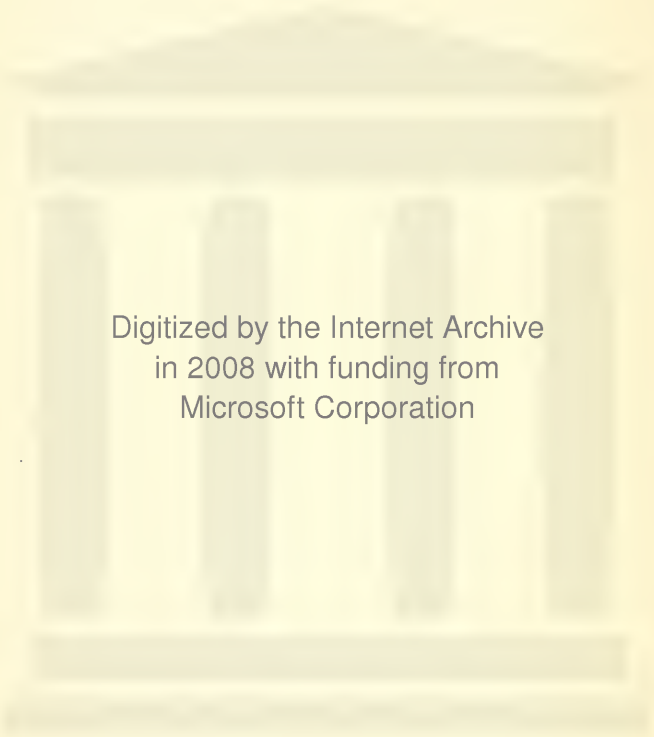
Constitutional Law
And
Leading Cases

CONSTITUTIONAL LAW



CONSTITUTIONAL LAW

AN INTRODUCTORY TREATISE DESIGNED FOR USE IN SCHOOLS WHERE THE PRINCIPLES OF THE CONSTITUTION ARE STUDIED

BY

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INTRODUCTION

Scope.—This book is introductory in scope. It is a study of the text of the Constitution and the principles of law pertaining to it, designed mainly for those students who are just beginning their inquiry into the subject of law and government. By it it is hoped that the student may obtain such knowledge of the instrument of government under which this country has lived for more than a century as is almost requisite for a liberal education and for good citizenship; and that those who have the time and the inclination to pursue the subject further may be inspired to do so.

Sources.—Except perhaps in the use of cases and in certain minor details this book pretends to no originality. It is the business of the law writer, like the historian, to record rather than to make. It is partly from classroom notes, the product of ten years in the teacher's chair; partly from the writings of such excellent publicists as Story, Black, Cooley, McLain, Pomeroy, Wilson, Baldwin and Burgess; and partly from a wide reading among the cases decided by the Supreme Court that this book is compiled.

Cases.—Since American Constitutional Law is largely a child of the Supreme Court the writer has made frequent use of cases for illustrative purposes, and has besides referred to many others in footnotes. Furthermore, an abstract of the leading and most interesting Supreme Court cases is printed in Chapter IX, which, it is hoped, will be found interesting and useful, both to instructor and to student. These cases may be used as best suits the instructor—either as review problems to be interpreted by the student's application of principles previously learned, or as illustrative material by the

teacher in his classroom discussions. They have been used by the writer in both ways, and have been found almost invaluable as a means of fixing the principles of the Constitution in the student's mind, and of securing an interest in the study not so easily obtained in any other way.

Acknowledgment.—The writer feels peculiarly indebted to the other members of the English Department of the United States Naval Academy for their friendly interest in the publication of this book, and especially for their many excellent suggestions and keen criticisms of the manuscript. Without such friendly coöperation the task of bringing the volume to completion would have been very much greater.

H. J. F.

UNITED STATES NAVAL ACADEMY,
NOVEMBER 1, 1913.

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CHAPTER I

A CHAPTER OF DEFINITIONS AND HISTORICAL SKETCH

A CHAPTER OF DEFINITIONS

Law: International, Municipal, and Constitutional

Law.—Law may be broadly defined as "a rule of action, imposed by a superior, which an inferior is bound to obey."[1] The law of gravitation, the law of heredity, the law of supply and demand—these, as well as regulations made by man, come under this wide definition. Our present study, however, is of law in a narrower and more technical sense; and as such it may be defined as "a rule of civil conduct, prescribed by a competent civil authority, commanding certain things as necessary to, and forbidding certain other things as inconsistent with, the peace of society."[1]

International and Municipal Law.—In a technical sense law is of two kinds, International and Municipal. International law comprises those rules of conduct which are agreed to by civilized nations for regulating their common intercourse. Strictly speaking, these are not laws, although loosely termed such, for the rules of conduct agreed to by nations are *not prescribed* by any superior authority, and there is no power, except War, to compel obedience to them. International laws might well be termed international agreements. Municipal law, on the other hand, includes those rules of civil conduct prescribed by the supreme power in a State, or department thereof, and regulating the intercourse of the State with its subjects, and of the subjects with one another. Under this head come statutes, ordinances, regulations, and all that machinery necessary to maintain the peace and order of a civilized community.

[1] Robinson's Elementary Law.

Written and Unwritten Laws.—It matters not whether the rules for the regulation of a civilized State are written or unwritten; if they exist under a directing, superior authority, and govern the intercourse of State and subjects, or of subjects with one another, they are laws. An unwritten law derives its force from long established custom, and may serve its purpose in society quite as well as one that is written or printed, and that men may read[2]; but since the day of unwritten law is largely past, we may better confine our attention to written law, or that law prescribed directly, in so many words, by the supreme power in the State, or of some department thereof. Such law is usually in the form of

Statutes and Ordinances.—An ordinance is a rule of conduct prescribed by some minor department within a State, such as a town or a city, for the preservation of good order therein. A statute is an enactment made by the supreme law making body of a State (in the United States, the Congress; in the several States, the respective legislatures).

Statutes at Large.—These are the Federal statutes, printed in full in large volumes, as distinguished from abridgments and revisions. The acts of each Congress are compiled separately; volume 35, for example, containing all the acts of the 60th Congress, 1907-1909. In the case of variance between an act of Congress, as printed in the statutes, and the original, as enrolled and deposited with the Secretary of State, the latter must prevail.[3]

Revised Statutes.—These are all the Federal laws that were general and permanent in their nature and in force December 1, 1873. They were printed in one large volume in 1875 under the direction of the Secretary of State (see Stat. at Large, 18, 113). Congress has since authorized the publication of

[2] For fuller discussion of this see page 267.

[3] 38 Pacific Reporter, 973.

several supplements to this volume, covering the period from 1873 to 1907. The Statutes at Large, then, are *all* the laws devised by Congress since the first session, and they fill many volumes; the Revised Statutes are those Federal laws that have not been repealed from time to time by Congress, or rendered inoperative by later legislation, and are contained in a single volume with a few supplements.

Constitutions Defined and Classified.—A constitution is a fundamental body of law serving as the basis of the government of a State. It is the backbone of a State, the guide and test for all political action within the State. Constitutions may be unwritten or written. An unwritten constitution is one of gradual accumulation; one that has grown up by slow evolution, and not contained in any single document, or reduced wholly, if at all, to writing. This is the oldest form of constitutions, as unwritten laws were the earliest forms of laws. Such was the Roman Constitution, and such is still the foundation of the government of Great Britain. The latter country indeed may be said to have the only unwritten constitution in existence to-day. It is the result of a slow accumulation of principles. Its larger provisions, such as the Magna Charta, the Petition of Rights, the Habeas Corpus Act and the Bill of Rights have been adopted at various times and in various ways. Besides these are many principles derived from court decisions, and customs enforced only by general acquiescence. Only Parliament can alter the Constitution, and no act by that body can be held invalid as unconstitutional. The foundation of the British government is largely in the conservatism of the British people. A written constitution, on the other hand, is a written instrument, or document, which is complete in itself. It is usually adopted at one time and by one act, although modified perhaps by later amendments. It is drawn up for the distinct purpose of serving as the basis of government in the State that creates it.

