commercial situation, which was rapidly becoming intolerable. After the Revolution mutual jealousies held sway, resulting in trade discriminations, and in disputes as to the control of bays and navigable streams. It is not surprising then that it was agreed without discussion to vest in the national government control of foreign and interstate commerce. The Committee of Detail recommended that Congress be given power "to regulate commerce with foreign nations and among the several States," which was agreed to without debate or dissent. It having been suggested that Congress, among other powers should be given the power to regulate affairs with the Indians, the committee to which these suggestions were referred, recommended that this be accomplished by adding to the clause already approved the words "and with the Indian tribes," which was agreed to, also without dissent or debate. In this form the commerce clause was reported by the Committee of Style, and in this form it was adopted.[2] The constitutional provision, therefore, reads: "Congress shall have power . . . to

[1] As to Admiralty and Maritime Jurisdiction, see sec. 45.

[2] Farrand, *The Records of the Federal Convention*, vol. ii, pp. 181, 308, 321, 324, 493, 495, 569.

See similar provisions in the Australia Constitution Act 1900, sec. 51 (1), discussed in Moore, *The Constitution of Australia*, 197 *et seq.*, and in the British North American Act 1867, sec. 91 (2), discussed in Lefroy, *Canada's Federal System*, 230 *et seq.*, and Lefroy, *Constitutional Law of Canada*, 102 *et seq.*

regulate commerce with foreign nations and among the several States and with the Indian tribes."[1]

It is very probable that all that was in the minds of the framers of the Constitution when they drafted the commerce clause was to give to the national government power to prevent the States from interfering with the freedom of interstate and foreign commerce,[2] and, in fact, for nearly a hundred years there was very little affirmative legislation by Congress under this constitutional provision, and very few cases based upon it came before the Supreme Court. More recently, however, it has been the basis of much congressional legislation, and by liberal interpretation a vast field of regulation has been brought under federal jurisdiction.

§86. *What Is Commerce?* In the case of *Gibbons v. Ogden*[3] it was contended that commerce included only "traffic"—that is, "buying and selling, or the interchange of commodities"—and that it did not include navigation. But Chief Justice Marshall answered that,

> "All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. . . . 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 'commerce.'"[4]

In *New York v. Miln*[5] Mr. Justice Barbour, in delivering the opinion of the court holding constitutional a State statute requiring masters of vessels coming to the port of New York to file lists of passengers, declared that "goods are the subject of commerce" but "persons are not." The

[1] Art. I, sec. 8, par. 3.

[2] *The Federalist*, No. 42, Fuller, *Interstate Commerce*, 7; Addyston Pipe & Steel Co. (1899) 175 U. S. 211, 227.

[3] (1824) 9 Wheaton 1.

[4] *Ibid.*, 190, 193.

[5] (1837) 11 Peters 102.

case does not stand upon this distinction, but upon the ground that the statute was a police regulation,[1] and, if the justice thought that the carrying of passengers was not commerce within the constitutional provision, that view has certainly not been accepted by the Supreme Court. In *Gloucester Ferry Company v. Pennsylvania*[2] it was said that,

> "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities."

In the Interstate Commerce Act we have congressional regulation of interstate passenger carriage as well as the carriage of goods, and no doubt has been expressed that Congress is as competent to regulate the one as the other. The White Slave Act forbids the transportation or the procurement of the transportation of women from State to State for immoral purposes. In holding this statute constitutional the court said[3]:

> "Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce."

It is not important whether a person transported from State to State is transported by a common carrier for hire or in a private vehicle gratuitously; in each case it is equally interstate commerce.[4] One is also engaged in interstate commerce when he carries goods in his own wagon from one State to another for sale at their destination[5]; or when he

[1] Sec. 94. [2] (1885) 114 U. S. 196, 203.

[3] Hoke *v.* United States (1913) 227 U. S. 308, 320.

[4] Wilson *v.* United States (1914) 232 U. S. 563, 567; United States *v.* Burch (1915) 226 Fed. 974.

[5] Kirmeyer *v.* Kansas (1915) 236 U. S. 568.

pipes oil from his well in one State to his refinery in another for ultimate disposition in the second State[1]; or when he buys goods in one State and carries them into another State on his own person for his own use.[2] But suppose that a man crosses a state line in his own vehicle, or on foot, neither for the purpose of selling or buying, nor to transport goods that he has bought, but to go for a ride or walk, or upon a social expedition, is this interstate commerce? In *Gibbons v. Ogden*[3] Chief Justice Marshall said: "Commerce undoubtedly, is traffic, but it is something more: it is intercourse." In the following sentence he says: "It [commerce] describes the commercial intercourse between nation and parts of nations, in all its branches." Whether, having defined commerce broadly as intercourse, he then meant to limit it to business intercourse is not entirely clear. In *Covington Bridge Company v. Kentucky*[4] what the court decided was that an interstate bridge is a vehicle of interstate commerce, but the court said by way of *dictum:*

> "Commerce was defined in *Gibbons v. Ogden*, 9 Wheat. 1,189, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool."[5]

In *Hendrick v. Maryland*[6] it appeared that the defendant was fined for not having complied with the Maryland law requiring nonresidents to obtain licenses to drive motors within the State. It does not appear whether he had gone into the State on a pleasure trip or for business. The court seemed to assume that he was engaged in interstate commerce, saying:

[1] The Pipe Line Cases (1914) 234 U. S. 548, 562 (the concurring opinion of the Chief Justice).
[2] United States *v.* Hill (1919) 248 U. S. 420.
[3] (1824) 9 Wheaton 1, 190.
[4] (1894) 154 U. S. 204. [5] *Ibid.*, 218.
[6] (1915) 235 U. S. 610.

"In the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others."[1]

It seems fair to assume that the policy of giving to the term "commerce" a liberal interpretation will be continued, and that it will be held to include all interstate intercourse.

The sale of goods in one State to be shipped into another is interstate commerce though the sale is made through an agent in the State of the purchaser.[2] In *Pensacola Telegraph Company v. Western Union Telegraph Company*[3] it was held that a company doing an interstate telegraph business, being an indispensable means of inter-communication, especially in commercial transactions, is engaged in interstate commerce within the meaning of the Constitution; and in *International Textbook Company v. Pigg*[4] the court declared that a correspondence school which has its headquarters in one State, with patrons in other States, is engaged in interstate commerce, since it is engaged in the business of sending information and the necessary paraphernalia from State to State in exchange for the fees of those under contract with it.

But it is not interstate commerce for a company located in one State to make contracts of insurance with patrons located in other States. This was first decided in 1868 with regard to fire insurance. The court said of such policies:

"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

[1] Hendrick *v.* Maryland (1915) 235 U. S., 622.

[2] Robbins *v.* Taxing District of Shelby Co. (1887) 120 U. S. 489; Caldwell *v.* North Carolina (1903) 187 U. S. 622; Norfolk W. R. Co. *v.* Sims (1903) 191 U. S. 441.

[3] (1877) 96 U. S. 1. See also Leloup *v.* Mobile (1888) 127 U. S. 640.

[4] (1910) 217 U. S. 91.

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."[1]

In *Hooper v. California*[2] it was urged that marine insurance is commerce because it involves contracts of insurance upon goods moving in commerce, but the court said:

"The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'"[3]

The business of life insurance, also, has been held not to constitute commerce.[4] Similar in principle are the cases which have held that the taking of orders for the purchase and sale of cotton and grain on speculation and not for delivery,[5] and the making of contracts for advertising[6] are not commerce. In the *Lottery Case*,[7] however, it was held that "lottery tickets are subjects of traffic and therefore are subjects of commerce."

§87. *The Commencement and Termination of Interstate and Foreign Commerce.* Interstate commerce does not include the production or manufacture of goods even though they are definitely destined for transportation to

[1] Paul *v.* Virginia (1868) 8 Wallace 168, 183.

[2] (1895) 155 U. S. 648.

[3] *Ibid.*, 655.

[4] New York Life Ins. Co. *v.* Cravens (1900) 178 U. S. 389.

[5] Ware *v.* Mobile (1908) 209 U. S. 405.

[6] Blumenstock Bros. Adv. Agency *v.* Curtis Pub. Co. (1920) 252 U. S. 436.

[7] (1903) 188 U. S. 321.

another State or country. If this were not so the whole industrial, agricultural and mining activities of the United States would be brought under the control of the federal government by force of the commerce clause.[1] Nor is it sufficient that goods have been moved by the owner to the point from which they are to be shipped, as long as transportation has not commenced, and as long as the goods have not been actually delivered there to a common carrier for carriage to another State or country.[2] But when goods are actually in course of transportation from one State to another, or have been delivered to a common carrier for that purpose they have then entered into interstate commerce.[3]

It is obvious that foreign and interstate commerce does not terminate at state lines. As said by Chief Justice Marshall "it would be a very useless power if it could not pass those lines."[4] He goes on to say of interstate commerce:

> "Can a trading expedition between two adjoining States commence and terminate outside of each? . . . Commerce among the States must of necessity be commerce with the States. . . . The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States."

But, as Congress may not legislate as to purely intrastate commerce,[5] it is important to determine when interstate commerce comes to an end. In the important case of *Brown v. Maryland* Chief Justice Marshall said:

> "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

[1] Kidd *v.* Pearson (1888) 128 U. S. 1; United States *v.* E. C. Knight Co. (1895) 156 U. S. 1.

[2] Coe *v.* Errol (1886) 116 U. S. 517.

[3] In Kelley *v.* Rhoads (1903) 188 U. S. 1, it was held that the driving of sheep from Utah across Wyoming to a point in Nebraska was interstate commerce.

[4] Gibbons *v.* Ogden (1824) 9 Wheaton 1, 195.

[5] See sec. 93.

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."[1]

But the Chief Justice also made the suggestion, "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," but that this is not true of it "while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported."[2] From this suggestion has developed the so-called "original package" doctrine—that when goods imported from another State or country are still in the hands of the importer unsold and in their original packages they are still a part of interstate commerce.[3] But if the goods have been taken from the original packages in which they were imported, though for the purpose of sale by the importer, the interstate or foreign commerce has terminated.[4] In an attempt to retain for sales by importers the character of interstate commerce, as sales of original packages, and yet to allow such sales to be in quantity suitable to retail business, cigarettes in packages of ten were shipped in open baskets,[5] and even loose.[6] In each case, however, the Supreme Court held that the shipments were not made in good faith in the sort of packages in which such goods were usually transported in interstate commerce, and that the sale of the small packages of cigarettes was, therefore, not a sale in the original packages, and so not part of interstate commerce.

[1] (1827) 12 Wheaton 419, 447. That sale of goods transported in interstate commerce is part of such commerce was decided in Leisy *v.* Hardin (1890) 135 U. S. 100. [2] *Ibid.*, 441.

[3] Bowman *v.* Chicago, etc., Ry. Co. (1888) 125 U. S. 465; Leisy *v.* Hardin (1890) 135 U. S. 100; Askren *v.* Continental Oil Co. (1920) 252 U. S. 444.

[4] May & Co. *v.* New Orleans (1900) 178 U. S. 496.

[5] Austin *v.* Tennessee (1900) 179 U. S. 343.

[6] Cook *v.* Marshall (1905) 196 U. S. 261.

It seems that peddling goods imported, even when they have been imported by the peddler, and are sold by him in the packages in which imported, is not a part of interstate commerce.[1] The reason seems to be that peddling is viewed as so distinctly a retail transaction, and local in its character, as not to be analogous to the ordinary sale by the importer, usually in quantity, of imported goods in their original packages.

§88. *Congressional Power Over Foreign Commerce.* Under the commerce clause and the taxing power Congress may lay duties upon imports from foreign countries, only restricted by the constitutional provisions that such duties shall be uniform throughout the United States, and that they shall not give preferences to the ports of one State over those of another.[2] But, further, in other connections, the Supreme Court has frequently asserted that the power of Congress over foreign commerce is plenary and absolute. It may impose general embargoes, or exclude special kinds of goods, or regulate the standard of goods to be admitted.[3] It may exclude all aliens or certain classes of aliens.[4] Under this power, also, Congress may exclude foreign vessels from our harbors or admit them upon such conditions as it sees fit.[5] In the case just cited the Court upheld a federal statute which allows a seaman on a foreign vessel to sue for and recover one half of the wages which he shall have earned, notwithstanding his contract of employment gives him no right to any wages until the termination of his voyage. Up to the present time no regulation of foreign commerce has been held to be in conflict with the Fifth Amendment because lacking in due process, or to be otherwise unconstitutional. It is to be borne in mind that the

[1] Ernest *v.* Missouri (1895) 156 U. S. 296; Wagner *v.* Covington (1919) 251 U. S. 95.

[2] See sec. 80.

[3] Butterfield *v.* Stranahan (1904) 192 U. S. 470, 492; The Abby Dodge (1912) 223 U. S. 166; Brolan *v.* United States (1915) 236 U. S. 216; Weber *v.* Freed (1915) 239 U. S. 325.

[4] Oceanic Navig. Co. *v.* Stranahan (1909) 214 U. S. 320, 342.

[5] Strathearn S. S. Co. *v.* Dillon (1920) 252 U. S. 348.

grant of power over foreign commerce is supported and supplemented by the possession by the central government of the exclusive control of foreign relations. It is also to be borne in mind that foreign commerce is the proper subject of treaties.[1]

§89. *Congressional Power Over Commerce with the Indian Tribes.*[2] It was early declared that under its power to regulate commerce with the Indian Tribes Congress may prohibit all intercourse with them except under license. This power was compared with the power to declare embargoes in foreign commerce. It is not lost by reason of the fact that the territory occupied by an Indian tribe is included within the area of a State.[3] By the Articles of Confederation[4] Congress was given the power of

> "regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limit be not infringed or violated."

Such a provision, as new States were admitted into the Union, would have practically nullified Congressional power, and the constitutional provision was so framed as to escape this difficulty. The same doctrine, which was laid down in the case last cited, was repeated by the Supreme Court in *United States v. Holliday,*[5] and was held to apply not only to Indian tribes within their reservations, but to members of such tribes when outside of their reservations. Whether any group of Indians constitutes a tribe is primarily a question for the decision of the political branch of the government. A State may not by any action of its own

[1] See sec. 34.

[2] See sec. 107, with regard to congressional control of Indian affairs generally.

[3] United States *v.* Cisna (1835, Cir. Ct.) 1 McLean 254. It was held, however, that the regulations in question had been in effect repealed by later joint action of the United States and the State with regard to the tribe in question.

[4] Art. ix.

[5] (1865) 3 Wallace 407.

withdraw Indians from this power of Congress. Somewhat later the Supreme Court held that the power of Congress may extend to territory surrounding Indian reservations for the protection of the Indian tribes involved.[1] And still later it was held that regulation of traffic in liquor may be enacted by Congress for a period of years for territory formerly belonging to an Indian tribe, but later partitioned in severalty to individual Indians no longer retaining their tribal allegiance.[2] The decisions in these last two cases are affected as well by the treaty power as by the power exercised under the commerce clause.[3]

§90. *Protection of Interstate Transportation and Traffic.* It was not until the latter part of the nineteenth century that Congress began to legislate for the purpose of directly regulating interstate commerce. Since that time, however, legislation in this field has become large in amount and very important in character. In 1887 was passed the Interstate Commerce Act,[4] which required that rates of carriers engaged in interstate and foreign commerce be reasonable, that there be no discrimination in rates or service, that receipts of different roads be not pooled and divided, and that rates be published. The Interstate Commerce Commission was created for the purpose of enforcing the act. The act has been frequently amended in order to make its enforcement more effective; in order to give to the commission the power to fix rates and regulations[5]; in order to prevent railroads from carrying commodities owned by them and dealt in by them in competition with their patrons; and in order to bring within the purview of the act express companies, sleeping car companies, telegraph, telephone and cable companies, and pipe lines. The regulation of the act of transportation of interstate commerce, and of

[1] United States *v.* 43 Gallons of Whiskey (1876) 93 U. S. 188.

[2] Dick *v.* United States (1908), 208 U. S. 340.

[3] As to treaty power generally see secs. 33 and 34; as to treaties with the Indians see sec. 107.

[4] Act of Feb. 4, 1887, 24 Stat. 379.

[5] See sec. 60.

the agencies engaged in such transportation would seem to fall so obviously within the power granted to Congress by the commerce clause, as not to make the question debatable. As a matter of fact the right of Congress to regulate the rates and practices of interstate carriers has been accepted without argument.[1] Such attacks as have been made upon regulations in this field have been based upon the contention that particular legislation infringed other constitutional limitations,[2] or that it was not in fact a regulation of interstate commerce but of commerce which was intrastate,[3] or that particular orders of the commission were so unreasonable as to be lacking in due process.[4]

In 1890 was passed the Sherman Anti-Trust Act.[5] This statute makes it a criminal offense to enter into a contract, combination,or conspiracy in restraint of trade or commerce among the States, or with foreign nations, or to monopolize or attempt to monopolize or conspire to monopolize any part of such trade. This statute has been upheld and applied in a large number of decisions of the Supreme Court.[6] The cases have for the most part dealt with the interpretation of the act,[7] or with the determination of the

[1] Interstate Comm. Comm. *v.* Illinois Cent. R. R. Co. (1910) 215 U. S. 452; Interstate Comm. Comm. *v.* Chicago, R. I. & Pac. Ry. (1910) 218 U. S. 88.

[2] Armour Packing Co. *v.* United States (1908) 209 U. S. 56 (Elkins Act attacked on the grounds that its provisions resulted in the levy of an export tax, and in a preference to the ports of one State over those of another); New York Cent. & H. R. R. R. *v.* United States (1909) 212 U. S. 481 (Elkins Act attacked as contrary to the due process clause of the Fifth Amendment).

[3] See the discussion just below in sec. 93.

[4] See, for example, discussion in Interstate Comm. Comm. *v.* Union Pac. R. R. Co. (1912) 222 U. S. 541; Interstate Comm. Comm. *v.* Louisville & N. R. R. Co. (1913) 227 U. S. 88.

[5] Act of July 2, 1890, 26 Stat. 209.

[6] See the very interesting little book by the present Chief Justice, William H. Taft, *The Anti-Trust Act and the Supreme Court*, in which he traces the application of the act and the development of its interpretation.

[7] For instance, whether the act forbids all combinations which fall within the letter of the statute, or only those which unreasonably re-

question, when does a contract or combination restrain interstate commerce?

In *United States v. E. C. Knight Company*[1] it was held that the acquisition by the American Sugar Refining Company of certain refineries in Pennsylvania as a result of which it controlled the output of ninety-eight per cent. of the sugar in the United States, did not fall within the prohibition of the act, on the ground that the transaction had only to do with the acquisition of property within a State. The case has never been overruled, but subsequent cases beginning with *Addyston Pipe & Steel Company v. United States,*[2] and including *Northern Securities Company v. United States*[3] and *Swift & Company v. United States*[4] have gone very far to restrict its authority.

In the *Addyston* case there was a combination of manufacturers within a certain area for the purpose of fixing prices and pooling profits in the sale of iron pipe. These transactions involved interstate sales and shipments. The court had no doubt that this arrangement fell within the terms of the statute. In the *Northern Securities* case it appeared that a corporation was organized in New Jersey to hold the majority of the stock in three railroads doing an interstate business. It was insisted by the defendants that this was simply a transaction in railroad stock, which was not interstate commerce, and was therefore similar to the transaction in the *Knight* case. The court, however, held that the necessary result of the arrangement was to prevent competition and to tend towards a monopoly in interstate transportation in the area affected. In the *Swift* case the evidence showed that the meat packers involved had entered into an agreement for the purpose of controlling the prices to be paid for cattle at certain stockyards to which cattle were shipped from many different States.

---

strain interstate or foreign commerce. See the development from United States *v.* Trans-Missouri Freight Asso. (1897) 166 U. S. 290, to Standard Oil Co. *v.* United States (1911) 221 U. S. 1.

[1] (1895) 156 U. S. 1.
[2] (1899) 175 U. S. 211.
[3] (1904) 193 U. S. 197.
[4] (1905) 196 U. S. 375.

Although the sales which were to be effected were in individual States, the court says that their

> "effect upon commerce among the States is not accidental, secondary, remote, or merely probable. It is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. . . . Here the subject matter is sales, and the very point of the combination is to restrain and monopolize commerce among the States in respect of such sales."[1]

The case is distinguished from the *Knight* case on the ground that in the latter it was not shown that restraint or monopoly was the purpose or would be the result of the transaction in question. It is believed that, if at the present time such a case as that against the Knight Company were properly pleaded, and supported by such evidence of the effect upon interstate sales of the acquisition of the property which was involved, as could undoubtedly be produced, it would be held to fall within the Sherman Act.[2]

It has been held that interstate commerce may be restrained illegally contrary to the prohibition of the Sherman Act by a combination of the employees of interstate railroads for the purpose of striking and causing an interruption of commerce over such roads.[3] Indeed the Supreme Court has held that, quite aside from the provisions of that

[1] Addyston P. & S. Co. *v.* United States (1905), 196 U. S., 397.

[2] In 1914 the Federal Trade Commission was established (Act of Sept. 26, 1914, 38 Stat. 717), and by the act of its creation and by the Clayton Act (Act of Oct. 15, 1914, 38 Stat. 730) the commission is given certain powers over interstate commerce which are in their character regulative, advisory, and investigative. These acts on the whole may be said to create new remedies rather than new obligations. See Harlan & McCandless, The Federal Trade Commission. And see Federal Trade Comm. *v.* Gratz (1920) 253 U. S. 421, on the limits of the powers of the commission.

[3] United States *v.* Elliott (1894) 62 Fed. 801. And see Loewe *v.* Lawler (1908) 208 U. S. 274. This has not been changed by the provisions of the Clayton Act. Note in *30 Harv. L. Rev.* 632.

act, the federal courts have the power to restrain such threatened interruption by injunction.[1]

The danger of interruptions to interstate commerce through strikes of railroad employees is serious and ever present. No means of fully protecting the public from this danger have yet been devised by Congress. Various expedients have been tried, however, in the effort to minimize this evil. Provision for the voluntary submission of labor disputes on interstate railroads to boards of conciliation or arbitration has been tried,[2] but the parties would not avail themselves of them. In 1920 provision was made for the compulsory submission of such disputes to a permanent board appointed by the President, composed of nine members—three employees, three employers, and three representatives of the public. No provision is made for enforcing the awards of the board, the provision which was originally in the bill prohibiting strikes having been dropped before its enactment. It is left to public opinion to compel compliance with the award of the board, made after full investigation.

In the case of *Adair v. United States*[3] the Supreme Court had presented for its determination the constitutionality of a provision in the act of 1898, which made it a misdemeanor for any interstate railroad carrier to threaten any employee with loss of employment or to unjustly discriminate against any employee because of his membership in any labor organization. This was part of a general scheme to prevent strikes, of which the provision for arbitration, spoken of above, formed another part. The majority of the court held the provision in question unconstitutional, on the ground that it was

> "an invasion of the personal liberty, as well as of the right of property, guaranteed by that [the fifth] amendment. Such liberty and right embrace the right to make con-

[1] *In re* Debs (1895) 158 U. S. 564.

[2] Act of June 1, 1898, ch. 370, 30 Stat. 424; act of July 5, 1915, ch. 6, 38 Stat. 103.

[3] (1908) 208 U. S. 161.

> tracts for the purchase of the labor of others, and equally the right to make contracts for the sale of one's own labor."[1]

It was urged that, though there might be here some curtailment of liberty and the right to acquire property, it was not without due process, since the statute was passed under the power to regulate commerce. But the court held that the provision in question was not a regulation of commerce, there being

> "no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part."[2]

One justice did not sit, and Justice McKenna and Justice Holmes dissented. The dissenting justices held that the section in question was a reasonable part of a general scheme to prevent strikes, and consequent interruption of interstate commerce, and was, therefore, a reasonable regulation of commerce. Justice Holmes even held that a policy on the part of Congress of complete unionization of interstate railroads would not be unconstitutional.[3]

In 1916 the country was threatened with a nation-wide railroad strike, and in order to avert this catastrophy Congress passed the so-called Adamson Law.[4] It provided

[1] Adair *v.* United States (1908) 208 U. S. 172.

[2] *Ibid.*, 179. This suggestion was, however, thrown out by the writer of the prevailing opinion (p. 175): "And it may be—but upon that point we express no opinion—that in the case of a labor contract between an employer engaged in interstate commerce and his employee, Congress could make it a crime for either party without sufficient or just excuse or notice, to disregard the terms of such contract or to refuse to perform it." It has been held, however, that a court of equity has no power to prevent such breaches of contract. Arthur *v.* Oaks (1894) 63 Fed. 310; Delaware L. & A. R. R. *v.* Switchmen's Union (1907) 158 Fed. 541, 543.

[3] *Ibid.*, 191.

[4] Act of Sept. 3, 5, 1916, 39 Stat. 721.

that, beginning January 1, 1917, "eight hours shall, in contracts for labor or service, be deemed a day's work for the purpose of reckoning the compensation for service of all employees who are now or may hereafter be employed by any common carrier by railroad," who are engaged in interstate commerce with certain unimportant exceptions. It then directed that a commission investigate the working of the eight-hour day and report to the President and Congress, and declared that pending the report, and for thirty days thereafter, the compensation of employees for a standard eight-hour day should not be reduced below the then existing standard day's wage, and that pro rata payment should be made for overtime. This legislation was attacked as being entirely outside of the power possessed by Congress over interstate commerce. In the case of *Wilson v. New*[1] the Supreme Court upheld the statute, though the court was divided five to four. None of the court denied the right of Congress to regulate the hours of work on interstate railroads,[2] but it was the aspect of the law as a regulation of wages which occasioned the division among the judges.[3] The majority held that in view of

> "the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent, it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a standard of wages to fill the want of one caused by the failure to exert

[1] (1917) 243 U. S. 332.

[2] See the next section.

[3] Justice Day, who dissented, did so, not on the ground that Congress might not regulate wages, but that the provisions of the statute for the regulation of wages first, and investigation afterwards was so arbitrary and unreasonable as to lack due process.

the private right on the subject, and to give effect by appropriate legislation to the regulations thus adopted."[1]

It is to be noticed that the legislation in question was not supported as a regulation for the benefit and protection of the employees, but on the ground that it was justified under the power of Congress to regulate and protect interstate commerce—that anything which is necessary to protect such commerce from interruption is necessarily a constitutional regulation. The three dissenting justices who held that Congress had no power to regulate wages, declared that the fixing of wages of interstate railroad employees is not a regulation of commerce, but of the internal affairs of commerce carriers.

There are interesting suggestions in the prevailing opinion over and above the actual points decided. The Chief Justice in that opinion says that the statute under consideration may be viewed

"as the exertion by Congress of the power which it undoubtedly possessed to provide by appropriate legislation for compulsory arbitration . . . a power which inevitably resulted from its authority to protect interstate commerce in dealing with a situation like that which was before it."[2]

He also says, however,

"that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relation is primarily private, the establishment and giving effect to such an agreed-on standard is not subject to be controlled or prevented by public authority."[3]

It seems, then, that Congress has no general authority to fix wages of interstate carriers, but that in case of a dispute which threatens to tie up interstate railroads it may compel arbitration and the compliance with the award of the arbitrators, or may itself settle such dispute by fixing wage

[1] Wilson *v.* New (1917), 243 U. S. 332, 347.
[2] *Ibid.*, 359. [3] *Ibid.*, 347.

scales or the standards which are to control them. It is interesting to speculate whether, in view of the broad power to protect interstate commerce from interruption through strikes, and in view of the changed personnel of the court, a statute such as that which was before the court in the *Adair* case would not now be upheld.

The interest of the national government in interstate highways does not arise solely from its authority over interstate commerce, but is also based upon its power to provide for postal accommodations, and for accommodations for military exigencies. As a result of this group of powers it is now well established that the national government may itself construct, or authorize others to construct national highways, including roads, railroads and canals, as well as bridges from State to State. To these ends, also, it may grant charters to corporations.[1] In the case of *Wilson v. Shaw*[2] it was contended that the federal government had no authority to provide for the building of the Panama Canal, but the court felt no doubt of the existence of that authority.

In order to provide for the accomplishment of one of the purposes enumerated above Congress may exercise, or confer the authority to exercise, the power of eminent domain.[3]

It would perhaps be competent for Congress to compel all businesses furnishing facilities for the carrying on of interstate or foreign commerce to incorporate under the federal government, because of its very comprehensive authority to control such businesses. It would seem, however, that it would have no authority to compel all businesses which engage in interstate commerce to so incorporate, and to thus take them out of the control of the States, since Congress has only power to legislate as to them insofar

[1] See generally on these points Pacific Railroad Removal Cases (1885) 115 U. S. 1; California *v.* Pacific R. R. Co. (1888) 127 U. S. 1; Luxton *v.* North Riv. B. Co. (1894) 153 U. S. 525.

[2] (1907) 204 U. S. 24, 33.

[3] Kohl *v.* United States (1875) 91 U. S. 367; Latinette *v.* St. Louis (1912) 201 Fed. 676.

as they do actually engage in interstate or foreign commerce. Whether Congress might compel all individuals and corporations actually engaging in such commerce to take out a federal license is another question, and would seem to depend upon the answer to the further question, whether this would be a reasonable means of exercising that control over such persons and corporation which is legitimately within the power of Congress.

§91. *Police Regulations under the Commerce Power.* We consider in another part of this treatise the police power of the States.[1] This power is perhaps the most important, and certainly the most comprehensive of those which are reserved to the States by the Tenth Amendment. Under it the States have the right to legislate to protect the safety, health, morals, public order, and general welfare of the community. The federal government has no similar general power, operative throughout the whole country, as the power of each State is operative within its own borders, for the federal government has only such powers as are granted to it by the Constitution, and no such power is given by that instrument. Congress has, however, asserted the right to legislate for the protection of the community, or of classes of the community, within the fields in which jurisdiction is expressly surrendered to it, and it has been upheld in this exercise of authority by the Supreme Court. The result has been the enactment by Congress of a very considerable body of what is essentially police regulation. We have already seen the extent to which Congress has been held justified in going in the use of the power of taxation for regulation.[2]

The first Federal Safety Appliance Act was passed by Congress in 1893, but this has been largely amended and supplemented by subsequent legislation.[3] These acts are declared to be for the purpose of promoting "the safety of

[1] Chap. 32. [2] Sec. 78.

[3] Act of March 2, 1893, 27 Stat. 531; act of March 2, 1903, 32 Stat. 943; act of April 14, 1910, 36 Stat. 298; act of May 30, 1908, 35 Stat. 476; act of Feb. 17, 1911, 36 Stat. 913; act of March 4, 1915, 38 Stat. 1192. These statutes deal with such subjects as brakes, couplers, grab irons,

employees and travellers upon railroads . . . engaged in interstate commerce." Their purpose, then, is primarily to protect certain classes of persons from dangerous appliances used upon interstate roads, and not to regulate interstate traffic, or the transportation of goods or persons in interstate commerce. The right of Congress, however, to legislate for this purpose has not been questioned, such litigation as there has been having arisen over the interpretation of the act,[1] or because it was thought that there was an unconstitutional delegation of legislative power,[2] or an unconstitutional interference with intrastate commerce.[3]

In 1907 was passed an act, applying to all railroads engaged in interstate commerce, or commerce within the territories or the District of Columbia, prohibiting employees from remaining on duty for more than sixteen consecutive hours, and requiring that when an employee has been on duty for sixteen consecutive hours he shall have ten hours' rest, and when he has been on duty sixteen hours in the aggregate he shall have eight hours' rest. Operators, train despatchers, and those engaged in the transmission of messages in connection with the movement of trains are restricted to nine or thirteen hours' service according to certain named circumstances. Provision is made for exceptions in cases of emergency. The act is entitled "An Act to promote the safety of employees and travellers upon railroads by limiting the hours of service of employees thereon."[4] The act has been interpreted as applying only

and hand holds, drawbars, ladders, and running boards, ash pans and boilers. Penalties are imposed, the Interstate Commerce Commission is given authority to enforce the duties imposed, and employees are freed from the assumption of risk.

[1] Johnson *v.* Southern Pac. Co. (1904) 196 U. S. 1.

[2] St. Louis I. M. & S. R. R. Co. *v.* Taylor (1908) 210 U. S. 281.

[3] Southern Ry. Co. *v.* United States (1911) 222 U. S. 20. See further, sec. 93.

[4] Act of March 4, 1907, 34 Stat. 1415. The Interstate Commerce Commission is given authority to enforce the act. A later act makes it obligatory upon interstate railroads to report accidents to the commission, and gives that body authority to investigate and publish a report. Act of May 6, 1910, 36 Stat. 350.

to employees having some part in interstate commerce, or commerce in the territories or in the District of Columbia, and has been declared to be constitutional. The court found no difficulty in discovering a close relation between long hours of work on the part of railroad employees and the safety of such employees and of passengers, and, therefore, held that the statute in question is a reasonable regulation of commerce.[1]

The first Employers' Liability Act passed by Congress in 1906[2] was held unconstitutional because it applied to all employees of interstate carriers whether engaged in interstate or intrastate transportation at the time of injury.[3] In 1908 another Employers' Liability Act was passed which made every railroad engaged in commerce in the territories or the District of Columbia or in interstate or foreign commerce liable for the injury or death of any employee himself engaged in such commerce,

> "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

It is provided that contributory negligence shall not be a defense, but that the jury shall reduce damages in proportion to the negligence attributable to the employee, except that an employee shall not

> "be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

[1] Baltimore & O. R. R. Co. *v.* Interstate Comm. Comm. (1911) 221 U. S. 612. With regard to state regulation of hours of labor, see sec. 274. See also the Adamson Law discussed in the next preceding section.

[2] Act of June 11, 1906, 34 Stat. 232.

[3] Employers' Liability Cases (1908) 207 U. S. 463. See further sec. 93.

In the same circumstances as those stated in the last exception it is declared that the employee shall not be taken to have assumed the risk of injury occasioned thereby. And it is provided that the carrier cannot relieve itself from liability under the act by any contract, rule, or regulation.[1] This act, abrogating the fellow-servant rule, limiting the doctrines of contributory negligence and assumption of risk, allowing actions for death, and preventing the parties from contracting to vary the statutory liability, was attacked in the *Second Employers' Liability Cases*[2] as not being a legitimate regulation of commerce, and as being contrary to the due process clause of the Fifth Amendment. The reasoning of the court in upholding the statute is to the following effect: To regulate in the sense in which that term is used in the commerce clause "is to foster, protect, control, and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large." This power extends to every agency and instrument of interstate transportation, and to "all who are in any wise engaged in such transportation, whether as common carriers or as their employees." The duty to protect the safety of employees in interstate commerce, and liability for their injury bear a substantial relation to interstate commerce.

> "The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omission which are made the bases of the rights of recovery which the statute creates and defines; and, as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."[3]

[1] Act of April 22, 1908, 35 Stat. 65. For a consideration of the State Workmen's Compensation Acts, see sec. 274.

[2] (1912) 223 U. S. 1.

[3] The quotations are from pages 47 and 50.

To the objection that carriers might be liable for injuries occasioned by employees not engaged in interstate commerce, it was answered that such injury to an employee engaged in interstate commerce would have the same effect upon that commerce as would an injury by one also engaged in it. In this decision the court was unanimous.

A federal statute passed in 1895 made it a criminal offense to import or to transport in interstate commerce lottery tickets.[1] In the *Lottery Case*[2] the Supreme Court held, as we have already seen, that lottery tickets may be the subject of commerce.[3] In that case it was also contended that the statute was unconstitutional because it was not a regulation of commerce but was an exercise of the police power, and so infringed a power reserved to the States by the Tenth Amendment, and that the power to regulate did not include a power to prohibit. Four justices who dissented agreed with the first proposition. But the answer of the majority is that, if lottery tickets are subjects of commerce, and when subjects of interstate commerce are, therefore, liable to regulation by Congress, the fact that Congress regulates them for the protection of the inhabitants of the States as a whole does not show that Congress has exceeded its authority. In fact the court asserts that considerations which will justify States under their police power in limiting property rights for the protection of the inhabitants of each State, will justify Congress in doing the same thing when the property involved is the subject of interstate commerce. To the contention that prohibition is not regulation, the court answered that anything which is so injurious that it may be prohibited by the States under their police power, may, when it is the subject of interstate commerce, be prohibited by Congress.

The national White Slave Act,[4] which under heavy penalties aims to prevent the transportation of women and

[1] Act of March 2, 1895, 28 Stat. 963.
[2] (1903) 188 U. S. 321.
[3] Sec. 86.
[4] Act of June 25, 1910, 36 Stat. 825.

girls in interstate commerce for immoral purposes, was attacked on the same grounds as those insisted upon in the *Lottery Case*, and to them the court, this time unanimous, made substantially the same answers. Two quotations will make clear the court's position[1]:

> "There is unquestionably a control in the States over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the States, but there is a domain which the States cannot reach and over which Congress alone has power; and if such power be exerted to control what the States cannot it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the States."
>
> "The principle established by the cases is a simple one when rid of confusing and distracting considerations, that Congress has power over transportation 'among the several States'; that the power is complete in itself, and that Congress, as an incident to it, may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."[2]

In the Food and Drugs Act of 1906[3] we have an example of extensive police regulation under the commerce clause. Generally speaking it prohibits the transportation in interstate commerce of food or drugs which are misbranded, adulterated, deleterious, or in a condition to be unfit for food, and provides for the confiscation of goods carried contrary to the act. In view of the already established power of

[1] Hoke *v.* United States (1913) 227 U. S. 308, 321, 323. And see Caminetti *v.* United States (1917) 242 U. S. 470, where it was held that the operation of the statute was not confined to transportation for commercialized vice.

[2] See also the act of Feb. 8, 1897, 29 Stat. 512, prohibiting the carrying of obscene literature and articles designed for indecent and immoral use from State to State, considered in United States *v.* Popper (1899) 98 Fed. 423.

[3] Act of June 30, 1906, 34 Stat. 768.

Congress to enact police regulations under the commerce clause, the constitutionality of the prohibitions contained in the act has not been really questioned. In fact in the first case under the act their constitutionality was expressly conceded, and only the methods provided for their enforcement were attacked.[1] In a later case under the act the Supreme Court said:

> "That Congress has ample power in this connection is no longer open to question. That body has the right not only to pass laws which shall regulate legitimate commerce among the States and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof."[2]

Similarly, a statute designed to prevent the transportation in interstate commerce of animals having contagious diseases is constitutional.[3] The Food and Drugs Act is not, however, aimed only at the protection of health, but in its provisions against false branding it aims also to protect from fraud and deception.[4] In *United States v. Ferger*[5] the Supreme Court upheld the authority of Congress to punish the counterfeiting and use of fictitious interstate bills of lading, even though such bills relate to no actual or contemplated commerce.

In view of the foregoing cases some surprise was occasioned by the decision of the Supreme Court declaring

[1] Hipolite Egg Co. *v.* United States (1911) 220 U. S. 45.

[2] McDermott *v.* Wisconsin (1913) 228 U. S. 115, 128. In United States *v.* 420 Sacks of Flour (1910) 180 Fed. 518, it was contended that the statute was unconstitutional because a police regulation and so outside the power of Congress to enact, but the court quickly disposed of this contention on the authority of the Lottery Case.

[3] Act of May 29, 1884, 23 Stat. 31. See Reid *v.* Colorado (1902) 187 U. S. 137.

[4] Weeks *v.* United States (1918) 245 U. S. 618.

[5] (1919) 250 U. S. 199.

unconstitutional the first federal Child Labor Act, which prohibited the transportation in interstate commerce of products of mines in which children under sixteen were employed, and the products of any manufacturing establishments in which children under fourteen were employed, or in which children under sixteen were allowed to work more than eight hours a day, or before six in the morning or after seven in the evening.[1] The court divided five to four. The majority held that this was not a regulation of interstate commerce but an attempt to regulate mining and manufacture within the several States contrary to the Tenth Amendment. The majority opinion, after reviewing the cases discussed just above, declared that "in each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results," while under the instant statute the goods shipped were harmless in themselves, and the work upon them was finished. The opinion asserts that manufacture within the States is subject only to the police power of the States, and that Congress has no authority to control the States in the exercise of that power. The dissenting opinion, written by Justice Holmes, accepts as not open to doubt the proposition that the federal government cannot directly control mining or manufacture within the several States, but asserts that it may affect such industries indirectly under its express powers. Justice Holmes points out what has been done under the commerce clause and sanctioned by the court with regard to lotteries, food and drugs, and the white slave traffic, and the regulatory legislation which has been upheld under the taxing power.[2] He says:

> "The act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across state lines they are no longer within their rights. If there were no Constitution

[1] Hammer *v.* Dagenhart (1918) 247 U. S. 251. The act is that of Sept. 1, 1916, 39 Stat. 675. [2] See sec. 78.

and no Congress their power to cross such lines would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. . . . The public policy of the United States is shaped with a view to the benefit of the nation as a whole."[1]

The lottery and white slave acts seemed to have aimed at the protection of the moral welfare of the States towards which the traffic moved, and one purpose of the Food and Drugs Act was certainly to protect the health of such States, but the latter act was also aimed to protect persons in the State of destination from economic injury through fraud and deception, and it would seem that part of the purpose of the White Slave Act was to protect women and girls from being induced to leave the States, in which transportation would begin, to their injury. If these objects are legitimate in the regulation of commerce, it is hard to see why commerce in what Justice Holmes calls "the product of ruined lives" should not be excluded, both for the protection of children in the States of shipment, and for the protection against competition by child-made goods of those in the States of destination who maintain higher standards in this regard. There may also be an element of protection to the children in the States of destination, since in the absence of such legislation pressure might be brought to bear upon state legislatures to meet the lower standards of competing States. The doctrine having been enunciated and acted upon by the court that police regulation may be enacted under the commerce clause, the position of the minority with regard to the Child Labor Act would seem to be more logical than that of the majority. The object which was frustrated by the Supreme Court in the decision just discussed has since been sought to be effected under the taxing power.[2]

[1] Hammer *v.* Dagenhart (1918) 247 U. S. 251, 281.

[2] See sec. 78.

§92. *Divesting Goods of Interstate Character.* While the Supreme Court recognized in *Mugler v. Kansas*[1] that the States may under their police power prohibit the manufacture or sale of intoxicants, it declared, nevertheless, that intoxicating liquor is a legitimate subject of interstate commerce, and that the States may not, therefore, interfere with the introduction from another State of such goods, or with their sale in the original packages, since this would be infringing a field reserved to Congress under the Constitution.[2] In 1890 was passed the Wilson Act[3] which subjected to the operation of state laws, passed under the police power, all intoxicating liquors introduced into the States, as if produced therein. In 1913 was passed the Webb-Kenyon Law[4] to make the state regulations even more effective. The law prohibits the transportation in interstate commerce of any liquor intended to be received, sold, or used in violation of the laws of the State to which it is sent. Both acts were attacked as attempts to delegate to the States the regulation of interstate commerce, which could not be constitutionally done. It was held that this was not the effect of the legislation. Congress was dealing here with a commodity whose transportation it might prohibit, and which on the other hand the States could not prevent being brought within their borders. Instead of prohibiting its transportation in interstate commerce, Congress finally took from it entirely the protection of the commerce clause, and left it to be wholly dealt with by the States. The court declared that if Congress could entirely prohibit the transportation of such goods it could adopt any restriction upon transportation short of complete prohibition.[5]

[1] (1887) 123 U. S. 623. It has since been held that a State may constitutionally prohibit the possession of whiskey for personal use, and make such possession criminal. Crane *v.* Campbell (1918) 245 U. S. 304.

[2] Bowman *v.* Chicago, etc., Ry. (1888) 125 U. S. 465; Leisy *v.* Hardin (1890) 135 U. S. 100.

[3] Act of Aug. 8, 1890, 26 Stat. 313.

[4] Act of March 1, 1913, 37 Stat. 699.

[5] As to the Wilson Act see *In re* Rahrer (1891) 140 U. S. 545. As to the Webb-Kenyon Law see Clark Distilling Co. *v.* Western Md. Ry. Co. (1917) 242 U. S. 311.

§93. *Incidental Regulation of Interstate Commerce.* Chief Justice Marshall in his far-reaching decision in *Gibbons v. Ogden*,[1] which established the right of Congress to legislate affirmatively for the regulation of commerce, laid it down as fundamental that the regulation of "the completely internal commerce of a State . . . may be considered as reserved for the State itself."[2] This has been repeated time after time by the Supreme Court in later decisions; it has been declared that while the Constitution gives to Congress the power to regulate commerce among the States and with foreign nations, the Tenth Amendment reserves to the States the complete control of that commerce which is not interstate or international.

> "The internal commerce of a State—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign and interstate commerce is under the control of the federal government."[3]

Over that commerce "the States have plenary power, and Congress has no right to interfere."[4]

In the *Minnesota Rate Case*[5] the contention was put forward that certain state rates for intrastate shipments resulted in undue discrimination against localities to which interstate shipments were made under interstate rates. The court held that since there had been no determination of this question of undue discrimination by the Interstate Commerce Commission, which had been brought to the court for review, the question was not properly before it, but it certainly seemed to be of the opinion that the Interstate Commerce Commission could order intrastate rates to be

[1] (1824) 9 Wheaton 1.

[2] *Ibid.*, 194.

[3] Sands *v.* Manistee (1887) 123 U. S. 288, 295.

[4] Covington & C. Bridge Co. *v.* Kentucky (1893) 154 U. S. 204, 209. See also, among many that might be cited, County of Mobile *v.* Kimball (1880) 102 U. S. 691, 699; Wabash, St. L. & P. R. R. *v.* Illinois (1886) 118 U. S. 557, 565; Hammer *v.* Dagenhait (1918) 247 U.S. 251, 274.

[5] (1913) 230 U. S. 352.

changed, which, because of their divergence from interstate rates, put certain localities under an undue disadvantage.[1] In the *Shreveport Case*[2] in the next year Justice Hughes, who had written the opinion in the *Minnesota Rate Case*, directly applied the doctrine which had been foreshadowed in the earlier decision. The Interstate Commerce Commission found that there was an unreasonable difference between charges made for certain interstate and intrastate hauls over the same railroad, to the disadvantage of localities engaged in interstate shipments, and ordered interstate rates to be reduced to a named maximum, and that competing interstate and intrastate traffic be carried at the same rate per mile. It was held by the Commerce Court that this order relieved the railroad of the duty to comply with orders of the state commission, which required it to carry certain classes of goods in intrastate shipments at a rate lower than that permitted under the order of the federal commission. The Supreme Court affirmed the decree of the Commerce Court. In reaching this conclusion the court said:

"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. . . . 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

[1] Minnesota State Cases (1913) 230 U. S. 352, 412 *et seq.*

[2] Houston, E. & W. T. Ry. Co. *v.* United States (1914) 234 U. S. 342.

> and equal terms. . . . 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. . . . It is for Congress to supply the needed correction where the relation between intrastate and interstate 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."[1]

Here then we find an inroad made upon the rule that Congress cannot regulate intrastate commerce, to the effect that it may do so when that appears reasonably necessary to prevent persons or localities engaged in interstate commerce from being unduly discriminated against in favor of those engaged in intrastate commerce. This same doctrine was applied to express rates in *American Express Company v. Caldwell.*[2] In the next year, however, an order of the federal commission was held not to abrogate state rates because it was not clear from its terms what practices were discriminatory towards interstate commerce and were therefore to be corrected. The court said that an order of the commission "should not be given precedence over a state rate statute otherwise valid unless, and except so far as, it conforms to a high standard of certainty."[3]

The Transportation Act,[4] passed at the termination of the World War, when the federal control of railroads was brought to an end, added to the Interstate Commerce Act a new section, 15a, directing the commission, in the exercise of its power to prescribe reasonable rates, to fix them so that carriers as a whole shall earn an aggregate annual income equal to a fair return upon the aggregate value of their

[1] Houston, E. & W. T. Ry. Co. *v.* United States (1914) 234 U. S. 342, 351, 353, 354, 355.

[2] (1917) 244 U. S. 617.

[3] Illinois Cent. R. R. Co. *v.* Public Util. Com. (1918) 235 U. S. 493, 510.

[4] Act of Feb. 28, 1920, 41 Stat. 456.

property used in transportation. It also added to section 13 of the Commerce Act by providing that, when in an investigation any rates or regulations authorized by any State are brought in question, the State shall be notified, and that a joint hearing by the federal commission and state authorities may be had. It then proceeds:

> "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any state authority to the contrary notwithstanding."

To put this act into effect an order was made by the federal commission making very substantial increases in both passenger and freight rates. Railroads in New York sought to increase their intrastate as well as their interstate rates in accordance with this order. The state commission refused to allow them to do so with regard to passenger rates without their showing that the New York statutory rates were unreasonably low. The Interstate Commerce Commission thereafter upon investigation decided that the intrastate rates were unduly preferential, and ordered them to be increased to conform to those set for interstate commerce. The state commission was then enjoined by the Federal

District Court from interfering with the execution of this order.[1] The case has been appealed to the Supreme Court.

There would, in the first place, seem to be serious doubt as to whether Congress had any intention to do more than incorporate into the Commerce Act, by its amendment to section 13, the law of the *Shreveport Case*, discussed just above, or whether it had any intention by the new section, 15a, to do more than authorize the federal commission to fix interstate rates so that they would bear their share of the aggregate return on the aggregate capital. It would seem that authority to fix all intrastate rates, thus ousting state authorities from this important field of regulation, should not be held to be given to the Interstate Commerce Commission except by congressional enactment which is explicit and unequivocal, and that the federal commission in making the order under consideration acted under no such explicit grant.[2]

The more fundamental question, however, is as to whether Congress may, directly or through the instrumentality of the Interstate Commerce Commission, regulate all intrastate railroad rates of interstate carriers. Undoubtedly the recognition and exercise of such a power would be convenient both for the federal commission and for the railroads, since it would do away with the necessity of separating cost, capital and earnings of interstate and intrastate carriage. But this clearly is not a sufficient reason for assumption by Congress of power over commerce wholly intrastate. The Supreme Court has repeatedly held in rate cases that interstate and intrastate business are separable,[3] and has held that for the purpose of taxation gross receipts from the two can be separated.[4] In the *Shreveport Case* it was held that under its power to protect

[1] Lehigh Val. R. Co. *v.* Public Serv. Com. (1921) 272 Fed. 758.

[2] See the very careful note on this question in *6 Cornell L. Quar.* 412.

[3] Smyth *v.* Ames (1898) 169 U. S. 466; Missouri Rate Case (1913) 230 U. S. 474; Allen *v.* St. Louis I. M. & S. Ry. (1913) 230 U. S. 553; Wood *v.* Vandalia R. R. (1913) 231 U. S. 1.

[4] Lehigh Valley R. R. *v.* Pennsylvania (1892) 145 U. S. 192; United States Exp. Co. *v.* Minnesota (1912) 223 U. S. 335.

interstate commerce the federal government through the Interstate Commerce Commission may abrogate intrastate rates, when the shipments under them are competitive with interstate shipments, to the disadvantage of the latter. But, of course, there is in many railroad systems a large volume of intrastate carriage which bears no competitive relation to the carriage of goods or persons in interstate commerce, and which, therefore, cannot be regulated by the federal government on that ground. This was the case with a very considerable part of the New York rates affected by the ruling of the Interstate Commerce Commission under the Transportation Act spoken of above, but the right of the commission to fix all intrastate rates was upheld by the District Court on the ground that the lower scale of state rates would put an undue burden on interstate commerce as a whole, by compelling it to meet the deficit in the aggregate fair return on the aggregate capital occasioned by the lower state rates. But this result does not seem necessarily to follow. If we grant that the state rates in any case are unreasonably low because lower than the federal rates, that does not require the federal government to make its rates high enough to make up the deficit—it is bound only to allow a fair return on the capital used in doing interstate business, while the constitutionality of the state rates is determined by their relation to the capital used in doing the intrastate business. If the intrastate rates are so low as not to allow a fair return on that capital their enforcement may be enjoined and reasonably remunerative rates substituted for them. This remedy would seem to be adequate for the protection of interstate railroads in the matter of intrastate rates, though not so convenient as would be the settlement of the whole matter of rates, interstate and intrastate, by one tribunal. The Constitutional Convention refused to incorporate in the fundamental law a grant to Congress of the sole and exclusive power over commerce,[1] but instead provided for the exercise by it only

[1] See the suggestions which were before the Committee of Detail, Farrand, *The Records of the Federal Convention*, vol. ii, pp. 135, 143.

of the power to regulate commerce among the States and with foreign nations. Then the Tenth Amendment declared that the powers not granted had been reserved to the States or to the people. The result has been that through a long series of cases it has been held, with the exception established in the *Shreveport Case*, that intrastate commerce is under the sole control of the States. If the recent ruling of the Interstate Commerce Commission is upheld it will constitute a most striking example of the absorption of important state police powers by the federal government, and will mark a step in the decline of state sovereignty.[1]

Another example of incidental control by Congress of intrastate commerce, as a result of its plenary power over interstate commerce, is found in the Safety Appliance Acts.[2] These acts by their terms apply to all cars and locomotives on any railroad engaged in interstate commerce, whether at the time the particular cars or locomotives are being so used or not. The Supreme Court upheld the legislation, saying that it was constitutional,

> "not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it. That is to say, it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce."[3]

The first Employers' Liability Act passed by Congress was held unconstitutional because it applied to employees

[1] See the note in *6 Cornell L.Quart.*, 412, already referred to, for a discussion of the constitutional question here involved.

[2] Act of March 2, 1893, 27 Stat. 531; act of March 2, 1903, 32 Stat. 943; act of April 14, 1910, 36 Stat. 298; act of May 30, 1908, 35 Stat. 476; act of Feb. 17, 1911, 36 Stat. 913; act of March 4, 1915, 38 Stat. 1192.

[3] Southern Ry. Co. *v.* United States (1911) *222* U. S. *20, 27.*

engaged in intrastate as well as to those engaged in interstate commerce.[1] Shortly afterwards a second act was passed with the purpose of meeting this difficulty, which covered liability only to employees engaged in interstate commerce. It was objected, however, that the injury covered by the act might be occasioned by a fellow employee who was engaged solely in intrastate commerce. The court held that this did not make the statute unconstitutional, since the effect upon interstate commerce would be the same whether one engaged therein were injured by a fellow employee engaged in interstate commerce or in commerce which was wholly intrastate.[2]

§94. *State Police Legislation Affecting Interstate Commerce.*[3] The police power—that is, the power to legislate for the protection of the safety, health, morals, good order, and general welfare of the community—is reserved to the States.[4] On the other hand, to Congress is confided the power "to regulate commerce with foreign nations and among the several States." The question is, how far may police regulation which affects interstate commerce go constitutionally? In *Gibbons v. Ogden*,[5] which is so often the starting point in the discussion of any question under the commerce clause, the point in controversy was whether the State of New York could by the grant of an exclusive privilege of navigation to Livingston and Fulton of the waters within the State, exclude therefrom those engaged in interstate navigation licensed by the federal government. It was contended that the grant to the national government of the power to regulate interstate commerce did not exclude the States from the exercise of a concurrent power over the

[1] Employers' Liability Cases (1907) 207 U. S. 463.

[2] Second Employers' Liability Cases (1912) 223 U. S. 1. See also sec. 91.

[3] Although, perhaps, the logical place for the full treatment of this subject would be in connection with the States' police power (see sec. 269), for the sake of completeness in the treatment of interstate commerce it seems preferable to put it here.

[4] See the full discussion of the police power in Chap. 32.

[5] (1824) 9 Wheaton 1.

same subject within their own borders. The decision was that Congress having legislated in a field in which power was expressly granted to it by the Constitution, its legislation must prevail over any state laws in conflict with it. It was not expressly decided whether, in the absence of conflicting federal legislation, the States might legislate within the whole field of interstate commerce, but it is strongly intimated that the power of the States to affect interstate commerce is only incidental to the police power which vests in it for the protection of its citizens.

During the years which immediately followed the decision in *Gibbons v. Ogden* we find in the decisions and opinions rendered by the Supreme Court some support for the doctrine of a concurrent authority in the States to legislate in the field of interstate commerce, as long as there is no conflicting federal legislation, though we find also the enunciation of the view that the States can legislate only in such a way as to affect interstate commerce when their legislation has to do with matters which are strictly local in character, and are in the nature of police regulations.[1] The next case which really helps to clear up the confusion in this field is that of *Cooley v. Port Wardens.*[2] The question in the case was as to the validity of legislation of the State of Pennsylvania with regard to pilotage in the port of Philadelphia. It was held by the majority of the Supreme Court that in so far as this statute applied to vessels engaged in foreign or interstate commerce it was a regulation of such commerce. The question then was whether as such regulation it was valid. The court points out that the power over interstate and foreign commerce granted by the Constitution is not declared by that instrument to be exclusive. It is argued, then, that if it is exclusive it must be because the subjects of that power are of such a nature as to require exclusive legislation by Congress.

[1] Compare the opinions in Wilson *v.* Blackbird Creek Co. (1829) 2 Peters 245; New York *v.* Miln (1837) 11 Peters 102; The License Cases (1847) 5 Howard 504; The Passenger Cases (1849) 7 Howard 283.

[2] (1851) 12 Howard 299.

"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 actually 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 only 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 is plain."[1]

The court, therefore, held that the state regulation of pilotage was valid. Justice McLean dissented on the ground that the States have no power to legislate as to interstate or foreign commerce. Justice Daniel concurred in the judgment of the court, but upon the ground that the state law was not a regulation of commerce, although it might incidentally affect commerce, but was in fact merely an exercise of the power reserved to each State for the protection of the safety of its citizens. This case at least disposes of the contention that the States have a general concurrent power with Congress to legislate in the field of interstate and foreign commerce, subject only to the limitation that in case of conflict of legislation that of Congress shall prevail.

The doctrine enunciated in the majority opinion in *Cooley v. Port Wardens*, that the States have concurrent authority over interstate commerce in cases where diversity of treatment to meet different local conditions is desirable, has been often repeated.[2] On the other hand in a large number of

[1] Cooley *v.* Port Wardens (1851) 12 Howard 299, 319.

[2] See, for instance, Bowman *v.* Railroad Co. (1888) 125 U. S. 465, 507; Covington, etc., Bridge Co. *v.* Kentucky (1894) 154 U. S. 204, 211.

cases, and particularly in those of more recent date, the Supreme Court has recognized that the States in the exercises of their police power for the protection of their citizens, may incidentally, and sometimes quite directly, affect interstate commerce, and has declared that this is not an unconstitutional invasion of the field of congressional legislation, as long as the state action constitutes a bona fide exercise of the police power, and does not unduly burden interstate commerce, and is not in conflict with any existing federal legislation.[1] It would seem that this principle would include all those cases which have been held to fall within the doctrine framed in the *Port Wardens* case, and that it states the basis of state action more satisfactorily. It is not surprising, therefore, that we hear less and less of the States' concurrent power over interstate commerce, and more of the validity of state police regulations which incidentally affect such commerce. In his opinion in *The Minnesota Rate Cases*,[2] which contains the most elaborate judicial review of this subject, Justice Hughes says:

> "It has repeatedly been declared by this court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and when Congress does act, the exercise of its authority overrides all conflicting legislation. . . . The principle which determines this classification underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States

[1] Typical cases among many are Escanaba Co. *v.* Chicago (1882) 107 U. S. 678, 683; Morgans S. S. Co. *v.* Louisiana (1886) 118 U. S. 455; Reid *v.* Colorado (1902) 187 U. S. 137, 151; Manigault *v.* Springs (1905) 199 U. S. 473; Second Employers' Liability Cases (1912) 223 U. S. 1, 54; Savage *v.* Jones (1912) 225 U. S. 501, 524; Gulf, C. & St. F. Ry. Co. *v.* Texas (1918) 246 U. S. 58.

[2] (1913) 230 U. S. 352, 399, 400, 402.

> are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains. . . . But within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected."

In the first place a State may not prohibit the shipment into or out of its borders of goods which are the legitimate subject of commerce.[1] The only goods which it may absolutely exclude are those which from their condition are not fit for any use, such, for instance, as cattle afflicted with some virulent disease, or decayed food stuffs,[2] or those which have been divested of their interstate character by act of Congress.[3] Somewhat similar in principle are the cases which hold that a State may prohibit the exportation of game[4] or of water from its streams and lakes.[5] In both cases the state legislation deals with property which in its natural state is not the subject of private ownership but belongs to the community as a whole, and the Supreme Court has held that the State, in allowing its appropriation, may deny to it the character of subject matter of interstate commerce. A State may not exclude from its borders natural persons or corporations desiring to do an interstate business.[6] When the States first began to regulate rail-

[1] Bowman *v.* Chicago, etc., Ry. Co. (1888) 125 U. S. 465; West *v.* Kansas Nat. Gas Co. (1911) 221 U. S. 229.

[2] Bowman *v.* Chicago, etc., Ry. Co. (1888) 125 U. S. 465, 489; Compagnie Française *v.* Board of Health (1902) 186 U. S. 380, 381. Similarly a State may prevent fruit too green to be used from being shipped out of the State. Sligh *v.* Kirkwood (1915) 237 U. S. 52.

[3] See sec. 92.

[4] Geer *v.* Connecticut (1896) 161 U. S. 519.

[5] Hudson County W. Co. *v.* McCarter (1908) 209 U. S. 349.

[6] Pembina Mining Co. *v.* Pennsylvania (1888) 125 U. S. 181; Hooper *v.* California (1895) 155 U. S. 648; International Text Book Co. *v.* Pigg (1910) 217 U. S. 91. Natural persons could demand admission also

road rates the Supreme Court held that they could regulate the rates for interstate as well as for intrastate shipments in the absence of legislation on the subject by Congress.[1] Ten years later, however, when the court took the matter under serious consideration, it repudiated its former view as having been ill-considered, and held that the exercise of such a right by the States would have so serious and demoralizing an effect upon interstate commerce as to be entirely unjustifiable.[2] State provision against race discrimination on interstate conveyances has been held to be an undue interference with interstate commerce.[3] It has been held that state legislation requiring railroads to deliver cars from another State to consignees on private sidings beyond the line of the railroad casts an undue and invalid burden upon interstate commerce,[4] and the same was held with regard to a state statute compelling the distribution of cars in such a way as to make the railroad incur heavy penalties in its interstate business.[5]

On the other hand it has been held that, until Congress acts in such matters, a State may regulate pilotage, and provide for the improvement of harbors and waterways, though they are interstate highways, and make quarantine regulations, and regulations for the inspection of goods to prevent fraud and imposition. Also, in the absence of federal legislation, interstate carriers may be held liable for misfeasances and nonfeasances according to the law of the State where the act or omission occurred, and their liability to employees, as well as their liability for death and

---

under the privileges and immunities clause of the Constitution, see secs. 204 and 205, whether desiring to do interstate business or not.

[1] Peik *v.* Chicago, etc., Ry. Co. (1876) 94 U. S. 164.

[2] Wabash, etc., Ry. Co. *v.* Illinois (1886) 118 U. S. 557. In Pennsylvania Gas Co. *v.* Public Serv. Com. (1920) 252 U. S. 23, regulation of rates by the State for natural gas piped from Pennsylvania and furnished to consumers in New York was upheld, in the absence of congressional regulation.

[3] Hall *v.* DeCuir (1877) 95 U. S. 485.

[4] McNeill *v.* Southern Ry. Co. (1906) 202 U. S. 543.

[5] St. Louis & S. W. Ry. Co. *v.* Arkansas (1910) 217 U. S. 136.

for the injury to or loss of property may be covered by state law. The States may also compel the examination of engineers, may require the heating of interstate trains and the proper guarding of crossings and the like, and may prohibit the running of freight trains on Sunday.[1] The State may further compel the stopping of interstate trains at points within the State in order to procure for its citizens reasonably adequate transportation facilities,[2] but when such legislation goes beyond this point it constitutes an unreasonable burden upon interstate commerce and is invalid.[3] When, however, Congress legislates on any of these matters state legislation is annulled insofar as it is in conflict with the federal statutes.[4]

§95. *State Taxation Affecting Interstate Commerce.*[5] We have already considered what constitutes commerce, and when interstate commerce commences and ends.[6] It is now thoroughly established that a State may not put a direct burden upon interstate or foreign commerce through taxation. It may not, therefore, tax goods or persons while in the course of transportation in such commerce. Nor may it put a tax upon the agencies of interstate or foreign commerce, nor upon the receipts from interstate commerce as such, nor upon the act of carrying it on, nor upon the right to carry it on.[7] But property which is within the borders of a State

[1] Minnesota Rate Cases (1913) 230 U. S. 352, 402 to 411. All the cases are so fully collected in this decision that it seems unnecessary to set them out here individually.

[2] Gulf, C. & S. F. Ry. Co. *v.* Texas (1918) 246 U. S. 58.

[3] Missouri, K. & T. Ry. Co. *v.* Texas (1918) 245 U. S. 484.

[4] Chicago, R. I., etc., Ry. *v.* Hardwick Elevator Co. (1913) 226 U. S. 426 (distribution of cars); Cooley *v.* Port Wardens (1851) 12 Howard 299 (quarantine); Reid *v.* Colorado (1902) 187 U. S. 137, 146 (quarantine and inspection of live-stock); Second Employers' Liability Cases (1912) 223 U. S. 1, 51, 53.

[5] Although, perhaps, the logical place for the fullest treatment of this subject would be in connection with the States' taxing power (see secs. 253 and 454), for the sake of completeness in the treatment of interstate commerce it seems preferable to put it here.

[6] See secs. 86 and 87.

[7] Brown *v.* Maryland (1827) 12 Wheaton 419; Western Un. Tel. Co. *v.*

is no less a proper subject of taxation because it previously moved in interstate commerce, if at the time it is taxed it is no longer a part of such commerce.[1] There is, however, this limitation upon the last stated proposition, namely, that a State may not levy a tax which discriminates against goods which have been introduced from other States or from foreign countries, though these goods are no longer a part of interstate commerce, for such discriminatory action would tend to impede interstate and foreign commerce.[2] It does not create a constitutional objection to a state tax on property within its borders that the property in question is used in doing an interstate business. Such property receives the same protection as all other property within the State and it is just that it should bear an equal burden. This, it is well established, does not cast any direct or any undue burden upon interstate commerce.[3] Such a tax may be upon intangible as well as upon tangible property, and, as we see elsewhere, where a person or company is doing business in several States, the value of the intangible property is apportionable among the States according to the so-called "unit rule."[4]

State taxes on gross receipts, when applied to corporations or persons doing an interstate as well as an intrastate business, have caused the Supreme Court of the United States a good deal of trouble. In *State Tax on Railway*

Texas (1881) 105 U. S. 460; People *v.* Compagnie Générale Transatlantique (1882) 107 U. S. 59; Robbins *v.* Shelby County Taxing Dist. (1887) 120 U. S. 489; Leloup *v.* Mobile (1888) 127 U. S. 640, 648, and cases cited (overruling Osborne *v.* Mobile (1872) 16 Wallace 479); Brennan *v.* Titusville (1894) 153 U. S. 289; Adams Exp. Co. *v.* Ohio (1897) 165 U. S. 194, 234 and 235, and cases cited; Kelley *v.* Rhoades (1903) 188 U. S. 1; International Text Book Co. *v.* Pigg (1910) 217 U. S. 91.

[1] Woodruff *v.* Parham (1868) 8 Wallace 123; Brown *v.* Houston (1885) 114 U. S. 622; American Steel Co. v. Speed (1904) 192 U. S. 500.

[2] Webber *v.* Virginia (1880) 103 U. S. 344; and Darnell & Son *v.* Memphis (1908) 208 U. S. 113, in which latter case the subject is fully reviewed by Chief Justice White.

[3] Postal Tel. C. Co. *v.* Adams (1895) 155 U. S. 688, 696; Adams Exp. Co. *v.* Ohio (1897) 165 U. S. 194, 220.

[4] See sec. 252.

Gross Receipts[1] it was held that such a tax is not a tax on interstate transportation, but is a tax upon a fund which has become the property of the company mingled with its other property, and which has thus lost its character as freight earned. It is also suggested that the tax may be considered as one upon the franchises exercised by grant of the taxing State as long as the tax is not greater than would be justifiable as a franchise tax. The suggestion is, however, thrown in rather as an afterthought. Three justices dissented on the ground that the tax was in effect a tax upon the privilege of transporting goods through the State. In *Philadelphia Steamship Company v. Pennsylvania*[2] the court had presented to it the case of a tax upon the gross receipts of a steamship company which did only interstate and foreign business. In this case the reasoning and conclusion of the court in the preceding case, with regard to the tax as a tax upon gross receipts, were repudiated. It was held that the earlier case could not be sustained upon that ground—that a tax upon gross receipts is substantially a tax upon the act of doing the business by which the receipts were earned, and so, as far as the receipts come from interstate commerce, is a tax upon such commerce, and is therefore unconstitutional. The court was this time unanimous. Between the dates of the last case and this the personnel of the court had changed except for three members, two of whom had dissented in the previous case. The third one, who wrote the opinion in the instant case, apparently concurred with the majority in the earlier decision. It was suggested that the former decision might perhaps be upheld on the ground that the tax there was on the franchises granted to the domestic corporation. In *Maine v. Grand Trunk Railway Company*[3] the court had before it an excise tax on the privilege of exercising franchises granted by the State, measured by gross receipts per mile multiplied by the number of miles of railroad in the State. The majority of the court held the tax valid as not being a tax on gross

[1] (1872) 15 Wallace 284.
[2] (1887) 122 U. S. 326.
[3] (1891) 142 U. S. 217.

receipts but on the franchises, and so distinguishable from the tax in the preceding case. Four justices dissented, holding this was in effect taxation of gross receipts, and so taxation of interstate commerce, as decided in the preceding case. In *Galveston, Harrisburg, etc., Railway Company v. Texas*[1] the tax under consideration was levied upon a railway doing intrastate and interstate business "equal to one per cent." of its gross receipts. The majority of the court held the tax unconstitutional as a tax on interstate commerce on the authority and reasoning of the *Philadelphia Steamship* case, which was declared to be "unshaken." The *Maine* case it was held by the majority might be distinguished as in fact involving a tax on the company's right of way, and so a property tax—the determination of the validity of a tax depending upon its real nature and not upon the name attached to it. Four justices dissented on the ground that the decision of the state court that this was an occupation tax should have been accepted, and the tax sustained as such, not being when so viewed a tax on interstate commerce. In *Crew Levick Company v. Pennsylvania*[2] the court unanimously held invalid as a tax upon interstate commerce a tax of one-half mill "on each dollar of the whole volume, gross, of business transacted annually." A large part of the sales of the company affected were made abroad. A tax was upheld in *United States Express Company v. Minnesota*[3] which was levied upon a company doing interstate business, measured by gross receipts, which was in lieu of all other property taxes, the court holding that such a tax is in effect a property tax. The *Maine* case was cited as authority for this decision. The same conclusion was reached in *Cudahy Packing Company v. Minnesota*[4] with the qualification that the tax must not be in excess of what would be a legitimate tax upon the company's property.

[1] (1908) 210 U. S. 217.

[2] (1917) 245 U. S. 292. This would seem in effect to overrule Ficklin *v.* Shelby County Taxing Dist. (1892) 145 U. S. 1, although not expressly doing so.

[3] (1912) 223 U. S. 335. [4] (1918) 246 U. S. 450.

From these cases it seems apparent that a tax upon gross receipts as such of a person or corporation doing in whole or part an interstate business is a tax upon interstate commerce and unconstitutional, but that a tax levied in lieu of other property taxes measured by gross receipts is to be viewed as a property tax and legal, if not more than could legitimately be levied upon the property, within the State, of the person or corporation affected. A tax cannot be levied upon the privilege of doing an interstate business in a State,[1] but since a tax may legitimately be levied upon franchises granted by the State, it would seem that a tax which is bona fide levied upon such franchises, and not in excess of what a tax upon such privileges may legitimately be, though measured by gross receipts, is to be viewed as a franchise tax, and held constitutional.[2] In one of the cases already discussed it was suggested by way of dictum that a State might tax the net income of a corporation, part of whose business is interstate.[3] This was directly determined in a case decided in 1918.[4] The court pointed out that it is the net income out of which all taxes are normally paid, and held that to tax the net income as such, though part of it is derived from interstate commerce, is not a direct burden upon interstate commerce, and is, therefore, not unconstitutional.

A tax upon the total capital stock of a foreign corporation doing an interstate business and having property in other States is unconstitutional both as putting an undue and

[1] Philadelphia S. S. Co. *v.* Pennsylvania (1887) 122 U. S. 326, 342; Western Un. Tel. Co. *v.* Kansas (1910) 216 U. S. 1. But the fact that a tax is called a privilege tax is not sufficient. When such a tax was levied upon a telegraph company according to the length of its lines in the State, in lieu of all other taxes, and was not unreasonable in amount it was viewed as a property tax and upheld. Postal Teleg. Cable Co. *v.* Adams (1895) 155 U. S. 688.

[2] A State may levy upon a foreign corporation an excise tax upon the privilege of doing an intrastate business in the State. Baltic Mining Co. *v.* Massachusetts (1913) 231 U. S. 68. As to the due process and equal protection clauses in this connection see secs. 254 and 276.

[3] State Tax on Railway Gross Receipts (1872) 15 Wallace 284, 296.

[4] United States Glue Co. *v.* Town of Oak Creek (1918) 247 U. S. 321.

direct burden upon interstate commerce, and also as being without due process because taxing property outside of the State.[1] But a tax upon a domestic corporation, levied upon its franchise to be a corporation, measured by its capital stock, with a maximum of $2,500, was upheld in *Kansas City Railway v. Kansas*.[2] The court said that a State may levy a tax on such a franchise, though the corporation is doing an interstate business, and that interpreting and applying such a statute as this it will look to the substance and not to the words used. The court thought that the tax law before it was a bona fide tax on the franchise, and not unreasonable in character, and held that the fact that reference was made to capital stock in determining its amount within reasonable limits did not invalidate it. The court has held similarly that a tax on a foreign corporation for the privilege of doing intrastate business, measured by capital stock, but not to exceed $2,000, is valid, on the same reasoning.[3] It seems that the validity of these taxes rests upon the facts that they are not based wholly upon the capital stock, but have a fixed and comparatively low maximum, and that they appear to be entirely reasonable as taxes upon the privileges involved.[4]

A tax upon interstate telegraph companies, taking the form of a small charge per pole, was justified by the Supreme Court, when the poles were placed in the streets of a municipality, largely as a sort of rental, which being reasonable in amount was not an undue burden upon interstate commerce.[5] In another case, however, where it appeared that the poles were set on a railroad's right of way, the court

[1] Looney *v.* Crane (1917) 245 U. S. 178; International Paper Co. *v.* Massachusetts (1918) 246 U. S. 135, and cases cited.

[2] (1916) 240 U. S. 227.

[3] Baltic Mining Co. *v.* Massachusetts (1913) 231 U. S. 68.

[4] In General Railway Signal Co. *v.* Virginia (1918) 246 U. S. 500, where the tax was similar to the one in the last preceding case, except that the maximum fixed by the statute was $5000, the court upheld the enactment, but said: "It seems proper, however, to add that the case is on the border line."

[5] Postal Telegraph Cable Co. *v.* Richmond (1919) 249 U. S. 252.

still held the small charge constitutional as compensation for governmental supervision and regulation.[1] Fees which are charged to cover the cost of such inspection as is justified under the State's police power, are constitutional, though they are charged against those engaged in interstate commerce, if they do not substantially exceed the cost of inspection.[2] But when they do substantially exceed such cost, and are therefore obviously levied for the purpose of revenue, they become a tax upon interstate commerce, and so unconstitutional.[3] In *American Manufacturing Company v. St. Louis*[4] the court had to determine whether a tax was in fact a tax upon the sales made in a business, which were part of interstate commerce, or upon the manufacture of the goods which were later sold. It determined that it was of the latter character, and that the levy was, therefore, constitutional.

[1] Mackay Tel. & Cable Co. *v.* Little Rock (1919) 250 U. S. 94.
[2] Pure Oils Co. *v.* Minnesota (1918) 248 U. S. 158, and cases cited.
[3] Standard Oil Co. *v.* Graves (1919) 249 U. S. 389, and cases cited.
[4] (1919) 250 U. S. 459.

CHAPTER IX

WAR POWERS AND CONTROL OF MILITARY AFFAIRS

§96. *War and Peace.* The Constitution gives to Congress the power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."[1] On the other hand the same instrument expressly forbids the States to "engage in war unless actually invaded, or in such imminent danger as will not admit of delay," without the consent of Congress.[2] Thus it seems clear that the exclusive power to declare war rests in the national legislature. This declaration may take either the form that a state of war shall exist or that it does exist. In the case of our Civil War the Supreme Court recognized the power of the President by proclamation to declare a state of war to exist, where the internal strife had reached in his opinion the proportions of a public conflict. The soundness of this decision seems very doubtful, and Justice Nelson dissented vigorously.[3] It has never been suggested that he would have this power in the case of a conflict with a foreign government. It is of course true, however, that it is possible for the President, as a result of his control of international affairs. to create a situation which will be likely to lead to war, or as a result of which war may become in fact inevitable.

The establishment of peace between two belligerents generally results from a treaty binding upon both parties and establishing their mutual rights and obligations. As we have seen, the treaty-making power is vested in the

[1] Art. I, sec. 8, par. 11.

[2] Art. I, sec. 10, par. 3.

[3] The Prize Cases (1862) 2 Black 635.

President and the Senate acting together. Besides his part in treaty-making the President as Commander-in-Chief may play an important preliminary part in the establishment of peace through the armistice terms which he lays down or to which he consents.[1] The Supreme Court also recognized the right of the President, in the case of our Civil War, to declare the existence of a state of peace.[2] Such a right, however, would probably not be recognized in the case of a war with a foreign power commenced by congressional action. In such a case the state of war being the result of law it would seem that that law could be taken off the statute book only by some action having the force of law.

After the World War the Treaty of Versailles with Germany and Austria-Hungary was negotiated by representatives of this country, and of those countries with which we were associated, but this treaty the Senate refused to ratify. Finally on July 2, 1921, was approved a joint resolution adopted by Congress, declaring that the state of war, which by previous joint resolutions had been declared to exist, was now at an end. By the terms of this resolution there were reserved to the United States all of the rights and privileges to which they had become entitled under the terms of the armistice, or by force of the Versailles treaty, or in any way by reason of the participation by this country in the war.[3] Some doubt has been expressed as to the constitutional right of Congress to declare peace, in view of the fact that the establishment of peace would be the proper subject matter of a treaty. In support of this position it is pointed out that in the Constitutional Convention it was proposed to include among the powers of Congress the power to "make peace," and that this motion was lost.[4]

[1] See secs. 28 and 33.

[2] The Protector (1871) 12 Wallace 700.

[3] Public Resolution, No. 8, 67th Congress.

[4] Farrand, *The Records of the Federal Convention*, vol. ii, p. 319. By the Articles of Confederation (art. IX) Congress had the sole power to "determine on peace and war," except when a State was invaded or invasion was so imminent as not to admit of delay until Congress could act.

It is perhaps worth noting that when this action was taken it was proposed to vest in the Senate alone the treaty making power, and the apparent reason for not expressly giving to Congress the power to make peace was that "it should be more easy to get out of war, than into it."[1] It would seem that since Congress has the express power to create or declare a state of war by legislative action, it should be held to have authority to repeal such action and thereby return the country to a state of peace, in the absence of any express prohibition. The fact that the establishment of peace is a proper subject of the treaty power does not prove that Congress is excluded from that field. There is a large field with regard to international commerce in which the government can act either by treaty or by congressional legislation.[2] If this power of declaring peace is not recognized as residing in Congress we might find it quite impossible in some instances to get out of a technical state of war, as where the President and two thirds of the Senate cannot agree on the terms of a peace treaty, or where the opposing belligerent and this country cannot so agree, or where the opposing government has been destroyed.[3]

§97. *Raising Military Forces.* Congress is given authority by the Constitution to raise money for "the common defense,"[4] and

> "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; 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,

[1] Farrand, *The Records of the Federal Convention*, vol. ii, p. 319.

[2] See sec. 34.

[3] See the article by E. S. Corwin on "The Power of Congress to Declare Peace," *18 Mich L. Rev.*, 669.

[4] Art. I, sec. 8, par. 1.

reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress; . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers. . . ."[1]

Under the Articles of Confederation Congress had power to build and equip a navy, but had only power "to agree upon the number of land forces, and to make requisition from each State for its quota."[2] There was no doubt, however, that each State had power to demand military service of its citizens, and at least nine of the original state constitutions contained provisions to this effect.[3] This requisition system constituted one of the great weaknesses of the national government during the period of the Revolution, and one which undoubtedly the framers of the Constitution intended to remedy. For three quarters of a century after the adoption of the Constitution the armies of the United States were raised by voluntary enlistment, although during the War of 1812 Mr. Monroe, then Secretary of War in President Madison's cabinet, suggested to Congress several plans for compulsory military service.[4] In the Civil War the policy of compulsory military service was in fact adopted, and four drafts were made under it, producing a force of about a quarter of a million men.[5] The constitutionality of this legislation was raised in only one case in a state court, and was there upheld.[6] Under the constitution of the Confederate States, containing provisions on the war power identical with those in the Constitution of the United States, men were drafted into the military service, and this action was repeatedly held constitutional.[7]

[1] Art. I, sec. 8, pars. 12, 13, 14, 15, 16 and 18.

[2] Art. IX.

[3] See Selective Draft Law Cases (1918) 245 U. S. 366, 380.

[4] *Ibid.*, 385.

[5] Act of March 3, 1863, 12 Stat. 731; Historical Report, Enrollment Branch, Provost Marshal General's Bureau, March 17, 1866.

[6] Kneedler *v.* Lane (1863) 45 Pa. St. 238.

[7] Burroughs *v.* Peyton (1864) 16 Gratton 470; Jeffers *v.* Fair (1862) 33 Ga. 347; Daly *v.* Harris (1864) 33 Ga. (Supp.) 38, 54; Barber *v.* Irwin

After the United States entered the World War Congress passed the Compulsory Draft Law,[1] providing for compulsory service in the armies of the United States. The constitutionality of this law was attacked in a number of cases, which were dealt with together by the Supreme Court of the United States under the title of *Selective Draft Law Cases.*[2] The decision was unanimous and the opinion was written by Chief Justice White. The court declared that under the power "to declare war; . . . to raise and support armies," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," Congress has power to compel military service, having in this respect all of the power previously possessed by the individual States; that this is the more clearly evident from the fact that the Constitution forbids the States to maintain armies or to engage in war except when invaded or in such imminent danger as will not admit of delay.[3] Such service is not involuntary servitude in any such sense as was intended by those who framed and adopted the Thirteenth Amendment, but is merely the enforcement of the duty of every citizen to support his government. That this method of raising an army is a proper method to be adopted by a sovereign state in the exercise of its war powers is further evidenced by the fact that it has been adopted by almost all of the nations of the world.[4] It was contended, however, that the draft law was in conflict with the constitutional provision

(1864) 34 Ga. 27; Parker *v.* Kaughman (1865) 34 Ga. 136; *Ex parte* Coupland (1862) 26 Tex. 386; *Ex parte* Hill (1863) 38 Ala. 429; *In re* Emerson (1864) 39 Ala. 437; *In re* Pill (1864) 39 Ala. 459; Simmons *v.* Miller (1864) 40 Miss. 19; Gatlin *v.* Walton (1864) 60 N. Car. 333, 408.

[1] Act of May 18, 1917, 40 Stat. 76. See A. A. Gillette, "War Legislation for the Army," *17 Mich. L. Rev.*, 127.

[2] (1918) 245 U. S. 366.

[3] Art. I, sec. 10, par. 3.

[4] Selective Draft Law Cases (1918) 245 U. S. 366, 378, where the legislation of the various countries is referred to. It is interesting to note that the Second Amendment as proposed by Madison would have excused from military service on the ground of religious scruples. See sec. 131.

which leaves the militia under the control of the States. But the court said:

> "There was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies. This did not diminish the military power or curb the full potentiality of the right to exert it, but left an area of authority requiring to be provided for (the militia area) unless and until by the exertion of the military power of Congress that area had been circumscribed or totally disappeared."[1]

It rests in the discretion of Congress to use the militia as it is empowered to do "to execute the laws of the Union, suppress insurrections, and repel invasions," if it so desires, but this does not in any way curb its power to raise an army by conscription.

In a later case it was contended that it was unconstitutional to compel persons to serve in the army overseas, because the militia clause only gives Congress the power to call out that body "to suppress insurrections, and repel invasion." The court, however, held that there is no such limitation upon the power of the national government in raising an army under its war powers.[2] In order to make the services of the members of the militia available to the nation for all purposes, the National Defense Act of 1916[3] provided for their taking an oath to, and promising obedience to the orders of the federal government as well as to the state governments, and for their being drafted into the federal service as individuals, not as organizations, at the order of the President.[4]

[1] Selective Draft Law Cases (1918), 245 U. S. 366, 383.

[2] Cox *v.* Wood (1918) 247 U. S. 3.

[3] Act of June 3, 1916, secs. 70, 73, 111, 39 Stat. 166.

[4] A State may not prohibit its citizens to possess and bear arms and so destroy the resources of the federal government for the protection of public security, but it may regulate the right to possess and bear arms so long as it does not conflict with national legislation. Presser *v.* Illinois (1886) 116 U. S. 252.

The President as Commander-in-Chief of the army and navy has entire authority to provide for the disposition of military and naval forces of the United States, and to direct all military campaigns.[1] But Congress has authority to provide for the raising of military forces, to determine what their equipment and discipline shall be, and to make appropriations for their maintenance. It is, therefore, clear that the ultimate control of the military machine is in the legislative rather than the executive branch of the government.

§98. *Courts-Martial and Martial Law.* So-called martial law, except in occupied territory of an enemy, is merely the calling in of the aid of military forces by the executive, who is charged with the enforcement of the law, with or without special authorization by the legislature. Such declaration of martial law does not suspend the civil law, though it may interfere with the exercise of one's ordinary rights. The right to call out the military forces to maintain order and enforce the law is simply part of the police power. It is only justified when it reasonably appears necessary, and only justifies such acts as reasonably appear necessary to meet the exigency, including the arrest, or in extreme cases the killing of those who create the disorder or oppose the authorities. When the exigency is over the members of the military forces are criminally and civilly liable for acts done beyond the scope of reasonable necessity. When honestly and reasonably coping with a situation of insurrection or riot a member of the military forces cannot be made liable for his acts, and persons reasonably arrested under such circumstances will not, during the insurrection or riot, be free by writ of habeas corpus.[2]

In the famous case of *Ex parte Milligan*[3] the question was whether in a State of the Union where the civil courts were in full operation, and the federal government was unopposed, military trial could constitutionally be substituted for civil trial, because the United States were at war with

[1] See sec. 28.

[2] Moyer *v.* Peabody (1909) 212 U. S. 78.

[3] (1866) 4 Wallace 2.

the Southern States. The Supreme court said: "No usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power."[1]

Courts-martial are not part of the judicial system provided for in the Judiciary Article[2] of the Constitution, but they are courts of the United States created under the power to govern the military forces, and by the terms of the Fifth Amendment "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger" are excepted from the rule that criminal prosecutions must be commenced by indictment, and this is held to except such cases from the rule of the Sixth Amendment that there must be a jury trial in criminal cases.[3] An application for a writ of habeas corpus is the proper means by which to test the jurisdiction of a military court.[4] "Undoubtedly courts-martial are tribunals of special and limited jurisdiction whose judgments, so far as questions relating to their jurisdiction are concerned, are always open to collat-

[1] *Ex parte* Milligan (1866) 4 Wallace 2, 121. [2] Art. III.

[3] Dynes *v.* Hoover (1857) 20 Howard 65; *Ex parte* Reed (1879) 100 U. S. 13, 21; Kurtz *v.* Moffitt (1865) 115 U. S. 487, 500; Grafton *v.* United States (1907) 206 U. S. 333; Kahn *v.* Anderson (1921) 255 U. S. 1, 8.

[4] That a writ of habeas corpus is not always an effective weapon against military authorities is evidenced by Chief Justice Taney's statement in *Ex parte* Merryman (1861) Fed. Cas. No. 9,487, where an attachment was issued but the officer was prevented by military force from serving it: "I have exercised all the power which the Constitution and laws confer upon me, but that power has been resisted by a force too strong for me to overcome. It is possible that the officer who has incurred this grave responsibility may have misunderstood his instructions, and exceeded the authority intended to be given him, I shall, therefore, order all the proceedings in this case, with my opinion, to be filed and recorded in the Circuit Court of the United States for the district of Maryland, and direct the clerk to transmit a copy, under seal, to the President of the United States. It will then remain for that high officer, in fulfilment of his constitutional obligation to 'take care that the laws be faithfully executed,' to determine what measures he will take to cause the civil process of the United States to be respected and enforced." See also *Ex parte* Benedict (1862) Fed. Cas. No. 1,292; *Ex parte* Moores (1870) 64 N. C. 802.

eral attack."[1] But judgments of military courts having jurisdiction cannot be reviewed or set aside by civil tribunals.[2]

The Articles of War[3] not only subject to trial by court-martial persons actually in the military service, but others as well. The ninety-fourth article confers upon courts-martial jurisdiction to try officers and soldiers, after they have severed their connection with the service, for certain frauds against the government committed before their discharge. A similar provision in the Articles for the Government of the Navy has been upheld by a federal court,[4] and these provisions may probably be supported as dealing with "cases arising in the land and naval forces."[5] The second article subjects to military law administered by courts-martial "all persons under sentence adjudged by courts-martial." This would include officers and men who upon conviction had been dishonorably discharged as well as civilians who had been tried by military courts, under the provisions to be noted in a moment. Those persons who at the time of their trial by court-martial were in military service, though upon conviction dismissed from the service, are viewed as still part of the military forces for purposes of discipline, and it is held that they may, therefore, be subjected to trial by a military court.[6] The provision in so far as it applies to civilians under sentence adjudged by courts-martial seems not to have been passed upon by the courts, but it has been suggested that this provision can be sustained on the ground that any offense committed in a prison

[1] Givens *v.* Zerbst (1921) 255 U. S. 11, 19.

[2] United States *v.* Pridgeon (1894) 153 U. S. 48; Johnson *v.* Sayre (1895) 158 U. S. 109; Reaves *v.* Ainsworth (1911) 219 U. S. 296, 304.

[3] U. S. Rev. Stat. secs. 1342 and 1343, as amended by act of Aug. 29, 1916, 39 Stat. 619. See also Articles for the Government of the Navy, U. S. Rev. Stat. sec. 1624.

[4] *Ex parte* Bogart (1873) 2 Sawyer 396; and see *Ex parte* Milligan (1866) 4 Wallace, 2, 138.

[5] See E. M. Morgan, "Court-Martial Jurisdiction Over Non-Military Persons under the Articles of War," *4 Minn. L. Rev.*, 79, 83.

[6] Carter *v.* McClaughry (1902) 183 U. S. 365, 383; Kahn *v.* Anderson (1921) 255 U. S. 1, 7.

under the jurisdiction of army authorities constitutes a case arising in the land forces.[1]

The second article of war also subjects to military law "all retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles." Since the constitutional guaranties do not apply outside of the territorial limits of the United States,[2] there is clearly no constitutional ground for attacking the first clause above quoted, in so far as it applies to trial without the territorial jurisdiction of the United States. Provisions for trial by courts-martial of camp followers and those accompanying the army were in force before the adoption of the Constitution, and have been in force ever since, and were never questioned until the late war. They have, however, come before the federal courts recently and apparently are held constitutional in their entirety.[3] Such provisions would seem to be necessary for the maintenance of military discipline, and would seem reasonably to come within the clause as to "cases arising in the land and naval forces."

The eighty-first article of war declares that "whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial or military commission may direct." And the eighty-second article declares that "any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or

[1] E. M. Morgan, "Court-Martial Jurisdiction over Non-Military Persons under the Articles of War," *4 Minn. L. Rev.*, 79, 87.

[2] *Ex parte* Gerlach (1917) 247 Fed. 616; *Ex parte* Fall (1918) 251 Fed. 415; *Ex parte* Jochen (1919) 257 Fed. 200. [3] *Ibid.*

elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death." The acts punishable by the eighty-first article constitute treason as defined in the Constitution,[1] and treason is a crime which clearly comes within the guaranties contained in that instrument with regard to indictment and trial by jury except "in cases arising in the land and naval forces." The words of the article do not confine its operation to cases involving members of the land and naval forces, nor has it been given such narrow interpretation. As to persons in the land and naval forces, and as to civilians properly subject to military law under the second article as discussed in the last preceding paragraph, the article seems quite clearly constitutional, since such cases would arise in the land and naval forces. It would seem as clearly not constitutional if attempted to be applied to all civilians indiscriminately. It has, however, been contended that the article may constitutionally be applied to "those civilians whose offenses occur in the theatre of war, in the theatre of operations, or in any place over which the military forces have actual control and jurisdiction."[2] This, at least, would seem to go to the extreme limit of constitutionality. In so far as the eighty-second article with regard to spies applies to members of the army and navy it would seem to be constitutional beyond question. As applied to a member of the armed forces of the enemy it would seem constitutional, if for no other reason, as a legitimate and recognized method of carrying on war between opposing forces. It would also seem constitutional as applied to alien enemies, not members of the opposing armed forces. They are not protected by any constitutional guaranties,[3] and would, in such transactions as are covered by the provisions of this article, be in

[1] "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Art. III, sec. 3, par. 1.

[2] E. M. Morgan, "Court-Martial Jurisdiction over Non-Military Persons under the Articles of War," *4 Minn. L. Rev.*, 79, 107, and see pp. 97 to 107.

[3] De Lancy *v.* United States (1918) 249 Fed. 625.

no different position from that of members of the opposing army. But such acts if done by a citizen would constitute treason, and what has been said as to citizens in connection with article eighty-one would equally apply here. The language of article eighty-two would cover acts done by citizens anywhere within the United States, and this clearly goes too far.[1]

Members of military forces in enemy territory are amenable only to military tribunals,[2] but their acts when done within the territory of the United States may subject them to criminal liability by the laws of the States in which their acts are done as well as to punishment under the articles of war. The seventy-fourth article of war requires that when a person, who is subject to military law, is accused of a crime committed within the United States, punishable by the law of the land, he shall be surrendered to the civil authorities upon demand, "except in time of war," and except when he is held by the military authorities to answer, or is awaiting trial or the result of trial, or is undergoing sentence for an offense under the articles of war. Article ninety-two provides that no person shall be tried by court-martial for murder or rape committed within the United States "in time of peace." In time of peace, then, the civil tribunals have the sole right to punish persons who are subject to military law for murder and rape, and in all other cases, in time of peace, military authorities must recognize the superior right of the civil tribunals over such persons unless such authorities have actually taken jurisdiction of such persons for the purpose of trial and punishment. In *Caldwell v. Parker*[3] the question was raised whether in time of war the military authorities have exclusive jurisdiction to try such persons for criminal offenses. The court held that they have not, and that a state court may, therefore, try a soldier in time of war for a crime committed within the State. The

[1] See E. M. Morgan, "Court-Martial Jurisdiction over Non-Military Persons under the Articles of War," *4 Minn. L. Rev.*, 79, 107 to 116.

[2] Coleman *v.* Tennessee (1878) 97 U. S. 509.

[3] (1920) 252 U. S. 376.

court even questioned whether the exceptions in articles seventy-four and ninety-two with regard to time of war were intended "to do more than to recognize the right of the military authorities in time of war, within the areas affected by military operations or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified."[1] This question was left unsettled, but in *Kahn v. Anderson*[2] the right of a military tribunal to try a person subject to military law for murder in time of war was upheld, the court merely saying that in the previous case "the question here raised was expressly reserved from decision." It is believed, however, that the decision of a District Court that in time of war the military tribunals have a right superior to that of the civil tribunals to try members of the military forces, and that a soldier under indictment in a state court should be taken upon demand from the state authorities by writ of habeas corpus and surrendered to the military authorities, is an incorrect interpretation and application of the articles of war. By a provision added to the articles of war in 1916 a civil or criminal action commenced against an officer or soldier in a state court on account of any act done under color of his office or status, or in respect of which he claims any authority under a law of the United States respecting the military forces, or under the laws of war, may be removed into and tried in a District Court of the United States in the district where the proceedings are pending.[3]

§99. *Unusual Powers in Time of War.* Very extensive and important powers may be exercised by the federal government in time of war which it could not exercise in time of peace, but this is not because in war time the Constitution is suspended. "The war power of the United States, like its other powers and like the police power of the

[1] Caldwell Parker (1920) 252 U. S. 376, 387.

[2] (1921) 255 U. S. 1, 9. It was also held in this case that war had not come to an end by the signing of the armistice, there having been no treaty or declaration of peace.

[3] Art. 117.

States, is subject to applicable constitutional limitations."[1] Yet the application of the constitutional guaranties may be quite different in times of war and peace.[2] Under the war power property rights may be affected in ways which would not constitute due process in times of peace, but if such legislation is "necessary and proper for carrying into execution" the war power, it for that reason constitutes due process in time of war. For example take the legislation by which the national government took over entire control of the railroads of the country,[3] and of the telegraph lines[4]; also the legislation regulating the price of fuel,[5] enforcing nation-wide prohibition before the Eighteenth Amendment[6] and providing for the commandeering of ships,[7] and of the output of factories.[8] But in *United States v. Cohen Grocery Company*[9] it was held that the Food Control Act, by imposing fine or imprisonment upon any person making "any unjust or unreasonable rate or charge in handling or dealing in or with any necessary," deprived persons of their liberty or property without due process, contrary to the Fifth Amendment, since the statute set up no ascertainable standard of guilt. The right of the government to take over the property belonging to alien enemies was thought to be so clear that the Supreme Court stated the proposition as

[1] Hamilton *v.* Kentucky Distilleries Co. (1919) 251 U. S. 146, 156. And see *Ex parte* Milligan (1866) 4 Wallace 2; United States *v.* Cohen Grocery Co. (1921) 255 U. S. 81, 88.

[2] See C. H. Hough, "Law in War Time—1917," *31 Harv. L. Rev.*, 692; E. Wambaugh, "War Emergency Legislation," *30 Harv. L. Rev.*, 663.

[3] Northern Pac. Ry. Co. *v.* North Dakota (1919) 250 U. S. 135. In peace time the war power has been relied on as one of the grounds for justifying the federal government in authorizing the construction of national highways. Pacific R. R. Removal Cases (1885) 115 U. S. 1; Wilson *v.* Shaw (1907) 204 U. S. 24, 33.

[4] Dakota Cent. Tel. Co. *v.* South Dakota (1919) 250 U. S. 163.

[5] United States *v.* Pennsylvania Cent. Coal Co. (1918) 256 Fed. 703.

[6] Hamilton *v.* Kentucky Distilleries Co. (1919) 251 U. S. 146.

[7] The Lake Monroe (1919) 250 U. S. 246.

[8] Moore & Tierney *v.* Roxford Knitting Co. (1918) 250 Fed. 276.

[9] (1921) 255 U. S. 81.

one which needed no discussion.[1] A military officer may, in cases where there is "immediate and impending" danger, destroy property to prevent its falling into the hands of the enemy, or may take it for use in military operations, and will not thereby become a trespasser. But if the officer oversteps these bounds he becomes a trespasser and is liable to the person injured.[2] When property is taken or destroyed in order to meet such an immediate and impending danger there is a duty upon the government to make compensation,[3] but whether this duty is one which can be enforced before the Court of Claims, or must be met by congressional action, depends upon the authority which has been given to that court.[4] Injury to property, however, as the result of operations in the field do not impose upon the government a duty of compensation. When compensation is made in such cases it is in the nature of a bounty rather than the payment of an obligation.[5]

If congressional legislation is reasonably related to the successful prosecution of a war which is in progress, so that it is "necessary and proper for carrying into execution" the war power, under the liberal construction given to that clause,[6] it is no ground for condemnation that it covers a field which is ordinarily within the police power of the States, or even that the motive in passing it may have been to improve moral conditions. Both of these objections have, as we have seen, been made to legislation under the commerce clause without success.[7] The Federal Control Act[8] passed during the World War gave to the federal government power to fix both interstate and intrastate rates of railroads, and the Supreme Court of the United

[1] Central Trust Co. *v.* Garvan (1921) 254 U. S. 554.

[2] Mitchell *v.* Harmony (1851) 13 Howard 115.

[3] *Ibid.*; United States *v.* Russell (1871) 13 Wallace 623; United States *v.* Pacific R. R. (1887) 120 U. S. 227, 239.

[4] United States *v.* Russell (1871) 13 Wallace 623.

[5] United States *v.* Pacific R. R. (1887) 120 U. S. 227.

[6] See sec. 59.

[7] See sec. 91.

[8] Act of March 21, 1918, 40 Stat. 451.

States in dealing with the statute assumed without argument that this was a legitimate exercise of the war power. In fact those attacking the federal regulation of intrastate rates did not claim that such regulation would be unconstitutional, but asserted that an intention to take from the States the power to regulate intrastate rates was not evident from the language of the statute. The court, however, held otherwise.[1] In upholding the War-Time Prohibition Act,[2] passed during the World War and before the Eighteenth Amendment was adopted, the Supreme Court said[3]:

> "That the United States lacks the police power, and that this was reserved to the States by the Tenth Amendment, is true. But it is none the less true that when the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power, or that it may tend to accomplish a similar purpose."

On the same principle it was held constitutional for Congress to authorize the Secretary of War to make regulations to prevent the establishment of disorderly houses within such distance of camps as he should think needful.[4]

We deal more fully in a later chapter with the guaranty of freedom of speech and of the press contained in the First Amendment.[5]

One of the most important bulwarks of liberty is the writ of *habeas corpus* and this is expressly preserved by the Constitution, which declares that "the privilege of the writ of habeas corpus shall not be suspended." But there is immediately added the proviso, "unless when in cases of rebel-

[1] Northern Pac. Ry. Co. *v.* North Dakota (1919) 250 U. S. 135.

[2] Act of Nov. 21, 1918, 40 Stat. 1046.

[3] Hamilton *v.* Kentucky Distilleries Co. (1919) 251 U. S. 146, 156.

[4] United States *v.* Casey (1918) 247 Fed. 362; Pappens *v.* United States (1918) 252 Fed. 55; McKinley *v.* United States (1919) 249 U. S. 397.

[5] Chap. 13.

lion or invasion the public safety may require it."[1] This provision being contained in the article dealing with the national legislature, it is reasonable to presume that the right to suspend the use of the writ was intended to be vested in Congress. Lincoln under the advice of his attorney-general suspended the privilege of the writ during the Civil War by executive order. Chief Justice Taney expressed the opinion that this was beyond the power of the President, and his view has been generally accepted as correct, although at the time that Lincoln acted the contrary view had its strong supporters.[2]

[1] Art. I, sec. 9, par. 2.

[2] *Ex parte* Merryman (1861) Fed. Cas. No. 9, 487 (see also *Ex parte* Benedict (1862) Fed. Cas. No. 1, 292); *Story on the Constitution* (5th ed.) sec. 1342 n.; Willoughby on the Constitution, sec. 738, and articles there cited.

CHAPTER X

FEDERAL TERRITORY, ADMISSION OF STATES AND STATUS OF INDIANS

§100. *General Power to Acquire Territory.* At the time of the Revolution several of the States, and particularly Virginia, claimed vast and sparsely settled territories extending west to the Mississippi. As the war progressed and the war debts increased this situation caused jealousy and apprehension on the part of those States which had no claims to such territories, for they feared that when the war was over these territories which they had helped to wrest from Great Britain would be sold by the States which claimed them to pay their debts, while the States less favorably situated in this regard would be left to pay their war debts by means of taxation.

In 1777 Articles of Confederation were submitted to the States by the Continental Congress. While the matter was before Congress it had been proposed that the Articles of Confederation contain a provision giving to Congress the right to fix the western boundaries of the States, and to establish in the territory outside of such boundaries new States from time to time, but this proposal was defeated. The fact that the Articles of Confederation contained no such provision, coupled with the fears of which we have already spoken, caused such States as Maryland, Delaware, and New Jersey to hesitate to ratify the Articles. However, New Jersey ratified in 1778 in the hope and the belief that the inequality of which she complained would be later removed, and Delaware followed her example in 1779. But Maryland still held back. At this juncture New York, in 1780, in order to lead the way in breaking the threatened deadlock, agreed to settle the western boundary of the

State and to cede the territory beyond for the benefit of those States which came into the confederation, the land to be disposed of for the common benefit and the territory to be eventually formed into new States. Congress thereupon urged all of the other States claiming western lands to follow New York's example, and at the same time urged upon Maryland the ratification of the Articles of Confederation. New York's action and the counsel of Congress bore fruit. The next year Maryland ratified the Articles, and this was followed a month later by the first move on the part of Virginia towards the cession of her vast western territory to the Confederation, though the cession was not completed until 1784. The examples of New York and Virginia were followed by Massachusetts in 1785, and by Connecticut and South Carolina in 1786.[1]

As a result of these cessions Congress proceeded to take over the control of the great western territory and to provide for its government, although not only was there no power of this kind expressly delegated to it in the Articles of Confederation, but, as we have seen, a provision looking to that end was suggested and failed of incorporation. Madison, in speaking in the *Federalist*[2] of the powers exercised over the territory ceded, said:

> "I mean not by anything here said to throw censure on the measures which have been pursued by Congress. I am sensible they could not have done otherwise. The public interest, the necessity of the case, imposed upon them the task of overleaping their constitutional limits. But is not the fact an alarming proof of the danger resulting from a government which does not possess regular powers commensurate to its objects? A dissolution or usurpation is the dreadful dilemma to which it is continually exposed."

It has been urged, in opposition to so sweeping an assertion of usurpation, that, although Congress had no power by

[1] See Curtis's *History of the Constitution*, vol. i, pp. 131 to 138, 291 to 301. [2] No. 38.

force of the Articles of Confederation to take over and govern this western territory, the acceptance of the cessions by Congress, in which each State was directly represented, constituted an implied grant of further power commensurate with the duties imposed upon it.[1] And no objection having been made by the States to the action of their delegates in this regard the implication of a further grant would seem to be well founded.

The Constitution provides that "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."[2] This paragraph clearly recognized the title of the United States to the territory already ceded to it, and the fact that it had claims to other territory which might in the future result in such territory's coming under its control. There seems, therefore, no ground to doubt that the federal government had a constitutional right to accept the cession of territory made to it by North Carolina in 1790 and by Georgia in 1802 and these cessions have never been called in question. But when Jefferson had an opportunity in 1803 to purchase from France the great Louisiana Territory he was very dubious of the constitutional right of the national government to enlarge its boundaries. Story points out the dilemma in which Jefferson as a strict constructionist was put when it was clear that only by a liberal construction could the Constitution be made to justify action which seemed to be demanded for the future development of the country, and which because of political conditions in Europe could not be delayed.[3] Finally, to a letter received by him from his Secretary of the Treasury, Albert Gallatin, expressing his opinion that the United States could con-

[1] Curtis's *History of the Constitution*, vol. i, p. 294; Dred Scott *v.* Sandford (1856) 19 Howard 393, 434, 438.

[2] Art IV, sec. 2, par. 2.

[3] *Story on the Constitution* (5th ed.), sec. 1286. See also generally the same work secs. 1282 to 1288, and Tiedeman, *The Unwritten Constitution of the United States*, 133.

stitutionally acquire territory, and that this could be done by treaty, and that after its acquisition Congress could admit it as a State or govern it as a territory,[1] Jefferson replied: "You are right, in my opinion. There is no constitutional difficulty as to the acquisition of territory, and whether, when acquired, it may be taken into the Union by the Constitution as it now stands will become a question of expediency. I think it will be safer not to permit the enlargement of the Union but by amendment of the Constitution."[2] After his correspondence with Gallatin Jefferson's doubt seems not to have been as to the power of the United States to acquire territory but as to the incorporation of acquired territory into the United States, and it does not seem to have been so much as to whether the Constitution might be interpreted to include this latter power, as whether it was wise to countenance a liberal interpretation of the Constitution in order to make incorporation possible. Jefferson prepared two drafts of amendments to meet the difficulty which he felt with regard to the incorporation of the new territory into the United States,[3] but the treaty was ratified and the money to be paid to France appropriated, and no action was taken on the amendments.

In 1819 Florida was by treaty ceded by Spain to the United States. In 1848 after the war with Mexico a large territory including California and New Mexico was ceded to the United States by treaty. In 1867 Alaska was purchased from Russia and ceded by treaty, and in 1899 by treaty with Great Britain and Germany territory was obtained in the Samoan Islands. After the war with Spain in 1898 Porto Rico and the Philippines were ceded to the United States, and in 1904 the United States obtained by

[1] *Writings of Albert Gallatin*, vol. i, p. 113.

[2] *Ibid.*, p. 115.

[3] They provided as follows: "The province of Louisiana is incorporated with the United States and made part thereof," and "Louisiana, as ceded by France to the United States, is made a part of the United States. Its white inhabitants shall be citizens, and stand, as to their rights and obligations, on the same footing as other citizens in analogous situations."

treaty with the Republic of Panama the strip of land through which the Panama Canal has been constructed.

In 1828 Chief Justice Marshall said in connection with a question arising in the territory of Florida, as if he were speaking of a matter which required no argument, "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."[1] Again in *Stewart v. Kahn*[2] the Supreme Court said: "The war power and the treaty-making power each carries with it the power to acquire territory. Louisiana, Florida, and Alaska were acquired under the latter, and California under both." Though in the *Dred Scott* case the Chief Justice took, as we shall see, a narrow view of the powers of the national government to govern territories, he felt no doubt that such territories might be acquired.[3] In the *Insular Cases*[4] the power of the United States to acquire Porto Rico and the Philippines by treaty from Spain is not questioned, the only difference of opinion being, as we shall see later, as to what the constitutional status of those islands was after the cession. Finally in *Wilson v. Shaw*,[5] in which the Panama Treaty was attacked, the court said, "it is too late in the history of the United States to question the right of acquiring territory by treaty."

It seems clear that the national government, under its power to do all that is necessary and proper for carrying into execution its war power, may take possession of territory belonging to the enemy, and in the treaty of peace provide for the cession of territory to the United States. Furthermore, since all matters of international relations are put under the exclusive control of the central government,

[1] American Ins. Co. *v.* Canter (1828) 1 Peters 511, 541.

[2] (1870) 11 Wallace 493, 507. See also United States *v.* Huckabee (1872) 16 Wallace 414, 434.

[3] Dred Scott *v.* Sandford (1856) 19 Howard 393, 447.

[4] See for example DeLima *v.* Bidwell (1901) 182 U. S. 1; Downes *v* Bidwell (1901) 182 U. S. 244.

[5] (1907) 204 U. S. 24, 32.

and the cession of territory by treaty is a well-recognized subject of treaty contracts between nations, it would also seem evident that the United States government has the power which it has exercised, to provide for the acquisition of territory by a treaty of purchase.

It is undoubtedly true that it was intended that all of the territory ceded by the States to the central government should ultimately be erected into States and both the treaty ceding Louisiana and that ceding Florida provided that the inhabitants of those territories should eventually "be incorporated into the Union of the United States." It is, therefore, sometimes suggested that the power to acquire territory rests upon the right to admit new States, and that territory can only be constitutionally acquired which is to be erected into States.[1] In answer to the first suggestion it may be said that the power to acquire territory can with at least as much reason be put upon the broader basis of the treaty power. Chief Justice Taney seems to have thought, when he rendered his decision in the *Dred Scott* case,[2] that the federal government only had a right to acquire territory in order to be made later into States, but there is certainly no such limitation to be found in the Constitution, and where the central government exercises a power which is granted to it the Supreme Court has frequently declared that it will not look to the object with which that power is exercised.[3] Neither Alaska, Samoa, Hawaii, Porto Rico, the Philippines nor the strip of land at Panama were acquired for the purpose of erecting them into States, and yet all of these acquisitions have been upheld either expressly, or by implication in countenancing legislation applying to them.

Texas, having gained its independence from Mexico, and having adopted a constitution and established an independent government in 1836, was anxious to enter the American

[1] Willoughby on the Constitution, secs. 148 and 149.

[2] Scott *v.* Sandford (1856) 19 Howard 393, 447.

[3] See as to the taxing power sec. 78, as to the commerce power sec. 91, and as to the war power sec. 99.

Union, and the southern States were equally anxious to have it admitted so as to add to the strength of the slave States. An attempt was made to annex the Republic of Texas by treaty, but because of the opposition from the North the necessary two thirds vote could not be obtained in the Senate. In this situation, in order to give effect to the desire of the majority in Congress, a joint resolution was passed and signed by the President declaring the consent of Congress that the territory belonging to the Republic of Texas should be erected into a State with a republican form of government to be adopted by a constitutional convention, "in order that the same may be admitted as one of the States of the Union." After Texas had acted as thus provided Congress by another joint resolution declared that State to be one of the States of the Union. The constitutionality of this action has never been directly attacked, or directly passed upon by the Supreme Court, but it has been repeatedly admitted tacitly when federal statutes have been held applicable in Texas and when the statutes of Texas have been reviewed by the Supreme Court. Although, when the provision was inserted in the Constitution that "New States may be admitted by Congress into this Union,"[1] the drafters probably had only in mind the creation of new States out of territory already within the geographical boundaries of the Union, no such limitation was put upon Congress by that instrument, and Congress would seem to have been clearly within its constitutional powers in taking Texas into the Union by the method which was adopted.

In 1893 a treaty for the annexation of Hawaii was presented to the Senate by President Harrison, but upon the accession of President Cleveland the treaty was withdrawn. In 1898, however, Hawaii was annexed by joint resolution signed by the President. This action was justified by the Senate Committee on Foreign Relations in a report made by it[2] upon the precedent established in the case of the annexation of Texas, and upon the ground that the Hawaiian

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

[2] Senate Report 681, 55th Cong. 2d Sess.

government having agreed to the terms of the treaty negotiated for its annexation, Congress might legislate on the basis of such consent. The precedent in the case of Texas does not seem wholly controlling authority for the action of Congress with regard to Hawaii, for, as has been pointed out, Texas was admitted as a State, and Congress is expressly given authority in the Constitution to admit new States. However, when no further diplomatic dealings are necessary, it would seem to be within the power of Congress to take action by joint resolution for the annexation of territory under its power, to do all that is necessary or proper to carry into execution its powers over foreign commerce, and its powers to make war and consequently to make proper provision for national protection.

The power of annexation clearly vests exclusively in the national government. Since the President is the proper channel of communication and negotiation with foreign states, and since, when action as the result of such negotiations is required, it usually takes the form of a treaty, which by the Constitution becomes a part of the supreme law of the land, it is usual for annexation to result from treaties. The fact, however, that a result may be accomplished by treaty does not mean that the subject matter is outside of the scope of congressional action.[1] So when negotiations have been completed looking to annexation there seems to be no constitutional reason to deny to Congress the right to annex the territory in question. It would also seem that where territory has been actually conquered it might be annexed by congressional action, instead of by compelling the defeated state to go through the form of transferring it. This of course would be an unusual method to adopt unless the opposing government were so completely destroyed as to leave no power with which a treaty could be made, in which case annexation could only be accomplished by congressional action.[2] It would also seem possible for

[1] See sec. 34.

[2] See the remarks in United States *v.* Huckabee (1872) 16 Wallace 414, 434.

Congress to provide for the annexation of certain territory in the event that negotiations were brought to a satisfactory conclusion by the President. For other purposes such conditional action has been taken by Congress,[1] and there seems to be no constitutional reason why it could not be taken in this field.

In 1823 Chief Justice Marshall said, in discussing the acquisition of the American colonies by the British Crown:

> "If the discovery be made, and possession of the country be taken, under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled, that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law."[2]

In 1856 Congress passed an act entitled "An Act to authorize Protection to be given to Citizens of the United States who may discover Deposits of Guano."[3] It provided that when any citizen of the United States shall

> "discover a deposit of guano on any island, rock or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof, and occupy the same, said island, rock or key may, at the discretion of the President of the United States, be considered as appertaining to the United States."

The act also provided that any crime committed in such a place shall be punished according to the laws of the United States for the punishment of crimes committed on the high

[1] See sec. 35.

[2] Johnson *v.* M'Intosh (1823) 8 Wheaton 543, 595. So in Martin *v.* Waddell (1842) 16 Peters 367, 409, the court said: "The English possessions in America were not claimed by right of conquest but by right of discovery."

[3] Act of Aug. 18, 1856, 11 Stat. 119.

seas. A certain island called Navassa in the Caribbean Sea was found to have upon it a deposit of guano, was taken possession of as provided in the statute, and was declared by the President to appertain to the United States. One Jones having been put on trial for a murder committed upon the island, and having been found guilty, moved in arrest of judgment that the statute in question was unconstitutional and void. The motion being overruled the defendant sued out a writ of error to the Supreme Court.[1] The court, however, held the statute constitutional, declaring[2]:

> "By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession and conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession, (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines,) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands."[3]

As the court points out, the annexation of new territory to that already possessed by a state by means of discovery and occupation has been recognized and acted upon for centuries. All that is necessary with regard to territory not under the jurisdiction of any other state is that the occupation shall be authorized or ratified by the state upon whose behalf

[1] Jones *v.* United States (1890) 137 U. S. 202.

[2] *Ibid.*, 212.

[3] The court cites *Vattel*, lib. 1, c. 18; *Wheaton on International Law* (8th ed.), secs. 161, 165, 176, note 104; *Halleck on International Law*, c. 6, secs. 7, 15; *I. Phillimore on International Law* (3d ed.), secs. 227, 229, 230, 232, 242; *I Calvo Droit International* (4th ed.), secs. 266, 277, 300; Whiton *v.* Albany Ins. Co. (1871) 109 Mass. 24, 31.

it is made. This consent may take the form of a treaty in which other nations recognize the validity of the right claimed, but such consent may also be given by Congress either in the form of a joint resolution or in the form of a statute, as in the instant case.[1] In *Shively v. Bowlby*[2] the Supreme Court said:

> "The title of the United States to Oregon was founded upon original discovery and actual settlement by citizens of the United States authorized or approved by the government of the United States; as well as upon the cession of the Louisiana Territory by France in the treaty of 1803, and the renunciation of the claims of Spain in the treaty of 1819. . . . So far as the title of the United States was derived from France or Spain, it stood as in other territories acquired by treaty. The independent title based upon discovery and settlement was equally absolute."

§101. *Power of Congress to Govern Territories.* As we saw in the last preceding section Congress was not given by the Articles of Confederation any express power to hold territory. Yet Maryland refused for several years to ratify those articles, in order to obtain as a condition precedent the cession of the western territory by the States claiming it to the United States, the Continental Congress urged the cession of such territory, and the States in question did finally cede this territory for the benefit of the States as a whole. The national government now having the control of this territory was faced with the problem of providing for its government until such time as it should be admitted into the Union. In 1784 Congress passed a resolve providing for the establishment of temporary governments by the inhabitants in each of the areas intended to be later formed into States, and for the later admission of these States into the Union.

[1] See the approval of the case just discussed and of the principles enunciated in the concurring opinion in Downes *v.* Bidwell (1901) 182 U. S. 244, 306.

[2] (1894) 152 U. S. 1, 50.

This, however, was soon seen to be inadequate because of the necessity of immediate legislation for this territory, and Congress, therefore, in 1787 passed the Ordinance for the Government of the Northwest Territory. The details of the provisions of this Ordinance are not here important,[1] but it should be noted that it dealt with the transfer and devolution of real property, with the establishment of local governments with power of local legislation, that it prohibited slavery or involuntary servitude except as punishment for crime, and that it contained a bill of rights safeguarding religious opinion, the writ of habeas corpus, jury trial, and contract rights, among other things. Madison in the *Federalist*[2] declared that Congress had in this legislation "overleaped their constitutional limits" because they had not been invested with powers commensurate with their responsibilities. At least, because of the silence of the Articles of Confederation on this subject, the right of Congress to hold and legislate for territory was in doubt, although in fact such authority would seem by reasonable implication to have been conferred by the acceptance of the cessions of territory on behalf of the States through their delegates in the Continental Congress.[3]

This was the situation when the Constitution was drafted and adopted. In that instrument it is provided that "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."[4] The first Congress reënacted the Ordinance for the Government of the Northwest Territory, and from that time to the present day Congress has continued both to provide for local government in its territories and to legislate directly for the territories. Upon what basis does this power rest? In cases arising with regard to the Territory of Orleans,[5] acquired from France in

[1] See the outline of the Ordinance given in Curtis's *History of the Constitution*, vol. i, pp. 302 to 307. [2] No. 38.

[3] Curtis's *History of the Constitution*, vol. i, p. 294; Dred Scott *v.* Sandford (1856) 19 Howard 393, 434, 438. [4] Art. IV, sec. 3, par. 2.

[5] Sere *v.* Pitot (1810) 6 Cranch 332, 336.

1803, and the Territory of Florida,[1] acquired from Spain in 1819, Chief Justice Marshall declared that Congress had authority to legislate for those territories under its power to "make all needful rules and regulations respecting the territory . . . belonging to the United States." The authority to govern the territory acquired from Mexico as a consequence of the Mexican War was put by the Supreme Court on the same ground in 1853 in the case of *Cross v. Harrison.*[2] In the *Dred Scott* case[3] Chief Justice Taney in speaking for the majority of the court expressed the opinion that the power granted to Congress by the Constitution to "make all needful rules and regulations respecting territory . . . belonging to the United States" had no application to any territory not included in the original area of the United States, and, therefore, did not apply to the territory acquired from Mexico. Justice Curtis vigorously dissented from this view, holding that the clause above quoted is amply sufficient to support complete power in Congress to legislate for the government of all territories which may belong to the United States.[4] It may be that the framers of the Constitution had only in mind the then existing western territory of the United States when they drafted this clause, but it would seem that they used language sufficiently broad to grant a general legislative power over territories. Notwithstanding the opinion of the Chief Justice in the *Dred Scott* case, the Supreme Court has since held that the power to govern territories may rest upon the power to make all needful rules and regulations for them.[5]

The power to govern the territories has, however, also been put upon other grounds. In *Sere v. Pitot*[6] Chief Justice

[1] American Ins. Co. *v.* Canter (1828) 1 Peters 511, 542.

[2] 16 Howard 164, 193.

[3] Dred Scott *v.* Sandford (1856) 19 Howard 393, 435 to 446.

[4] *Ibid.*, 604 *et seq.*

[5] Mormon Church *v.* United States (1890) 136 U. S. 1, 42. See also McAllister *v.* United States (1891) 141 U. S. 174, 180, where language to this effect in the earlier case of American Ins. Co. *v.* Canter (1828) 1 Peters 511, 542, is quoted with approval.

[6] (1810) 6 Cranch 332, 336.

Marshall says, "The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and hold territory," and in *American Insurance Company v. Canter*[1] the same judge says,

> "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State acquired 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."

Chief Justice Taney in the *Dred Scott* case,[2] although he denied that the constitutional provision with regard to the making of needful rules and regulations for the territory belonging to the United States, conferred a general power of legislation for territories nevertheless declared that it is not only the right but the duty of Congress to pass laws and establish government for territories which have been acquired—that the right to acquire carries with it this right and duty. In *Mormon Church v. United States*[3] the power to legislate for the territories was rested upon the power to acquire, as well as upon the constitutional authorization to make rules and regulations. In the later cases the inclination seems to be to rest the legislative power more definitely upon the exclusiveness of control and the power of acquisition. In one case it is said[4]: "By the Constitution, as is now well settled, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, have the entire dominion and sovereignty, . . ." In *DeLima v. Bidwell*,[5] one of the Insular Cases, and a case involving the acquisition and

[1] (1828) 1 Peters 511, 542. It will be remembered that in both of these cases the power had also been rested upon the express provision of the Constitution just discussed.

[2] (1856) 19 Howard 393, 448.

[3] (1890) 136 U. S. 1, 42.

[4] Shively *v.* Bowlby (1894) 152 U. S. 1, 48.

[5] (1901) 182 U. S. 1, 196.

status of Porto Rico, the Supreme Court said that the authority to govern territories "arises, not necessarily from the territorial clause of the Constitution, but from the necessities of the case, and from the inability of the States to act upon the subject." Since, as we have seen in the next preceding section, the United States has power to acquire territory, and since it has under the Constitution power to make all laws which shall be necessary and proper to carry its other powers into execution, it would seem that, as the courts have said, it must have power to provide for the government of territory acquired. The fact that the power to acquire territory is itself implied instead of being express should make no difference.

There is no constitutional division of powers between the federal government and the territories as there is between the federal government and the States, "Congress in the exercise of its powers in the organization and government of the territories combining the powers of both the federal and state authorities."[1] The people of the United States have supreme power over territories and their inhabitants, and in the exercise of this sovereign dominion they are represented by the government of the United States to whom that power has been delegated.[2] So when Congress establishes courts for the territories it does so under its power to govern the territories and not as an exercise of its power to establish lower federal courts under the constitutional provisions with regard to the federal judiciary.[3] Therefore, the constitutional provision that federal judges shall hold office during good behavior does not apply to judges of the territorial courts, who may be appointed for short terms, nor are those courts vested by virtue of their creation with the powers given by the Constitution to federal courts.[4]

It is a thoroughly established principle of American constitutional law that the legislative branch of the government

[1] Benner *v.* Porter (1850) 9 Howard 235, 242. The same language is used in Mormon Church *v.* United States (1890) 136 U. S. 1, 43.

[2] Murphy *v.* Ramsey (1885) 114 U. S. 15, 44. [3] Art. III.

[4] American Ins. Co. *v.* Canter (1828) 1 Peters 511, 545.

whether state or federal, cannot delegate its essential legislative functions to any other agency. However, an exception, equally well recognized, allows such delegation to municipal corporations with regard to local affairs.[1] It has been the practice of the federal government beginning with the legislation of the Continental Congress for the Northwest Territory and coming down to the present day, to organize territorial governments as early as practicable, and to grant to them the widest powers of legislation with regard to territorial affairs.[2] This right of delegation seems not to have been questioned, and is treated by the Supreme Court as a right to be taken for granted.

> "The right to legislate in the territories is conferred under the constitutional authority by the Congress of the United States, and the passage of a territorial law is the exertion of an authority exercised under the United States."[3]

The practice has been to grant to the territories legislative power extending "to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." Under such grants the territorial legislatures have been held to have authority to grant legislative divorces,[4] to exclude classes of persons from the exercise of the elective franchise in the territories,[5] and to adopt criminal codes.[6] This is, of course, quite consistent with the accepted right of States to delegate legislative power to municipalities, and with the Anglo-Saxon theory of local self-government which underlies it. But Congress is no more concluded by its legislation by which it delegates power to the territories than it is by any other legislative act.

> "The organic law of a territory takes the place of a constitution as the fundamental law of the local government.

[1] See sec. 60.

[2] See the review of such legislation in Clinton *v.* Englebrecht (1871) 13 Wallace 434, 441 to 445.

[3] McLean *v.* Denver & Rio Grande R. R. Co. (1906) 203 U. S. 38.

[4] Maynard *v.* Hill (1888) 125 U. S. 190.

[5] Davis *v.* Beason (1890) 133 U. S. 333.

[6] United States *v.* Pridgeon (1894) 153 U. S. 48.

It is obligatory on and binds the territorial authorities; but Congress is supreme . . . Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words it has full and complete legislative authority over the peoples of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the States."[1]

Under the constitutional power vested in Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"[2] it has been declared that "with respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it. . . . No state legislation can interfere with this right or embarrass its exercise."[3] Acting under this power Congress passed a statute which provides that "no lands acquired under the provisions of this act shall in any event become liable for the satisfaction of any debt or debts contracted prior to the issuing of the patent therefore."[4] The question was presented to the Supreme Court in *Ruddy*

[1] National Bank *v.* Yankton County (1879) 101 U. S. 129, 133. See also Murphy *v.* Ramsey (1885) 114 U. S. 15, 44; Mormon Church *v.* United States (1890) 136 U. S. 1, 42. In most of the territories the common law is declared by congressional act to be in force so far as applicable to their conditions and not inconsistent with congressional or local legislation. Montana M. Co. *v.* St. Louis M. Co. (1907) 204 U. S. 204, 217. In Porto Rico and the Philippines, however, the civil law is the basis of the local jurisprudence. Alzua *v.* Johnson (1912) 21 Philippine 308; People *v.* Llouger (1908) 14 Porto Rico 534.

[2] Art. IV, sec. 3, par. 2.

[3] Gibson *v.* Chouteau (1871) 13 Wallace 92, 99.

[4] U. S. Rev. Stat. sec. 2296.

v. Rossi[1] as to whether Congress has the power, upon conveying in fee simple property which is located within a State, to preserve it free from previously contracted debts. State courts had uniformly upheld the federal legislation.[2] The statute was attacked as attempting to deprive the States of a part of their sovereign power. But it may fairly be argued that the States in surrendering to Congress the power to dispose of the public lands and to make all needful rules and regulations respecting them, divested themselves of so much of their sovereignty as would interfere with the adequate fulfillment of the power conferred, that in order to induce persons to settle in a new and undeveloped country an effective appeal must be made to those who are not getting along successfully where they are already located, and that this appeal would not be great if the land newly acquired could be taken by their creditors to pay their past debts. The Supreme Court upheld the legislation in question, although Justice Holmes entered a strong dissent.

§102. *Does Annexation Bring Territories within the Scope of Existing Federal Legislation?* It seems clear that the mere conquest and military occupation of territory does not result in its annexation to the United States. This was declared to be so, and was at least one ground of decision in *Fleming v. Page*,[3] and was admitted by both the majority and minority of the court in *DeLima v. Bidwell*.[4] It requires either a treaty or congressional action to effect such annexation. The point upon which the Supreme Court divided five to four in *DeLima v. Bidwell* was as to whether the mere act of annexation by treaty brings the annexed territory

[1] (1918) 248 U. S. 104.

[2] Miller *v.* Little (1874) 47 Calif. 348; Patton *v.* Richmond (1876) 28 La. Ann. 795; Dickerson *v.* Bridges (1898) 147 Mo. 235; Baldwin *v.* Boyd (1885) 18 Neb. 444; Jackett *v.* Bower (1901) 62 Neb. 232; Ritzville Hardware Co. *v.* Bennington (1908) 50 Wash. 111.

[3] (1850) 9 Howard 603. On the other hand it will not be held that the laws of the United States are operative in American territory during a period of actual occupation by the forces of an enemy. United States *v.* Rice (1819) 4 Wheaton 246.

[4] (1901) 182 U. S. 1.

under the operation of such existing general congressional legislation as that embodied in revenue laws. The majority held that annexation has such effect, while the minority declared that some further act of the government is necessary to put such legislation into operation in the territory.

The majority was confronted at the outset with the case of *Fleming v. Page*, just referred to, in which the court held that part of Mexico, though occupied by our forces, was still a foreign country under the revenue law. In that case, after declaring that territory is not annexed merely by conquest and military occupation, the court went on to say that federal revenue laws do not apply to territories until they are extended to them by act of Congress. The majority of the court in the *DeLima* case disposed of this part of the opinion in the *Fleming* case on the ground that it was not necessary to the decision, and that it was in effect repudiated three years later in the case of *Cross v. Harrison.*[1] In that case it appeared that California had been conquered and occupied by our military forces and a government set up under the direction of the President with express authority to levy duties and raise necessary revenue. Under this authority import duties were levied at the port of San Francisco. The treaty of peace by which this territory was ceded to the United States was ratified May 30, 1848, knowledge of this fact was received in California in August, and Congress did not legislate for the purpose of including California in a collection district until March, 1849. Until knowledge of the ratification was received the provisional government collected the tariffs imposed by it, but after such knowledge had come to it that government made collections in accordance with existing revenue laws of the United States. This action taken by the local government upon its own initiative accorded with the instructions shortly after received from the Secretary of State and the Secretary of the Treasury. The court held that the President as Commander-in-Chief had authority to establish a temporary government in the conquered territory and to direct the collection of import

[1] (1853) 16 Howard 164.

duties by that government, that this government had a right to continue to function after the treaty of peace was ratified and until Congress made provision for the government of the territory, and that after the ratification of the treaty the President might direct the provisional government to collect import duties according to the terms of the revenue laws of the United States because, as the court says: "By the ratification of the treaty California became a part of the United States. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage."[1] The case does, therefore, seem to be inconsistent with the second ground of the decision in *Fleming v. Page*, and since the Chief Justice who wrote the earlier opinion and all of the rest of the court concurred in the later decision the authoritativeness of the second ground of the earlier decision would seem at least to be put in grave doubt.

The majority of the court in *DeLima v. Bidwell* also rely upon executive precedent to support their position. They admit that in the case of Louisiana, the first territory to be acquired from a foreign country, the executive department of the government took the view that existing revenue legislation did not extend to the territory, and directed that the preëxisting revenue laws there should be continued in force, and that in the cases of Florida and Texas there was no interval between cession and legislation in the one case and between the annexation and admission into the Union in the other. They rely, however, upon the official letters of the Secretary of State and the Secretary of the Treasury to those in charge of the temporary government in California before Congress legislated for that territory directing them that the revenue laws were in force and applicable there, and letters of a later Secretary of State and Secretary of the Treasury declaring that Alaska came within the provisions of the national revenue laws, during the period between the

[1] Cross *v.* Harrison (1853) 16 Howard 164, 197.

annexation of that territory and formal extension of the revenue laws to it by Congress.

Finally the majority argued that since by the treaty of cession the territory in question, Porto Rico, had become annexed to the United States, it

> "can remain a foreign country under the tariff laws only upon one of two theories: either that the word 'foreign' applies to such countries as were foreign at the time the statute was enacted, notwithstanding any subsequent change in their condition, or that they remain foreign under the tariff laws until Congress has formally embraced them within the customs union of the States."[1]

The majority judges hold that neither position is tenable; that a territory must be either entirely foreign or entirely domestic, that it cannot at the same time partake of the characteristics of both, and that since the territory of Porto Rico was not wholly foreign, being annexed to United States, it must be treated as coming under the provisions of existing revenue laws as they applied to the United States.

The position of the four minority justices was that a treaty which merely provides for the cession of territory to the United States does not of its own force bring such newly acquired territory within the provisions of congressional legislation, applicable at the time when it was passed only to the then existing territory of the United States. Therefore, for the purposes of the enforcement of such legislation such territory is to be treated as if it were still foreign. For authority the dissenting justices depend first upon *Fleming v. Page*,[2] in which, as we have seen, Chief Justice Taney for the court does declare that military occupation does not bring territory under existing federal legislation, and seems to base his decision at least partially upon this ground. The case of *Cross v. Harrison*[3] is explained by the dissenting justices as having decided merely that, after the treaty of peace but before

[1] De Lima *v.* Bidwell (1901) 182 U. S. 1, 197.

[2] (1850) 9 Howard 603.

[3] (1853) 16 Howard 164.

Congress legislated for California, the provisional government set up under military authority by the President might continue to function, and the President might direct that duties be levied by that government according to the provisions of the federal statutes theretofore applicable to the rest of the country. But in fact this was not the position taken by the court in that case. The only conclusion which can be reached from a careful reading of the case is that the court held that the federal revenue statutes of their own force applied to the territory in question. This case is, therefore, opposed to the position taken by the minority of the court. The dissenting justices also point to the opinion of Justice Johnson at circuit in the case of *American Insurance Company v. Canter*,[1] his decision being later affirmed by the Supreme Court. He declared that by the law of nations the laws of annexed territory remain in force until changed by the new sovereign government, that there is nothing in the Constitution requiring the application of a different rule, and that "on this subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of cession." When this case was before the Supreme Court Daniel Webster, being one of the counsel, said: "Do the laws of the United States reach Florida? Not unless by particular provision."[2]

The minority justices find comfort as did the majority of the court in executive precedents. They point particularly to the attitude taken by the Secretary of the Treasury in the case of Louisiana, the first territory acquired by treaty, when he directed that until Congress should act duties should be collected there according to the laws there in force before the annexation. The executive precedent is clearly in the minority's favor, but the opinions of the Secretaries of State and of the Treasury with regard to the territories of

[1] (1828) 1 Peters 511, Justice Johnson's opinion at circuit being given in a note.

[2] *Ibid.*, 538.

California and Alaska, referred to above, which are practically ignored, take the opposite view, and in the case of Alaska Secretary of State Seward bases his opinion that federal revenue laws apply *ipso facto* to territories upon annexation upon the case of *Cross v. Harrison*,[1] which clearly supports his view, though the minority justices think that it does not. In the dissenting opinion it is also pointed out that Congress in the case of each accession of territory, and even in the case of the admission of Texas made express statutory provision for the extension of the revenue laws to the new areas, indicating the opinion of that body that they would not be operative there automatically.

Finally the minority justices admit that the treaty power is a proper instrument for the annexation of territory, and that a treaty is the supreme law of the land, but they ask whether there is anything in the treaty for the annexation of Porto Rico which repeals or changes the existing tariff law? If not then, since before the treaty goods coming from Porto Rico were subject to duties, they must still be so subject notwithstanding the treaty. It is claimed that to argue that since Porto Rico is no longer foreign territory it must be domestic as that term is used in the revenue laws, is to let the use of words confuse the issue, and defeat the intention of the legislators. The question was "whether a particular tariff law applies" and the dissenting justices held that it did apply to Porto Rico notwithstanding the treaty of cession, as it had applied before that treaty.

Two things seem clear. Congress could expressly make legislation applicable to territory which should be afterwards acquired. On the other hand the terms of a treaty for the annexation of territory might extend to that territory federal laws which without such treaty provision would not apply there. This would seem to be fairly within the scope of the treaty-making power, and would thus become part of the supreme law of the land, supplanting any inconsistent federal legislation. Since congressional statutes and treaties are both declared by the Constitution to be the supreme law

[1] (1853) 16 Howard 164.

of the land, either may be repealed by the other.[1] It does not seem reasonable to suppose that Congress in passing a tariff law, providing for the imposition of certain duties upon goods coming into the United States from places outside, or in passing any other general statute, intends that it shall apply without further legislation to after-acquired territory. Nor does it seem clear that drafters of a treaty for the annexation of territory, or the Senate in ratifying such a treaty, show an intention from such action alone to extend to that territory laws which when passed by Congress were not intended to apply there, whether they are revenue laws or laws of other character. Such intention certainly should be clear before a treaty is held to amend or repeal statutory law. The position of the minority in *DeLima v. Bidwell* would, therefore, seem to be more correct than that of the majority, unless some constitutional guaranty prevents the diversity of treatment which would result from that view. That question we take up directly. In *Dooley v. United States*[2] the Supreme Court, applying the principle laid down in the *DeLima* case, held that after the treaty of cession, since the ceded territory was no longer foreign territory so that duties could be levied under the revenue laws upon goods coming from that territory to a port of the United States, it was no longer foreign so that the military governor could levy duties upon goods coming to it from a port of the United States. In *Fourteen Diamond Rings v. United States*[3] the rule of the *DeLima* case was applied to the Philippines. In both of these cases the same four justices dissented as in the first case.[4]

§103. *Territories and the Constitutional Guaranties.* At the same time that the case of *DeLima v. Bidwell* was decided the decision in *Downes v. Bidwell*[5] was handed down. This case involved the constitutionality of federal legislation

[1] See sec. 34.
[2] (1901) 182 U. S. 222.
[3] (1901) 183 U. S. 176.
[4] They were Justices McKenna, Shiras, White, and Gray.
[5] (1901) 182 U. S. 244.

placing an import duty upon goods coming from Porto Rico. This legislation was attacked as being in conflict with the provision of the Constitution that "all duties, imposts and excises shall be uniform throughout the United States."[1] If this clause applies to such a territory as Porto Rico, it was admitted by all parties that the legislation in question was unconstitutional. The court, however, was divided as to whether that clause did apply to Porto Rico. The four justices who dissented in the *DeLima* case, holding there that the federal revenue legislation did not apply in Porto Rico, held in the instant case that the application of the constitutional section in question did not extend to that territory. They were joined by Justice Brown, who had agreed with the majority in the preceding case. Thus by the adhesion of Justice Brown the minority justices in the *DeLima* case became majority justices in *Downes v. Bidwell*, while all of the majority justices in the preceding case, except Justice Brown, dissented in this case. Of the majority justices three wrote opinions—Brown, White, and Gray, while Chief Justice Fuller and Justice Harlan wrote opinions for the minority.

As the majority justices point out, according to the law of nations a State which has acquired territory may govern it as it sees fit, and it would naturally follow that the United States government would have the same power unless it is restrained by the Constitution. These justices, and particularly Justice White, try to make it perfectly clear that Congress can never act except in accordance with the Constitution, but they assert that it does not follow from this that all of the provisions of the Constitution apply to all of the territory over which Congress has jurisdiction. They point out that if all of the provisions of the Constitution apply to every territory as soon as it is annexed by the United States, provisions in most of our treaties by which we have acquired territory are unconstitutional. They point to the treaty ceding Louisiana which recognized that the inhabitants of that territory were not to have the priv-

[1] Art. I, sec. 8, par. 1. For a discussion of this clause see sec. 80.

ileges of citizens of the United States until they should be later conferred upon them, and which gave French and Spanish vessels a right to enter the ports of the ceded territory on the same basis as American ships. French and Spanish ships were not allowed to enter other ports of the United States on this basis, and so a preference was given to the Louisiana ports, which would be unconstitutional if the constitutional clause forbidding the giving of preference to the ports of one State over those of another[1] was there in force. Similar provisions were contained in the treaty for the cession of Florida. So in the act annexing Hawaii provision was made for continuing in force the existing customs regulations of that territory, although this put its ports under a disadvantage as compared with the other ports of the United States. And by the treaty with Spain for the cession of Porto Rico and the Philippines it was provided that Spanish vessels might enter the ports of those territories on the same basis as American vessels.[2] Numerous instances of legislation are referred to, also, in which Congress has recognized a difference between States and territories under the Constitution.[3]

The majority of the court rely for judicial support for their position upon *American Insurance Company v. Canter*.[4] In that case it was held that Congress under its power to legislate for the territories may establish territorial courts, and that in doing so the provisions of the Constitution as to the tenure of federal judges and the jurisdiction of federal courts do not apply. But this, in fact, is not put upon the ground that the constitutional provisions do not extend to the territories, but upon the ground that Congress in legislating for the territories "exercises the combined powers of a general and of a state government," and in this instance was acting in the latter capacity. The majority justices admit that there is language in *Loughborough v. Blake*,[5] *Cross v.*

[1] Art. I, sec. 9, par. 6

[2] Downes *v.* Bidwell (1901) 182 U. S. 244, 253 to 257.

[3] *Ibid.*, 257.

[4] (1828) I Peters 511.

[5] (1820) 5 Wheaton 317.

Harrison[1] and *Dred Scott v. Sandford*,[2] which is embarrassing, but they hold such language in the first two cases to be only dicta, and treat that part of the *Dred Scott* case in question as not being entitled to great weight because it was so much influenced by political considerations, and because the case had in fact been disposed of on another ground. On the other hand these justices point out that the other cases in which it had been held that all of the provisions of the Constitution applied to the territories involved were cases which arose after the provisions of the Constitution had been extended by Congress to the territories in question, and they emphasize the fact that Congress had thought it necessary from time to time to extend the provisions of the Constitution to the territories.[3]

The majority of the court assert that the phrase "throughout the United States," in the constitutional clause requiring uniformity of duties, meant the territory of the United States at the time of the adoption of the Constitution, and they declare that the other provisions of the Constitution were framed for the same territory.[4] As proof of this conclusion they point to the Thirteenth Amendment, which declares that "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." In this

[1] (1853) 16 Howard 164.

[2] (1856) 19 Howard 393.

[3] In Mormon Church *v.* United States (1890) 136 U. S. 1, 44, it is said: "Doubtless Congress in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."

[4] Justice Brown in his opinion in Downes *v.* Bidwell seems to hold that the Constitution was made by the States for the States, and that in it the term United States is intended to cover only the States.

It was held *In re* Ross (1891) 140 U. S. 453, that a person tried for murder before a consular court in Japan is not entitled to a jury trial, the Constitution not applying outside of the United States.

amendment a distinction is made between the United States and places "subject to their jurisdiction," and this language shows that it was not thought that a constitutional provision for the United States would extend of its own force to all places subject to their jurisdiction.

It is recognized that Congress may extend the provisions of the Constitution to the territories, and it is declared that when Congress has done so this action is irrevocable.

The majority held, as a result of all of these considerations that the constitutional provision as to uniformity of duties did not apply to Porto Rico by force of its annexation, and pointed out that it had not been extended to that territory by Congress. These justices want it understood, however, that it does not follow from their argument that there are no constitutional limitations upon Congress in legislating for territories. There are absolute and unqualified prohibitions contained in the Constitution which prevent any legislation by Congress in conflict with them, but the justices do not attempt to list those prohibitions.

The minority of the court rest their position upon the two propositions that Congress is always controlled by the Constitution, and that the Constitution was meant to apply in all of its terms to all territory belonging to the United States. Therefore, when a territory is annexed to the United States all parts of the Constitution apply to it as part of the United States. Certainly, they insist, at least when Congress has legislated for the government of a territory, as it had in the case of Porto Rico, as part of the territory for which it is authorized by the Constitution to legislate, the Constitution in all of its parts must apply to that territory.

The weight of judicial precedent would seem to support the position of the minority. In *Loughborough v. Blake*[1] Marshall declared that the term United States, used in the clause with regard to uniformity of duties "is the name given to our great republic, which is composed of States and territories." The decision of the case, however, was only that Congress could levy taxes in the District of Columbia in

[1] (1820) 5 Wheaton 317.

conformity with the Constitution, and the position of the District of Columbia, having been part of the original States when the Constitution was adopted is obviously different from that of after-acquired territories. In *Cross v. Harrison*[1] it was held that by the treaty with Mexico "California became part of the United States." The conclusion arrived at from this, however, was only that it thereby came under the revenue laws previously made for the United States, and not that it came under the constitutional provision as to uniformity of duties. In fact it is suggested that by terms introduced into the treaty it might have been excluded from the operation of the revenue laws. In *Dred Scott v. Sanford*[2] it was held that a congressional statute forbidding slavery in a territory was unconstitutional, and it was held that the Constitution applies to territories equally with the States. This is clearly direct authority for the minority of the court in *Downes v. Bidwell*, but it is generally recognized that the opinions in the *Dred Scott* case were dictated to an unprecedented degree by party and sectional feeling, and that the case cannot be considered as having the weight ordinarily attaching to a decision of the Supreme Court.

It is submitted that the position of the majority of the court in *Downes v. Bidwell* is on the whole preferable to that taken by the minority. By the law of nations the rights guarantied to citizens of a State are not automatically extended to the inhabitants of territory acquired by conquest, treaty, or discovery and occupation. On the contrary such inhabitants are subject to government by the annexing State, which may legislate for them in its discretion. Prima facie this would seem to be true of the United States as a sovereign state. There is nothing in the Constitution which in terms covers the situation. We do know, however, that the framers of that instrument had in mind the situation of that territory which had wrested its freedom from England, and were attempting to provide for its protection from aggression, for its internal harmony, and for the

[1] (1853) 16 Howard 164.
[2] (1856) 19 Howard 393.

preservation within its borders of certain important guaranties of individual liberty and welfare. Furthermore in the Thirteenth Amendment we find a distinction made between the United States and "any place subject to their jurisdiction." We also find that from the beginning of our government treaties have been made and legislation framed upon the assumption that the Constitution does not of its own force apply to annexed territory, and find that from time to time Congress has expressly extended the operation of the Constitution to the territories, and thus incorporated them into the United States as that term is used in the Constitution. It would seem that this incorporation could be affected directly by treaty of annexation, although this has not been the practice, and although Justice White seemed to doubt whether it could be accomplished except by congressional action. As was pointed out particularly in Justice White's opinion the doctrine of the majority does not leave Congress unrestrained by the Constitution in legislating for the territories, since there are certain things which Congress is absolutely and unequivocally forbidden to do at all.

In *Hawaii v. Mankichi*[1] and *Dorr v. United States*[2] it was held that the guaranties in the Fifth and Sixth Amendments with regard to indictment and jury trial do not apply to unincorporated territories which have not been brought under the Constitution by congressional action. These cases together with *Downes v. Bidwell*[3] lead fairly to the conclusion that none of the guaranties of the Second to the Eighth Amendments apply in unincorporated territories.[4] Similarly it would seem that a person born in a territory not incorporated into the United States is not born "in the United States," as that term is used in the Fourteenth

[1] (1903) 190 U. S. 197.
[2] (1904) 195 U. S. 138.
[3] (1901) 182 U. S. 244.
[4] Though it has been suggested that there are constitutional restrictions as to liberty and property which extend even to unincorporated territories. Mormon Church *v.* United States (1890) 136 U. S. 1, 44; Downes *v.* Bidwell (1901) 182 U. S. 244, 295; Dorr *v.* United States (1904) 195 U. S. 138, 148.

Amendment, and so does not by force of its provisions become a citizen of the United States. As said by Justice Brown in *Downes v. Bidwell*,[1] "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.'" It will be noticed, however, that the provisions of the Eighteenth (the Prohibition) Amendment extend to "the United States and all territories subject to the jurisdiction thereof." Other provisions of the Constitution constitute direct prohibitions of any legislation by Congress in certain fields. Such is the First Amendment which says "Congress shall make no law" as to an established religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, the press, or of assembly. The Constitution also declares that "no bill of attainder or *ex post facto* law shall be passed,"[2] that "no title of nobility shall be granted by the United States,"[3] and that "the writ of *habeas corpus* shall not be suspended unless when in case of rebellion or invasion the public safety may require it."[4]

§104. *When Is a Territory Incorporated into the United States?* When the Hawaiian Islands were annexed to the United States by joint resolution in 1898,[5] it was therein provided that the islands were "annexed as part of the territory of the United States" and "subject to the sovereign dominion thereof," that until Congress acted in the matter the government should be carried on by officers appointed by the President, and that "the municipal legislation of the Hawaiian Islands . . . not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." It was further provided that the existing customs relations of the islands with the United States and

[1] (1901) 182 U. S. 244, 251.
[2] Art. I, sec. 9, par. 3.
[3] *Ibid.*, par. 8.
[4] *Ibid.*, par. 2.
[5] Joint Resolution of July 7, 1898, 30 Stat. 750.

other countries should continue until changed by Congress. One Mankichi was thereafter convicted of manslaughter in the islands in accordance with the local laws, but without indictment, and without the verdict of a unanimous jury. The conviction was sustained by the Supreme Court,[1] but the court was divided five to four. Two opinions were written by the majority. Justice Brown held that prima facie all provisions of the Constitution were extended to the islands, and that "clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community."[2] But he held that since, if the constitutional provisions as to indictment and jury trial were held to be in force, the existing municipal law for the trial of criminals would be unenforceable, and since no law had been put in its place by Congress, it was to be presumed that Congress did not intend those constitutional provisions to apply. Justice White wrote a concurring opinion in which Justice McKenna joined in which he held that it was not the intention of Congress to extend the whole Constitution to the islands, but it was only their intention to annul so much of the municipal legislation as might conflict with the provisions of the Constitution which apply to all territories, though he did not say what those provisions are. This conclusion he bases upon the facts that customs duties were continued in the islands by the joint resolution which conflicted with the uniform provision of the Constitution as to duties, that Congress contemplated the framing of a new body of laws for the islands and appointed a commission to that end, and that in 1900 Congress passed an act for the government of the islands which did clearly bring them under all of the provisions of the Constitution. Chief Justice Fuller wrote a dissenting opinion in which he stood upon the words of the resolution which he declared could

[1] Hawaii *v.* Mankichi (1903) 190 U. S. 197.

[2] *Ibid.*, 217.

mean nothing else but that no legislation contrary to the Constitution remained in force. Justices Peckham and Brewer concurred in this opinion. Justice Harlan also dissented, but upon the ground that every territory upon annexation comes at once and by force of such annexation under all of the provisions of the Constitution.

In *Dorr v. United States*[1] the question was whether an inhabitant of the Philippines has a constitutional right to a jury trial. Justice Day writing the opinion of the court held that the treaty of cession clearly did not incorporate the Philippines, since it declared that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Furthermore, when Congress legislated for that territory they expressly declared that that provision of the revised statutes should not apply which gives force and effect to the Constitution in the territories. He further held that trial by jury is not a fundamental right, "which goes wherever the jurisdiction of the United States extends."[2] He does not suggest what, if any, those rights may be. The Chief Justice and Justices Peckham and Brewer concurred solely on the authority of the *Mankichi* case, while Justice Harlan dissented as he did in that case.

In *Rassmussen v. United States*[3] it was held by a unanimous court that Alaska had been incorporated into the United States and brought under all of the provisions of the Constitution. In the treaty for the cession of that territory it was declared that "the inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States." This had been followed by legislation which the court held showed an intention on the part of Congress to consider such territory as incorporated. Furthermore that terri-

[1] (1904) 195 U. S. 138.

[2] The federal legislation for the territory declared that no person should be held for a criminal offense without due process of law. That due process does not require a jury trial see sec. 247.

[3] (1905) 197 U. S. 516.

tory had previously been declared by the Supreme Court to have come under all of the constitutional provisions.

It is apparent from these cases that the Supreme Court will determine each case with regard to incorporation of territories on its own facts, striving to determine what the intention was in each case. The *Dorr* and *Rassmussen* cases seem quite clear, but the decision in the *Mankichi* case seems at least doubtful.

§105. *The District of Columbia.* It was desired by those who drafted the Constitution that the national government should have a seat which should not be under the jurisdiction of any one of the States, and to this end Congress was given power by the Constitution

> "to exercise exclusive legislation in all cases whatever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."[1]

As a result of this provision Congress may legislate for the District of Columbia, not only as part of the United States under the general power delegated to it, but "it may exercise within the District all legislative powers that the legislature of a State might exercise within a State,"[2] including all that are included in the States' police powers.[3] We have seen in a preceding section that Congress may delegate to territorial governments very broad governmental powers, but

[1] Art. I, sec. 8, par. 17.

[2] Capital Traction Co. *v.* Hof (1899) 174 U. S. 1, 5. By congressional legislation the common law is declared to be in force so far as applicable to conditions there and not inconsistent with congressional or local legislation. Crawford *v.* United States (1909) 212 U. S. 183.

[3] District of Columbia *v.* Brooke (1909) 214 U. S. 138, 149; Block *v.* Hirsh (1921) 41 Sup. Ct. Rep. 458. As to the States' police power see Chap. 32.

in the case of the District of Columbia it seems that Congress has only authority to delegate the exercise of municipal powers.[1] The central government may acquire title to other pieces of land within the States, and this may be done without the consent of the States and even by the exercise of the power of eminent domain,[2] but Congress cannot exercise governmental authority over such lands unless "purchased by the consent of the legislature of the State in which the same shall be."[3]

In 1820 in the case of *Loughborough v. Blake*[4] Chief Justice Marshall held that all of the provisions of the Constitution are applicable to the District of Columbia. The same proposition was reiterated in *Callan v. Wilson*[5] where it was held that the constitutional provisions as to jury trial in criminal proceedings apply in the District. In both of these cases, however, it was assumed that the same was true of the territories. We have seen that this is no longer held to be true with regard to unincorporated territories, but nevertheless in the case which established that doctrine for the territories the rule established for the District of Columbia in the earlier cases was not attacked. Justice Brown in the opinion of the court declared that, since the District of Columbia was part of the original States which adopted the Constitution, all of the provisions attached at once to that area, and it could not be taken out from under the provisions of the Constitution by being ceded to the United States.[6] However, in 1871 the Constitution was specifically extended to the District, so that since that date assurance has been made doubly sure.[7]

[1] Stoutenburgh *v.* Hennick (1889) 129 U. S. 141, 147.

[2] Kohl *v.* United States (1875) 91 U. S. 367.

[3] Fort Leavenworth R. R. Co. *v.* Lowe (1884) 114 U. S. 525. But such property cannot be taxed by the State. Van Brocklin *v.* Tennessee (1885) 117 U. S. 151.

[4] 5 Wheaton 317.

[5] (1888) 127 U. S. 540. See also Capital Traction Co. *v.* Hof (1899) 174 U. S. 1, holding applicable to the District the constitutional provision as to jury trial in civil actions.

[6] Downes *v.* Bidwell (1901) 182 U. S. 244, 260.

[7] Act of Feb. 21, 1871, 16 Stat. 426.

But Marshall declared[1] that the District of Columbia is not a "State" in the sense in which that term is used in the Constitution where it gives federal courts jurisdiction over actions between "citizens of different States,"[2] and this authority has been followed.[3] However a treaty giving certain rights to aliens within the States of the Union was held to include the District.[4]

§106. *Admission of States.* The only provision in the Articles of Confederation for increasing the number of States is contained in Article XI, as follows: "Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union: but no other colony shall be admitted into the same, unless such admission be agreed to by nine States." This makes no provision for the formation of new States out of the unsettled western territory. But as we have seen earlier in this chapter the agitation for the adoption of the Articles of Confederation led finally to the cession of the western territory to the national government. In order particularly to induce such cession by Virginia Congress declared by resolve in 1780 that if the desired cessions were made the territory would be held for the public benefit and would be formed into new republican States with the same status as the other States. The cessions were made and accepted under the guaranties of this resolve. After the cession Congress passed another resolve in 1784 for the government of the ceded territory and for the admission of new States to be formed from it. The famous Ordinance for the Government of the Northwest Territory, passed by Congress in 1787, also contained specific provisions for the erection of new States in the ceded territory.[5] Though the Articles of Confederation did not provide for the acquisition of territory by the national government, nor for the forma-

[1] Hepburn *v.* Ellzey (1805) 2 Cranch 445.

[2] Art. III, sec. 3, par. 1. [3] Hoe *v.* Mamieson (1897) 166 U. S. 395.

[4] DeGeofroy *v.* Riggs (1890) 133 U. S. 258.

[5] See for a more detailed account Curtis's *History of the Constitution*, vol. i, pp. 291 to 309.

tion of States by Congress, it would seem that the cessions of territory to the national government and acceptance thereof by the representative of the States upon the terms stated by Congress constituted a delegation of authority to Congress to receive and govern such territory, and to erect States therein. This, however, was very much doubted,[1] and one of the first resolutions presented to the Constitutional Convention was that provision ought to be made for the admission of States "with the consent of a number of voices in the national legislature less than the whole."[2] The provision with regard to the admission of new States which was finally incorporated into the Constitution is as follows: "New States may be admitted by Congress into the Union; but no new States shall be formed or erected within the jurisdiction of any other States; 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 Congress."[3]

The ordinary procedure for the admission of States is for the people of a territory to petition Congress to be admitted as a State. If Congress approves there is passed what is known as an "enabling act," which makes provision for the framing of a constitution, and often sets forth requirements which must be met. If Congress is satisfied with the constitution which is framed the territory is declared to be a State and a member of the Union. Sometimes, however, a constitutional convention has assembled in a territory, and a constitution has been submitted to the people of the territory and adopted without previous authorization from Congress. In such a case if Congress admits the territory as a State the proceedings are as effective as if the other course had been adopted.