The Constitution of the United States is such a written instrument, and so are the constitutions of the respective States of the Union. These instruments of government are fundamental in this respect, namely, that whatever Congress enacts must conform to the provisions of the Constitution, and whatever the States' legislatures enact must conform to the States' constitutions and also to the Constitution of the United States.

Constitutional Law.—This is not susceptible of a ready and accurate definition, for it is not wholly law in the technical sense. Briefly, it may be said to be that branch of jurisprudence which treats of constitutions. But the constitution of a nation is inseparably linked with the nation's history, and students of law have come to recognize the fact that constitutional law is in a peculiar sense a branch of history, and is to be studied in a historic spirit. Constitutional law therefore is not so much a body of customs, maxims, or enactments, as it is a science, an historical study. Regarded in this light the constitutional law of the United States may be said to include the following: 1st, the Constitution itself; 2d, the history of its establishment; 3d, the construction put upon its various clauses by the courts, as their meaning has been brought into question by properly instituted cases; 4th, and lastly, the validity of legislative enactments as tested by their conformity to the Constitution. It is well, however, that the student, before undertaking the study of the Constitution and the interpretation of its clauses, should have a clear understanding of the reasons for the adoption of this instrument as the basis of government. This understanding it is hoped he will get by the following brief historical sketch.

HISTORICAL SKETCH

The Articles of Confederation.—With the Declaration of Independence, 1776, the American colonies severed themselves from British control. To be sure, that severance was not at

all certain to be lasting, for the war had just begun; but the people were so united in their opposition to the mother country and so determined to be free that they immediately set about to establish some definite form of government. At this time, the student should remember, there was no such thing as a united American people, but only a thin line of half-formed States stretched along the Atlantic seaboard, exceedingly jealous of one another, but held together for the time being by a common danger and interest. A body of delegates from the several colonies, which had first convened in 1774, was by common consent conducting the war. This was the Continental Congress. It was a provisional body merely, made necessary by stress of the times. It was bound by no organ of government; its acts were sanctioned by no nation. If the self-freed colonies therefore were to become anything more than a number of weak and petty principalities, more or less sure to be brought again beneath the British yoke, they must before long hit upon some plan of amalgamation. Accordingly, within two years after the Declaration of Independence, or in 1778, the members of the Continental Congress had drawn up an organ of government known as the Articles of Confederation, which was designed to be the authority for all acts of the Congress, and a means of guidance for the new nation.

This famous document represents the first attempt by the American people to frame a general constitution. When completed by the Congress it was submitted to the thirteen colonies—or new-born States—for their approval. Maryland, the last State to ratify the Articles, gave her consent in 1781. Then the instrument became binding. By ratification the States gave their free consent to become members of a confederation having a central government. The adoption of the Articles did not, however, much change the nature of what had been the government before; it merely gave the people a sort

of rudder with which to steer their ship of state. The same Congress of delegates from the several States continued to govern the Confederation, as well as the Articles allowed it to do, and it continued to meet in yearly sessions until 1789, when the Articles of Confederation were superseded by the Constitution of the United States. The name "Continental," however, clung to the Congress after the adoption of the Articles; hence the Congress that adjourned in 1789 is sometimes termed the 14th Continental Congress. The "Federal" Congress originated with the Constitution.

Why the Articles of Confederation Failed.—Before the Revolution the colonists had been ruled by a far away government, which they had learned to distrust and fear. When the war was well advanced, and they found that they were about to substitute for the distant government one nearer home, they began to distrust that too. In truth, the people were naturally apprehensive of any government except that in their immediate localities. The great question of States' rights, which was to cause so much trouble for the nation later on, was even then before them. As a whole they had no very distinct notion of the value of national unity except for defensive purposes. Therefore it is not strange to find that, before they agreed to the Articles of Confederation, which established a central government, they made sure that the government was to have little power. Consequently, the Articles worked badly from the beginning, for they were glaringly inadequate to the needs of such a country as the United States. Briefly, they created a confederation, not a union; they provided no head to the organization; and though they gave Congress full power to recommend and to declare, they gave it little power to do. Perhaps the most vital weakness of the Continental Congress was its inability to tax, for without that power no government can prosper. The only means of raising money which Congress had under the Articles

of Confederation were: to make requisitions on the States—with no power to collect them; to borrow from foreign nations; and to issue paper currency. Of these, the first was very uncertain, the other two tended to financial ruin. The result of these weaknesses was that the Congress began rapidly to lose power at home and respect abroad; while the States, relieved of their common enemy, began to irritate each other and to make trouble for the central government. Each State maintained its own troops, regulated its internal and foreign commerce as it pleased, often to the detriment of neighboring States, and paid or withheld its quota of the general tax at will. Since voting in the Congress was by States, a large State that sent many delegates had no more authority than a small State that sent but few; and a comparatively small number of members could negative any measure. Furthermore, since each State paid its own delegates to the Congress, some found it convenient occasionally to send none at all.

The Annapolis Convention.—These conditions could not long endure. In the year 1786, therefore, at the instance of Virginia, delegates from several States met in Annapolis, Md., for the purpose of discussing interstate trade, and of recommending a uniform system of commercial regulations. Of the States invited only five sent delegates—New York, New Jersey, Pennsylvania, Delaware and Virginia. Although the convention met in the capital city of Maryland, that State was not represented. The assembly offers the rather singular instance of a body which, although convened to discuss an important public matter, deliberated instead a public question very different, but quite as important. Because the members were few, they did not enter upon the proper business of the Convention at all, but drew up a resolution instead, devised by Alexander Hamilton, expressing their unanimous conviction that the constitution of the existing government was not adequate to the needs of the nation. This resolution with its

pertinent suggestion led to the assembling of that remarkable convention in Philadelphia the next year which framed the Federal Constitution.

Effect of the Resolution.—The resolution was at once submitted to the legislatures of the several States and to the Congress. The latter body could do nothing but recommend, but it did that with reasonable quickness. In February, 1787, it passed a resolution calling the attention of the States to the failure of the Articles of Confederation, and suggesting that a convention of delegates from all the States should assemble in the month of May following to revise them. In response to this suggestion, delegates from every State except Rhode Island met in the city of Philadelphia on the 14th of May, 1787, and by the 25th of that month were hard at work remodelling the ship of state.

A Convention of Famous Men.—It was a remarkable body of men that composed the Constitutional Convention. Its presiding officer was George Washington, one of the great men of all time, of whom an English historian has said: "No nobler figure ever stood in the forefront of a nation's life."[1] There was Franklin, scientist, author, inventor, statesman; to whose prudence, calmness, and sagacity Americans owe an everlasting debt. There was Hamilton, one of the greatest constructive statesmen that ever lived. There, too, were Madison, and Sherman, and Ellsworth, and Pinckney, and Morris, all men of affairs, well versed in history, in letters, and in the ways of men. The Convention furthermore was mainly composed of young men. Their average age was 43; ranging from Franklin, 81, to J. Francis Mercer, 28. Ellsworth was 42; Madison was 36; Gouverneur Morris was 35; Edmund Randolph was 34; and Hamilton but 30. Thus age, with its experience and ripened judgment, and youth, with its energy and abounding hope, united to produce what no less

[1] J. R. Green.

a man than Gladstone has said was "the greatest political instrument ever struck off on a single occasion by the minds of men."