Since by the Constitution Congress is given absolute power with regard to the admission of States, it may clearly impose such conditions precedent to admission as it sees fit,

[1] *The Federalist*, No. 38.

[2] Farrand, *The Records of the Federal Convention*, vol. i, p. 22.

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

and if these conditions are not met it may refuse to admit the petitioning territory.[1] But in *Coyle v. Oklahoma*[2] the question was raised whether by the terms of the enabling act, accepted and adopted by the State in order to gain admission to the Union, a State may be deprived of the right to exercise powers which are possessed by the original States. The court held that it cannot be so deprived. The power of Congress is, declared the court, to admit "new States . . . into this Union." "The definition of 'a State' is found in the powers possessed by the original States which adopted the Constitution," and "'this Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."[3] The court quoted with approval the words of Chief Justice Chase that "the Constitution in all of its provisions looks to an indestructible Union composed of indestructible States."[4] To the suggestion that the adoption of the provisions of the enabling act might be looked upon as a contract which the State was forbidden by the Constitution to impair, the court said that the contract "here sought to be enforced is one having no sanction in that instrument."[5]

There was a discussion in the Constitutional Convention to which the court did not refer, but which is certainly interesting in this connection. In the provision for the admission of new States reported by the Committee of Detail it was declared that, "if the admission be consented to, the new States shall be admitted on the same terms with the original States." Gouverneur Morris moved to strike out this provision because "he did not wish to bind down the legislature to admit western States on the terms here stated." Madi-

[1] Coyle *v.* Oklahoma (1911) 221 U. S. 559, 568, 569.

[2] (1911) 221 U. S. 559. The question here was whether the state capital could be moved by vote of the people of the State, though the enabling act, adopted by the people as a condition precedent to the admission of the State, forbade it.

[3] *Ibid.*, 566, 567.

[4] Texas *v.* White (1868) 7 Wallace 700, 725.

[5] Coyle *v.* Oklahoma (1911) 221 U. S. 559, 578.

son insisted "that the western States neither would nor ought to submit to a Union which degraded them from an equal rank with the other States." Mason and Sherman agreed with Madison, but Langdon was in favor of the motion, and Williamson "was for leaving the legislature free." Morris's motion was carried by nine States to two.[1] It would seem from this debate and vote that it was the intention of the framers of the Constitution to leave it in the power of Congress to admit to the Union States which should not have an equality of rights with the original States. However, Congress has never professed to assume to admit States on a footing of less dignity than those which made up the original Union. In admitting Vermont and Kentucky in 1791 and 1792 it declared that each was admitted "as a new and entire member of the United States of America," and in admitting Tennessee it used the language "on an equal footing with the original States in all respects whatever," which language was in substance repeated in all subsequent admission acts, including the Oklahoma act. Earlier statements of the Supreme Court also show that that tribunal has uniformly held the opinion that States can only be admitted upon an equal footing with all of the other members of the Union.[2] The interpretation put upon the Constitutional provision with regard to the admission of States is clearly a wise one, and also constitutes an entirely reasonable construction of the language actually used, notwithstanding the fact that the framers of the Constitution seemed to think that they had given to Congress a greater power. It follows then that, even if a provision has been incorporated into the State constitution excluding it from the exercise of certain normal state powers, this may later be amended by the people of the State in the ordinary way.[3]

[1] Farrand, *The Records of the Federal Convention*, vol. ii, pp. 188, 454.

[2] Pollard's Lessee *v.* Hagan (1845) 3 Howard 212; Withers *v.* Buckley (1857)20 Howard 84, 92, 93; Escanaba Co. *v.* Chicago (1882) 107 U. S. 678, 688.

[3] "A constitution thus supervised by Congress would, after all, be a

The principle enunciated in the *Coyle* case has been approved and acted upon by the Supreme Court in several subsequent cases. The Ordinance for the Government of the Northwest Territory contained certain provisions which it is declared shall constitute articles of compact between the original States and the people and States in the territory "unalterable except by common consent," but the Supreme Court has held that they "ceased to be . . . obligatory upon such States from and after their admission into the Union as States."[1] In a later case from Oklahoma it was contended that a State statute providing for separate coaches on trains for white and colored passengers was invalid because, among other grounds, it conflicted with the enabling act passed in connection with the admission of that State, but the court held that after admission Oklahoma had the same power to enact police regulations as other States.[2]

It is to be borne in mind, however, that the restrictions upon State action contained in an enabling act, and adopted by the State in order to gain admission to the Union, which are not binding upon the State are such as attempt to deprive it of powers which the original States possess under the Constitution. When such restrictions are, on the other hand, in a field which was surrendered to the national government by the Constitution, they are as valid as congressional legislation in the usual form would be on the same subjects. This was recognized and the distinction carefully pointed out in the *Coyle* case, where the court said:

> "It may well happen that Congress should embrace in an enactment introducing a new State into the Union legislation intended as a regulation of commerce among the States, or with Indian tribes situated within the limits of such new States, or regulations touching the sole care and

constitution of a State, and as such subject to alteration and amendment by the State after admission. Its force would be that of a state constitution, and not that of an Act of Congress." Coyle *v.* Oklahoma (1911) 221 U. S. 559, 568.

[1] Cincinnati *v.* Louisville & N. R. R. Co. (1912) 223 U. S. 390.

[2] McCabe *v.* Atchison T. & S. F. Ry. Co. (1914) 235 U. S. 151.

> disposition of the public lands or reservations therein, which might be upheld as legislation within the sphere of the plain power of Congress. But in every such case such legislation would derive its force not from any agreement or compact with the proposed new State, nor by reason of its acceptance of such enactment as a term of admission, but solely because the power of Congress extended to the subject, and, therefore, would not operate to restrict the State's legislative power in respect of any matter which was not plainly within the regulating power of Congress."[1]

So the disposition of the public lands may be controlled,[2] regulation of interstate commerce may be provided for,[3] and provision may be made for the protection of the Indians.[4] In this connection the case of *Ervien v. United States*[5] is interesting. In the enabling act for the admission of New Mexico provision was made for the grant of certain public lands to the State to be held in trust for enumerated purposes, and it was made the duty of the Attorney-General of the United States to enforce such trusts by appropriate proceedings. The State attempted to use three per cent. of the proceeds from the trust property to advertise the natural resources of the State. The court without citation of authority, and with very little discussion held that this was contrary to the provisions of the trust and that it could be enjoined. However, as the provisions in question had to do with the public lands, the disposition of which is entrusted to Congress by the Constitution, the decision would seem to be entirely justified upon the principles above discussed.

§107. *Status and Control of Indians.* The only provisions in the Constitution with regard to Indians are those which

[1] Coyle *v.* Oklahoma (1911) 221 U. S. 559, 574.

[2] Pollards Lessee *v.* Hagan (1845) 3 Howard 212.

[3] Williamette Iron Bridge Co. *v.* Hatch (1888) 125 U. S. 1.

[4] *Ex parte* Webb (1912) 225 U. S. 663; United States *v.* Sandoval (1913) 231 U. S. 28.

[5] (1919) 251 U. S. 41.

exclude them from the enumerations upon which direct taxes and representation in Congress are based,[1] and the commerce clause, which gives Congress "power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."[2] These leave untouched the general field of constitutional power to deal with Indian affairs, and it has been necessary for the Supreme Court to build up here a very considerable body of unwritten constitutional law.

In the first place what is the status of Indian tribes? Here we get a little help from the commerce clause, since we see from the language there used that Indian tribes are neither classed as nations nor as States. In *Cherokee Nation v. Georgia*[3] an Indian tribe sought to sue the State of Georgia, but the Supreme Court held that under the terms of the judiciary article an Indian tribe is not a foreign nation, nor is it a State as that word is used in the Constitution. Chief Justice Marshall said that "they may more correctly, perhaps, be denominated domestic dependent nations. . . . they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."[4] In the next year the Supreme Court declared that the State of Georgia had no constitutional right to legislate for the territory occupied by the Cherokee nation, reserved to it by treaties first with the British Crown, and later with the Confederacy, and finally with the United States after the adoption of the Constitution. Marshall declared that,

> "The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and

[1] Art. I, sec. 2, par. 3 and Amendment XIV, sec. 2. See sec. 63.
[2] Art. I, sec. 8, par. 3. See sec. 89.
[3] (1831) 5 Peters 1.
[4] *Ibid.*, 16.

this nation is, by our Constitution and laws, vested in the government of the United States."[1]

So, when Indian tribes have by treaty agreed to relinquish land within a State and move to other territory, state authorities cannot take action to enforce the agreement, but the enforcement lies entirely with the national government[2]; nor can a State tax the property of Indians who have not been incorporated into the body of its citizens.[3] Indians maintaining their tribal organization "owe no allegiance to the States, and receive from them no protection."[4]

During the colonial days the relations with the Indians were determined by treaties made with them by the British Crown. This practice was continued under the Confederacy and by the United States after the adoption of the Constitution. But from the earliest days of our present government Congress has also legislated on this subject. In 1802 a comprehensive act was passed by Congress, defining the territories of Indian tribes as established by treaties, regulating entrance into such territories and trade with the Indians, providing for the punishment of those committing offenses against friendly Indians, and for rendering material assistance to such Indians. There is no provision, however, in that statute for interference with the internal affairs of Indian tribes, and it is declared that if Indians shall cross the boundaries of States or territories and commit offenses such matters are to be reported to their tribes, and only if the tribes refuse to make satisfaction is the President to "take such steps to compel satisfaction as may be necessary."[5]

In 1871 Congress by statute declared that thereafter no Indian nation or tribe within the territory of the United States should be recognized as a power with which the

[1] Worcester *v.* Georgia (1832) 6 Peters 515, 560.

[2] Fellows *v.* Blacksmith (1856) 19 Howard 366.

[3] Kansas Indians (1866) 5 Wallace 737; New York Indians (1866) 5 Wallace 761.

[4] United States *v.* Kagama (1886) 118 U. S. 375, 384.

[5] Act of March 30, 1802, 2 Stat. 139.

United States could contract by treaty, although all existing treaties were preserved in force.[1]

In 1885 a congressional statute was passed which made Indians criminally liable before the federal courts for certain offenses committed against each other as well as against other persons, whether committed within or without Indian territory.[2] The constitutionality of this legislation was attacked in *United States v. Kagama*,[3] but the Supreme Court was unanimous in upholding it. The Indians are within the geographical limits of the United States, and all territory within such limits must be under the jurisdiction either of the States or of the United States. It has been declared, as we have seen, that lands reserved to the Indians are not within the jurisdiction of the States. The relation of the Indian tribes to the people of the United States has, says the court, always been "an anomalous one and of a complex character." Although they were at first dealt with as partaking somewhat of the character of separate peoples, and left to deal with their internal affairs, yet, declares the court,

> "These Indian tribes *are* wards of the nation. They are communities *dependent* on the United States. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . . The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."[4]

[1] U. S. Rev. Stat. sec. 2079.

[2] Act of March 3, 1885, 23 Stat. 362.

[3] (1886) 118 U. S. 375.

[4] *Ibid.*, 383 to 385. Indian legislation may abrogate former treaties with

We have here a very interesting development in theory and practice with regard to the status and control of Indian tribes.[1]

The provision of the Fourteenth Amendment to the effect that "all persons born . . . in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,"[2] does not apply to an Indian born a member of one of the Indian tribes, for it is held that he is born subject to tribal jurisdiction and not subject to the jurisdiction of the United States within the meaning of the Constitution.[3] The general provisions for naturalization do not apply to Indians, since they are confined to white persons or persons of African decent.[4] Many provisions have been made for the naturalization of certain tribes in past years,[5] and more recent statutes look to the complete absorption of the Indians into the general body of citizens within a comparatively short time.[6]

The question of the rights of Indian tribes to the lands which they occupied was fully considered by Chief Justice Marshall in the case of *Johnson v. M'Intosh*,[7] and the principles there laid down have ever since been accepted as correct. The European governments, at the time of the discovery of America, acted upon the rule that discovery of territory followed by possession vested in the sovereign title to all of the territory in question subject to a right of possession in the natives. Since title vested in the sovereign

---

Indians. Stephen *v.* Cherokee Nation (1899) 174 U. S. 445; Lone Wolf *v.* Hitchcock (1903) 187 U. S. 553.

[1] See Cuthlert W. Ponred, "Nationals without a Nation: The New York State Tribal Indians," 22 col. L. Rev. 97.

[2] For a discussion of this clause see sec. 112.

[3] Elk *v.* Wilkins (1884) 112 U. S. 94. See also Van Dyne, *Citizenship of the United States*, 7, 8, 10, 13 to 15; United States *v.* Wong Kim Ark (1898) 169 U. S. 649, 693.

[4] Van Dyne, *Citizenship of the United States*, 58.

[5] *Ibid.*, 235 to 237.

[6] Act of April 26, 1906, 34 Stat. 137; act of May, 1906, 834 Stat. 182.

[7] (1823) 8 Wheaton 543.

the natives might not convey title, while the sovereign might do so subject to the possessory right of the native occupants. The King of Great Britain by proclamation in 1763 reserved to the Indians, subject to his dominion and protection, all of the western lands and forbade British subjects from making any purchases of such lands or settling there. After the Revolution the rights of the Crown or of its grantees devolved upon the States, and by cession of the western territories there was transferred to the United States the title to these lands subject to the Indians' right of occupancy, together with the sole privilege of extinguishing such right. It was, therefore, held that a person could not acquire a title by conveyance from Indians of land occupied by them.[1] The federal government has in form at least respected the proprietary rights of the Indians, and when their lands have been taken the government has obtained their formal consent and has compensated them in money or other land. While maintaining their tribal relations the Indians' possessory right to land is held to vest in the tribe and not in the individuals, but it has been held that Congress may legislate with regard to Indian lands, and may provide for their being divided among the Indians of the various tribes and held thereafter in severalty.[2] Provision has now been made for the division of practically all of the Indian lands, though for twenty-five years after such division the United States holds the lands apportioned in trust for the allottees.[3]

[1] This proposition had previously been enunciated by Marshall in Fletcher *v.* Peck (1810) 6 Cranch 87, though without any argument.

[2] Cherokee Nation *v.* Hitchcock (1902) 187 U. S. 294; Lone Wolf *v.* Hitchcock (1903) 187 U. S. 553.

[3] See act of Feb. 8, 1887, 24 Stat. 388 and act of June 28, 1898, 30 Stat. 495.

CHAPTER XI

CITIZENSHIP AND NATURALIZATION

§108. *Dual Citizenship Recognized by the Constitution.* From the outset the Constitution has clearly recognized a dual citizenship, citizenship of the United States and citizenship of a particular State.[1] In the "privileges and immunities" clause state citizenship was recognized,[2] and this was also true in article III, section 2 with regard to the jurisdiction of the federal courts.[3] On the other hand it is provided in article I, section 2, that a Representative must have been a citizen of the United States for seven years, in article I, section 3 that a Senator must have been a citizen of the United States for nine years, and in article II, section 1, that the President must be "a natural born citizen or a citizen of the United States at the time of the adoption of the Constitution."

It is clear at the present day that if either is "paramount and dominant" it is the citizenship of the Union.[4] Since the adoption of the Fourteenth Amendment there is no constitutional basis for Calhoun's view that federal citizenship is subordinate to and derivative from State citizenship.[5]

[1] In Pomeroy's *Constitutional Law*, p. 48, it is declared that there was no United States citizenship under the Articles of Confederation. This seems a justifiable conclusion, but see Justice Curtis's view contra in Dred Scott *v.* Sandford (1856) 19 Howard 393, 572.

[2] See sec. 204. [3] See sec. 44.

[4] In Selective Draft Cases (1918) 245 U. S. 366, 369, Chief Justice White, writing for a unanimous court, declared: The Fourteenth Amendment has "completely broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant, instead of being subordinate and derivative."

[5] Calhoun's *Works*, vol. ii, p. 242, quoted by Justice Field in Slaughter House Cases (1872) 16 Wallace 36, 94.

It is also clear that, even before the Fourteenth Amendment was added to the Constitution, a person's duty as a citizen of the United States was not "subordinate" to his duty as a citizen of a State. Quite the reverse has always been true. The Constitution was framed and adopted with a view to instituting a government that should operate directly upon the people of the United States, and not indirectly through separate State sovereignties. It and laws and treaties made in pursuance of its provisions were declared to be the supreme law of the land. The federal government had the right to demand obedience to its lawful mandates, and the people in return had the right to insist upon protection. The tie of political allegiance was created between the people and the Union. If a constitutional command of the federal government conflicted with a command of the State the citizen was under a duty to obey the former.

§109. *United States Citizenship Originally Derived from State Citizenship.* But it would seem that, before the adoption of the Fourteenth Amendment, United States citizenship, except in cases of naturalization, was derived from State citizenship. Chief Justice Taney in the famous case of *Dred Scott v. Sandford*[1] said that "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 the new political body; but none other." Justice Curtis in the same case, admitting the proposition just stated, raises the question whether the federal government has been given power to determine, "What native-born persons should be citizens of the United States?"[2] After an examination of the subject he holds it to be a "necessary conclusion" that "those persons born within the several States, who, by force of their several constitutions and laws, are citizens of the State, are thereby citizens of the United States."[3] This conclusion he bases upon the following grounds: First, that the power "of

[1] (1856) 19 Howard 393, 406.
[2] *Ibid.*, 579.
[3] *Ibid.*, 582.

establishing a uniform rule of naturalization, was granted" to the central government, "and here the grant, according to its terms, stopped. Construing a Constitution containing only limited and defined powers of government, the argument derived from this definite and restricted power to establish a rule of naturalization, must be admitted to be exceedingly strong." Second, article IV, declares that "citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." Here privileges and immunities are granted to be enjoyed throughout the United States. Those who are to enjoy them are described as citizens of each State.

> "It would seem that if it had been intended to constitute a class of native-born persons within the States, who should derive their citizenship of the United States from the action of the Federal government, this was an occasion for referring to them. It cannot be supposed that it was the purpose of this article to confer the privileges and immunities of citizens in all the States upon persons not citizens of the United States. And if it was intended to secure those rights only to citizens of the United States, how has the Constitution here described such persons? Simply as citizens of each State."

Third, although suffrage is not inseparable from citizenship it is one of the important marks of citizenship.

> "Here, again, the consideration presses itself upon us, that if there was designed to be a particular class of native-born persons within the States, deriving their citizenship from the Constitution and laws of the United States, they should at least have been referred to as those by whom the President and House of Representatives were to be elected, and to whom they should be responsible. Instead of that, we again find this subject referred to the laws of the several States. The electors of President are to be appointed in such manner as the legislature of each State may direct, and the qualifications of electors

of members of the House of Representatives shall be the same as for electors of the most numerous branch of the State Legislature."

Justice Curtis concluded that since Missouri recognized free negroes as citizens they thereby became citizens of the United States, and were clearly entitled to the privilege, given to the citizens of each State by the Constitution, to sue citizens of other States in the federal courts.

The Chief Justice held that free negroes were not recognized as state citizens when the Constitution was adopted, that no free negroes became citizens of the United States by the adoption of the Constitution, and that it was contrary to the intention of the framers of the Constitution that any State should have the power, by conferring state citizenship upon free negroes, to invest them with United States citizenship, or with the rights of citizens throughout the United States guaranteed by the Constitution. Three Justices, Wayne, Grier, and Daniel, concurred in this view. However, the Chief Justice and Justices Wayne, Grier, and Daniel did not hold that United States citizenship was not derived from State citizenship, but simply held that it was not the intention of those adopting the Constitution that a State should have power to confer United States citizenship upon free negroes.[1] Justice McLean held that the question of citizenship could not be gone into by the Supreme Court under the pleadings. Three Justices, Catron, Nelson, and Campbell, held that it was not necessary to decide this

[1] Justice Curtis seems to have the better of the historical argument. He points out that in at least five States free negroes had the right of suffrage at the time of the adoption of the Constitution; that free negroes had by the decisions of at least two States been recognized as citizens; and that when the provision in the Articles of Confederation, which was the forerunner of article IV, section 2, of the present Constitution, was before the Continental Congress, giving to "free inhabitants of each State privileges and immunities in other States," it was proposed to change the phrase to "free white inhabitants," which proposal was defeated. See also, Patterson, *The United States and the States under the Constitution* (2d ed.), 292; "Emancipation and Citizenship," by G. E. Sherman, *15 Yale Law Jour.*, 263.

point, holding with the three Justices just previously named and with the Chief Justice that the evidence showed that the plaintiff was still a slave. The decision, therefore, stands on the latter ground as it was the only ground upon which a majority agreed.

It seems to have been the generally accepted view before the adoption of the Fourteenth Amendment that, except in cases of naturalization, United States citizenship was derived from state citizenship. Story says, "Every citizen of a State is *ipso facto* a citizen of the United States."[1] Rawle in his early work[2] says:

> The citizens of each State constituted the citizens of the United States when the Constitution was adopted. The rights which appertained to them as citizens of those respective commonwealths accompanied them in the formation of the great, compound commonwealth which ensued. They became citizens of the latter, without ceasing to be citizens of the former, and he who was subsequently born a citizen of a State, became at the moment of his birth a citizen of the United States.[3]

§110. *Power and Effect of Naturalization.* Great confusion and no little opportunity for misunderstandings between the States had resulted from the fact that each State, after the Declaration of Independence, was a law unto itself in the matter of naturalization, and from the fact that there

[1] *Story on the Constitution*, sec. 1693.

[2] *Rawle on the Constitution*, 86.

[3] In the debate in Congress on the Fourteenth Amendment Mr. Johnson said: "The decisions of the courts, and the doctrine of the commentators is that every man who is a citizen of a State becomes *ipso facto* a citizen of the United States; but there is no definition as to how citizenship can exist in the United States except through the medium of citizenship in a State." Van Dyne, *Citizenship of the United States* 11. Notice the statement of Chief Justice White quoted in the footnote above. See Tiedeman, *The Unwritten Constitution of the United States*, 94 *et seq.* In Sergeant's *Constitutional Law*, 111, the author says with regard to article IV, "This citizenship means a residence or domicile in a particular State by one who is a citizen of the United States," but there is no further comment on this subject.

was great diversity in the state enactments on this subject.[1] To remedy this difficulty the sole power of naturalization was given to Congress.[2] By naturalization under Congressional legislation persons have clearly become from the first citizens of the United States, and as clearly, it would seem, citizens of the States in which they may reside.[3] Naturalization by the federal government may be of individuals,[4] or of classes of persons, or, by the admission of a State, of all of the citizens of the State, or, by treaty, of designated persons or groups.[5]

The general provisions for naturalization require a residence within the United States of five years, a declaration of an intention to become a citizen at least two years before the applicant is admitted, and at the time of admission a declaration in open court that he will support the Constitution, and a renunciation of all other allegiance.[6] Special exceptions are made in favor of those who have served in the army and navy, and who have been seamen on American vessels.[7] An alien woman who marries an American citizen and who might lawfully become naturalized thereby becomes an American citizen herself[8]; and the naturalization

[1] *The Federalist*, No. 42.

[2] Const. of U. S., art. I, sec. 8, par. 4. In 1792 the Supreme Court held that under the Constitution the States had a concurrent right of naturalization. Collet *v.* Collet, 2 Dallas 294. This case was overruled on this point in Chirac *v.* Chirac (1817) 2 Wheaton 259.

[3] "A citizen of the United States residing in any State of the Union is a citizen of the State." Chief Justice Marshall in Gassies *v.* Ballon (1832) 6 Peters 761. See also the earlier case of Collet *v.* Collet (1792) 2 Dallas 294; and the opinion of Justice Curtis in Dred Scott *v.* Sandford (1856) 19 Howard 393, 571. A naturalized citizen of the United States was not deprived of such citizenship by the attempted secession of the State in which he resided. The Peterhoff (1866) 5 Wallace 28, 60.

[4] Spratt *v.* Spratt (1830) 4 Peters 393 contains the record of proceedings leading up to a certificate of citizenship by naturalization.

[5] See Van Duyne, *Citizenship of the United States*, chaps. 4 to 7.

[6] U. S. Rev. Stat., secs. 2170, act of June 29, 1906, 34 Stat. 596.

[7] U. S. Rev. Stat., secs. 2166, 2174, act of June 30, 1914, 38 Stat. 395, act of May 9, 1918, 40 Stat. 542.

[8] This was not true at the common law, Shanks *v.* Dupont (1830) 3

of the parent carries with it the naturalization of minor children dwelling in the United States.[1] When a man has declared his intention to become a citizen, but dies before he is naturalized, his widow and minor children can go forward from that point with the steps necessary for naturalization.[2] Alien enemies cannot be admitted to citizenship during the continuance of a war, unless they have declared their intention to become citizens at least two years and not more than seven years before the beginning of the war. By order of the President persons may be excepted from these provisions.[3] Only aliens who are white or of African nativity or descent can be naturalized.[4] The District Courts of the United States, the Supreme Court of the District of Columbia, certain territorial courts, and courts of record of the States are given jurisdiction to naturalize aliens.[5] Certificates of citizenship may be set aside on the ground that they were procured by fraud or illegality.[6]

It is also provided by national legislation that persons are citizens of the United States, though born out of the limits and jurisdiction of the United States, if at the time of their birth their fathers were citizens of the United States and had at some time resided in the United States.[7]

§111. *State Citizenship now Derived from United States*

Peters 242, but is provided for by U. S. Rev. Stat., sec. 1994. See Van Duyne, *Citizenship of the United States*, chap. 3.

[1] U. S. Rev. Stat., sec. 2172.

[2] Act of June 29, 1906, 34 Stat. 596.

[3] Act of May 9, 1918, 40 Stat. 542. Anarchists and polygamists cannot be naturalized. Act of June 29, 1906, 34 Stat. 596.

[4] See Van Duyne, *Citizenship of the United States*, Part II, chap. 1; *In re* Halladjian (1909) 174 Fed. 834; United States *v.* Balsara (1910) 180 Fed. 694; *In re* Young (1912) 198 Fed. 715; Dow *v.* United States (1915) 220 Fed. 145. As to naturalization of those who are "nationals" (see sec. 114) but not citizens, see *In re* Alverto (1912) 198 Fed. 638; *In re* Lampito (1916) 232 Fed. 382; *In re* Mollari (1916) 239 Fed. 416.

[5] Act of June 29, 1906, 34 Stat. 596.

[6] Act of June 29, 1906, 34 Stat. 596. This provision is constitutional. Johannessen *v.* United States (1912) 225 U. S. 227; Luria *v.* United States (1913) 231 U. S. 9.

[7] U. S. Rev. Stat. sec. 1993.

Citizenship. Since the adoption of the Fourteenth Amendment, declaring that, "All persons born or naturalized in the United States, and subject to the jurisdicton thereof, are citizens of the United States and of the States wherein they reside," there is no doubt that State citizenship is now derived from United States citizenship, rather than United States citizenship from citizenship in a State. The Thirteenth Amendment, forbidding slavery or involuntary servitude, was intended to safeguard the post-bellum status of the negroes as freemen; the Fifteenth Amendment declaring that the right of citizens of the United States to vote shall not be denied on account of race, color or previous condition of servitude, was intended to safeguard their political rights; the main purpose of section one of the Fourteenth Amendment was undoubtedly to establish the position of the emancipated negroes as citizens of the United States and of the States of their domiciles and to prevent discrimination against them by the States, though the section obviously has, and has been given, a much wider application.

§112. *Persons Who Become Citizens by Birth.* It is to be noted that only "persons born . . . in the United States, and subject to the jurisdiction thereof" come within the operation of the Fourteenth Amendment with regard to citizenship. This includes not only children of citizens, and former slaves and their children, but children born to aliens as well, if born in the United States and subject to their jurisdiction. Furthermore, children become citizens by birth, though their parents are of a race or nationality which precludes them from naturalization.[1] But certain persons though within the territorial limits of the United States are not within its jurisdiction. This is true of diplomatic representatives of other countries, alien enemies invading the country, and aliens upon public vessels of a foreign country though within our territorial waters.[2] Indians stand in a rather curious and

[1] United States *v.* Wong Kim Ark (1898) 169 U. S. 649.

[2] *Ibid.*, 693.

anomalous position. During all of the early part of our history they were dealt with as foreign nations, and treaties were made with them in that capacity. As the result of later developments Congress has assumed authority to legislate with regard to them,[1] but as long as they continue to owe allegiance to tribal organizations they are held not to be subject to the jurisdiction of the United States so as to make them citizens by birth by force of the Fourteenth Amendment.[2]

§113. *One May Be a United States Citizen and Not a Citizen of a State.* While every citizen of the United States resident in any State is now without doubt a citizen of that State it is perfectly possible for a person to be a citizen of the United States and not a citizen of any State, as when he resides in one of the territories, or is born abroad of a father who is a citizen, and continues to reside abroad, or where a citizen of the United States and of a State takes up his residence abroad, when, it would seem, he loses his state citizenship.[3]

[1] United States *v.* Wong Kim Ark (1898) 169 U. S. 649, 693. See the discussion of the power of Congress over Indians in sec. 107.

[2] United States *v.* Wong Kim Ark (1898) 169 U. S. 649, 693.

[3] Hammerstein *v.* Lyne (1912) 200 Fed. 165. In the Dred Scott case (1856) 19 Howard 393, although Chief Justice Taney denied that a State could, from classes not recognized as citizens at the time of the adoption of the Constitution, create state citizens who would thereby become United States citizens and so acquire rights guaranteed to citizens by the Constitution, he asserted that States might create state citizens who would not be United States citizens (p. 405). The Fourteenth Amendment does not deny this power, so that States may, and in some cases do, confer upon aliens rights which are normal incidents of state citizenship, such as the right to vote, and the right to own and inherit personal and real property. Since the federal government has exclusive power of naturalization, and since a naturalized citizen or a citizen born within the United States and subject to its jurisdiction is a citizen of the State in which he resides, there would be few opportunities for a State to attempt to make a person one of its citizens in the constitutional sense. If, however, a State should declare by legislation that a person born abroad, whose father was a United States citizen and had resided in that State, should be a citizen of that State, and such person should assert his right to the privileges and immunities of citizens in another State, the question of the power of a State to create a person

§114. *Nationals Who Are Not Citizens.* It is further possible for one to owe allegiance to the United States, to be subject to its jurisdiction, and to be entitled to its protection—that is, to be a national[1]—and yet not to be a citizen. This was the situation occupied by free negroes before the adoption of the Fourteenth Amendment, according to the view of Chief Justice Taney and three other Justices in *Dred Scott v. Sandford.*[2] By treaty, after the Spanish War, the Philippines and Porto Rico were ceded to the United States, and it was provided that the civil rights and political status of the inhabitants should be determined by Congress. By congressional legislation[3] the inhabitants of Porto Rico and of the Philippines were respectively declared to be citizens of Porto Rico and of the Philippines. Clearly, then, they were no longer aliens, and this the Supreme Court declared in *Gonzales v. Williams.*[4] But neither did they become citizens of the United States.[5] Furthermore, it would seem that persons born in Porto Rico and the Philippines after their annexation did not, from the fact that they were born "subject to the jurisdiction" of the United States, become citizens of the United States, for the Fourteenth Amendment further requires that persons to be citizens by birth must be born "in the United States." A person born in territory acquired by the United States but not incor-

---

one of its citizens in the constitutional sense would be raised. There would seem to be nothing in the Constitution which would prevent its doing so.

[1] See an article entitled "American Citizenship," by D. O. McGovney, in *11 Columbia L. Rev.*, 231 and 326.

[2] (1856) 19 Howard 393, already discussed.

[3] Laws of 1900, chap. 191, 31 Stat. 79, Laws of 1902, chap. 1369, 32 Stat. 692.

[4] (1904) 192 U. S. 1.

[5] *In re* Alverto (1912) 198 Fed. 688. Congress by an Act of June 14, 1902, 32 Stat. 386, made provision for issuance of passports to those owing allegiance to the United States, whether citizens or not, by officers of the insular possessions; and by Act of June 29, 1906, 34 Stat. 606, the right to naturalization is extended to those owing permanent allegiance though not citizens, showing a recognition by Congress that there were persons who were nationals though not citizens.

porated into the United States is probably not born "in the United States" as that term is used in the Constitution. "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,'" said a Justice of the Supreme Court[1] in commenting upon the Fourteenth Amendment. He further said that the power to acquire territory includes the power to determine the status of its inhabitants.

> "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."[2]

The Justice points out that the attitude of the government has never supported such an idea. Here, then, we have again a class of nationals who are still not citizens within the meaning of the Constitution.[3]

§115. *Expatriation.* The right of expatriation without the aid of statutory provision was generally denied by our courts, although asserted by some of our statesmen.[4] In 1868, however, Congress declared by statute that "the right of expatriation is a natural and inherent right of all people,"[5] and in 1907 Congress expressly provided that an American citizen shall be deemed to have expatriated himself when he becomes naturalized in a foreign state.[6]

[1] Downs *v.* Bidwell (1901) 182 U. S. 244, 251. It was not a question of citizenship which was involved in the decision, but the question was whether the constitutional provision that taxes must be uniform "throughout the United S tates" applied to Porto Rico. The court held that it did not. See sec. 102. [2] *Ibid.*, 279.

[3] By Act of March 2, 1917, 39 Stat. 953, United States citizenship was conferred upon the citizens of Porto Rico.

[4] J. B. Moore, "A Hundred Years of American Diplomacy," *14 Harvard L. Rev.*, 165, 179. [5] U. S. Rev. Stat., sec. 1999.

[6] Act of March 2, 1907, 34 Stat. 1228. A woman, who is a United

§116. *Privileges and Immunities of State Citizenship and United States Citizenship Are Not the Same.* Although the primary purpose intended to be accomplished by the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments was undoubtedly the placing of the negro upon an equal footing with the white citizen, nevertheless their whole spirit, and particularly that of the Fourteenth, show also a wide swing of the pendulum of public opinion from its attitude at the time of the adoption of the Constitution and of the first ten amendments. At the time when the Constitution was adopted there was great fear of a tyrannical central government, and the powers of that government were jealously limited. The extreme states-rights doctrine finally led to secession and the bitter struggle of the Civil War. At the close of that struggle the fear of the sovereign powers of the States was naturally uppermost in the minds of the Congress which drafted the amendments then proposed. We shall later consider the important results of the "due process" and "equal protection" clauses of the Fourteenth Amendment,[1] but a contention based upon the provision in the Fourteenth Amendment that, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" was early presented to the Supreme Court,[2] which, if it had been acted upon by that court would have reduced the States to practical impotence. The contention was briefly this, that since citizens of the States were by the Fourteenth Amendment first of all United States citizens the privileges and immunities of their state citizenship now became privileges and immunities attached to their United States citizenship. If this interpretation of the amendment had been adopted it would have prevented the States from abridging any rights or privilege

States citizen, in effect expatriates herself when she marries an alien, for by such marriage she takes the same citizenship as that of her husband. Mackenzie *v.* Hare (1915) 239 U. S. 299.

[1] See chaps. 28 to 33.

[2] Slaughter House Cases (1872) 16 Wallace 36.

which by the common law, or by the constitutions or statutes of the States had been recognized as incidents of state citizenship; and it would further have allowed Congress to define and enforce those rights under the last section of the amendment which declares that "Congress shall have power to enforce by appropriate legislation the provisions of this article."

It is undoubtedly true that many who took part in framing the Fourteenth Amendment thought that it wrought a radical change in the constitutional relations of the States to the Union, reducing the former very nearly to the status of counties within a State[1]; and it was only by a majority of one that the United States Supreme Court declared itself against an interpretation which would have substantially done away with the dual sovereignty of state and federal governments, with which the American has become so familiar. It is not surprising that Justice Miller, in pronouncing the opinion of the court[2], said,

> "We do not conceal from ourselves the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several States to each other and to the citizens of the States and of the United States have been before this court during the official life of any of its present members."

Justice Miller first points out that the Fourteenth Amendment itself recognizes the distinction between state citizenship and United States citizenship, and that under it persons may be citizens of the Union without being citizens of any State. He then reminds us that only privileges and immunities of citizens of the United States are protected by that amendment.

[1] Flack, *The Adoption of the Fourteenth Amendment.*
[2] Slaughter House Cases (1872) 16 Wallace 36, 67.

"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."

Since there were before the Fourteenth Amendment privileges and immunities of state citizenship and United States citizenship distinct one from the other, Justice Miller concludes that the Fourteenth Amendment protects only the privileges and immunities of United States citizenship, and does not affect those attaching to state citizenship. After pointing out what the results of a contrary decision would be, Justice Miller concludes his argument as follows[1]:

"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."

Four justices[2] dissented, and three wrote vigorous dissenting opinions. The gist of their argument is that if the provision of the amendment under consideration only prohibited the abridgment of privileges and immunities already inhering in United States citizenship under the Constitution, this provision was unnecessary and accom-

[1] Slaughter House Cases (1872) 16 Wallace 36, 78.

[2] Chief Justice Chase and Justices Field, Bradley and Swayne.

plished nothing, because without it the interference by a State with such privileges and immunities would have been unconstitutional. This conclusion is correct, and the provision of the Fourteenth Amendment that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," as interpreted by the majority of the court, is merely declaratory of what would, in its absence, have been true by implication.

§117. *Guaranties of the First Eight Amendments Are Not Privileges and Immunities of United States Citizenship.* A second contention based on the "privileges and immunities" clause of the Fourteenth Amendment, which had far-reaching possibilities, was first presented to the Supreme Court in 1887,[1] but was not actually settled until the last year of the nineteenth century.[2] The first eight amendments to the Constitution, adopted shortly after the national government was formed, constitute a Bill of Rights, guarantying freedom of religion, of the press, of speech, of assembly, and of petition, and the right to bear arms; guarantying against the abuse of quartering soldiers upon civilians, and against unreasonable search and seizure; guarantying in cases of capital and infamous crimes indictment by a grand jury, confrontation of witnesses, information as to the cause of accusation, the right to compulsory process to obtain witnesses, the right to counsel, the right to trial by jury and the right not to be twice put in jeopardy; guarantying the right to trial by jury in civil actions where the value in controversy exceeds twenty dollars; guarantying against excessive bail, excessive fines, cruel and unusual punishments; and against deprivation of life, liberty, or property without due process of law, and against the taking of private property for public use without just compensation. Before the adoption of the Fourteenth Amendment it had been repeatedly decided that the first eight amendments constituted limitations only upon the

[1] In Spies *v.* Illinois (1887) 123 U. S. 131, 166.

[2] Maxwell *v.* Dow (1900) 176 U. S. 581.

federal government, and did not affect the States.[1] It was contended, however, that the privileges and immunities guarantied by the first eight amendments constituted privileges and immunities of citizens of the United States, and that, therefore, the States were by the Fourteenth Amendment forbidden to abridge these privileges and immunities. This view was accepted by Justice Harlan,[2] but the rest of the court held the deduction upon which it was based to be unsound. Speaking for the majority of the court, Justice Peckham said of the privileges and immunities guarantied by the first eight amendments[3]:

> "In none are they privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the Federal Government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgment by the States of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against federal governmental powers.

It might have been further said that, even if the privileges and immunities of the first eight amendments belonged to United States citizenship, they were guaranties affecting federal action, and could only be abridged by a State if a State attempted to interfere with federal action in one of the matters covered by those amendments.

§118. *What Are Privileges and Immunities of United States Citizenship?* The Supreme Court has not attempted a full definition of the privileges and immunities of United States citizenship, but it has, nevertheless, pointed out from time to time certain rights which do or which do not fall within

[1] These provisions are considered more fully in subsequent chapters.

[2] Maxwell *v.* Dow (1900) 176 U. S. 581, 605. [3] *Ibid.*, 595.

those terms. Certain rights arise from the very nature of the relationship of a citizen to the state of which he is a member, and others arise from certain exclusive powers granted to the national government. Such are the rights

> "to come to the seat of government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign countries are conducted, to the sub-treasuries, land offices, and courts of justice in the several States."[1]
>
> "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 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."[2]

The right of a natural born citizen of the United States to be a candidate for the presidency, or of a citizen of the United States for nine years to be a candidate for Senator, or of a citizen of the United States for seven years to be a candidate for Representative, are clearly privileges of United States citizenship.[3] The right granted in the Fourteenth Amend-

[1] Crandall *v.* Nevada (1867) 6 Wallace 35, 44.

[2] Slaughter House Cases (1872) 16 Wallace 36, 79.

[3] But the right to vote is not a privilege inherent in United States citizenship. Many state citizens have not the privilege of voting, while some States allow aliens to vote before naturalization. Minor *v.* Happersett (1874) 21 Wallace 162. But the right of an elector of the most numerous branch of the state legislature to vote for federal Senators and Representatives is given by article I, section 2, and by the Seventeenth Amendment, and this right may be protected by national legislation. *Ex parte* Yarborough (1884) 110 U. S. 651.

ment to a citizen of the United States to be a citizen of the State where he resides is a privilege of United States citizenship, and so, the guaranties in the Fifteenth and Nineteenth Amendments that 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" or on "account of sex," are immunities of United States citizenship. It has also been held that it is a privilege attaching to United States citizenship to make a homestead entry upon unoccupied public lands[1]; to inform federal officials of the commission of an offense against federal laws[2]; and to be protected by the United States against lawless violence while in the custody of a United States Marshall.[3]

§119. *What Are Not Privileges and Immunities of United States Citizenship?* As we have seen just above the protections against federal action under the first eight amendments being guarantied to *all persons* have been expressly declared by the Supreme Court not to constitute privileges or immunities of United States citizenship.[4] By parity of reasoning the prohibitions in the body of the Constitution against suspension of the writ of habeas corpus, except in cases of rebellion or invasion, and against the passing of bills of attainder or ex post facto laws, by the Federal Government do not establish privileges or immunities of United States citizenship, since these provisions protect all persons.[5] The same would be even more clearly true of the Thirteenth Amendment which prohibits slavery or involuntary servi-

[1] United States *v.* Waddell (1884) 112 U. S. 76.

[2] *In re* Quarles (1895) 158 U. S. 532.

[3] Logan *v.* United States (1892) 144 U. S. 263.

[4] Maxwell *v.* Dow (1900) 176 U. S. 581. The *dictum* in the Slaughter House Cases (1872) 16 Wallace 36, 79, that, "The right to peaceably assemble and petition for redress of grievances," falls within the "privileges or immunities" clause of the Fourteenth Amendment is incorrect in the light of this later case.

[5] A *dictum* in the Slaughter House Cases (1872) 16 Wallace 36, 79, that the privilege of the writ of habeas corpus is a privilege of United States citizenship is not sustainable in view of the reasoning in Maxwell *v.* Dow, *supra.*

tude everywhere within the United States, constituting a protection to all persons against both federal and state action; of the provisions of the Fourteenth Amendment forbidding States to deprive any person of life, liberty, or property without due process of law, or to deny any person the equal protection of the laws[1]; and of the provisions in the body of the Constitution[2] forbidding the States to "pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts," which furnish protection to all persons whether citizens or not. The mere fact that certain privileges guarantied to citizens of a State, *eo nomine*, are contained in the federal Constitution would clearly seem insufficient reason for considering them privileges of United States citizenship. Such are the right of the citizen of a State to enjoy "all privileges and immunities of citizens in the several States,"[3] and the right of citizens of a State under certain circumstances to resort to the federal courts.[4]

§120. *Privileges and Immunities of Citizenship are Protected against State Action.* It is entirely clear from the language used in Article Four of the Constitution and in the Fourteenth Amendment that the protection therein guarantied to privileges and immunities of state and federal citizenship is a protection against state action, and not against the action of private individuals. It is the denial or abridgment of such rights by the States which is unconstitutional. A private individual cannot deny or abridge a right, he can at most interfere with its exercise.[5]

[1] A *dictum* in the Slaughter House Cases (1872) 16 Wallace 36, 80, that these guaranties are within the "privileges or immunities" clause of the Fourteenth Amendment is not sustainable in view of the reasoning in Maxwell *v.* Dow, *supra.*

[2] Art. I, sec. 10. [3] Art. IV, sec. 2.

[4] Art. III, sec. 2. Both Chief Justice Taney and Justice Curtis in Dred Scott *v.* Sandford (1856) 19 Howard 393, 406, 580 and 588, take the position that if a person has these rights he is a United States citizen, because such rights could only have been intended to attach to United States citizenship. But as a matter of fact they are expressly attached to State citizenship as such.

[5] See on this point the discussion of the further provisions of the Fourteenth Amendment in sec. 160.

CHAPTER XII

MISCELLANEOUS POWERS

§121. *Bankruptcy.* The Constitution provides that Congress shall have power to establish "uniform laws on the subject of bankruptcies throughout the United States."[1] The first national bankruptcy law was passed in 1800 and repealed in 1803; a second was passed in 1841 and repealed in 1843; a third was passed in 1867 and repealed in 1878, and the present statute was passed in 1898. Though the English bankruptcy legislation in force at the time of the adoption of the Constitution applied only to merchants or traders, while the term insolvency was applied to those proceedings by which others were empowered to surrender their property for the benefit of creditors and so be discharged, this distinction was not acted upon in the colonies, and was not adopted by the Supreme Court. According to its decisions Congress may, under the bankruptcy clause, pass what would have been classed under the English law as insolvency laws as well as bankruptcy laws.[2]

It has been decided that the uniformity required by the bankruptcy clause is a geographical uniformity, but that this is not destroyed by allowing to a bankrupt the exemptions to which he is entitled at the time of filing his petition by the laws of the State in which he has been domiciled for the six months or the greater portion thereof immediately preceding the filing of the petition.[3] The trustee still

[1] Art. I, sec. 8, par. 4.

[2] *Story on the Constitution* (5th ed.), secs. 1111 to 1113; Sturges *v.* Crowninshield (1819) 4 Wheaton 122, 194; Hanover Nat. Bk. *v.* Moyses (1902) 186 U. S. 181, 184.

[3] Sec. 6 of the Bankruptcy Act of 1898. There was a similar provision in the earlier act.

"takes in each State whatever would have been available to the creditor if the bankruptcy law had not been passed. The general operation of the law is uniform although it may result in certain particulars differently in different States."[1]

The fact that power to enact bankruptcy legislation is vested in Congress was early held not to deprive the States of the power to pass insolvency laws in the absence of federal legislation.[2] Nor does the enactment of a national bankruptcy law annul existing state laws. Such laws are simply suspended and come again immediately into force upon the repeal of the federal enactment.[3]

§122. *Patents, Copyrights, and Trade-Marks.* The Constitution gives Congress 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."[4] A patent or a copyright does not give to the recipient any right to sell the patented or copyrighted product in a State which he would not have had otherwise, but only excludes others from producing it. It, therefore, follows that the States may control the use of the product under their police power[5]; and it has also been held that the States may impose license fees upon the sale of such products.[6] Congress has no general jurisdiction or authority with regard to trade-marks, and so can only

[1] Hanover Nat. Bk. *v.* Moyses (1902) 186 U. S. 181, 190. See also *In re* Deckert (1874) Fed. Cas. No. 3, 728. In the Hanover Nat. Bk. case it was also held that there was not an unconstitutional delegation by Congress of legislative power to the States.

[2] Sturgis *v.* Crowninshield (1819) 4 Wheaton 122; Odgen *v.* Saunders (1827) 12 Wheaton 213.

[3] Sturgis *v.* Crowninshield (1819) 4 Wheaton 122; Butler *v.* Gaveley (1892) 146 U. S. 303. For a consideration of what laws are suspended see Williston, "The Effect of a National Bankruptcy Law upon State Laws," *22 Harv. L. Rev.*, 547.

[4] Art. I, sec. 8, par. 8.

[5] Patterson *v.* Kentucky (1878) 97 U. S. 501.

[6] Webber *v.* Virginia (1880) 103 U. S. 344; Allen *v.* Riley (1906) 203 U. S. 347.

legislate with regard to them under its power over interstate commerce.[1] A protection of mere labels is not within the purpose of the constitutional provision as to copyrights.

> "To entitle it to a copyright the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached."[2]

§123. *Postal Service.* The constitutional provision upon which the federal postal service is based is very brief, declaring merely that Congress shall have power "to establish post-offices and post roads."[3] Under the Articles of Confederation Congress was given exclusive power of

> "establishing and regulating post-offices from one State to another throughout the United States, and exacting such postage on papers passing through the same as may be requisite to defray the expenses of the said office."[4]

Under this provision the interior post-offices in each State seem to have been left to the regulation of the State itself.[5] The first proposal in the Constitutional Convention was to give Congress the power of "establishing post-offices," but the words "and post roads" were added apparently without debate by a vote of six States to five.[6] It was contended on the one hand that this gave Congress only the power to designate the roads over which the posts should travel, and not the power to provide for such roads.[7] This view has,

[1] Trade-Mark Cases (1879) 100 U. S. 82; Ryder *v.* Holt (1888) 128 U. S. 525. Compare United Drug Co. *v.* Rectamus Co. (1918) 248 U. S. 90, 97 and 98.

[2] Higgins *v.* Keuffel (1891) 140 U. S. 428, 431. Compare Courier Lith. Co. *v.* Donaldson Lith. Co. (1900) 104 Fed. 993 and Louis De Jouge & Co. *v.* Breuker & Kessler Co. (1910) 182 Fed. 150.

[3] Art. I, sec. 8. par. 7. [4] Art. IX.

[5] *Story on the Constitution* (5th ed.), sec. 1126.

[6] Farrand, *Records of the Federal Convention*, vol. ii, pp. 135, 144, 159, 168, 182, 303.

[7] *Story on the Constitution* (5th ed.), secs. 1128 to 1150, contains an extended consideration of these questions.

however, not been accepted by the Supreme Court, which has rested the power of the national government to construct or to provide for the construction of national highways, including railroads and canals from State to State, as well upon the powers to provide for postal accommodations as upon the powers to provide accommodations to meet military exigencies, and to regulate interstate commerce.[1] The national government may also provide for

> "the Carriage of the mail, and all measures necessary to secure its safe and speedy transit, and the prompt delivery of its contents. . . . The power possessed by Congress embraces the regulation of the entire postal system of the country."[2]

So the national government may by injunction or by the use of military forces prevent interference with the movement of the mails as well as of interstate commerce.[3]

> "To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend."[4]

Congress may determine what classes of things will be transmitted by mail as long as there is no discrimination between individuals with regard to things in any given class. It may exercise this power for the purpose of protecting the morals of the community,[5] or to protect the public against

[1] California *v.* Cent. Pac. R. R. Co. (1888) 127 U. S. 1; Wilson *v.* Shaw (1907) 204 U. S. 24, 33. And the power of eminent domain may be exercised for this purpose. Latinette *v.* City of St. Louis (1912) 201 Fed. 676.

[2] *Ex parte* Jackson (1877) 96 U. S. 727, 732.

[3] *In re* Debs (1895) 158 U. S. 564.

[4] *Ex parte* Jackson (1877) 96 U. S. 727, 735.

[5] *In re* Rapier (1892) 143 U. S. 110.

fraud.[1] It may not, it has been said, make regulations with regard to the mail service which constitute a curtailment of the constitutional right of free speech,[2] but it may prevent the use of the mails for the transmission of seditious matter.[3] The constitutional provision against searches and seizures, however, prevents the opening of sealed mail matter without a search warrant for the purpose of determining whether its contents are improper.[4]

§124. *Weights and Measures.* The desirability of uniformity in standards of weights and in measures was sufficiently apparent at the outset of our national history to result in the introduction into the Articles of Confederation of a clause giving Congress power to "fix the standard of weights and measures throughout the United States."[5] A like power was incorporated in the Constitution[6] by a unanimous vote without debate.[7] Congress has never exercised this power except to make the brass troy pound weight the standard troy pound weight of the United States mint.[8] Until it does so it seems that each State may for itself regulate weights and measures.[9] The Secretary of the Treasury has, however, had standards of weights and measures made for the use of the custom-houses, and under the direction of Congress has provided each State with duplicates of these standards.[10]

[1] Public Clearing House *v.* Coyne (1904) 194 U. S. 497.

[2] *Ex parte* Jackson (1877) 96 U. S. 727, 733. Generally on the subject of freedom of speech and of the press see the next chapter.

[3] United States *v.* Burleson (1921) 41 Sup. Ct. Rep. 352.

[4] *Ex Parte* Jackson (1877) 96 U. S. 727.

[5] Art. IX.

[6] Art. I, sec. 8, par. 5.

[7] Farrand, *The Records of the Federal Convention*, vol. ii, p. 308. See also the *Federalist*, No. 42.

[8] U. S. Rev. Stat., secs. 3548, 3549.

[9] Higgins *v.* Cal. Pet. Co. (1895) 109 Calif. 304; Harris *v.* Rutledge (1865) 19 Ia. 388; Caldwell *v.* Dawson (1862) 4 Metc. (Ky.) 121; Weaver *v.* Fegely (1857) 29 Pa. St. 27. *Contra*, The Miantinomi (1855) Fed. Cas. 9, 521.

[10] Joint Res. June 14, 1836, 5 Stat. 133; Act of March 3, 1881, 21 Stat. 521; Act of July 11, 1890, 26 Stat. 242.

CHAPTER XIII

FREEDOM OF RELIGION, SPEECH, PRESS AND ASSEMBLY

§125. *Religious Freedom.* Even without any constitutional prohibition the advocate of a federal statute providing for an established religion, or of one prohibiting the free exercise of religion, would have been unable to find any constitutional warrant for such an act. Moreover, the diversity of religious creeds and practices in the various States would have assured freedom from such legislation by Congress. Still it is not strange that Jefferson, who had fought for and secured the Virginia statute for "establishing religious freedom"—one of the three things for which he wished to be remembered—should ask for an express guaranty on this point. Although his policy was destined to gain acceptance in every State, it had made but little progress when the first Congress met. The First Amendment to the Constitution declares that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1]

No act of Congress has ever been assailed as an attempt to set up an establishment of religion, and the complete separation of church and state in this country is an unquestioned canon of government.

The meaning of the phrase "prohibiting the free exercise of religion" received careful consideration for the first time by the Supreme Court in the case of a person who had violated the federal law prohibiting poligamy in the territories.[2] The defense set up was that poligamy was en-

[1] The Constitution also provides that, "no religious test shall ever be required as a qualification to any office or public trust under the United States." Art. VI, par. 3.

[2] Reynolds *v.* United States (1878) 98 U. S. 145.

joined by the religious creed of defendant's church, and that the statute was unconstitutional in prohibiting defendant's free exercise of his religion. Chief Justice Waite, writing for a unanimous court, recounted the history of the amendment, quoted from the preamble of the Virginia statute "for establishing religious freedom," as well as from the writings of Jefferson and Madison, and concluded that "Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."[1] Shortly after the statute on religious freedom was enacted in Virginia, that State reënacted an English law making the offense of poligamy punishable with death, and the practice of poligamy had remained a crime against society. The court concluded that the statute under consideration was within the legislative power of Congress, and that the defendant could not excuse practices prohibited by the statute because of his religious beliefs. In a later case, upholding territorial legislation excluding from the right to vote all those who practiced or taught poligamy, the Supreme Court said:

> "It is assumed by counsel of the petitioner, that because no mode of worship can be established or religious tenets enforced in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as religion."[2]

[1] Reynolds *v.* United States (1878) 98 U. S. 145, 164.

[2] Davis *v.* Beason (1890) 133 U. S. 333, 345. Religious freedom does not secure to one the right to use the mails in a scheme to get money from others by professing the attainment of a supernatural state of self-

Many state constitutions explicitly provide that liberty of conscience shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State.[1] Under such provisions a parent's religious liberty is not unwarrantably limited by a statute which requires him to provide medical aid for his children, though his religious belief forbids his doing so.[2] Nor is a statute or a city ordinance unconstitutional which prohibits the beating of drums or the use of musical instruments in the public streets of towns, though these acts are done in the performance of religious services and in accordance with the offender's religious belief.[3] The fact that statutes are colored and molded by the Christian religion does not render their prohibitions violative of religious freedom if primarily they are civil regulations with a view to promoting the moral and physical welfare of the community, as in the case of statutes prohibiting Sunday labor.[4]

§126. *Freedom of Speech and of the Press under the Common Law.* The early English law had no place for freedom of speech and of the press, in the sense of a right to criticize the sovereign, the government or those holding public office, no matter how true the strictures might be, and no matter how proper might be the motives of the per-

---

immortality by righteous conduct, enabling him to conquer disease, death, poverty, and misery, and to transmit this power to others. New *v.* United States (1917) 245 Fed. 710.

[1] See the reporter's note appended to the Supreme Court case last cited, at page 348.

[2] People *v.* Pearson (1903) 176 N. Y. 201.

[3] Commonwealth *v.* Plaisted (1889) 148 Mass. 375; State *v.* White (1886) 64 N. H. 48.

[4] Rosenbaum *v.* State (1917) 131 Ark. 251. As to whether it is unconstitutional to require children in public schools to listen to the reading of the Bible, and to join in singing hymns and in repeating the Lord's Prayer, has been differently decided. People *v.* Board of Education (1910) 245 Ill. 334 (holding such legislation invalid); Church *v.* Bullock (1908) 104 Tex. 1 (holding it valid). See also Commonwealth *v.* Herr (1910) 229 Pa. 132, holding it constitutional to forbid teachers in public schools to wear any dress or emblem indicating that they are members of any order, sect, or denomination.

sons publishing them. This was true of the England of the Tudors and of the Stuarts, and legal recognition of real freedom of speech and press was not attained until the close of the eighteenth century.

As soon as printing became at all general in the middle of the sixteenth century the Crown assumed the prerogative of regulating its exercise. It determined the number of printers and presses, where printing might be carried on, and required all books to be first licensed by its representative. All this was done through the instrumentality of the Star Chamber, and severe penalties were visited upon those who disobeyed. When the Commonwealth replaced the Kingdom, Parliament continued the policy of licensing, and of restriction, against which, Milton wrote his *Areopagitica* in 1644; and upon the restoration the same policy was pursued. It was not until 1694 that the last licensing act expired, and Parliament refused to pass another.[1]

At first the printing of proceedings in Parliament was not interfered with, and the Long Parliament authorized the publication of its proceedings. It forbade, however, the printing of speeches, except with the permission of the House, and one of its members was expelled and imprisoned in the tower for printing a collection of his speeches. After the Restoration the publication of debates continued to be forbidden, though a summary of "votes and proceedings" in the House of Commons was published under the direction of the Speaker. Reports of debates were, however, published, but in very garbled and partisan form. As the attempts to restrain these publications became more strenuous after the Revolution, it became the practice to print the substance of the parliamentary debates as if they had taken place in some imaginary realm, or in some political club. Notwithstanding these subterfuges many printers were brought to the bar of the House and punished. Finally a messenger of the House, sent to arrest an offender, was by the latter charged with assault and false imprisonment

[1] May, *Constitutional History of England*, vol. ii, pp. 2 to 4; Stephen, *History of the Criminal Law of England*, vol. ii, pp. 309, 310.

before the Mayor of London and two aldermen. These magistrates, declaring that no warrant of arrest could be executed within the city unless issued by a magistrate, released the original offender, and committed the messenger. This brought the House and the city into direct conflict. The House committed the Mayor and one of the aldermen to the Tower for a violation of the privilege of the House, where they stayed six weeks, until the end of the parliamentary session. But popular feeling ran so high in their favor that really the victory was with them and not with Parliament. Thereafter, though the publication of parliamentary debates was and still is declared to be a breach of privilege, it has been prosecuted with impunity, and there has been no punishment except for willful misrepresentation.[1]

We must now look for a moment at what the common law made illegal to say or write. Defamatory words or writings were the basis of action for damages, but the truth of the words, spoken or written, was always a defense in such an action.[2] In such action it was not and is not necessary to prove actual malice, the malice necessary being only the absence of legal excuse, but actual malice may aggravate the damages, or deprive the defendant of certain defenses of privilege.[3] Speaking words defamatory of private persons was not criminal at common law, but writing and publishing such words were. The gist of the crime of libel was doing an act tending to a breach of the peace. The truth of a defamatory writing was, therefore, no defense—such a disclosure was quite as likely to cause resentment as were false statements.[4] Malice meant nothing more here than in the civil action, and proof of actual malice was only important in defeating certain defenses of privilege.[5]

[1] May, *Constitutional History of England*, vol. i, pp. 330 to 345.

[2] *Odgers on Libel and Slander* (5th ed.) 181, 473.

[3] *Ibid.*, 341 *et seq.*

[4] The Case de Libellis Famosis (1605) 5 Coke's Rep. 125; Stephen, *History of the Criminal Law of England*, vol. ii, pp. 305, 343, 348; *Odgers on Libel and Slander* (5th ed.) 473.

[5] *Odgers on Libel and Slander* (5th ed.) 473. A person is free from any

In Coke's report of the *Case de Libellis Famosis*[1] we are told that if a libel is "against a magistrate, or other public person, it is a greater offense; for it concerns not only the breach of the peace, but also the scandal of government." If in a state the government takes the attitude that it is set above the people and is not the agent of the people, and that the people can not determine what is best for them, but that it is for the government to give them what it believes is for their good, in that state the government will naturally strongly reprobate any criticism by the people of the constitution, the laws or the instruments of government, or any efforts by the people to bring about changes by public discussion. This was, of course, the attitude taken by the early English rulers, and strongly adhered to by the Tudor and Stuart sovereigns. It was also the attitude which until comparatively recently was taken by the British Parliament.

> "Everywhere authority has resented discussion, as hostile to its own sovereign rights. Hence, in states otherwise free, liberty of opinion has been the last political privilege which the people have acquired."[2]

From this policy of suppression of discussion and criticism resulted the indefinite enlargement of the crime of treason, against which are aimed the constitutional provisions already discussed. From this policy also resulted the rigorous punishment of the crime which came to be known as seditious libel. And it is to be noted that it was not only the written word of agitation and criticism which was punished, but the spoken word as well.[3]

---

liability for words spoken or written in legislative debate, in judicial proceedings or in official communications on matters of state. One is also not liable if he speaks or writes honestly and without malice of a matter with regard to which he has an interest or duty, and to one who also has an interest or duty with regard to the matter. *Ibid.*, chaps. 9 to 11.

[1] (1605) 5 Coke's Rep. 125.

[2] May, *Constitutional History of England*, vol. ii, p. 2.

[3] "In the early part of the seventeenth century prosecutions for sedi-

These crimes of seditious libel and seditious speech were developed in all their rigor by the Star Chamber, which dispensed justice without a jury.[1] In 1641 the Star Chamber was abolished, and the Court of King's Bench administered the law of libel and of seditious speech. In these courts the trial was by jury, but the precedents established by the Star Chamber were followed, and in fact the jury was given very little scope. The whole crime consisted of the saying or writing and publishing of words critical of the sovereign, constitution, laws or men in public office, because this tended to bring the government into disrepute and to weaken its authority. The truth of the words was no defense. It was not a defense to show that there was no intention to stir up disorder, or to induce breach of law, or that the words in question had no such tendency. Nor was it a defense to show that the words were spoken or written for the purpose of bringing about orderly reforms in government, or to point out to the government the danger of popular odium which it was incurring. This being so, juries were repeatedly instructed that it was not their function to look to the truth of the statements, or to the purpose with which they were made—their only function was to determine whether the statements alleged had been made, whether, in case of a writing, the defendant when he published it knew its contents, and whether the innuendoes set forth in the indictment were correct.[2] In 1789, in answer to questions put by the House of Lords, the Judges of England gave unanimous answers, which have been summarized as follows[3]:

"1. The criminality or innocence of any act done (which includes any paper written) is the result of

---

tious words were as common as prosecutions for libels, and sometimes even more important." Stephen, *History of the Criminal Law of England*, vol. ii, p. 307.

[1] *Ibid.*, 304 to 309.

[2] Stephen, *History of the Criminal Law of England*, vol. ii, pp. 298 to 358; May, *Constitutional History of England*, vol. ii, pp. 1 to 18.

[3] Stephen, *History of the Criminal Law of England*, vol. ii pp. 343, 344.

the judgment which the law pronounces upon that act, and must therefore be in all cases, and under all circumstances, matter of law and not matter of fact, and this as well where evidence is given for the defendant as where it is not given. 2. The truth or falsehood of a written or printed paper [charged to be a libel] is not material, or to be left to the jury upon the trial of an indictment or information for libel. The word 'false' in an indictment or information is at most a word of form. 'In point of substance the alteration in the description of the offense would hardly be felt if the epithet were *verus* instead of *falsus*.' 3. If the judge, on a trial for libel, is quite clear that the matter alleged to be libelous is not libelous, he may direct an acquittal although the publication and the innuendoes are proved, but he ought to be very sure indeed; and, as a general rule, the safer course is to leave the matter to the court upon the record. 4. The criminal intention charged upon the defendant in legal proceedings upon libel is generally matter of form, requiring no proof on the part of the prosecutor and admitting of no proof on the part of the defendant to rebut it. The crime consists of publishing a libel. A criminal intention in the writer is no part of the definition of libel at the common law. 'He who scattereth firebrands, arrows, and death,' which, if not a definition, is a very intelligible description of libel, is *eâ ratione* criminal; it is not incumbent upon the prosecutor to prove his intent, and on his part he shall not be heard to say, 'Am I not in sport?' "

It is probably the law as thus administered by the courts that Blackstone had in mind when he wrote the following passage[1]:

"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments

[1] Bk. IV, sec. 168. This book was published in 1769.

he pleases before the public: to forbid this is to destroy the freedom of the press, but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all contraverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writing which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion,—the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or of inquiry: liberty of private sentiment is still left; the dissemination, or making public, of bad sentiments, destructive to the ends of society, is the crime which society corrects. A man (says a fine writer on his subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add, that the only plausible argument heretofore used for restraining the just freedom of the press, 'that it was necessary, to prevent the daily abuse of it,' will entirely lose its force when it is shown (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment; whereas it never can be used to any good one, when under the control of an inspector. So true will it be found that to censure the licentious, is to maintain the liberty of the press."

Notwithstanding this eulogy it is quite evident that severe penalties consistently visited upon those who criticize the government may constitute substantially as effective a censorship as a system of licensing.

It takes but little study of the times, however, to discover that before the end of the eighteenth century there existed, side by side with this legal doctrine of seditious libel and seditious speech, with its drastic limitations upon free expression, a very different popular notion of the rights of free speech and of a free press. This is shown in the first place by the great increase of popular discussion and criticism of the government, the laws and of public men during the eighteenth century, notwithstanding the penalties repeatedly imposed by the courts. This is the surest indication of a popular sentiment in favor of such discussion and criticism. We also find juries at times rebelling and taking matters very much more into their own hands than the judicial theory of their function would justify. For instance in *Rex v. Owen*[1] the jury was urged by counsel to acquit on the ground that defendant's publication was not proved to be malicious or false, and this the jury did, although the judge directed a conviction in case the jury should find the publication proved. Again in *Rex v. Miller*,[2] one of the prosecutions for the publication of Junius's famous letter to the King, the publication by the defendant was not controverted, and that the meaning put upon the writing by the prosecution was substantially correct was not denied. Lord Mansfield clearly instructed the jury that their only duty was to determine whether defendant published the writing, and whether it meant what the prosecution alleged, and that it was quite out of their province to pass upon its criminality. The writing was most obviously and severely critical of the government and of those conducting it, but it was justified by defendant's counsel as a manly and wholesome piece of advice to the King for the betterment of the government. The jury brought in a verdict of not guilty. They went to Lord Mansfield's house to report it to him. The report of the trial ends thus:

"His lordship went away without saying a word. But there being a vast concourse of people in the square, who

[1] (1752) 18 State Trials 1203. [2] (1770) 20 State Trials 870.

had followed the jury from Guildhall, they, as soon as the verdict was known, testified their joy, by the loudest huzzas."

In *Woodfall's* case,[1] also growing out of the publication of the Junius letter, the jury brought in a verdict of "guilty of printing and publishing only." The prosecution moved to amend this to a general verdict of guilty, while the defense moved to discharge the prisoner. Lord Mansfield said:

"if the jury find that the defendant published at all, they find the paper as charged in the information, for that is their only inquiry. . . . I did not leave it to the jury whether the paper was innocent or not. I never do. . . . Here the jury did not mean to find the malice of the defendant, because it was not within their inquiry; nor did they mean to exclude it, because it was not within their power to exclude a legal deduction."

The verdict, however, was not amended, but a new trial was ordered. The proceedings were then dropped.[2] In the *Dean of St. Asalph's* case[3] the jury also brought in a verdict of "guilty of publishing only." Justice Buller asked them if they meant to negative the truth of the innuendoes, and they said that they did not. He then asked them if they meant "guilty of publishing, but whether it is a libel or not you don't know," and they said that they did, and the verdict was entered accordingly, though over the strenuous objections of defendant's counsel, Mr. Erskine.

The proceedings resulting from the publications of Junius's letter to the King attracted wide attention, and the rulings of the courts occasioned great dissatisfaction, and

[1] (1770) 20 State Trials 895.

[2] In a third case growing out of the publication of this letter there was a conviction, but defendant escaped with a nominal punishment because of his slight connection with the matter it appearing merely that the magazine containing the letter was sold in his shop. Lord Mansfield in this case laid down the doctrine that sale in a shop in the due course of business throws upon the bookseller the burden of proving his lack of privity. Rex *v.* Almon (1770) 20 State Trials 805.

[3] (1783) 21 State Trials 847.

resulted in a new shower of pamphlets.[1] They occasioned a heated debate in the House of Commons,[2] and led Lord Camden to propound to Lord Mansfield in the House of Lords the following questions with regard to *Woodfall's* case:

> "1. Does the opinion mean to declare that, upon the general issue of not guilty in the case of a seditious libel, the jury have no right by law to examine the innocence or criminality of the paper if they think fit, and to form their verdict upon such examination? 2. Does the opinion mean to declare in the case above mentioned, where the jury have delivered in their verdict guilty, their verdict has found the fact only and not the law? 3. Is it to be understood by this opinion that, if the jury come to the bar and say that they find the printing and publishing but that the paper is no libel, the jury are to be taken to have found the defendant guilty generally, and the verdict must be so entered up? 4. Whether the opinion means to say that, if the judge, after giving his opinion of the innocence or criminality of the paper, should leave the consideration of that matter, together with the printing and publishing, to the jury, such a direction would be contrary to law?'

Lord Mansfield refused to answer.[3]

Counsel for defendants in the prosecutions for seditious speech and libel continually sought to vindicate the motives of their clients, notwithstanding the declarations of the courts that motive or intent was unimportant. And it must be admitted that the crown officers gave openings to this line of defense, since they were very prone to load the informations with the most violent attacks upon the defendants. The most brilliant of the counsel who fought the battles of free speech was Erskine. Probably his greatest effort was in the case of the *Dean of St. Asalph*,[4]

[1] See the note to Woodfall's case, 20 State Trials, 895, 922.

[2] May, *Constitutional History of England*, vol. ii, p. 12.

[3] Stephen, *History of the Criminal Law of England*, vol. ii, pp. 325, 326.

[4] (1783) 21 State Trials 847. Fox declared it to be "the finest argu-

in moving for a new trial. He insists that intention is a necessary element of the crime, and must be left to the jury, and that the gist of the offense being the tendency to stir up discontent, this tendency is also a question for the jury.

The agitation culminated in Fox's Libel Act of 1792.[1] It was therein declared that doubt having arisen as to whether in a prosecution for libel the jury might

> "give their verdict upon the whole matter in issue: be it therefore declared and enacted . . . that on every such trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment and information; and shall not be required or directed by the court . . . to find the defendant or defendants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information."

It was provided that the court might still, however, give its opinion or directions to the jury on the matters in issue. This did not in terms change the substantive law of libel, but merely purported to establish in the jury the right to pass upon the presence of all of the elements of the crime. But it was interpreted as giving the jury the right to pass upon the intent of the defendant in actions for seditious libel, and the tendency of his words, and to exonerate the defendant for criticism of public institutions, laws, and men, unless such criticisms were made with illegal intention.[2] "In a word, nothing short of direct incitement to disorder and

ment in the English language," and Lord Campbell says, "Erskine's addresses display beyond all comparison the most perfect union of argument and eloquence ever exhibited in Westminster Hall." Stephen, *History of the Criminal Law of England*, vol. ii, p. 333 n.

[1] 32 Geo. 3 c. 60.

[2] Stephen, *History of the Criminal Law of England*, vol. ii, p. 359; May, *Constitutional History of England*, vol. ii, 18. See DeLolme's account of the liberty of the press in chapters 12 and 13 of book 2 of his *Constitution of England*, written in 1810.

violence is a seditious libel."[1] The immediate accomplishment of this result under Fox's Libel Act shows how strong was the popular conception of liberty of the press and of speech as a right to freely discuss public affairs, as long as this privilege was not used for the purpose of stirring up violence or breach of the law.[2]

§127. *Freedom of Speech and of the Press under the Constitution.* The Constitution of the United States, as originally adopted, contained nothing on the subject of freedom of speech or of the press. To be sure Charles Cotesworth Pinckney proposed a clause to the effect that the liberty of the press should be inviolably preserved (or observed)[3] but Sherman answered: "It is unnecessary . . . the power of Congress does not extend to the press." The proposition was lost.[4] In many of the state conventions called to pass upon the Constitution it was objected that there was no bill of rights, and that such a bill of rights should contain guaranties of freedom of speech and of the press. To such an objection, raised in the South Carolina House of Representatives, Pinckney himself replied:

> "With regard to the liberty of the press, the discussion of that matter was not forgotten by the members of the convention. It was fully debated, and the impropriety of saying anything about it in the Constitution clearly evinced. The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press. That invaluable blessing, which deserves all the encomiums the gentleman has justly bestowed upon it, is secured by all our state constitutions; and to have mentioned it in our general Constitution would perhaps furnish an argument, here-

[1] Stephen, *History of the Criminal Law of England*, vol. ii, p. 375.

[2] It was not until 1843 that Lord Campbell's Act (6 & 7 Vic. c. 96) allowed the truth of statements to be pleaded in prosecutions for libel, coupled with the plea that "it was for the public benefit that the said matter charged should be published."

[3] Farrand, *Records of the Federal Convention*, vol. ii, pp. 335, 617.

[4] *Ibid.*, 618.

after, that the general government had a right to exercise powers not expressly delegated to it."[1]

Similarly Hamilton said:

"For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restriction can be imposed?"[2]

To this such men as Jefferson, who feared a strong central government, answered that it was against possible abuse of power that they wanted to be guarded, and particularly of the broad power to pass all laws necessary and proper to carry out the other powers delegated to the central government.[3] In fulfillment of the understanding upon which a number of the state conventions had ratified the Constitution, several amendments, in the nature of a bill of rights, were submitted to the people of the States by the First Congress. Among these was the provision that, "Congress shall make no law . . . abridging the freedom of speech or of the press."[4]

In the first place, was this provision intended to entirely exclude Congress from legislating at all on the subject of speech and of the press? Madison, who sponsored the amendment in Congress, in the report written by him with regard to the Virginia Resolutions on the Alien and Sedition Laws of 1798, declared unequivocally that under the Constitution as originally adopted Congress had no power whatever to legislate on these subjects, and that the First Amendment was adopted to make this limitation of power even more clear.[5] Jefferson was of the same opinion, and held the Sedition Law unconstitutional.[6] He held that

[1] Farrand, *Records of the Federal Convention*, vol. iii, p. 256.

[2] *The Federalist*, No. 84.

[3] Hart, "Power of Government over Speech and Press," *29 Yale L. Jour.* 410, 412.

[4] First Amendment, ratified in 1791.

[5] Elliot's *Debates*, vol. iv, pp. 571 to 573.

[6] Writings of Thomas Jefferson, vol. viii, pp. 56 to 58.

prosecutions for seditious writings should be had under the state laws.[1] However, Congress early evinced a different view of the meaning of the First Amendment when it passed the first Sedition Law in 1798. When the constitutionality of this act was attacked, the subject was canvassed by the Committee on Petitions, and the legislation was vindicated as part "of a general system of defense, adapted to the crisis of extraordinary difficulty and danger."[2] A majority of the state legislatures supported the position taken by Congress.[3] The question of the constitutionality of this act was not taken to the Supreme Court as it expired by its own limitations in 1801, but in the lower federal courts it was uniformly upheld as necessary and proper legislation under the circumstances for the preservation of the government established by the Constitution.[4] The "necessary and proper" clause has been given a liberal construction,[5] and would seem, in the absence of other specific limitations, to justify Congress in legislating with regard to speech and the press in connection with its war power and its power to maintain the government established by the Constitution, and its power to govern territories and the District of Columbia, and with regard to the press in connection with interstate commerce and control of the mails. But it was claimed that, even if this might be true without the First Amendment, that amendment clearly negatived any right in Congress to legislate on the subjects of speech and the press. This we have seen was denied by Congress itself, by the federal courts, and by the majority of the state legislatures. This position has been confirmed, and it is now thoroughly established, that the injunction against "abridging the freedom of speech

[1] Writings of Thomas Jefferson, vol. iii, p. 218.

[2] Annals, 5th Cong., iii, 2990.

[3] *Story on the Constitution* (5th ed.) sec. 1892.

[4] Lyon's Case (1798) Wharton's State Trials 333; Cooper's Case (1800) *ibid.*, 659; Haswell's Case (1800) *ibid.*, 684; Calendar's Case (1800) *ibid.*, 688.

[5] Art. I, sec. 8, par. 18. See the discussion of this paragraph in sec. 59.

and of the press," does not prohibit all congressional legislation on those subjects.[1] In the words of the Supreme Court,

> "the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language. . . . We venture to believe that neither Hamilton nor Madison, nor any other competent person then or later, ever supposed that to make criminal the counseling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech."[2]

What then is the freedom of speech and of the press which cannot be abridged by Congress?[3] We know that as in England, so in colonial America, limitation and repression of printing and publication was attempted,[4] but we also know that these efforts were unsuccessful, and that the period just before, during and after the Revolution, was marked by the freest discussion of public affairs.[5] Americans immediately after the Revolution were peculiarly restive under governmental control and very ready to critically appraise those in public office. In fact it was the violent attacks made upon the government, during

[1] Robertson *v.* Baldwin (1897) 165 U. S. 275, 281; Schenck *v.* United States (1919) 249 U. S. 47.

[2] Frohwerk *v.* United States (1919) 249 U. S. 204, 206. See also the limitations put upon the guaranty of religious freedom (sec. 125) and the guaranty against involuntary servitude (sec. 222).

[3] See Hall, "Free Speech in War Time," *21 Col. Law Rev.* 526; Vance, "Freedom of Speech and of the Press," *2 Minn. L. Rev.* 239; Chafee, *Freedom of Speech;* Hart, "Power of Government over Speech and Press," *29 Yale L. Jour.* 411; Corwin, "Freedom of Speech and Press under the First Amendment," *30 Yale L. Jour.* 48; Carroll, "Freedom of Speech and of the Press in War Time: The Espionage Act," *17 Mich. L. Rev.*, 621; Carroll, "Freedom of Speech and of the Press in the Federalist Period: The Sedition Act," *18 Mich. L. Rev.* 615.

[4] Cooley, *Constitutional Limitations* (7th ed.), 600-602.

[5] See the famous trial of Peter Zenger, the New York printed (1735) 17 Howard's State Trials 675.

those difficult early days of the Republic, when England and France were at war, and partisan feeling ran very high in this country, which led to the enactment of the Sedition Law of 1798.[1]

The first section of this act made criminal all conspiracies to oppose lawful measures of the government, or to intimidate or prevent any federal officer from performing his duty. This section was not attacked. Section two made it a crime to write, print, utter or publish

> "any false, scandalous, and malicious writing or writings against the government of the United States, or either House of Congress of the United States, or the President of the United States, with the intent to defame the said government, or either House of the said Congress, or the said President, or to bring them or either of them, into contempt or disrepute; or to excite against them, or either of them, the hatred of the good people of the United States, or to stir up sedition within the United States; or to excite any unlawful combinations, therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the Constitution of the United States, or to resist, oppose or defeat any such law or act; or to aid, encourage or abet, any hostile design of any foreign nation against the United States, their people or the government."

Coupled with this in the third section was the provision that the defendant might give in evidence the truth of the matter charged in the libel, and that the jury should determine "the law and the fact under the direction of the court as in other cases." The first provision of section three accomplished what was not accomplished in England until the passage of Lord Campbell's Act in 1843. The second provision of section three was undoubtedly intended to incorporate the doctrine of Fox's Libel Act of 1792, but since the previous section of the Sedition Act had defined a

[1] Act of July 14, 1798, 1 Stat. 596.

seditious libel, while the English act left that to the determination of the jury, the result of the American act was very different from that of the English statute.

It is apparent that the prohibitions in section two of the Sedition Act fall into two parts. The last clauses deal with incitement to breaches of the law, and with aiding and abetting hostile designs of foreign nations. These acts always were and still are criminal under the English common law, and if Congress can legislate at all with regard to speech and the press it would seem clear that it can legislate to prevent such conduct. The earlier clauses of section two, however, have to do with words spoken and written which tend to bring the government, Congress, or the President into "contempt or disrepute," or to excite hatred against them. The actions which were brought under the act were brought under these clauses, three[1] for words written about the President and his conduct in office, and one for words written against the government, and words written about the treatment of one of the former defendants while in prison,[2] and in all of them the defendants were convicted. Justice Chase of the Supreme Court, a strongly partisan supporter of the existing Federalist administration, sat in *Cooper's Case* and *Calender's Case*. In both he supported the constitutionality of that part of the act in question, and particularly in *Cooper's Case* declared that freedom of the press and of speech is not abridged when criticisms of government are punished.[3] Justice Chase in effect supported Congress in adopting the standard fixed by the English judges before Fox's Libel Act, as the measure of that freedom of speech and of the press which was guarantied against abridgment by the First Amendment—

[1] Lyon's Case (1798) Wharton's State Trials 333; Cooper's Case (1800) *ibid.*, 659; Calender's Case (1800) *ibid.*, 688.

[2] Haswell's Case (1800) *ibid.*, 684.

[3] "All governments which I have ever read or heard of punish libels against themselves. If a man attempts to destroy the confidence of the people in their officers, their supreme magistrate, and their legislature he effectually saps the foundation of the government." Cooper's Case (1800) Wharton's State Trials 659, 670.

a standard which English public opinion was already repudiating before our Revolution, and which was in effect swept away in that country the year after the adoption of the First Amendment by the passage of Fox's Libel Act in 1792. Popular resentment was greatly aroused by the Sedition Act and by the decisions under it. To be sure a majority of the state legislatures, being still in sympathy with the national administration, expressed their approval,[1] but the Virginia and Kentucky legislatures drafted very strong resolutions against the act,[2] and it is pretty apparent that public opinion generally condemned the legislation. It is supposed to have been one of the effective causes of Jefferson's victory over the Federalists at the next presidential election.

Madison in his famous Report on the Virginia Resolutions[3] very clearly expresses his opinion of what is meant by freedom of the press in this country. He insists that it is a mere mockery to say that freedom from censorship constitutes freedom of the press, since severe and consistent punishment for published criticisms would be as effective a means of suppression. Besides, he declares that though it may be the theory of the English common law that criticism of the government and of public officers is a crime, "the freedom exercised by the press, and protected by public opinion, far exceeds the limits prescribed by the ordinary rules of law." But, he says, the principles of government in England and in the United States, point, of necessity, to different theories with regard to freedom of the press and of speech. The theory of the British Constitution is that the king can do no wrong and that Parliament is omnipotent; the theory of our Constitution is that the people are omnipotent, that the Constitution may be changed by them, and that the government and public officers are confined by the popular mandate within certain defined spheres of action. It must, therefore, follow that the people may freely discuss

[1] Elliot's *Debates*, vol. iv, pp. 532 to 539.
[2] *Ibid.*, 528 to 532 and 540 to 545.
[3] *Ibid.*, 546 *et seq.*

the advisability of changes in the form of government, and the shortcomings of those in public office. He declares that,

> "In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands; . . ."[1]

It is interesting also to see the opinion of Hamilton, one of the leaders of the Federalist party, on this subject of the liberty of the press. In *People v. Croswell*,[2] a common law action brought in New York for a libel of President Jefferson, Hamilton argued brilliantly against the doctrine that the jury can pass only upon the publication and the meaning of the writing, insisting that they should pass also upon the intent and the libelous nature of the publication.[3] He declared:

> "The liberty of the press consists, in my idea, in publishing the truth, from good motives and for justifiable ends, though it reflect upon the government, on magistrates, or individuals. If it be not allowed, it excludes the privilege of canvassing men, and our rulers."[4]

This is substantially the doctrine of fair comment on matters of public interest, which has come to be accepted both in England and in this country.[5]

[1] Elliot's *Debates*, vol. iv, pp. 569 to 571.

[2] (1804) 3 Johnson's Cases 337.

[3] Works of Alexander Hamilton, vol. vii, pp. 333 to 373.

[4] *Ibid.*, 339. The court however adopted Mansfield's doctrine of the common law and the function of the jury. Upon the argument for rehearing the court was equally divided, Kent adopting Hamilton's view. The prosecuting attorney did not move for judgment. The doctrine contended for by Hamilton was enacted into law in New York the next year, and is now found in the state constitution. See the report of the case, and Corwin, "Freedom of Speech and Press under the First Amendment," *30 Yale L. Jour.*, 48, 52. For the provisions in the various state constitutions see Cooley's *Constitutional Limitations* (7th ed.), 596 to 599.

[5] *Odgers on Libel and Slander* (5th ed.), chap. 8; *Burdick on Torts*

Story, writing in 1833, says:

> "No one can doubt the importance, in a free government, of the right to canvass the acts of public men and the tendency of public measures, to censure boldly the conduct of rulers, and to scrutinize closely the policy and plans of the government. This is the great security of a free government. If we would preserve it, public opinion must be enlightened; political vigilance must be inculcated; free, but not licentious discussion, must be encouraged."

In illustrating words which may be punished he speaks of

> "libels and inflammatory publications, the object of which is to excite sedition against the government, to stir up resistance to its laws, to urge on conspiracies to destroy it, to create odium and indignation against virtuous citizens, to compel them to yield up their rights, or to make them the object of popular vengeance."[1]

In other words, he would seem to hold constitutional laws for punishing ordinary libels of private individuals, and seditious libels tending to violence and breaches of the law. Cooley, who wrote in 1868, declares that,

> "The English common-law rule which made libels on the constitution or the government indictable, as it was administered by the courts, seems to us unsuited to the condition and circumstances of the people of America, and therefore never to have been adopted in the several States. If we are correct in this, it would not be in the power of the state legislatures to pass laws which should

---

(3d ed), 378 *et seq.* In the former work it is said (p. 193): "Every one has a right to comment, both by word of mouth and in writing, on matters of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not actionable, however severe in their terms, so long as the writer or speaker truly states his real opinion of the matter on which he comments. Every citizen has full freedom of speech on such subjects; but he must not abuse it."

[1] *Story on the Constitution* (5th ed.) secs. 1887 and 1888.

make mere criticism of the constitution or of the measures of government a crime, however sharp, unreasonable, and intemperate it might be."

And again he says that

"it is difficult to conceive of any sound principle on which prosecutions for libels on the system of government can be based, except when they are made in furtherance of conspiracy with the evident intent and purpose to excite rebellion and civil war."[1]

Thus the matter stood when we entered the World War. Shortly thereafter was passed what is known as the Espionage Act.[2] Section 3 of title I provided as follows:

"Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States, shall be punished by a fine of not more than $10,000 or imprisonment of not more than twenty years, or both."

This was a piece of war legislation, but it was emphatically declared by the Supreme Court in the leading case of *Ex parte Milligan*[3] that the operation of the bill of rights contained in the Constitution is not suspended by war. This is also recognized by the Supreme Court in all of the cases decided under the Espionage Act. Convictions under each of the provisions in the act of 1917 were upheld, and each

[1] Cooley, *Constitutional Limitations* (7th ed.), 613, 614.
[2] Act of June 15, 1917, 40 Stat. 217.
[3] (1866) 4 Wallace 2.

of those provisions was held constitutional.[1] It would seem clear that these provisions do not of themselves interfere with free speech or the freedom of the press. They involve either incitement to illegal acts, or an attempt to promote the cause of the enemy in time of war, or to interfere with the legitimate program of the government for the raising of forces or the conduct of the war. These acts it would seem entirely proper for the federal government to forbid and to make criminal without incurring the accusation of abridging the freedom of speech and of the press guarantied by the First Amendment. Some critics of the Espionage Act have pointed to the fact that during the Civil War no similar legislation was enacted. To be sure the internal conditions were such that it was not thought politic to enact such legislation during that period, but that is no evidence that there was greater freedom of expression during the Civil War than during the World War.

> "Without the sanction of legislation, the federal government arrested by the thousand men whom it knew or suspected of being dangerous or disaffected, and confined them without charges and without trial in military prisons as long as it saw fit—and public opinion generally acquiesced in this as a fairly necessary measure of war-time precaution. The number of such executive arrests has been variously estimated up to as high as 38,000. The War Department records, confessedly very incomplete, show over 13,000."[2]

The section of the act of 1917 quoted above was amended and amplified in 1918.[3] This act added the following offenses

[1] Schenck *v.* United States (1919) 249 U. S. 47 (obstruction of recruiting and enlistment); Sugarman *v.* United States (1919) 249 U. S. 182 (attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in military or naval forces); Schaefer *v.* United States (1920) 251 U. S. 466 (false reports with intent to interfere with success of our military operations, or to promote the success of the enemy).

[2] Hall, "Free Speech in War Time," *21 Col. L. Rev.*, 526, 527, referring to 4 Rhodes, *History of the United States* (1900), 230–32 n.

[3] Act of May 16, 1918, 40 Stat. 219.

not covered by the original act: saying or doing anything with intent to obstruct the sale of liberty bonds, except by way of bona fide and not disloyal advice; urging curtailment of production of anything necessary to the prosecution of the war with intent to hinder its prosecution; wilfully displaying the flag of an enemy; using language intended to incite resistance to the United States or promote the cause of the enemy; by word or act supporting the cause of the enemy or opposing the cause of the United States. None of these provisions seems to overstep the constitutional inhibition of the First Amendment. They all are aimed at acts or words intended to induce breach of law, to aid the enemy, or to obstruct the government in the carrying out of its legitimate program for the conduct of the war.

The amendment also makes criminal

> "whoever, when the United States is at war, shall wilfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States, or any language intended to bring the form of government of the United States, or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the army or navy of the United States into contempt, scorn, contumely, or disrepute."

This clause would seem to deserve all of the criticism which has in the past been directed against section two of the Sedition Act of 1798, discussed above. It would ignore the right of citizens under a constitutional and democratic government to freely discuss and criticize the form of government, the laws, and the conduct of those in authority, and would measure the freedom of speech and of the press, guarantied by the First Amendment, by the standards repudiated by public opinion in England and the United

States before the Revolution, and discarded by the English common law after Fox's Libel Act. It is true that the Espionage Act was a war measure, and it is true that words may be criminal in war time which would not be criminal in time of peace, because their direct tendency may be to cause breach of law, or interference with the execution of the law in war time, when that would not be their tendency in time of peace. But it is only words which tend to "bring about the substantive evils that Congress has a right to prevent,"[1] which may be prohibited, and it is disquieting to find Congress assuming the right to prevent the speaking of words simply because they may tend to bring the form of government or branches of the government into "contempt, scorn, contumely, or disrepute." *Abrams v. United States*[2] seems to be the only case reaching the Supreme Court in which an indictment was based upon this clause of the act. In the indictment in that case two counts were based upon this clause, and two counts upon other clauses in the act. The court declared that, since the penalty inflicted was no more than could lawfully be inflicted under one count, it was only necessary to find that the offense charged in one count was made out, and the court held that at least the offense charged in the fourth count—inciting and advocating the curtailment of production of ordnance and ammunition—as proved. Holmes and Brandeis, in their dissenting opinions, stated that there was no evidence to support the counts framed under the clause which we are discussing. Nothing is said by any of the court with regard to its constitutionality. Justice Holmes' closing paragraph on the general subject of freedom of speech is, however, impressive:

> "Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech

[1] Schenck *v.* United States (1919) 249 U. S. 47, 52.

[2] (1919) 250 U. S. 616.

seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country. I wholly disagree with the argument of the government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed. Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.' Of course I am speaking only of expressions of opinion and exhortations, which were all that were uttered here, but I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States."

All of the provision of the Espionage Act punishing written or spoken utterances require that there shall be an intention to accomplish the ends declared in the statute. In *Schenck v. United States*,[1] the first case which came before the Supreme Court under the Espionage Act, Justice Holmes declared for a unanimous court that

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

This would seem to be as far as the restrictions of free speech ought to go. It would seem to furnish adequate protection against illegal agitation, being analogous to the standard by which criminal attempts are measured.[2] To go further and to assume to punish words simply because they may have an indirect or remote tendency to cause disturbances and breaches of the law, and also to deduce defendants' intent from this tendency, would practically make possible the punishment of all criticisms of government or of existing laws. It was because they felt that the majority of the court were departing from the test set forth in the *Schenck* case, quoted above, and were upholding convictions obtained only upon evidence of remote and indirect tendency of the defendant's words to accomplish the ends declared in the statute, that Justice Holmes and Justice Brandeis dissented in *Schaefer v. United States*[3] and *Pierce v. United States*.[4] In *Abrams v. United States*[5] they dissented upon this same ground, and also upon the ground that there was no sufficient evidence of intent. The arguments of the minority in these cases is more convincing than that of the majority.

[1] (1919) 249 U. S. 47, 52.

[2] Chafee, *Freedom of Speech*, 51; Schaefer *v.* United States (1920) 251 U. S. 466, 486.

[3] (1920) 251 U. S. 466. Justice Clarke also dissented, though not on the broad grounds taken by Justice Holmes and Justice Brandeis.

[4] (1920) 252 U. S. 239. [5] (1919) 250 U. S. 616.

§128. *Control of Freedom of the Press under the Postal and Interstate Commerce Powers.* We have seen[1] that Congress may determine what classes of things may be transmitted by mail, and may exercise this power for the protection of the morals of the community or to protect the public against fraud. Title XII of the Espionage Act declares any writing forbidden by the act to be non-mailable, forbids its conveyance or delivery, and makes the use of the mails for the transmission of such matter a crime.[2] This provision would seem to be constitutional, and was upheld in *Masses Publishing Company v. Patten*[3] and in *Milwaukee Publishing Company v. Burleson.*[4]

We have seen that under the interstate commerce clause of the Constitution Congress has been upheld by the Supreme Court in developing a very extensive police power for the protection of the morals and safety of the community at large.[5] It would seem clear, therefore, that writings, the publication of which can be prohibited, may by federal statute be excluded from interstate commerce. In fact the Trading with the Enemy Act[6] did make unlawful the transportation as well as the publication of newspapers or magazines printed in German containing any news or comment on the government or the war or international relations or policies unless a translation was filed with the local postmaster, or unless a permit was obtained from the President.[7]

[1] Sec. 123.

[2] Act of June 15, 1917, 40 Stat. 217, amended by Act of May 16, 1918, 40 Stat. 219. See Chafee, *Freedom of Speech*, 106; Carroll, "Freedom of Speech and the Press in War Time," *17 Mich. L. Rev.*, 621, 629.

[3] (1917) 246 Fed. 24. The Circuit Court of Appeals reversed Judge Hand's injunction directing the postmaster not to exclude the *Masses* from the mail. Judge Hand's opinion contains an excellent discussion, 235 Fed. 535.

[4] (1921) 255 U. S. 407. Justice Holmes and Justice Brandeis dissented on the ground that there was no authorization to the Postmaster-General to deny second class privileges with regard to future numbers of a paper because previous issues contained unmailable matter.

[5] Sec. 91. [6] Act of Oct. 6, 1917, 40 Stat. 411.

[7] Carroll, "Freedom of Speech and of the Press in War Time," *17 Mich. L. Rev.*, 621, 636 *et seq.*

§129. *Censorship.* It was originally proposed to incorporate into the Espionage Act a provision making it a crime to violate any regulation which the President might make, as to the collection, publication, and communication of information with regard to the forces of the United States, or with regard to military operations, or with regard to matters concerning the public defense.[1] This would in effect have resulted in a censorship of the press by the executive department. This proposal had the support of the administration but was violently attacked by the press of the country, and strongly criticized upon the floor of Congress. It was finally abandoned for an agreement for a voluntary censorship entered into by the newspapers.[2]

The constitutionality of the legislation which was proposed would seem exceedingly doubtful. We have seen in our discussion above that licensing of publications was abandoned in England in 1694, and Blackstone in 1769 declared that liberty of the press "consists in laying no *previous* restraints upon publication, and not in freedom from censure for criminal matter when published."[3] Those who defended the Sedition Act of 1798 claimed that freedom of speech and of the press was guarantied by the First Amendment in the sense in which Blackstone had defined freedom of the press, and that, therefore, the Sedition Act was not unconstitutional because it did not put any previous restriction upon publication, freely admitting that previous restraint would be unconstitutional.[4] In *Patterson v. Colorado*[5] the Supreme Court, in upholding a punishment for contempt, says that

> "the main purpose of such constitutional provisions [in the First Amendment] is 'to prevent all such *previous*

[1] 65th Cong., 1st sess. 1917, p. 766.

[2] Carroll, "Freedom of Speech and of the Press in War Time," *17 Mich. L. Rev.*, 621, 622 to 629.

[3] Bk. IV, sec. 168.

[4] Madison's *Report on the Virginia Resolutions*, 4 Elliot's *Debates*, 546, 569 *et seq.*; Chafee, *Freedom of Speech*, 8; Carroll, "Freedom of Speech and of the Press in the Federalist Period," *18 Mich. L. Rev.*, 615, 630 *et seq.*

[5] (1907) 205 U. S. 454, 462.

restraints upon publication as had been practiced by other governments' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. . . . The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."

The legislation which was proposed was of course a war measure, and it may be said that punishment after publication will not be a sufficient safeguard against publication of information important to the enemy, but, if the First Amendment means that there shall be no previous restraint upon publication, this is effective in war time as well as in time of peace. Furthermore, a provision for previous licensing or censorship may be violated, as well as laws which lay one open only to subsequent punishment; and the liability to subsequent punishment, if supported by public opinion, will be very effective to prevent improper publications.

In *Mutual Film Corporation v. Industrial Commission of Ohio*[1] the Supreme Court upheld a state statute for the censorship of moving picture films as not being in conflict with the provision of the state constitution with regard to freedom of speech and the press. The court held that such constitutional provisions are meant to safeguard free expression of opinion, and do not apply to theatrical performances or moving pictures which are subject to censorship under the police power.

Several state decisions, under provisions in state constitutions guarantying freedom of speech and of the press, have held that the courts were thereby forbidden to enjoin any publications however serious or irreparable may be the threatened damage.[2] It is said of these cases in the article just referred to[3] that,

"It would seem more reasonable, and far more practicable to say that the constitutional provision in question pro-

[1] (1915) 236 U. S. 230.

[2] See the discussion of these cases in "Freedom of Speech and of the Press," by W. R. Vance, *2 Minn. L. Rev.*, 239, 253 to 255.

[3] *Ibid.*, 255.

hibits any other previous restraints than those recognized and accepted at the time the Constitution was adopted, thus leaving the courts free to exercise their equity powers in accordance with settled principles of justice."

It is believed that this proposition is sound. In *Gompers v. Buck Stove and Range Company*[1] it appeared that Gompers and others had been enjoined from boycotting the Buck Company, and from publishing any statement that there was such a boycott, and were adjudged in contempt for publishing certain statements in violation of this injunction. Upon appeal to the Supreme Court it was contended that this injunction was an unconstitutional abridgment of free speech. The Supreme Court held that the constitutional provision as to free speech was not involved, but only the right to enjoin a boycott however carried out. In fact, however, the case would seem to support the right of a court to enjoin words or writings in pursuance of established equitable principles.

§130. *Right of Assembly and of Petition.* Finally the First Amendment provides that, "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The Bill of Rights of 1689 provided for the right to petition the king, and statutes before and since have made similar provision for presenting petitions to Parliament.[2] Story says of this constitutional provision:

"This would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature of its structure and institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen."[3]

[1] (1911) 221 U. S. 418.

[2] *I Black. Comm.* sec. 198.

[3] *Story on the Constitution* (5th ed.), sec. 1894. See also *Rawle on the Constitution*, 124; Cooley, *Constitutional Limitations* (7th ed.), 497.

The Supreme Court of the United States said of this constitutional provision, in the case of *United States v. Cruikshank*[1]:

"The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. . . . It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. . . . The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; nor was its continuance guarantied, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States. The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and as such under the protection of, and guarantied by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances."

[1] (1875) 92 U. S. 542, 551, 552

CHAPTER XIV

THE SECOND AND THIRD AMENDMENTS[1]

§131. *The Second Amendment.* The declaration in the Second Amendment is that, "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." The right to keep and bear arms is not granted by this amendment; it constitutes only a denial of the power to limit that right. And this limitation, like those contained in all the others of the first ten amendments, is directed only against the national government.[2]

The litigation which has occurred with regard to the right to bear arms has arisen under provisions in state constitutions similar to those in the Second Amendment. It is well settled that the right is not unqualified, but is subject to the police power of the States. Laws are constitutional which prohibit individuals from carrying concealed weapons or from bearing arms except as members of lawfully organized bodies. The right guarantied is that to bear arms in the common defense, not to carry such arms as the individual may choose to be used in private affrays.[3] The Supreme Court of the United States has said that "the right of the people to keep and bear arms (Art. II) is not infringed by laws prohibiting the carrying of concealed weapons."[4] But the Supreme Court has also said that a State may not

[1] These amendments together with the others of the first ten were adopted in 1791.

[2] United States *v.* Cruikshank (1875) 92 U. S. 542, 553.

[3] Commonwealth *v.* Murphy (1896) 166 Mass. 171; Salina *v.* Blakesley (1905) 72 Kan. 230; State *v.* Keet (1916) 269 Mo. 206; notes in 3 L. R. A. (N. S.) 168 and L. R. A. 1917 C 63.

[4] Robertson *v.* Baldwin (1897) 165 U. S. 275, 282.

prohibit its citizens to possess and bear arms and so destroy the resources of the federal government for the protection of public security, but it may regulate the right so long as it does not conflict with national legislation.[1]

When the Second Amendment is read in connection with section eight of the first article of the Constitution, it is apparent that the colonists shared the suspicion which their English ancestors had shown of a standing army, and their preference for a locally organized militia. Congressional appropriations for a national army are limited to two years. The militia may be called into the service of the Union in stated circumstances, but the States are accorded definite rights in the officering and training of this body. Apparently, the constitutional scheme contemplates an organization similar to that provided for by Parliament under the Commonwealth, which was "a national army raised from the counties and placed under the guidance of country gentlemen." Such a scheme is quite consistent with the policy of universal military service; a policy which a modern writer has reminded us germinated in England during the Commonwealth,[2] and which has been declared constitutional by the Supreme Court.[3] Undoubtedly the reservation to the States of the militia power by the section referred to above, was felt to be desirable both as being in accord with the principles of local self-government, and as diminishing the occasion for the exercise by Congress of the power to raise armies. But the ultimate supremacy of the latter power when its exercise is essential to the national welfare is no longer subject to doubt.[4]

It is interesting to note that the amendment as proposed by Madison to the First Congress contained a clause providing that "no person religiously scrupulous of bearing arms shall be compelled to render military service in person." This provision was retained in substance by the committees

[1] Presser *v.* Illinois (1886) 116 U. S. 252.

[2] Glenn, *The Army and the Law*, 17.

[3] Selective Draft Cases (1918) 245 U. S. 366.

[4] See secs. 97 and 176.

which considered the amendment, but was dropped by Congress before the amendment was submitted to the people.[1]

§132. *The Third Amendment.* Among the complaints made against the king in the Declaration of Independence were the keeping of standing armies in the colonies without the consent of their legislatures, the rendering of the military independent of and superior to the civil power, and the quartering of large bodies of armed troops among the colonists. The Petition of Right presented to Charles First in 1628 had made a similar complaint against the quartering of troops upon the people without their consent. Fear that the new central government might indulge in similar practices led to the provision in the Constitution that appropriations for the maintenance of the army can only be made for two years, and later to the addition of the Third Amendment. This amendment declares that, "No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law." This protects the householder from any invasion of his privacy by the military authorities in time of peace, and from any such invasion in time of war, except as authorized by Congress.

[1] 1 Annals 451; Thorpe's *Constitutional History of the United States*, vol. ii, p. 225.

CHAPTER XV

FEDERAL CRIMINAL LAW AND SAFEGUARDS OF THOSE ACCUSED OF CRIMES

§133. *Federal Criminal Law.*[1] The municipal law in force in each colony at the time of the Revolution continued in force in the States after the Revolution, except as abrogated by state constitutions and statutes. This law consisted of the common law and statutes of England as found applicable to conditions in America, usages which had grown up in the colonies and which had come to have the force of law, and enactments of colonial legislatures.[2] One of the grounds of the attack which Jefferson led against the federalist judiciary was that the judges were without constitutional authority claiming the right to try and punish persons for crimes against the United States according to common law precedents without the support of any federal statute. This they did in fact do for a number of years.[3] And this undoubtedly reflected the opinion of most of the members of the Supreme Court at that time.[4] Justice Chase of the Supreme Court, however, held the view that there was no common law of crimes of the United

[1] With regard to impeachments see sec. 40.

[2] Guardians of the Poor *v.* Greene (1813) 5 Binney (Pa.) 554; Commonwealth *v.* Chapman (1848) 13 Metcalf (Mass.) 68.

[3] Henfields Case (1793) Fed. Cas. 6, 360; United States *v.* Ravara (1793) 2 Dallas 297; United States *v.* Warrall (1798) 2 Dallas 384; William's Case (1799) Fed. Cas. 17, 708. And see Beveridge's *Life of John Marshall*, vol. iii, pp. 23 to 28.

[4] See the note to United States *v.* Warrall as reported in Fed. Cas. 16, 766. We find Jay, Iredell and Wilson expressing their opinions at various stages of Henfield's Case, and Ellsworth expressing his in William's Case.

States.[1] His position was based upon two propositions. The first was that while before the Revolution there was a body of law enforceable in each colony which continued in force after the Revolution, there was no such body of law applicable throughout the United States which could be said to remain in force after severance from England. The second was that the Constitution is the source of all powers belonging to each branch of the national government; the Constitution does not adopt the common law of crimes for the United States, and it is "as essential that Congress should define the offenses to be tried, and apportion the punishment to be inflicted, as that they should erect courts to try the criminal, or to pronounce a sentence on conviction." The view of Chase was acted upon without argument by the Supreme Court in 1812,[2] and has been acted upon ever since.[3] The common law is resorted to for the definition of terms used in the Constitution or statutes, when such terms are not there defined.[4]

The constitutional provision, which gives Congress authority to make all laws necessary and proper for carrying into execution the powers given to the national government by that instrument,[5] includes, of course, the right to enact criminal legislation for the purpose of enforcing its will in the fields which have been delegated to it. In pursuance of this power a very large body of federal criminal law has been enacted.[6] The Constitution does, however, make specific provision for certain classes of crimes. Congress is expressly given power "to provide for the punishment of

[1] United States *v.* Warrall (1798) 2 Dallas 384.

[2] United States *v.* Hudson (1812) 7 Cranch 32.

[3] See the doubts expressed in United States *v.* Coolidge (1816) 1 Wheaton 415. But see United States *v.* Britton (1882) 108 U. S. 199; United States *v.* Eaton (1892) 144 U. S. 677, 688; United States in Gladwell (1917) 243 U. S. 476, 485. With regard to whether there is a common law of the United States in civil actions see sec. 48.

[4] United States v. Smith (1820) 5 Wheaton 153; United States v. Carll (1881) 105 U. S. 611.

[5] Art. I, sec. 8, par. 18. For a discussion of this paragraph see sec. 59.

[6] See Zoline's *Federal Criminal Law and Procedure.*

counterfeiting the securities and current coin of the United States."[1] This is held to carry with it by implication the power to punish for uttering counterfeit currency.[2] The Constitution also gives to Congress the power "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations."[3] Congress has acted upon its power to define and punish piracies, and has included in this definition engaging in the slave trade.[4] It has also legislated with regard to felonies on the high sea.[5] Under its power to define and punish offenses against the law of nations, it has legislated for the protection of public ministers, and with regard to passports and safe-conducts.[6] Congress also made it a crime to counterfeit within our boundaries the securities of foreign governments, and this was upheld as constitutional by the Supreme Court under the power to define and punish offenses against the law of nations.[7]

In order to prevent possible abuses with regard to the crime of treason very specific provisions were incorporated into the Constitution, as follows:

> "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. The Congress shall have the 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.[8]

[1] Art. I, sec. 8, par. 6.

[2] United States *v.* Marigold (1850) 9 Howard 560. The right to punish the bringing into the country of counterfeit coin is based upon this power and the power over foreign commerce.

[3] Art. I, sec. 8, par. 10.

[4] Zoline's *Federal Criminal Law and Procedure*, chaps. 55 and 57.

[5] *Ibid.*, chap. 57.

[6] U. S. Rev. Stats., sec. 4062.

[7] United States v. Arjona (1887) 120 U. S. 479.

[8] Art. III, sec. 3.

Mere conspiracy to overturn the government is not treason; there must at least be an actual assembling of men for that purpose to constitute a levying of war.[1] Nor is the opposition to the enforcement of a law by armed force treason unless undertaken for the purpose of overthrowing the government, or, at least, of preventing the general execution of some governmental power, such as that of taxation or the administration of justice.[2] Adhering to the enemy, giving him aid and comfort would include supplying him with warlike materials or with information.[3] Other acts which are injurious to the government, but which do not come within the definition of treason may, of course, be made criminal by congressional legislation.[4] "Treason is a breach of allegiance, and can be committed by him only who owes allegiance either perpetual or temporary."[5] But an alien who is within the territorial limits of the United States does owe a temporary allegiance to its government, in the sense that he is amenable to its laws. The Supreme Court has said of such a person,

> "He owed allegiance to the government of the country so long as he resided within its limits, and can claim no exemption from the statutes passed to punish treason, or the giving of aid or comfort to the insurgent States. The law on this subject is well settled and universally recognized."[6]

§134. *Habeas Corpus.* The Constitution declares that, "The writ of habeas corpus shall not be suspended, unless

[1] *Ex parte* Bollman (1807) 4 Cranch 75. See also Burr Trials, and the account of these proceedings in Beveridge's *Life of John Marshall*, vol. iii, chaps. 6 to 9.

[2] United States *v.* Vigol (1795) 2 Dallas 346; United States *v.* Mitchell (1795) 2 Dallas 348; United States *v.* Hoxie (1814) 1 Paine 265.

[3] United States *v.* Greathouse (1863) 4 Sawyer 457; United States *v.* Pryor (1814) 3 Washington 234; Zoline's *Federal Criminal Law and Procedure*, sec. 662.

[4] Zoline's *Federal Criminal Law and Procedure*, secs. 664 to 669.

[5] Marshall in United States v. Wiltberger (1820) 5 Wheaton 76, 97

[6] Radich *v.* Hutchins (1877) 95 U. S. 210, 211.

when in cases of rebellion or invasion the public safety may require it."[1] This clause was proposed by Pinckney and was agreed to with very little debate, although Rutledge and Wilson thought that there would never be any reason for suspension.[2] We have already dealt with the power of the federal courts to issue this writ in considering the powers of the judiciary,[3] and with the respective claims of the President and of Congress to exercise the power of suspension in considering the functions of those branches of the government.[4] We shall not, therefore, take up those questions again at this point.

§135. *Ex Post Facto Laws and Bills of Attainder.* One of the guaranties contained in the body of the Constitution provides that, "No bill of attainder or ex post facto law shall be passed."[5] This was inserted late in the proceedings of the Constitutional Convention. Several members of the Convention thought the provision as to ex post facto laws unnecessary, declaring that without it the government would have no power to pass such laws. The answer was that governments did pass such laws, and that the proposed constitutional prohibition would give the judges something to "take hold of."[6] This prohibition applies to the federal government only,[7] but there is a similar provision in the following section of the Constitution which applies to the States. The meaning of these provisions are so fully discussed in dealing with the constitutional limitations upon the powers of the States that they will not be again considered here.[8]

§136. *Place of Trial.* A further guaranty contained in the body of the Constitution is that the trial of all crimes "shall be held in the States where the said crimes shall have been committed; but when not committed within any

[1] Art. I, sec. 9, par. 2.
[2] Farrand, *Records of the Federal Convention*, vol. ii, pp. 341, 438.
[3] See sec. 44. [4] See secs. 39 and 99.
[5] Art. I, sec. 9, par. 3.
[6] Farrand, *The Records of the Federal Convention*, vol. ii, pp. 375, 376.
[7] Calder *v.* Bull (1798) 3 Dallas 386, 389.
[8] See Chap. 21.

State, the trial shall be at such place or places as the Congress may by law have directed."[1] This is supplemented by the requirement in the Sixth Amendment that a criminal trial shall be by a jury "of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." These provisions show the anxiety of the States that persons accused of having committed crimes within their borders against the United States should be tried within the locality where the crime was committed. It leaves the federal government free, however, to determine where crimes committed in the territories or upon the high sea shall be tried.[2] The Federal Judicial Code provides that "the trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience."[3] On the other hand it provides that,

> "When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."[4]

So a person may be tried and convicted for a conspiracy in any county in which an overt act was done to effectuate the conspiracy[5]; misuse of the mail may be punished in the district in which the matter was mailed or in that in which it was received[6]; and a carrier may be prosecuted for trans-

[1] Art. I, sec. 9, par. 3.

[2] United States *v.* Dawson (1853) 15 Howard 467, 488; Cook *v.* United States (1891) 138 U. S. 157; Jones *v.* United States (1890) 137 U. S. 202. And see Zoline's *Federal Criminal Law and Procedure*, chap. 5.

[3] Sec. 40. See United States *v.* Fries (1799) Fed. Cas. 5, 125, in which a trial outside of the country in which it was committed was upheld because that county was in a state of insurrection. [4] Sec. 42.

[5] Hyde *v.* United States (1912) 225 U. S. 347.

[6] *In re* Palliser (1890) 136 U. S. 257. See also Lamar *v.* United States (1916) 240 U. S. 60 (false impersonation of an officer of the United States over the telephone).

portation of goods for less than the published rates in any district through which the goods are carried.[1]

§137. *Indictment.* The Constitution as originally adopted contained no provision with regard to indictment, but the Fifth Amendment 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."

The common law recognized two ways of initiating criminal proceedings, one by an information drawn up and filed by the official prosecutor, the other by presentment or indictment of a grand jury.[2] As the grand jury is not a permanent body, but drawn periodically from the people, it has always been regarded as less subject to governmental influence than the official prosecutor. Hence this provision in the bill of rights was deemed necessary to the citizens' protection against the bureaucracy of government.

Whether criminal conduct falls within the category of the amendment depends upon the penalty that may be inflicted, not that which is awarded upon trial.[3] If the crime charged is punishable with death it is a capital crime. If the maximum penalty is punishment which is infamous, the offender must be called to answer therefore by a grand jury's presentment or indictment. In determining whether a punishment is infamous or not regard must be had for the public opinion at the time. This changes from age to age, and the courts refuse to formulate a hard and fast rule to be applied. For more than a century, however, a crime that is punishable by imprisonment for a term of years at

[1] Armour Packing Co. *v.* United States (1908) 209 U. S. 56.

[2] For the difference between presentment and indictment see Zoline's *Federal Criminal Law and Procedure*, sec. 133.

[3] *In re* Claasen (1891) 140 U. S. 200, 205; Fitzpatrick *v.* United States (1900) 178 U. S. 304.

hard labor has been considered infamous both in England and America,[1] and crime punishable by imprisonment in a penitentiary have been held infamous.[2] A party cannot waive his constitutional right to an indictment.[3]

§138. *Jury Trial.* The Constitution as originally adopted provided that, "the trial of all crimes, except in cases of impeachment, shall be by jury,"[4] and the Sixth Amendment also declares that "in all criminal prosecutions" there shall be a 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." It will be observed that the word "crime" is used both in the original text and in the amendment. This term had a definite technical meaning in English law, and is to be understood in that sense. It was employed in contrast to petty offenses which subjected the offender to criminal punishment, but did not entitle him to a jury trial. The draft of the provision as reported to the Constitutional Convention by the Committee of Five read, "the trial of all criminal offenses . . . shall be by jury." By a unanimous vote this was changed so as to read, "the trial of all crimes."[5] Hence this guaranty is not available to petty offenders, whose acts are *mala prohibita* only, and punishable by light fines,[6] nor to persons sued for penalties,[7] nor to those proceeded against for contempt,[8] nor to aliens in summary proceedings for their deportation under statutory regulations governing their entrance into this country and their continuance here.[9] But the distinction is not between felonies and misdemeanors.[10]

[1] *Ex parte* Wilson (1885) 114 U. S. 417 (The subject is discussed with great fulness and learning in the opinion of Justice Gray).
[2] *In re* Claasen (1891) 140 U. S. 200, 205 and cases there cited.
[3] Thompson *v.* Utah (1895) 170 U. S. 343.
[4] Art. III, sec. 2, par. 3.
[5] Schick *v.* United States (1904) 195 U. S. 65, 70.
[6] *Ibid.*
[7] Oceanic Steam Nav. Co. *v.* Stranahan (1909) 214 U S. 320.
[8] *In re* Debs (1895) 158 U. S. 564, 594.
[9] Zakonaite *v.* Wolf (1912) 226 U. S. 272.
[10] Callan *v.* Wilson (1888) 127 U. S. 540.

The guaranties of a jury trial mean a trial by a jury of twelve, because that was the accepted meaning attached to the term when the Constitution and the first ten amendments were adopted.[1] For the same reason conviction must be by a unanimous verdict.[2] Also, the requirement that the trial shall be by an "impartial jury" means that the right of challenge for cause cannot be taken away.[3] A person accused of crime may not waive a jury trial in the case of any serious offense, where the penalty would be deprivation of life or liberty,[4] but he may apparently do so in case of petty offenses.[5]

§139. *Speedy and Public Trial.* By force of the Sixth Amendment a person is entitled to "a speedy and public" trial in all criminal prosecutions. By a speedy trial is meant one which is carried on with such reasonable speed as is consistent with the due course of justice.

> "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."[6]

In *Phillips v. United States*[7] it is said that a defendant may not acquiesce in postponements of his trial and then claim that his case should be dismissed because he had not been given a speedy trial. It is his duty if he wants a speedy trial to ask for it.

A person accused of crime is also by the same amendment

[1] Thompson *v.* Utah (1895) 170 U. S. 343.

[2] Maxwell *v.* Dow (1900) 176 U. S. 581, 586.

[3] Lewis *v.* United States (1892) 146 U. S. 370.

[4] Thompson *v.* Utah (1895) 170 U. S. 343, 353. As to presence of accused while jury is drawn, see Hopt *v.* Utah (1884) 110 U. S. 574.

[5] Schick *v.* United States (1904) 195 U. S. 65, 71. Justice Harlan strongly dissented. See a note in 8 *Col. L. Rev.*, 577, discussing the various views of the state courts.

[6] Beavers *v.* Haubert (1905) 198 U. S. 77, 87. See also the discussion of this point in *Ex parte* Stanley (1868) 4 Nev. 113, 116; United States *v.* Fox (1880) 3 Mont. 512, 517.

[7] (1912) 201 Fed. 259, 262.

entitled to a "public trial." This provision has not come before the Supreme Court for interpretation, but has twice been discussed by the Circuit Court of Appeals in different circuits. *Reagan v. United States*[1] was a prosecution for rape. The trial judge directed that the courtroom be cleared of spectators, leaving court officers, members of the bar, witnesses and all persons connected with the trial. The court, reviewing the state decisions admitted a diversity of view, but held that the constitutional provision should have a reasonable construction, and that in such a case as that before the court it was not improper to limit the persons who should be allowed to attend. In *Davis v. United States*[2] defendants were on trial for a train robbery. When the arguments to the jury were to be made the courtroom was crowded and the judge directed that the room be cleared except for members of the bar, relatives of the defendants and reporters. The court reviewing the cases in the state courts came to the conclusion that the defendant had not had a public trial within the meaning of the Constitution. The court, however, did not seem to disapprove of *Reagan v. United States.* Probably in cases of rape and the like, it is constitutional to exclude young persons, and those apparently actuated by a morbid curiosity to hear the indecent details of the crime, as long as a reasonable representation of the public is admitted.[3]

§140. *Self-Incrimination.* The Fifth Amendment declares that, "No person . . . shall be compelled in any criminal case to be a witness against himself." The Supreme Court has said of this clause of the amendment:

> "The object of the amendment is to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. It is not declared that he may not

[1] (1913) 202 Fed. 488.
[2] (1917) 247 Fed. 394.
[3] See Cooley, *Constitutional Limitations* (7th ed.) 441.

be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him,[1] but the line is drawn at testimony that may expose him to prosecution. If the testimony relates to criminal acts long since past, and against the prosecution of which the statute of limitations has run, or for which defendant has already received a pardon or is guarantied an immunity, the amendment does not apply."[2]

The court in the same case further declares that,

"The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person."[3]

It, therefore, does not excuse an officer of a corporation from giving testimony which may incriminate the corporation. Again the court says in the same case:

"The question whether a corporation is a 'person' within the meaning of this amendment really does not arise, except perhaps where a corporation is called upon to answer a bill of discovery, since it can only be heard by oral evidence in the person of some one of its agents or employés."[4]

In *Counselman v. Hitchcock*[5] the Supreme Court had presented to it for determination the question whether a witness might refuse to answer a question on the ground that his testimony might tend to incriminate him in view of a statute which provided that

[1] If the evidence is not material to the issue on trial, but will only impair the credibility of the witness, and will show his infamy, it seems that he may fall back upon his privilege. Brown *v.* Walker (1896) 161 U. S. 591, 598.

[2] Hale *v.* Henkel (1906) 201 U. S. 43, 66.

[3] *Ibid.* 69. [4] *Ibid.*

[4] (1892) 142 U. S. 547.

"no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture."

The court held that this statute would not prevent the use of the testimony of a witness to search out other testimony to be used against him, and that he might in effect, therefore, be compelled to be a witness against himself, notwithstanding the statutory provision. That being so it was held that he could refuse to answer. To meet the objection raised in this case a new statute was framed which provided that

"no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise."

In *Brown v. Walker*[1] this statute was held to furnish absolute immunity in the federal courts. This being so testimony given by a witness could not tend to incriminate him, and, therefore, he could not refuse to testify on the ground that he was being compelled to be a witness against himself. In *Hale v. Henkel*[2] the Supreme Court says:

"The further suggestion that the statute offers no immunity from prosecution in the state courts was also fully considered in *Brown v. Walker* and held to be no answer. The converse of this was also decided in *Jack v. Kansas*, 199 U. S. 372, namely that the fact that an immunity granted to a witness under a state statute would not prevent a prosecution of such witness for a violation of a federal statute, did not invalidate such statute under the Fourteenth Amendment. . . . The question has been fully considered in England, and the conclusion reached

[1] (1896) 161 U. S. 591. See also Hale *v.* Henkel (1906) 201 U. S. 43.
[2] (1906) 201 U. S. 43, 68.

by the courts of that country that the only danger to be considered is one arising within the same jurisdiction and under the same sovereignty."[1]

A person may waive the constitutional immunity against self-incrimination, and if he "discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure."[2] It is for the trial court to determine whether in view of all the circumstances is a question such that the answer may tend to incriminate the witness, and a direction to answer will not be held by an appellate tribunal to have infringed the constitutional guaranty unless real danger of incrimination appears to be the probable result of answering.[3] But "if the fact that the witness is in danger appears, great latitude should then be allowed to him in judging for himself of the effect of any particular question."[4]

The prohibition of the Fifth Amendment for the protection of witnesses "is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."[5] Hence the exhibition of his person to the jury, or the comparison of his face with a photograph, or the trying of clothing on him are not violations of this guaranty.

§141. *Unreasonable Searches and Seizures.* The Fourth Amendment to the Constitution is as follows:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

[1] Citing Queen *v.* Boyes (1861) 1 B. & S. 311; King of the Two Sicilies *v.* Wilcox (1850) 7 State Trials (N. S.) 1049, 1068; State *v.* March (1854) 1 Jones (N. Car.) 526; State *v.* Thomas (1887) 98 N. C. 599.

[2] Brown *v.* Walker (1896) 161 U. S. 591, 597.

[3] Mason *v.* United States (1917) 244 U. S. 362.

[4] Foot *v.* Buchanan (1902) 113 Fed. 156, 161; Zoline's *Criminal Law and Procedure*, sec. 122.

[5] Holt *v.* United States (1910) 218 U. S., 245, 252.

The historical background of this amendment is very graphically sketched by Justice Bradley in *Boyd v. United States*[1]

> "This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."[2]

Sealed mail matter may not be opened to determine whether it contains material improper for mailing without a search warrant.[3]

The provision in the Fourth Amendment, which guaranties persons against "unreasonable searches and seizures," has been read with the provision in the Fifth Amendment against self-incrimination with important results. In *Boyd v. United States*,[4] it was held that to search for and seize a man's private papers in order to use them against him in criminal proceedings would be unreasonable, and so unconstitutional, because this would in effect be making him a witness against himself.[5] It was held equally un-

[1] (1886) 116 U. S. 616.

[2] Weeks *v.* United States (1914) 232 U. S. 383, 392. Acts of officials in violation of the constitutional guaranty against unreasonable searches and seizures cannot be validated by legislation. Griffin *v.* Wilcox (1863) 21 Ind. 370.

[3] *Ex parte* Jackson (1877) 96 U. S. 727. [4] (1886) 116 U. S. 616.

[5] But the constitutional provision does not prevent the search of a person legally arrested to discover and seize the fruits or evidence of crime. Weeks *v.* United States (1914) 232 U. S. 383, 392. Nor does it

constitutional to compel him to produce such papers by *subpœna duces tecum*. This is not true, however, of a corporation. A corporation is a creature of the State, and the State has more freedom in investigating its conduct than that of a natural person, and it is, therefore, reasonable to compel the production of papers of a corporation, though they may tend to incriminate it.[1] Furthermore, a person may not refuse to produce corporate papers or books under his charge or in his possession on the ground that they will tend to incriminate him, since the doctrine of the *Boyd* case applies only to a person's private papers.[2]

In *Adams v. New York*[3] it appeared that in executing a search warrant for gambling devices the officer found papers of the defendant which were introduced in evidence for the purpose of connecting him with the illegal gambling transactions. The Supreme Court held that to admit such evidence was not contrary to the Fourth or Fifth Amendments. The court emphasized the fact that the papers were procured by officers executing a legal search warrant for other property, but it seemed to actually base its decision upon the broad doctrine laid down by Greenleaf,[4] and supported by decisions reviewed by the court, as follows:

> "It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent

prevent the arrest without a warrant of one engaged in the commission of a crime, nor, under certain circumstances, of one who is suspected of having committed a felony. See Bishop's *New Criminal Procedure* (2d ed.) secs. 164 to 186.

[1] Hale v. Henkel (1906) 201 U. S. 43. But it was held in this case that an order for the production of papers may be so sweeping and unreasonable as to be unconstitutional.

[2] Wilson *v.* United States (1911) 221 U. S. 361; Wheeler *v.* United States (1913) 226 U. S. 478; Grant *v.* United States (1913) 227 U. S. 74.

[3] (1904) 192 U. S. 585.

[4] Vol. i, sec. 254a.

to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question."

In *Weeks v. United States*[1] it appeared that the defendant's house had been entered without any warrant or legal authority by a United States marshal, and property and papers taken therefrom. The defendant made application to the court for the return of the things taken. The court ordered the return of certain of the property, but refused to order the return of papers which the government desired to use as evidence against the accused. Again upon the trial the defendant asked for the return of the papers, and when they were introduced in evidence he objected upon the ground that their introduction was in violation of the Fourth and Fifth Amendments. The Supreme Court held that these constitutional provisions for his protection had been violated. Although the court did not overrule the *Adams* case it seemed to look upon it with very little favor. The court, distinguished that case upon the grounds that the papers there in question were obtained by one who was executing a valid search warrant for other property, and that no application had there been made for the return of the papers, the defendant merely contenting himself with a collateral attack upon the evidence at the trial.

In *Burdeau v. McDowell*[2] a petition was presented to a District Court for an order on an Assistant to the Attorney-General for the return of certain papers which he was about to present to a grand jury as evidence of the petitioner's guilt of fraudulent use of the mails. It appeared that the papers were stolen from the petitioner and turned over to the officer in question. The district judge granted the petitioner's prayer, but upon appeal to the Supreme Court the order was reversed. The court held that no constitutional right of the petitioner was involved, and that there was no

[1] (1914) 232 U. S. 383. See further Gould *v.* United States (1921) 255 U. S. 298.

[2] (1921) 41 Sup. Ct. Rep. 574.

reason why a public officer into whose hands incriminating papers had come should not use them, simply because some other person may have wrongfully taken them. Justice Brandeis and Justice Holmes dissented. They admit that there may not be any constitutional provision which requires the return of such papers, but they declare that if the papers were still in the hands of the thief they would be restored to the owner, and that being in the hands of a law officer their return may be ordered, and that this should be done, for "respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

If a warrant is sought for the seizure or search of person or property the application must be based on a sworn statement of facts, not surmises or beliefs.[1]

> "No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief though the belief be utterly unfounded in fact and law. The finding of the legal conclusion or of probable cause from the exhibited facts is a judicial function, and it cannot be delegated by the judge to the accuser. No

[1] See the Act of June 15, 1917, 40 Stat. 228, with regard to search warrants.

search warrant should be broader than the justifying basis of facts."[1]

"But the averment of facts need not be by an eye witness. Allegations on information can be stated, if the facts so referred to and the source of the information are stated."[2]

The affidavit and warrant must describe "with reasonable particularity the thing for which the search was to be made."[3]

§142. *Double Jeopardy.* The constitutional guaranty against double jeopardy is in the following terms: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."[4] Federal authority supports the rule that a person may plead former jeopardy if he has previously been put on trial in the same jurisdiction for the same offense, before a court of competent jurisdiction, and a jury has been empaneled and sworn, even though the jury be dismissed before verdict, if this was done without his consent and without necessity.

A trial and acquittal by court-martial is a bar to another prosecution in a federal court, since they are both courts of the same jurisdiction.[5] But the fact that one has been indicted and tried in a state court for certain acts, does not prevent his being tried in a federal court for the same acts if they also constitute a crime against the United States, for he is, under such circumstances, being tried in different jurisdiction for offenses against different sovereignties.[6] Even in the same jurisdiction a single transaction may constitute two distinct offenses. For example, a drunken person using rude and boisterous language insulted a police

[1] Veeder *v.* United States (1918) 252 Fed. 414, 418. See also *In re* Tri-State Coal & Coke Co. (1918) 253 Fed. 605.

[2] *In re* Rosenwasser Bros. (1918) 254 Fed. 171, 173.

[3] Weeks *v.* United States (1914) 232 U. S. 383, 393.

[4] Fifth Amendment.

[5] Grafton *v.* United States (1907) 206 U. S. 333.

[6] Fox *v.* Ohio (1847) 5 Howard 410; United States *v.* Marigold (1850) 9 Howard 560; Moore *v.* Illinois (1852) 14 Howard 13.

officer on the street. He thereby violated an ordinance against drunkenness and rude and boisterous conduct in a public place, and another prohibiting insults to public officials. Conviction under one ordinance was held to be no bar to prosecution under the other.[1] The test is, will the same evidence sustain a conviction under each charge. In the case last cited no evidence of insult to an officer was needed to prove a breach of the first ordinance, and no proof that the misconduct occurred in a public place was required to establish a breach of the second ordinance. On the other hand, if the same set of facts will support a conviction under either of two statutes, a conviction or acquittal under one will be a bar to prosecution under the other.[2] So it seems that if the acquittal on one indictment will show that the defendant could not have been guilty of another crime charged in a later indictment, he may plead double jeopardy to the second, as where he has been acquitted of murder and is charged with the manslaughter of the same person, or vice versa.[3]

Where the court, before which a previous trial was had, was without jurisdiction, the earlier proceedings are void, and are, therefore, no bar to a subsequent indictment for the same offense.[4]

Although the general rule is that when a jury has been empaneled and sworn the defendant is in jeopardy, and cannot be again tried for the same offense, this was early qualified by the Supreme Court, as follows:

[1] Gaviers *v.* United States (1911) 220 U. S. 338. For further examples see Zoline's *Federal Criminal Law and Procedure*, sec. 238.

[2] Wemyss *v.* Hopkins (1875) L. R. 10 Q. B. 378, approved in Kepner *v.* United States (1904) 195 U. S. 100, 126 to 128.

[3] Grafton *v.* United States (1907) 206 U. S. 333, 350. See also United States *v.* Negro John (1833) 4 Cranch Cir. Ct. 336; *ex parte* Nielson (1889) 131 U. S. 176. But in Hopkins *v.* United States (1894) 4 App. Cas. (D. C.) 430, it was held that a former conviction of assault and battery is no bar to a later indictment for murder, the victim having subsequently died. The same was held in Diaz *v.* United States (1912) 223 U. S. 442.

[4] Kepner *v.* United States (1904) 195 U. S. 100.

"We think that in all cases of this nature the law has invested the courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is manifest necessity for that act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which will render it proper to interfere."[1]

In the case quoted from, the jury was dismissed because it could not agree.[2] The doctrine has also been applied when the bias of a juror has been discovered after the commencement of the trial,[3] when it has been discovered that a juror is disqualified because he was a member of the grand jury which found the indictment,[4] when there were procedural irregularities in the matter of the defendant's pleadings,[5] and when the indictment was defective.[6]

"In England an aquittal upon an indictment so defective that, if it had been objected to at the trial, it would not have supported any conviction or sentence, has generally been considered as insufficient to support a plea of former acquittal. . . . And the general tendency of opinion in this country has been to the same effect."[7]

The Supreme Court has, however, disapproved of this view, saying:

"After the full consideration which the importance of the question demands, that doctrine appears to us to be unsatisfactory in the grounds upon which it proceeds, as well as unjust in its operation upon those accused of

[1] United States *v.* Perez (1824) 9 Wheaton 579.

[2] See also Logan *v.* United States (1892) 144 U. S. 263, 297.

[3] Simmons *v.* United States (1891) 142 U. S. 148.

[4] Thompson *v.* United States (1894) 155 U. S. 271.

[5] Lovato *v.* New Mexico (1916) 242 U. S. 199.

[6] Simpson *v.* United States (1916) 229 Fed. 940; certiorari denied, 241 U. S. 668.

[7] United States *v.* Ball (1896) 163 U. S. 662, 666.

crime; and the question being now for the first time presented to this court, we are unable to resist the conclusion that a general verdict of acquittal upon the issue of not guilty to an indictment undertaking to charge murder and not objected to before the verdict as insufficient in that respect, is a bar to a second indictment for the same killing."[1]

In *United States v. Sanges*[2] it was held that a writ of error did not lie in favor of the United States in a criminal case. In *Kepner v. United States*[3] the question was whether Congress could constitutionally provide for writ of error on behalf of the government in criminal cases, with a resulting new trial of the accused, although on the first trial he had been acquitted. The majority of the court held that this could not constitutionally be done—that "the protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense."[4] Three justices dissented on the ground that "a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried."[5] One justice dissented on the ground that when the guaranty against double jeopardy was extended by Congress to the Philippines where the alleged crime occurred, it was intended to operate in the sense in which it had previously operated there, namely, that "jeopardy did not terminate, if appeal were taken to the audiencia or Supreme Court, until that body had acted upon the case."[6]

Where upon conviction the defendant procures the judgment against him to be set aside, "he may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted."[7] Such action on his part constitutes a waiver of his immunity

[1] United States *v.* Ball (1896) 163 U. S. 662 669.
[2] (1892) 144 U. S. 310.
[3] (1904) 195 U. S. 100.
[4] *Ibid.*, 130. [5] *Ibid.*, 134.
[6] *Ibid.*, 137.
[7] United States *v.* Ball (1896) 163 U. S. 662, 672.

from a second jeopardy. In *Trono v. United States*[1] the Supreme Court went a step further. The defendants were indicted for murder in the first degree, and were found guilty of assault. They appealed, the judgment was reversed, and they were convicted of murder in the second degree. Upon writ of error to the Supreme Court of the United States it was claimed that, the defendant having been acquitted of the charge of murder on the first trial, he was put a second time in jeopardy when he was again tried for that crime, and that by getting the first judgment set aside he waived only his immunity from a second trial for the offense of which he was previously convicted. Though four justices dissented,[2] the majority of the court were not convinced by the appellant's argument, saying:

> "We do not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment, or of any lesser degree thereof. No power can wrest from him the right to so use that judgment, but if he chooses to appeal from it and to ask for its reversal he thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed."[3]

§143. *Counsel and Compulsory Process to Obtain Witnesses.* The Sixth Amendment provides that, "In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." The common law did not allow the person accused of felony to fortify his defense with witnesses. Gradually, however, he was allowed to call witnesses, but not to testify under oath, until finally in 1702 it was provided that in all cases of

[1] (1905) 199 U. S. 521.
[2] Fuller, Harlan, McKenna, and White.
[3] Trono *v.* United States (1905) 199 U. S. 521, 533.

treason and felony both witnesses for and against the accused should be examined upon oath.[1] Justice Brown in *Holden v. Hardy*[2] said:

> "Even before the adoption of the Constitution, much had been done toward mitigating the severity of the common law, particularly in the administration of its criminal branch. . . . The earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there."

It was early held that process would issue for the defendant to a judge,[3] or a member of Congress,[4] or to a member of the Cabinet.[5] But such process does not extend to ambassadors who by international law, or to consuls who by treaty are exempt from the jurisdiction of the courts.[6]

A person charged with a felony was not by the common law given the right to counsel, unless some point of law arose which needed to be debated, although the judges did gradually feel the injustice in this situation and were liberal in allowing a prisoner's counsel to instruct him what questions to ask, or even to ask questions for him with regard to matters of fact. In 1695 and 1746 it was provided that persons accused of treason should have counsel, and in 1820 and 1830 similar provisions were made for the protection of those accused of felonies.[7] There seems to be no federal case in which the right of one accused of crime to counsel has been denied or abridged.

[1] 4 *Black. Com.* 359 and 360.
[2] (1898) 169 U. S. 366, 386.
[3] United States *v.* Caldwell (1795) Fed. Cas. 14, 708.
[4] United States *v.* Cooper (1800) 4 Dallas 341.
[5] United States *v.* Smith (1806) Fed. Cas. 16, 342.
[6] *In re* Dillon (1854) Fed. Cas. 3, 914.
[7] 4 *Black. Com.* 355 and 356.

§144. *Confrontation with Witnesses.* The Sixth Amendment further provides that, "In all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." In *Kirby v. United States*[1] on a trial of one person for receiving stolen goods the judgment against others for stealing the goods in question was admitted, as directed by statute, as conclusive evidence that the goods had been stolen. It was held that this was contrary to the constitutional guaranty above quoted. The constitutional provision does not, however, prevent the admission of dying declarations,[2] nor the reading, upon a new trial, of the testimony of a witness at the former trial, who was then subject to cross-examination by the defendant, but who has since died,[3] or who on the second trial absents himself by the defendant's procurement.[4] The right of confrontation is one which may be waived by the defendant.[5]

§145. *Excessive Bail and Fines, and Cruel and Unusual Punishments.* The Eighth Amendment declares that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." These provisions are taken from the English Bill of Rights of 1688. As the restrictions in that document are directed against the executive and judiciary and not against Parliament, doubt has been expressed whether this amendment is not equally limited. The courts of some of the States have thought so, but the Supreme Court has construed the limitations as extending to the legislative branch of government. Moreover it has declared that the language, though copied from the English Bill of Rights, is to be deemed progressive in its application, and acquires a wider meaning than it had in 1688 or 1789, as public opinion becomes more humane and enlightened.

[1] (1899) 174 U. S. 47.
[2] Kirby *v.* United States (1899) 174 U. S. 47, 61.
[3] Mattox *v.* United States (1895) 156 U. S. 237.
[4] Reynolds *v.* United States (1878) 98 U. S. 145.
[5] Diaz *v.* United States (1912) 223 U. S. 442.

Bail is for the purpose of assuring the person's attendance at a future time, and it would seem that its reasonableness should be determined by consideration of whether in a particular case it is adequate to that purpose. In the interesting case of *United States v. Lawrence*,[1] in which it appeared that the defendant had shot at and tried to kill President Jackson, the judge in fixing bail declared that in the exercise of discretion as to the amount of bail which should be required, a judge should consider the ability of the prisoner to give bail as well as the atrocity of the offense.

Death is not a cruel and unusual punishment, whether it be by hanging, shooting, or beheading,[2] or by electrocution,[3] but the Constitution forbids torture or lingering death.[4] A long term of imprisonment for habitual criminals does not come within the inhibition of the Constitution.[5]

This constitutional provision received its fullest consideration by the Supreme Court in *Weems v. United States*.[6] Under statutory provisions in force in the Philippines, for two small falsifications of the public records by a disbursing officer he was sentenced to fifteen years imprisonment at hard and "painful" labor, to receive no outside assistance, to carry a chain at wrist and ankle, to be deprived of all civil rights while in prison, to be perpetually disqualified politically, to be perpetually under surveillance of public authorities, and to pay a fine of four thousand pesetas. The court came to the conclusion that this was cruel and unusual punishment within the meaning of the Constitution—that that instrument forbids punishments or fines greatly disproportionate to the offense. Justice White and Justice Holmes dissented, holding that the Constitution only prevents Congress from authorizing inhuman methods for causing bodily torture, or

[1] (1835) 4 Cranch Cir. Ct. 514.
[2] Wikerson *v.* Utah (1878) 99 U. S. 130.
[3] *In re* Kemmler (1890) 136 U. S. 436, 447.
[4] See the discussion in the last two cases cited.
[5] McDonald *v.* Massachusetts (1901) 180 U. S. 311, 313.
[6] (1910) 217 U. S. 349.

the courts from exercising a discretion as to punishment vested in them in an unusual manner or to an unusual degree, or Congress from vesting the judiciary with an illegal discretion as to the kind or degree of punishment to be inflicted.

CHAPTER XVI

JURY TRIAL IN CIVIL SUITS

§146. *The Right to a Jury Trial.* That the Seventh Amendment to the Constitution, guarantying that, "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," was essential to personal security, or has operated beneficially is open to doubt. It covers but a narrow field of litigation affecting private rights. Actions in equity as well as those in admiralty and of a maritime nature are not within its scope.[1] Nor are suits which the United States permits to be brought against it in law courts. These latter were not known to the common law, but have their origin in federal statutes.[2] The Amendment applies only to actions in federal courts, and does not apply to actions in state courts based upon federal legislation.[3] The Amendment prevents change by federal statute in the jury system as it stood when the Amendment was adopted. A body of twelve jurors whose verdict must be unanimous, presided over by a judge empowered to instruct them on the law and advise them on the facts, cannot be superseded[4].

This right to a jury trial in civil cases may be waived. There seems to have been no serious doubt on this subject.[5]

§147. *Reëxamination of Facts Found by a Jury.* The Seventh Amendment further provides that, "no fact tried

[1] Parsons *v.* Bedford (1830) 3 Peters 433, 446; Luria *v.* United States (1913) 231 U. S. 9, 27.

[2] McElrath *v.* United States (1880) 102 U. S. 426.

[3] Minnesota & St. L. R. R. *v.* Bombalis (1916) 241 U. S. 211.

[4] Capital Traction Co. *v.* Hof (1899) 174 U. S. 1.

[5] Parsons *v.* Armor (1830) 3 Peters 413, 425; Supervisors of Wayne County *v.* Kennicott (1880) 103 U. S. 554.

by a jury shall be otherwise reëxamined in any court of the United States, than according to the rules of the common law." At common law the verdict of a jury in a civil case could be set aside by the trial judge, if in his opinion it was against the law or the evidence. It could be set aside also by the proper appellate tribunal. In these ways an issue of fact tried by a jury could be reëxamined, and such methods are secured against legislative interference by the clause of the Seventh Amendment just quoted. This rule applies to cases tried in state courts, which are reviewable by federal tribunals. The meaning of the constitutional provision is stated as follows by the Supreme Court[1]:

"By virtue of the Seventh Amendment . . . when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be reëxamined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law no other mode of reëxamination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore, that, unless a new trial has been granted in one of those two ways facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States."

[1] Capital Traction Co. *v.* Hof (1899) 174 U. S. 1, 13.

CHAPTER XVII

DUE PROCESS OF LAW AND THE FIFTH AMENDMENT: EMINENT DOMAIN

§148. *Meaning of Due Process in the Fifth Amendment.* The Fifth Amendment, among other provisions, declares that no person shall be "deprived of life, liberty, or property without due process of law." This limitation, like the others in the first eight amendments, is directed only against the federal government. It was put into the Constitution in 1791, but did not come before the Supreme Court until 1855.[1] In 1868 the Fourteenth Amendment was adopted, which provides that no State shall "deprive any person of life, liberty, or property without due process of law." Almost at once appeals and writs of error began to be taken to the Supreme Court based upon the due process clause of the Fourteenth Amendment, and this clause has been before that court much more frequently than the similar provision in the Fifth Amendment. The States not being sovereignties of limited powers, as is the case of the national government, the limitation put upon them by the requirement of due process has called for more constant interpretation in connection with their varied activities. It has been thought best, therefore, to deal most fully with due process in connection with the States,[2] and not to repeat the discussion in this chapter where the same rules apply under both clauses.

In *Hurtado v. California*[3] the Supreme Court said:

[1] Murray *v.* Hoboken Land and Improvement Co. (1855) 18 Howard 272.

[2] See chaps. 28 to 32.

[3] (1884) 110 U. S. 516, 525.

"Due process of law in the latter [the Fifth Amendment] 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 States exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. . . ."

It seems, then, in the first place, that the due process clause of the Fifth Amendment is in a sense supplementary to the other specific limitations placed upon the federal action by the Constitution, and that federal legislation, affecting life, liberty, or property, which is outside of the field of Congress' jurisdiction, or which conflicts with any of the constitutional prohibitions, is not only unconstitutional on those grounds, but is also unconstitutional as lacking in due process. Thus legislation, restraining persons' freedom of contract and of action, which purports to be a regulation of interstate commerce but is held not to be so by the Supreme Court, has been declared to be in conflict with the due process clause.[1] Similarly in the first of the legal tender cases, in which it was decided that Congress had acted outside of its constitutional sphere, it was held that for that reason the legislation which affected adversely the property rights of creditors, resulted in a taking of property without due process.[2]

But the due process clause of the Fifth Amendment has much greater importance as a limitation upon the federal government within the spheres of jurisdiction which have been granted to it. Although the spheres of operation of

[1] Adair *v.* United States (1908) 208 U. S. 161.

[2] Hepburn *v.* Griswold (1869) 8 Wallace 603, 624. The statute was later held to be constitutional. Legal Tender Cases (1870) 12 Wallace 457. See sec. 83.

the due process clauses in the Fifth and Fourteenth Amendments are different, it is believed that their meaning is the same when applied to similar powers exercised by the federal and by the state governments.

> "The Fourteenth Amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty, and property as is offered by the Fifth Amendment against similar legislation by Congress."[1]

The due process clause of the Fifth Amendment is a limitation upon the power of Congress as well as upon the executive and judicial branches of the national government.[2] It did not crystallize for all time the usages and rules of the common law in force at the time of its adoption, but established rather as a standard those principles of liberty and justice which lie at the foundation of our Anglo-Saxon institutions.[3]

§149. *Meaning of "Person," "Life," "Liberty," and "Property."* The term "person," as used in the due process clauses includes corporations as well as natural persons.[4] The term "life" hardly needs explanation, but it has been said to include not merely animal existence, but the retention of limbs and organs by which life is enjoyed.[5] "Liberty" includes liberty of action as well as liberty of person, and "property" as used in the due process clauses covers not only the title or possession to property, but the right to acquire and to use it.[6]

[1] Hibben *v.* Smith (1903) 191 U. S. 310, 325. Though in French *v.* Barber Asphalt Pav. Co. (1901) 181 U. S. 324, 328, the court said that cases may perhaps arise in which the clauses will be differently interpreted, it held that they meant the same with regard to the subject before it, that of special assessments for local improvements.

[2] Murray *v.* Hoboken L.&I. Co. (1855) 18 Howard 272. See sec. 231.

[3] See sec. 233.

[4] See sec. 236; McGehee, *Due Process of Law*, 189.

[5] Munn *v.* Illinois (1876) 94 U. S. 113, 142; Bertholf *v.* O'Reilly (1878) 74 N. Y. 509, 515.

[6] See sec. 234.

§150. *Due Process in Judicial Proceedings.* As we have seen in a previous chapter,[1] the Constitution throws about persons accused of crimes against the United States certain safeguards with regard to ex post facto legislation, the place of trial, indictment, jury trial, self-incrimination, unreasonable searches and seizures, double jeopardy, the right to counsel and compulsory process to obtain witnesses, confrontation with witnesses, excessive bail and fines, and cruel and unusual punishments. These safeguards with all of their implications having already been discussed, will not be dealt with again here. We have also considered the right to a jury trial in civil proceedings in federal courts.[2]

In judicial proceedings in order that there shall be due process a defendant must have notice, and an opportunity to be heard, which includes an opportunity to introduce evidence.[3] In a criminal trial the defendant must be present at every stage of the trial,[4] but due process does not require that he be present in an appellate court where he is represented by counsel.[5] The court must also have jurisdiction of the defendant in an action in personam, or of the res in an action in rem.[6] We have already fully considered the jurisdiction of the federal courts, both original and appellate.[7]

§151. *Due Process and Interstate and Foreign Commerce.* We have already discussed with some fullness the powers of Congress over interstate and foreign commerce. We have seen how broad a definition has been given to the term "commerce," how large a police power has been built up by Congress under the commerce clause, and how far it has been held legitimate for Congress to go in regulating commerce within the States as an incident to the regulation of

[1] Chap. 15. [2] Chap. 16.

[3] See sec. 235.

[4] Hopt *v.* Utah (1884) 110 U. S. 574.

[5] Schwab *v.* Berggren(18892) 143 U. S. 442.

[6] See Chap. 29.

[7] See for jurisdiction of the Supreme Court secs. 42 and 43; for jurisdiction of Circuit Courts of Appeals sec. 46; for jurisdiction of District Courts see sec. 44.

interstate commerce.[1] But even within the sphere of interstate commerce congressional legislation, or regulation under statutory authority, may be lacking in due process. So the Supreme Court has declared that regulation of interstate rates may be so unreasonable and confiscatory as to be in conflict with the due process clause.[2] The question of what is a reasonable rate is discussed in connection with the States' police power,[3] and the same considerations apply to interstate transportation. It was also declared by Chief Justice White that, although a company which has a pipe line from its own well in one State to its own refinery in another State is engaged in interstate commerce, it would be unreasonable and therefore lacking in due process to require it to become a common carrier of oil for others.[4] In dealing with the Webb-Kenyon Act it was assumed that the limitations of due process upon congressional legislation with regard to intoxicating liquors under the commerce clause is the same as the limitations of due process upon state legislation on the same subject under the police power.[5]

§152. *Due Process and the Taxing Power.* It seems clear, on principles fully discussed in connection with federal[6] and state[7] taxation, that taxes can only be levied for public purposes. As is pointed out, however, in the discussion referred to, federal taxes are not generally vulnerable at this point since Congress does not generally levy taxes for particular purposes, but to be applied to the expenses of the government as a whole. Appropriations by Congress of

[1] Chap. 8.

[2] Interstate Comm. Comm. *v.* Union Pac. R. R. Co. (1912) 222 U. S. 541; Interstate Comm. Comm. *v.* Louisville & N. R. R. Co. (1913) 227 U. S. 88.

[3] Sec. 272.

[4] The Pipe Line Cases (1914) 234 U. S. 548, 562.

[5] Clark Distilling Co. v. West Virginia (1917) 242 U. S. 311, 332. See sec. 274.

See also the discussion in Lottery Case (1903) 188 U. S. 321, 362; Butterfield v. Stranahan (1904) 192 U. S. 470; United States v. Delaware & H. Co. (1909) 213 U. S. 366; Wilson v. New (1917) 243 U. S. 332, 346.

[6] Sec. 77. [7] Sec. 249.

money so raised to purely private uses would undoubtedly be unconstitutional, but there has been no inclination to question congressional appropriations in the courts. It seems a reasonable interpretation of the taxing power given to Congress to hold that the exercise of that power need not be confined to the raising of money to be expended in those fields in which the national government is given exclusive or paramount authority. The Constitution authorizes the imposition of taxes by Congress "to pay the debts and provide for the common defense and general welfare of the United States."[1] We have seen further that under its taxing power, as well as under its power over commerce, Congress has been upheld in the enactment of a very considerable body of legislation whose character is really that of police regulations.[2]

Certain important limitations are expressly placed upon the taxing power of the national government by the Constitution. Direct taxes are forbidden except when levied "in proportion to the census or enumeration" provided for in the Constitution. Income taxes are direct taxes. The Sixteenth Amendment was adopted to take income taxes out from this constitutional limitation, but it has since been held that stock dividends are not income but capital. Succession taxes, however, are not taxes upon property but upon a privilege, and so do not come within the provision as to direct taxes. National taxes which are not direct must be levied with geographical uniformity throughout the United States. And, finally, Congress cannot tax exports. All of these matters have already been fully discussed.[3]

Since the laws of a state have no extraterritorial effect, tax laws cannot reach property outside of the territorial boundaries of the state passing them. The question of the situs of property for taxation has received its fullest consideration in connection with taxes levied by the States. The conclusions there reached must, however, be equally applicable to the national government. They may be

[1] Art. I, sec. 8, par. 1. See sec. 76.

[2] Secs. 78 and 91.

[3] Secs. 79 and 82.

summarized as follows[1]: Land may be taxed only by the State within whose boundaries it is. Chattels may be taxed by the State within whose boundaries they are. The maxim *mobilia sequunter personam* has been assumed to apply to tangible personal property and to give the State of the owner the right to tax though the chattels are outside of its boundaries, but this has been declared by the Supreme Court to be incorrect. Choses in action may be taxed in the State of domicile of the owner. They may also be taxed at the domicile of the debtor. (This is perhaps not true of bonds when the bonds themselves are not in the taxing State.) Whether, when they are represented by bonds, negotiable paper and stock, they may be taxed in a State where these evidences of rights are, though it is neither the domicile of the owner nor of the debtor, seems not to be definitely settled as yet. Income may be taxed at the domicile of the person receiving it, or in the State where the property is located from which it is derived. Whether, if a person owns bonds, stock, or negotiable paper, which are in a State which is neither the domicile of the debtor nor of the owner, that State can tax the income seems not to have been decided. An inheritance tax can only be imposed upon land by the State where it is located. This should also be true of chattels, but taxes have been levied by the State of the deceased's residence. In the case of intangible property the State of the deceased's domicile may impose an inheritance tax. It seems that the State of the debtor's domicile may also levy such a tax, unless, perhaps, in the case when the debt is represented by bonds or negotiable paper, which are not in the State. Where a debt owed to the deceased is represented by bond or mortgage, which is in a State other than that of the domicile of the deceased or of the debtor, it has been held that that State may also levy an inheritance tax upon its transfer. The same arguments would apply to corporate stock.

In *DeGanay v. Lederer*[2] a federal income tax levy was

[1] See the full discussion in Chap. 30.

[2] (1919) 250 U. S. 376.

upheld upon stocks, bonds, and mortgages, belonging to an alien nonresident, secured upon property in the United States or payable by persons or corporations domiciled in the United States, the income being collected and transmitted by an agent here, and the evidences of debt being here. This was a case, then in which both the debtors or obligors were within the United States, and the obligations were evidenced by bonds, stocks and mortgages which were also within the taxing territory.

In the case of a specific tax notice and hearing are not necessary to due process. But in the case of a tax based upon value these are necessary incidents. This question and the sufficiency of notice are more fully dealt with in connection with state taxation.[1]

§153. *Due Process and the Impairment of Contracts.* The Constitution forbids the States to pass laws impairing the obligations of contracts.[2] This has been interpreted to include franchises and other contracts to which the State itself is a party. But it is held that a State cannot by contract preclude its subsequent exercise of its police powers, and that contracts between individuals are made subject to the future exercise of those powers.[3]

There is no constitutional clause which in express terms forbids the national government to impair the obligations of contracts. But in the first of the cases involving the constitutionality of legal tender legislation it was said with regard to the application of the due process clause:

> "A very large proportion of the property of civilized men exists in the form of contracts. . . . And it is beyond doubt that the holders of these contracts were and are as fully entitled to the protection of this constitutional provision as the holders of any other description of property."[4]

[1] Sec. 259.

[2] Art. I, sec. 10, par. 1.

[3] See the full discussion of these subjects in chap. 22.

[4] Hepburn *v.* Griswold (1869) 8 Wallace 603, 624. In the Sinking Fund Cases (1878) 99 U. S. 700, 718, the court said: "The United States

This case was later overruled, and the issuance of legal tender notes held constitutional, but this was not on the ground that contracts are not protected by the due process clause of the Fifth Amendment, but on the grounds that the contracts were not directly impaired, but only indirectly affected, and that even under the contract clause applicable to States contracts are made subject to the exercise by the States of essential governmental powers.[1] It would seem, then, that contracts have as substantial protection against federal action under the due process clause as they have under the contract clause against state action.[2]

§154. *Due Process and the War Power.* This subject is so fully dealt with in the chapter on the war power and control of military affairs that it would constitute mere repetition to go over it again. The reader is, therefore, referred to that chapter.[3]

§155. *Due Process and the Government of the Territories and the District of Columbia.* We have seen in our discussion of the power of the national government to acquire territory that the mere annexation of territory does not bring it under the constitutional guaranties.[4] It would follow, therefore, that until the Constitution is extended to such

---

cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. . . . The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, as it would be if the repudiator had been a State, or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable."

[1] Legal Tender Cases (Knox *v.* Lee; Parker *v.* Davis) (1870) 12 Wallace 457, 450, 451. See the discussion of these cases in sec. 83.

[2] See the recent interesting case of United States v. Northern Pacific Railway Co. (1921) 256 U. S. 51.

[3] Chap. 9, particularly sec. 99. See also chapter 13, with regard to war-time legislation affecting freedom of speech and of the press.

[4] Sec. 103.

territories the due process clause does not constitute a limitation upon congressional legislation operative there.

Congress exercises over the territories and over the District of Columbia not only the powers of a national government, but also all of the powers which a State may exercise within its own borders.[1] It, therefore, may exercise within those areas the same police powers which the States possess,[2] and it would seem that the due process clause of the Fifth Amendment in the District of Columbia and the territories where it is effective would put the same limits upon the exercise of those powers by the national government as it does upon their exercise by the States.