The Work of the Convention.—The avowed purpose of the Convention was to *revise* the Articles of Confederation. To revise had been the instruction given by most of the States to their delegates. But before the assembly had been long at work better statesmanship prevailed. Two schemes of government were laid before the Convention: one by Mr. Patterson of New Jersey, providing for the revision of the Articles; the other by Mr. Randolph of Virginia, calling for an entirely new constitution. After due deliberation the Convention wisely decided that it was easier and better to construct a new instrument than to patch up the old, and they proceeded to do so. Not without misgivings on the part of many members Mr. Randolph's plan was adopted; the insufficient Articles of Confederation were forever abandoned, and a new Constitution was begun. In framing a new Constitution, however, little that was new in principle entered into the work. The men of the Convention did not dare to experiment. They did not believe, as did the French at a later period, that working political principles could be made off-hand. Instead of creating they made wise selection from materials right at hand. The British Government had been, and was still, successful, and it was a representative government. The States all had constitutions that seemed to work well. It was from these working models that the Convention took most of the principles now embodied in the Federal Constitution. The Articles of Confederation had provided for no Executive; the Convention created a President modelled on the English Crown in some respects, on the State governors in certain others. The Continental Congress was a single body having both legislative and executive functions; the Convention provided for a Congress which should consist of two houses and

have legislative powers mainly—in many ways resembling the British Parliament and the legislatures then in operation in the States. Under the Articles there was no system of national courts; the Convention provided for a national judiciary, in many respects like the British. In short, the broad, basic principles woven into the Constitution were principles that had already stood the test of time within the political experience of the men in the Convention. It has been said that those parts of the Constitution which were copied from the English system of government, or from the systems operating in the States, have worn the best, while those that were original have been less satisfactory.

The document was finished and signed by the men of the Convention on the 17th of September, 1787. It was immediately submitted to the people of the States for their approval. Within two years it had received the necessary ratification, and in the spring of 1789 it went into operation, superseding forever the Articles of Confederation.

The Constitution is Unique.—As a successful organ of government the Constitution is unique. In the excellence of its scheme, in its adaptation to a diversified people, in its brevity, simplicity, and precision of language, it ranks above every other written constitution. History can show few examples of governmental documents at once so momentous and so short. The English Constitution—so far as England can be said to have a Constitution—consists of hundreds of volumes of statutes and reported cases; the Federal Constitution can be read through in less than half an hour. It was made short for a purpose. It was intended to be a people's Constitution, easily to be read and understood. Furthermore, its makers realized that the more they specified, the more they should have to specify. The document was therefore made rather general in its principles; much was left to be filled in by later legislation, much to be worked out by interpretation. A

century and more has now passed since the Constitution was written, during which time it has been subjected to a severe experience. Hardly a line in it but has been made the subject of judicial examination. It has withstood the shock of the greatest civil war in history. Amendments have been added to it; some of its minor principles have through time and changing circumstances become dead letters; but its general features stand unaltered—an enduring monument to men who "builded better than they knew."

CHAPTER II

THE PREAMBLE
THE TWO HOUSES OF CONGRESS

ARTICLE 1, SECTIONS 1-7

THE PREAMBLE

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

The Opening Clause.—The opening clause of the Constitution has been called a *preamble* by some, the *enacting clause* by others. Whatever name is given to it, its meaning and purpose are obvious. It contains in simple language, without ostentation or forced humility, six broad reasons for the adoption of the Constitution. It is well for the student to ponder these reasons briefly before undertaking the study of the law itself; he may then pursue his study with a more sympathetic, if not clearer, understanding. Accordingly, a short discussion of them is given herewith.

"**We, the People . . . .**"—A comparison of this clause with the preamble to the Articles of Confederation shows this great difference: that document was made by the *States,* the Constitution was made by the *people.* This clause, therefore, is not only a statement of reasons, but a declaration to all the world that the United States comprised one people, no longer a loose confederation of separate States. The nation began to exist on July 4, 1776, but not until 1789, when the people adopted their Constitution, did it assume a corporate form.

"**A More Perfect Union.**"—The Articles of Confederation created the United States of America; the Constitution perfected the Union. Under the Articles the Union was, as we have seen, imperfect. The phraseology of its title was some-

what contradictory—"Articles of Confederation and Perpetual Union," for the terms "confederation" and "perpetual union" do not have precisely the same meaning. As Mr. John Fiske states in his admirable text-book on civil government, a confederation is what the Germans call a *Staatenbund,* or a *Band-of-States;* a union is a *Bundesstaat,* or a *Banded-State.* The Articles of Confederation made the former colonies little more than a loosely banded group of States. They remained still what the Declaration of Independence had made them, separate and independent little commonwealths, independent of Great Britain and of each other. Mutual jealousy and distrust now served to keep them apart, where formerly the fear of a common enemy had linked them together. It was to correct the evils incident to this state of affairs, to make of the thirteen commonwealths a *Banded-State,* that the Federal Constitution was adopted. Even then, it took some people many years to grasp the meaning of the word Union, to realize that the United States made one country, one nation, and not a group of more or less independent States. Under the Constitution the States still have a great deal of independence; but they acknowledge now a superior central government, they have the same interest in the present and a common hope in the future, as they never did have under the Articles of Confederation.

"**Establish Justice.**"—Under the Articles of Confederation there was no Supreme Court, no system of Federal tribunals. The States had their judicial systems, it is true, under which controversies within the States were settled well enough; but the Articles provided no ready means for the settlement of cases of national importance. The method provided by the Articles for the adjustment of disputes between States, namely, that Congress should act as arbiter in such cases, was at best cumbersome and difficult of operation.[1] The Constitution, on

[1] Art. of Confederation, IX.

the other hand, established justice among the States by providing for a separate judicial department, and for the creation and maintenance of a system of national courts.

"**Insure Domestic Tranquillity.**"—Where no strong central authority exists in a republic, internal peace cannot be assured. For some time after the Revolutionary War money was scarce, taxes were high, and the people were distrustful. In consequence, disturbances took place here and there in the States, some of which threatened very serious results; and in no case was the Congress of much assistance in settling the trouble. This was notably so in the case of Shays's Rebellion, an outbreak in Massachusetts in 1786 that nearly involved the entire country, or a large part of it, in a general revolution. Although the Congress made motions and resolutions respecting the affair, it did almost nothing to quiet the disturbance. The outside help that Massachusetts received came rather from neighboring States on their own initiative, or at the request of Massachusetts herself. To-day a domestic trouble assuming serious proportions would call for immediate legislation by Congress—legislation that could be enforced —or quick action by the President, or both.

"**The Common Defense.**"—To provide for the common defense was probably the main reason for forming the Confederation. Yet the Articles of Confederation gave the Congress little or no power to insure tranquillity within or defense against enemies without. Each State attempted to provide for its own defense, and in time of need it was more likely to call upon neighboring States for help than upon the Congress. Had New Hampshire, for example, been invaded by troops from Canada during this early period, it is quite possible that Massachusetts would have sent her assistance, and very probable that Georgia would not, being too far away from the scene to feel vitally interested. The Congress, in such a

case, might have declared war on Canada and have called on the States to furnish money and troops to repel invasion. But some States might have refused to furnish money or troops, and the Congress would have been unable to enforce its demands on them, for the Articles gave it no such power. In providing for the common defense, therefore, the Constitution is very strong where the Articles of Confederation were lamentably weak. To-day, Congress may not only declare war and require money and troops from the States, but it can enforce its requisitions by taxation and draft.

"The General Welfare."—The phrase, "to promote the general welfare," states a broad purpose. Every act of Congress which benefits the public may be said to promote the general welfare. But this phrase is not to be interpreted as giving to Congress any actual authority. It merely states one of the broad reasons for forming the Union, and for having such a guiding instrument as the Constitution. Congress, however, has promoted the general welfare through powers distinctly given to it by other clauses in the Constitution, or implied by them. It has passed acts to conserve forests and waterways; it has created the national banking system, enacted inspection laws, and made tariff regulations—all of which may be said to advance the interests of the general public. A careful perusal of the Articles of Confederation, however, discloses no intention on the part of its makers of allowing the Congress any such scope in its legislation. It is doubtful if the Continental Congress ever could have done much to promote the general welfare of the country.