§156. *Due Process and Administrative Action.* It is not necessary that every determination of fact or of law which may result in depriving a person of liberty or property shall be made by a judicial tribunal, and it is competent for the legislature to make the determination of an administrative officer conclusive with regard to questions of fact. This was determined as early as 1855 when the Supreme Court held that an administrative officer might be authorized to issue a distress warrant against a revenue collector and that his decision with regard to the facts justifying the issuance might constitutionally be made final.[3] Similarly it has been held that the determination of an administrative officer may be made conclusive with regard to the liability of a person to a tax,[4] with regard to the appraisement[5] and classification[6] of goods taxed, as to the exclusion of persons from the use of the mail because of fraud,[7] and on the question whether a person falls within a class which may be precluded from admission to the country.[8] Administrative officers may also be vested with power to make final de-

[1] See secs. 101 and 105.
[2] See chap. 32.
[3] Murray *v.* Hoboken L. & I. Co. (1865) 18 Howard 272.
[4] Springer *v.* United States (1880) 102 U. S. 586.
[5] Hilton *v.* Merritt (1884) 110 U. S. 97.
[6] Butterfield *v.* Stranahan (1904) 192 U. S. 470.
[7] Public Clearing House *v.* Coyne (1904) 194 U. S. 497.
[8] United States *v.* Ju Toy (1905) 198 U. S. 253.

cisions on matters of law,[1] though this is not so frequently done, and statutes will probably not be very readily interpreted as having this effect.[2] But, of course, an administrative officer has no authority to act outside of his jurisdiction, and it is competent for a court to determine whether he has done so.[3] Ordinarily notice and a reasonable opportunity to be heard are required by due process before a person is deprived of life, liberty, or property, where some fact must be determined whose determination is not the result merely of computation.[4] In conformity with this principle it has been declared that before an alien can be deported on the ground that he is a pauper and likely to become a public charge he must be given some notice and an opportunity to be heard, though they may be of an informal character,[5] and that where a person threatened with exclusion contends that he is a citizen and desires to call witnesses, the refusal to allow him to do so is a denial of due process.[6]

§157. *Does Due Process Include Equal Protection?* The Fourteenth Amendment declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This has been interpreted to guaranty the protection of reasonably equal laws, and so to prohibit

[1] Reetz *v.* Michigan (1903) 188 U. S. 505; United States *v.* Hitchcock (1903) 190 U. S. 316.

[2] Gonzales *v.* William (1904) 192 U. S. 1; American School of Magnetic Healing *v.* McAnnulty (1902) 187 U. S. 94.

[3] Smelting Co. *v.* Kemp (1881) 104 U. S. 636. This may involve the determination of whether there has been a clear abuse of discretion, or a decision unsupported by evidence. Interstate Comm. Comm. *v.* Union Pac. R. R. Co. (1912) 222 U. S. 541, 547; Interstate Comm. Comm. *v.* Louisville & N. R. R. Co. (1913) 227 U. S. 88, 91.

[4] Hager *v.* Reclamation District (1884) 111 U. S. 701, 709.

[5] The Japanese Immigrant Case (1903) 189 U. S. 86. This would seem to modify the statement in the earlier case, where an alien was excluded on the same ground, that "the statute does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land." Ekiu *v.* United States (1892) 142 U. S. 651, 663.

[6] Chin Yow *v.* United States (1908) 208 U. S. 8.

unreasonable discrimination. The equal protection clause has received much judicial interpretation, and is discussed in another chapter.[1] It applies, however, only to the States, and there is no provision similarly worded which applies to the national government.

In considering state legislation in its relation to the Fourteenth Amendment the Supreme Court has declared that arbitrary action is forbidden by the due process clause as well as the clause guarantying equal protection,[2] and has also treated as vital to due process as well as to equal protection the fact that a state statute operates upon all alike.[3] In *McCray v. United States*[4] a federal tax was attacked on the ground, among others, that it lacked due process because the classification was unreasonable and arbitrary. The court said:

> "Conceding merely for the sake of argument that the due process clause of the Fifth Amendment, would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand."

In the *Second Employers' Liability Cases*,[5] in answering an attack upon the statute as unconstitutionally classifying both employers and employees, the Supreme Court said:

> "But it does not follow that this classification is violative of the 'due process of law' clause of the Fifth Amendment. Even if it be assumed that that clause is equivalent to the 'equal protection of the laws' clause of the Fourteenth Amendment, which is the most that can be claimed for it here, it does not take from Congress the

[1] Chap. 33.

[2] Dent *v.* West Virginia (1889) 129 U. S. 114, 124.

[3] Leeper *v.* Texas (1891) 139 U. S. 468; Giozza *v.* Tiernan (1893) 148 U. S. 657, 662; Duncan *v.* Missouri (1894) 152 U. S. 377, 382.

[4] (1904) 195 U. S. 27, 61. See also Billings *v.* United States (1914) 232 U. S. 261, 283.

[5] (1912) 223 U. S. 1, 52.

> power to classify, nor does it condemn exertions of that power merely because they occasion some inequalities. On the contrary, it admits of the exercise of a wide discretion in classifying according to general, rather than minute distinctions, and condemns what is done only when it is without any reasonable basis, and therefore is purely arbitrary."

The classifications in question were held to be reasonable. In upholding a federal graduated income tax the Supreme Court made the following statement:

> "And no change in the situation here would arise even if it be conceded, as we think it must be, that this doctrine [that the Fifth Amendment does not conflict with the taxing power] would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion. We say this because none of the propositions relied upon in the remotest degree present such questions."[1]

No federal legislation has as yet been declared lacking in due process because it denied the equal protection of the laws. On the other hand the Supreme Court has entertained and given serious consideration to attacks upon federal legislation based upon the ground that, because of unreasonable classification, it denied the protection of reasonably equal laws. Furthermore, we have in the last case referred to a statement that classification may be so grossly unreasonable as to be unconstitutional. It seems, therefore, that the conception of due process does exclude legis-

[1] Brushaber *v.* Union Pac. R. R. Co. (1916) 240 U. S. 1, 24. *Cf.* La Belle Iron Works v. United States (1921) 41 Sup. Ct. R. 528.

lation which inflicts inequality of burden, which is clearly arbitrary, and without any basis in reason.

§158. *The Power of Eminent Domain.* After the due process clause of the Fifth Amendment there is a clause declaring, "nor shall private property be taken for public use without just compensation." The Supreme Court has declared that the power of eminent domain would inhere in the federal government without any express constitutional provision, being a power which belongs to every free government and which is incident to sovereignty, and that this power enables the federal government to take property within the States without their consent. The clause in the Fifth Amendment is not the source of this power, but merely a limitation upon its exercise.[1]

No express provision was inserted in the Fourteenth Amendment with regard to the taking of property for public use by the States, and it was claimed that, since a separate clause on the subject was contained in the Fifth Amendment, the subject-matter of that clause could not reasonably be held to be included within the scope of due process. The Supreme Court, however, held otherwise.[2]

All kinds of property is subject to the power of eminent domain, including franchises and contracts, and property which has previously been acquired by the owner by the exercise of the same power. It is a power which can only be exercised by the State or its grantee, and the right to exercise it cannot be contracted away.[3]

It is clear that private property cannot be taken by the power of eminent domain for a private purpose even though compensation be made.[4] The use must be a public one. What is a public use is considered at length in connection with the exercise of the power by the States.[5] The same principles apply to the exercise of the power by the national

[1] Kohl *v.* United States (1875) 91 U. S. 367; United States *v.* Jones (1883) 109 U. S. 513.

[2] See sec. 260. [3] See secs. 261.

[4] Missouri Pac. Ry. *v.* Nebraska (1896) 164 U. S. 403, 417, and cases cited. See also sec. 260. [5] See sec. 262.

government within the spheres in which it may act under the Constitution.[1] The national government may, for instance, exert this power in order to obtain sites for public buildings,[2] in order to construct highways for interstate commerce,[3] and for the purpose of establishing parks and national memorials.[4]

Since it is the right in chattels and land which constitutes property rather than the objects themselves, the infringement of property rights constitutes a taking which must be justified as having been done with due process.[5] But if a private property right is held subject to a public right, the exercise of the public right will not constitute a taking of private property. So the owner of the bed of a navigable stream holds it subject to the public right of navigation, and, if the stream is an interstate highway, he holds it subject to congressional regulation. If Congress, then, makes use of the bed of the stream for structures beneficial to interstate commerce, though the owner's use is interfered with, this is not a taking for which compensation must be made.[6] So also interference by the federal government with a riparian owner's access to a stream which is an interstate highway is not a taking of his property, since his right was subject to the public right to use the stream for navigation, and the right of Congress to control it in the interest of interstate commerce.[7]

The subject of the measure of compensation in condemnation proceedings is considered in connection with the exercise of the power of eminent domain by the States, and the reader is referred to that discussion.[8]

[1] Kohl *v.* United States (1875) 91 U. S. 367, 372. [2] *Ibid.*, 367.

[3] United States *v.* Jones (1883) 109 U. S. 513.

[4] Shoemaker *v.* United States (1893) 147 U. S. 282; United States *v.* Gettysburg El. Ry. Co. (1896) 160 U. S. 668.

[5] Pumpelly *v.* Green Bay Co. (1871) 13 Wallace 166; Cooley, *Constitutional Limitations* (7th ed.) 787; 12 *Corpus Juris* 1215.

[6] United States *v.* Chandler-Dunbar W. P. Co. (1913) 229 U. S. 53, 62.

[7] Scranton *v.* Wheeler (1900) 179 U. S. 141. And see Eldridge *v.* Trezevant (1896) 160 U. S. 452 (property bordering on Mississippi subject to lessee construction). [8] Sec. 264.

Notice and an opportunity to be heard are necessary to due process in condemnation proceedings.[1] Notice by publication is sufficient against a non-resident owner, and also against a resident owner who cannot be served with due diligence.[2]

It is competent for Congress to authorize state tribunals to determine the amount due from the United States to persons whose property is taken by the national government.[3]

[1] United States *v.* Jones (1883) 109 U. S. 513, 519. See also sec. 265.
[2] See sec. 265.
[3] United States *v.* Jones (1883) 109 U. S. 513.

CHAPTER XVIII

THE LATER AMENDMENTS AND THE FEDERAL GOVERNMENT [1]

§159. *The Thirteenth Amendment.* This amendment adopted in 1865 declares in section one, that,

> "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."

By section two it is provided that, "Congress shall have power to enforce this article by appropriate legislation."

It is to be noted that this amendment operates equally as a limitation upon the federal and state governments. But it does more than limit governmental action. It forbids individual action also which reduces persons to slavery or to involuntary servitude.[2] Moreover, it expressly extends to "any place" subject to the jurisdiction of the United States as well as to the United States themselves, and, therefore, applies to "unincorporated" as well as to "incorporated" territories.[3]

The history of slavery in this country and of the enactment of the Thirteenth Amendment are fully considered

[1] The Eleventh Amendment was adopted to meet the situation created by the decision of the Supreme Court that the Constitution gave it jurisdiction of suits against States, and is discussed in the chapter on the judiciary. See sec. 42.

The Twelfth Amendment changed the method of electing the President and Vice-President. It will be found discussed in sec. 25.

[2] So it operates to abolish slavery among the Choctaw Indians, United States *v.* Choctaw Nation (1903) 38 Ct. of Claims 558, 566, and the Alaskan tribes, *in re* Sah Qual (1886) 31 Fed. 327.

[3] See the discussion of the Insular Cases, sec. 103.

in connection with the discussion of the constitutional limitations upon state powers.[1] That has also seemed the more appropriate place in which to go at length into the meaning of the guaranties against slavery and involuntary servitude.[2] The discussion of these matters will not be repeated here.

> "It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punishing one who holds another in that condition of involuntary servitude.[3] This legislation is not limited to the territories or other parts of the strictly national domain, but is operative in the States and wherever the sovereignty of the United States extends. We entertain no doubt of the validity of this legislation, or of its applicability to the case of any person holding another in a state of peonage, and this whether there be municipal ordinance or state law sanctioning such holding. It operates directly on every citizen of the Republic, wherever his residence may be."[4]

Discrimination against colored persons by innkeepers, common carriers, and proprietors of places of public amusement is not subjecting them to slavery or imposing upon them a badge of slavery so that such discrimination can be forbidden by Congress under the authority given in the Thirteenth Amendment.[5] Nor do mere trespasses, or assaults, or acts of intimidation which prevent one from making a contract which he otherwise would have made

[1] Secs. 215 to 219.

[2] Secs. 220 to 222.

[3] U. S. Rev. Stat., sec. 1990 and 5526. For other provisions of the criminal law directed against slavery and peonage see U. S. Crim. Code, secs. 907 to 932; Zoline's *Federal Criminal Law and Procedure*, chap. 40.

[4] Clyatt *v.* United States (1905) 197 U. S. 207, 218. See also United States *v.* Harris (1882) 106 U. S. 629, 640.

[5] Civil Rights Cases (1883) 109 U. S. 3, 20 to 25.

constitute slavery or involuntary servitude, simply because those acts might legally have been done in respect to slaves, and Congress has no authority under the Thirteenth Amendment to legislate against such acts.[1]

§ 160. *The Fourteenth Amendment.* This amendment, adopted in 1868, is principally designed to establish certain rights against impairment by the States, though it has some provisions applicable to the national government. In the first place it declares that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." This is, of course, operative upon the national government as well as upon the States, but an important result of it is to make clear that state citizenship is dependent upon national citizenship. In the next clause the States are forbidden to "make or enforce any law which shall abridge the privileges and immunities of citizens of the United States." These provisions are fully discussed in an earlier chapter.[2] The amendment then goes on to forbid any State to deprive any person of "life, liberty, or property without due process of law," or any person within its jurisdiction of "the equal protection of the laws."

The second section makes new provision for the apportionment of Representatives in Congress because of the enfranchisement of the negroes, but provides that if male inhabitants over twenty-one years of age are denied the right of suffrage representation in Congress shall be reduced in proportion. These provisions are fully dealt with elsewhere.[3]

Section three excludes from the right to hold office persons who, having previously held office and sworn to support the Constitution, had participated in the Rebellion. Con-

[1] Hodges *v.* United States (1906) 203 U. S. 1. Justice Harlan and Justice Day dissented. [2] Chap. 11.

[3] With regard to due process see chaps. 28 to 32. With regard to equal protection see chap. 33. With regard to apportionment of Representatives see sec. 63.

gress, however, was given power to remove this disability by a two-thirds vote of each house.

Section four established permanently the validity of debts and obligations incurred by the national government during the Civil War, but forbade the United States and the States to assume or pay any debt incurred in aid of the Rebellion, or any claim for the loss or emancipation of slaves. This was to forestall any attempt by Representatives in Congress from the southern States to procure the repudiation of debts incurred by the government, or to saddle upon the government the debts of the Confederacy, and to make those who had contributed to the support of the Confederacy bear the loss resulting from its failure.

By section five of the Fourteenth Amendment it is provided that "The Congress shall have power to enforce by appropriate legislation the provisions of this article." Congress, believing that it was acting under this constitutional authorization, passed the so-called Civil Rights Act in 1875, which among other things made it a misdemeanor for proprietors of inns, public conveyances, theaters and other places of amusement to deny equal enjoyment of their facilities to any person on account of race, color, or previous condition of servitude. In holding this statute unconstitutional[1] the Supreme Court pointed out that it was State action of a particular character which was prohibited, and not the conduct of private individuals. In effect the support of the legislation was based upon the assumption that because the States were prohibited

> "to act in a particular way on a particular subject, and power is conferred upon Congress to enforce the prohibition, this gives Congress power to legislate generally on the subject, and not merely power to provide modes of redress against such state legislation or action."

But the court said that "the assumption is certainly unsound."[2]

[1] Civil Rights Cases (1883) 109 U. S. 3.

[2] *Ibid.*, 15.

> "It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[1]

The court seems clearly right in the restrictions which it enforced upon congressional action. This view is fortified by the fact that the original proposal for the amendment was to the effect that

> "Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."

Strong objection was made in debate to this provision on the ground that it would allow Congress to invade the proper legislative sphere of the States, and the present provision was finally substituted in its place.[2]

But the prohibition of the Fourteenth Amendment is not directed solely against the legislative branch of the state governments. "Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial departments of the States."[3] This it may do by removing the case from a state court in which a guarantied right has been denied, into a federal court where it will be acknowledged,[4] or by making the disregard of a constitutional right by a state officer a criminal offense.[5] Furthermore, an act of a state officer comes within the scope

[1] Civil Rights Cases (1883) 109 U. S. 3, 11. See also United States *v.* Cruikshank (1875) 92 U. S. 542; Virginia *v.* Rives (1879) 100 U. S. 313; United States *v.* Harris (1883) 106 U. S. 629.

[2] Flack, *The Adoption of the Fourteenth Amendment*, 56 *et seq.*

[3] Virginia *v.* Rives (1879) 100 U. S. 313, 318.

[4] *Ibid.*; Strauder *v.* West Virginia (1879) 100 U. S. 303.

[5] *Ex parte* Virginia (1879) 100 U. S. 339.

of the amendment if it infringes one of the guarantied rights, though such act was not authorized by the laws of the State.

> "The theory of the amendment is that where an officer or other representative of a State, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the amendment, inquiry whether the State has authorized the wrong is irrelevant." [1]

§ 161. *The Fifteenth Amendment.*[2] Section one of this amendment declares that, "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." By section two it is provided that, "Congress shall have power to enforce this article by appropriate legislation."

The Thirteenth Amendment having abolished slavery and involuntary servitude, and the Fourteenth Amendment having assured to colored persons the status of citizens, the Fifteenth Amendment was adopted in order to give them an equal right of suffrage.[3] Although the first section of this amendment is directed against the United States as well as against the States, no federal legislation has ever been attacked as being in conflict with it. Since the questions with regard to the scope of its prohibition have come up in connection with state legislation it has seemed appropriate to consider those questions in connection with the discussion of the constitutional limitations upon the powers of the States.[4]

Congress is authorized to enforce the amendment by "appropriate legislation." But the amendment is not directed against the abridgment of the right of citizens generally to vote. It is directed only against the abridgment of that right "on account of race, color, or previous

[1] Home Tel. Co. *v.* Los Angeles (1913) 227 U. S. 278, 287.

[2] Adopted in 1870.

[3] Slaughter House Cases (1872) 16 Wallace 36, 71.

[4] See sec. 283.

condition of servitude." Therefore, congressional legislation which makes it a crime for a state officer to refuse to allow persons to vote, without clearly restricting the application of the statute to cases where the refusal is on account of race, color, or previous condition of servitude, is unconstitutional.[1] Again, the amendment is not directed against action by individuals, but against action by the States or the United States. So an attempt by federal legislation to punish private persons who conspire to prevent negroes from voting is not within the power granted by the amendment.[2]

§162. *Sixteenth Amendment.* This amendment adopted in 1913, is as follows: "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 enumeration." This amendment was adopted to meet the situation created by the decision of the Supreme Court that a tax upon income derived from property is a tax upon property, and so a direct tax, as that term is used in the constitutional provision with regard to taxation. The discussion of this whole subject, with the interpretation put upon the Sixteenth Amendment, will be found in the chapter on federal taxation, and will not be here repeated.[3]

§163. *Seventeenth Amendment.* This amendment was also adopted in 1913. The Constitution originally provided for the choice of Senators by the state legislatures.[4] The Seventeenth Amendment was the culmination of an agitation for the popular election of Senators which first found expression in state laws or party regulations giving the electors the right to indicate to the state legislatures the persons whom they wished the latter to chose for Senators. The amendment declares that Senators shall be elected by the electors of the most numerous branch of the State legislatures. It also provides for elections to fill vacancies,

[1] United States *v.* Reese (1875) 92 U. S. 214.
[2] James *v.* Bowman (1903) 190 U. S. 127.
[3] Sec. 79.
[4] See sec. 66.

but gives authority to the state legislatures to empower the governors to make interim appointments.[1]

§164. *Eighteenth Amendment.* This is the Prohibition Amendment which was adopted in 1920. Its constitutionality was violently attacked, but it was sustained by the Supreme Court. This controversy is considered in the chapter dealing with the amending of the Constitution.[2]

Section one of this amendment declares that,

> "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

The Supreme Court has said with regard to the definition of intoxicating liquors:

> "While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (Title II, sec. 1), wherein liquors containing as much as one-half of one per cent. of alcohol by volume and fit for use for beverage purposes are treated as within that power."[3]

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

"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 legislatures 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.

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

[2] Chap. 3.

[3] National Prohibition Cases (1920) 253 U. S. 350, 387. The court refers to its previous decision upholding a similar definition in the War-Time Prohibition Act in Jacob Ruppert *v.* Caffey (1920) 251 U. S. 264.

Section two of the amendment declares that, "Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." In the *National Prohibition Cases*[1] the Supreme Court, in upholding the Eighteenth Amendment and the legislation passed under it, laid down the following propositions among others:

"7. The second section of the amendment—the one declaring 'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation'—does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.

"8. The words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

"9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them."

It seems clear from these propositions that Congress may constitutionally legislate on the subject of intoxicating liquor for the whole country, and that such legislation will annul any inconsistent state laws. The concurrent power of the States would seem to consist of the right to legislate with regard to the same subject, not inconsistently with the terms of the amendment or with existing federal laws.[2]

§ 165. *The Nineteenth Amendment.* This is the so-called Suffrage Amendment, adopted in 1920 after a long struggle.

[1] (1920) 253 U. S. 350, 387.

[2] See sec. 285.

After the adoption of the Fourteenth Amendment it was contended that the right of suffrage was a privilege of United States citizenship, and that, since the States were prohibited to abridge the privileges and immunities of citizens of the United States, they could not thereafter deny the vote to women. The Supreme Court, however, held that, while women were citizens before as well as after the amendment, the right to vote was not a privilege inhering in citizenship, and that the amendment had not added to the privileges of citizenship.[1]

But gradually the suffrage was obtained by women in one State after another, until finally they found themselves politically strong enough to induce Congress to propose the Suffrage Amendment. In its first section it provides that, "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 sex." The second section declares that, "Congress shall have power, by appropriate legislation, to enforce the provisions of this article." It will be noticed that in this amendment the language of the Fifteenth Amendment, discussed just above, has been followed, except that the word "sex" has been substituted for the words "race, color, or previous condition of servitude." What has been said, therefore, about the Fifteenth Amendment may be also said of the Nineteenth.

The constitutionality of the amendment has been attacked, and the Supreme Court will very shortly pass upon that question. In view of the fact that the Fifteenth Amendment has repeatedly been assumed to be constitutional, and in view of the fact that the attacks made upon the constitutionality of the Eighteenth Amendment proved unsuccessful, it may reasonably be assumed that the Nineteenth Amendment will be upheld.[1]

[1] Minor *v.* Happersett (1874) 21 Wallace 162.

[1] See the discussion of the power to amend the Constitution in sec. 22.

PART III

THE STATES

CHAPTER XIX

THE STATES UNDER THE CONSTITUTION

§ 166. *The Powers of the States before the Tenth Amendment.* It was not the intention of the framers of the Federal Constitution to do away with the separate States and out of their elements to form a single national state. Nor was it their purpose to leave the States mere administrative units. While acting "to form a more perfect union," they were clearly determined that it should be a union not only of "indestructible States," but of States which should retain so much of their sovereignty as should not conflict with the functions of the national government, or with express prohibitions laid upon the States. No reasonable doubt as to this purpose can exist in the mind of one who reads the Federal Constitution. He finds certain defined powers granted to the national government. On the other hand he finds the existence of the States recognized, and certain express limitations put upon their powers. Finally, he finds that it was thought necessary, near the close of the Constitution,[1] to declare 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."

Clearly each State was left free to make such constitutional provisions and laws as it saw fit so long as they did not

[1] Art. VI, sec. 2.

conflict with the powers granted to the central government, or with the express prohibitions put upon state action. It is beyond a doubt that this was the understanding of the framers of the Constitution.[1] Madison declared that,

> "The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiations, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State."[2]

§167. *The Tenth Amendment.* Nevertheless, the feeling was repeatedly expressed in the state constitutional conventions that the Constitution should be amended by the addition of a bill of rights, similar to those which had become familiar parts of the state constitutions, and which should constitute an express protection against possible abuses of power by the central government. A number of the States in adopting the Constitution suggested amendments to it, and, as a result of this action, Congress at its first session proposed to the States twelve amendments, ten of which were adopted. The Tenth Amendment, which was based

[1] The whole discussion by Madison in *The Federalist* of the powers of the central government, and of the supposed dangers to the state governments recognizes such division of powers. *The Federalist*, Nos. 41 to 44. Hamilton asserted in the New York Convention that the Constitution established such division of powers. II Elliot's *Debates*, p. 362. The same point was made by Randolph in the Virginia Convention, III Elliot's *Debates*, p. 464, as well as by Marshall, later the great Chief Justice of the United States, III Elliot's *Debates*, p. 419; and by Davie in the North Carolina Convention, IV Elliot's *Debates*, p. 58, supported by Maclaine and Iredell, IV Elliot's *Debates*, pp. 140 and 220.

[2] *The Federalist*, No. 45.

upon suggestions made in a number of the state conventions, provides that, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[1] Therefore, when a State exercises a governmental power the presumption is that it has the right to do so, and the contrary must be shown by force of some provision in the Federal Constitution, or in the constitution of the particular State.[2]

§168. *State Action Expressly Limited by Federal Constitution and Statutes.* It was obviously imperative that, though the States retained many of their sovereign powers, if the surrender by them of others to the federal government and the limitations put upon the States by the Constitution were to be effective, the States must not pass legislation in conflict with the constitutional provisions or with valid federal statutes, and that state officials must sup-

[1] The Ninth Amendment declares that, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." "This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmative in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies. The amendment was undoubtedly suggested by the reasoning of *The Federalist* on the subject of a general bill of rights." *Story on the Constitution* (5th ed.), sec. 1905. See *The Federalist*, No. 84.

[2] In 1783, four years before the Constitutional Convention, Pelatiah Webster thus declared what the division of powers between the national and state governments should be: "I propose further that the powers of Congress, and all the other departments acting under them, shall all be restricted to such matters only of general necessity and utility to all the States as cannot come within the jurisdiction of any particular State, or to which the authority of any particular State is not competent, so that each particular State shall enjoy all sovereignty and supreme authority to all intents and purposes, excepting only those high authorities and powers by them delegated to Congress for the purposes of the general union." See *A Memorial in Behalf of the Architect of Our Federal Constitution*, p. 43.

port the Federal Constitution. All this would seem to follow from the very adoption of the Constitution, but it was not left to inference. Article VI contains the following provisions:

> "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.[1]
>
> "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; . . ."

§169. *The Rights of New States.* As new States have been admitted by Congress into the Union,[2] they have become automatically possessed of all of the political rights of the original States, and the provisions of the Tenth Amendment apply to them as well as to the States which formed the Union at the time of its adoption. It is not competent for Congress to take from a new State, as a condition of admission to the Union, any power possessed by the original States. Such a condition has no more effect to restrict the powers of a new State, than has congressional legislation which attempts to take from one of the original States any power reserved to it by the Tenth Amendment. The Constitution not only contemplates a union of indestructible States, but a union of equal States.[3]

§170. *The Scope of the Discussion with Regard to the States.* It is the purpose of the writer in the third part of this book

[1] The power of the judiciary to enforce this provision we consider in sec. 49.

[2] "New States may be admitted by Congress into this Union." Const. of the U. S., art. IV, sec. 3.

[3] Coyle *v.* Oklahoma (1911) 221 U. S. 559, contains a most interesting discussion on this point. And see sec. 106.

to deal only with the direct restrictions put upon all of the States by the people of the United States, in adopting and amending the Federal Constitution. No pretense will be made of dealing with the restrictions put upon the various state governments by their individual constitutions, or with the formation of state governments under state constitutions.

CHAPTER XX

POLITICAL LIMITATIONS

§171. *Treaties and Compacts.* The Constitution declares that, "No State shall enter into any treaty, alliance, or confederation,"[1] and a little later that, "No State shall, without the consent of Congress, enter into any agreement or compact with another State or with a foreign power."[2] The absolute prohibition is clearly directed against political combinations, either between the States or with foreign nations, while the provision that "any agreement or compact" must have the consent of Congress, applies to agreements of a non-political character.[3] So the confederation of the southern States at the time of the Civil War was illegal, coming within the absolute prohibition of the Constitution of the United States,[4] while boundary agreements between two or more States are legal if consented to by Congress.[5] Agreements made between the States before the adoption of the Constitution, are not abrogated by the Constitution except in so far as they may conflict with its provisions.[6]

[1] Art. I, sec. 10, par. 1.

[2] *Ibid.*, par. 3.

[3] Virginia *v.* Tennessee (1892) 148 U. S. 503, 519.

[4] Williams *v.* Bruffy (1877) 96 U. S. 176.

[5] Virginia *v.* Tennessee, *supra*, and the consent may be implied, and may follow the agreement as well as precede it.

[6] South Carolina *v.* Georgia (1876) 93 U. S. 4; Wharton *v.* Wise (1893) 153 U. S. 155. Though article VI of the Articles of Confederation forbade States to make treaties with foreign nations, and forbade them to make treaties with each other except with the consent of Congress, it left them free to make non-political agreements among themselves, according to the decision in the case last cited.

§172. *Letters of Marque and Reprisal.* "No State shall . . . grant letters of marque or reprisal."[1] Such letters are issued by a State authorizing the seizure of property to redress injuries inflicted by another nation for which satisfaction cannot be otherwise obtained. It is not necessarily an act of war, but is very likely to lead to open hostilities. Obviously, therefore, the States should not be left with the power to issue such letters, and so embroil the whole nation in war.[2]

§173. *Coining of Money and Emitting Bills of Credit.* The States are forbidden by the Constitution to "coin money, emit bills of credit," or "make anything but gold and silver coin a legal tender in payment of debts."[3] The propriety of giving to the national government exclusive power to coin money and to determine its value is obvious, in order that the medium of exchange may be uniform throughout the country. The wisdom of this provision was not questioned in the Constitutional Convention. The Articles of Confederation[4] had left a concurrent jurisdiction in Congress and in the States to coin money, though giving to Congress the sole power to regulate the value and alloy of all coin.

The term "bills of credit" might be given an interpretation broad enough to cover all written obligations binding the credit of a State. The evil, however, which was clearly in the minds of the drafters of the Constitution when they provided that States should not emit bills of credit, was that from which the country had suffered during and after the Revolution—the issuing of bills upon the credit of the States, intended to pass as a general medium of exchange in place of money.[5] Therefore the Supreme Court has held

[1] Const. of the U. S., art. I, sec. 10, par. 1.

[2] Under the Articles of Confederation, art. IX, Congress alone could issue letters of marque and reprisal in time of peace, but the States could issue them in time of war.

[3] Art. I, sec. 10, par. 1. See sec. 83, for a consideration of the power of the central government to coin money and regulate its value.

[4] Art. IX.

[5] *The Federalist*, No. 44.

that the prohibition does not apply to obligations of a State issued for services actually received or money borrowed for present use, merely because they are payable to bearer, or receivable in payment of taxes, where it does not appear that they were issued with the intention that they should circulate as money.[1] Nor does the prohibition apply to bills of credit emitted by a state bank, even though the State be the only stockholder.[2]

The clause which declares that, "No State shall . . . make anything but gold and silver coin a tender in payment of debts," has also its historical background in the demoralizing tender laws of the States in the period preceding the adoption of the Constitution. It is also a necessary part of the general scheme for a uniform monetary system and medium of exchange throughout the country.[3]

§174. *Titles of Nobility Not to be Granted.* The Constitution declares that, "No State shall . . . grant any title of nobility."[4] This provision hardly needs comment. It was the purpose of the people of the United States to establish a democracy, and to guard against the abuses of English monarchy supported by a privileged nobility.

§175. *Duties on Exports, Imports, and Tonnage.*

> "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 revision and control of the Congress.[5]

[1] Houston & Tex. Cent. R. R. Co. *v.* Texas (1900) 177 U. S. 66, containing a full review of earlier cases.

[2] Briscoe *v.* Bank of Kentucky (1837) 11 Peters 257; Darrington *v.* Bank of Alabama (1851) 13 Howard 12.

[3] See sec. 83 for a consideration of the power of the national government to issue legal tender notes.

[4] Art. I, sec. 10, par. 1. There is a similar provision with regard to the United States Government in art. I, sec. 9, par. 8.

[5] Const. of U. S., art. I, sec. 10, par. 2.

"No State shall, without the consent of Congress, lay any duty of tonnage."[1]

In *Woodruff v. Parham*[2] we have a very interesting discussion of the meaning of the words "imports or exports" as used in the paragraph of the Constitution quoted above. The conclusion reached was that the terms had to do solely with exports and imports to and from foreign countries, and that they were not intended to apply to exports and imports from one State to another.[3] The force of this decision is substantially nullified, however, by the position taken by the Supreme Court[4] that a tax levied upon the movement of goods from one State to another, or upon goods while so moving is an unconstitutional interference with interstate commerce, the regulation of which is committed to the national government.[5]

With regard to the prohibition of "any duty on tonnage" the Supreme Court has said[6]:

"The general prohibition upon the States against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance. This extension was doubtless intended by the prohibition of any duty on tonnage. It was not only a *pro rata* tax which was prohibited, but any duty on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."

[1] Const. of U. S., art. I, sec. 10, par. 3. [2] (1868) 8 Wallace 123.

[3] The contrary view seems to have been held earlier by the Supreme Court. See Brown *v.* Maryland (1827) 12 Wheaton 419, 449; Almy *v.* California (1860) 24 Howard 169.

[4] Coe *v.* Erral (1885) 116 U. S. 517.

[5] This is discussed in connection with the consideration of the commerce clause. See sec. 94.

[6] Steamship Co. *v.* Portwardens (1867) 6 Wallace 31. See also Inman Steamship Co. *v.* Tinker (1876) 94 U. S. 238.

An ordinance which requires vessels to pay for the use of municipal wharves according to tonnage is not unconstitutional. Packet Co. *v.* Keokuck (1877) 95 U. S. 80; Packet Co. *v.* St. Louis (1879) 100 U. S. 423.

§176. *States Not to Keep Troops or Engage in War.* It is provided in the Constitution that:

> "No State shall, without the consent of Congress, . . . keep troops or ships of war in time of peace, . . . or engage in war, unless actually invaded or in such imminent danger as will not admit of delay."

Since it was the purpose of the Constitution to put the control of international relations in the central government it was obviously necessary to prohibit individual States from engaging without the consent of Congress in wars which would almost inevitably involve the whole country. The exception in the last clause is based upon the principle of self-preservation. If States are not separately to engage in war they should not keep up separate military and naval establishments. The provision that no State shall keep "troops" is aimed at the maintenance of regular, professional military forces, and does not prevent the training of a state militia. "The militia of the several states" is expressly referred to in another part of the Constitution.[1]

§177. *Republican Form of Government.* Section four of the Fourth Article of the Constitution is as follows:

> "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 application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence."

There is not here a direct prohibition of any other than a republican form of government in the States, but clearly the provision that the United States shall guarantee such a form of government is in effect a prohibition of any other.

In case of insurrection or revolution within a State the federal government is also empowered to determine which of two governments, which may have been set up, is in fact the true government, since it has authority upon application

[1] Art. II, sec. 2, par. 1. With regard to the power of the national government over the militia of the States, see secs. 97 and 131.

to protect each State against "domestic violence." The Supreme Court has declared that the determination whether a State has a republican form of government is not a judicial question, but one solely for Congress to decide.[1] This it normally does by admitting Representatives and Senators to its membership. It might refuse to do this on the ground that the States by which they were sent did not have a republican form of government, although it has never taken such a course. Undoubtedly it might further take affirmative action to oust a government which it considered unrepublican.

Also, it is primarily for Congress to determine which of two contending governments in a State is the real government, when application is made by one or the other for aid, but Congress may delegate this power to the President as it has in fact done. The court will not review such a determination.[2]

[1] Pacific Telephone Co. *v.* Oregon (1912) 223 U. S. 118 (claim that initiative and referendum make government unrepublican); Mountain Timber Co. *v.* Washington (1916) 243 U. S. 219, 234.

[2] 1 Luther *v.* Borden (1849) 7 Howard 1.

CHAPTER XXI

BILLS OF ATTAINDER AND EX POST FACTO LEGISLATION

§178. *Bills of Attainder.* States are expressly forbidden to pass any "bill of attainder."[1] "A bill of attainder is a legislative act which inflicts punishment without a judicial trial."[2] The English law distinguished a bill of attainder proper, which inflicted the death penalty, and a bill of pains and penalties, which inflicted a lesser punishment. However, the term "bill of attainder" in the Constitution of the United States is interpreted as including both. Such bills were passed in England in time of rebellion, or public excitement, or when Parliament was particularly subservient to the Crown. The legislative body was prosecutor and judge unrestrained by any rules of criminal procedure, and at times passed judgment upon whole classes of individuals.

§179. *Ex Post Facto Laws.* Blackstone in the first volume of his Commentaries[3] protests against the practice "of making laws ex post facto when after an action (indifferent in itself) is committed, the legislature then for the first time declares it to have been a crime." We are told that this is an improper use and an improper writing of the term; that it should be written ex post facto, and means "by matter subsequent," being used thus, and with this sense, in the Digest, as when one might speak of a contract which has become void ex post facto.[4] But it was in Blackstone's sense that the term was used in the Constitution, where States were forbidden to pass any "ex post facto law,"[5] and in that

[1] Const. of the U. S., art. I, sec. 10, par. 1. See, for similar restriction upon the federal government, sec. 135.

[2] Cummings *v.* Missouri (1866) 4 Wallace 277, 323. [3] P. 46.

[4] Note in *34 Law Quart. Rev.*, 8. [5] Art. I, sec. 10, par. 1.

sense it is now an accepted part of our legal terminology—namely, as descriptive of retroactive criminal legislation.

§180. *What Are Ex Post Facto Laws.* At an early day the Supreme Court attempted to classify legislation which is ex post facto, as follows:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."[1]

That a law which increases the punishment for a crime already committed is ex post facto, is conceded, but when does a change in the character of punishment to be inflicted constitute an increase in the punishment? The highest court of New York has declared that any law which in any way changes the *character* of the punishment to be inflicted for an act committed before the passage of the law is ex post facto, that any other rule would lead to uncertainty in the application of the constitutional guaranty; and applying this doctrine to a situation where the punishment had been changed from death to life imprisonment, held the statute unconstitutional.[2] It would seem that wherever there is any doubt as to whether the change in fact mitigates the rigor of the law, the statute making the change should be held to be ex post facto, but that where there is no reasonable doubt that the penalty has been decreased, the legislation should be upheld. It is but reasonable to assume that

[1] Calder *v.* Bull (1798) 3 Dallas 386, 390.

[2] Shepherd *v.* People (1862) 25 N. Y. 406. But see the doubt expressed as to so sweeping a proposition in People *v.* Hayes (1894) 140 N. Y. 484.

every rational man wants to live as long as he can, and the only fair conclusion would seem to be that life imprisonment is, therefore, a lesser penalty than death.[1] A statute which, after the commission of a murder changes the method of inflicting the death penalty from hanging to electrocution, is not unconstitutional.[2]

It is not uncommon for statutes to inflict a heavier penalty upon a second offender than upon one who commits an offense for the first time. Such statutes have been attacked as ex post facto when they are passed after the first offense has been committed, on the ground that they add to the penalty for such first offense. It has been answered, however, that the punishment is for the second, and not the first offense, and that the statute may, therefore, be constitutionally given effect under such circumstance.[3]

The fourth proposition quoted at the opening of this section, from an early Supreme Court case, that "every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender" is ex post facto, has received some qualification. The later cases have held that a change in the rules of evidence made after the commission of a crime, is not ex post facto where the change does not lessen the amount or measure of proof necessary to convict, and by which no right is given to the prosecution which is not also given to the defense.[4]

Procedural changes may or may not be ex post facto according to whether they do or do not deprive the defendant of "any of those substantial protections with which the

[1] So held in Commonwealth *v.* Wyman (1853) 12 Cush. (Mass.) 237; McGuire *v.* State (1898) 76 Miss. 504. The language of the Supreme Court in Rooney *v.* North Dakota (1905) 196 U. S. 319, supports this view.

[2] Malloy *v.* South Carolina (1915) 237 U. S. 180.

[3] McDonald *v.* Massachusetts (1901) 180 U. S. 311.

[4] Thompson *v.* Missouri (1898) 171 U. S. 380.

existing law surrounds the person accused of crime."[1] By this test it was held, in the case last cited, that to reduce a criminal jury from twelve to eight was ex post facto; and it has also been held to be within the constitutional prohibition to take from a plea of guilty of murder in the second degree, which is accepted by the court, its effect as an acquittal of the crime of murder in the first degree.[2] But after a crime has been committed it is by the same test, not unconstitutional to change the place of trial, or the number of judges, or the qualification of jurors.[3]

§181. *Ex Post Facto Laws Which Are Not Penal in Form.* A statute may be ex post facto though not penal in form if its sole purpose is to inflict a penalty upon persons for past acts. Such were the provisions introduced into the Missouri constitution after the Civil War disqualifying those who had been guilty of past disloyalty from engaging in the professions of teaching or preaching, and from acting as managers or directors of corporations. It was held that such past conduct had no bearing upon present fitness to act in such capacities, and that the disqualifications were, therefore, merely in the nature of penalties, and unconstitutional.[4] But legislation providing for the cancellation of naturalization certificates obtained by fraud is held to be constitutional even as to certificates obtained before the enactment of the legislation, on the ground that it simply deprives a person "of a privilege that was never rightfully his"—the transaction by which naturalization was obtained being fraudulent is voidable, and the legislation simply provides for its avoidance.[5]

[1] Cooley, *Constitutional Limitations* (7th ed.), p. 381, approved in Thompson *v.* Utah (1898) 170 U. S. 343.

[2] Krug *v.* Missouri (1898) 170 U. S. 221.

[3] See respectively Gret *v.* Minnesota (1869) 9 Wallace 35; Duncan *v.* Missouri (1894) 152 U. S. 377; Gibson *v.* Mississippi (1896) 162 U. S. 565.

[4] Cummings *v.* Missouri (1866) 4 Wallace 277. But past disloyalty has a distinct bearing upon fitness to exercise the suffrage, and legislation depriving persons guilty of past disloyalty of the right to vote is constitutional. Boyd *v.* Mills (1894) 53 Kan. 594.

[5] Johannessen *v.* United States (1912) 225 U. S. 227.

§182. *Judicial Decisions and the Ex Post Facto Rule.* The prohibition of ex post facto laws applies only to legislative acts, and, therefore, does not cover a situation where a court departs from a previous decision in dealing with acts done after, and in reliance upon that decision.[1] Then, if a statute makes certain acts criminal, and the highest court of the State declares the statute unconstitutional, and later reverses this decision, are acts prohibited by the statute, and done after and in reliance upon the first decision, punishable under the statute? The person who did the acts in question cannot escape liability on the ground that the later decision is ineffective because ex post facto; when the Constitution forbids the passing of any ex post facto law it contemplates only legislative acts. A court, even when it declares a statute constitutional which it had previously held unconstitutional, does not legislate, it simply says that it made a mistake in its previous decision, and that the legislative enactment has been law all the while. But the tendency of state courts has been to hold a person, in the situation supposed above, not guilty, though they have been embarrassed to find a satisfactory ground for these decisions.[2] Perhaps a sufficient reason should be that, while a mistake of law is ordinarily no defense in a criminal action, a mistake of law shared by that branch of the state government whose function it is to expound the law should be pleadable as a defense in a prosecution by the State.

[1] Ross *v.* Oregon (1913) 227 U. S. 150.

[2] See an interesting note in 33 L. R. A. (N. S.) 788.

CHAPTER XXII

PROTECTION OF CONTRACTS

§183. *The Contract Clause and Its Original Purpose.* A provision of the Federal Constitution which has had a much wider effect than its language would at first suggest, and a wider effect, also, than was probably dreamed of by its framers, is that which declares that, "No State shall . . . pass any . . . law impairing the obligation of contracts."[1] Towards the end of the session of the Constitutional Convention Mr. King of Massachusetts "moved to add, in the words used in the Ordinance of Congress establishing new States,[2] a prohibition on the States to interfere in private contracts.'[3] This suggestion was very little debated, but at a later day was, in its present form, incorporated into the constitution.[4] The Federalist deals with this provision only twice, and then in very general terms.[5] However, it seems practically certain that it was introduced for the protection of creditors, because, as Madison tells us:

> "In the internal administration of the States a violation of Contracts had become familiar in the form of depreciated paper made a legal tender, of property substituted

[1] Art. I, sec. 10, par. 1.

[2] The Ordinance for the government of the Northwestern Territory, passed by the Continental Congress, July 13, 1787, which provided as follows: "And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall in any manner whatever interfere with or effect private contracts or engagements, *bona fide* and without fraud previously formed."

[3] Farrand, *The Records of the Federal Convention*, vol. ii, p. 439.

[4] Farrand, *The Records of the Federal Convention*, vol. ii, p. 619.

[5] *The Federalist*, Nos. 7 and 44.

for money, of instalment laws, and of the occlusions of the Courts of Justice."[1]

In the North Carolina convention one of the supporters of the Constitution declared that, "The clause refers merely to contracts between individuals,"[2] but it is very probable that the members of the Convention also had in mind the rather general disposition towards the repudiation of public debts, and meant to protect creditors of the States as well as creditors of private individuals.

§184. *Liberal Construction by the Supreme Court.* It was not long after the adoption of the Constitution that the interpretation of the "contract clause" began, and around that clause has developed a very large and important field of unwritten law. The Supreme Court has given to the clause a very liberal interpretation. It has not felt controlled by a consideration of what may have been the particular evil aimed at by the Convention, but has looked rather to the meaning which may fairly be given to the general language actually embodied in the Constitution.

A contract involves the conception of a mutual and valid agreement with a consideration on both sides. The contract clause does not, therefore, protect contracts which are void for illegality or other cause, but it does, quite as obviously, cover implied contracts as well as those which are express. Legal terminology includes the phrases "executory contracts" and "executed contracts," the former used to designate contracts where performance is incomplete, and the latter contracts which have been fully performed. A contract to sell in the future is an executory contract; a present sale or grant is an executed contract. It would be strange if a contractual right to get title to property in the future were protected by the constitutional

[1] Preface to Debates in the Convention of 1787, Farrand, *The Records of the Federal Convention*, vol. iii, p. 548. This conception of the purpose of the prohibition is corroborated by the short debate on Mr. King's motion and by Luther Martin's comments before the Maryland Legislature, Farrand, *The Records of the Federal Convention*, vol. iii, pp. 214 and 215.

[2] IV Elliot's *Debates*, 191.

provision against impairing contracts, while a right to keep title acquired under a sale was not.[1] The possibility of such an anomaly was early precluded by the decision of the Supreme Court that the contract clause applies as well to executed contracts as to those which are executory.[2] Marriage, however, is an exception to this rule. Undoubtedly marriage is a contract, but it results in a status whose incidents have always been within the control of the State and not within the control of the parties. The Supreme Court has declared that it is not within the fair intendment of the contract clause that the State should be deprived of control over such status, and of the right to dissolve it.[3]

§185. *When the Obligation of a Contract Is Impaired.* It is to be noted that it is the "obligation of contracts" which the Constitution declares is not to be impaired. By the obligation of a contract must be meant the legal obligation—the obligation of the parties to adhere to their agreement, which, at the time of contracting, the law recognized and made enforceable.[4] At first glance it would seem, then, that the provision against impairment would be simple and easy of application, but it will be found that the courts have been frequently occupied with the question, when is a contract impaired?

Does every change in the remedies open to parties to a contract, constitute an impairment of its obligation? This question has been repeatedly answered in the negative;

[1] If this latter possibility had not been held to be met by the contract clause it would not have been covered at all as far as the States were concerned until the later adoption of the Fourteenth Amendment with its prohibition against taking property without due process. See chaps. 28 to 32.

[2] Fletcher *v.* Peck (1810) 6 Cranch 87, 136. The background of this case is most interestingly painted in Beveridge's *Life of John Marshall*, vol. iii, at p. 10.

[3] Maynard *v.* Hill (1888) 125 U. S. 190, 210. This decision was preshadowed nearly seventy years earlier by Chief Justice Marshall in Dartmouth College *v.* Woodward (1819) 4 Wheaton 518, 629.

[4] Sturgis *v.* Crowninshield (1819) 4 Wheaton 122, 197; Ogden *v.* Saunders (1827) 12 Wheaton 213, 257, 302, 317; McCracken *v.* Hayward (1844) 2 Howard 608, 612.

and, generally speaking, it has been held that where the statute deals only with the remedy, if a reasonably adequate remedy is left the obligation of the contract has not been impaired. State legislation which attempts to make transactions usurious and void which were not so when entered into, or which provides for discharging insolvent persons from debts contracted before the passage of the act, is unconstitutional.[1] A state statute which substantially impairs a creditor's right to satisfy his claim by execution levied upon the property of his debtor, is within the constitutional prohibition.[2] So is a state statute which after a sale upon foreclosure extends the time for the redemption of the property so sold, since it materially affects the contract right of the purchaser;[3] as well as a state statute which repeals a former statute making stockholders in a corporation personally liable, so far as it affects creditors existing at the time of the repeal.[4] On the other hand a statute of a State which does away with imprisonment for debt is constitutional, though applied to existing contracts, for it is held not to affect the nature or extent of the obligation, and to leave an entirely adequate remedy against the debtor's property.[5]

[1] Sturgis *v.* Crowninshield (1819) 4 Wheaton 122. When a debtor pleads to an action on the debt a discharge under a state insolvency law which was in force at the time the contract was made the law is as follows: (1) The discharge is a good defense if both contracting parties were citizens of the State of the discharge, because they may be said to have contracted in contemplation of the laws of that State for the enforcement of contracts; (2) the discharge is a good defense against a party to the insolvency proceedings; (3) but where both contracting parties are not citizens of the State of the discharge, the discharge is not effective against one not a party to the insolvency proceedings, because the parties cannot be said to have contracted in contemplation of the laws of the State for the enforcement of contracts, and so the statute which attempts to discharge one of the parties to the contract, attempts to impair the obligation of the contract and is void. Ogden *v.* Saunders (1827) 12 Wheaton 213.

[2] McCracken *v.* Hayward (1844) 2 Howard 608.

[3] Barritz *v.* Beverly (1896) 163 U. S. 118.

[4] Hawthorne *v.* California (1864) 2 Wallace 10.

[5] Beers *v.* Haughton (1835) 9 Peters 329; and see Chief Justice Marshall's earlier statement to the same effect in Sturges *v.* Crowninshield

The Supreme Court of the United States has declared that state legislation which exempts homesteads from liability for existing obligations is void, since it substantially lessens the value of such obligations.[1] The same arguments would seem to apply to exemptions of personal property from liability for existing contractual obligations,[2] unless a distinction be drawn upon the ground that the usual exemptions of personal property withdraw objects of comparatively small value from the reach of the judgment creditor.[3] State statutes which stay execution on judgments in cases of pre-existing contracts are in conflict with the contract clause of the Federal Constitution,[4] but a statute shortening periods of limitation for the bringing of actions is not invalid though applying to existing contracts, unless it operates to prevent an accrued right of action being sued upon or creates an unreasonably short period in which action may be brought.[5] The Supreme Court has also held[6] that a statute, which gives priority to deeds according to the dates upon which they are recorded, is not unconstitutional, though applying to existing deeds, which before the statute would take priority according to their dates. The provisions of such a statute do not affect the obligations of the parties to

---

(1819) 4 Wheaton 122, 201. In New York it has also been held that the abolition of distress for rent does not impair the obligation of existing leases, since it leaves the obligation intact, and, though it takes away one remedy, it leaves other remedies which are adequate. Conkey *v.* Hart (1856) 14 N. Y. 22.

[1] Gunn *v.* Barry (1872) 15 Wallace 610; Edwards *v.* Kearzey (1877) 96 U. S. 595.

[2] See Justice Swayne's opinion in Edwards *v.* Kearzey, *supra*, and the state decisions supporting this view collected in Cooley, *Constitutional Limitations* (7th ed.), 408.

[3] Dictum in Bronson *v.* Kinzie (1843) 1 Howard 311, 315; concurring opinions of Justice Clifford and Justice Hunt in Edwards *v.* Kearzey, *supra*, and the state decisions collected in Cooley, *Constitutional Limitations* (7th ed.), 408.

[4] Dictum in Edwards *v.* Kearzey, *supra*, and the state decisions collected in Cooley, *Constitutional Limitations* (7th ed.), 414.

[5] Wheeler *v.* Jackson (1890) 137 U. S. 245, 258; 12 *Corpus Juris* 1079.

[6] Jackson *v.* Lamphire (1830) 3 Peters 280.

deeds, are as available to the elder as to the younger grantee, and are based upon sound policy.[1]

§186. *Contracts to Which a State Is a Party.* So far we have considered contracts between individuals, but the provision that no State shall pass any law impairing the obligation of contracts was early held to apply as well to contracts to which a State is a party.[2] Chief Justice Marshall pointed out that, if contracts made with the State are to be exempted from the operation of the contract clause, "the exception must arise from the character of the contracting party, not from the words which are employed," and he found no reason to read into the language of the Constitution an exception which is not there, in order to justify States in passing laws impairing the obligation of their own contracts.[3] The constitutional provision has been held as applicable to contracts between States as to those between a State and private individuals.[4] The constitutional provision does not, however, give to a party who has contracted with a State the right to sue the State, and a statute which allows a State to be sued is not itself a contract. The repeal of such a statute is, therefore, not an impairment of the contract.[5] But even if the privilege of suing the State is not given or is withdrawn, the contract

[1] State statutes which validate invalid or defective contracts do not come within the contract clause of the Federal Constitution, West Side R. R. Co. *v.* Pittsburgh Cons. Co. (1911) 219 U. S. 92, and cases there cited; neither, of course, do statutes in so far as they affect remedies for torts, Louisiana *v.* New Orleans (1883) 109 U. S. 285. There is no general prohibition of retroactive state legislation. Retroactive legislation may, however, come in conflict with the due process clause of the Fourteenth Amendment if it affects vested property rights, as will be seen later.

[2] Fletcher *v.* Peck (1810) 6 Cranch 87.

[3] But the mere breach of a contract by the State will not give the federal courts jurisdiction under the contract clause. St. Paul Gas Light Co. *v.* St. Paul (1901) 181 U. S. 142; City of Dawson *v.* Columbia Avenue Saving Fund Co. (1905) 197 U. S. 178.

[4] Green *v.* Biddle (1823) 8 Wheaton 1; Virginia *v.* West Virginia (1870) 11 Wallace 39.

[5] Baltzer *v.* North Carolina (1896) 161 U. S. 240.

clause is still of great value to one who contracts with the State, for if the State or one of its officers brings judicial proceedings based upon a state statute its unconstitutionality may be set up; and if an officer of the State acts under such a statute, the question whether the statute is unconstitutional as impairing the obligation of the contract may be litigated in an action to enjoin the officer, or in an action against him for damages, and if, in a controversy to which the state is not a party, with regard to a right or property secured by the contract with the State, a person relies upon a statute subsequent to the contract, the question as to whether the statute impairs the obligation of the contract may be litigated.

§187. *Dartmouth College Case: Franchises as Contracts.* When Chief Justice Marshall rendered his famous decision in *Dartmouth College v. Woodward*[1] in 1819, he established a doctrine, which, as it has been developed, and, as the field of its operation has then been delimited, has occupied much of the attention of federal and state courts, and has, besides, played a most important part in the law of corporations and of public utilities. Dartmouth College had been chartered by George Third. The New Hampshire legislature by statute materially amended the charter. This legislation was attacked by the college as unconstitutional, Daniel Webster arguing the case for the college. The Chief Justice declared:

> "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."

[1] 4 Wheaton 518. Justice Washington and Justice Story delivered concurring opinions. Justice Duvall dissented without opinion.

After examining and dissenting from the suggestion that the college was a public and not a private corporation, and declaring that it was essentially a private eleemosynary corporation, the Chief Justice states his position as to the charter to be this:

> "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 face 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 vested 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."

This, upon examination was held to be no ground for taking the charter contract out of the protection of the Constitution, and it was held that the New Hampshire legislation, in materially altering the charter, did impair the obligation of that contract.[1]

Although the decision in the *Dartmouth College* case applied to the charter of an eleemosynary corporation, it has subsequently been held to control with regard to all corporate charters.[2]

But besides the franchise to be a corporation, which is

[1] In reading the opinions in the case one feels throughout that the object of the court was to protect property interests from arbitrary interference by state legislation. It is interesting to speculate as to whether the decision might have been different if the Fourteenth Amendment, which prohibits States from depriving any person of property without due process (see chaps. 28 to 32), had at the time been a part of the Constitution.

[2] Providence Bank *v.* Billings (1830) 4 Peters 514; Stone *v.* Mississippi (1879) 101 U. S. 814.

the subject matter of charter contracts, there are also franchises to do certain things, namely to exercise the power of eminent domain, or to occupy public highways and streets.[1] The grant and acceptance of one of this latter class of franchises may be included in the charter contract, or may themselves constitute a separate contract[2] protected by the constitution.[3]

§188. *Grants Which Are Not Contracts.* Certain classes of legislation granting powers and privileges which have been held not to result in contracts should be distinguished from the grant and receipt of franchises which we have seen are contractual in character. In the first place the grant of a municipal charter is not a contract between the State and the municipality, protected by the Federal Constitution.

[1] The Supreme Court has thus defined a franchise in California *v.* Pacific R. R. (1888) 127 U. S. 1, 40: "Generalized and divested of the special form which it assumes under a monarchial government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority." The court continues: "No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise."

[2] Such franchises can only be granted for a public use, and part of the consideration on the part of the grantee of the franchise is held to be an implied undertaking to use the franchise for the benefit of the public, which includes the obligation to give reasonably adequate service and charge only reasonable rates. See C. K. Burdick, "The Origin of the Peculiar Duties of Public Service Companies," *9 Col. L. Rev.*, 514, 616.

[3] City Ry. Co. *v.* Citizens Street R. Co. (1897) 166 U. S. 557; Walla Walla *v.* Walla Walla Water Co. (1898) 172 U. S. 1.

In such a charter we have merely a delegation of governmental powers which the State may withdraw at will.[1] In the second place appointment to office is not a contract within the constitutional protection.[2]

§189. *Power of State to Exclude Itself by Contract from Exercise of Government Powers.* Corporate charters or grants of franchises may include in their terms the grant of other privileges, or immunity from the exercise of certain governmental powers by the State, such, for instance as the grant of the exclusive right to construct a bridge, conduct a ferry, or use the streets for a given purpose within a certain area, or of the right to charge certain designated rates or fares, or of immunity from taxation, or of the right to carry on business at a designated place. The question, whether one legislature may, by such a grant, because the grant constitutes a contract protected by the Constitution deprive a subsequent legislature of its ordinary governmental powers over such matters, is of very great moment.

Some state constitutions expressly forbid the grant of exclusive privileges, but where this is not the case such grants are held constitutional when granted to further some purpose beneficial to the public.[3] Such a grant is a contract within the meaning of the Constitution and so is protected against legislation which would impair it.[4] A provision in a corporate charter, or in a general law under which a business is incorporated, establishing a rate of taxation for such corporation has been repeatedly held to be part of the contract within the meaning of the Federal

[1] Hunter *v.* Pittsburgh (1907) 207 U. S. 161; Pawhuska *v.* Pawhuska Oil Co. (1919) 250 U. S. 393.

[2] Butter *v.* Pennsylvania (1850) 10 Howard 402. But salary which has been earned is within the protection of the contract clause. Fisk *v.* Jefferson Police Jury (1885) 116 U. S. 131.

[3] C. K. Burdick, "The Origin of the Peculiar Duties of Public Service Companies," 9 *Col. L. Rev.*, 514, 633; Cooley, *Constitutional Limitations* (7th ed.), 401.

[4] The Binghampton Bridge (1865) 3 Wallace 51; Slaughter House Cases (1872) 16 Wallace 36; New Orleans Gas Co. *v.* Louisiana Light Co. (1885) 115 U. S. 650.

Constitution.[1] It has also been decided, relying upon the earlier cases with regard to exclusive privileges, that a provision in a corporate charter or franchise, whereby the State agrees that a public utility may charge a certain rate or fare, is contractual, and protected against impairment.[2]

§190. *Tendency to Limit this Power.* It is obvious that if there were no limits to the power of a legislature to bind the State by contract, it might by this means so far abrogate the governmental powers of the State as to greatly embarrass it in its functions of government. This fact has been increasingly impressing itself upon the courts in recent years, and certain important limitations upon the broad doctrine of the inviolability of charter and franchise contracts have been developed.

§191. *Contract Rights Subject to Eminent Domain.* In the first place such contract rights have been declared to be property subject, like other property, to the right of the State to take upon the payment of reasonable compensation, under its power of eminent domain.[3] This was early decided by the Supreme Court in the case of an exclusive grant of the right to construct a bridge within a certain area.[4] It is declared that every contract, whether between individuals or between a natural or artificial person and the State, is made subject to this power, and that the exercise of this power does not, therefore, impair the obligation of the contract. So a franchise contract for the supplying of water in a municipality, with express provisions as to the rates which are to be paid by the municipality for water used by it, may be condemned by the municipality under

[1] New Jersey *v.* Wilson (1812) 7 Cranch 164; Piqua Branch of State Bank of Ohio *v.* Knoop (1853) 16 Howard 369; Home of the Friendless *v.* Rouse (1869) 8 Wallace 430; New Orleans *v.* Houston (1886) 119 U. S. 265.

[2] Freeport Water Co. *v.* Freeport (1901) 180 U. S. 587; Vicksburg *v.* Vicksburg Waterworks Co. (1907) 206 U. S. 496.

[3] This power will be more fully discussed in connection with due process, see Chap. 31.

[4] West River Bridge Co. *v.* Dix (1848) 6 Howard 507.

the power of eminent domain.[1] It must be equally true that a contractual immunity from taxation may be condemned. In such cases the obligation of the contract is not impaired, but its value as property is recognized, and as property it is acquired by the State under the power of eminent domain, which is classed as one of the State's inherent and necessary powers of sovereignty.

§192. *Strict Construction of Contracts in Favor of the Public.* Again it is held that any grant by a State is to be strictly construed against the grantee and in favor of the public. From this it results that in the case of a charter or franchise contract, when it is claimed that the State has contracted away the right to exercise a governmental power, this must clearly appear from the contract itself, and is not to be implied. The leading case to this effect is *Charles River Bridge v. Warren Bridge.*[2] A franchise to build a bridge between Cambridge and Boston and receive tolls for seventy years was granted to the proprietors of the Charles River Bridge. During the period of this franchise a franchise to build another bridge between the same places was granted to the proprietors of the Warren Bridge, which bridge was to become free within six years, thus destroying the value of the Charles River Bridge franchise. It was claimed by the proprietors of this bridge that an exclusive grant to them was to be implied, but the majority of the court emphatically laid down the principle above stated.[3]

§193. *Municipalities Have No Inherent Power to Limit State Action by Contract.* A large number of the cases in which it has been claimed that a public utility has acquired by contract the right to charge certain fares or rates, and that the State has, therefore, contracted away its right of rate fixing, are cases where the contract is embodied in a franchise granted by a municipality to use its streets. In such a case there is first the question as to whether the

[1] Long Island Water Supply Co. *v.* Brooklyn (1896) 166 U. S. 685.

[2] (1837) 11 Peters 420.

[3] See also Troy Un. R. R. Co., *v.* Mealy (1920) 254 U. S. 47, with regard to taxation.

franchise does clearly embody a contractual surrender of the rate fixing power,[1] and secondly, if such a contractual surrender appears, it must be determined whether the municipality had power to make such a contract. The Supreme Court of the United States has declared that a municipality not only has no inherent or implied power either to regulate rates or to contract away the State's power of rate regulation, but that the delegation of authority to the municipality to make such a contract must be perfectly clear.[2] In some cases the power to contract as to rates has been found clearly vested in the municipality, and the utility has, therefore, been protected in its contract rates[3]; but in others that clear power has not been found, and the contract has, therefore, been held to be no protection against the exercise of the police power in the form of rate regulation.[4] An examination of these cases makes two things clear. The first is that there is a strong pre-

[1] In Southern Pacific Co. *v.* Campbell (1913) 230 U. S. 537, it appeared that the company was incorporated under a law giving it "power to collect and receive such tolls or freight for transportation of persons or property thereon as it may prescribe." It was held that this provision was merely an authorization to collect reasonable tolls, and gave no greater power than the company would have had without it, and was not to be interpreted as a contractual surrender by the State of its power to regulate rates. And see Stone *v* Farmers' Loan and Trust Co. (1886) 116 U. S. 307, 330.

[2] Freeport Water Co. *v.* Freeport (1901) 180 U. S. 587; Detroit *v.* Detroit Citizens Ry. (1902) 184 U. S. 368; Cleveland *v.* Cleveland City Ry. (1904) 194 U. S. 517; Vicksburg *v.* Vicksburg Waterworks Co. (1907) 206 U. S. 496; Home Telephone Co. *v.* Los Angeles (1908) 211 U. S. 265, (in which authority given to a city to fix rates was held not to give the city power to bind the State by a contract as to rates): Puget Sound Traction Co. *v.* Reynolds (1917) 244 U. S. 574; City of Englewood *v.* Denver & St. P. Co. (1919) 248 U. S. 294.

[3] Detroit *v.* Detroit Citizens Ry., *supra;* Cleveland *v.* Cleveland City Ry., *supra;* Vicksburg *v.* Vicksburg WaterworksCo., *supra;* Detroit United Ry. *v.* Michigan (1916) 242 U. S. 283.

[4] Freeport Water Co. *v.* Freeport, *supra;* Home Telephone Co. *v.* Los Angeles, *supra;* Milwaukee Electric Ry. *v.* Railroad Commission (1915) 238 U. S. 174; Puget Sound Traction Co. *v.* Reynolds, *supra;* City of Englewood *v.* Denver & S. P. Ry., *supra.*

sumption against the surrender by contract of governmental powers over rates, and a consequent strong presumption against the delegation by the State to the municipality of the authority to abrogate such powers by contract. The second is that, although when a case is presented to the Supreme Court of the United States under the contract clause of the Constitution, it will itself determine whether there is a contract, as well as whether there has been a breach of it, that court, nevertheless, in determining whether there is a contract, will give much weight to decisions of the highest court of the State on the question whether the statutes of the State do in fact delegate to the municipality power to contract as to rates. A most striking example of this policy is found in *Freeport Water Company v. Freeport*,[1] where the majority of the court, following the interpretation put upon the state statute by the Illinois court, held that there had been no delegation. Also in the case of *Vicksburg v. Vicksburg Waterworks Company*,[2] the Supreme Court examined with care the Mississippi cases in which the state court had interpreted the statutes of that State, and followed its interpretation to the effect that there had been legislative delegation of authority to make rate contracts with utilities.

§ 194. *Certain Police Powers Cannot be Contracted Away.* But further and most important the Supreme Court has held that there are certain "police powers" which a State cannot contract away, and that, therefore, legislation in pursuance of such powers does not impair the obligation of a contract to which the State was a party, though the legislation is contrary to the contractual agreement. Those police powers, which it is universally agreed cannot be surrendered, are such as are exercised for the protection of the public health, safety, and morals. A State may provide for the suppression of nuisances, or pass other legislation in the interest of public health, even though this will infringe franchise privileges and rights.[3] Franchises for the manu-

[1] *Supra.* [2] *Supra.*

[3] Fertilizing Co. *v.* Hyde Park (1878) 97 U. S. 659; Butchers' Union Co. *v.* Crescent City Co. (1883) 111 U. S. 746.

facture of alcoholic beverages, or for the conduct of lotteries, do not prevent later legislation, which may be justified as protective of public morals.[1] Legislation requiring railroads to carry their tracks over or under highways, or to go to other expense or inconvenience for the safety of the public is not unconstitutional, though immunity from such legislation may have been contracted for.[2]

§ 195. *The Same Principles Should Apply to Contracts as to Rates and Taxes.* But do these cases mark the limits of that police power the exercise of which cannot be surrendered by the State? Blackstone speaks of "offences against the public police and economy," saying:

> "By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and not offensive in their respective stations."[3]

In a comparatively early case Chief Justice Taney said:

> "But what are the police powers of the 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. It is by virtue of this authority that it legislates."[4]

[1] Beer Co. *v.* Massachusetts (1877) 97 U. S. 25; Stone *v.* Mississippi (1879) 101 U. S. 814.

[2] Chicago B. & Q. Ry. *v.* Nebraska (1898) 170 U. S. 57; Northern Pacific Ry. *v.* Duluth (1908) 208 U. S. 583; Atlantic Coast Line Ry. *v.* Goldsboro (1914) 232 U. S. 548.

[3] IV *Black. Comm.*, 162. [4] License Cases (1847) 5 Howard 504, 583.

And a few years later Chief Justice Waite said:[1]

> "Under these [the police] 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."

Blackstone is speaking of a system of rules for the conduct of society rather than of a governmental power. Chief Justice Taney is speaking of a governmental power, but would seem to use the term "police power" as substantially synonymous with the power to legislate. Chief Justice Waite, however, applies the term to that sphere of legislative power which has to do with the control of the conduct of certain individuals for the benefit of society as a whole. It is in this sense that it has come to be used in American constitutional law. In Freund's Police Power[2] it is said that

> "it is possible to evolve at least two main attributes or characteristics which differentiate the police power; it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion."[3]

The legislative power to fix rates of public utilities is recognized as part of the police power, being the power to enforce the liability which rests upon public utilities to serve at reasonable rates.[4] This is a power distinctly for the protection of the public, and affecting vitally their welfare. Yet the Supreme Court has, as we have seen, declared that the State may contract away this power for a fixed period, and may authorize a municipal corporation to do so, and that legislation impairing such a contract is in conflict with the Constitution and void. The taxing power is not a part

[1] Munn *v.* Illinois (1876) 94 U. S. 113. [2] Sec. 3.

[3] The limits of the police power have been gradually pricked out by decisions under the Fourteenth Amendment. See discussion, secs. 270 to 274.

[4] Munn *v.* Illinois (1876) 94 U. S. 113; Northern Pacific Ry. *v.* North Dakota (1915) 236 U. S. 585.

of the police power, nor is it a power to exercise which a government is primarily created. Yet it is a power essential to the performance of the primary governmental powers. Nevertheless, as we have seen, it is held that the State may by contract surrender the exercise of that power, and that a tax laid in conflict with such a contract is void. The question as to what governmental powers can be abdicated by contract, even temporarily, is, of course, merely a question of public policy, where it is not controlled by the provisions of state constitutions.[1] It is a question of what powers need to be so continually available that public policy imperatively forbids their abdication by contract. In view of the continual necessity and constant practice of governmental regulation of rates, and the essential character of the taxing power, it seems regrettable that the Supreme Court of the United States gave currency to the doctrine that a State may contract away these powers.

As a matter of fact a very strong dissent was entered at the very outset in the matter of contractual surrender of the

[1] If the constitution of the State expressly forbids the State to contract away its power to regulate rates, an attempt to surrender by contract such right would be void, and later legislation in conflict with such contract would be entirely constitutional. Detroit *v.* Detroit Citizens Street Ry. Co. (1902) 184 U. S. 368, 382. There are such provisions in the constitutions of Missouri (art. 12, sec. 5), of Oklahoma (art. 18, sec. 7) and of Pennsylvania (art. 16, sec. 3). It is also probable that, in States which have, without express constitutional provisions, declared through their highest courts that it is unconstitutional for the State to abdicate by contract its fundamental police power to regulate rates, such a contract would be held void by the Supreme Court of the United States, and so not impaired by subsequent rate regulation. It was said in Freeport Water Co. *v.* Freeport (1901) 180 U. S. 587, 593: "We do not mean to say that if it was the declared policy of the State that the power of alienation of a governmental function did not exist, a subsequent asserted contract would not be controlled by such policy." There are such judicial declarations in several of our States. City of Tampa *v.* Tampa W.W. (1903) 45 Fla. 600; Portland *v.* Public Serv. Comm. (1918, Ore.) 173 Pac. 1178; Salt Lake City *v.* Utah Light Co. (1918, Utah) 173 Pac. 556; Georgia Ry. & P. Co. *v.* Railroad Commission (1919, Ga.) 98 S. E. 696; Memphis *v.* Eulve (1919, Tenn.) 214 S. W. 71; City of Chicago *v.* O'Connell (1917) 278 Ill. 591.

taxing power. In the case in which the Supreme Court recognized the power of a state legislature to make an irrevocable contract limiting its taxing power Justice Catron, dissenting, declared the correct view to be[1]:

> "That according to the constitutions of all the States of the Union, and even of the British Parliament, the sovereign political power is not the subject of contract so as to be vested in an unrepealable charter of incorporation, and taken away from, and placed beyond the reach of, future legislatures; that the taxing power is a political power of the highest class, and each successive legislature having vested in it, unimpaired, all the political powers previous legislatures had, is authorized to impose taxes on all property in the State that its constitution does not exempt."[2]

Some years later Justice Miller dissenting in a similar case said[1]:

> "We do not believe that any legislative body, sitting under a state constitution of the usual character, has a right to sell, to give, or to bargain away forever the taxing power of the State. This is a power which in modern political societies, is absolutely necessary to the continued existence of every such society. . . . To hold, then, that any one of the annual legislatures can by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve, and that their action in that regard is strictly lawful."

The doctrine of the prevailing opinions in these cases has however, been repeatedly followed, though often criticized.

[1] Peoria Branch of the State Bank of Ohio *v.* Knoop (1853) 16 Howard 369, 404. Justice Daniel and Justice Campbell also dissented.

[2] Washington University *v.* Rouse (1869) 8 Wallace 439, 443. Chief Justice Chase and Justice Field concurred in this dissent.

§196. *Broader Legislative Power Indicated by Recent Cases under the Contract Clause.* Until the latter part of the nineteenth century the public mind was suspicious of governmental encroachment, hostile to governmental regulation, and bent upon the preservation of the largest possible degree of individual freedom. This is reflected in the strictness with which the Supreme Court interpreted, as against the States, the constitutional restrictions upon state action. But during the last generation the pendulum has swung, and there has been an increasing demand for social legislation and for regulation of big business, and particularly of public utilities. Gradually, responsive to this change in the attitude of the public mind, the opinions of the Supreme Court of the United States and our other judicial tribunals have in recent years shown a change of emphasis, as a result of which the constitutional limitations upon state action have been liberally construed in favor of a wide power of governmental control. This tendency is particularly evident in decisions under the Fourteenth Amendment, as we shall see later, but it is also becoming apparent in connection with the contract clause of the Constitution. A striking case in this connection is *Chicago and Alton Railroad Company v. Tranbarger.*[1] A statute of Missouri passed in 1907 required railroads to make suitable openings in embankments on their "rights of way" for water drainage. The company in question had constructed its embankment long before the passage of this statute, and the company contended that the statute impaired its rights secured from the charter contract, and took its property without due process. After consideration of other points the court said[2]:

"But a more satisfactory answer to the argument under the contract clause, and one which at the same time refutes the contention of plaintiff in error under the due process clause, is that the statute in question was passed under the police power of the State for the general benefit

[1] (1915) 238 U. S. 67. [2] *Ibid.*, 76.

of the community at large and for the purpose of preventing unnecessary and wide-spread injury to property.

"It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 558, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of public health, morals, or safety. . . .

"We deem it very clear that the act under consideration is a legitimate exercise of the police power, and not in any proper sense a taking of the property of plaintiff in error."

This language is very important. It is not only the police power, which has to do with safety, health, and morals, which cannot be surrendered by contract, but "the power of the State to establish all regulations reasonably necessary to secure the health, safety, and *general welfare*[1] of the community . . . inalienable even by express grant." The court concludes that the power to protect land from being flooded is so necessary for the "general welfare of the community" that it cannot be abridged even by express grant. But is not the police power to regulate the rates of public utilities, in order to prevent unreasonable rates and discriminatory practices much more important to the "general welfare of the community," than the police power to prevent the flooding of one person's land by the use made of their lands by others? One is led to hope that perhaps it is not yet too late for the Supreme Court to reconsider its decisions that a State may by charter or franchise con-

[1] The italics are introduced by the present writer.

tract surrender its police power to regulate rates and fares of public utilities.[1]

This hope is given support by the summary way in which Chief Justice White, speaking for a unanimous court in a recent case, dealt with the contention that certain condemnation proceedings were unconstitutional because the State had previously contracted not to condemn the property in question. The court said[2]:

> "There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the States cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of the power to legislate for the preservation of society or to secure the performance of essential governmental duties."

§197. *Contracts Between Individuals are Made Subject to the Police Power.* Are contracts between private individuals made subject to the police power, so that the exercise of that power, though it interferes with their operation or enforcement, does not impair their obligation? As early as

[1] As a result of the great increase of cost of service resulting from conditions incident to the World War, there was during the years 1914 to 1920 a very interesting reversal of parties in the efforts to get away from franchise and charter rates. During those years the utilities sought legislation increasing such rates, and were often opposed by municipalities with which the utilities had franchise contracts, on the ground that such legislation would impair contractual obligations. The answer has been that the municipality in making such a contract acts for the State, and that, therefore, the utility and the State are the contracting parties, and for them to change the contract by mutual agreement is no impairment of the obligation of the contract. See Worcester *v.* Street Ry. Co. (1905) 196 U. S. 539, and the consideration of the subject in an article entitled "Regulating Franchise Rates," by C. K. Burdick, *29 Yale Law Journal*, 589, where the state decisions will be found.

[2] Pennsylvania Hospital *v.* Philadelphia (1917) 245 U. S. 20, 23.

1870, in the *Legal Tender Cases*,[1] the Supreme Court spoke as follows on this subject:

> "If, then, the legal tender acts were justly chargeable with impairing contract obligations, they would not, for that reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law. But, as already intimated, the objection misapprehends the nature and extent of the contract obligation spoken of in the Constitution. As in a state of civil society property of a citizen or subject is ownership subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate governmental authority."

It is quite true that the court was dealing with Congressional legislation, and that such legislation which impairs the obligation of contracts can only be attacked under the due process clause of the Fifth Amendment, since the express prohibition of legislation impairing the obligation of contracts in the body of the Constitution is only by its terms a limitation upon state action. However, the language of the court in the paragraph quoted above is sweeping, and intended to apply to state governments as well as to the government of the United States, and obviously intended as an interpretation of the constitutional clause against the impairment of contracts.

In *Manigault v. Springs*[2] the same principle which was laid down in the *Legal Tender Cases*, *supra*, was directly applied to state legislation which relieved a party from his performance of a contract previously entered into. Defendants had contracted to remove a dam across a stream and to keep the stream open, thus giving plaintiff access by water to his land, and making the cultivation of his land more advantageous. The dam was removed, but the state legis-

[1] 12 Wallace 457, 550.

[2] (1905) 199 U. S. 472.

lature later authorized defendant to construct another dam for the purpose of reclaiming low and swampy land. The court held that there was a legitimate exercise of the police power, and declared[1]:

> "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals. Familiar instances of this are where parties enter into contracts, perfectly lawful at the time, to sell liquor, operate a brewery or distillery, or carry on a lottery, all of which are subject to impairment by a change of policy on the part of the State, prohibiting the establishment or continuance of such traffic; in other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good."

This view, that all contracts between individuals are made subject to the police power of the State, and that legislation enacted in the reasonable exercise of that power, though it interferes with or excuses the performance of contracts, does not unconstitutionally impair their obligation, has been constantly reiterated by the United States Supreme Court.[2]

[1] *Ibid.*, 480.