"The Blessings of Liberty."—This, like the foregoing, is a general phrase. Paradoxical as it may seem, the States by giving up liberty have gained liberty. Under the Articles of Confederation the States retained their sovereignty and independence. As a result they were weak individually, and the Confederacy lacked that unity which is necessary to

make a strong nation. Under the Constitution the idea of complete State sovereignty is untenable, for much of the freedom of the separate States is merged in that of the general government. But who will now say that this loss of individual independence does not make the independence of the Union greater and more lasting?

THE TWO HOUSES OF CONGRESS

Article 1

Section 1, Clause 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.

Character of the National Legislature.—The framers of the Constitution, in making the national legislature to consist of two separate branches, followed as their model the British Parliament, which consists of a House of Lords and a House of Commons. They were also doubtlessly influenced by examples at home of successful governments whose legislatures were thus dual in character. On the other hand, the Continental Congress was not divided, but consisted of a single body; France has at various times had a single legislative body; Sweden once had four, corresponding to the four classes of people in that country: but experience has shown that the dual legislature is the most conducive to good government. This is because one branch of such a legislature acts as a check on the doings of the other. Before a bill in Congress can become a law it is first reviewed by two separate and distinct assemblies, one of which is composed, at least in theory, of older and more experienced men than the other. Hasty legislation is thus less possible, for what may be passed in the heat of passion by one house must be subjected to the probably cooler judgment of the other. Such a system of checking is

not possible in a single bodied legislature; and a deliberative assembly made up of three or four houses is obviously too cumbersome for harmonious work.

Of the two Houses which compose the Congress of the United States the Senate is the smaller and more conservative. It is constituted mainly of older men, who are elected for longer terms and who are so divided into classes that a large proportion of them, as will be explained later, will always have had the experience of two or more years in office. It is thus the permanent branch of the legislature. The House of Representatives, although much larger, is not a permanent body, for it goes out of being every two years, and its members go out of office at the same time. Many of the latter, of course, are re-elected to serve in the succeeding House, but many others are supplanted by new and inexperienced men. In this way the House of Representatives is ever changing its personnel, and its members, coming as they do from comparatively small districts scattered about the country, are supposed to reflect pretty thoroughly the will of a democratic people. On the other hand, they are quite as likely to reflect the passions, prejudices and errors of those whom they represent.

Section 2, Clause 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.

Representatives' Term of Office.—We have said that the House of Representatives, as a legal assembly, goes out of existence every two years. This is by virtue of the present clause, which compels the election of Representatives every second year. Members of the British House of Commons serve for seven years. In America it is not the rule to

keep citizens long in political offices, but rather to have short terms and frequent elections. Whether this is a good rule in respect to the House of Representatives is open to question, but it seems to have some advantages. Two years is long enough for a Representative to acquire a practical knowledge of legislative work, and not sufficiently long to allow him to lose his sense of responsibility to his constituents. This, at least, seems to have been the reason in the Convention for limiting the term to so short a period. In some of the States the same rule is followed; in others it is not. For example, in Maryland the delegates to the legislature are chosen every two years; but as the legislature of the State meets normally but once in that period the delegates are selected anew for every session.

Qualifications of Electors.—The House is the popular branch of the national legislature, for by the Constitution the right to select its members rests solely with the people. The word electors in this clause means voters. Not all the people in the States are voters, however; hence not all the people help to elect their Representatives in Congress, but only those qualified under State laws to vote for members of the larger body of their own legislatures. It has been decided that Congress, although it may regulate such matters as *time, place,* and *manner* of conducting elections,[2] may not prescribe any more specific qualifications for voters in national elections than this clause contains.[3] Since the matter of suffrage is thus left almost entirely to the discretion of the States, there has arisen a noticeable lack of uniformity in the qualifications of those persons who elect the Federal Representatives, and indirectly the President. Some States require a property qualification of their voters[4]; others require a certain amount of educa-

[2] Const. 1, 4, 1. (See R. S., 23-25.)

[3] Ex parte Yarbrough, 110 U. S., 651.

[4] Mass., Del., Penn., R. I., Ga.

tion[5]; some permit women to vote[6]; and some even allow the ballot to unnaturalized foreigners after a short residence in the State.[7] The only positive restriction which the Constitution lays on the States in respect to suffrage is to be found in the 15th Amendment. It follows from what has just been said, and from the custom of choosing Representatives from separate districts, that, although the Constitution requires the members of the House to be elected by the people, they are in fact chosen by a comparatively small proportion of the whole; and that those who actually may assist in the election of a Representative are but a fraction even of the voters in the State.

Section 2, Clause 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.

Qualifications of Representatives.—The Constitution defines in a negative way the qualifications of national Representatives. Any person not debarred by age, citizenship, or habitancy may aspire to the office. The Constitution does not require a Representative to be a voter, a property holder, a male citizen, or even an American-born citizen, but merely to be a resident of a State, twenty-five years of age, and a citizen of the United States for seven years. To debar naturalized citizens from membership in the House would deprive the country of the services of many able men, and since the establishment of the Constitution many such citizens have been elected to that assembly. But before a foreigner can legally become a Representative he must have had at least twelve

[5] Mass., Conn., Del., Miss., Wy.
[6] Col., Cal., Ida., Wash., Wy., Utah, Kan., Ariz., Ore.
[7] Ala., Ark., Ind., Kan., Mo., Neb., Ore., Tex.

years' residence within the United States—five years before he can be naturalized, and seven years of citizenship. It has been decided that neither Congress nor the States can change these qualifications. Representatives cannot, for example, be required to be freeholders, or to profess any religion, or to be college bred, or to be residents of the districts from which they shall be chosen.

Residence.—A Representative must, at the time of his election, be a domiciled resident of the State in which he is chosen. He need not reside in the district that elects him, although people as a rule prefer to choose one who is domiciled among them. It is thought that only a person who is familiar with a district from personal residence there can properly represent it in Congress. It is perhaps from the custom of electing Representatives from particular districts that the people have come to regard members of the House as purely local Representatives, and the latter often spend quite as much time and effort in looking after petty affairs for their districts as they do in considering broader national matters. By a political fiction one who resides temporarily at a foreign court as representative of the United States, or who is traveling or sojourning abroad, does not thereby lose his status as resident in his State, or his national citizenship. He may on his return become a Representative, if duly elected.

Since the Constitution does not require a Representative to reside in any particular district, it follows that removal from the district after election does not affect his political status. Whether removal from the State after election would compel a Representative to vacate his office is still an unsettled question. Although it is a rule of the common law that, if a person holding a representative office remove from his district (State), he thereby vacates the office, it would seem that, although a Representative-elect who should do this ought with good reason to resign his office, he cannot be compelled to do

so, for the present clause in the Constitution relates only to time before or at election, not to time after.

Age.—Before a man can be a member of the British House of Commons he must be at least twenty-one years of age. This is the rule of membership in legislative assemblies generally throughout the United States, but to be a member of the national House of Representatives one must be at least twenty-five. Few men have had a very extensive political experience by the time they are twenty-five; hence the age limit for the important position of Representative does not seem too high. As a matter of fact few men enter Congress before they are thirty.

NOTE.—The British Constitution does not permit a foreigner, although naturalized, to be a member of either House of Parliament.

> **Section 2, Clause 3.**—Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three.

Equal Apportionment.—It is a principle of republican government that the people shall bear the burdens of the govern-

ment equally, if possible, and share equally in the blessings. People like to elect Representatives, or like to be such themselves; they do not like to pay taxes. With a delicate sense of justice therefore the Constitution declares that Representatives and direct taxes shall be apportioned among the people. By "their respective numbers" is obviously meant the population of the several States.

"**Three-Fifths of All Other Persons.**"—The so-called "Three-Fifths Rule" is now but a historical curiosity, for the present clause in the Constitution has, since July 21, 1868, been superseded by the 14th Amendment, which omits the phrase "three-fifths of all other persons." It begins thus: "Representatives and direct taxes 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 Constitution was adopted the people of many States were slave holders, who naturally desired to have their slaves count in the census, for a State's representation in Congress increased with its population. Other States objected to this, on the ground that slaves were in reality property and not citizens. The agreement finally to count three-fifths of the slaves in determining the census of a State was one of the many compromises reached by the Convention, in which the slave-holding States got a little the better of the argument.

"**Indians Not Taxed.**"—Indians once were numerous; today they form but an inconsiderable part of the population. As tribes they have never had any political status, their relation to the government being that of ward to guardian, and for this reason they have never been subject to taxation or reckoned as part of the population. They can not sue or be sued in the Federal courts. There is nothing, however, to prevent individual Indians from adopting the ways of civilization and acquiring a political status; that is, becoming citizens with all

the rights and privileges thereunto pertaining, and many have done so.[8] An Indian who has become a citizen is of course subject to taxation, and he may acquire the right to vote.

Apportionment of Representatives.—The present method of apportioning Representatives among the respective States has been used since 1850. It is as follows: Congress first decides upon the number of Representatives desired. This number is then divided into the entire population of the country, and the quotient is taken as the basis of representation. The population of each State is then divided by this number as a common divisor to get the number of Representatives allowed to it. If the sum of the quotients thus obtained does not equal the number of Representatives which Congress has deemed requisite—and it rarely does—an additional member is allotted to each of the States having the largest remainders, until the required number is reached.

The Constitution required the census to be taken within three years after the first meeting of the Congress of the United States. It was in fact made in 1790. Since then it has been made at the beginning of every decade, and with every new enumeration of the people Congress has made a new apportionment of Representatives. The thirteenth census was taken in 1910. The Congress that was in session at the completion of the task, the 62d, fixed the number of Representatives for the decade beginning with March 3, 1913, at 433, the basis of representation being 211,877. This number was apportioned among the States as follows: Alabama 10, Arkansas 7, California 11, Colorado 4, Connecticut 5, Delaware 1, Florida 4, Georgia 12, Idaho 2, Illinois 27, Indiana 13, Iowa 11, Kansas 8, Kentucky 11, Louisiana 8, Maine 4, Maryland 6, Massachusetts 16, Michigan 13, Minnesota 10, Mississippi 8, Missouri 16, Montana 2, Nebraska 6, Nevada 1, New

[8] See 24 Stat. at Large, 390; 30 Stat. at Large, 513, 518; 31 Stat. at Large, 1447.

Hampshire 2, New Jersey 12, New York 43, North Carolina 10, North Dakota 3, Ohio 22, Oklahoma 8, Oregon 3, Pennsylvania 36, Rhode Island 3, South Carolina 7, South Dakota 3, Tennessee 10, Texas 18, Utah 2, Vermont 2, Virginia 10, Washington 5, West Virginia 6, Wisconsin 11, Wyoming 1.

The same act provided that Arizona and New Mexico, which then were Territories, should, if admitted as States within the decade, be allowed one Representative each in Congress. This has since taken place.

The Constitution established the number of Representatives for the first Congress by stating how many each State should be entitled to choose until the first census could be taken. It is interesting to compare the representation allotted then to the original thirteen States respectively, and the number apportioned to the same States for the decade beginning with 1913, after one hundred and twenty-three years of growth. For comparison the two apportionments are printed herewith:

	1790	1913
New Hampshire	3	2
Massachusetts	8	16
Rhode Island	1	3
Connecticut	5	5
New York	6	43
New Jersey	4	12
Pennsylvania	8	36
Delaware	1	1
Maryland	6	6
Virginia	10	10
North Carolina	5	10
South Carolina	5	7
Georgia	3	12

From this list it is obvious that, while certain States, particularly New York and Pennsylvania, have tremendously increased their representation in the House, other States have not increased at all, and one, New Hampshire, has even lost

a member. Population in that State has not kept pace with the increase in the basis of representation.

How Territories are Represented.—Although States are allowed representation in the House according to their population, Territories are allowed but a single delegate, regardless of population. This official occupies a peculiar position in Congress. He is entitled to membership on certain committees, particularly such as are concerned with Territorial business, and he has the privilege of the floor, that is, he may address the House, but he has no vote. At present (1913) Alaska and Hawaii have each such a delegate in Congress. Porto Rico sends a resident commissioner to the United States, who represents the island in its transactions with the Federal government, but who has no connection with Congress.

Representative at Large.—Until June 25, 1842, States elected their Representatives to Congress by general ticket; that is, all the electors in a State had the right to vote for all the State's Congressional candidates at a general election. In that year Congress enacted that Representatives should be chosen by districts of contiguous territory within the respective States corresponding in number with the Representatives. The rule thus established has been followed ever since. The work of dividing the States into districts falls upon the States' legislatures, and the only restriction placed on them is that the districts shall contain approximately the same population. Under this system a State sending ten Representatives to Congress should be divided into ten districts, each of which is entitled to choose one Representative. Now it may happen that this State, by virtue of a new apportionment of Representatives, suddenly finds itself entitled to send eleven members to the House instead of ten, and the legislature may fail to redistrict the State in time for the next general election. What then? How is the additional Representative to be chosen? He is elected by the whole State

regardless of districts, and is called Representative at Large. Of course a State entitled to but one Representative of necessity elects him at large.

In the 62d Congress there were Representatives at Large from the following States: Colorado, Connecticut, Delaware, Montana, Nevada, North Dakota (2), South Dakota (2), Utah.

Section 2, Clause 4.—When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

Vacancies in Office.—Vacancies may happen in the representation from any State by death, removal, resignation, or the acceptance of incompatible offices. As the people elect the regular Representatives, it is but natural that they should have a voice in the matter of filling vacancies in office when they occur. Consequently, in such a case, the Governor of the State has no power of appointment, although a different rule may obtain in respect to vacancies in the Senate. His duty is to call a special election in the district concerned, or in the whole State in the case of a Representative at Large, by issuing a writ of election. This is a formal notice to the people of the existence of the vacancy, commanding them to meet together on a certain day for the purpose of choosing some one for the vacant office. It is customary for the House, when a vacancy occurs, to notify the Executive of the State concerned; but it is sufficient notice if he receives the resignation of the member. Whoever is elected to fill the vacancy serves for the rest of the term.

Section 2, Clause 5.—The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

The Speaker.—The Speaker is chosen by ballot at the beginning of every term of Congress from the list of Representatives, and is the only Representative to hold special office. His general duties are: to preside over the deliberations of the House; to appoint all special[9] committees; to vote in case of a tie, although he may do so on other occasions; and to sign all bills and joint resolutions. Next to the President the Speaker holds the most important and powerful office under the government, for his position allows him to wield considerable influence on legislation. The title of Speaker originated in the time when the legislature was addressed in person occasionally by the chief executive of a nation, and the presiding officer of the assembly was expected to reply. This custom long ago fell into disuse, but the name remains.

Other Officers of the House.—The other officers of the House are the clerk, the doorkeeper, the sergeant-at-arms, and the postmaster. These are not Congressmen. The office of clerk is of considerable importance, and involves much labor. The clerk calls the rolls, reads the minutes and the almost countless bills presented to the House, and presides at the opening of each subsequent Congress. An ex-member of Congress is sometimes appointed clerk. The duties of the other officers are obvious.

Impeachment.—Impeachment in legislative bodies corresponds in general to indictment in criminal procedure. Technically, it is a written accusation made by the House of Representatives of the United States (or of a State) to the Senate of the United States (or of a State) against a civil officer,[10] charging him with misdemeanor in office. The accusation is directed to the Senate, because that body is the court before

[9] Until 1911 the Speaker appointed all regular standing committees. In that year, at the beginning of the 62d Congress, the House adopted a rule requiring all such committees to be elected by the members of the body. (House Rules, Sec. 661.)

[10] Military and naval officers are tried by courts martial.

which the officer must be tried. Briefly, the method of impeaching a man is as follows: The Speaker first appoints a special committee to investigate the conduct of the officer. If the report of the committee is in favor of impeachment the House draws up the necessary articles embodying the specific charges on which the accused is to be tried, and a special committee is then appointed to prosecute the case before the Senate. (For further treatment see pages 52-53, 184, 198-200.)