[2] Hudson County Water Co. *v.* McCarter (1908) 209 U. S. 349, 357; Atlantic Coast Line R. R. Co. *v.* Goldsboro (1913) 232 U. S. 548, 558; Union Dry Goods Co. *v.* Georgia Pub. Ser. Corp. (1919) 248 U. S. 372; Producers Transp. Co. *v.* Railroad Comm. of California (1920) 251 U. S. 228; Marcus Brown Holding Co. *v.* Feldman (1921) 41 Sup. Ct., R. 465.

§198. *Reservation of Right to Alter Charter Contracts.* When it was decided in the *Dartmouth College* case that a corporate charter is a contract whose obligations are protected against impairment by the Federal Constitution, it was suggested that this limitation upon state power might be obviated by granting the charter subject to the right to amend, alter, or repeal.[1] If the parties agree in their contract that the State may exercise such power, its exercise is obviously no impairment of the contractual obligations. This suggestion has been very generally acted upon in the grant of charters, but not so generally in the grant of franchises by municipalities. It has sometimes been intimated that property rights might be constitutionally affected under the power reserved to alter and amend charters when they could not be so affected under the police power.[2] This seems incorrect. It would seem that all that is effected by reserving such power is to put the parties in the same position as if there were no constitutional provision prohibiting the impairment of the obligation of contracts. The reservation of such power still leaves the due process clause of the Fourteenth Amendment fully operative, and so makes any taking of property without due process as unconstitutional as if the charter contained no provision for alteration or amendment.[3]

[1] Dartmouth College *v.* Woodward (1819) 4 Wheaton 518, 712.

[2] People *v.* Beekes Dairy Co. (1918) 222 N. Y. 416.

[3] Commonwealth *v.* Essex Co. (1859) 13 Gray 239, 253 (Shaw, C. J.); Detroit *v.* Detroit etc. R. Co. (1880) 43 Mich. 140, 147 (Cooley, J.); Spring Valley W. W. Co. *v.* Shottler (1883) 110 U. S. 347, 368; Lake Shore & M. S. R. R. *v.* Smith (1898) 173 U. S. 684, 698; Chicago, M. & St. P. R. R. *v.* Wisconsin (1915) 238 U. S. 491, 501; note in 3 *Cor. L. Quar.*, 283.

CHAPTER XXIII

FULL FAITH AND CREDIT

§199. *What is Meant by the Requirement of Full Faith and Credit.* It is provided in the Constitution that,

> "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."[1]

Of course the provision that "full faith and credit shall be given in each State to the public acts . . . of every other State" does not give any extra territorial effect to state legislation. It simply requires that, when rights or obligations have in one State been fixed by the statutes of that State, the force of such statutes in fixing such rights or obligations shall be recognized in controversies arising in any other State.[2] The public records which are referred

[1] Art. IV, sec. 1. For a history of the section see Watson on the Constitution, pp. 1193 to 1196. The Articles of Confederation provided that, "Full faith and credit shall be given in each of these States to the records, acts, and judicial proceedings of the courts and magistrates of every other State." (Art. IV.) The Commonwealth of Australia Constitution Act provides that, "Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State." (Chap. iv, sec. 118.)

[2] "But the courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independent jurisdiction from that exercised by the state courts. . . . And the courts of the United States are bound to give to the judgments of the State courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States." Cooper *v.* Newell (1899) 173 U. S. 553, 567.

to are not only records of judicial proceedings but records of deeds, mortgages, marriages, and the like, kept in public offices.[1]

§200. *Full Faith and Credit as Applied to Judgments.* The constitutional provision as applied to judgments does not give the judgment of one State the force of a domestic judgment in another State, but makes it evidence in that other State of the rights and obligations of the parties as established by the judgment.[2] Nor does the provision put upon any State the duty of enforcing a judgment in a criminal case obtained in another State.[3] There is no constitutional duty resting upon the state or federal courts to give full faith and credit to judgments of foreign countries. If this is done it is solely as the result of comity.[4]

It seems that the fact that the judgment in one State was obtained upon an obligation of a character which it is against the declared policy of another State to enforce, does not constitute an excuse to the second State for a refusal to give full faith and credit—*i. e.*, a refusal to enforce the judgment.[5] It appeared in the case cited that a gambling contract was entered into in Mississippi, in which State such contracts are by statute declared to be unenforceable. The parties submitted their controversy to arbitration, and an award was made. An action upon this award was brought in Missouri,

---

So also by federal statute the records and judgments of the territories and District of Columbia are entitled to full faith and credit in the state courts. Embrey *v.* Palmer (1882) 107 U. S. 3.

[1] For the methods of authentication see U. S. Rev. Stats., secs. 905 and 906.

[2] Thompson *v.* Whitman (1873) 18 Wallace 457, 463.

[3] Huntington *v.* Attrill (1893) 146 U. S. 657. But this court points out that a distinction is to be made between a judgment on a statute which may in a broad sense be termed penal as to the defendant, but which is for the purpose of remedying another person, and a judgment on a statute which aims merely to punish a wrong done to the state sovereignty. The full faith and credit clause applies to the former, but not to the latter.

[4] Ætna Life Ins. Co. *v.* Tremblay (1912) 223 U. S. 185.

[5] Fontleroy *v.* Lum (1908) 210 U. S. 230. Chief Justice White wrote a dissenting opinion concurred in by three other justices.

and judgment obtained. It was held by the Supreme Court that the constitutional provision required that full faith and credit be given to this judgment in Mississippi. But it seems that a State may expressly deny to its courts jurisdiction of a suit between two foreign corporations where the cause of action did not arise within the State, and this will not constitute a denial of full faith and credit, though the cause of action be based upon a judgment rendered in another State.[1] *A fortiori* may a State deny to its courts jurisdiction of actions based solely upon a statute of a sister State, as, for instance, statutes giving actions for death[2]; though it may, of course, allow such actions on principles of comity.

While the Constitution requires that full faith and credit shall be given in each State to judgments of every other State, this is only true if the court rendering the judgment had jurisdiction, for if it had not the judgment was a nullity for lack of due process; and the fact that the record of the case on its face shows jurisdiction is not conclusive of the question, but the court in determining whether the judgment was entitled to full faith and credit may go beyond the record and examine the facts.[3]

§201. *Judgments in Rem.* In a proceeding *in rem*, if the *res* is within the State, the state court has jurisdiction though the defendant did not appear and was not served within the State, if the court in taking jurisdiction has proceeded in accordance with the rules in force in the State, including reasonable rules for constructive notice by publication.[4] The court in the case just cited makes clear the field in which this doctrine applies, as follows[5]:

[1] Anglo-American Provision Co. *v.* Davis Provision Co. No. 1 (1903) 191 U. S. 373.

[2] Dougherty *v.* American McKenna Process Co. (1912) 255 Ill. 369; L. R. A. 1915 F. 955, and note.

[3] Thompson *v.* Whitman (1873) 18 Wallace 457. Old Wayne Mutual Life Assoc. *v.* McDonough (1907) 204 U. S. 8. (As to due process in judicial proceedings, see chap. 29.) But judgments are not "re-examinable upon the merits, nor impeachable for fraud in obtaining them." Hanley *v.* Donoghue (1885) 116 U. S. 1, 4.

[4] Pennoyer *v.* Neff (1877) 95 U. S. 714. [5] *Ibid.*, 734.

"It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

§202. *Judgments in Personam.* In a proceeding *in personam*—that is, in a proceeding where a judgment is sought directing the defendant to do or to refrain from doing something, or directing the defendant to pay a sum of money, and property is not by the proceedings brought within the control of the court so as to make the proceeding one *in rem*—in order that a judgment may be entitled to full faith and credit, the case must be of a character to come within the jurisdiction of the court, and the court must have obtained jurisdiction of the defendant by proper service of process upon him,[1] or by his appearance in the action. If the court has not such jurisdiction of the subject matter and of the defendant, the proceeding is without due process,[2] is, therefore, without validity even in the jurisdiction where rendered, and is not entitled to full faith and credit.[3]

§203. *Judgments in Divorce Actions.* Judgments in divorce actions do not, however, fall into either of these categories. Each State has the right to determine the status of its own residents, including the right to determine whether or not they shall have the status of married or of unmarried persons; and a State cannot be deprived of this right with regard to a resident by the fact that the husband

[1] See chap. 29 as to what is proper service.

[2] See sec. 237.

[3] Pennoyer *v.* Neff (1877) 95 U. S. 714.

or wife of that resident has removed from the jurisdiction. It may, therefore, decree a divorce to one of its residents, when the defendant is a non-resident, if it makes an effort to give notice by publication according to reasonable rules in force in the State. As a result of this decree both parties will be divorced in that State, for a decree cannot divorce a husband from a woman, and still leave the woman with a husband.[1] But if the plaintiff and the defendant are both nonresidents the court has no jurisdiction, and the decree is not valid even in the State where it is rendered, and the finding of the court of divorce on the question of residence or domicile is not conclusive.[2]

However, the fact that the parties are no longer husband and wife in the State of divorce, does not necessarily determine that they are not still husband and wife in some other State. Their status in that other State will be determined by the law of that State, except when the judgment of divorce in the first State is entitled under the Constitution to full faith and credit, or is given effect in the second State on grounds of comity.[3] A court has such jurisdiction as will make its judgment of divorce entitled to full faith and credit under the following circumstances:

(1) When the defendant as well as the plaintiff was a resident of the State in which the judgment was rendered. Normally a married woman's domicile is the same as her husband's. When a husband deserts his wife she may acquire a separate domicile. She may not, however, acquire a separate domicile when she leaves her husband without cause, but she may do so if she leaves him for reasons which would support an action by her for a divorce or legal separation.[4]

(2) When the defendant, though not a resident of the

[1] Haddock *v.* Haddock (1906) 201 U. S. 562, 569.

[2] Bell *v.* Bell (1901) 181 U. S. 175; Andrews *v.* Andrews (1903) 188 U. S. 14.

[3] Examples of the recognition on grounds of comity of divorces obtained in other States are Ditson *v.* Ditson (1856) 4 R. I. 87; Felt *v.* Felt (1899) 59 N. J. Eq. 606; Dunham *v.* Dunham (1896) 162 Ill. 589.

[4] Haddock *v.* Haddock (1906) 201 U. S. 562, 570.

State in which the judgment was rendered, was served with process in that State, or voluntarily appeared in the divorce proceedings.[1]

(3) When, though the defendant was not a resident of the State in which the judgment was rendered, and was not served with process in that jurisdiction and did not voluntarily appear, the State in which the judgment was rendered was the "last matrimonial domicile" of the parties. In *Atherton v. Atherton*[2] it appeared that the husband's domicile was Kentucky and there the husband and wife lived together. The wife left her husband and went to New York where she later brought the action for divorce. The New York court found that the wife left her husband because of his cruel and abusive treatment without fault on her part. In the New York action for divorce the husband appeared and set up a divorce obtained previously by him in Kentucky upon constructive service. The New York court found that the wife had become a resident of New York, and that the Kentucky divorce was inoperative in New York, and gave judgment in the wife's favor for divorce. Upon appeal the Supreme Court of the United States determined that the Kentucky decree was entitled to full faith and credit in New York, and constituted, therefore, a defense to the divorce action in the latter State. The Supreme Court said[3]:

> "This case does not involve the validity of a divorce granted, on constructive service, by the court of a State in which only one of the parties ever had a domicile; nor the question to what extent the good faith of the domicile may be afterwards inquired into. In this case the divorce in Kentucky was by the court of the State which had always been the undoubted domicile of the husband and which was the only matrimonial domicile of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky."

[1] Haddock *v.* Haddock (1906) 201 U. S. 562, 570.
[2] (1901) 181 U. S. 155. [3] *Ibid.* 171.

The court refused to inquire into the validity of the wife's claim of domicile in New York, as it would have done if the enforceability of the Kentucky divorce in New York had turned upon the question whether Kentucky was the wife's domicile as well as that of the husband. In the later case *Thompson v. Thompson*[1] the Supreme Court in speaking of the case of *Haddock v. Haddock*[2] said:

> "The New York court refused to give credit to the Connecticut judgment, and this court held that there was no violation of the full faith and credit clause in the refusal, and this because there was not at any time a matrimonial domicile in the State of Connecticut and therefore the *res*—the marriage status—was not within the sweep of the judicial power of that State."

The facts in the *Thompson* case were similar to those in *Atherton v. Atherton* and the court held that the divorce obtained by the husband in the State of his domicile and which was the last matrimonial domicile was binding in the District of Columbia to which the wife had moved.

Great confusion, and situations that are in many ways unfortunate, may and often do result from the fact that persons may have obtained divorces valid in the States where granted but which other States are not bound to recognize. However, it is, of course, possible for a State to give effect to a foreign divorce through comity, though the decree was not such as to be entitled to full faith and credit. This course is followed by a considerable number of the States, although different States hedge it about with varying limitations, resulting from their different views of what public policy dictates.[3]

[1] (1913) 226 U. S. 551, 562. [2] (1906) 201 U. S. 562.

[3] Excellent collections of cases will be found in notes in 59 L. R. A. 162, 167; 18 L. R. A. (N. S.) 647, 649; L. R. A. 1917 B 1032, 1042.

CHAPTER XXIV

INTERSTATE PRIVILEGES AND IMMUNITIES

§204. *Citizens Are Entitled to Equal Privileges and Immunities in Each State.* It is declared in the Constitution that, "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states."[1] The Fourteenth Amendment, which was adopted in 1868, further provides that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[2]

[1] Art. IV, sec. 2, par. 1. The forerunner of this provision is found in article IV of the Articles of Confederation:

> "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of any property imported into any State to any other State of which the owner is an inhabitant. . . ."

It will be noted that there is here a curious confusion of the terms "free inhabitants," "free citizens," and "people," as pointed out in *The Federalist*, No. 42.

The Commonwealth of Australia Constitution Act provides in Section 117:

> "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

[2] For a consideration of this clause of the amendment see sec. 112.

§205. *What Privileges and Immunities are Protected.* The Supreme Court has refused to attempt a complete and comprehensive definition of the privileges and immunities guarantied by the Constitution.

> "It is safer and more in accordance with the duty of a judicial tribunal to leave the meaning to be declared in each case, upon a view of the particular rights asserted or denied therein. And especially is this true, when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief."[1]

The court has, however, worked out with reasonable clearness the privileges and immunities which a citizen is entitled to in one State as a result of citizenship in another State. He has a right

> "to pass into any other State of the Union, for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the States, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."[2]

§206. *Exclusion of Foreign Corporations.* But "special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States."[3] The

[1] Conner *v.* Elliott (1855) 18 Howard 591, 593.

[2] Ward *v.* Maryland (1870) 12 Wallace 418, 430; Blake *v.* McClurg (1898) 172 U. S. 239. But in the latter case it is said that, "a State may require a non resident, although a citizen of another State, to give bond for costs, although such bond is not required of a resident. Such a regulation of the internal affairs of a State cannot reasonably be characterized as hostile to the fundamental rights of citizens of other States." (P. 256.)

[3] Paul *v.* Virginia (1869) 8 Wallace 168, 178.

right to be a corporation is a special privilege conferred by the State granting the charter of incorporation, and this right other States are not bound to recognize,[1] and a corporation as a legal entity is not a citizen in the sense in which that term is used in the Fourth Article of the Constitution.[2] The exclusion of a foreign corporation is not unconstitutional, except where it wishes to enter for purposes of interstate commerce, or for the performance of some "governmental or quasi-governmental functions" on behalf of the National Government.[3] Under these latter circumstances any interference with the corporation would be an infringement of the federal government's exclusive sphere of control.[4]

Since a State may, except in the cases noted, exclude a foreign corporation, it may equally attach conditions precedent to the privilege of doing business in the State.[5] If a foreign corporation is only given a license to do business in a State for a definite period, it has been held that at the expiration of that period the privilege may be withdrawn, or a new condition attached to its renewal, without infringing the equal protection clause, the corporation, upon the expiration of the license, being in the eye of the law "outside,

[1] By parity of reasoning a person who has been granted the privilege of practicing law, or medicine in one State does not acquire a like privilege in every other State. Robinson's Case (1881) 131 Mass. 376; *Ex parte* Spinney (1875) 10 Nev. 323.

[2] Paul *v.* Virginia (1869) 8 Wallace 168. It is clear that a corporation being neither born nor naturalized does not come within the term "citizen" in section one of the Fourteenth Amendment. With regard to corporations and Article III see sec. 44; and with regard to their rights as "persons" under the Fourteenth Amendment, see secs. 236 and 237.

[3] Pembina Mining Co. *v.* Pennsylvania (1888) 125 U. S. 181, 188, 190; Hooper *v.* California (1895) 155 U. S. 648, 652, and cases cited.

[4] *Ibid.;* International Text Book Co. *v.* Pigg (1910) 217 U. S. 91.

[5] "The States may, therefore, require for the admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provisions of the first section of the Fourteenth Amendment." Pembina Mining Co. *v.* Pennsylvania (1888) 125 U. S. 181, 189.

at the threshold, seeking admission, with consent not yet given."[1]

Strong efforts have been made by the States to prevent the removal of cases, on the ground of diverse citizenship of the parties,[2] to the federal courts by foreign corporations. When it has been sought to reach this result by requiring as a condition to admission to the State, an agreement by the foreign corporation not to remove to the federal courts suits which are brought in the courts of the State, the Supreme Court has declared such agreements to be void as attempts to oust the federal courts of their constitutional jurisdiction.[3] However, in *Doyle v. Continental Insurance Company*[4] and *Security Mutual Insurance Company v. Prewitt*[5] the Supreme Court held valid a condition attached to a license to a foreign corporation to do business in the State, to the effect that, if the corporation should remove to a federal court an action brought in a court of the State, its license would be revoked.

> "No stipulation or agreement being required as a condition for coming into the State and obtaining a permit to do business therein, the mere enactment of a statute, which, in substance, says if you choose to exercise your right to remove a case into a federal court your right to further do business within the State shall cease and your permit shall be withdrawn, is not open to any constitutional objection."[6]

Nevertheless the authority of these two cases has been confined to a very narrow field by subsequent decisions. If the foreign corporation is already within the jurisdiction of

[1] Philadelphia F. Ins. Co. *v.* New York (1886) 119 U. S. 110, 119. As to when a corporation is within the jurisdiction of a State so as to be entitled to equal protection, see sec. 276.

[2] See sec. 44.

[3] Insurance Co. *v.* Morse (1874) 20 Wallace 445; Baron *v.* Burnside (1887) 121 U. S. 186; Barrow S. S. Co. *v.* Kane (1898) 170 U. S. 100.

[4] (1876) 94 U. S. 535, Justices Bradley, Swayne and Miller dissenting.

[5] (1906) 202 U. S. 246, Justices Day and Harlan dissenting.

[6] *Ibid.*, 257.

the State at the time when the condition against resort to federal tribunals is laid down by state legislation, the foreign corporation has come under the shield of the equal protection clause, and such legislation constitutes a denial of equal protection.[1] Furthermore it seems that if the foreign corporation desires to do interstate as well as intrastate business within the State such a condition is a burden placed upon interstate commerce and is unconstitutional for that reason.[2]

§207. *Private Rights Only Are Protected by the Privileges and Immunities Clause.* The provision of the Constitution under consideration does not give the citizen of every State the right to vote or to hold office in every other State. It secures and protects private rights as distinguished from public rights.[3] The early case of *Corfield v. Coryell*[4] is interesting. A New Jersey statute forbade any person not an inhabitant of the State to gather oysters within the State on board of any vessel not wholly owned by an inhabitant of the State. This statute was held not to be in conflict with the Constitution, on the ground that the right to creatures *ferœ naturœ*, such as wild animals, fish and oysters, is the property right of all of the citizens of the State collectively, and that this right is not such a privilege as the constitution has reference to, it not being reasonably within the purpose of the Constitution to allow an outsider to share in this peculiar collective right.

[1] Herndon *v.* Chicago, R. I. & Pac. Ry. (1910) 218 U. S. 135, 158. As to the equal protection clause see generally sec. 276.

[2] Harrison *v.* St. Louis & San Fran. R. R. (1914) 232 U. S. 318, 332; Wisconsin *v.* Philadelphia & R. Coal Co. (1916) 241 U. S. 329.

[3] See the early statement in Campbell *v.* Morris (1797) 3 Harr. & McH. (Md.) 535. See also Blake *v.* McClung (1895) 172 U. S. 239, 256.

[4] (1825) Fed. Cas. No. 3, 230.

CHAPTER XXV

INTERSTATE RENDITION OF FUGITIVES

§208. *Constitutional and Statutory Provisions.* An important provision of the Constitution[1] is that,

> "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

Legislation to make this provision effective was enacted by Congress in 1793,[2] which remains on the statute book at present day, with only slight verbal changes.[3] It puts upon the governor of the State or Territory to which a person has fled the duty to arrest and deliver him to the agent of the State or Territory from which he has fled, upon demand made by the governor of that State or Territory, upon production of a copy of an indictment found, or an affidavit made before a magistrate charging the fugitive with the commission of treason, felony or other crime, certified as authentic by the governor of the demanding State. If no

[1] Art IV, sec. 2, par. 2. This paragraph is taken with slight changes from Article IV of the Articles of Confederation.

[2] Act of Feb. 12, 1793, Chap 7, 1 Stat. 302. In 1791 the governor of Pennsylvania made a demand upon the governor of Virginia for the extradition of a criminal. Since it was not clear under the constitutional provision what proof should be required that the person demanded was a fugitive from justice, the governors agreed to bring the matter before the President, who submitted it to the consideration of Congress. The statute of 1793 was the result. Kentucky *v.* Dennison (1860) 24 Howard 66, 105.

[3] U. S. Rev. Stat. secs. 5278 and 5279.

agent appears to take the fugitive away within six months of arrest he may be discharged. Expenses of arrest and transportation are to be borne by the demanding State. It is made a crime to take by force a person so arrested from the agent of the demanding State.

§209. *This Duty Not Enforceable by Mandamus.* Clearly the constitutional provision, and the congressional legislation enacted by its authority, place a duty upon the governor of a State in which a fugitive is found, and to whom the requisite evidence of guilt is presented, to arrest the fugitive and deliver him to the agent of the demanding State. In the case of *Kentucky v. Dennison*[1] the question was raised as to whether, under such circumstances, a writ of mandamus could issue from the Supreme Court to a governor directing him to make the arrest and delivery demanded, when he had refused to do so. The court recognized that a governor under such circumstances was under a "moral duty" to make the arrest and delivery.

> "The performance of the duty, however, is left to depend on the fidelity of the State Executive to the compact entered into with the other States when it adopted the Constitution of the United States, and became a member of the Union. It was so left by the Constitution, and necessarily so left by the Act of 1793."[2]

Cases have from time to time arisen in which interstate extradition has been refused, but for the most part the chief executives of the States have conscientiously responded to the "moral duty" which rests upon them.[3]

[1] (1860) 24 Howard 66. [2] *Ibid.*, 109.

[3] A State has no power under the Constitution to surrender fugitives from justice to foreign States. On this point the Supreme Court divided evenly in Holmes *v.* Dennison (1840) 14 Peters 540, but later declared unanimously against the possession of such power by the States, on the ground that international extradition falls within the exclusive jurisdiction of the federal government over foreign relations. Though this was a *dictum* it may be considered authoritative. United States *v.* Rauscher (1886) 119 U. S. 407. See also *Ex parte* Holmes (1840) 12 Vt. 631, and People *v.* Curtis (1872) 50 N. Y. 321. With regard to international extradition see sec. 36.

§210. *Supplementary State Legislation.* Although any state legislation in conflict with the constitutional provision or with congressional legislation as to interstate extradition would be void, States may constitutionally legislate in aid of congressional legislation on the subject. Such, for instance, would be a state statute directing how the fugitive is to be arrested and secured.[1]

§211. *Judicial Review of Arrest and Surrender of Fugitive.* The act of a governor in arresting a fugitive from justice and in delivering him to an agent of the demanding State may be inquired into by a federal court through a writ of habeas corpus, to determine whether he has acted in accordance with the provisions of the Constitution and federal statute.[2] Since neither the arresting officer of the State in which the fugitive is arrested, nor the agent of the demanding State to whom he is delivered, is an officer of the United States, the courts of the State in which the fugitive is arrested may also inquire, by means of habeas corpus proceedings, into the validity of the arrest.[3]

Upon a demand for interstate extradition two things must appear before compliance will be justified,

> "first, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, certified as authentic by the governor of the State making the demand; and, second, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand."[4]

The first of these requirements presents a question of law, upon the papers presented, in a habeas corpus proceeding,[5] and if it is found that the papers do not conform to the

[1] Commonwealth *v.* Tracy (1843) 5 Metcalf (Mass.) 536; *Ex parte* Walters (1913) 106 Miss. 439; *Ex parte* McKean (1878) 3 Hughes (Fed.) 23.

[2] Roberts *v.* Reilly (1885) 116 U. S. 80.

[3] Robb *v.* Connelly (1884) 111 U. S. 624.

[4] Roberts *v.* Reilly (1885) 116 U. S. 80.

[5] *Ibid.*

requirements of the federal statute, the prisoner must be discharged from custody. It is sufficient, however, if the indictment or affidavit "shows satisfactorily that the fugitive has been in fact, however inartificially, charged with crime in the State from which he has fled," though the indictment may not be faultless as to pleading[1]; and in habeas corpus proceedings the court will not consider the question whether the fugitive is in fact guilty of the crime charged.[2]

The question whether the person demanded is a fugitive from justice is a question of fact, which the governor upon whom the demand is made must decide, and his decision is *prima facie* evidence of the fact in proceedings on a writ of habeas corpus. "If upon a question of fact made before the governor which he ought to decide, there were evidence *pro* and *con* the courts might not be justified in reviewing the decision of the governor upon such question," but when the evidence presented to the governor, that the person arrested is not a fugitive, is conclusive, the *prima facie* case is rebutted, and the prisoner should be discharged.[3] A person who was not actually in the State when the crime is alleged to have been committed is not a fugitive; constructive presence is not sufficient, for if he was not in the State

> "it could not be properly held that he had fled from it. . . . He must have been there when the crime was committed, as alleged, and if not, a subsequent going there and coming away is not a flight."[4]

But the motive with which he left the State where it is alleged that he committed a crime is not important.[5] The right to interstate extradition applies to all crimes whether

[1] Pierce *v.* Creecy (1908) 210 U. S. 387, 402.

[2] Drew *v.* Thaw (1914) 235 U. S. 432.

[3] Hyatt *v.* Corkran (1903) 188 U. S. 691, 711. [4] *Ibid.*, 719.

[5] "It long has been established that for purposes of extradition between the States it does not matter what motive induces the departure." Drew *v.* Thaw (1914) 235 U. S. 432, 439.

felonies or misdemeanors, and whether statutory or derived from the common law.[1]

§212. *Kidnapping of Fugitives.* A very interesting question was presented to the United States Supreme Court in the case of *Mahon v. Justice.*[2] The governor of Kentucky had made a demand upon the governor of West Virginia for the arrest and delivery of Mahon, accused of murder in Kentucky. Before the arrest was made persons from Kentucky entered West Virginia, apprehended Mahon and carried him to Kentucky where he was put in jail pending trial under an indictment for murder. The governor of West Virginia on behalf of that State, and Mahon individually presented to the federal district court in Kentucky petitions for a writ of habeas corpus, directing the production of Mahon and his return to West Virginia. The court admitted that Mahon would have been entitled, while still in West Virginia to a writ of habeas corpus from the federal or West Virginia courts to free him from the unlawful arrest in that State; that the persons kidnapping him might have been extradited from Kentucky to West Virginia, because of the crime committed in the latter State; and that if Mahon's arrest after his return to Kentucky was in any respect illegal he might obtain a writ in the Kentucky courts to free him from such arrest. The court, however, found no justification for freeing him from lawful arrest in Kentucky because others had committed a wrong against him, or had committed an offense against another State, and held that he was not in custody in violation of the Constitution.[3]

[1] Kentucky *v.* Dennison (1860) 24 Howard 66, 99, 102.

[2] (1888) 127 U. S. 700. And see Pettibone *v.* Nichols (1906) 203 U. S. 192.

[3] Section 753 of the United States Revised Statutes declares that, "the writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States."

The court suggested that Congress *might* pass a law requiring the return of persons wrongfully abducted from a State, but did not pass upon that question. Justice Bradley and Justice Harlan dissented on the ground that the Constitution by providing for interstate extradition excluded all other means of obtaining jurisdiction by one State of a person who had fled to another State, and that a person held in one State as the result of abduction from another is, therefore, held in violation of the Constitution, and that the proper remedy of the State from which such person is abducted is by writ of habeas corpus.[1]

§213. *A Person Extradited for One Crime May Be Tried for Others.* When a person has been extradited from one State to another for the commission of a particular cime, he may, nevertheless, be tried in the demanding State for other crimes. There is nothing in the Constitution to prevent such trials, and the fugitive having been brought within the jurisdiction of the State may properly be tried by that State for any past offenses against its sovereignty.[2]

§214. *Return of Persons Held to Service.* There is a further provision in the Constitution with regard to interstate relations, as follows:[3]

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

This provision was undoubtedly introduced to protect slave owners;[4] and, therefore, since the adoption in 1865 of the

[1] For a consideration of the situation when a fugitive has been abducted from a foreign country see sec. 36.

[2] Lascelles *v.* Georgia (1893) 148 U. S. 537. For a consideration of this question when a fugitive has been extradited from a foreign country see sec. 36.

[3] Art. IV, sec. 2, par. 3. This is similar to the provision contained in Article VI of the Ordinance for the government of the Northwest Territory, adopted by the Continental Congress in July, 1787.

[4] For a full discussion of the constitutional provision see Prigg *v.* Pennsylvania (1842) 16 Peters 539.

Thirteenth Amendment abolishing slavery and involuntary servitude, it is practically obsolete. But since the Thirteenth Amendment does not prevent the apprenticing of minors, the provision above quoted may still apply to such persons.[1]

[1] See a note in *Willoughby on the Constitution*, 234.

CHAPTER XXVI

THE THIRTEENTH AMENDMENT

§215. *Text of the Amendment.* The Thirteenth Amendment to the Constitution[1] is as follows:

"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."

§216. *Slavery Recognized by the Constitution.* Although, at the time of the adoption of the Constitution, slavery was dying out in the northern States, it prevailed very extensively in the south, where slave labor was found to be particularly profitable. In order to obtain the adherence of the southern States to the new system of government it was necessary to recognize the institution of slavery, and to make certain concessions to the slave-holding States. In the first place, as we have seen,[2] slavery is tacitly recognized in the Fourth Article of the Constitution, which provides for the return of runaway slaves. Again, in the First Article, national legislation is forbidden before the year 1808 which would prohibit the importation of slaves.[3] The greatest difficulty arose, however, over the questions of direct taxation and representation in Congress. On these

[1] Adopted in 1865.

[2] Sec. 214.

[3] Sec. 9, par. 1: "The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

points a compromise was finally arrived at, which was embodied in the following provision[1]:

> "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons."

It is interesting to notice that, while the existence of slavery is clearly recognized in the Constitution, neither the word slave nor the word slavery is anywhere used in that instrument.

§217. *The Ordinance for the Government of the Northwest Territory.* In 1787 the Continental Congress adopted "An Ordinance for the government of the Territory of the United States Northwest of the river Ohio"—the territory which was later carved into the states of Michigan, Wisconsin, Illinois, Indiana, and Ohio. Certain articles "of compact between the original States and the people and States in the said territory" were included, which the Ordinance declares shall "forever remain unalterable, unless by common consent." The sixth article provided that, "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted." By this provision all of the great Northwest Territory was put into the non-slaveholding category.

§218. *Admission of Free and Slave States.* But after the ratification of the Constitution, with its accentuation of slavery and anti-slavery feeling, the practice was adopted of admitting into the Union a free State and a slave State by turns so as to maintain the balance between the two groups of States. Vermont was admitted in 1791, Kentucky in 1792, Tennessee in 1796, and Ohio in 1803. In

[1] Art. I, sec. 2, par. 3. See *The Federalist*, No. 54; *Story on the Constitution*, secs. 636 to 643.

1803 the great Louisiana Purchase was made from Napoleon, adding vastly to the territory of the United States, but the practice of admitting free and slave States alternately was continued. Louisiana was admitted in 1812, Indiana in 1816, Mississippi in 1817, Illinois in 1818, Alabama in 1819, and Maine in 1820.

In 1818 Missouri applied for admission to the Union as a slave State. The consideration of this application brought on a very violent conflict between the slavery and anti-slavery forces in Congress. Feeling ran very high, but finally the immediate difficulty was met by the famous Missouri Compromise by which that State was admitted to the Union as a slave State, but it was provided that

> "in all that territory ceded by France to the United States, under the name of Louisiana, which lies north of 36 degrees 30 minutes north latitude, excepting only such part thereof as is included within the limits of the State contemplated by this Act, slavery and involuntary servitude, otherwise than in the punishment for crime, whereof the party shall have been duly convicted, shall be and is hereby forever prohibited."

In 1836 Arkansas was admitted as a slave State, while Michigan was admitted as a free State in 1837. Florida, which had been ceded to the United States by Spain by treaty signed in 1819 and ratified in 1821, was admitted to the Union as a slave State in 1845, and in the same year Texas was added to the Union as a slave State, having seceded from Mexico in 1836. Iowa, Wisconsin, and California were admitted as free States in 1846, 1848, and 1850 respectively, the State of California being formed from part of the territory won from Mexico in 1848, and Minnesota and Oregon were admitted as free States in 1858 and 1859. Thus twenty new States were admitted to the Union—eleven free and nine slave States, but the contests with regard to them had made the feeling between slavery and anti-slavery adherents ever more and more bitter. The twelfth free State, Kansas, could not gain admittance

until after the withdrawal of the southern Senators in 1861.

§219. *Emancipation of the Slaves and Adoption of the Thirteenth Amendment.* With the secession of the southern States came the great struggle of the Civil War. At first the freeing of the slaves was not contemplated by the President or by Congress, but gradually sentiment changed. In the spring of 1862, as the result of a suggestion from the President, a joint resoluton was passed by Congress declaring that the United States ought to coöperate with any State willing to gradually abolish slavery on the basis of compensation. On this basis slavery was abolished in the District of Columbia. However, the border States were deaf to this suggestion, and finally on January 1, 1863, President Lincoln issued his famous Emancipation Proclamation. When, after bitter years of fighting, the Confederacy was vanquished, the anti-slavery sentiment was, of course, triumphant, and Congress determined that there should be written into the fundamental law a provision which should for all time prevent slavery from again rearing its head in this country. The Thirteenth Amendment was, therefore, proposed and quickly ratified.

§220. *Purpose of the Thirteenth Amendment.* Although the Thirteenth Amendment was adopted primarily to give constitutional sanction to President Lincoln's Emancipation Proclamation, it went further than merely to prohibit negroes being owned and bartered as chattels. In the first place it protects all persons whether colored or not, and in the second place it not only forbids slavery but all forms of involuntary servitude. It should also be noted that, while the Fourteenth and Fifteenth Amendments only prohibit State action, the Thirteenth Amendment would be equally contravened by state or federal legislation and by individual action which reduced a person to slavery or involuntary servitude.[1] On the other hand certain extravagant claims

[1] It operates, therefore, to abolish slavery among the Choctaw Indians, United States *v.* Choctaw Nation (1903) 38 Ct. of Claims 558, 566, and the Alaskan tribes, *in re* Sah Qual (1886) 31 Fed. 327.

have been made under the Thirteenth Amendment, which quite clearly are not justified by its language or purpose. In the *Slaughter House Cases*[1] it was contended that a state statute which gave to one corporation the exclusive right to slaughter cattle within a given area, by compelling all persons to resort to that corporation for that purpose reduced them to involuntary servitude, but the Supreme Court held that to be too fanciful an application of the amendment to even justify serious consideration.[2] In the *Civil Rights Cases*[3] the Supreme Court held that, under the power given to Congress to legislate to enforce the Thirteenth Amendment, it had no authority to prohibit discrimination in inns, public conveyances, and places of amusement; that such discrimination does not constitute a badge of slavery.[4]

§221. *Peonage and Other Involuntary Servitude.* Peonage is a Mexican term used to describe a condition whereby a debtor is compelled to work out for a creditor a debt or obligation due to the latter. Peonage is clearly involuntary servitude, and it is no less so because a contract between the parties, instead of a statute, gives the creditor the right to compel the performance of services if the debt is not paid, or the obligation fulfilled, when due.[5] To enjoin an employee from breaking his contract of employment, and from leaving his employer contrary to the terms of that

[1] (1872) 16 Wallace 36.

[2] *Ibid.*, 69.

[3] (1883) 109 U. S. 3.

[4] In Plessy *v.* Ferguson (1896) 163 U. S. 537, the contention was made, but almost impatiently waived aside, that a state statute which provides for separate but equal railroad accommodations for white persons and negroes conflicted with the constitutional prohibition of slavery and involuntary servitude. In Hodges *v.* United States (1906) 203 U. S. 1, it was held that conspiracy to prevent colored persons by intimidation from fulfilling their contracts, could not under the Thirteenth Amendment be made an offense by Congress, since such conduct did not reduce the persons intimidated to slavery or involuntary servitude. Justice Harlan and Justice Day dissented.

[5] Peonage Cases (1903) 123 Fed. 671; Bailey *v.* Alabama (1911) 219 U. S. 219, 242.

contract, would obviously be reducing him to involuntary servitude, and so would be in conflict with the purpose of the Thirteenth Amendment.[1] The United States Supreme Court has held that to make the breach of a contract for personal services a crime, is to so coerce the contracting party to perform his services as to constitute involuntary servitude.[2] The case which was before the court involved a statute which made it a crime for any person, with intent to injure or defraud his employer to enter into a contract in writing for services, thereby obtaining money or property, and with like intent, and without just cause, and without returning the money or paying for the property received, to refuse or fail to perform the services in question; and the statute further made refusal or failure to return the money or pay for the property *prima facie* evidence of intent to defraud, while a rule of evidence in the State forbade the defendant, for the purpose of rebutting this presumption, to testify as to his uncommunicated intention. It was held that, while obtaining money or property by false pretenses may be made a crime, the purpose of the statute in question was to make it a crime to break a contract of employment, and that it was, therefore, unconstitutional.

But suppose that the employer seeks a decree enjoining the breach of an express or implied covenant not to serve anyone else during the period of the contract? Such relief has been granted in several cases, but without considering the constitutional aspect of the problem.[3] If the defendant disobeys such an

[1] Gossard Co. *v.* Crosby (1906) 132 Ia. 155; Arthur *v.* Oakes (1894) 63 Fed. 310; Delaware, L. & W. R. R. Co. *v.* Switchmen's Union (1907) 158 Fed. 541, 543; Stocker *v.* Brocklebank (1851) 3 McH. &G. (Eng.) 250.

[2] Bailey *v.* Alabama (1911) 219 U. S. 219. Justices Holmes and Lurton dissented on the ground that the Thirteenth Amendment does not forbid state legislation making the breach of employment contracts criminal. And see United States *v.* Reynolds (1914) 235 U. S. 133.

[3] Daly *v.* Smith (1874) 38 N. Y. Super. Ct. 158; Cart *v.* Lassard (1889) 18 Ore. 221; Philadelphia Ball Club *v.* Lajoie (1902) 202 Pa. 210; Duff *v.* Russell (1891) 68 N. Y. Super. Ct. 80, aff'd. 133 N. Y. 678; Keith *v.* Kellerman (1909) 169 Fed. 196.

injunction he lays himself open to imprisonment for contempt, which fact is strongly coercive. To be sure he may escape punishment by either fulfilling his contract of service or by not serving anyone in the capacity provided for in the contract. When, however, the contract covers the field of endeavor in which he is qualified to support himself the alternative is rather one of shadow than substance. In fact it is generally recognized that the real purpose of such "negative specific performance" is to compel the defendant to fulfill his contract of service, although it may also have as an object the prevention of an advantage to a rival employer. If such is in fact the real purpose and the probable result of such relief backed as it is by the threat of imprisonment for contempt, it would seem to be contrary to the spirit of the Thirteenth Amendment, and hard to reconcile with the holding that it is unconstitutional to make the breach of a service contract a crime.[1]

§222. *Services Which May Be Constitutionally Enforced.* But a parent is still entitled to the services of his minor child, and a master to the services of a child duly apprenticed to him during minority.[2] The State may also compel services to it without infringing the Thirteenth Amendment. So compulsory military service is not involuntary servitude within the meaning of the Constitution.[3] Nor is compulsory work on highways, or compulsory jury service.[4] The Supreme Court has also declared that federal legislation which provides for the return of deserting seamen, and for criminal punishment of seamen for desertion does not con-

[1] Gill *v.* Maryland (1846) 4 Gill (Md.) 487, 490; Ford *v.* Jermon (1865) 6 Phila. R. 6, 7; Rice *v.* D'Arville, reported in Boston *Transcript*, Sept. 29, 1894, and noted in *8 Harv. L. Rev.*, 172 (opinion by Justice Holmes), American Baseball & Athl. Ass'n *v.* Harper (1902) *54 Cent. L. Jour.* (Mo.), 449, 451; Gossard Co. *v.* Crosby (1906) 132 Ia. 155, 163. See R. S. Stevens, "Involuntary Servitude by Injunction," *6 Cor. L. Quar.* 235.

[2] Clyatt *v.* United States (1905) 197 U. S. 207, 216; Note in *18 L. R. A. (N. S.)* 893.

[3] Selective Draft Cases (1918) 245 U. S. 366, 390.

[4] Butler *v.* Perry (1916) 240 U. S. 328.

travene the Thirteenth Amendment.[1] This conclusion is based largely upon an historical argument, but the public service character of the employment seems also to have weighed with the court. In a later case the same court suggests that:

> "it may be—but upon that point we express no opinion—that, in the case of a labor contract between an employer engaged in interstate commerce and his employee, Congress could make it a crime for either party, without sufficient or just excuse or notice, to disregard the terms of such contract or to refuse to perform it."[2]

In other words, where criminal liability for breach of a contract of service is clearly not imposed for the purpose of compelling the fulfillment of the contract for the benefit of the employer, but is imposed in order to protect the public or in order to prevent an injury which would concern the public, it should not be considered as an instrument of involuntary servitude, but as a legitimate police regulation.[3]

[1] Robertson *v.* Baldwin (1897) 165 U. S. 275.

[2] Adair *v.* United States (1908) 208 U. S. 161, 175.

[3] A fair example of such statutes is found in the New York Penal Law, sec. 1910: "A person, who wilfully and maliciously, either alone or in combination with others, breaks a contract of service or hiring, knowing, or having reasonable cause to believe, that the probable consequence of his so doing will be to endanger human life, or to cause grievous bodily injury, or to expose valuable property to destruction or serious injury, is guilty of a misdemeanor." In Freund's *Police Power*, sec. 452, it is said, "We may then conclude that in a business affected with a public interest the violation of a contract of service which is essential to the carrying on of the business, may, as a matter of constitutional power, be punished."

CHAPTER XXVII

THE PROVISIONS OF THE FOURTEENTH AMENDMENT

§223. *Provisions with Regard to Citizenship.* Although the primary purpose of the Fourteenth Amendment was undoubtedly, like that of the Thirteenth, to safeguard the negro in his new status of a freeman, its actual scope is vastly wider than that, and its effect has been very far reaching. Its first clauses have to do with a definition of citizenship and with the safeguarding of certain rights of citizens, as follows:

> "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 inforce any law which shall abridge the privileges or immunities of citizens of the United States."

These provisions have been fully dealt with in the chapter dealing with citizenship, and the reader is referred to that discussion.[1]

§224. *The Due Process and Equal Protection Clauses.* After the clauses with regard to citizenship, the Fourteenth Amendment continues as follows: "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 and their interpretation, which have come to play so important a part in our system of Constitutional law, are considered in detail in the next six chapters.

§225. *These Prohibitions Are Directed Against State Action.*

[1] See Chap. 11.

It is important to notice here, at the outset, that we have in the clauses just quoted prohibitions directed solely against the States.[1] "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment." A person is entitled to redress against "the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment."[2] The prohibitions are directed against actions by the States by whatever agency they are consummated. Speaking of the equal protection clause, the Supreme Court has said:

> "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws."[3]

And persons may claim the protection of the Fourteenth Amendment against acts of state officers which are made possible by their official positions, though not authorized by, or though actually contrary to state laws.

> "The theory of the amendment is that when an officer or other representative of a State, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the amendment, inquiry concerning whether the State has authorized the wrong is irrelevant, and the federal judicial power is

[1] While the Fourteenth Amendment does not apply to the federal government, the Fifth Amendment, which applies exclusively to the federal government, provides that, "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." See Chap. 17.

[2] Civil Rights Cases (1883) 109 U. S. 3, 11. See also Hodges *v.* United States (1906) 203 U. S. 1.

[3] *Ex parte* Virginia (1880) 100 U. S. 339, 347.

competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."[1]

When one is deprived of his property by the judgment of a state court, which is without jurisdiction, he is deprived of his property without due process of law,[2] but an erroneous judgment in a case of which a state court has jurisdiction does not constitute lack of due process.[3]

§226. *Apportionment of Representatives.* The provisions with regard to citizenship, due process and equal protection, are all contained in the first section of the Fourteenth Amendment to the Constitution of the United States, but that amendment also contains four other sections. Section two deals with apportionment of representatives in Congress, and is considered in connection with the discussion of that subject.[4]

§227. *Political Disabilities.* Section three of the Fourteenth Amendment is as follows:

"No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two thirds of each House, remove such disability."

Many of those who held positions of leadership in the Confederacy had held public offices before the southern States seceded, and had in assuming such offices taken an

[1] Home Telephone Co. *v.* City of Los Angeles (1913) 227 U. S. 278, 287.

[2] Scott *v.* McNeal (1894) 154 U. S. 34, 46: "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party." See Chap. 29.

[3] Arrowsmith *v.* Harmoning (1886) 118 U. S. 194.

[4] Sec. 63.

oath to support the Constitution of the United States. It was felt that they had violated such oath when they joined the Confederacy, and that they should not again be allowed to assume positions of leadership in affairs of the nation or of the States, except by special action of Congress.

§228. *Financial Obligations Arising Out of the Civil War.* The Civil War had put the national government under a very heavy debt. The northern States feared that the States which had joined the Confederacy might, attempt through their representatives in Congress when again returned to a full share in the direction of national affairs, to repudiate this national debt. They also feared that an effort would be made to saddle the nation with claims for the emancipation of slaves, which would have added immensely to its financial burden. Finally they felt that the debts which had been incurred for the support of the Confederacy should be entirely outlawed, and that those who had contributed to the support of the rebellion should bear the loss resulting from its failure. With these purposes in mind the fourth section of the amendment was adopted, as follows:

> "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 and 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."

§229. *Enforcement of the Amendment by Congress.* By section five of the Fourteenth Amendment it is provided that, "The Congress shall have power to enforce by appropriate legislation the provisions of this article." The power given to Congress by this section is discussed in another chapter.[1]

[1] See sec. 160.

CHAPTER XXVIII

MEANING OF THE DUE PROCESS CLAUSE

§230. *Due Process in English Law.* In our attempt to determine what due process is, and what limitations the due process clause of the Fourteenth Amendment puts upon state action, it may first be convenient to dispose of certain erroneous conceptions of the meaning of due process. In Magna Charta it was provided that

> "no freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land."

By the middle of the next century the enactments of Edward III, made for the further protection of his subjects: began to read "by due process of law" instead of "by the law of the land," and in the Petition of Rights, of Charles First's day, it is prayed "that freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the King's special command without any charge." In English law the two expressions seem to have the same meaning.[1] These provisions were directed to the actions of kings and were meant as protections against kings; and it was thought a sufficient protection if the king was prevented from acting arbitrarily, and was compelled to act only in accordance with laws existing or duly enacted. No limitations were put upon the powers of Parliament; it was merely provided that persons should not be deprived of

[1] For an excellent sketch of the development of these terms in English law see Taylor's *Due Process of Law*, secs. 1 to 9.

their liberty or property except in accordance with the law of the land, that is, in accordance with the process of duly established law.[1] If the same significance had been attached to the phrase "due process of law" in our Fifth and Fourteenth Amendments, as was attached to it by the English law, our due process clauses would only have limited the powers of our federal and state executives, together with our courts in case the latter attempted to act without legal jurisdiction; but would have put no limitations upon legislative power.

§231. *Legislation Does Not Necessarily Constitute Due Process.* Although the Fifth Amendment, which was

[1] "It were endless to enumerate all the affirmative acts of Parliament wherein justice is directed to be done according to the law of the land; and what that law is every subject knows, or may know if he pleases; for it depends not upon the arbitrary will of any judge; but is permanent, fixed and unchangeable, unless by authority of Parliament. . . . Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding cannot be altered but by Parliament." 1 *Black. Com.* 141.

"It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England." Davidson *v.* New Orleans (1877) 96 U. S. 97, 102.

"The concessions of Magna Charta were wrung from the King as guaranties against the oppressions and usurpations of his prerogative. It did not enter 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 law of the land; for notwithstanding what was attributed to Lord Coke in Banham'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." Hurtado *v.* California (1884) 110 U. S. 516, 531.

adopted in 1791, contains the provision that "No person shall . . . be deprived of life, liberty, or property without due process of law,"[1] this clause did not come before the Supreme Court for interpretation until the case of *Murray v. Hoboken Land and Improvement Company*,[2] in 1855. In that case the court said[3]:

> "The words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land' in Magna Charta. Lord Coke, in his commentary on those words (2 Inst. 50), says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the Great Charter more closely, generally contained the words 'but by the judgment of his peers, or the law of the land.'[4] The ordinance of Congress of July 13, 1787, for the government of the territory of the United States northwest of the River Ohio, used the same words."

This paragraph, if taken by itself, would justify the conclusion that the constitutional provisions as to due process require only that the process be in conformity with the provisions of the law, and put no restrictions upon legislative power. However, the court very quickly dispels this impression when it goes on to say:

> "That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law'? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even

[1] As we have seen (*supra*, sec. 148) this provision applies only to the federal government, while the Fourteenth Amendment applies to the States, but on the point now under consideration that distinction is of no importance.

[2] 18 Howard 272.

[3] *Ibid.*, 276.

[4] A summary of these provisions in the state constitutions adopted at the time of the Revolution will be found in Taylor's *Due Process of Law*, sec. 11.

declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."

It is interesting that, while there was very little discussion of the due process clause of the Fifth Amendment during three-quarters of a century after its adoption, the Fourteenth Amendment had hardly been ratified when state legislation began to be attacked as violative of due process. It, therefore, became necessary for the Supreme Court to determine whether, when a person was deprived of life, liberty, or property in conformity with state legislation, he could be said to be deprived "without due process of law." In 1877 that court said,

"when, in the year of grace 1866,[1] there is placed in the Constitution of the United States a declaration that 'no State shall deprive any person of life, liberty, or property without due process of law,' can a State make any thing due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation."[2]

A few years later the Court stated its opinion on this point even more succinctly[3]:

"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

[1] The amendment was proposed in 1866 but not ratified by three fourths of the States until 1868.

[2] Davidson *v.* New Orleans (1877) 96 U. S. 97, 102.

[3] Hurtado *v.* California (1884) 110 U. S. 516, 531.

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."[1]

§232. *Due Process Need Not Conform to Past Usage.* In *Murray v. Hoboken Land and Improvement Company*[2] the court was asked to declare unconstitutional a federal statute which provided for summary action against a collector of customs for a balance due. After declaring, as we have seen, that the due process clause was meant to be a limitation upon legislative power, the court asked,

"To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political conditions by having been acted on by them after the settlement of this country."[3]

The court concluded that the sort of summary proceeding provided for by the federal statute was in accordance with such "settled usages and modes of proceeding" under similar circumstances. In *Hurtado v. California*[4] it was contended "that any process otherwise authorized by law, which is not thus sanctioned by usage, or which supercedes and displaces one that is, cannot be regarded as due process." The court emphatically denied that this was the force of its earlier decision. To put such an interpretation upon the due process clause "would be to deny every quality of the law but its age, and to render it incapable

[1] For a criticism of this interpretation due process clauses see Reeder's *Validity of Rate Regulation*, chaps. 3 and 4.

[2] (1855) 18 Howard 272.

[3] *Ibid.*, 276.

[4] (1884) 110 U. S. 516, 528.

of progress and improvement." The court declared that in its earlier decision it had simply held that legislation which did conform to "settled usages and modes of proceeding" could not be said to be lacking in due process, but that it had not held that no legislation would constitute due process which did not so conform.[1]

§233. *Essential Significance of Due Process.* In one of the earlier cases[2] under the Fourteenth Amendment the Supreme Court, commenting upon the lack of constitutional definition of due process, recognized the advantages that would result from a full definition of those words, if it were possible to give a definition which would be correct and exhaustive. It was held, however, that this was not practicable, the court expressing its view of the proper course in those words so often quoted,

> "there is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded."[3]

And yet, though the court has continued to disclaim any intention to frame a comprehensive definition of due process it has, at least, given us, for our guidance, a general description of the nature of due process, and of the principles which guide the court in its "gradual process of judicial inclusion and exclusion." In *Hurtado v. California*[4] the court stated its general views on due process as follows:

[1] Following the case just discussed, the Supreme Court again declared in Twining *v.* New Jersey (1908) 211 U. S. 78, 101: "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."

[2] Davidson *v.* New Orleans (1877) 96 U. S. 97.

[3] *Ibid.*, 104.

[4] (1884) 110 U. S. 516, 535.

"Due process of law in the latter [the Fifth Amendment] 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 liberty 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."[1]

This statement has been paraphrased in later cases but it has not been improved upon.[2]

§234. *Meaning of "Life," "Liberty," and "Property."* The term "life" hardly needs explanation, but it has been held to include not merely animal existence, but the retention of limbs and organs by which life is en-

[1] It is interesting to note that in 1819 the United States Supreme Court had made the following comment upon a provision in the Maryland Constitution: "As to the words from Magna Charta, incorporated into the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Bank of Columbia *v.* Ikeley, 4 Wheaton 235, 244. See also Webster's definition of "law of the land" in Dartmouth College *v.* Woodward (1819) 4 Wheaton 518, 581, which is often quoted.

[2] "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." Hogan *v.* Reclamation District (1884) 111 U. S. 701, 708. "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." Holden *v.* Hardy (1898) 169 U. S. 366, 389.

See also Twining *v.* New Jersey (1908) 211 U. S. 78, 101.

joyed.[1] The liberty which is protected by the Fourteenth Amendment is more than liberty of person.

> "The term is deemed to embrace the right of the citizen to be free in the engagement of all his 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, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."[2]

On the other hand the right of property which that amendment protects includes the right to use property for any lawful purpose, and to acquire property by any lawful means.[3]

§235. *Notice and Hearing as Elements of Due Process.* It is a principle applicable to most circumstances that due process requires notice and an opportunity to be heard, before a person shall be deprived of life, liberty, or property.

> "Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved."[4]

It is certainly true that a person may not generally be deprived of life or of personal liberty by the authority of the State without personal notice, and a hearing, ordinarily held before a judicial tribunal. This, of course, applies to criminal prosecutions.[5] It also applies to proceedings for the determination of a person's sanity.[6] In accord with the

[1] Munn *v.* Illinois (1876) 94 U. S. 113, 142; Bertholf *v.* O'Reilly (1878) 74 N. Y. 509, 515.

[2] Allgeyer *v.* Louisiana (1897) 168 U. S. 578. Compare Shattuck, "The Meaning of the Term 'Liberty' in Federal and State Constitutions," *4 Harv. L. Rev.* 365.

[3] Holden *v.* Hardy (1898) 169 U. S. 366.

[4] Hagar *v.* Reclamation District (1884) 111 U. S. 701, 708.

[5] See sec. 247.

[6] Simon *v.* Craft (1901) 182 U. S. 427.

general principle as to notice and hearing it seems that an alien may not be deported without some notice and an opportunity to be heard,[1] though the proceedings may be conducted by an administrative officer instead of a court.[2] So a defendant brought before a court upon due notice may not have judgment rendered against him without an opportunity to present a defense and support it by evidence.[3]

But under the constitutional provision adopted for that purpose the executive of a State may extradite a person as a fugitive from justice upon requisition without any notice or hearing.[4] It is also constitutional for a governor in time of public danger caused by insurrection, to call out the National Guard and to direct that persons resisting be killed or imprisoned, as long as he acts in good faith.[5] Furthermore, as we shall see a little later, there are circumstances under which property may be taken for taxes without any notice or hearing[6]; and under the police power the use and acquisition of property, and the return which may be received from it, may be limited, also without notice or an opportunity to be heard.[7]

§236. *Persons Protected.* It should also be born in mind that the protection afforded by the due process clause of the Fourteenth Amendment is not confined to citizens, but, extends to "any person." In the case of *Yick Wo v. Hopkins*[8] the court said,

> "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

[1] The Japanese Immigrant Case (1903) 189 U. S. 86.

[2] When an executive officer or tribunal has constitutional authority to affect a person in his liberty or property, the proceeding is not without due process because not held before a judicial tribunal. See sec. 156.

[3] Hovey *v.* Elliott (1897) 167 U. S. 409.

[4] Marbles *v.* Creecy (1909) 215 U. S. 63. As to interstate extradition see chap. 205.

[5] Moyer *v.* Peabody (1909) 212 U. S. 78.

[6] Sec. 259. [7] See chap. 32. [8] (1886) 118 U. S. 357, 368.

not confined to the protection of citizens. [Quoting the due process and equal protection clauses.] These provisions are universal in their application, to all persons within the territorial jurisdiction,[1] without regard to any differences of race, of color, or of nationality."

It is

"now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."[2]

The provision that a person shall not be deprived of life without due process of law seems clearly applicable to natural persons only. Although the liberty which is protected by the Fourteenth Amendment is not only liberty of person but liberty of action,[3] it has been declared that, "The liberty referred to in that amendment is the liberty of natural, not artificial persons."[4] But, since the rule against depriving a person of property without due process of law has been declared to include depriving him of the right to acquire property and to contract with regard to property,[5] corporations are adequately protected under this part of the due process clause.

[1] As a matter of fact the limitation to persons within the jurisdiction of the State is found only in the equal protection clause.

[2] Covington Turnpike Co. *v.* Sandford (1896) 164 U. S. 578, 592.

[3] Allgeyer *v.* Louisiana (1897) 165 U. S. 578.

[4] Northwestern Life Ins. Co. *v.* Riggs (1906) 203 U. S. 243, 255. This is restated in Western Turf Assoc. *v.* Greenberg (1907) 204 U. S. 359, 363.

[5] Holden v. Hardy (1898) 169 U. S. 366, 391.

CHAPTER XXIX

DUE PROCESS IN JUDICIAL PROCEEDINGS

§237. *In Actions in Personam There Must Be Jurisdiction of the Subject-Matter and of the Defendant.* Let us now consider what is due process in judicial proceedings.[1] A prime requisite of due process is, of course, that the court shall have jurisdiction of the subject-matter. "To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit."[2] In proceedings *in personam*—proceedings to determine the personal liability of the defendant, no property being brought by the proceedings within the control of the court—the court must also have jurisdiction of the defendant.

§238. *Jurisdiction of Non-residents.* Attempts have repeatedly been made to take jurisdiction of non-resident defendants through service by publication or through personal service made outside of the State in which the action is brought. The Supreme Court has held that such procedure does not give jurisdiction of the non-resident, for a State cannot in that way extend its jurisdiction beyond its territorial limits. The defendant "must be brought within its jurisdiction by service of process within the State, or by his voluntary appearance."[3]

§239. *Requirement that Foreign Corporations Appoint Agents to Receive Service.* Since a State may exclude a

[1] See the previous discussion in chap. 23 as to full faith and credit due in each State to the judgments rendered in other States.

[2] Pennoyer *v.* Neff (1877) 95 U. S. 714, 733.

[3] *Ibid.;* Harkness *v.* Hyde (1878) 98 U. S. 476; Wilson *v.* Seligman (1892) 144 U. S. 41; Riverside & Dan River Cotton Mills *v.* Menefee (1915) 237 U. S. 189.

foreign corporation (except when it desires to engage in interstate commerce or to act in the State for the federal government)[1] it may compel such corporation as a condition of entrance to appoint an agent in the State upon whom service may be made, and such service will give jurisdiction.[2] The statute may, however, simply provide that if a corporation does business in the State service may be made upon one of its agents in the State, or upon a State officer. Such statutes have been upheld either upon the theory of implied consent to such service,[3] or upon the theory that the corporation, having voluntarily come into the State to do business there, is bound by the State's reasonable regulations of such business.[4] It has also been held that to require a corporation engaged in interstate commerce to appoint an agent upon whom service may be made in controversies arising within the State is not an unreasonable burden upon interstate commerce[5]; but, if the statute attempts to compel such a corporation to subject itself to the jurisdiction of the State courts in all controversies wherever arising, this would probably be held to burden interstate commerce unreasonably.[6]

§240. *Requirement that Non-resident Natural Persons Appoint Agents to Receive Service.* Under the "privileges and immunities" clause of Article Four of the Constitution a natural person, a citizen of one of the States, cannot be excluded from doing business in any other State.[7] A Kentucky statute provides that

> "in actions against an individual residing in another State . . . engaged in business in this State, the summons

[1] Sec. 206.

[2] Pennsylvania F. Ins. Co. *v.* Gold Issue Mining & Milling Co. (1917) 243 U. S. 93.

[3] Lafayette Ins. Co. *v.* French (1855) 18 Howard 404.

[4] Smolik *v.* Philadelphia & R. Coal & Iron Co. (1915) 222 Fed. 148, approved in Pennsylvania Fire Ins. Co. *v.* Gold Issue Min. & Mill. Co. (1917) 243 U. S. 93.

[5] International Harvester Co. *v.* Kentucky (1914) 234 U. S. 579.

[6] See Sioux Remedy Co. *v.* Cope (1914) 235 U. S. 197.

[7] See chap. 24.

may be served upon the manager, or agent of, or person in charge of, such business in this State, in the county where the business is carried on, or in the county where the cause of action occurred."[1]

Upon a cause of action which arose in Kentucky, an action was brought against non-resident partners who had done business in Kentucky through W. Flexner as their agent, process being served upon W. Flexner, who at the time of the service had ceased to be such agent. Judgment was obtained in Kentucky and sued upon in Illinois, where the court gave judgment for the defendant, which was affirmed by the supreme court of the State.[2] The case was taken to the Supreme Court of the United States on the ground that full faith and credit was not given to the Kentucky judgment. Justice Holmes in his brief opinion affirming the judgment of the Illinois court said.[3]

"It is argued that the pleas tacitly admit that Washington Flexner was agent of the firm at the time of the transaction sued upon in Kentucky, and the Kentucky statute is construed as purporting to make him agent to receive service in suits arising out of the business done in that State. On this construction it is said that the defendants by doing business in the State consented to be bound by the service prescribed. The analogy of suits against insurance companies based upon such service is invoked. *Mutual Reserve Fund Life Association v. Phelps*, 190 U. S. 147. But the consent that is said to be implied in such cases is a mere fiction, founded upon the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in. *Lafayette Ins. Co. v. French*, 18 How. 404. *Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co.*, 243 U. S. 93, 96. The State had no power to exclude the defendants and on

[1] Kentucky Civil Code, sec. 51 (6).
[2] Flexner *v.* Farson (1915) 268 Ill. 435.
[3] Flexner *v.* Farson (1919) 248 U. S. 289.

that ground without going farther the Supreme Court of Illinois rightly held that the analogy failed, and that the Kentucky judgment was void. If the Kentucky statute purports to have the effect attributed to it, it cannot have that effect in the present case. *New York Life Ins. Co. v. Dunlevey*, 241 U. S. 518, 522, 523."

Probably the justifiable deduction from this opinion is that, in the case of a natural person, a citizen of another State, no service will give jurisdiction except personal service within the State or voluntary appearance, unless actually consented to by the defendant. Yet we have seen that a reasonable regulation as to service of process upon a foreign corporation entering to engage in interstate commerce may be imposed, though the corporation cannot be excluded from the State. Similarly, a regulation as to natural persons entering to do business within the State, providing for service of process upon an agent in the State where a cause of action arises within the State, would seem not to deny such persons any privilege or immunity of citizens of the State, but rather to put them on an equal footing with such citizens. In *Kane v. New Jersey*[1] a state statute requiring that a non-resident automobile owner should, before operating his car in the State, appoint the Secretary of State his agent upon whom process might be served in any action arising out of the operation of his car in the State, was held constitutional. It is possible that *Flexner v. Farson* will be ultimately held to stand only for the proposition that there was no jurisdiction of the defendants because W. Flexner was, at the time of service, no longer their agent.[2]

§241. *Service upon a Resident Who Is Within the State: State Decisions.* A resident of one of the States of the Union who is a citizen of the United States is also a citizen of the State in which he resides.[3] But a person may also,

[1] (1916) 242 U. S. 160.

[2] For a very interesting discussion of this subject see Scott, "Jurisdiction over Non-residents Doing Business within a State," *32 Harv. L. Rev.* 871.

[3] Const. of U. S. Amend. XIV, sec. 1.

of course, be domiciled in a State who is a citizen of a foreign country. Whether a person is a citizen of the State or not, the State clearly may authorize its courts to take jurisdiction of him when he is within the State. By the common law jurisdiction in a proceeding *in personam* was acquired by personal service upon the defendant within the jurisdiction; if he could not be found, pressure was brought upon him to appear by proceedings in outlawry.[1]

> "One thing our law would not do, the obvious thing. It would exhaust its terrors in the endeavor to make the defendant appear, but it would not give judgment against him until he had appeared. . . . Instead of saying to the defaulter, 'I don't care whether you appear or no,' it set its will against his will: 'But you shall appear.'"[2]

The practice, however, has been very generally adopted by our state legislatures of allowing substituted service of process, by leaving it at the defendant's residence, or of allowing constructive service by publication, in cases where the defendant cannot be found and personally served. It is believed that substituted service has been held due process and to give the court jurisdiction, where the defendant is domiciled in and is actually within the State, in all cases where the constitutional question has been considered in the state courts. Such service is treated as on the same footing with personal service.[3] The verdict of the state courts is also that constructive service by publication is due process and gives the court jurisdiction as against a defendant domiciled in and actually within the State, on the ground that such a person owes obedience to the laws of the State, and the State has a right to prescribe by law how he shall

[1] 3 *Black. Comm.*, 283.

[2] Perry, *Common-law Pleading*, 151.

[3] Buneler *v.* Dawson (1843) 5 Ill. 536; Birsenthall *v.* Williams (1864, Ky.) 1 Duv. 329; Cassidy *v.* Leitch (1877, N. Y.) 2 Abb. N. C. 315; Continental Nat. Bk. *v.* Thurbar (1893) 74 Hun 632, aff'd. on opinion below in 143 N. Y. 648; Bernhardt *v.* Brown (1896) 118 N. C. 700; Bryant *v.* Shute's Ex'r. (1912) 147 Ky. 268, and cases cited at p. 275 of the opinion.

be brought into its courts, as long as the methods used are reasonably probable to apprise him of the proceedings,[1] although it is very reasonably insisted in one case that such service is not due process except when it appears that defendant could not be found within the jurisdiction and personally served.[2]

§242. *Service upon Resident Who Is Within the State: United States Supreme Court.* It is not easy to determine the position of the Supreme Court of the United States with regard to the validity of substituted service and of constructive service by publication upon persons domiciled in and actually within the State, in actions *in personam*.[3] In *Webster v. Reed*[4] commissioners appointed to partition certain Indian lands sued the owners and had process served by publication according to the laws of the territory. The Supreme Court held the judgment void, declaring that the

> "suits were not a proceeding *in rem* against the land but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served,

[1] Holt *v.* Alloway (1827, Ind.) 2 Blackf. 108; Welch *v.* Sykes (1846) 8 Ill. 197; Matter of Empire Bk. (1858) 18 N. Y. 199; Harryman & Schryver *v.* Roberts (1879) 52 Md. 64; Betencourt *v.* Eberlin (1882) 71 Ala. 461 (action commenced by attachment treated as an action *in personam*); Bardwell *v.* Collins (1890) 44 Minn. 97 (foreclosure action treated as action *in personam*). In Bickerdike *v.* Allen (1895) 157 Ill. 95, the court held that in an action *in personam* service by publication is not sufficient, but that if process is also mailed to defendant's residence this is *prima facie* evidence that he received it, and therefore such service is *prima facie* valid.

[2] Bardwell *v.* Collin (1890) 44 Minn. 97.

[3] "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citations of authority would give additional weight; but upon the question of the length of such notice there is a singular dearth of judicial decision. It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose." Roller *v.* Holly (1900) 176 U. S. 398, 409.

[4] (1850) 11 Howard 437.

> or whose property has not been attached. In this case there was no personal notice, nor an attachment or other proceeding against the land until after the judgments. The judgments, therefore, are mere nullities and did not authorize the executions on which the land was sold."

This seems a pretty explicit decision against service by publication in an action strictly personal, whether the defendant is a resident within the State or not. In *Knowles v. Gaslight & Coke Company*[1] the court said merely by way of dictum:

> "We do not mean to say that personal service is in all cases necessary to enable a citizen to acquire jurisdiction of the person. When the defendant resides in the State in which the proceedings are had, service at his residence and perhaps other modes of constructive service may be authorized by the law of the State."

In *Earle v. McVeigh*[2] the court had before it a case where service was attempted by posting on the door of defendant's former residence, he having been seven months out of the State. The court held that the house in question was not defendant's "usual place of abode" as required by the state statute, and that the service was, therefore, invalid. But the court said, "Doubtless constructive notice may be sufficient in certain cases," and apparently approved of service at the actual place of residence of one domiciled in the State. The next case is that of *Pennoyer v. Neff*,[3] in which the action was against a nonresident in which service by publication was held insufficient. The court's discussion is directed to the question before it, but it quotes with approval the statement quoted above from *Webster v. Reid* and declares in general language that in an action *in personam* the defendant "must be brought within its jurisdiction by service of process within the State, or his voluntary appearance."[4] The next ye[illegible]the Supreme Court had

[1] (1873) 19 Wallace 58, 61.
[2] (1875) 91 U. S. 503.
[3] (1877) 95 U. S. 714.
[4] *Ibid.*, 733.

before it a case where the action was one *in personam*, and in which process was served by leaving it at defendant's residence with his wife. A state statute authorized such service if defendant could not be found. There was no averment in the sheriff's return that he could not find defendant. For this reason the judgment was held void. The court said, "Substituted service in actions purely *in personam* was a departure from the rule of the common law, and the authority for it, if it could be allowed at all, must have been strictly followed."[1] In *Harkness v. Hyde*,[2] it appeared that in an action *in personam* process out of a court of Idaho Territory was served personally upon the defendant at his residence on an Indian reservation. The reservation was, by treaty with the Indians and by legislation, put outside of the jurisdiction of the territory of Idaho. It was held that the service was invalid and the resulting judgment therefore void. The court said[3]:

> "There can be no jurisdiction in a court of a territory to render a personal judgment against anyone upon service made outside its limits. Personal service within its limits, or the voluntary appearance of the defendant is essential in such cases. It is only where property of a nonresident or of an absent defendant is brought under its control, or where his assent to a different mode of service is given in advance that it has jurisdiction to inquire into his personal liabilities or obligations without personal service of process upon him, or his voluntary appearance to the action. Our views on this subject are expressed at length in the late case of *Pennoyer v. Neff* (95 U. S. 714) and it is unnecessary to repeat them here."

The fair deduction from these expressions of opinion by the Supreme Court would seem to be that the court does not consider service by publication to be due process in an action strictly *in personam* even though the defendant be domiciled in and be actually within the State from whose court the

[1] Settlemeer *v.* Sullivan (1878) 97 U. S. 444, 447.
[2] (1878) 98 U. S. 476. [3] *Ibid.*, 478.

process issues. This point seems to be actually involved in the decision in *Webster v. Reid.* *Harkness v. Hyde* had to do with a nonresident, but the statement in the case as quoted above is very strong to the effect that personal service within the State or voluntary appearance is always necessary. In *Knowles v. Gaslight & Coke Company* and in *Earle v. McVeigh* where a broader view is intimated the court may have had actions *in rem* in mind. It is impossible to say whether the court would be influenced by the more liberal view of the State courts, if the question were now brought before it.[1] It is believed, however, that service by publication may without unreasonable hardship to plaintiffs be restricted to actions *in rem*, which include actions commenced by attachment. Substituted service, where process is left at the residence of the defendant, stands on a different footing. It is treated by the state courts, not as distinct from, but as a kind of personal service. It is believed that the Supreme Court would probably take the same position, in view of the expressions by that court quoted above, and particularly in view of the suggestion to be dealt with shortly, which was thrown out in the recent case of *McDonald v. Mabee*[2] that substituted service may be good even upon a resident defendant when out of the State.

§243. *Service upon Resident Temporarily Out of State.* When a person is domiciled in a State but is temporarily outside of the State at the time of service of process in an action *in personam*, two questions are raised—has the State authority over such person, and if so what means of service constitute due process? It has been held that a court of a State may only be given jurisdiction over those actually within the State—that an attempt to give jurisdiction to a court of a person who, though domiciled within the State, is actually outside of the State, is an attempt to invade the sovereignty of the State where he is.[3] However, the weight

[1] In the recent case of McDonald *v.* [redacted]bee (1917) 243 U. S. 90, the court refused to express any opinion on this point.

[2] (1917) 243 U. S. 90.

[3] De La Montany *v.* De La Montany (1896) 112 Calif. 101, three judges

of authority in state courts seems to be on the other side. The theory is that a person domiciled in a State or country

> "owes allegiance to the country and submission to its laws. . . . By reason of the relation between the State and its citizen, which affords protection to him and his property and imposes upon him duties as such, he may be charged by judgment *in personam* binding on him everywhere as the result of legal proceedings instituted and carried on in conformity to the statute of the State prescribing a method of service which is not personal and which may not become *actual* notice to him. And this may be accomplished in his lawful absence from the State. It, therefore, becomes important to inquire whether the State of Wisconsin was the domicile of the defendant at the time the constructive service was made there, because it is upon domicile that his civil status depends."[1]

Three methods of service upon an absent resident have been attempted, namely, personal service outside of the State, service at the defendant's residence, and service by publi-

---

dissenting. Similar declarations are found in Amsbaugh *v.* Exchange Bk. (1885) 33 Kan. 100, though there it seems that the service was not at defendant's "usual place of residence" as required by the statute, and in Smith *v.* Grady (1887) 68 Wis. 215, though that case involved an action brought in Ontario against one who though a British subject was not a resident of Ontario, and was served personally outside of Ontario. It is not clear whether Moss *v.* Fitch (1908) 212 Mo. 484 and Roher *v.* Roher (1911) 150 Ia. 511, were meant to support the same proposition, or were meant only to determine that the methods of service there adopted were invalid.

[1] Huntley *v.* Baker (1884, N. Y.) 33 Hun 578, 580, cited with approval in de Mali *v.* de Mali (1890) 120 N. Y. 485, 495, and in Teel *v.* Yost (1891) 128 N. Y. 387, 396. (This is not in conflict with Grubel *v.* Nassauer (1913) 210 N. Y. 149, where the court refused to enforce a judgment obtained in Germany against a German citizen, who, however, was *domiciled* in New York, where the action was *in personam* and the process was served by publication.) In accord, Sturgis *v.* Fay (1861) 16 Ind. 429; Henderson *v.* Stamford (1870) 105 Mass. 504; Fernandez *v.* Casey & Swasey (1890) 77 Tex. 452; Ouseley *v.* Lehigh Val. T. & S. D. Co. (1897) 84 Fed. 602. *Freeman on Judgments* (4th ed.), sec. 570.

cation. If the State has authority to give the court jurisdiction of the person of a resident temporarily out of the State, service of process at his residence would seem to constitute due process.[1] This would seem to follow from the general view that such service is valid against a resident who is within the State, and because it is a way reasonably likely to give him notice of the proceedings. The Supreme Court, though being careful not to express a definite opinion on the point, has intimated that such service may be valid under the circumstances stated.[2] Personal service on a resident while outside of the State has been held bad by the Supreme Court of the United States,[3] and by the state courts.[4] Although this is clearly the best method of giving actual notice to an absent resident of the proceedings pending against him, it is held to constitute an attempt to give extraterritorial effect to the mandate of the state court. Service by publication has in one case been held invalid as against an absent resident.[5] In another case it has been held valid.[6] In a third jurisdiction it has been held that a judgment obtained upon such a service is at most voidable by the defendant, and cannot be treated as void by the plaintiff.[7] If the Supreme Court is, as seems to be the case, opposed to service by publication as against a resident defendant who is within the State, *a fortiori* would it be against such service when the defendant is absent from the State.

[1] Sturgis *v.* Fay (1861) 16 Ind. 429; Huntley *v.* Baker (1884, N. Y.) 33 Hun 578. This seems to be the effect of Botna Valley St. Bk. *v.* Silver City Bk. (1893) 87 Ia. 479. Two judges in Roher *v.* Roher (1911) 150 Ia. 511, expressly take this view; three do not express themselves upon this point.

[2] McDonald *v.* Mabee (1917) 243 U. S. 90. [3] *Ibid.*

[4] Moss *v.* Fitch (1908) 212 Mo. 484, overruling Hanull *v.* Talbott (1897) 72 Mo. App. 22, (1899) 81 Mo. App. 210; Roher *v.* Roher (1911) 150 Ia. 511.

[5] De La Montany *v.* De La Montany (1896) 112 Calif. 101; three judges dissenting. And see Bernhardt *v.* Brown (1896) 118 N. C. 700.

[6] Fernandez *v.* Casey & Swasey (1890) 77 Tex. 452.

[7] Henderson *v.* Staniford (1870) 105 Mass. 504; Stockton *v.* McCracken (1871) 109 Mass. 84.

This also is the fair deduction from *McDonald v. Mabee.*[1] The English courts have held that a judgment against an absent resident is valid though based upon constructive service if such constructive service is authorized by law.[2]

§244. *Service upon Domestic Corporations.* If a charter is granted by a State to a domestic corporation upon condition that service may be made upon it through some public officer or by publication such service being consented to would be good. Aside from any such consent it would seem that the due process clause would require the same sort of service upon a domestic corporation as upon a resident natural person. It has been held that constructive service upon a domestic corporation, which does not have an office in the State, is due process when reasonable in character.[3]

§245. *Service Required in Actions in Rem.* A State has, clearly, authority over property which is within its territorial limits, whether that property be owned by a resident or a nonresident. It may, therefore, authorize its courts to take jurisdiction of controversies with regard to rights in, or claims against such property, though personal jurisdiction of the defendant is not obtained. Such proceedings are denominated actions *in rem* to distinguish them from the purely personal actions, or actions *in personam* which we have been discussing.[4] Although it is said that "the theory

[1] (1917) 243 U. S. 90.

[2] Douglas *v.* Forrest (1828) 4 Bing. 686 (public proclamation in court, in the market place and on the seashore according to Scottish law); Bocquet *v.* McCarthey (1831) 2 B. & Ad. 951 (process served upon a public officer to be forwarded to the defendant in accordance with the law of the colony); Maubourquet *v.* Wyse (1867) Ir. Rep. C. L. 471 (similar decision as to French judgment).

[3] Town of Hinckley *v.* Kattle River R. Co. (1897) 70 Minn. 105 (service of process upon the Secretary of State with direction to mail a copy to the office or to an officer of the corporation); Ward Lumber Co. *v.* Henerson-White M'f'g. Co. (1907) 107 Va. 626 (service by publication).

[4] Some courts distinguish between actions *in rem*, *i.e.*, actions for the enforcement of existing interests in property, and actions *quasi in rem*, by which is meant attachment proceedings. See for example Bernhardt *v.* Brown (1896) 118 N. C. 700. There seems no advantage in this differ-

of the law is that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him,"[1] yet the owner has a right to appear and be heard. "To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential."[2] When personal service cannot with due diligence be made other means of notification, reasonably likely to bring the proceedings to the knowledge of the defendant, may be employed, such as publication; and this, whether the defendant be a resident or a nonresident.[3]

§246. *Service Required in Divorce Proceedings.* Divorce proceedings constitute a class by themselves. They are, however, rather proceedings *in rem* than *in personam*, having as their object the determination of status. If the plaintiff is domiciled in the State where the proceedings are brought, service by publication will be sufficient to give the determination as to his status validity in that State; and if

---

entiation for our purposes; "it is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned." Pennoyer *v.* Neff (1877) 95 U. S. 714, 734. So proceedings *in rem* include also actions to quiet title, Jacob *v.* Roberts (1912) 223 U. S. 261; garnishment proceedings, Herbert *v.* Bicknell (1914) 233 U. S. 70; condemnation proceedings, Huling *v.* Kaw Valley Co. (1889) 130 U. S. 559; escheat, Hamilton *v.* Brown (1896) 161 U. S. 256; and the probate of a will, *Freeman on Judgments* (4th ed.) sec. 608; *cf.* Cummings *v.* Reading School Dist. (1905) 198 U. S. 458. See a note in 22 *Col. L. Rev.* 153, on "Service by Publication upon non-resident Defendants in Actions *in Rem*."

[1] Windsor *v.* McVeigh (1876) 93 U. S. 274, 279. [2] *Ibid.*

[3] *Ibid.;* Pennoyer *v.* Neff (1877) 95 U. S. 714, 734; Jacob *v.* Roberts (1912) 223 U. S. 261; Herbert *v.* Bicknell (1914) 233 U. S. 70.

the plaintiff is by such proceedings declared to be single the defendant can no longer be the plaintiff's spouse in that State. But a judgment under these circunstances against a nonresident defendant will not determine his status in the State of *his* residence, since that status is not a *res* within the jurisdiction of the court rendering the decree. To give such a decree extraterritorial effect the defendant must have appeared or been served within the State. To the last proposition there is, however, this apparent exception, when action is brought in the State of last matrimonial domicile the marriage status is within the jurisdiction of that State, and therefore the marriage status may be acted upon, though the defendant has been served only by publication.[1]

§247. *Due process in Criminal Trials.* In the criminal case of *Twining v. New Jersey*[2] the court said that

> "due process requires that the court which assumes to determine the rights of parties shall have jurisdiction . . . and that there shall be notice and opportunity for hearing given the parties."

The Fifth and Sixth Amendments of the Federal Constitution expressly provide that a person can only be tried for "a capital or otherwise infamous crime" upon indictment by a grand jury, that a person cannot be twice put in jeopardy for the same offense, that a person shall not be compelled to be a witness against himself in a criminal case, and that in a criminal prosecution the defendant shall be entitled to a jury trial, and to be confronted with the witnesses against him. But these amendments constitute restrictions only upon the federal government. There are no similar express limitations in the Federal Constitution upon the States. They are limited by the Federal Constitution, with regard to criminal trials, only by the due process clause. The Supreme Court, after the sentence quoted above, goes on to say,[3]

[1] See the discussion and citation of authorities in secs. 203.

[2] (1908) 211 U. S. 78, 110.

[3] *Ibid.*

"Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, the court has up to this time sustained all state laws, statutory and judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law."

The Supreme Court has held that a State may, without violating the due process clause, provide for the commencement of criminal prosecutions by information instead of indictment,[1] and for trial by a jury of eight instead of twelve.[2] "Indeed the requirement of due process does not deprive a State of the power to dispense with jury trial altogether."[3] So due process does not require that a person be exempt from compulsory self-incrimination.[4] It has been held, overruling previous cases, that there is no lack of due process where the defendant is not formally arraigned, but is tried as if a formal plea of not guilty had been entered, upon an information of which he had full knowledge, as evidenced by motions to quash, to strike out, and to make more definite made by him before trial.[5] Also a person cannot complain that he has been convicted without due process, when, though present throughout the trial, he is so deaf that he cannot hear any of the testimony.[6] Confrontation with witnesses is not guarantied by the Constitution to persons accused of crimes in the state courts, and it is not contrary to due process to introduce in a criminal trial a deposition taken before the examining magistrate in the presence of the defendant, even though the witness is still alive.[7] An appeal to a higher court is not a matter of

[1] Hurtado *v.* California (1884) 110 U. S. 516.

[2] Maxwell *v.* Dow (1900) 176 U. S. 581.

[3] Jordan *v.* Massachusetts (1912) 225 U. S. 167, 176. So provision for a struck jury in criminal cases is constitutional. Brown *v.* New Jersey (1899) 175 U. S. 172.

[4] Twining *v.* New Jersey (1908) 211 U. S. 78.

[5] Garland *v.* Washington (1914) 232 U. S. 642.

[6] Felts *v.* Murphy (1906) 201 U. S. 123.

[7] West *v.* Louisiana (1904) 194 U. S. 258.

constitutional right under the due process clause, and a State may allow an appeal upon such terms as it thinks proper.[1]

Although no provision in the first ten amendments expressly requires that a defendant must be present in court throughout criminal proceedings, the Supreme Court has declared that by the common law he had a right to be so present in a trial for felony, and that in such a trial in a federal court, under a trial practice regulated by the common law, there was lack of due process under the Fifth Amendment if he was involuntarily absent at any stage of the proceedings.[2] But there is no lack of due process under the Fifth Amendment if the defendant who is not in custody voluntarily absents himself, and so waives his right to be present, at least if he is not on trial for a capital offense.[3] In *Howard v. Kentucky*[4] it was held that a person is not denied the due process guarantied by the Fourteenth Amendment by the law of a State which holds it not to be reversible error for a defendant in a murder trial to be occasionally absent during the trial, when no injury results to his substantial rights. Later in *Frank v. Mangum*[5] the Supreme Court held that a defendant may waive his right to be present when the jury renders its verdict, and that such waiver may occur after as well as before the event, that it is competent for a State to adopt the inference that there has been such waiver when defendant moves for a new trial on other grounds; that since a State may do away with trial by jury it may make such provisions as have just been stated for waiver of the right to be present when the jury renders its verdict without being chargeable with a denial of due process. The court points out[6] that there is a "distinction between what the common law requires with

[1] McKane *v.* Durston (1894) 153 U. S. 684.

[2] Lewis *v.* United States (1892) 146 U. S. 370. There is of course lack of due process if he is absent when a statute expressly requires his presence. Hopt *v.* Utah (1884) 110 U. S. 574.

[3] Diaz *v.* United States (1912) 223 U. S. 442.

[4] (1906) 200 U. S. 164. [5] (1915) 237 U. S. 309. [6] *Ibid.*, 341.

respect to trial by jury in criminal cases, and what the States may enact without contravening the 'due process' clause of the Fourteenth Amendment." In view of the further statement[1] that "repeated decisions of this court have put it beyond the range of further debate that the 'due process' clause of the Fourteenth Amendment has not the effect of imposing upon the States any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with," it would seem that voluntary waiver of the right to be present, at any stage of the proceedings might constitutionally be provided for.

[1] Frank *v.* Mangum (1915) 237 U. S. 309, 340.

CHAPTER XXX

DUE PROCESS IN TAXATION

§248. *Taxation Properly Levied for a Proper Purpose Constitutes Due Process.* Since taxation is absolutely necessary for the existence of a government, it is clear without argument or citation of authority that a person whose property is taken by taxation is deprived of property with due process if the tax is levied for a proper purpose, if the State has jurisdiction of the subject-matter of the tax, and if the procedure adopted is adequate. On the other hand, since a State exists only for the protection of its citizens and to provide for their general welfare, it may not levy taxes except for a public purpose. Again, since a State has no authority outside of its borders it may not levy taxes on property outside of its territorial jurisdiction. Furthermore its procedure must be such as to conform to principles of substantial justice with regard to notice and hearing.

§249. *What Are and What Are Not Proper Purposes for Taxation.* The ordinary expenses of government, the cost of public buildings and highways, the administration of justice, the provision for public education, and the care of the insane, the physically handicapped and the indigent are obviously public purposes.[1] So are the building of railroads,[2] and of irrigation plants.[3] The construction of water, gas, and electric plants and of telegraph and telephone lines are also public purposes though the question has generally

[1] 37 *Cyc.* 721.

[2] Folsom *v.* Township Ninety-six (1895) 159 U. S. 611, 628; 14 *L. R. A.* 479, note.

[3] Davidson *v.* New Orleans (1877) 96 U. S. 97; Hogan *v.* Reclamation District (1884) 111 U. S. 701.

arisen with regard to eminent domain.[1] Furthermore, aid may be given to them by subscription to stocks and bonds instead of by the donation of funds.[2] The discharge of a moral obligation resting upon the State, though there is no legal obligation, is a public purpose justifying taxation.[3] On the other hand it is clear that money may not be raised by taxation to aid or to establish a business of a purely private character, though there might be some incidental benefit to the community as the result of the establishment of the business.[4] But where the dividing line is to be drawn courts have not found it easy to determine. Some courts, particularly in the earlier cases, have stressed the argument of custom, and the question whether the business involved was one upon which a person could only enter with the aid of governmental powers such as that of eminent domain.[5] The modern tendency, however, has been to make the determination turn rather upon whether the undertaking, which it is desired to carry on or aid by taxation, will supply a public need which may not be adequately supplied by private enterprise alone. So it has been held that taxation to provide for a municipal coal yard is constitutional,[6] and also to supply a municipal ice plant.[7] Whether it is constitutional for the State by taxation to supply housing facilities, seed grain, or other commodities

[1] See Chap. 31. "The use for which private property is to be taken must be a public one whether the taking be by the exercise of the right of eminent domain, or by that of taxation." Fallbrook Irrigation Dist. *v.* Bradley (1896) 164 U. S. 112, 161.

[2] Folsom *v.* Township Ninety-six (1895) 159 U. S. 611. State aid to privately owned enterprises though "public" in character is now quite generally forbidden by state constitutions. "Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation, or private undertaking." N. Y. Const., Art. VIII, sec. 9.

[3] United States *v.* Realty Co. (1896) 163 U. S. 427, 438.

[4] Loan Association *v.* Topeka (1874) 20 Wallace 655.

[5] *Ibid.;* Opinion of Justices (1912) 211 Mass. 624.

[6] Loughlin *v.* City of Portland (1914) 111 Me. 486; Jones *v.* City of Portland (1917) 245 U. S. 217. *Contra,* Opinion of Justices (1903) 182 Mass. 605; Baker *v.* City of Grand Rapids (1906) 142 Mich. 687.

[7] Holton *v.* City of Camilla (1910) 134 Ga. 560.

usually supplied by private enterprise, when, as the result of some calamity or unusual circumstances, a large number of citizens are not able to supply themselves, is a question to which diverse answers have been given by state courts.[1] It would seem that the controlling factors in the decision should be the extent of the need, and the question whether the need can be adequately supplied through private enterprises. In the recent case of *Green v. Frazier*[2] the Supreme Court had before it legislation of North Dakota for the organization of a state bank, for the organization of a state mill and elevator association, for the manufacture and marketing of farm products and farm machinery, and the maintenance of elevators and warehouses, and for the establishing of a Home Building Association to provide homes for residents of the State. All these projects were to be financed by taxation, and to be carried on by the State. The Supreme Court unanimously held that the legislation was not in conflict with the due process clause of the Fourteenth Amendment. It was thought by the state legislature and by the state court in a State essentially agricultural, and where a large part of the population were tenants, that the act to provide for the Mill and Elevator Association and the Home Building Association would promote the general welfare, and that a state bank was necessary to these other projects. The Supreme Court felt that it could not say that these conclusions were not correct, and that if they were correct the purposes could fairly be denominated "public." The court relied upon *Jones v. City of Portland*,[3] in which the establishment of a public fuel yard was held a public purpose, distinguishing *Citizens Savings & Loan Association v. Topeka*[4] on the ground that

[1] Lowell *v.* Boston (1873) 111 Mass. 454 (taxation to help rebuild after great fire unconstitutional); Fillan *v.* Gillan (1867) 55 Pa. 430 (taxation to compensate for property burned by confederate soldiers constitutional); State *v.* Osawkee Township (1875) 14 Kan. 418 (taxation to supply seed grain to farmers in financial distress unconstitutional); State *v.* Nelson (1890) 1 N. D. 88 (same, constitutional).

[2] (1920) 253 U. S. 233.

[3] (1917) 243 U. S. 217.

[4] (1874) 20 Wallace 655.

"this is not a case of undertaking to aid private institutions by public taxation," saying that

> "in many instances States and municipalities have in late years seen fit to enter upon projects to promote the public welfare which in the past have been considered entirely within the domain of private enterprise."

It would seem that the Fourteenth Amendment will constitute no obstacle to state socialism.

§250. *Exemption from Taxation.* Although there is difference of opinion among the state courts as to whether an exemption of a private business from taxation falls under the same condemnation as aid granted to such business through taxation,[1] the Supreme Court of the United States seems to accept such exemptions as constitutional.[2]

§251. *Right of State to Tax Land and Chattels.* The Supreme Court of the United States has said that

> "we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State; much less where such action has been defended by any court."[3]

It has always been accepted as true that chattels may be taxed in the State where they are,[4] but in the case just cited the court apparently recognized the power of the State of the owner's residence to tax such chattels also, though they are not within its borders.[5] This would be in accord with the maxim *mobilia sequuntur personam* which has been

[1] Weeks *v.* Milwaukee (1860) 10 Wis. 186 (exemption of hotel property unconstitutional); Opinion of the Court (1879) 58 N. H. 623 (exemption of private property constitutional).

[2] Illinois Cent. Ry. *v.* Decatur (1893) 147 U. S. 190.

[3] Union Refrigerator Tr. Co. *v.* Kentucky (1905) 199 U. S. 194, 204.

[4] Coe *v.* Errol (1886) 116 U. S. 517.

[5] *Ibid.*, 524: "If the owner of personal property within a State resides in another State which taxes him for that property as part of his general estate attached to his person, this action of the latter State does not in the least affect the right of the State in which the property is situated to tax it also."

frequently assumed to apply to tangible as well as to intangible personal property.[1] The Supreme Court, however, has more recently declared that the State of the owner's domicile cannot tax chattels which have a situs in another State,[2] although these decisions do not apply "to tangible personal property, which, although physically outside the State of the owner's domicile, had not acquired an actual situs elsewhere."[3] So a railroad company in the State of its domicile may be taxed upon all of its rolling stock which is within the State during any part of the tax year,[4] even though another State may also levy a tax based upon the average number of cars within its border during the year.[5]

§252. *Taxation of Franchises and the "Unit Rule" as to Intangible Property.* The franchise of a corporation may be taxed in the State which grants it,[6] and the value generally put upon such franchise for taxation is arrived at by capitalizing the net earnings and deducting from the resulting figure the value of the tangible property in the State,[7] or by taking the market value of the stocks and bonds of the corporation.[8] A State may not, however, tax directly a franchise granted by another State.[9] But it may be that a

[1] See notes in 69 *L. T. A.* 443, 36 *L. R. A.* (*N. S.*) 295 and *L. R. A. 1915 C* 908.

[2] Delaware L. & W. R. R. Co. *v.* Pennsylvania (1905) 198 U. S. 341; Union Refrigerator Tr. Co. *v.* Kentucky (1905) 199 U. S. 194. In the first of these cases it was held that a tax on corporate stock when directed against the corporation is a tax on the assets of the corporation issuing the stock.

[3] Hawley *v.* Malden (1914) 232 U. S. 1, 11. So where a Kentucky corporation owned ships plying between New York and New Orleans it was held that they could be taxed in Kentucky having acquired no other situs. Southern Pac. Co. *v.* Kentucky (1911) 222 U. S. 63.

[4] New York *ex rel.* New York Cent. & H. R. R. R. Co. *v.* Miller (1906) 202 U. S. 584.

[5] American Refrigerator Tr. Co. *v.* Hall (1899) 174 U. S. 70.

[6] New York *ex rel.* Met. St. Ry. Co. *v.* Tax Com'rs. (1905) 199 U. S. 1.

[7] People *v.* Tax Commissioners (1909) 196 N. Y. 39.

[8] Henderson Bridge Co. *v.* Kentucky (1897) 166 U. S. 150.

[9] Louisville & J. Ferry Co. *v.* Kentucky (1909) 188 U. S. 385.

corporation is doing business in a number of States, and that the aggregate value of its property measured by its earning capacity is far in excess of the aggregate value of its tangible property. Is this excess to go untaxed, or is it to be taxed wholly in the State of its creation, or is it to be apportioned among the States for taxing purposes? The latter result has been reached by the Supreme Court under what is known as the "unit rule." "It is a cardinal rule which should never be forgotten that whatever property is worth for the purpose of income and sale it is also worth for purposes of taxation."[1] This taxation value may fairly be arrived at by adding together the market value of the company's capital stock and bonds.[2]

> "Where is the situs of this intangible property? Is it simply where its home office is . . . or in the State which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly as we think, the latter. Every State within which it is transacting business and where it has its property, more or less, may rightfully say that the $16,000,000 of value which it possesses springs not merely from the original grant of corporate power by the State which incorporated it, or from the mere ownership of the tangible property, but it springs from the fact that that tangible property it has combined with contracts, franchises, and privileges is a single unit of property and this State contributes to that aggregate value not merely the separate value of such tangible property as is within its limits, but its proportionate share of the value of the entire property."[3]

The apportionment has been made in the case of railroads upon the basis of the ratio which the track mileage within the State bears to the entire track mileage[4]; in the case of

[1] Adams Express Co. *v.* Ohio (1897) 166 U. S. 185, 220.

[2] State Railroad Tax Cases (1875) 92 U. S. 575; Henderson Bridge Co. *v.* Kentucky (1897) 166 U. S. 150.

[3] Adams Express Co. *v.* Ohio (1897) 166 U. S. 185, 223.

[4] Pittsburgh etc. Ry. Co. *v.* Backus (1894) 154 U. S. 421.

Pullman or sleeping car companies upon the basis of the ratio which the miles of track over which the company runs within the State bear to the whole track mileage over which it runs[1]; in the case of telegraph companies upon the basis of the ratio which the wire mileage within the State bears to the entire wire mileage[2]; and in the case of express companies upon the basis of the ratio which the railroad mileage covered within the State bears to the entire railroad mileage used by it.[3] But if it appears that part of the capital of the corporation, which is not located in the taxing State, is not used in connection with the business which is in part carried on in that State, the value of such property must be excluded in arriving at the unit value of the business.[4] It may be, also, that in special cases the apportionment of the unit value of a business according to the ratios above stated would not be reasonable, and would have to be modified, as where a railroad has in one State a very short track mileage but a very valuable terminal.[5]

§253. *State Taxes Interfering with the National Government.* Although not expressly limited by constitutional provision, a State may not levy taxes which interfere with the federal government in the performance of its functions. Therefore, States may not tax federal property,[6] the salaries of federal officers,[7] the property of a purely federal instrumentality such as a national bank, except so far as expressly

[1] Pullman Palace Car Co. *v.* Pennsylvania (1891) 141 U. S. 18.

[2] Western Union Tel. Co. *v.* Taggart (1896) 163 U. S. 1.

[3] Adams Express Co. *v.* Ohio (1897) 165 U. S. 194, upon rehearing (1897) 166 U. S. 185; Fargo *v.* Hart (1904) 193 U. S. 490. *Cf.* Underwood Typewriter Co. *v.* Chamberlain (1920) 254 U. S. 113, where in the case of a manufacturing concern the apportionment was made upon the basis of a comparison of the tangible property within the State and without the State.

[4] Fargo *v.* Hart (1904) 193 U. S. 490.

[5] Cleveland &c. Ry. Co. *v.* Backus (1894) 154 U. S. 439, 443. *Cf.* Wallace *v.* Hines (1920) 253 U. S. 66.

[6] Van Brocklin *v.* Tennessee (1886) 117 U. S. 151; Wisconsin C. Ry. *v.* Price Co. (1890) 133 U. S. 496.

[7] Dobbins *v.* Commissioners (1842) 16 Peters 435.

permitted by Congress[1]; may not directly tax the right to exercise federal franchises,[2] and may not tax federal securities.[3] But an inheritance tax may be levied by a State upon legacies consisting of United States bonds, because this is not a tax on the bonds but upon the privilege of transmission or of inheritance.[4] Also an inheritance tax may be levied by a State upon property left by will to the United States. The tax in such a case is looked upon as a tax upon the privilege of transmission, and as being deducted before the legacy reaches the hands of the United States.[5] While a State may not levy a tax upon the privilege of engaging in interstate commerce within its borders or upon the receipts from interstate commerce as such, it may tax the property within the State of persons or corporations engaged in interstate commerce.[6] It is on this principle that the "unit rule" of taxation on interstate business, discussed just above, is justified as not being an improper interference with interstate commerce.

§254. *Excises on Foreign Corporations.* As we have seen, a State may not exclude a foreign corporation desiring to enter to engage in interstate commerce, but it may exclude such a corporation desiring to do intrastate business, and, if it desires to do intrastate business only, the State may apparently impose upon it such arbitrary excise tax upon the privilege of doing so as it may think fit.[7] However, in case the foreign corporation is doing both interstate and intrastate business within the taxing State an excise

[1] Owensboro National Bank *v.* Owensboro (1899) 173 U. S. 664; Bank of California *v.* Richardson (1919) 248 U. S. 476.

[2] California *v.* Central Pac. Ry. Co. (1888) 127 U. S. 1.

[3] Weston *v.* Charleston (1829) 2 Peters 449. But a State may tax securities issued by another State and held by a resident of the taxing State. Bonaparte *v.* Tax Court (1881) 104 U. S. 592.

[4] Plummer *v.* Coler (1900) 178 U. S. 115.

[5] United States *v.* Perkins (1896) 163 U. S. 625; United States *v.* Fitch (1896) 163 U. S. 631.

[6] Adams Express Co. *v.* Ohio (1897) 165 U. S. 194. See further as to state taxation and interstate commerce, sec. 95.

[7] Sec. 206.

may not be laid ostensibly upon the privilege of doing the intrastate business which in fact lays a substantial burden upon the interstate business.[1] So an excise in form upon the intrastate business but measured by the entire capital stock of the corporation is invalid[2]; unless this is coupled with a declaration of fixed sum beyond which the tax is not to go, which is so low in view of the intrastate business done as not to be a substantial burden on the interstate business.[3] An excise upon the intrastate business measured by that part of its total capital stock which represents the value of the property located within the State is valid,[4] and so *a fortiori* is such a tax based upon the gross receipts from the intrastate business.[5]

§255. *State Taxation of Choses in Action.* All forms of choses in action are taxable by the State of the owner's domicile according to the maxim *mobilia sequuntur personam.*[6] In an early case it was held that a State could not

[1] See generally Thomas R. Powell, "Indirect Encroachment on Federal Authority by the Taxing Power of the States," *31 Harv. L. Rev.*, 321, 572, 721, 932. *Cf.* Postal Teleg. Cable Co. *v.* Tremont (1921) 255 U. S. 114. See further sec. 95.

[2] Western Union Tel. Co. *v.* Kansas (1910) 216 U. S. 1. The majority of the court in this case further held that, aside from the interference with interstate commerce, the requirement that the corporation pay an arbitrary sum or give up its established interstate business and sacrifice its property in the State devoted to that purpose was a taking of its property arbitrarily and so without due process. To this the minority answered, that since the foreign corporation had no right in the State, and since it was, therefore, merely in the State as a licensee that license could be withdrawn at will, or continued upon such conditions as the State should declare, and that the corporation must have entered upon this understanding. In such a case, aside from the effect upon interstate commerce, the action of the State would seem rather to be a denial of equal protection than of due process. See Southern Ry. Co. *v.* Greene (1910) 216 U. S. 400, and the text, sec. 276.

[3] Baltic Mining Co. *v.* Massachusetts (1913) 231 U. S. 68; General Ry. Signal Co. *v.* Virginia (1918) 246 U. S. 500.

[4] St. Louis & S. W. R. Co. *v.* Arkansas (1914) 235 U. S. 350. *Cf.* Wallace *v.* Hines (1920) 253 U. S. 66.

[5] New York *v.* Sohmer (1915) 235 U. S. 549.

[6] State Tax on Foreign Held Bonds (1872) 15 Wallace 300 (bonds); Sturgis *v.* Carter (1885) 114 U. S. 511 (stock); Kirtland *v.* Hotchkiss

tax bonds of a domestic corporation owned by and in the possession of a nonresident,[1] the broad doctrine being laid down that "debts can have no locality separate from the parties to whom they are due." This broad doctrine, however, has not stood the test of time. In the same year the Supreme Court held that a foreign stockholder might be taxed on his stock in the State in which the concern issuing it is incorporated.[2] This decision was based to be sure upon the supposed analogy of a stockholder to a partner. But this analogy is not sound, for while a partner owns the partnership property and should only be taxed on that property in the State where it is located, a stockholder does not own the corporate property but owns only a chose in action against the corporation.[3] Where a debt is owed to a nonresident but is secured by a mortgage on property within the State, it is held that the State where the mortgaged property is located may levy a tax on the mortgagee's interest in the property.[4] Most important are the decisions represented by *Metropolitan Life Ins. Co. v. New Orleans*,[5] which held that when a nonresident invests money in loans in a State that State may tax the debts.[6] This quite reverses the broad doctrine stated in the case of *State Tax on Foreign*

(1879) 100 U. S. 491 (debt, though secured by mortgage in another State); Hawley *v.* City of Malden (1914) 232 U. S. 1 (stock of a foreign corporation). "Generally speaking, intangible property in the nature of a debt may be regarded, for the purpose of taxation, as situated at the domicil of the creditor and within the jurisdiction of the State where he has such domicil. It is property within that State." Buck *v.* Beach (1907) 206 U. S. 392, 401.

[1] State Tax on Foreign Held Bond (1872) 15 Wallace 300.

[2] Tappan *v.* Merchants Nat. Bk. (1873) 19 Wallace 490.

[3] See criticism by Joseph H. Beale, Jr., "The Taxation of Foreign Corporations," *17 Harv. L. Rev.*, 248, 254.

[4] Savings & L. Soc. *v.* Multnomah County (1898) 169 U. S. 421.

[5] (1907) 205 U. S. 395.

[6] In the two earlier cases of New Orleans *v.* Stempel (1899) 175 U. S. 309, and State Assessors *v.* Comptoir National D'Escompte (1903) 191 U. S. 388, some stress was laid upon the fact that the evidences of debt were left with an agent in the taxing State, but this was not so in the case cited in the text.

Held Bonds quoted above and is to be justified on the basis of compensation for the protection of the obligation and of the right to enforce it in the State of the obligor's domicile. Upon this ground the decision noted above as to corporate stock is supportable. This doctrine leaves the decision that foreign held bonds cannot be taxed in the State of the debtor as the exception instead of the rule, which is explainable only, if at all, upon the theory that bonds are to be viewed not as evidences of obligations, but as constituting the obligations, and so having their situs where they actually are.

In the case of *Buck v. Beach*[1] the Supreme Court had before it an attempt of a State to tax promissory notes which were within its jurisdiction, although both the owner and the makers were nonresidents. The court held that the mere physical presence of the evidence of debt within a State would not give that State jurisdiction to tax the debt.[2] This decision would be equally applicable to corporate stock. It is intimated that bonds are sufficiently analogous to tangible property to give them a situs for taxation at the place where they are.[3] It is submitted that a distinction between bonds on the one hand and stock and negotiable paper on the other is not justified. If it is not made, there is no present justification for the decision in *State Tax on Foreign Held Bonds*.[4]

We see from the cases discussed in this section that it is quite possible that a chose in action may be taxed both at the

[1] (1907) 206 U. S. 392.

[2] In Wheeler *v.* New York (1914) 233 U. S. 434, Justice Holmes suggests that Buck *v.* Beach was decided on the theory that the notes were only temporarily and improperly in the taxing State, and that the decision might have been different except for these facts. Justice McKenna refutes this interpretation, and holds it unnecessary to the decision in the instant case. Three Justices concurred with Holmes, one with McKenna and three dissented, so that the question is put very much in doubt. See also De Ganey *v.* Lederer (1919) 250 U. S. 376.

[3] New Orleans *v.* Stempel (1899) 175 U. S. 309, 322; Buck *v.* Beach (1907) 206 U. S. 392, 403.

[4] (1872) 15 Wallace 300.

domicile of the obligor and at the domicile of the obligee, but double taxation is not unconstitutional.[1]

§256. *State Income Taxes.* In general conformity to the principles underlying the rights to tax choses in action, it is held that a State may impose a tax on all of the income of a resident though part of it is derived from without the State.[2] Also a State may levy a tax on income derived by a nonresident, from any business, trade, profession or occupation carried on within the State.[3]

§257. *State Inheritance Taxes on Realty and Chattels.* State inheritance taxes have become of increasing importance in recent years, and the cases in this field frequently raise the question of jurisdiction in the taxing State. In approaching this question it should be born in mind that the inheritance tax is not a tax on property but upon the right to take or to dispose of the property involved.[4] There is no question that the State in which real property or chattels are located may tax their transfer.[5] It is also clear that the State of a decedent's residence cannot tax the succession to his real property located in another State.[6] The same should be true of chattels, for in fact it is the State where the chattels are located that controls the succession, and, though States generally follow the law of the decedent's domicile with regard to the inheritance of chattels, this is a matter of comity and not of obligation, and the

[1] Shaffer *v.* Carter (1920) 252 U. S. 37.

[2] Maguire *v.* Trefrey (1920) 253 U. S. 12.

[3] Shaffer *v.* Carter (1920) 252 U. S. 37; Travis *v.* Yale & Towne M'f'g. Co. (1920) 252 U. S. 60, though in this latter case the tax was held unconstitutional for other reasons.

Whether, if a person owns bonds, stock or negotiable paper which are in a State which is neither the domicile of the owner or of the debtor, that State may tax the income, seems not to have been considered. But see the language of the court in De Ganey *v.* Lederer (1919) 250 U. S. 376.

[4] Knowlton *v.* Moore (1900) 178 U. S. 41 (containing an interesting history of death duties); Blackstone *v.* Miller (1903) 188 U. S. 189.

[5] Mager *v.* Grima (1850) 8 Howard 490; Blackstone *v.* Miller (1903) 188 U. S. 189, 206; Ross, *Inheritance Taxation*, secs. 171 and 172.

[6] Ross, *Inheritance Taxation*, sec. 171; Gleason and Otis, *Inheritance Taxation* (2nd ed.), 307.

privileges granted by the State of decedent's domicile have in fact no extraterritorial effect. And yet the comparatively few cases in the state courts which have dealt with a tax imposed by the State of decedent's residence upon the succession to chattels (as distinguished from intangible property) located without the State have held such a tax valid.[1] This is only supportable under the maxim *mobilia sequuntur personam*, but, as we have seen, this has been held by the Supreme Court of the United States not to apply where a tax is sought to be imposed upon the chattel itself which is outside of the taxing State,[2] and it is reasonably to be hoped that the Supreme Court will hold that the maxim is equally inapplicable when a State seeks to impose a tax upon the succession to chattels located outside of its jurisdiction.

§258. *State Inheritance Taxes on Intangible Property.* When a person dies owning intangible property such as bonds, stock, negotiable paper, or debts, since it is held, as we have seen above, that such property has its situs at the domicile of the owner, the State of the owner's domicile may impose a succession tax upon the privilege of transmitting and inheriting such property.[3] The United States Supreme Court has also held that, when a person dies having a bank deposit in a State other than that of his residence, and being owed a debt by one who lives in another State, the State where the bank is located and where the debtor resides may levy an inheritance tax on the deposit and debt.[4] This is "not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its (the State's) power over the person of the debtor." This would seem equally true of stock of a

[1] Matter of Swift (1893) 137 N. Y. 77, Gray, J., dissenting (where the court laid down a different rule for realty and chattels); 46 *L. R. A. (N. S.)* 1179 n.; Ross, *Inheritance Taxation*, sec. 173.

[2] Delaware L. & W. R. Co. *v.* Pennsylvania (1905) 198 U. S. 341.

[3] Matter of Estate of Romaine (1891) 127 N. Y. 80; Frothingham *v.* Shaw (1899) 175 Mass. 59. This is assumed in Blackstone *v.* Miller (1903) 188 U. S. 189.

[4] Blackstone *v.* Miller (1903) 188 U. S. 189.

domestic corporation owned by a nonresident.[1] The Supreme Court has suggested that this may not be true of bonds and negotiable instruments, not present in the State where the debtor is a resident, and of which the owner is a nonresident, since "the debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions."[2] This suggests a third possibility, namely that the evidence of the obligation is in a State other than that of the domicile of either the obligor or the owner. Under these circumstances it has been declared by the Supreme Court that a State may levy an inheritance tax upon the transfer of bonds and negotiable paper, including, of course, bank bills.[3] Justice Holmes asserts that

> "it is not primitive tradition alone that gives their peculiarities to bonds, but a tradition laid hold of, modified and adapted to the convenience and understanding of business men. The same convenience and understanding apply to bills and notes, as no one would doubt in the case of bank notes, which technically do not differ from others."[4]

Justice McKenna concurring did not rest his opinion upon the ground that bonds and negotiable paper are substantially property in themselves, but upon the ground that the State where they are can control the transfer of these evidences. Whether the same rule should apply to corporate stock is not entirely clear, but it would seem that it

[1] Matter of Bronson (1896) 150 N. Y. 1; Ross, *Inheritance Taxation*, sec. 182. This view would undoubtedly be taken by the Supreme Court of the United States on the authority of Tappan *v.* Merchants' Nat. Bk. (1873) 19 Wallace 490, holding that a State may tax a nonresident stockholder on stock of a domestic corporation.

[2] Blackstone *v.* Miller (1903) 188 U. S. 189, 206. To this effect with regard to bonds is Matter of Bronson (1896) 150 N. Y. 1, two judges dissenting. See also Gleason and Otis, *Inheritance Taxation* (2nd ed.), 313.

[3] Wheeler *v.* Sohmer (1914) 233 U. S. 434, three justices dissenting.

[4] *Ibid.*, 439.

should in view of the fact that certificates of stock are freely bought and sold and used as collateral.[1]

§259. *Notice and Hearing in Taxation.*[2] It is not always true that due process requires notice and an opportunity to be heard when property is taken by taxation. Whether such notice and hearing are necessary depends upon the nature of the tax—whether it is a specific tax or one levied ad valorem.

> "Of the different kinds of taxes which the State may impose, there is a vast number of which, from their nature, no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll-taxes, license taxes (not dependent upon the extent of his business) and, generally, specific taxes on things or persons or occupations. In such cases the legislation authorizing the tax fixes its amount, and that is the end of the matter. If the tax be not paid the property of the delinquent may be sold, and he be thus deprived of his property. Yet there is no question that the proceeding is due process of law. . . . In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it. But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in."[3]

But where the tax is based upon the value of property it is not necessary that an opportunity for a hearing be given

[1] In Matter of James (1894) 144 N. Y. 6, it was held that stock certificates of foreign corporations, being within the State but owned by nonresidents, were not intended by the Legislature to be included in the term property in the inheritance tax law. See also People *v.* Griffith (1910) 245 Ill. 532. But in Simpson *v.* Jersey City Co. (1900) 165 N. Y. 193, such certificates were held subject to attachment, and in People *ex rel.* Hatch *v.* Reardon (1906) 184 N. Y. 431, the court declared that a statute which expressly taxed the transfer of such certificates was constitutional.

[2] With regard to due process and administrative action, see sec. 156.

[3] Hagar *v.* Reclamation District (1884) 111 U. S. 701, 709.

before it is assessed, as long as the property owner has such opportunity before the tax becomes irrevocably fixed. Such opportunity may be afforded before a board of revision, or it is sufficient if the tax can be enforced only through judicial proceeding[1]; but the law must afford the property owner an opportunity "to support his allegations by argument, however brief; and, if need be, by proof, however informal."[2] It is not necessary that the notice of an opportunity for a hearing be personal; it is sufficient if it is "either personal, by publication, or by a law fixing the time and place of the hearing."[3]

[1] Hagar *v.* Reclamation District (1884) 111 U. S. 701, 709.
[2] Londoner *v.* City & County of Denver (1908) 210 U. S. 373, 386.
[3] *Ibid.*, 385. See Taylor, *Due Process of Law*, sec. 159.

CHAPTER XXXI

DUE PROCESS IN EMINENT DOMAIN

§260. *When Property is Taken by Eminent Domain for a Public Use There is Due Process.* The Fifth Amendment to the Federal Constitution ends with the provision, "nor shall private property be taken for public use without just compensation," but this amendment applies only to the national government. There are now similar provisions in all of the State Constitutions except those of Kansas, New Hampshire and North Carolina,[1] but the Constitution of the United States does not *expressly* prohibit the taking of private property by the States without compensation, under their power of eminent domain. If they are to be visited with such a limitation it must be under the due process clause of the Fourteenth Amendment. Since the Fifth Amendment contains both a due process clause and a clause requiring compensation for property taken for a public use, it might be argued that the latter limitation is not covered by the due process clause of the Fourteenth Amendment,[2] but the Supreme Court of the United States has now repeatedly declared that to take private property for a public use without just compensation is mere spoliation, and so contrary to the fundamental principles of justice and liberty as to be entirely wanting in due process.[3]

[1] Lewis, *Eminent Domain* (3rd ed.) secs. 16 to 61. In Kansas a right of way cannot be appropriated to a corporation without compensation.

[2] See Justice Miller's comment in Davidson *v.* New Orleans (1877) 96 U. S. 97, 105.

[3] Searl *v.* School Dist. (1890) 133 U. S. 553, 562; Swart *v.* Rechel (1895) 159 U. S. 380, 398; Chicago B. & G. R. Co. *v.* Chicago (1897) 166 U. S. 226. Even before the adoption of state due process clauses or of the federal due process clause applicable to the States the taking of

A fortiori is it unconstitutional to take private property for a private use even though compensation be made.[1] The power of eminent domain, like the taxing power, inheres in a government because it is necessary for the conduct of government and for the advancement of the public welfare. Inhering in the State for the benefit of the public this power can only be used for a public purpose. And what is said of the power of eminent domain applies equally to the use of public highways which are dedicated or acquired for public purposes only. But under the proper exercise of the power of eminent domain all kinds of property may be taken, including franchises and contracts. This does not impair the obligations of contracts, but merely allows their acquisition.[2] Property may also be taken which has itself been acquired by eminent domain, and is being devoted to a public use.[3] The power of eminent domain is a sovereign power[4] and can only be exercised by the State or by one to whom it has been granted, either specifically, or as a member of a class.[5] This power, however, cannot be exercised by a State to take property belonging to the United States government.[6]

§261. *Power of Eminent Domain May Not Be Contracted Away.* In a recent case the question was directly raised as to whether a State may contract away its right to exercise the power of eminent domain. The Supreme Court disposed of this case unanimously and summarily on the ground that

---

property for public purposes without compensation was condemned in Gardner *v.* Newburgh (1816, N. Y.) 2 Johns. Ch. 162; Sinnickson *v.* Johnson (1839) 17 N. J. Law 129.

[1] Missouri Pac. Ry. *v.* Nebraska (1896) 164 U. S. 403, 417, and cases there cited.

[2] West River Bridge Co. *v.* Dix (1848) 6 Howard 507; City of Cincinnati *v.* Louisville & N. R. R. Co. (1912) 223 U. S. 390; Long Island W. S. Co. *v.* Brooklyn (1897) 166 U. S. 685.

[3] United States *v.* Gettysburg El. Ry. (1896) 160 U. S. 668, 685.

[4] United States *v.* Jones (1883) 109 U. S. 513, 578; City of Cincinnati *v.* Louisville & N. R. R. Co. (1912) 223 U. S. 390, 404.

[5] Lewis, *Eminent Domain* (3rd ed.) sec. 367.

[6] Utah Power etc. Co. *v.* United States (1917) 243 U. S. 389.

"there can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the States cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties."[1]

§262. *What Is a Public Use in Eminent Domain.* When we come to consider what is a public use for which property may be taken under the power of eminent domain we find certain cases in which the conclusion is quite obvious. When the property is to be used by a State or one of its subdivisions, or when it is going to be put directly to the use of the people of a community as a whole, and is necessary so that the public may have a service important to their welfare or convenience, we seem quite clearly to have a public use. It would seem clear, for instance, that property is taken for a public use when taken for public buildings, such as city halls, schools and the like[2]; also when taken for a sewage system, or for supplying gas, water and electricity to inhabitants of a city, town, or district.[3] Property is also taken for a public use when taken for a highway.[4] The same is true of toll roads, bridges and ferries,[5] and, of a canal used as a highway.[6] Railroads, though constructed by private capital, are so essentially highways that the well-established rule with regard to highways has naturally been

[1] Pennsylvania Hospital *v.* Philadelphia (1917) 245 U. S. 20, 23.

[2] Lewis, *Eminent Domain* (3rd ed.) sec. 270, and cases cited; Kohl *v.* United States (1875) 91 U. S. 367.

[3] Lewis, *Eminent Domain* (3d ed.) secs. 267 and 268, and cases cited; United States *v.* Great Falls M'f'g. Co. (1884) 112 U. S. 645.

[4] Luxton *v.* North River Bridge Co. (1894) 153 U. S. 525, 529.

[5] *Ibid.*

[6] United States *v.* Jones (1883) 109 U. S. 513; Chesapeake, etc. Canal Co. *v.* Key (1829) 3 Cranch C. C. 599.

applied, and the construction of a railway with its necessary appurtenances has been held a public use.[1] It is not a far step from the carriers of goods by rail to those who transport oil for the public by pipe lines,[2] or to those who transmit messages for the public by telegraph or telephone.[3] To these public uses may be added irrigation of arid tracts of land,[4] drainage of land whereby the community at large will be benefited,[5] public parks,[6] and public cemeteries.[7]

On the other hand it has been held that taking property for a private grain elevator is a private use and unconstitutional.[8] Also it has been held unconstitutional for the same reason to take land for stores in a city.[9]

The so-called "mill acts," which permit, upon compensation, the flooding of the land of others for the creation of water power for mills, have caused the courts much trouble.[10] As a matter of fact this practice seems to have been general along the Atlantic seaboard before the Revolution. The explanation is, perhaps, twofold: (1) In the earlier days in England the right to conduct a gristmill was apparently considered a manorial franchise, which carried with it a duty to the public, and, therefore, made it a sort of public institution,

[1] Cherokee Nation *v.* Kansas Ry. Co. (1890) 135 U. S. 641, 656; Union Lime Co. *v.* Chicago & N. W. Ry. Co. (1914) 233 U. S. 211.

[2] West Va. Trans. Co. *v.* Volcanic C. & O. Co. (1872) 5 W. Va. 382.

[3] Pierce *v.* Drew (1883) 136 Mass. 75; American T. & T. Co. *v.* St. Louis etc. Ry. Co. (1907) 202 Mo. 656.

[4] Fallbrook Irrigation Dist. *v.* Bradley (1896) 164 U. S. 112.

[5] Sweet *v.* Rechel (1895) 159 U. S. 380.

[6] Shoemaker *v.* United States (1893) 147 U. S. 282. To acquire land as a memorial of a great battle is also a public use. United States *v.* Gettysburg El. Ry. Co. (1896) 160 U. S. 668. The grant of the power to a corporation will be scrutinized more closely than the exercise of it by the State. *Ibid.*

[7] 15 *Cyc.* 600.

[8] Missouri Pac. Ry. Co. *v.* Nebraska (1896) 164 U. S. 403. But a public elevator has been held a public use. Stewart *v.* Great Northern R. R. Co. (1896) 65 Minn. 515.

[9] Opinion of the Justices (1910) 204 Mass. 607.

[10] See the interesting discussion of the subject in Lewis, *Eminent Domain*, secs. 275 to 280.

justifying the grant of eminent domain. (2) In primitive agricultural communities, before the invention of steam, local gristmills driven by water power would be necessary to the public, and eminent domain would often be necessary in order to get the power. So the practice became established, and has been continued, though these reasons no longer exist.[1] In other States, however, it is held unconstitutional to grant the power for this purpose.[2]

In some of our western States a more liberal doctrine has developed with regard to eminent domain than that which has just been discussed, a doctrine which substitutes "public benefit" through the development of the natural resources of the community for "public use." This doctrine has developed particularly where mining is a chief industry, and where there is a scarcity of water, and irrigation is necessary to successful agriculture. Two decisions of the court of last resort, both involving legislation of the State of Utah, are instructive in this connection, and show the inclination of the Supreme Court to allow the determination of what is a public use to be largely influenced by special circumstances existing in each community. In *Clark v. Nash*[3] it was held that a statute allowing private individuals to condemn rights of way across the lands of others to carry water for irrigation was constitutional. The court admitted that this probably would not be so in other States, but believed that the Utah legislature and court were justified in reaching the conclusion which they did in view of the special circumstances existing there.

[1] Olmstead *v.* Camp (1866) 33 Conn. 532; Boston & Rox. Mill Corp. *v.* Newman (1832, Mass.) 12 Pickering 467; Great Falls Manf. Co. *v.* Fernald (1867) 47 N. H. 444; Head *v.* Amoskeag Manf. Co. (1885) 113 U. S. 9, upholding a New Hampshire statute, and giving countenance to the later Massachusetts view that there is not here a taking but the regulation of riparian rights. See Lowell *v.* Boston (1873) 111 Mass. 454, 464.

[2] Ryerson *v.* Brown (1877) 35 Mich. 333; Houghbridge *v.* Harris (1871) 42 Ga. 501; Gaylord *v.* Sanitary Dist. (1903) 204 Ill. 576; Dice *v.* Sherman (1907) 107 Va. 424.

[3] (1905) 198 U. S. 361.

"But," the court said, "we do not desire to be understood as approving of the broad proposition that private property may be taken in all cases where the taking may promote the public interest and tend to develop the natural resources of the State. We simply say that in this particular case, and upon the facts stated in the findings of the court, and having reference to the conditions already stated, we are of the opinion that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."[1]

The same attitude led the court to hold in *Strickley v. Highland Boy Mining Co.*[2] that individual mine owners may be authorized to condemn a right of way across adjoining property in order to get their products to the railroad.

§263. *What Is a Taking in Eminent Domain.* Since rights in chattels and lands and not the chattels and lands themselves constitute property, the infringement of any property rights is a taking, which must be justified under the due process clause, though the owner is not actually deprived of any subject.[3] If, however, a private property right is held subject to a public right, the exercise of the public right will not constitute a taking of the private property right. So where a person owns the bed of a navigable stream, his rights in the river bed and to the use of the water in the stream are held subject to the public

[1] Clark *v.* Nash (1905) 198 U. S. 361, 369.

[2] (1906) 200 U. S. 527. See also Montaire Mining Co. *v.* Columbus Co. *et al.* (1918, Utah) 174 Pac. 172, where it was held that one mining company could constitutionally be authorized to condemn a part use of a tunnel constructed by another mining company, where the whole capacity of the tunnel was not being used. The court divided three to two.

[3] Pumpelly *v.* Green Bay Co. (1871) 13 Wallace 166; Cooley, *Constitutional Limitations* (7th ed.), 787; 12 *Corpus Juris* 1215.

right of navigation, and, if the stream is an interstate highway, subject to the right of Congress to regulate.

> "If, in the judgment of Congress, the use of the bottom of the river is proper for the placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in the very nature subject to that use in the interest of public navigation."[1]

When a property owner's line goes to the bank of a navigable stream, Congress may, for the improvement of interstate navigation, interfere with the riparian owner's access to the water without making compensation.[2] Other public uses to which a state may put a stream without making compensation to persons who are adversely affected, are drainage of adjoining land,[3] and the supplying of cities with water.[4] But the state may not take the bed of a nonnavigable stream to improve and make navigable without compensating the owner.[5]

When the state or municipality owns the fee in highways and streets the abutting landowners' easements of light, air, access, and lateral support are held subject to reasonable highway purposes. Any further use which interferes with the easements constitutes a taking. When the state or municipality has merely an easement in highways or streets, any uses of the highways and streets beyond those reasonably contemplated for highway purposes puts an added burden upon the fee, and so constitutes a taking. The construction of street railways, and of sewer, gas, and water systems are generally

[1] United States *v.* Chandler-Dunbar W. P. Co. (1913) 229 U. S. 53, 62.

[2] Scranton *v.* Wheeler (1900) 179 U. S. 141. And see Eldridge *v.* Trezevant (1896) 160 U. S. 453 (property bordering on Mississippi subject to levee construction).

[3] Chicago, B. & Q. Ry. Co. *v.* Illinois (1906) 200 U. S. 561.

[4] St. Anthony Falls W. P. Co. *v.* St. Paul Water Commissioners (1897) 168 U. S. 349.

[5] Morgan *v.* King (1866) 35 N. Y. 454.

held to be proper highway purposes.[1] On the other hand reasonable purposes are generally held not to include the placing in the streets of telegraph or telephone poles and wires, or of electric lighting poles and wires, except when the latter are to be used to light the streets.[2] There is diversity of view as to whether the construction of elevated railroads, subways, and steam railroads constitute reasonable street purposes.[3] It would seem that steam railroads should not be held to come within this category, but that elevated railways and subways should, at least where the fee or easement in the property has been acquired since these means of conveyance have come into use.

§264. *Measure of Compensation in Eminent Domain.* If an entire lot or tract of land is taken under the power of eminent domain, the measure of compensation is the market value of that land. But a taking may consist of injury to one's proprietary rights without the actual taking of any land, or there may be an injury in addition to the taking of part of one's land, as, for instance, where an easement appurtenant to land is interferred with, or an easement in one's land is acquired. In such a case, also, the taking must be fully paid for. On the other hand special benefits may accrue to the person whose property has been taken, as where the building of a highway through his land drains a swamp, or gives him an easement of access to the highway. In all States except Mississippi such *special* benefits may be set off against damages to property rights in lands which have not been taken. As to whether special benefits may be set off against the value of land which is taken, there is irreconcilable conflict. Since the purpose of compensation in condemnation proceedings is to put the person whose property right has been interfered with in as good a position as his neighbor who has not suffered such interference it would seem that *special* benefits should be deducted from the full sum of damage occasioned to property rights. Where the land remaining to a person, whose property rights

[1] Lewis, *Eminent Domain* (3rd ed.), secs. 161 and 183 to 185.

[2] *Ibid.*, secs. 187 and 188.

[3] *Ibid.*, secs. 151 to 157 and 162.

have been adversely affected, is benefited in common with the land of other persons in the locality, this general benefit should clearly not be deducted from the value of proprietary rights which have been taken, though some courts do, in fact, allow it to be deducted from incidental damages, and some even allow it to be deducted from the value of land which is taken. If the object of compensation is to put the person whose proprietary rights have been taken in as good a position as if such rights had not been interfered with, he should not have deducted from his compensation benefits which those whose property has not been taken are allowed to enjoy unmolested.[1] Besides, the general benefit is usually the basis of assessment for the cost of resulting improvements, and a person is put in a hard position if his recovery is reduced to the extent to which he has shared in a general benefit, and then he is assessed for the improvement on the basis of such benefit.[2]

§265. *Notice and Hearing in Eminent Domain.*[3] As we have seen, it is a general principle that, when title to or possession of property is taken by authority of the State, "the party to be affected shall have notice and an opportunity to be heard."[4] This principle clearly applies to the condemnation of any proprietary interest under the power of eminent domain.[5] Notice by publication is sufficient as

[1] See the excellent treatment of the subject of "Just Compensation and Damages" in Lewis, *Eminent Domain* (3rd ed.), chap. 20, with exhaustive collection of authorities. However, the Supreme Court has held that it is not unconstitutional to deduct increase in market value as well as special benefits from the value of property rights which are taken. McCoy *v.* Union Elevated R. R. Co. (1918) 247 U. S. 354.

[2] For a treatment of assessments for local improvements see sec. 280.

[3] For a consideration of due process and administrative action see sec. 156.

[4] Hagar *v.* Reclamation District (1884) 111 U. S. 701, 708. See sec. 235.

[5] United States *v.* Jones (1883) 109 U. S. 513, 519; Baltimore Traction Co. *v.* Baltimore Belt R. R. Co. (1894) 151 U. S. 137.

against a nonresident owner,[1] and also as against a resident, owner at least when personal service cannot be made with due diligence.[2]

[1] Huling *v.* Kaw Valley Ry. (1889) 130 U. S. 559.

[2] Lewis, *Eminent Domain* (3rd ed.), sec. 568, and cases cited. See also sec. 245.

CHAPTER XXXII

DUE PROCESS AND THE POLICE POWER

§266. *The Relation of Police Power to Due Process.*[1] In examining the theory upon which the American Union was organized we have seen that the State Legislatures are held to possess all ordinary legislative powers, as measured by the powers exercised by the British Parliament at the time of the Revolution, except in so far as such powers are limited by the Federal Constitution, and by the constitutions of the individual States.[2] At the time that the Constitution was adopted the people of the United States were particularly fearful of too great centralization of power in the federal government. This is apparent from the whole tenor of the Constitution, but is more particularly evidenced by the first ten amendments. However, after the Civil War, which had been the direct outcome of the extreme states rights doctrine, we find a very natural swing of the pendulum, evidenced by the war amendments, which not only guarantied freedom to the colored race, but put certain direct limitations upon state action.[3] One of these limitations is that a State may not "deprive any person of life, liberty, or property without due process of law." As we have seen the liberty here guarantied is not only personal liberty, but liberty of action, including liberty to contract; and the provision against taking property without due process not only limits the power of the States to take land and chattels, but also their right to interfere with the free use of property, or with the returns which may be realized from its use.[4] It is evident that the extent of this limitation

[1] With regard to due process and administrative action see sec. 156.
[2] Secs. chap. 19. [3] Sec. 116. [4] Sec. 234.

will entirely depend upon the interpretation put upon the phrase "due process." The Supreme Court might have interpreted due process of law as meaning merely in due conformity with the law, as it was urged to do. So interpreted the due process clause would have constituted no limitation upon legislative action. The Supreme Court without hesitation refused to adopt this interpretation. Although the court has refused to attempt a definition of due process, it has declared that in the Fourteenth Amendment

> "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 liberty 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."[1]

The so-called "police power" is one of those inherent powers of the State to which the court refers,[2] and it therefore, follows that legislation passed in pursuance of that power, and which is not clearly in conflict with "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" is constitutional. Bearing this in mind, it becomes apparent that a liberal interpretation of the police power will go far towards modifying the restriction of due process as it applies to legislative action. The police power is the most general and least defined of the inherent powers of the States and that there has been an increasingly liberal interpretation put upon it is apparent from a study of the decisions of the last decades. This does not evidence a revival of sentiment in favor of State's Rights,

[1] Hurtado *v.* California (1884) 110 U. S. 515, 535. See the discussion sec. 233.

[2] We have already to some extent considered the meaning of the term "police power" in connection with the constitutional provision against the impairment of the obligation of contracts, secs. 194 to 197.

for the fact is that there has been a continual extension of federal power at the expense of the States. It shows rather, taken together with the increasing regulatory activities of the federal government, a gradual replacement of that philosophy of individualism, which prevailed during the eighteenth and first half of the nineteenth centuries, by a philosophy of collectivism, evidencing itself in a governmental paternalism.

§267. *Police Power and Eminent Domain Distinguished.* The power of eminent domain may, as we have seen, be exercised for a "public use"—that is, for a use which will be *beneficial* to the members of the community—upon the payment of just compensation.[1] On the other hand, the police power is essentially a power inhering in the state governments for the *protection* of the community, and carrying with it no duty to compensate persons who are adversely affected. While a taking of property under the legitimate exercise of the police power is due process, a taking to be a legitimate exercise of the police power must be reasonably necessary for the protection of the community.[2]

§268. *Extent of Interference with Property Rights under the Police Power.* Generally, the protection of the community will be adequately effected by the regulation of the exercise of proprietary rights, without the actual confiscation or destruction of tangible property. However, when the confiscation or destruction of tangible property is reasonably necessary for the protection of the community, the taking is a legitimate exercise of the police power and there is due process, but if there is not such reasonable necessity, the taking is unconstitutional. Property which is likely to cause the spread of disease, as well as animals, trees, and plants having contagious diseases, may be destroyed.[3] Probably it is also justifiable under the police power to authorize the destruction of buildings to prevent

[1] Chap. 31.

[2] Northern Pac. Ry. *v.* North Dakota (1915) 236 U. S. 585, 595.

[3] Philadelphia *v.* Scott (1876) 80 Pa. 81, 85; State *v.* Main (1897) 69 Conn. 123. But state legislation generally provides for compensation.

the spread of fire.[1] Where property is being used for an illegal purpose, and has no legitimate use, as may be true of gambling devices, it may be destroyed under the police power,[2] but it would seem unconstitutional to destroy property under the police power simply because it is being used for an illegal purpose, if there are legitimate purposes to which it may be put. The community will be adequately protected by restricting its use to purposes which are legitimate. To be sure, forfeiture of the property may be made part of the punishment for the illegal use, but in such a case due process would require notice and a hearing. The Supreme Court of the United States in the case of *Lawton v. Steele*[3] held constitutional a state statute which declared nets used for unlawful fishing to be a nuisance, and authorized their summary seizure and destruction. The court laid stress upon the trifling value of the property destroyed ($15.00). Three justices dissented, and it is submitted that the position taken by them, that the destruction of the property in question was not a proper exercise of the police power, is sounder than the conclusion reached by the majority.[4]

§269. *Police Power of the States and Interstate Commerce.* The Constitution expressly commits to Congress the power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes."[5] As a result of the commerce clause "the power of Congress to regulate commerce among the several States is supreme and plenary," but not wholly exclusive in matters with regard to

[1] Russell *v.* Mayor (1845, N. Y.) 2 Denio 461; American Print Works *v.* Lawrence (1847) 21 N. J. L. 248; Surroco *v.* Geary (1853) 3 Calif. 69. See the comment on these cases in Freund, *Police Power*, secs. 534 and 535.

[2] See cases collected and commented on in 12 *L. R. A.* (*N. S.*) 394 n.

[3] (1894) 152 U. S. 133.

[4] For a collection of the cases dealing with property used in violation of the game laws see notes in 3 *L. R. A.* (*N. S.*) 997, and *L. R. A. 1916 F.* 913.

[5] Art. I, sec. 8, par. 3. See the consideration of interstate commerce in chap. 8.

which Congress has not yet legislated. The States may not directly regulate interstate commerce, or impose direct burdens upon it, but on the other hand until Congress acts a State may legislate for the protection of the interests of persons within the State, though such regulation indirectly affects interstate commerce.[1]

§270. *Police Power to Protect Health, Safety, Good Order, and Morals.* Legislation is most clearly within the scope of the police power which has for its object the protection of the health, safety, good order and morals of the community. An almost unlimited number of examples of the constitutional exercise of the police power for these purposes could be collected, but only a comparatively limited number of typical cases can be referred to.[2] In the interest of the health of the community the State may regulate the practice of medicine and the training of practitioners[3]; and to prevent the spread of contagious diseases it may make all reasonable regulations, including so drastic a requirement as that of vaccination against smallpox.[4] To protect the health of the community further, burials in a cemetery in a populous district may be prohibited,[5] land may be required to be drained,[6] and liveries[7] and brickyards[8] may be forbidden in thickly populated parts of cities. It is clearly legal, also, to prohibit the sale of adulterated food and drugs,[9] or milk from cows which have not been tested for tuberculosis.[10]

[1] For a fuller discussion see sec. 94.

[2] Although legislation as to hours of labor and a living wage might be considered here, they will be taken up later in connection with legislation regulating employment, sec. 274.

[3] Dent *v.* West Virginia (1889) 129 U. S. 114.

[4] Jacobson *v.* Massachusetts (1905) 197 U. S. 11.

[5] Laurel Hill Cemetery *v.* San Francisco (1910) 216 U. S. 358.

[6] New Orleans Gas Light Co. *v.* Drainage Commission (1905) 197 U. S. 453.

[7] Reinman *v.* Little Rock (1915) 237 U. S. 171.

[8] Hadecheck *v.* Sebastian (1915) 239 U. S. 394.

[9] Crossman *v.* Lurman (1904) 192 U. S. 189.

[10] Adams *v.* Milwaukee (1913) 228 U. S. 572.

For the safety of the community a State may regulate the use of property to prevent the risk of fire.[1] It may also regulate the carrying and use of firearms, and the speed of vehicles on highways.[2] Railroads may be compelled to fence their property[3] and to employ proper safety devices at their crossings.[4] A duty may be imposed upon mine owners to leave sufficient thickness of rock between adjoining mines to be a protection to each mine in case of the flooding of the other.[5] It is even competent for a State in the interest of public safety to put an absolute liability upon a person without any corresponding fault on his part. So statutes have been held constitutional which make railroads absolutely liable for fires caused by their locomotives,[6] or which make the driver of animals absolutely liable for injuries caused by such animals to highways,[7] or which put upon a municipality absolute liability for injury to property caused by a mob.[8]

The right to protect the safety of the community shades off into the right to maintain public order. Here we find ample justification for the vagrancy legislation of our various States[9] and for the statutes prohibiting and punishing public drunkenness and disorderly conduct.[10] In several of the southern States there has been rather persistent effort to segregate the white and colored residents of the larger cities within separate areas. A very carefully framed ordinance of the city of Louisville, which was declared to be adopted "to prevent conflict and ill-feeling between the white and colored races, . . . to preserve the public peace

[1] Patterson *v.* Kentucky (1878) 97 U. S. 501; Barbier Connelly (1885) 113 U. S. 27.

[2] 11 *Corpus Juris*, 917, and cases cited.

[3] Missouri Pac. Ry. Co. *v.* Humes (1885) 115 U. S. 512.

[4] Chicago B. & Q. R. R. Co. *v.* Chicago (1897) 166 U. S. 226, 252.

[5] Plymouth Coal Co. *v.* Pennsylvania (1914) 232 U. S. 531.

[6] St. Louis & S. F. R. R. Co. *v.* Matthews (1897) 165 U. S. 1.

[7] Jones *v.* Brim (1897) 165 U. S. 180.

[8] Chicago *v.* Sturges (1911) 222 U. S. 313.

[9] Freund, *Police Power*, secs. 97 to 100.

[10] *Corpus Juris*, 918.

and promote the general welfare," provided *inter alia* that it should be

> "unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house upon any block upon which a greater number of houses are occupied as residences, places of abode, or places of assembly by white people than are occupied as residences, places of abode, or places of assembly by colored people."

White persons were in like manner forbidden to move into colored blocks, and all interests were protected which were vested at the time of the adoption of the ordinance. The Supreme Court of the United States held the ordinance unconstitutional, as in conflict with the due process clause, and evinced a clear determination to hold void any law whose operation amounts to a limitation upon the use of and right to dispose of property, and whose sole basis is that of race difference.[1] It is interesting to note that legislative separation of the white and colored races in the vehicles of common carriers,[2] and in schools[3] has been held constitutional. Thus it would seem that segregation to prevent race friction may be constitutional though it somewhat infringes upon the personal liberty of the individual, but that it is not constitutional when it also interferes with property rights.

The restraints, with which we are all familiar, which are placed by the State upon those who are mentally defective, and upon minors, are imposed to some extent in the interest of good order, and to some extent in the interest of public safety to prevent crime, but are largely justified for the protection of those classes which are

[1] Buchanan *v.* Warley (1917) 245 U. S. 60.

[2] Louisville etc., R. Co. *v.* Mississippi (1890) 133 U. S. 587; Plessy *v.* Ferguson (1896) 163 U. S. 537; Chesapeake & O. R. Co. *v.* Kentucky (1900) 179 U. S. 388.

[3] Bertonneau *v.* Board of Directors (1878) Fed. Cas. No. 1,361; People *v.* Gallagher (1883) 93 N. Y. 438.

directly affected, whose members are not able unaided to fully care for themselves.[1]

Again we find that the rights to maintain public order, and to conserve the health of the community shade off into the right to protect the public morals, but legislation which is generally put under the latter head deals with gambling, intoxication, and sexual irregularities and obscenity. Gambling was not an offense at common law,[2] but it has been very extensively legislated against both in England and in this country.[3] Such legislation is within the police power.[4] So it has been determined that lotteries may be entirely suppressed,[5] and that, if it reasonably appears necessary to forbid all option contracts in grain in order to suppress gambling contracts in that commodity, this may be done.[6] Although the Kentucky Court of Appeals has declared that "the right to use liquor for one's own comfort" is an "inalienable right,"[7] the Supreme Court of the United States has taken quite another view, and has upheld the most drastic of dry laws. Not only may the manufacture for sale and the sale of intoxicants be prohibited, but the State may prohibit their private manufacture within its borders for the maker's own use,[8] or even their use or mere possession.[9] Moreover an Illinois statute was upheld[10] which made a judgment against a liquor dealer for loss to dependents of his customers, as a result of sales made by him, a lien upon the premises where the goods were sold, provided the owner knew of the use to which the premises were being put. However, the subject is now comprehensively dealt with by

[1] A full consideration of the various provisions on this subject will be found in Freund, *Police Power*, secs. 252 to 271.

[2] Jenks *v.* Turpin (1884) L. R. 13 Q. B. D. 505.

[3] 15 *Laws of England*, 284; 12 *K. C. L.* 708.

[4] Marvin *v.* Trout (1905) 199 U. S. 212.

[5] Stone *v.* Mississippi (1879) 101 U. S. 814.

[6] Booth *v.* Illinois (1902) 184 U. S. 425.

[7] Commonwealth *v.* Campbell (1909) 133 Ky. 50, 63.

[8] Mugler *v.* Kansas (1887) 123 U. S. 623.

[9] Crane *v.* Campbell (1917) 245 U. S. 304.

[10] Eiger *v.* Ga rity (1918) 246 U. S. 88.

a super-police regulation in the form of the Eighteenth Amendment to the Federal Constitution.[1] A State has complete authority to deal with the subject of the marriage and divorce of its residents, except in so far as it is compelled to give full faith and credit to the divorce decree of other States.[2] Places of ill-fame may be completely suppressed under the police power,[3] and it seems that prostitutes may also be segregated within a designated area.[4] Provisions against indecent exposure, obscene language, and obscene publications are very generally found on the statute books of our States,[5] and their constitutionality is unquestioned.

§271. *Police Power May Not Be Exercised Purely for Æsthetic Purposes.* Since the police power is essentially a power for the protection of the public its exercise is, naturally, not justified for purely æsthetic purposes.[6] The prohibition of billboards of certain size and character, or within certain areas has been upheld by the Supreme Court when it appeared that the prohibited billboards might provide a place where criminals could hide, where refuse would accumulate, and where immoral practices might be carried on.[7] When these facts are shown, the fact that the legislature may have also been to some extent moved by æsthetic considerations will not invalidate the legislation.[8] It is also probably true that anti-smoke legislation, which

[1] See sec. 285. It was not competent before the amendment for States to forbid the importation of liquor, or its sale in the original package, since this would be an interference with interstate commerce, Leisy *v.* Hardin (1890) 135 U. S. 100, but Congress might forbid its transportation in interstate commerce, or could, as it did, permit the States to prohibit its introduction within their borders. Clarke Distilling Co. *v.* Western Maryland Ry. Co. (1917) 242 U. S. 311. See secs. 91 and 92.

[2] Sec. 203.

[3] Commonwealth *v.* Goodall (1896) 165 Mass. 588; Hudson *v.* Jennings (1910) 134 Ga. 373; Hatcher *v.* Dallas (1911, Tex.) 133 S. W. 914.

[4] L'Hote *v.* New Orleans (1900) 177 U. S. 587.

[5] 29 *Cyc.* 1314 *et seq.*

[6] See note and cases in *3 Cornell L. Quar.*, 135.

[7] Thomas Cusack Co. *v.* Chicago (1917) 242 U. S. 526.

[8] St. Louis Poster Advertising Co. *v.* St. Louis (1919) 249 U. S. 269.

has as its constitutional justification the protection of health, may also have its origin to some extent in a desire to make the locality more attractive.[1]

§272. *Regulation of Rates and Service.* Common carriers and innkeepers, as survivors of the ancient common callings, are under a duty to serve the public reasonably within the scope of their business.[2] A similar duty is by the common law put upon those who are the recipients of the franchises of eminent domain or of the use of streets or highways.[3] It is quite clear that reasonable rates and practices may be established for these businesses by legislation, for this is but defining existing duties for the protection of the public.[4] However, the Supreme Court has gone further, and has held that a state legislature may under the police power impose a duty to serve at reasonable rates upon businesses not previously under that duty. In *Munn v. Illinois*[5] and *Budd v. New York*[6] it was held with regard to grain elevators, that the use of and profits from property could be regulated when the business is of great importance to the public and monopolistic in tendency, so that the public are in danger of oppression. In the first case two, and in the second case three justices dissented on the ground that such regulation not being for the protection of health,

[1] Northwestern Laundry *v.* Des Moines (1916) 239 U. S. 486.

[2] Jackson *v.* Rogers (1683) 2 Show. 327; Gisbourne *v.* Hurst (1710) 1 Salk. 249; Rex *v.* Ivens (1835) 7 C. & P. 213; Moore, *Carriers*, sec. 2; Beale, *Innkeepers and Hotels*, secs. 51 *et seq.* See C. K. Burdick, "The Origin of the Peculiar Duties of Public Service Companies," *11 Col. L. Rev.*, 514–531.

[3] Haugen *v.* Albina L. & P. Co. (1891) 21 Ore. 411; State *ex rel.* Wood *v.* Consumers' Gas Co. (1901) 157 Ind. 345, 351; Jones *v.* Horth Georgia El. Co. (1906) 125 Ga. 618. See C. K. Burdick, "The Origin of the Peculiar Duties of Public Service Companies," *11 Col. L. Rev.*, 616–638.

[4] Beale, *Innkeepers and Hotels*, sec. 242; Hutchinson, *Carriers*, sec. 574; Joyce, *Electric Law*, sec. 14; gas, 20 *Cyc.* 1166, water, 40 Cyc. 796.

[5] (1876) 94 U. S. 113.

[6] (1891) 143 U. S. 517. See particularly the excellent opinion of Andrews, J., in this case in the New York Court of Appeals *sub nom.* People *v.* Budd (1889) 117 N. Y. 1.

safety or morals could only be imposed upon businesses exercising a public use, as distinguished from those exercising a use in which the public has an interest, that is, that a business could only be so regulated which a state might carry on, or which was invested with powers reserved to the state such as eminent domain. In *Brass v. North Dakota*[1] monopolistic conditions were declared not to constitute a necessary basis of such police regulations; it is enough if the business in question is of great public importance. In this case four justices dissented on the ground that where no monopolistic tendency is shown the doctrine of the preceding cases did not apply, and the need of the public for protection was not apparent. Although the strong dissent in the *Brass* case left somewhat in doubt for a time the very broad doctrine of the majority, this doubt seems to have been set at rest by the case of *German Alliance Insurance Company v. Kansas*[2] in which the doctrine of the *Brass* case was expressly approved and applied to the insurance business. These same principles were held by the New York Court of Appeal and the Supreme Court of the United States to apply to rented property, and to justify the New York legislature, during the building shortage after the Great War, in restricting landlords in New York City to the receipts of a reasonable rental, irrespective of the rent agreed upon.[3] Though it is declared to be "fundamental that private business may not be regulated, and may not be converted into public business by legislative fiat,"[4] we certainly have a very liberal view taken of what makes a business public in char-

[1] (1894) 153 U. S. 391.

[2] (1914) 233 U. S. 389. Mr. Justice Lamar wrote a dissenting opinion, concurred in by Mr. Chief Justice White and Mr. Justice Van Devanter, in which he asserted that the result of the decision of the majority is that "the price of every article sold and the price of every service offered can be regulated by statute."

[3] People *ex rel.* Durham Realty Co. *v.* LaFetra (1921) 230 N. Y. 429; Marcus Brown Holding Co. *v.* Feldman (1921) 41 Sup. Ct. Rep. 465.

[4] People *ex rel.* Durham Realty Co. *v.* La Fetra (1921) 230 N. Y. 429, 442; Producers' etc. Co. *v.* Railroad Comm. (1920) 251 U. S. 228, 230.

acter, and we have the police power put in these cases upon a very broad foundation.[1]

In the first rate cases the Supreme Court held that the rates fixed by a State Legislature were conclusive and not reviewable.[2] Shortly, however, the court began to doubt this proposition,[3] and finally abandoned it entirely because it discerned that a taking of property under the guise of the police power, which is not reasonably justified for the protection of the public is not in fact an exercise of the police power at all, but is an arbitrary taking of property, and so is a taking without due process.[4] The public is fully protected if the business which is regulated is confined to the receipt of reasonable rates, and reasonable rates are to be measured by operating expenses plus a fair return upon

[1] It has been contended that Munn *v.* Illinois, discussed above, is authority for the proposition that a business which is important to the public and monopolistic is under a common law duty to serve all. Inter-Ocean Publishing Co. *v.* Associated Press (1900) 184 Ill. 438; State *v.* Nebraska Tel. Co. (1885) 17 Neb. 126; dictum of Mr. Justice Miller in Wabash etc. Ry. Co. *v.* Illinois (1886) 118 U. S. 557, 569. But see contra, Ladd *v.* Southern Cotton Press Co. (1880) 53 Tex. 172; Delaware L. & W. R. R. *v.* Central S. Y. & T. Co. (1889) 45 N. J. Eq. 50; State *ex rel. v.* Associated Press (1900) 159 Mo. 410; Live Stock Comm. Co. *v.* Live Stock Exch. (1892) 143 Ill. 210. Although there is some language in the rather loosely expressed opinion in the Munn case which would support the view first stated, the Budd case, the Brass case, and the German Insurance Co. case do not go at all on that ground. In fact in the latter case the insurance company contended that where the right to demand service did not exist there was no legislative right to fix rates, but the court said that this proposition had no support in the law, citing as upholding its position, the Munn, Budd, and Brass cases. This would seem to show clearly that the interpretation which the Supreme Court now puts upon the Munn case is that it upholds the imposition of a new duty and not the regulation of one existing under the common law. See C. K. Burdick, "The Peculiar Duties of Public Service Companies," *11 Col. L. Rev.*, 743–764.

[2] Munn *v.* Illinois (1876) 94 U. S. 113; Peik *v.* Chicago & N. W. Ry. Co. (1876) 94 U. S. 164.

[3] Stone *v.* Farmers' L. & T. Co. (1885) 116 U. S. 307, 330.

[4] In Reagan *v.* Farmers' L. & T. Co. (1894) 154 U. S. 362, the right of judicial review was put upon the ground that a discrimination between the rates of those who are regulated and those who are not, which regula-

"the fair value of the property being used by it for the convenience of the public."[1]

In the case just cited the court goes on to say,

> "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."[2]

Clearly, however, the value of stocks and bonds has very little evidentiary significance in a rate case, since their market value is itself very largely determined by the existing rates, and such value is given little if any consideration. This really leaves the choice between original investment and reproduction cost. It may fairly be argued in many cases that it is both equitable and wise to

---

tion is not required for the reasonable protection of the public, is a denial of equal protection. (For a discussion of the equal protection clause of the Fourteenth Amendment see chap. 33.) However, in Smyth *v.* Ames (1898) 169 U. S. 466, which has become the leading case on the subject, the right of judicial review was put rather on the "due process" clause. See, as typical of a large number of cases, Chicago, & St. P. Ry. Co. *v.* Tompkins (1900) 176 U. S. 167; Northern Pac. Ry. Co. *v.* North Dakota (1915) 236 U. S. 585.

[1] Smyth *v.* Ames (1898) 169 U. S. 466. In this case it was also decided that a State in fixing intrastate rates must allow a fair return upon the property used in intrastate business, and may not take into account the returns from interstate business.

When a legislative schedule of rates as a whole is attacked, it is sufficient to show that the return as a whole is reasonably remunerative, but when service is classified and different rates established for different services it is not sufficient to show that the whole schedule is remunerative, if the rate for a particular class is unreasonably low. In such a case the unreasonably low rate is unconstitutional, since it goes beyond the legitimate scope of the police power. Northern Pacific Ry. Co. *v.* North Dakota (1915) 236 U. S. 585.

[2] Smyth *v.* Ames (1898) 169 U. S. 466, 546.

allow a fair return upon the investment, but that is not what the Constitution guaranties. It declares that a person's *property* shall not be taken without due process, and as we have seen above the Supreme Court has declared that this means that one whose rates are regulated is entitled to a return upon "the fair value of the property *being used*[1] by it" for the public. Original investment is clearly not conclusive of present value, and its evidentiary value on that point will depend very largely upon the lapse of time since the investment was made.[2] Cost of reproduction, less depreciation, has been increasingly used as the most important evidence of present value of a plant.[3] This gives to the owner the advantage of appreciation in value, while visiting him with the loss due to depreciation. The term "reproduction cost" has, however, no appropriate application to the value of rights of way, or other realty. The value of realty should be measured by the market value of adjoining land.[4] In fact this is nothing more than applying to land the normal practice of determining the reproduction cost of a plant in terms of present cost of material and labor.[5] Franchise value, as used in taxation cases, should not be allowed in fixing rates, except as it represents the actual cost of franchises,[6] since it is arrived at by capitalizing returns, and deducting the value of tangible property, and is therefore dependent upon existing rates. If such value were used no reduction in rates would be possible. Ordinarily the element of "good will" does not attach to a public utility, in the sense in which the term is

[1] Italics are those of the present writer.

[2] For arguments in favor of basing rates upon investment see Whitten, *Valuation of Public Service Corporations*, chap. 5.

[3] Knoxville *v.* Knoxville Water Co. (1909) 212 U. S. 1; Louisville & N. R. R. Co. *v.* Railroad Comm. of Ala. (1912) 196 Fed. 800; Minnesota Rate Cases (1913) 230 U. S. 352, 456.

[4] Minnesota Rate Cases (1913) 230 U. S. 352, 450.

[5] Louisville & N. R. R. Co. *v.* Railroad Comm. of Ala. (1912) 196 Fed. 800.

[6] Whitten, *Valuation of Public Service Corporations*, chap. 27, and cases there collected.

used in competitive business,[1] and if it did, since its value is measured by present returns, its use in rate cases would tend to destroy the right to regulate rates. "Going concern value," however, is generally allowed, though there is difference of opinion as to how it should be dealt with. The federal courts seem to hold that some sum should be added to the aggregate of the value of the various elements of the plant to represent the value of the plant as in successful operation, but no manner of measuring this sum is suggested.[2] A good many courts take going value to mean the cost of building up a profitable business, which is measured by the deficits during the period of development. But these courts differ as to whether such deficits are to be capitalized, and a return earned upon them, or whether they are to be paid back out of current rates.[3] Other items which are frequently allowed are promotion and organization, engineering and superintendence during construction, and interest on capital lost during the same period.[4]

Operating expenses must be deducted from gross earnings before the return on capital can be figured,[5] but operating expenses are open to scrutiny, and only those that are reasonable may be taken into consideration.[6] Operating expenses obviously include reasonable salaries, wages, taxes, and supplies.[7] Annual repairs should clearly be included in operating expenses, as should an item for annual depreciation in order to keep the capital intact.[8] Betterments,

[1] Consolidated Gas Co. *v.* City of New York (1907) 157 Fed. 849, 871, and on appeal *sub nom.* Willcox *v.* Consolidated Gas Co. (1909) 212 U. S. 19, 52.