Section 3, Clause 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.

The 17th Amendment, adopted in 1913, rendered this section of the Constitution void. For the sake of historical interest, however, it may be worth while, in passing, to discuss briefly the old method of electing Senators.

Equality of Representation.—Previous to the adoption of the 17th Amendment the House might be said to represent the people in Congress; the Senate, to represent the States. Such at least was the thought in the Convention. Prior to the adoption of the new Constitution practical equality had existed among the States, for in the old Continental Congress each had but one vote on any question, no matter how many delegates it furnished. Naturally the smaller States wished the same rule to hold under the Constitution; naturally the larger ones did not. The Convention finally compromised by providing that the States should be represented in the House according to their respective numbers, but equally in the Senate. Accordingly, each State was allowed to send two Senators to the national Congress, and each Senator had a vote. Thus in both Houses voting was now done by individuals, no longer by States.

How Senators were Elected.—The student should remember

this important difference between the mode of electing Senators previous to the 17th Amendment, and that of electing Representatives: the former were chosen by States' legislatures; the latter, by the people. The first method is called *indirect;* the second, *direct.* Now the Constitution nowhere specifies in what manner the legislatures of the States should choose Senators for the United States Congress, and for many years there was little uniformity in the methods used. In 1866, however, Congress, by virtue of the power conferred upon it in Article 1, Section 4, Clause 1, of the Constitution, prescribed the following mode.[11] Each House of any State legislature that should be chosen next preceding the expiration of the time for which a Senator from that State was elected should, on the second Tuesday after its first meeting and organization, name one candidate for United States Senator. The members of each House, in this case, were to vote openly, *viva voce,* and the number necessary for choice was a majority of those present. The name of the candidate thus chosen by each House was required to be entered on the journal, and if either House failed to select a candidate, that was likewise entered. At noon on the following day the two Houses were required to meet in joint assembly, and if it appeared from the journals that the same man had been selected for Senator by each House, that person was duly declared elected. If, however, the two Houses had not chosen the same person, or if one or both failed to present a candidate, then they were required to vote in joint assembly at least once a day, until they should succeed in selecting a Senator. In this case a majority of each House was required to be present, and of these a majority was sufficient to elect. The voting was, as before, *viva voce.* The Governor had nothing whatever to do with these elections.

This was the procedure when a vacancy was about to occur

[11] Revised Statutes, 15.

through the expiration of a Senator's term of office. The same steps were taken, of course, if a legislature, on convening, found a vacancy already existing; and if a vacancy occurred while the legislature was in session, they proceeded to elect on the second Tuesday after they had received due notice of it.

The System Abused.—The method just explained was theoretically a rather neat way of getting men into the United States Senate. Legislatures represent the people of the whole State; hence a legislature's choice for the Senate would be peculiarly representative of the State. But in practice the scheme came to be altogether unsatisfactory, for it was awkward, cumbersome, and open to abuse. Legislatures were sometimes in disagreement (deadlock) over elections for weeks. Meanwhile, important business of the State was delayed, and the vacancy at Washington still continued. Furthermore, bribery and coercion were not unheard of in this connection; and too often a Senator-elect, instead of being representative of the whole State, was in reality representative of a powerful faction in a State legislature. For these and other reasons the question of electing Senators by popular ballot had long been agitated; but it was not until the spring of 1913 that the necessary amendment providing for such a radical change in the organic law became a fact.

Senatorial Primaries.—As illustrative of the general growing demand for the popular election of United States Senators many States had, previous to the adoption of the 17th Amendment, passed primary election laws allowing the people to participate in a measure in the selection of United States Senators by naming candidates at the general State elections. These elections were called Senatorial primaries. The final selection of the Senator in these cases was reduced to a mere form, for the law usually made it incumbent on the legislature to choose the person for whom the people had shown their preference at the polls. This, however, only scotch'd the snake; the 17th Amendment killed it.

AMENDMENT 17.

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.

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.

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

This amendment was proposed in the House of Representatives in the form of a joint resolution in 1911. It was submitted to the legislatures of the States in 1912. Early in 1913, having received the ratification of the necessary three-fourths, it became therewith an integral part of the Constitution.

Effect on the Constitution.—The 17th Amendment at once made void the first clause of Section 3, Article 1; and so much of the second clause, as relates to vacancies. According to this amendment United States Senators must now be elected by the people, in the manner provided by the Constitution for the election of Representatives; and when vacancies occur, they also must be filled by popular election, *except* that a State legislature may authorize its chief executive to make temporary appointments to fill the vacancies until the legislature provides for a special election. In any event the original office and the vacancies in it must now be filled through elections by the people, and not by State legislatures as heretofore.

At this writing (1913) it is a little too soon after the enact-

ment of the 17th Amendment for an extended discussion. We cannot forecast the years and say what will be the result of such a radical change in the basic law, but there is reason in believing that it will redound to the general good. If ever there was a valid reason for employing different methods in electing members to the two Houses of Congress, it has no great force to-day; and certainly it would seem that, in a republican country, both parts of a bicameral legislature should be as nearly as possible representative of the people.

Section 3, Clause 2.—Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

Classes of Senators.—Dividing the Senators into classes was an expedient devised to make the Senate a perpetual body. It is not to be inferred from this clause, however, that some Senators serve only two years, some four, and the rest six. The short terms occurred when the Senate assembled in consequence of the first election, *i. e.*, in 1789, and on the admission of new States to the Union. To illustrate: After the first Congress was set in operation, and the Senators had been divided into the three classes, the seats of the first class became vacant by law in 1791, two years after the assembling of Congress; the seats of the second class became vacant in 1793; the seats of the third class, in 1795. Now, since the senatorial term is six years, the seats of the first class again became vacant in 1797; the seats of the second class, in 1799; and the seats of the third class, in 1801. On the admission of new

States, however, it has been necessary to assign the first two Senators from such States to different classes, in order that their seats should not be vacant at the same time; and these Senators have enjoyed their offices for two, four, or six years, according to the classes to which they happened to be assigned. To illustrate again: The Senators from Ohio took their seats in 1803, and were assigned to the first and third classes respectively. Consequently, the one assigned to the first class served the full period of six years, for the terms of that class expired in 1809, 1815, etc., but the one assigned to the third class served only four years, for the terms of that class expired in 1807, 1813, etc. Thereafter, however, all the Senators from that State were entitled to the full six-year term.

Vacancies in the Senate.—These may occur from resignation, death, removal from office, or the acceptance of incompatible offices. In the last case, the act of accepting the incompatible office creates the vacancy without further action by the Senator. An instance of this would be the acceptance by the Senator of the office of United States District Judge. The election of a Senator to the governorship of a State would not create a vacancy at once, for State and Federal officers are not strictly incompatible.

Since the matter of filling vacancies in the Senate has already been discussed under the 17th Amendment it is unnecessary to discuss it further here. The student should notice in particular that the Governor of a State no longer has the power to make temporary appointments unless the State legislature gives him authority so to do.

Certificate of Election.—When a person is duly elected to the United States Senate it is the duty of the executive of his State to confirm the election by giving him a formal certificate, countersigned by the secretary of State, and stamped by the State's seal. This he presents to the president of the Senate as evidence of his lawful election. It is only *prima*

facie evidence, however, since the Senate may go behind the certificate and demand more evidence of the fact. This is more fully discussed under Section 5, Clause 1, of this Article. (See page 59.)

Section 3, Clause 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.

Qualifications of Senators.—The qualifications of Senators differ from those of Representatives only in degree, the higher requirements for admission to the Senate giving that body a slightly more exalted character. It is seemly that these requirements should be higher, for the Senate now and then engages in more serious business.[12] What in general has been said in previous pages concerning the qualifications of Representatives applies equally to Senators. Citizens of foreign birth are not eligible to the United States Senate until nine years after their naturalization—a limitation that is reasonably certain to prevent any foreign government from exercising an influence over the conduct of affairs within the United States.