[2] Knoxville *v.* Knoxville Water Co. (1909) 212 U. S. 1, 9; Cedar Rapids Gas Co. *v.* Cedar Rapids (1912) 223 U. S. 655.

[3] Whitten, *Valuation of Public Service Corporations*, chaps. 22 to 25, and cases there discussed.

[4] *Ibid.*, chap. 12

[5] Chicago, M. & St. P. Ry. Co. *v.* Tompkins (1900) 176 U. S. 167.

[6] Chicago & G. T. Ry. Co. *v.* Wellman (1892) 143 U. S. 339.

[7] Reeder, *Validity of Rate Regulations*, sec. 172.

[8] Knoxville *v.* Knoxville Water Co. (1909) 212 U. S. 1. But it is also made clear in this case that depreciation not provided for in the year in which it took place cannot be charged up to operating expenses of a later year.

which increase the value of the plant or system, should properly, however, be paid for out of net earnings or new capital.[1]

State legislatures may also in the interest of public welfare regulate the methods of rendering service on the part of businesses which because of their importance, come within the purview of the police power. So a State may make regulations for such businesses to prevent discrimination between patrons,[2] or to compel the provision of adequate facilities,[3] or to give the patron a more adequate remedy for loss or injury.[4]

§273. *Protecting the Public against Fraud, Oppression, Loss and Waste.* The common law, except where property was obtained by false tokens or letters,[5] left a party who had been defrauded by another to his remedy for damages for deceit. As was said by the Court of King's Bench, "we are not to indict one man for making a fool of another. Let him bring his action."[6] Since the day when that sentiment was expressed there has been a radical change in the conception of the state's duty towards its citizens. In England and in this country statutes have been passed

[1] Illinois Cent. R. R. Co. *v.* Interstate Com. Comm. (1907) 206 U. S. 441; Coal & C. Ry. Co. *v.* Conley (1910) 67 W. Va. 129; Erie *v.* Erie G. & M. Co. (1908) 78 Kan. 348, 354. But this distinction between depreciation and betterment is not always kept in mind. Southern P. Co. *v.* Board of R. R. Comrs. (1896) 78 Fed. 236.

[2] Wadley S.R. Co. *v.* Georgia (1915) 235 U. S. 651, upholding a statute forbidding discrimination by requiring prepayment of freight by some and not by other patrons.

[3] Minneapolis & St. L. R. R. Co. *v.* Minnesota (1904) 193 U. S. 53, upholding a statute requiring the building of stations where needed to give reasonably adequate service.

[4] Atlantic C. L. R. Co. *v.* Glenn (1915) 239 U. S. 388, holding constitutional a statute making all carriers joining in intrastate shipments agents of each other, and giving the patron the right to sue anyone of them for any loss, without reference to where it occurred.

[5] At the early law it had to be by public tokens. By 33 Hen. VIII, c. 1, it was made a criminal offense to obtain property by false private tokens or letters.

[6] Regina *v.* Jones (1703) 1 Salk. 379.

making it a criminal offense to obtain property from another by any form of false pretense.[1] But under the police power the States have gone much further than this, and have been repeatedly upheld in legislation interfering with proprietary rights, and with liberty of action, when the purpose of such legislation has fairly been to protect the public from the danger of fraud or deception. In *Lemieux v. Young*[2] the Supreme Court sustained a statute prohibiting the sale or assignment, not in the ordinary course of business, of all of a retailer's stock in trade, without giving certain notice specified in the act. This is what is known as a "sales in bulk law," and the court held it to be reasonably designed to prevent fraud on creditors. In 1916 the Supreme Court settled a controversy which had been going on in the lower courts as to whether a State could prohibit the use of trading stamps. In the cases which came before the court the legislation involved had put a prohibitive license fee upon the use of trading stamps, and the court held this constitutional, since a State could entirely prohibit the use of such stamps. The court's decision was not put upon the ground that such devises actually tend to defraud purchasers, but the court declared that "by an appeal to cupidity" they "lure to improvidence," and that the State is justified in protecting its citizens against such seduction.[3] In 1917 "Blue Sky" laws of three States were upheld by the Supreme Court.[4] It was declared that in requiring dealers in securities to obtain licenses, and in giving to an administrative officer the authority to revoke licenses on certain grounds named, the statutes were within the police power to protect the public from fraud. The same reason was held to justify a statute providing that farm produce should

[1] 3 Stephen, *History of the Criminal Law of England*, 160 *et seq.*; Wharton, *Criminal Law* (11th ed.), secs. 1393 *et seq.*

[2] (1909) 211 U. S. 489.

[3] Rast *v.* Van Deman & Lewis Co. (1916) 240 U. S. 342; Tanner *v.* Little (1916) 240 U. S. 369; Pitney *v.* Washington (1916) 240 U. S. 387.

[4] Hall *v.* Geiger-Jones Co. (1917) 242 U. S. 539; Caldwell *v.* Sioux Falls Stock Yard Co. (1917) 242 U. S. 559; Merrick *v.* Halsey (1917) 242 U. S. 568.

only be sold under license,[1] and one which required a license and a certain term of residence in the case of an insurance broker.[2] It has been held competent for the state legislature to define the amount of butter fats which must be contained in any article sold as ice cream, not for the protection of health, but so that purchasers may know what they are getting under that name.[3] For the same reason legislation may forbid the sale of condensed milk not made from full cream milk unadulterated[4]; and may require ingredients to be stated on each package of goods.[5]

It is competent for the States, in order to protect the public from oppression, to supplement the common law as to monopolies and unlawful combinations in restraint of trade. On this ground the Supreme Court has upheld legislation forbidding retailers to combine and agree not to buy from wholesalers who sell directly to customers,[6] and a statutory provision prohibiting sales at one place lower than at another with the intent to destroy competition.[7] A very important case is that of *Noble State Bank v. Haskell*[8] where the court considered the constitutionality of a statute which provided for an assessment upon every state bank's average daily deposits for the purpose of creating a depositors' guaranty fund. The court held it a valid exercise of the police power for the protection of the public against loss from bank failures. The court also pointed out that the banks themselves received protection in exchange for the money contributed. So persons may be compelled to incorporate before carrying on a banking business, and the amount of capital and the

[1] Payne *v.* Kansas (1918) 248 U. S. 112.

[2] La Tourette *v.* McMasters (1919) 248 U. S. 465.

[3] Hutchinson Ice Cream Co. *v.* Iowa (1916) 242 U. S. 153.

[4] Hebe Co. *v.* Shaw (1919) 248 U. S. 297.

[5] Corn Products Refining Co. *v.* Eddy (1919) 249 U. S. 427.

[6] Grenada Lumber Co. *v.* Mississippi (1910) 217 U. S. 433.

[7] Central Lumber Co. *v.* South Dakota (1912) 226 U. S. 157. Of course, we also have the anti-trust legislation by Congress under the commerce clause. See sec. 90.

[8] (1911) 219 U. S. 104.

character of investments in such business may be regulated by statute.[1]

In *Chicago and Alton Railroad Co. v. Tranbarger*[2] a statute was under consideration which required railroads to make suitable openings in embankments on their rights of way for water drainage. This was held to be a justifiable exercise of the police power to prevent property loss to adjacent land owners. In this case the court expresses most broadly the proposition that the police power includes regulations in the interest of the "general welfare of the community." That the States may legislate to prevent the waste of natural resources, to the detriment of the community, was decided in *Ohio Oil Company v. Indiana*,[3] where the court upheld legislation forbidding persons in control of gas or oil wells to permit the gas or oil to escape without being confined in receptacles or pipes.[4]

§274. *Regulation of Employment.* One of the most interesting developments in the interpretation of the Constitution has been in connection with legislation regulating hours of labor. In the case of *Holden v. Hardy*[5] the Supreme Court had presented to it the question whether a Utah statute was constitutional which forbade the employment of workmen over eight hours a day in mines or in the reduction or refining of ores. It was insisted that this deprived the parties affected of liberty of contract and of liberty of acquiring property by their labor, without due process. The court said, "this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science," and it declared that the Constitution should not be so con-

[1] *Ibid.;* Shallenberger *v.* First St. Bk. of Holstein (1911) 219 U. S. 114.

[2] (1915) 238 U. S. 67. This case is also important on the interplay of the police power and the constitutional provision against legislation impairing contracts. See sec. 196.

[3] (1900) 177 U. S. 190.

[4] See also Walls *v.* Midland Carbon Co. (1920) 254 U. S. 300. On this same ground are supported game laws, Geer *v.* Connecticut (1896) 161 U. S. 519.

[5] (1896) 169 U. S. 366. Justice Brewer and Justice Peckham dissented.

strued as to deprive the State of the power to amend its laws so as to conform to the wishes of the citizens for their welfare. The court felt it to be self-evident that mining and smelting are businesses of such a character "that they can no longer be carried on, with due regard for the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments," and that in such industries long hours are particularly dangerous to health and safety. The court also pointed out that under modern conditions in such industries as were under consideration, employers and employees do not stand upon an equality, and that in the absence of state regulation employees may be compelled to conform to rules which are detrimental to their well-being. Seven years later the case of *Lochner v. New York*[1] went to the Supreme Court on the question of the constitutionality of a statute which forbade employees in bakeries or confectionaries to work over ten hours a day. The New York Court of Appeals had held the statute constitutional.[2] Justice Peckham, who dissented in the earlier case, wrote the prevailing opinion in the *Lochner* case, which declared the New York statute to be unconstitutional. Justice Peckham declared that "to the common understanding the trade of a baker has never been regarded as an unhealthy one," and that, therefore, neither the health of bakers and confectioners or of the public was involved, as in the case of mining and smelting which are peculiarly unhealthful industries. His general attitude is represented by this statement:

> "Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered

[1] (1905) 198 U. S. 45. [2] People *v.* Lochner (1904) 177 N. Y. 145.

with, unless there be some fair ground reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed."[1]

Justice Harlan wrote a dissenting opinion, concurred in by Justices White and Day, in which he said,

"We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. . . . It is enough for the determination of this case and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion."[2]

Justice Holmes also wrote a dissenting opinion. He said in part[3]:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . I think that the word 'liberty,' in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon

[1] Lochner *v.* New York (1905) 198 U. S. 45, 61.
[2] *Ibid.*, 71 and 72.
[3] *Ibid.*, 75 and 76.

the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss."[1]

It has seemed worth while to present these quotations from the judges' opinions for the purpose of showing the difference in the attitudes of mind of the majority and minority of the court in this case, which, for a time, seemed to put a severe check upon general legislation restricting hours of labor. However, within three years the court unanimously held an Oregon statute constitutional which forbade the employment of any female in any mechanical establishment, factory, or laundry for more than ten hours a day.[2] Mr. Brandeis, now a justice of the Supreme Court, prepared the brief, which contained an elaborate review of similar legislation throughout the world, and an exhaustive presentation of scientific knowledge and opinion with regard to the evil effects of overwork upon women. The result was that the Supreme Court was satisfied that excessive hours of work in industry generally are very injurious to women, and through them to their children, and so to the community at large; and that women because of their structure and maternal functions, and because of their inadequate training, are at a disadvantage in the economic struggle. It was on these grounds that the court held that the state legislature was justified in restricting the number of hours of work for women in industry.[3] In 1917 only four of the justices who

[1] The case was not argued as one involving unreasonable classification and as so in conflict with the equal protection clause, which we discuss in chap. 33.

[2] Muller *v.* Oregon (1908) 208 U. S. 412.

[3] Sturges *v.* Beauchamp (1914) 231 U. S. 320 (sustaining Illinois child labor law); Riley *v.* Massachusetts (1914) 232 U. S. 671 (sustaining 54 hours of work per week statute for women); Hawley *v.* Walker (1914) 232 U. S. 718 (sustaining an Ohio 9 hour statute for women); Miller *v.*

participated in the decision of the *Lochner* case remained on the bench, and three of those who remained had dissented in that case. In that year there was again brought before the Supreme Court in the case of *Bunting v. Oregon*[1] the question of the constitutionality of a state statute limiting the hours of work for men in industries not peculiarly dangerous or unhealthful. The statute prohibited the employment of any person in a mill, factory or manufacturing establishment for more than ten hours a day, with a provision that an employee might work overtime not more than three hours in any day if paid at the rate of time and one half for overtime. This statute was held constitutional in a brief opinion in which the constitutionality of general regulations of hours of labor is almost taken for granted, and the *Lochner* case is not even mentioned, although in principle it is obviously overruled. Three justices dissented, but without opinion. Again the court had the advantage of a most illuminating brief, prepared in large part by Mr. Brandeis before his appointment to the bench, which contained an exhaustive review of legislation in this country and abroad regulating hours of labor, as well as a most interesting collection of data with regard to the effect of overwork upon the health, safety, and morals of the workers.[2]

In the same year in which the fight for hours of labor legislation was finally won the Supreme Court had presented to it the question of the constitutionality of minimum wage

---

Wilson (1915) 236 U. S. 373, and Bosley *v.* McLaughlin (1915) 236 U. S. 385 (sustaining California 48 hours of work per week statute for women). After being reversed in the Lochner case the New York Court of Appeals in People *v.* Williams (1907) 189 N.Y. 131, held a statute prohibiting night work for women unconstitutional, but in People *v.* Schweinler Press (1915) 214 N. Y. 395, that court overruled its previous decision and upheld such a statute.

[1] (1917) 243 U. S. 426.

[2] Before the decision of the case just discussed the New York Court of Appeals upheld as constitutional the so-called one day of rest in seven law, applicable to those working in factories and mercantile establishments. People *v.* Klinck Packing Co. (1915) 214 N. Y. 121.

legislation.[1] This was another case from the State of Oregon. The statute in question provided that

> "it shall be unlawful to employ women in any occupation within the State of Oregon for wages which are inadequate to supply the necessary cost of living and to maintain them in health."

The amount of such wages was to be established by a commission. The Supreme Court of Oregon held the statute constitutional, and in the Supreme Court of the United States this decision was affirmed by an evenly divided court.[2] It would seem that such legislation can not only be supported as an exercise of the police power for the protection of the physical and moral well-being of the workers involved, and so through them for the protection of the general welfare of the community, but also for the protection of the community against the burden of making up the deficit between the living wage and the wage received. It may reasonably be expected that the case will be sustained in later decisions, especially as minimum wage statutes have already been adopted in a considerable number of our States.

The Supreme Court has had before it various forms of workmen's compensation acts and has upheld them all. In the first case[3] the New York statute was considered, which makes the employer liable according to a prescribed schedule, based upon loss of earning capacity, for death or disability of employees resulting from accidental personal injury in the course of employment, without regard to fault as a cause, except where injury to self or another is intended, or results solely from intoxication. Waiver of the right to

[1] Stettler *v.* O'Hara (1917) 243 U. S. 629.

[2] Justice Brandeis took no part in this decision, having been of counsel in the case. The brief is a most interesting and exhaustive presentation of legislation on the subject in hand, and of data with regard to the physical and moral effect of underpayment.

[3] New York Cent. R. R. Co. *v.* White (1917) 243 U. S. 188.

compensation, and assignment or release of claims are forbidden. The employer must secure compensation by insuring through a state fund, or through an approved insurance company, or by satisfactory proof of his ability to pay the compensation required himself. If the employer fails to secure such payments, an employee may, if he desires, bring a common law action for damages, and the employer may not set up contributory negligence, negligence of a fellow servant or assumption of risk. The court held that there is no property right in rules of law, and it is, therefore, not unconstitutional to take away defenses of contributory negligence, fellow servant's negligence, and assumption of risk. It was also held that in imposing an absolute liability upon employers, and in forbidding contracts waiving rights of compensation, there is not an unconstitutional taking of property or interference with the right to contract, for these provisions are a proper exercise of the police power to protect the employer from exorbitant recoveries, the employee from costly litigation, and the public from the burdens ordinarily incident to industrial accidents. The method of insuring compensation was held to be reasonable, and, therefore, not to transcend the police power.[1] The Washington statute, which was before the court at the same session, was particularly distinguished from those of the other States in that it gave the employer no option as to the way in which he should arrange to meet his obligations under the act, but required him to contribute to a state fund for the compensation of employees. The court held that compensation for injuries in such industries as are enumerated is of such public importance as to justify the employment of the State as the agency through which to effect that purpose; that the protection to be derived by the employees and the public, as well as the employers themselves is sufficient justification for requiring contribution by all of

[1] In Hawkins *v.* Bleakley (1917) 243 U. S. 210, an Iowa statute was upheld which varied somewhat from the New York act, particularly in that the employee could elect whether to stand on the statute or on the common law.

the employers affected.[1] It has been held constitutional to take from the employee all right to choose between his former common law remedy and the remedy under the statute, and to restrict him to the latter[2]; and a majority of the court also upheld an Arizona statute which leaves to a jury the assessment of the damages suffered by the employee.[3]

The following enactments under the police power for the protection of wage earners have been held not to unconstitutionally deprive persons of liberty or property: that store orders or other evidences of indebtedness issued by employers in payment of wages should be redeemed in cash[4]; that wages should not be paid to sailors in advance[5]; that coal be measured for the payment of wages before it is screened[6]; and that future wages may not be assigned without the consent of the wife of the wage earner and certain other formalities.[7] It was held in *Brazee v. Michigan*[8] that it was constitutional to require the licensing of employment agencies and to regulate them for the protection of those seeking employment. However, in *Adams v. Tanner*[9] a statute was declared unconstitutional which prohibited such agencies to collect any fee from those desiring employment. It was declared that, while the business of obtaining positions for workers may be regulated, it is an entirely

[1] Mountain Timber Co. *v.* Washington (1917) 243 U. S. 219. Four justices dissented without opinion. On the point referred to in the text the case really seems controlled by Noble State Bank *v.* Haskell (1911) 219 U. S. 104, discussed above.

[2] Middleton *v.* Texas P. & L. Co. (1919) 249 U. S. 152.

[3] Arizona Employers' Liability Cases (1919) 250 U. S. 400. Four justices dissented.

[4] Knoxville Iron Co. *v.* Harbison (1901) 183 U. S. 13.

[5] Latterson *v.* Bark Eudora (1903) 190 U. S. 169. This was a federal statute with regard to interstate and foreign commerce, but the same principles of the police power were applied as are applied to state legislation.

[6] McLean *v.* Arkansas (1909) 211 U. S. 539, two judges dissenting. Same decision by a unanimous court in Rail & River Coal Co. *v.* Yaple (1915) 236 U. S. 338.

[7] Mutual Loan Co. *v.* Martell (1911) 222 U. S. 225.

[8] (1916) 241 U. S. 340.

[9] (1917) 244 U. S. 590.

legitimate business, and may not be destroyed, as it would be if all fees from the workers were prohibited. In *Coppage v. Kansas*[1] the Supreme Court had before it a statute which made it a misdemeanor for an employer to require an employee to agree not to become or remain a member of any labor organization during the time of his employment. This was held by the majority of the court to be an unreasonable restriction upon the liberty of contract, and, therefore, unconstitutional. Justice Holmes, Justice Day, and Justice Hughes dissented very vigorously on the ground that labor organizations are entirely legitimate, that a State may protect the right of workers to join such organizations, and that it cannot, therefore, be said that the limitation put upon the power to contract by the statute in question is so clearly unreasonable as to be unconstitutional.

[1] (1915) 236 U. S. 1.

CHAPTER XXXIII

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

§275. *The Purpose of Its Adoption.* It is declared in the Fourteenth Amendment to the Federal Constitution that no State shall "deny to any person within its jurisdiction the equal protection of the laws." In the first case which came before the Supreme Court under the reconstruction amendments the court spoke of the particular purpose of the equal protection clause, as follows:

> "In the light of the history of these amendments, and the pervading 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."[1]

Though the Thirteenth Amendment guaranteed to the colored race their freedom, and though the first sentence of the Fourteenth Amendment made them citizens of the United States and of the States in which they might reside, it was very strongly felt that they needed special and express protection against discriminatory legislation. This was undoubtedly the reason for the inclusion in the Fourteenth Amendment of the equal protection clause.

§276. *The Persons Who are Protected by the Equal Protection Clause.* The Supreme Court, in the case just above referred to, said:

[1] Slaughter House Cases (1872) 16 Wallace 36, 81.

> "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. It is so clear a provision for that race and that emergency, that a strong case would be necessary for its application to any other."[1]

In fact the first cases to which the Supreme Court applied the equal protection clause were cases involving discrimination against the colored race in the empaneling of petit and grand juries. It was declared that the exclusion of colored persons from the number of those from whom a grand or petit jury is drawn, in a case to which a colored person is a party, constitutes unconstitutional discrimination.[2] However, the prophecy that the equal protection clause would be applied only for the benefit of the colored race has not found fulfillment in the decisions. The language of the amendment was, in fact, so general as not to justify such interpretation. In *Yick Wo. v. Hopkins*[3] it was held applicable to prevent discrimination against Chinamen, the court saying,

> "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[4]

In *Truax v. Raich*[5] the Supreme Court held unconstitutional a state statute which required employers of more than five persons to employ eighty per cent. qualified voters or native

[1] Slaughter House Cases (1872) 16 Wallace 36, 81.

[2] Strauder *v.* West Virginia (1880) 100 U. S. 303; Neal *v.* Delaware (1880) 103 U. S. 370. Later cases on this point are Carter *v.* Texas (1900) 177 U. S. 442; Marin *v.* Texas (1906) 200 U. S. 316. But equal protection does not require that any part of a jury trying a negro shall actually be composed of persons of his race, as long as they are not excluded on that ground. *In re* Wood (1891) 140 U. S. 278.

[3] (1886) 118 U. S. 356. [4] *Ibid.*, 369. [5] (1915) 239 U. S. 33.

born citizens. The purpose of the statute was frankly to protect citizens against non-citizens. Since "the description—'any person within its jurisdiction'—as it has frequently been held, includes aliens," this discrimination was held to conflict with the equal protection clause.[1] When the question came before the Supreme Court as to whether the equal protection clause applies to corporations, that court had so little doubt on the subject that we read in the report:

> "One of the points made and discussed at length in the brief of counsel for defendants in error was that 'Corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States.' Before argument
>
> "Mr. Chief Justice Waite said: 'The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.' " [2]

[1] In Patsone *v.* Pennsylvania (1914) 232 U. S. 139, the court had before it a statute which made it unlawful for any unnaturalized foreigner to kill any wild bird or animal except in defense of person or property, and "to that end" made it unlawful for such person to own or possess a shotgun or rifle. The court said: "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 mainly is to be feared, it properly may be picked out. . . . 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 the resident unnaturalized aliens were the peculiar source of the evil that it desired to prevent. . . . It is enough that this court has no such knowledge of local conditions as to be able to say that it was manifestly wrong."

[2] Santa Clara County *v.* Southern Pac. Ry. Co. (1886) 118 U. S. 394, 396. See also Southern Ry. Co. *v.* Greene (1910) 216 U. S. 400. Thus a corporation comes within the scope of the equal protection clause of the Fourteenth Amendment, though it may not claim the "privileges

It is important to notice that while the due process clause applies to "any person," a State is only prohibited to pass laws which will deny the equal protection of the law to "any person within its jurisdiction." So a natural person who is not within the jurisdiction of a State may not claim to come within the purview of the equal protection clause,[1] though if he is a citizen of a State he may claim all of the "privileges and immunities of citizens in the several States,"[2] while on the other hand the equal protection clause protects the citizens of the several States from discriminatory action by their own States—a protection which was not afforded them by the Federal Constitution before the adoption of the Fourteenth Amendment—and also protects corporations. A natural person is within the jurisdiction of a State if he is a resident of the State, or if he is physically within its borders.[3] A corporation, like a natural person, must be within the jurisdiction of a State to come within the operation of the equal protection clause. In *Blake v. McClung*[4] the court, in holding that the clause did not apply to the foreign corporation claiming its protection, said:

> "Without attempting to state what is the full import of the words, 'within its jurisdiction,' it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the Fourteenth Amendment, within the jurisdiction of that State."

In the later case of *Southern Railway Company v. Greene*[5] in which the foreign corporation successfully claimed the pro-

---

and immunities" of a citizen of a State under the Fourth Article. See Pembina Cons. Silv. Min. Co. *v.* Pennsylvania (1888) 125 U. S. 181, and the discussion in sec. 206.

[1] Blake *v.* McClung (1898) 172 U. S. 239, 260; Sully *v.* American National Bank (1900) 178 U. S. 289, 303.

[2] U. S. Const, Art. IV, sec. 2. See discussion in chap. 24.

[3] Sully *v.* American Nat. Bk. (1900) 178 U. S. 289, 303.

[4] (1898) 172 U. S. 239, 261.

[5] (1910) 216 U. S. 400, 413.

tection of the constitutional clause under consideration, the court expressed itself as follows:

> "Is the plaintiff corporation a person within the jurisdiction of the State of Alabama? In the present case the plaintiff is taxed because it is doing business within the State of Alabama. The averments of the complaint, admitted by the demurrer, show it has acquired a large amount of railroad property by authority of and in compliance with the laws of the State; that it is subject to the jurisdiction of the courts of the State; that it has paid taxes upon its property, and also upon its franchises within the State; in short, that it came into the State in compliance with its laws, and at the time of the imposition of the tax in question had been for many years carrying on business therein under the laws of the State. We can have no doubt that a corporation thus situated is within the jurisdiction of the State. *Blake v. McClung*, 172 U. S. 239."

In another case decided in the same year the court, in holding that a foreign corporation came within the scope of the equal protection clause, said that,

> "the corporation was within the State, complying with its laws, and had acquired, under the sanction of the State, a large amount of property within its borders, and thus had become a person within the State within the meaning of the Constitution, and entitled to its protection."[1]

Here nothing is expressly said about the corporation being subject to the jurisdiction of the courts of the State. It is possible that the court means that a corporation becomes a person within the jurisdiction of a State when it is permitted by the State to enter and to acquire property, though not under conditions which subject it to process issuing from the State courts, but it is more probable that the court assumed that a corporation which had entered the State with the State's consent and had been allowed to acquire a

[1] Herndon *v.* Chicago & R. I. & P. Ry. Co. (1910) 218 U. S. 135, 158.

large amount of property, had upon entering submitted itself to the jurisdiction of the courts of the State.

§277. *It Is the State which Must Not Deny Equal Protection.* Believing that it was acting in pursuance of the fifth section of the Fourteenth Amendment, which provides that "Congress shall have power to enforce this article by appropriate legislation," Congress in 1875 passed the so-called Civil Rights Act, which among other things made it a misdemeanor for proprietors of inns, public conveyances, theaters, and other places of amusement to deny equal enjoyment of their facilities to any person on account of race, color, or previous condition of servitude. These provisions of the statute were held unconstitutional by the Supreme Court in the *Civil Rights Cases.*[1] The court pointed out that, "It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment."[2]

Though neither the due process clause nor the equal protection clause applies to acts of individuals, their operation is not confined to the acts of the States through their legislatures, but extends to the acts of any state officer.

> "They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws."[3]

A claim that a person's rights protected by the Fourteenth Amendment have been infringed is not answered by showing that the act complained of was done by a state officer with-

[1] (1883) 109 U. S. 3, 11. [2] See further sec. *225*.

[3] *Ex parte* Virginia (1880) 100 U. S. 339, 346; Yick Wo *v.* Hopkins (1886) 118 U. S. 356.

out authority, or contrary to statutory provisions. As was said by Chief Justice White,

> "the theory of the amendment is that where an officer or other representative of a State, in the exercise of the authority with which he is clothed misuses the power possessed to do wrong forbidden by the amendment, inquiry concerning whether the State has authorized the wrong is irrelevant, and the federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power."[1]

In *Heim v. McCall*[2] the Supreme Court had under consideration a New York statute which provides that only citizens of the United States can be employed on public works, and that citizens of New York shall be given preference. The court held that the Fourteenth Amendment had no application to such a statute, on the ground that the statute dealt only with the State as employer, and that the State as employer can employ whom it likes.

§278. *Rights Which Are Protected.* In one of the early cases Justice Field said of the equal protection clause that

> "the equality of the protection secured extends only to civil rights as distinguished from those which are political, or arise from the form of government and its mode of administration. . . . It secures to all their civil rights upon the same terms; but it leaves political rights, or such as arise from the form of government and its administration, as they stood previous to its adoption. . . . This is manifest from the fact that when it was desired to confer political power upon the newly made citizens of the States, as was done by inhibiting the denial to them of the suffrage on account of race, color, or previous condition of servitude, a new amendment was required."[3]

[1] Home Tel. Co. *v.* Los Angeles (1913) 227 U. S. 278, 287.

[2] (1915) 239 U. S. 175.

[3] *Ex parte* Virginia (1879) 100 U. S. 339, 367. See also Neal *v.* Delaware (1880) 103 U. S. 370, 408.

It has been for the protection of civil rights that the equal protection clause has been resorted to, and in the case of *Barbier v. Connelly*,[1] in which we find perhaps the fullest statement of the purpose of this provision, the full enumeration of the rights which are protected is an enumeration of civil, not political rights.

§279. *Reasonable Differences Not Forbidden.* The guaranty against denial of equal protection of the laws does not require that absolutely the same rules of law shall apply to all persons irrespective of differences of circumstance.[2] Such a result would obviously be obstructive of reasonable and necessary legislation. What the constitutional provision has been interpreted to mean is that no person within the jurisdiction of a State shall be denied by that State the protection of reasonably equal laws. As has been said by the Supreme Court, "the equal protection of the laws is a pledge of the protection of equal laws"[3]; and again, "the equal protection of the laws means subjection to equal laws, applying alike to all in the same situation."[4] It is, therefore, constitutional to classify persons, placing those whose circumstances are substantially similar under the same rule of law, but applying different rules of law to those whose circumstances are substantially dissimilar.

> "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."[5]

[1] (1885) 113 U. S. 27, 31.

[2] "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies." Missouri *v.* Lewis (1879) 101 U. S. 22, 31.

[3] Yick Wo *v.* Hopkins (1886) 118 U. S. 356, 369. This same language is used in Connolly *v.* Union Sewer Pipe Co. (1902) 184 U. S. 540, 559, and in German Alliance Ins. Co. *v.* Hale (1911) 219 U. S. 307, 319.

[4] Southern Railway Co. *v.* Greene (1910) 216 U. S. 400, 412.

[5] Barbier *v.* Connolly (1885) 113 U. S. 27, 31. In Hayes *v.* Missouri (1887) 120 U. S. 68, 71, the court said: "The Fourteenth Amendment

But classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."[1] The Supreme Court has very well summarized its position as follows[2]:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the States the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4.

to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

[1] Gulf, C. & S. F. Ry. Co. *v.* Ellis (1897) 165 U. S. 150, 155. "It is true, no doubt, that where size is not an index to an admitted evil the law cannot discriminate between the great and the small," Engel *v.* O'Malley (1911) 219 U. S. 128, 138, and such was held to be the case in Cotting *v.* Kansas City Stock Yards Co. (1901) 183 U. S. 79, where a statute was held invalid which regulated the rates of stock yards doing more than a certain volume of business. On the other hand workmen's compensation acts applying to those employing more than five persons are valid, Jeffrey Mfg. Co. *v.* Blagg (1915) 235 U. S. 571, as is a statute forbidding the assignment of wages to secure loans of less than $200, Mutual Loan Co. *v.* Martell (1911) 222 U. S. 225. The classification of larcenies according to the value of the property taken is familiar to all.

[2] Lindsley *v.* Natural Carbonic Gas Co. (1911) 220 U. S. 61, 78.

One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

§280. *Special Assessments and Other Geographical Classifications.* It is perfectly constitutional for a State to provide by general taxation for the cost of an improvement which will be particularly beneficial to a given locality.[1] However, when property within a certain area will be specially benefited by a local improvement it seems more reasonable that that property should bear the cost of such improvement than that it should be paid for by general taxation, and to provide for local assessment to defray the cost of local improvements is to establish for this purpose a classification which is entirely reasonable in character.[2] This principle may be applied validly to such purposes as the opening and improvement of highways,[3] the draining of swamp land,[4] and the improvement of harbors.[5] It is, of course, necessary that there be some reasonable basis for the determination of those upon whom the assessment is to be levied, and that there be a uniform plan of assessment for all those who are affected. Clearly the most equitable basis of special assessment is the special benefit actually accruing to each piece of property within the prescribed area, but it is not unconstitutional to employ as a measure the frontage upon the highway or other improvement,—this is known as the "front-foot rule"—or the superficial area of the property affected.[6]

[1] Mobile County *v.* Kimball (1880) 102 U. S. 691; Bauman *v.* Ross (1897) 167 U. S. 548.

[2] *Ibid.*, and cases there cited.

[3] Norwood *v.* Baker (1898) 172 U. S. 269; Louisville & N. R. Co. *v.* Barber Asphalt Co. (1905) 197 U. S. 430.

[4] Hagar *v.* Reclamation Dist. (1884) 111 U. S. 701.

[5] Mobile County *v.* Kimball (1880) 102 U. S. 691.

[6] Walston *v.* Nevin (1888) 128 U. S. 578; Louisville & N. R. R. Co. *v.* Barber Asphalt Co. (1905) 197 U. S. 430; Cleveland & St. L. Ry. *v.* Porter (1908) 210 U. S. 177. However, if it appears that the assessment is levied on the basis of the area of the abutting lots, and that they vary

In *Norwood v. Baker*[1] upon the opening of a street the full cost of such opening was charged against the abutting land by the front-foot rule, without any reference to the actual benefits received. In that case the court declared that, "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation,"[2] and the court, therefore, held that the assessment was invalid since it excluded any inquiry as to special benefits. This decision does not seem to be correct. There is no lack of equal protection as long as the assessment area has reasonable limits, and as long as those within it are assessed on the same basis. Also, the fact that the assessment exceeds special benefits would not seem to make the taking one which is without due process, any more than a general tax where there is no benefit makes the tax lacking in due process.[3] The special benefit is the justification for classing those within the benefited area together for assessment, but would seem not to mark the constitutional limit of such assessment. As a matter of fact the principle acted upon in the *Norwood* case seems to be quite repudiated in *French v. Barber Asphalt Paving Company*,[4] wherein an assessment levied by the front-foot rule, without any opportunity for the determination of special benefits, was upheld. Although the *Norwood* case was not actually overruled, it was distinguished upon its particular facts, namely, that all of the cost of putting through a street was charged to the property of one person. This hardly seems an adequate ground

widely in depth, such assessment will be held to constitute a denial of equal protection. Gast Realty & Inv. Co. *v.* Schneider Granite Co. (1916) 240 U. S. 55.

[1] (1898) 172 U. S. 269.

[2] *Ibid.*, 279. Three justices dissented.

[3] The discussion of this point belongs, perhaps, above where taxation and due process are considered, but is retained here to complete the treatment of special assessments.

[4] (1901) 181 U. S. 324, three justices dissenting.

for distinction, since the one person owned all of the abutting property. In *Louisville & Nashville Railroad Company v. Barber Asphalt Company*,[1] the railroad attacked the constitutionality of an assessment for grading, curbing, and paving, which apportioned the expense among abutting properties by the front-foot rule, claiming that its property was rather hurt than benefited by the work done, and that no assessment could, therefore, be levied against its land. The court answered[2]:

> " . . . The result of the supposed constitutional principle is simply to shift the burden to a somewhat large taxing district, the municipality, and to disguise rather than to answer the theoretic doubt. . . . It now is established beyond permissible controversy that laws like the one before us are not contrary to the Constitution of the United States.
>
> "A statute like the present manifestly might lead to the assessment of a particular lot for a sum larger than the value of the benefits to that lot. The whole cost of the improvement is distributed in proportion to area, and a particular area might receive no benefits at all, at least if its present and probable use be taken into account. If that possibility does not invalidate the act it would be surprising if the corresponding fact should invalidate an assessment. Upholding the act as embodying a principle generally fair and doing as nearly equal justice as can be expected seems to import that if a particular case of hardship arises under it in its natural and ordinary application, that hardship must be born as one of the imperfections of human things. And this has been the implication of the cases."

However, the court also pointed out that because the property would not be benefited for railroad purposes by the improvement, it did not necessarily follow that it was not in fact benefited in its general relations, and it was fair to presume that it was. In *Marvin v. District of Columbia*[3] the

[1] (1905) 197 U. S. 430, two justices dissenting.
[2] *Ibid.*, 433.
[3] (1907) 205 U. S. 135.

court had before it a statute which provided for the assessment of the cost of street opening upon the adjoining land according to the benefits received. The amount of the assessment on the particular property in question was equal to twice the value of the property. The court, after referring to the *Louisville & Nashville* case just discussed, said,

> "but when the chance of the cost exceeding the benefit grows large and the amount of the not improbable excess is great, it may not follow that the case last cited will be a precedent. Constitutional rights like others are matters of degree."[1]

The court suggests this as a ground for distinguishing *Norwood v. Baker*[2] and *French v. Barber Asphalt Paving Company*.[3] But the court held that the statute under consideration might be interpreted as only permitting assessment to the extent of the benefits received, and as, therefore, not raising the constitutional question.[4]

It is the general practice in the States to fix geographical limits to the jurisdiction of lower courts, and also to distinguish between the jurisdiction of different courts on the basis of the character of suits involved, or the amounts in controversy. This is held to be entirely constitutional.[5]

[1] *Ibid.*, 139. [2] (1898) 172 U. S. 269. [3] (1901) 181 U. S. 324.

[4] In Wagner *v.* Baltimore (1915) 239 U. S. 207, a state statute provided that the cost of paving previously laid should be assessed against the adjoining property by the front-foot rule. The court declared that it was not necessary to provide for a hearing as to the benefits to be derived from such paving. The legislature could constitutionally determine the amount to be raised and the property benefited, and direct the assessment against such property. The objection that the assessment was for previously constructed improvements was held not to be valid. However, the court said that there might under the guise of assessment be such arbitrary abuse of legislative power as to be a denial of due process. The Norwood case is referred to as being supportable on this ground.

[5] "The amendment could never have been intended to prevent a State from arranging and parcelling out the jurisdiction of its several courts at its discretion. No such restriction as this could have been in

Furthermore, for administrative purposes the States are divided into counties and municipalities, and these latter are themselves divided into different classes, and different laws may be made applicable to the different subdivisions, or they may under delegated power enact different local regulations. This is undoubtedly constitutional, as long as those within the local area are treated alike, and as long as there is no obvious and wholly unreasonable discrimination against some class as a result of such local differences in the law.[1] Local option legislation, which may become oper-

---

view, or could have been included in the prohibition that 'no person shall deny to any person within its jurisdiction the equal protection of the laws.' . . . The last restriction, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like case and under like circumstances, to resort to them for redress. . . . As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory, and another system for another portion." Missouri *v.* Lewis (1879) 101 U. S. 22, 30.

[1] "We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, for example, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. . . . It is not impossible that a distinct territorial establishment and jurisdiction might be intended as, or might have the effect of, a discrimination against a particular race or class, where such race or class should happen to be the principle occupants of the disfavored district." Missouri *v.* Lewis (1879) 101 U. S. 22, 31, 32. See also Williams *v.* Eggleston (1898) 170 U. S. 304 (several towns may be formed into a single municipal corporation and subjected to different highway laws from those in other parts of the State); Mason *v.* Missouri (1900) 179 U. S. 328 (cities may be classified according to population, and

ative in some localities and not in others, falls within this principle.[1]

§281. *Classification for General Taxation.*

> "A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings. Its discretion in such matters is very great. . . ."[2]

It has been held constitutional to tax corporations upon a different basis from individuals in the same business[3]; to impose a different tax rate upon tangible and intangible property[4]; to classify railroads separately for taxation,[5] and to do the same with regard to express companies[6]; to make a distinction for taxation between tracts of one thousand acres and those which are smaller[7]; and to base the amount of the tax on the amount of business done in a place.[8] The Supreme Court in *American Sugar Refining Company v. Louisiana*[9] upheld a statute which imposed a license fee upon those engaged in the business of refining sugar and molasses while exempting those refining their own products.

Inheritance taxes are in very general use in Europe, and in some of our States provisions for such taxes have been

---

different regulations as to elections applied to different classes); Gardner *v.* Michigan (1905) 199 U. S. 325 (the law relating to jury trials in one county of a State may be different from that relating to jury trials in the rest of the State).

[1] Rippey *v.* Texas (1904) 193 U. S. 504; Ohio *v.* Dollison (1904) 194 U. S. 445; note in 8 *L. R. A.* (*N. S.*) 362.

[2] Connolly *v.* Union Sewer Pipe Co. (1902) 184 U. S. 540, 562.

[3] Michigan Cent. R. R. Co. *v.* Powers (1906) 201 U. S. 245.

[4] Coulter *v.* Louisville & N. R. R. Co. (1905) 196 U. S. 599.

[5] State R. R. Tax Cases (1875) 92 U. S. 575.

[6] Pacific Exp. Co. *v.* Seibert (1892) 142 U. S. 339.

[7] King *v.* Mullins (1898) 171 U. S. 404, 435.

[8] Toyota *v.* Hawaii (1913) 226 U. S. 184.

[9] (1909) 179 U. S. 89.

on the statute books for many years.[1] In recent years they have come into general use on this side of the Atlantic. Such a tax is not generally treated as one on vested property, but as a tax on the privilege of inheriting or of transmitting property.[2] As such it is generally held not to fall within the provisions contained in some state constitutions that taxes on property shall be uniform and in proportion to valuation.[3] In *Magoun v. Illinois Trust & Savings Bank*[4] an Illinois inheritance tax was attacked as unconstitutional which imposed a tax of one per cent. upon any excess over $20,000 going to lineal descendants, two per cent. upon any excess over $2,000 going to collateral heirs, and which imposed different taxes upon other persons receiving property by inheritance according to the amounts received. The court held that the two bases for classification in this statute—relationship and the amount received—were reasonable and that the statute was, therefore, not open to attack as denying equal protection.[5]

Income taxes are not new in American law but they have come into much wider use in the last few years. That there is nothing in the Federal Constitution to prevent a State's adopting such method of taxation is quite clear.

> ". . . That the State, from whose laws property and business and industry derive the protection and security

[1] Magoun *v.* Illinois T. & S. Bank (1898) 170 U. S. 283, 287.

[2] United States *v.* Perkins (1896) 163 U. S. 625; Magoun *v.* Illinois T. & S. Bank (1898) 170 U. S. 283. It is frequently suggested that since the transmission or inheritance of property is only a privilege it may be entirely taken away. See note in 9 *L. R. A.* (*N. S.*) 121–123.

[3] Magoun *v.* Illinois T. & S. Bank (1898) 170 U. S. 283. In this opinion the state decisions will be found, both those which are in accord, and the few which take the opposite view.

[4] (1898) 170 U. S. 283.

[5] See also Plummer *v.* Coler (1900) 178 U. S. 115; Campbell *v.* California (1906) 200 U. S. 87; Beers *v.* Glynn (1909) 211 U. S. 477. In Keeney *v.* New York (1912) 222 U. S. 525, it was held that a State may impose a graduated tax on transfers of personal property by instrument taking effect on the grantor's death without violating the equal protection clause.

without which production and gainful occupation would be impossible, is debarred from exalting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible.

"Income taxes are a recognized method of distributing the burden of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay. Taxes of this character were imposed by several of the States at or shortly after the adoption of the Federal Constitution."[1]

The statute in question provided for a progressive income tax. No question was raised in the case with regard to this feature of the statute, but the language quoted above clearly shows approval of it. Such taxes have generally been upheld by state courts.[2] The Supreme Court, however, has declared that taxes on incomes from real estate and from invested personal property are in effect taxes on property, while taxes on income from "professions, trades, employments, and vocations" are in the nature of excise taxes.[3] It would seem, therefore, that in States whose constitutions require that taxes on property be uniform and in proportion to valuation, a distinction might be drawn between the validity of these two classes of income taxes. A nonresident may be taxed by a State on the income which accrues to him within the State, but to deny to a citizen of another State the exemptions which are granted to its own citizens is

[1] Shaffer *v.* Carter (1920) 252 U. S. 37, 50. See also Travis *v.* Yale & Towne Mfg. Co. (1920) 252 U. S. 60.

[2] See notes in 27 *L. R. A.* (*N. S.*) 864 and *L. R. A. 1915 B* 569.

[3] Pollack *v.* Farmers' L. & T. Co. (1895) 157 U. S. 429, on rehearing 158 U. S. 601; Brushaber *v.* Union Pac. Co. (1916) 240 U. S. 1, 15.

unconstitutional.[1] The Supreme Court has also held that a state statute which taxes all of the income of a domestic corporation derived from business done outside of the State and business done within it, while exempting entirely the income derived from outside the State by domestic corporations which do no local business is contrary to the equal protection clause, because an unreasonable classification.[2]

§282. *Classification Under the Police Power.* The Supreme Court early used the following very instructive language as to the police power and equal protection[3]:

"But neither the [fourteenth] 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 for 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 and 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

[1] Travis *v.* Yale & Towne Mfg. Co. (1920) 252 U. S. 60.
[2] Royster Guano Co. *v.* Virginia (1920) 253 U. S. 412.
[3] Barbier *v.* Connolly (1885) 113 U. S. 27, 31.

in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

There is no doubt that for purposes appropriate to the police power reasonable classifications may be created by legislation without conflicting with the guaranty of equal protection in the Fourteenth Amendment. The Supreme Court has asserted, however, that a wider discretion is allowed in classification for taxation than is allowed in the exercise of the police power,[1] and this is reasonable. Since a State may tax all it should not be held to be beyond its power to tax a part, as long as the line which is drawn is not entirely arbitrary and without reason. But regulation is only justifiable when such regulation is required for the protection of some public interest, and, therefore, when some are regulated and others are not, some reasonable justification for such difference should be perceivable based upon considerations of public welfare. The number of cases which have involved the right to classify under the police power is very great,[2] but the attitude of the Supreme Court towards the problems involved can be made clear by a consideration of comparatively few decisions.

Naturally in considering the exercise of the police power one thinks first of legislation for the protection of health, safety, morals, and good order. Of course in our criminal law, developed for the protection of life, and of the safety of person and property, as well as for the protection of morals and good order, we have a great amount of classification as to acts and penalties whose constitutionality is accepted without question. However, in *Finley v. California*[3] a statute was attacked as denying equal protection which provided that life convicts alone should be punished with death for an assault with a deadly weapon. The court upheld the statute on the ground that life convicts form a class by themselves, upon whom no longer term of imprison-

[1] Connolly *v.* Union Sewer Pipe Co. (1902) 184 U. S. 540.

[2] See 12 *Corpus Juris* 1157 *et seq.*; 6 *R. C. L.* secs. 364 *et seq.*

[3] (1911) 222 U. S. 28.

ment could be imposed.[1] Night work in laundries may be forbidden, though allowed in other businesses, on the ground of protecting the community against fire.[2] Regulations may be imposed upon the dealing in, or the use of intoxicating liquor which are not imposed upon other products[3]; and persons selling milk may be required to take out licenses and to conform to special sanitary provisions.[4] Fertilizer plants may be kept out of cities,[5] and so may cow stables and dairies,[6] and brick making may be restricted to designated areas.[7] The emission of dense smoke in cities may be made a nuisance.[8] A city may be divided into commercial and residential districts, and different heights may be fixed for buildings in the two districts, provided these differences are reasonable.[9] The sale of preservatives containing boric acid may be prohibited,[10] and the manufacture and sale of oleomargarine may be put under different restriction from the manufacture and sale of butter.[11] Some forms of speculation which have been found particularly harmful, such as the sale of stock on margin, may be prohibited without prohibiting all transactions in which speculation is possible.[12] Similarly it has been held lawful to forbid the keeping of billiard and pool tables for the general use of the public while allowing hotels to keep such tables for the use of their guests.[13] It is clearly reasonable to prohibit the employment of children under sixteen years of age in hazard-

[1] See McDonald *v.* Massachusetts (1901) 180 U. S. 311, upholding a statute imposing heavier penalty upon habitual criminals.

[2] Barbier *v.* Connolly (1885) 113 U. S. 27.

[3] Mugler *v.* Kansas (1887) 123 U. S. 623.

[4] New York *v.* Van De Carr (1905) 199 U. S. 552.

[5] Fertilizer Co. *v.* Hyde Park (1878) 97 U. S. 659.

[6] Fischer *v.* St. Louis (1903) 194 U. S. 361.

[7] Hadecheck *v.* Sebastian (1915) 239 U. S. 394.

[8] Northwestern Laundry Co. *v.* Des Moines (1916) 239 U. S. 486.

[9] Welch *v.* Swasey (1909) 214 U. S. 91.

[10] Price *v.* Illinois (1915) 238 U. S. 446.

[11] Powell *v.* Pennsylvania (1888) 127 U. S. 678; Capital City Dairy Co. *v.* Ohio (1902) 183 U. S. 238.

[12] Otis *v.* Parker (1903) 187 U. S. 606.

[13] Murphy *v.* California (1912) 225 U. S. 623.

ous occupations,[1] and it is equally constitutional to make restrictions as to hours of work apply only to women, when it appears that long working hours are especially injurious to women.[2] So restrictions upon the hours of work for men may be applied to businesses which are notoriously unhealthful, though not applied to businesses generally.[3] The singling out of mine owners as a class upon whom to put absolute liability for defaults of certain of their employees is not an improper classification in view of the care needed in such business.[4] In all of these cases we have instances of classifications based upon legitimate regard for the health, safety, morals, and good order of the community.

The likelihood of friction between the white and colored races has led to legislation for their separation, some of which has been upheld, and some of which has not. In *Plessy v. Ferguson*[5] a statute was attacked as denying equal protection which required separate but equal railroad accommodations for white and colored passengers. This regulation was held to be reasonable. Similarly statutory provisions for the separation of white and colored children in schools are upheld.[6] The Supreme Court of the United States has, however, absolutely set its face against the segregation of the races into separate areas, as attempted in several of the southern States, even when identical restrictions are put upon both races.[7] It seems doubtful if in any case of the separation of the races, where there is identity of treatment, there could be said to be a denial of the equal protection of the laws.[8] The question would seem rather to

[1] Sturges & Burn Mfg. Co. *v.* Beauchamp (1913) 231 U. S. 320.

[2] Muller *v.* Oregon (1908) 208 U. S. 412.

[3] Holden *v.* Hardy (1898) 169 U. S. 366.

[4] Wilmington Star Mining Co. *v.* Fulton (1907) 205 U. S. 60.

[5] (1896) 163 U. S. 537.

[6] *Ibid.*, 544; People *v.* School Board (1900) 161 N. Y. 598; 13 *Ann. Cases* 343.

[7] Buchanan *v.* Warley (1917) 245 U. S. 60.

[8] But if the facilities are not substantially equal there is a denial of the equal protection of the laws. Maddox *v.* Neal. (1885) 45 Ark. 121; Williams *v.* Board of Education (1908) 79 Kan. 202.

be whether there has been a deprivation of liberty or property without due process. The last Supreme Court case cited, where segregation was condemned, was decided upon the ground that the property owner was deprived of his property without due process.[1]

All rate regulation of public utilities, and of businesses which are of such importance to the public as to justify this exercise of the police power, involves classification on the basis of the particular business to be regulated. Clearly it is reasonable, and therefore constitutional, to apply different systems of rates to railroads, grain elevators, telephone companies, telegraph companies, gas plants, water works, and to the various other businesses whose rates may be fixed by the State.[2] Furthermore different rates may be applied to different utilities of the same kind if there is a difference of circumstances which justifies the distinction made[3]; or some businesses may be regulated and others of the same kind left unregulated, if there is reasonable ground for this discrimination.[4] The Supreme Court has established, however, that there may be a judicial review with regard to the reasonableness of legislative rates. This has sometimes been put on the ground that the establishment of rates which are unreasonably low constitutes an unreasonable discrimination between those who are regulated and those who are not, and so results in a denial of the equal protection of the laws.[5] But as has been pointed out, the right to review legislative rates has been more generally upheld under the due process clause.[6]

We have seen that under the due process clause a very wide discretion is allowed to state governments in limiting liberty of action and the use of property in the exercise

[1] See the discussion in sec. 270.

[2] For a consideration of rate regulation see sec. 272.

[3] Covington & L. Turnpike Co. *v.* Sandford (1896) 164 U. S. 578; 12 *Corpus Juris* 1169.

[4] Munn *v.* Illinois (1876) 94 U. S. 113; Budd *v.* New York (1892) 143 U. S. 517.

[5] Reagan *v.* Farmers' L. & T. Co. (1894) 154 U. S. 362.

[6] Sec. 272.

of the police power in order to protect the public against fraud, oppression, loss, and waste.[1] It is also well established that when a State legislates for these purposes it may make classifications of those persons or businesses which shall and of those which shall not fall under the statutory provisions, and that if there is any reasonable basis for such classifications they do not constitute a denial of the equal protection of the laws. Many of the cases considered in connection with due process exemplify this proposition with regard to equal protection.[2] A rather extreme example of classification which was upheld as an exercise of the police power to prevent fraud is found in the statute which was involved in *Armour & Company v. North Dakota*,[3] which singled out lard, and required that it should not be sold otherwise than in bulk unless put up in one, three, or five pound packages, net weight or in packages of some multiple of these weights. The court thought that in view of the fact that the law was drafted by the state pure food commission after several years' experience and observation it could be assumed that there was reason for singling out the sale of lard for the regulation in question.

The Supreme Court upheld a Missouri statute which prohibited combinations of manufacturers and vendors of goods to lessen competition and to regulate prices, but which did not prohibit combinations of workers or of purchasers.[4] It is quite clear that the public may suffer oppression from combinations of manufacturers and vendors which will not result from combinations of workers or of purchasers.

[1] Sec. 273.

[2] For instance: Lemieux *v.* Young (1909) 211 U. S. 489 ("sale in bulk" law upheld though it applied only to retailers); Hall *v.* Geiger-Jones Co. (1917) 242 U. S. 539 ("blue sky" laws requiring dealers in securities to obtain licenses); Noble State Bank *v.* Haskell (1911) 219 U. S. 104 (statute requiring banks to contribute to a depositors' guaranty fund); Shallenberger *v.* First St. Bk. of Holstein (1911) 219 U. S. 114 (statute requiring those doing a banking business to incorporate).

[3] (1916) 240 U. S. 510.

[4] International Harvester Co. of America *v.* Missouri (1914) 234 U. S. 199.

It does not follow that the latter might not be forbidden, but if the problems are different the classification made by the statute is not unreasonable. On the other hand the Supreme Court held unconstitutional an Illinois statute against combinations for the restriction of competition, which expressly excepted from its operation agricultural products or live stock in the hands of the producer or raiser.[1] The majority of the court could see no reasonable ground for the distinction which was made, and therefore declared that the statute denied the equal protection of the law. The court in this case would seem to have taken a rather less liberal attitude towards the power of the States to make classifications under the police power than has usually been its wont, in view of the fact that the dangers from combinations in commercial centers are obviously greater than among those engaged in agricultural pursuits.[2] In *Bacon v. Waller*[3] it was held that the State of Idaho had not gone beyond its constitutional power in providing that damages may be recovered from one who permits his sheep to graze on the public domain within two miles of a dwelling house. This was held not to be an unreasonable discrimination in favor of owners of cattle in view of the fact that cattle will not graze on land where sheep have been pastured.

The New York statute considered in *Lindsley v. Natural Carbonic Gas Company*[4] was directed against the waste of the mineral waters at Saratoga Springs. Its prohibitions applied to those pumping from wells bored in the rock, but not to those pumping from other wells, and they applied to those pumping the water for the purpose of extracting and vending the gas, but not to those pumping the water for other purposes. The court was not satisfied that this classification was unreasonble in view of the facts that wells not bored in the rock did not seem to draw water from the common reservoir, and that there is a greater temptation to wastefulness when the water is pumped for the purpose of

[1] Connolly *v.* Union Sewer Pipe Co. (1902) 184 U. S. 540.
[2] *Ibid.*, Justice McKenna's dissenting opinion.
[3] (1907) 204 U. S. 311.
[4] (1911) 220 U. S. 61.

extracting gas than when it is pumped for other purposes.

Several statutes have come before the Supreme Court of the United States which have, in connection with designated businesses, provided for the imposition of special penalties in cases where claims have been made and not satisfied, and where such claims have afterwards been successfully prosecuted to judgment. Where the only apparent purpose of such a statute was to compel the prompt payment of small claims by railroads, the statute was held unconstitutional, on the ground that no greater duty rested upon railroads to pay small claims against them than rests upon other businesses.[1] On the other hand it was held constitutional to impose a penalty in favor of plaintiffs recovering their full claims in suits against common carriers for damage to property while in their possession, provided the claim is not settled within forty days after presentment.[2] This statute was upheld on the ground that common carriers are under a special duty of care with regard to goods in their possession, and a carrier is in a much better position than the shipper to know what has happened to such goods, and what its liability is.[3]

Legislation with regard to employment, such as we have discussed in connection with the due process clause,[4] generally involves classification for the purpose of regulation. So we have seen that hours of work and minimum wage

[1] Gulf C. & S. F. Ry. *v.* Ellis (1897) 165 U. S. 150.

[2] Seaboard Air Line Ry. *v.* Seegers (1907) 207 U. S. 73.

[3] See also Fidelity Mut. Life Assn. *v.* Mettler (1902) 185 U. S. 308 (where a Texas statute was upheld which directs that life and health insurance companies, who shall default in payment of their policies, shall pay twelve per cent. damages, together with reasonable attorney's fees, though no similar provision is made applicable to other kinds of insurance companies or to mutual benefit associations); Missouri Pac. Ry. Co. *v.* Larabee (1914) 234 U.S. 459 (upholding a statute allowing an attorney's fee in a mandamus proceeding against a party refusing to obey a peremptory writ though a similar provision is not made in behalf of the successful defendant, or in behalf of parties in other proceedings).

[4] Sec. 274.

legislation applicable to women and not to men has been held constitutional.[1] Similarly labor legislation applicable to children and not to adults constitutes legal classification.[2] Also classification of those employed in particularly unhealthful callings for the purpose of protective legislation,[3] and the classification of those working in mills, factories, and manufacturing establishments, as distinct from those engaged in mercantile or agricultural pursuits, has been upheld.[4] So in workmen's compensation acts, which we have seen do not contravene due process,[5] there may be classification of those businesses which do and of those which do not fall within the purview of the act.[6] It has been held constitutional to except banks and certain loan companies from the provisions of a statute which invalidates as against the employer the assignment of future wages without the consent of the wage-earner's wife, and certain other formalities,[7] and to apply the prohibition against employers issuing orders for the payment of labor not purporting to be payable in money to those engaged in mining and manufacturing only.[8]

[1] Muller *v.* Oregon (1908) 208 U. S. 412; Stettler *v.* O'Hara (1917) 243 U. S. 629.

[2] Sturges *v.* Beauchamp (1914) 231 U. S. 320.

[3] Holden *v.* Hardy (1898) 169 U. S. 366.

[4] Bunting *v.* Oregon (1917) 243 U. S. 426.

[5] Sec. 274.

[6] Jeffrey Mfg. Co. *v.* Blagg (1915) 235 U. S. 571.

[7] Mutual Loan Co. *v.* Martell (1911) 222 U. S. 225.

[8] International Harvester Co. *v.* Missouri (1914) 234 U. S. 199.

CHAPTER XXXIV

THE SUFFRAGE AND PROHIBITION AMENDMENTS

§283. *The Fifteenth Amendment.* The Fifteenth Amendment, which was proposed in 1869 and ratified the next year, provides as follows:

"1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any of the States on account of race, color or previous condition of servitude.

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

In the first case to come before the Supreme Court of the United States under the reconstruction amendments, Justice Miller made this statement[1]:

". . . A few years' experience satisfied the thoughtful men who had been the authors of the other two amendments that, notwithstanding the restraints of those articles on the States, and the laws passed under the additional powers granted to Congress, these were inadequate to the protection of life, liberty and property, without which freedom to the slave was no boon. They were in all those States denied the right of suffrage. The laws were administered by the white man alone. It was urged that a race of men distinctively marked as was the negro, living in the midst of another and dominant race, could never be fully secured in their person and their property without the right of suffrage.

"Hence the fifteenth amendment, . . . The negro having by the fourteenth amendment, been declared

[1] Slaughter House Cases (1872) 16 Wallace 36, 71.

to be a citizen of the United States, is thus made a voter in every State of the Union."

We have here a good statement of the general purpose of the Fifteenth Amendment, but the statement that it made the negro "a voter in every State of the Union" is misleading. The determination of the qualifications for voters for federal as well as state officers is still left, as it was by the original terms of the Constitution, to the determination of the States,[1] with the one qualification only that such determination shall not be based upon lines of race, color, or previous condition of servitude. It has, therefore, been held that it is entirely constitutional for a State to establish a literacy test for its electors, which applies to all persons, there being in such provision no discrimination against colored persons, though it may in fact apply to more members of that race than of the white race.[2] But where a state statute or constitutional provision excepts from the literacy test any "person who was on January 1, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation," and any "lineal descendant of such person," it is unconstitutional, since its only discernible purpose and effect is to disfranchise former black slaves and their descendants, contrary to the Fifteenth Amendment.[3]

The Fifteenth Amendment resembles the Fourteenth in that it is not directed against the action of individuals. So an attempt by federal legislation to punish private persons who conspire to prevent negroes from voting is not within

[1] By Article I, section 2 of the Constitution of the United States, and by the Seventeenth Amendment it is provided that electors for Representatives and Senators "shall have the qualifications requisite for electors of the most numerous branch of the State Legislature," and by Article II, section 1 it is provided that presidential electors shall be appointed in each State in such manner as the Legislature thereof may direct."

[2] Williams *v.* Mississippi (1898) 170 U. S. 214.

[3] Guinn *v.* United States (1915) 238 U. S. 347; Myers *v.* Anderson (1915) 238 U. S. 368.

the power granted by the amendment.[1] It is to be noticed that the Fifteenth Amendment, unlike the Fourteenth, is a limitation upon the National Government as well as upon the States.

§284. *The Nineteenth Amendment.* Upon the adoption of the Fourteenth Amendment, declaring that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," it was contended that the right to vote is a privilege of citizenship and that women could not, therefore, be deprived of the privilege of the ballot.[2] The Supreme Court held that women were citizens before as well as after the adoption of the amendment, but that the right to vote was not a privilege inhering in citizenship, and that the Fourteenth Amendment did not add to existing privileges. Gradually, however, the suffrage was obtained by women in State after State, until finally they found themselves politically strong enough to induce Congress to propose to the States the Nineteenth Amendment, which provides that,

> "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 sex.
>
> "2. Congress shall have power, by appropriate legislation, to enforce the provisions of this article."[3]

It will be noticed that the Nineteenth Amendment follows the language of the Fifteenth, substituting only the word "sex" for the words "race, color, or previous condition of servitude." All that has been said about the Fifteenth Amendment, therefore, applies equally to the Nineteenth.

[1] James *v.* Bowman (1903) 190 U. S. 127. See also United States *v.* Reese (1875) 92 U. S. 214.

[2] Minor *v.* Happersett (1874) 21 Wallace 162.

[3] The amendment was proposed in 1919 and was declared by the Secretary of State to be in effect on August 26, 1920.

The question of the constitutionality of this amendment is now before the Supreme Court. It is believed that the amendment will be upheld.

§285. *The Eighteenth Amendment.* This amendment was proposed by Congress in 1917, and was declared by the Secretary of State to be in effect January 29, 1919.[1] Its provisions are as follows:

> "1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory, subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> "2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
>
> "3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the Legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

It will be noticed that section two of this amendment differs from corresponding sections in the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments in that those amendments vest in Congress sole authority of enforcement, while the Eighteenth Amendment gives to "Congress and the several States concurrent power to enforce this article by appropriate legislation." In upholding the amendment and the Volstead Act passed by Congress under its authority, the Supreme Court laid down among others the following propositions[2]:

> "7. The second section of the amendment—the one declaring 'Congress and the several States shall have concurrent power to enforce this article by appropriate

[1] With regard to the attack upon the validity of this amendment see sec. 22.

[2] National Prohibition Cases (1920) 253 U. S. 350, 387.

legislation'—does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.

"8. The words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several States or any of them; nor do they mean that the power to enforce is divided between Congress and the several States along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs.

"9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and other intrastate transactions as well as importation, exportation, and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several States or any of them."

From this it is clear that Congress may legislate, consistently with the amendment, on the subject of intoxicants for the whole country, and that any inconsistent state legislation would be annuled by such federal enactments. On the other hand it seems safe to say that any state legislation with regard to intoxicants, which would before the Eighteenth Amendment have been valid under the police power of the States, is now valid under the amendment, as long as it does not conflict with the provisions of the amendment or with national legislation passed in pursuance of it. Such legislation may have been passed before or after the adoption of the amendment, and may have been passed for the purpose of enforcing the amendment or for the purpose of enacting a stricter rule of prohibition than is required by that addition to the fundamental law.[1]

[1] Commonwealth *v.* Nickerson (1920, Mass.) 128 N. E. 273; United States *v.* Nickerson (1920) 268 Fed. 864; *Ex parte* Crookshank (1921) 269 Fed. 980; notes in *19 Michigan L. Rev.*, 329, *6 Cornell L. Quar.*, 443, *10 A. L. R.*, 1587.

APPENDIX

[CONSTITUTION OF THE UNITED STATES OF AMERICA][1]

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common 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

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. [1.] The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

[1] This copy of the Constitution (through Amendment XVII), together with the footnotes, is reprinted from the appendix to Hall's *Cases on Constitutional Law*, with the courteous permission of the publishers, the West Publishing Company. American History Leaflet No. 8, from which the text of the Constitution was largely taken by Dean Hall, was prepared by Professor Albert B. Hart and Professor Edward Channing of Havard, and is published by Simmons-Peckham Co., Inc. The authors and publishers of the Leaflet have also consented to the use of the text of the Constitution in the form in which it is here published. The words and figures enclosed in brackets do not appear in the original manuscripts, and are inserted for convenience of reference.

[2.] No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[3.] Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[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.

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

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

SECTION 3. [1.] The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote. [Superseded by Amend. XVII.]

[2.] Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three classes. The Seats of the

[1] See Amend. XIV, sec. 2.

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 Appointment until the next Meeting of the Legislature, which shall then fill such Vacancies.

[3.] No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

[4.] The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they are equally divided.

[5.] 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.

[6.] The Senate shall have the sole Power to try all Impeachments. When sitting for that purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

[7.] Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION 4. [1.] The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

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

SECTION 5. [1.] Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

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

[3.] Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

[4.] Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION 6. [1.] The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

[2.] No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been 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.

SECTION 7. [1.] All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

[2.] Every Bill which shall have passed the House of Representatives and the Senate shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

[3.] Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION 8. The Congress shall have Power [1.] To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

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

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

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

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

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

[7.] To establish Post Offices and post Roads;

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

[9.] To constitute Tribunals inferior to the supreme Court;

[10.] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

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

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

[13.] To Provide and maintain a Navy;

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

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

[16.] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[17.] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles

square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, dock Yards, and other needful Buildings:—And

[18.] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION 9. [1.] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2.] The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

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

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

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

[6.] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7.] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8.] No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust

under them, shall, without the Consent of the Congress, accept of any Present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION 10. [1.] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2.] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

[3.] No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II

SECTION 1. [1.] The Executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

[2.] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[3.] The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest number of Votes shall be the President, if such Number be a Majority of the whole number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately 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]

[4.] 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.

[5.] No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[1] This paragraph was superseded by Amend. XII.

[6.] In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

[7.] The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be 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.

[8.] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION 2. [1.] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

[2.] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law;

but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

[3.] The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. [1.] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting

Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;[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.

[2.] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions, and under such Regulations as the Congress shall make.

[3.] The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

SECTION 3. [1.] Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

[2.] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV

SECTION 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Pro-

[1] See Amend. XI.

ceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

SECTION 2. [1.] The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

[2.] A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime.

[3.] No Person held to Service or 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.

SECTION 3. [1.] New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

[2.] The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI

[1.] All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

[2.] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

[3.] The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.[1]

[Note of the draughtsman as to interlineations in the text of the manuscript.]

Attest

WILLIAM JACKSON
Secretary

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.

Delaware

GEO: READ
GUNNING BEDFORD JUN
JOHN DICKINSON
RICHARD BASSETT
JACO: BROOM

New Hampshire

JOHN LANGDON
NICHOLAS GILMAN

Massachusetts

NATHANIEL GORHAM
RUFUS KING

[1] The States ratified the Constitution in the following order:

Delaware	December 7, 1787	delegates on April 28, 1788. See 2	
Pennsylvania	December 12, 1787	Doc. Hist. Const., 104, 121.)	
New Jersey	December 18, 1787	South Carolina	May 23, 1788
Georgia	January 2, 1788	New Hampshire	June 21, 1788
Connecticut	January 9, 1788	Virginia	June 26, 1788
Massachusetts	February 6, 1788	New York	July 26, 1788
Maryland	April 26, 1788	North Carolina	November 21, 1789
(Vote taken on April 26, but official ratification signed by		Rhode Island	May 29, 1790

By an act of September 13, 1788, the Congress of the Confederation appointed the first Wednesday in January next for the appointment of presidential electors in the States that had by then ratified the Constitution; the first Wednesday in February for the electors to assemble and vote for President; and the first Wednesday in March for commencing proceedings under the Constitution. On the latter date, March 4, 1789, the Constitution became legally operative, Owens *v.* Speed (1820) 5 Wheat. 420; though in fact the House of Representatives did not assemble, for want of a quorum, until April 1, and the Senate not until April 6; and President Washington was not inaugurated until April 30.

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

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

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.[1]

[ARTICLE I.][2]

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

[1] This heading appears only in the joint resolution submitting the first ten amendments. 1 Stat. 971.

In vol. ii of *Amer. Hist. Assn. Reports* (1896), is an elaborate essay by H. V. Ames upon Proposed Amendments to U. S. Constitution, 1789–1889, which contains a calendar of over 1,800 amendments proposed in Congress or the State Legislatures, with a history of the more important proposals.

[2] The first 10 amendments were proposed by Congress on September 25, 1789, when they passed the Senate [1 Ann. Cong. (1st Cong. 1st Sess.) 88], having previously passed the House on September 24 [*Id.*, 913.]

people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II.]

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

[ARTICLE III.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner prescribed by law.

[ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[ARTICLE V.]

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

---

They appear officially in 1 Stat. 97. The eleventh State (Virginia), there then being 14 in all, ratified them on December 15, 1791 [2 Doc. Hist. Const., 386–90].

Two other amendments proposed at the same time failed of ratification. One of these concerned the ratio of representation to population in the House, and the other forbade any change in the compensation of Senators and Representatives to become effective until after an intervening election of Representatives. The first was ratified by ten States and the second by six States [2 Doc. Hist. Const., 325–390].

shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI.]

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

[ARTICLE VII.]

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

[ARTICLE VIII.]

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

[ARTICLE IX.]

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

[ARTICLE X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

[ARTICLE XI.][1]

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[ARTICLE XII.][2]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of

[1] The Eleventh Amendment was proposed by Congress on March 4, 1794, when it passed the House [4 Ann. Cong. (3rd Cong. 1st Sess.) 477], having previously passed the Senate on January 14 [*Id.*, 30, 31]. It appears officially in 1 Stat. 402. The ratifications of but six States appear among the official records printed in 2 Doc. Hist. Const., 392–407. The fifth of these (North Carolina) was on February 7, 1795. Three others were announced to Congress in a message by President Washington on January 8, 1795 [1 Mess. and Papers of Pres. 174]. Rhode Island ratified at the March session of its legislature, 1794 [R. I. Laws (March, 1794) 32]; New Hampshire on June 20, 1794 [N. H. Laws, 1785–1796, p. 501]; Georgia on November 29, 1794 [Dig. Georgia Laws, 1755–1800, p. 291]; and Delaware on January 22, 1795 [2 Del. Laws (Ed. 1797), 1199, 1200]. North Carolina was therefore the twelfth State (there then being 15 in all) and the amendment became effective on February 7, 1795. On January 8, 1798, President Adams stated in a message to Congress that the amendment had been adopted by three-fourths of the States (there being then 16 in all) and might now be declared a part of the Constitution [1 Mess. and Papers of Pres. 260].

[2] The Twelfth Amendment was proposed by Congress on December 8, 1803, when it passed the House [13 Ann. Cong. (8th Cong. 1st Sess.) 775, 776], having previously passed the Senate on December 2 [*Id.*, 209,

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

---

210]. It appears officially in 2 Stat. 306. The ratifications of but 12 States appear among the official records printed in 2 Doc. Hist. Const., 411–450; and 5 Doc. Hist. Const., 480–491; the last of which were Georgia (May 19, 1804) and Tennessee (July 27, 1804). In addition, Kentucky ratified on December 27, 1803 [3 Littell, Ky. Stats. 149]. On June 15, 1804, the New Hampshire Legislature passed an act ratifying the amendment, which was vetoed by the governor and failed to pass again by two thirds vote then required by the state constitution for the enactment of laws over a veto. [Transcript of proceedings in New Hampshire House of Representatives, June 20, 1804, furnished by Secretary of State Pearson in September, 1913.] If this veto was ineffectvie (see Const. art. V; and H. V. Ames in 2 Am. Hist. Assn. Rep. 1896, 297, 298), New Hampshire was the thirteenth State to ratify and the amendment became operative on June 15, 1804. Otherwise, Tennessee was the last State needed, and the amendment dates from July 27, 1804. On September 25, 1804, Secretary of State Madison in a circular letter to the governors of the States declared it ratified by three fourths of the States, there then being 17 in all [2 Doc. Hist. Const., 451, note].

majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.[1]

SECTION 1. 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.

A thirteenth amendment depriving of United States citizenship any citizen who should accept any title, office, or emolument from a foreign power, was proposed by Congress on May 1, 1810, when it passed the House [21 Ann. Cong. (11th Cong. 2d Sess.) 2050], having previously passed the Senate on April 27 [20 Ann. Cong. (11th Cong. 2d Sess.) 672]. It appears officially in 2 Stat. 613. It failed of adoption, being ratified by but 12 States up to December 10, 1812 [2 Miscell. Amer. State Papers, 477–479; 2 Doc. Hist. Const., 454–499], there then being 18 in all.

Another thirteenth amendment, forbidding any future amendment that should empower Congress to interfere with the domestic institutions of any State, was proposed by Congress on March 2, 1861, when it passed the Senate [Cong. Globe (36th Cong. 2d Sess.) 1403], having previously passed the House on February 28 [*Id.*, 1285]. It appears officially in 12 Stat. 251. It failed of adoption, being ratified by but three States: Ohio, May 13, 1861 [58 Laws Ohio, 190]; Maryland, January 10, 1862 [Laws Maryland (1861–62) 21]; Illinois, February 14, 1862 [2 Doc. Hist. Const., 518] (irregular, because by convention instead of by legislature as authorized by Congress).

[1] The Thirteenth Amendment was proposed by Congress on January 31, 1865, when it passed the House [Cong. Globe (38th Cong. 2d Sess.) 531], having previously passed the Senate on April 8, 1864 [*Id.*, (38th Cong. 1st Sess.) 1490]. It appears officially in 13 Stat. 567 under date of February 1, 1865. The twenty-seventh State (Georgia), there then being 36 in all, ratified it on December 9, 1865 [2 Doc. Hist. Const., 613]; and on December 18, 1865, it was certified by Secretary of State Seward to have become a part of the Constitution [13 Stat. 774]. In making

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.[1]

ARTICLE XIV.[2]

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

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress,

---

this and subsequent certificates of like character the Secretary of State has acted under the authority of 3 Stat. 439, c. 80, sec. 2 (1818) [now R. S. U. S. sec. 205], which however attaches no legal effect to such certification.

[1] In the original manuscript this section does not appear as a separate paragraph [2 Doc. Hist. Const., 520].

[2] The Fourteenth Amendment was proposed by Congress on June 13, 1866, when it passed the House [Cong. Globe (39th Cong. 1st Sess.) 3148, 3149], having previously passed the Senate on June 8 [*Id.*, 3042]. It appears officially in 14 Stat. 358 under date of June 16, 1866. Two States (Ohio and New Jersey) which had ratified it withdrew their assent before three quarters of the States had ratified, occasioning grave doubt as to the validity of such action. Assuming this withdrawal to be ineffective, the twenty-eighth State (South Carolina), there then being 37 in all, ratified on July 9, 1868 [2 Doc. Hist. Const., 764]. If such withdrawal was effective, the twenty-eighth State (Georgia) ratified on July 21, 1868 [5 Doc. Hist. Const., 554–557]. On July 20, 1868, Secretary of State Seward certified that it had become a part of the Constitution if said withdrawals were ineffective [15 Stat. 708]. On July 21, 1868, Congress by joint resolution declared it a part of the Constitution and that it should be promulgated as such by the Secretary of State [15 Stat. 709–10]. On July 28, 1868, Secretary Seward certified it as such without reservation [15 Stat. 708–711].

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.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

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

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

ARTICLE XV.[1]

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or

[1] The Fifteenth Amendment was proposed by Congress on February 26, 1869, when it passed the Senate [Cong. Globe (40th Cong. 3rd Sess.) 1641], having previously passed the House on February 25 [*Id.*, 1563,

by any State on account of race, color, or previous condition of servitude.—

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

ARTICLE XVI.[1]

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.

ARTICLE XVII.[2]

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

1564]. It appears officially in 15 Stat. 346 under date of February 27. As in the case of the Fourteenth Amendment (see note above) one State (New York) withdrew its assent before three quarters of the States had ratified. If such withdrawal was ineffective, the twenty-eighth State (Iowa), there then being 37 in all, ratified on February 3, 1870 [2 Doc. Hist. Const., 877]. Otherwise the last State needed (Nebraska) ratified on February 17, 1870 [Id., 879]. On March 30, 1870, Secretary of State Fish certified that it had become a part of the Constitution [16 Stat. 1131].

[1] The Sixteenth Amendment was proposed by Congress on July 12, 1909, when it passed the House [44 Cong. Rec. (61st Cong. 1st Sess.), 4390, 4440, 4441], having previously passed the Senate on July 5 [*Id.*, 4121]. It appears officially in 36 Stat. 184. The thirty-sixth and thirty-seventh States (Delaware and Wyoming), there then being 48 in all, ratified on February 3, 1913; and on February 25, 1913, Secretary of State Knox certified that it had become a part of the Constitution [37 Stat. 1785].

[2] The Seventeenth Amendment was proposed by Congress on May 13, 1912, when it passed the House [48 Cong. Rec. (62d Cong. 2d Sess.) 6367], having previously passed the Senate on June 12, 1911 [47 Cong. Rec. (62d Cong. 1st Sess.) 1925]. It appears officially in 37 Stat. 646. The thirty-sixth State (Wisconsin), there being 48 in all, ratified on May 9, 1913; and on May 31, 1913, it was certified by the Secretary of State Bryan to have become a part of the Constitution [38 Stat. 2049].

[2.] 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.

[3.] 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.

ARTICLE XVIII.[1]

SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

SECTION 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

ARTICLE XIX.[2]

The right of citizens to vote shall not be denied or abridged by the United States or by any State on account of sex.

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

[1] The resolution for the submission of this amendment was passed by Congress December 3, 1917. The amendment was declared adopted by Acting Secretary of State Polk on January 29, 1919, three fourths of the States having ratified it at that time [40 Stat. 1941].

[2] The resolution for the submission of this amendment was passed by Congress May 19, 1919. The amendment was declared adopted by Secretary of State Colby on August 26, 1920, three fourths of the States having ratified it at that time [41 Stat. 1823].

TABLE OF CASES

(The figures following these semicolons are the folios of this book in which cases are cited.)

C

D

E

F

G

H

I

J

K

L

Y

INDEX

F

J

U