Scope of Congressmen.—Although Representatives and Senators represent the States in Congress primarily, in a larger sense they are all national officers, whose work should not be limited, individually, to legislation affecting local sections. They serve their own States best in Congress who labor for the good of the commonwealth. State legislatures, however, have sometimes instructed their United States Senators to work for special objects, and the people of certain districts too often expect their Representatives to get more or less Federal patronage for them; but Congressmen are not

[12] The Senate tries impeachments, confirms Presidential appointments, and assists in making treaties.

bound to follow either the instructions of the one or the wishes of the other. Those who do not take this wide view of their duty are presumably guided by somewhat restricted, personal interests.

Removal from the State.—There is nothing in the Constitution to prevent a Senator from removing his residence after election from the State in which he was chosen. It is merely necessary that he be an inhabitant of the State at the time of his election.

Section 3, Clause 4.—The Vice President of the United States shall be the President of the Senate, but shall have no vote, unless they be equally divided.

The Vice President.—The Vice President is a sort of President in expectancy. If the office of President becomes vacant through the death, resignation, or removal of its occupant the Vice President at once becomes President. Although the Vice President is not a Senator, the makers of the Constitution provided that he should be President of the Senate, and for two very good reasons: 1st, to give him something to do, since there are no duties attached to the office of Vice President; and 2d, to avoid the unpleasant possibility of any one State's obtaining more than its due share of influence by the selection of one of its representatives for the presidency of the Senate. The Vice President himself has no choice in the matter. By virtue of the Constitution he must preside over the deliberations of the Senate whether he wishes to do so or not, and even though he may be naturally unfitted for the task.

The United States Senate is not the only example of a deliberative body whose presiding officer is in no other sense a member of it. This is the case in the English House of Lords, and in the legislatures of some of the States. In the latter the Lieutenant-Governor presides over the State Senate. In Maryland, however, which has no Lieutenant-Governor, the pre-

siding officer of the Senate is chosen by ballot from the members of that body.

Duties as President of the Senate.—Unlike the Speaker of the House the President of the Senate wields no great power. He is virtually a figurehead. The Senate makes its own rules, elects its committees by ballot, and there is but little for the presiding officer to do but to maintain order, declare votes, and perform other more or less perfunctory duties. Even questions of order decided by him may be appealed to the Senate. Furthermore, the Constitution distinctly limits his right to vote, allowing it only in case of a tie. The chance to exercise this right does not happen very often, but when it does the Vice President becomes at once a person of considerable importance, for he has the power single handed to make or to mar legislation of vast importance. With this lone exception the office of Vice President carries no great influence, and for this reason has not been much sought after by men in public life.

> **Section 3, Clause 5.**—The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice President, or when he shall exercise the office of President of the United States.

Other Officers.—The other officers here referred to are a secretary, a sergeant-at-arms, a chaplain, a postmaster, and two doorkeepers. These officers are not Senators. On the other hand the president *pro tempore* is a Senator. He is not, however, appointed permanently except on the death of the Vice President, or on the latter's promotion to the Presidency. It is customary for the Vice President to vacate the presiding officer's chair in the Senate a few days before the close of each session, in order that the Senate may choose a president *pro tempore,* who will thus be in office in case the Vice President should in the recess of Congress become President, or

become mentally or physically unable to discharge his duties. But the president *pro tempore* receives no additional salary, except when he succeeds the Vice President in office permanently; then he gets the latter's salary. Unlike the Vice President, the president *pro tempore* of the Senate is not restricted in his power to vote.

> **Section 3, Clause 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.

Impeachment.—It is well that the right of impeachment exists, for it is a bulwark against possible oppression on the part of those in high places. Furthermore, it is eminently proper that legislatures, or other bodies than courts of law, should conduct impeachment proceedings, for the offenses reached thereby are mainly, though not always,[13] of a political or judicial nature—abuses of trust, neglect of duty, unwarranted assumption or high-handed exercise of power—and are not always within the jurisdiction of municipal courts. The procedure in impeachment cases is not so intricate or so technical as in action before courts of law, and there is less opportunity therefore for offenders to escape conviction on mere quibbles. Undoubtedly the framers of the Constitution got their notions of impeachment from England, where from time immemorial the House of Commons has exercised the right to impeach offenders, the House of Lords the right to try them. Under the Constitution the participation of the two Houses of Congress is similar: the House of Representatives is the prosecuting body, the Senate is the court before which

[13] Constitution, 2, 4. See p. 198.

the case is tried. It would not be seemly for either assembly to be both accuser and court.

The Senate as a Court.—While engaged in impeachment cases the Senate assumes the character of a judicial tribunal. But it is a peculiar tribunal. It is at once both judge and jury, deciding questions of fact as well as questions of law; and as a court it is almost unwieldy in size. The ordinary trial jury in courts of law consists of twelve men, who must be unanimous in order to convict; whereas the Senate convened as a court may consist of nearly a hundred men, and conviction may be had by a *two-thirds vote of the members present*. This may mean the full Senate, or only a majority, the number necessary under the law to do business. Thus the number necessary to convict is always variable. How different is this from the rule in courts of law, where exactness and certainty are prerequisite. In this respect the procedure in impeachment trials is open to criticism; yet the custom of allowing conviction on a fractional vote is in itself wise, for it is very probable that a unanimous verdict could never be obtained in such a large body of men, a body, furthermore, that is often divided on purely party or sectional lines.

Procedure in the Senate.—When the House has presented the articles of impeachment—that is, the charge or indictment—to the Senate, it becomes the latter's duty to summon the accused party to appear before it on a designated day. When the accused appears he is given a copy of the charges, and is allowed a certain time in which to make his answer. If he denies the allegations, the prosecuting committee from the House replies in writing, and states its readiness to prove the charges preferred. The accused is then furnished counsel, and the trial proceeds according to the ordinary rules of law and parliamentary practice. Should the accused fail to appear in answer to the summons, the Senate may go on with the trial in his absence. This is called an *ex parte* proceeding.[14]

[14] The case of Judge Pickering, 1804.

Ordinarily the Vice President presides over impeachment trials, but should the President happen to be the accused party, the Chief Justice of the Supreme Court presides. To have the Vice President officiate in such a case is not deemed good policy in view of the fact that he has an interest in the chair of the Chief Executive.

Impeachment in the States.—The constitutions of most, if not all, of the States provide for the impeachment of State officers. The right to impeach is, however, generally regarded as inherent in a republican state, hence it is probable that any State legislature would have the power to bring impeachment proceedings whether the constitution expressly provided for them or not. In most States the Chief Justice of the State Supreme Court presides if the Governor is impeached. For many years the States of South Carolina and New York required a mixed tribunal of legislative and judicial officers in impeachments. Impeachment trials in the States have been comparatively rare.

> **Section 3, Clause 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.**

Punishment.—In Great Britain, after conviction in a case of impeachment, the House of Lords may inflict as much punishment as a court of law. This is because the Parliament was originally the highest court of judicature in the realm, and the power of the Lords to decree extreme punishment in cases over which it has jurisdiction has never been taken away. The Constitution of the United States, however, limits the penalty which the Senate may impose to "removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States." By a later clause,

Article 2, Section 4, removal from office is, on conviction in certain cases, made imperative. Briefly then, one who is impeached and found guilty of the charge *must* be removed from office; in addition, he *may* be disqualified to hold that, or any other office under the national government, at the discretion of the Senate.

Courts May Also Punish.—Thus the power of the Senate to punish in cases of impeachment is limited.[15] But in addition the impeached person is liable to trial and punishment by any court of law having jurisdiction of the person and the offense. This of course is an exception to the principle that conviction or acquittal by one established tribunal renders a second trial for the same offense impossible.[16] But the framers of the Constitution made the exception arbitrarily in order that no man should lightly escape a deserved punishment if guilty of an offense against the State. It is the purpose of impeachment to purify the office; it is the function of the law to punish. As yet, however, in the history of the United States, no impeached person has suffered further trial and punishment according to law for the same offense.

Office Under the United States.—Disqualification to hold and enjoy any office of honor, trust, or profit under the United States has no bearing on the occupation of State offices. They are not offices under the United States. It would not be unconstitutional, therefore, for a person whom Congress had impeached and found guilty to accept afterwards the governorship of a State, or any other purely State office. In this respect the States and the United States, it may be seen, are separate entities, working independently of each other.

[15] Nevertheless, the power of the Senate is absolute as far as it goes, for not even the President can pardon one whom the Senate has convicted. Art. 2, Sec. 2, Clause 1, pp. 181, 184.

[16] Constitution, Amendment 5.

Section 4, Clause 1.—The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

The Control of Elections.—At the time of the Constitutional Convention many people argued that to allow Congress in any way to control the elections of Congressmen would be placing an arbitrary power in the hands of the national legislature that might work infinite harm to some States, or to all. On the other hand it was clear that every good government should possess the means for its own preservation, and to grant to the State legislatures the exclusive power to regulate elections might result in leaving Congress to their mercy. The Convention finally agreed on the sensible compromise stated in the clause above.

Acts of Congress Regulating Elections.—Until 1842 the States appointed Representatives and Senators in what manner, time, and place they saw fit; and there was in consequence very little uniformity in the matter. In 1842, however, Congress enacted a law compelling the elections of Representatives to be held in districts of contiguous territory.[17] This was a regulation as to *place*. In 1871 Congress provided that all votes for Representatives should be on written, or printed, ballots, any law of any State to the contrary notwithstanding.[18] Thus was the *manner* of such elections determined. In 1872, furthermore, Congress regulated the *time* of choosing Representatives by making it the same throughout the Union: viz., on the Tuesday after the first Monday in November of every alternate year.[19] As to the selection of Senators, Congress passed an act in 1866 to regulate the procedure,[20] the manner

[17] Stat. at Large, 5, 491.
[18] R. S., 27.
[19] R. S., 25.
[20] R. S., 15.

of which has already been explained. The 17th Amendment has, however, rendered that law inoperative.

In such ways as these Congress has at various times regulated the time, manner, and place of holding elections for Representatives, and the manner of electing Senators. The purpose of these regulations has been to make uniform the methods of choosing men for Congress, and they have been beneficial rather than harmful. Power to prescribe in what places the elections of Senators should be held was distinctly prohibited to Congress by the Constitution, for it was plainly improper for Congress to have the power to fix the meeting places of State legislatures, and consequently to determine the situation of State capitals.

Section 4, Clause 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.

Meetings of Congress.—Terms of Congress and sessions of Congress are different things. A term of Congress consists of two years, the length of time for which Representatives are elected to serve. A session, on the other hand, is any assembling of Congress for legislative purposes, whether for long or short periods, whether at regular or irregular intervals. A term of Congress begins regularly on the 4th of March of every alternate year. During every term there must be by law at least two sessions, one each year; and there may be more. Normally, the first regular session of a Congress begins on the first Monday in December of the year in which the term begins, and it lasts until some time during the following spring or summer. It is of indefinite length, for it may continue legally until the time set for the second session to begin. The second session begins legally on the first Monday in December of the following year and closes by law on the 4th of March next ensuing.[21]

[21] Until 1853 it was on the 3d of March.

Congresses Named Numerically.—Congresses are named in the order of their terms, beginning with the 1st in 1789. Thus the Congress which began on March 4, 1913, was the 63d.

Special Sessions.—It is obvious from what has just been said that the two sessions of Congress convened in every term are of unequal length. The first is always the longer, its length being determined by the amount of business on hand. The second session, however, must close on the 4th of March next ensuing, unless adjourned beforehand on motion, or by Executive order. But the President may call extra, or special, sessions of Congress, or of either House separately, whenever in his judgment the exigencies of the country demand it; and he may adjourn the two Houses should they disagree as to the time of adjournment.[22] The President has never yet adjourned Congress, but he has called many extra sessions. For example, President Taft called an extra session of Congress on the 4th of March, 1909, to revise the tariff; his successor, President Wilson, did likewise in the spring of 1913. An extraordinary session of Congress is not limited to the business for which it is convened; it may consider any business properly within its scope.

"**A Different Day.**"—Under the authority of this clause Congress might appoint some other day for its yearly assembling than the first Monday in December, and for some time after the adoption of the Constitution it exercised its prerogative in this respect. But the custom of meeting on the first Monday in December has now become so fixed that it is unlikely that Congress will ever appoint a different day.

> **Section 5, Clause 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.

[22] Constitution, 2, 3.

Contested Elections.—The word "returns" here means the election reports made by the proper officials after an election. The correctness of these returns, the legality of the election, and the qualifications of the person concerned are all matters to be determined finally by each House of Congress if the status of a member is in doubt. Ordinarily, the certificate of election which the Representative- or the Senator-elect brings with him is sufficient to establish his right to a seat. But the certificate is only *prima facie* evidence of the fact, and each House may demand other and additional evidence. All doubtful cases, accordingly, are referred to a standing committee on elections, whose report, if accepted, is final; and neither States nor courts have power to re-open the question. This power to determine the fitness of members, and the legality of their elections, is generally inherent in legislative bodies.

Quorums.—A quorum is the number of members of a deliberative body necessary to be present in order that the body may transact legal business. Usually assemblies determine their own quorums; sometimes they are established by law. Sometimes a quorum is a variable number, as in Congress, where a majority in each House is sufficient; and this may be said to be the usual custom among assemblies. Sometimes, however, it is a fixed number, as in the British Parliament, where in the House of Commons of 670 members [23] forty-five make a quorum, in the House of Lords of 631 members [23] only three are necessary. In a few of the States, likewise, a quorum is a fixed number.

The rule requiring a majority for a quorum makes it impossible for a crafty minority to pass a bill by stealth or surprise, or to obstruct legislation seriously, as might be the case if a definite number below or above a majority were necessary for a quorum.

[23] Statesman's Year Book, 1910.

Compelling Attendance.—Under this clause in the Constitution a smaller number than a majority may meet and adjourn from day to day, thus preventing the legal dissolution of Congress, and may compel the attendance of absent members under such penalties as either House may deem proper. By a rule of the House of Representatives fifteen members, including the Speaker, may compel attendance. Under the Articles of Confederation no such rule existed, and the Congress was often idle for want of a sufficient number to do business.

When it becomes necessary to compel the attendance of absent members of either House the sergeant-at-arms is usually empowered to arrest truant members wherever he can find them, and bring them before the House to which they belong for final action by that body.[24] This, however, is a procedure not often invoked.

Counting a Quorum.—Until the 51st Congress only those members of either House who *voted* on questions were considered to be constitutionally present. That is, members might be in actual attendance, and might even speak on matters before the assembly, but unless they voted on measures they could not be counted to make the necessary majority. In this way legislation was often impeded for want of a quorum. During the 51st Congress, however, Speaker Reed established the rule of numbering all the members of the House who were present in person whether they voted or not. Later, this right to count a quorum was questioned rigorously, but the rule was upheld by the Supreme Court,[25] and the practice is now settled.

Filibustering.—This was the term applied to the act of a member in refusing to vote, thus making himself constitutionally absent, and delaying legislation. The word, however,

[24] House Rule.

[25] United States *v.* Ballin, 144 U. S., 1.

has to-day a wider application, meaning any tactics whatsoever indulged in by members of either House to impede the passage of an act. Thus the continual calling for a yea and nay vote on trivial matters, and the making of unduly long speeches are favorite filibustering tactics.

Section 5, Clause 2.—Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

House Rules.—To allow Congress to frame its own rules of procedure, or parliamentary rules, as they are called, is a matter of common sense. Without this power it might be impossible for the national legislature to do business with decency, deliberation, and order. It is customary, at the opening of the first session of each Congress, for the House of Representatives to adopt the rules in force during the preceding term, but later to adopt such changes or additions as the standing committee on rules may recommend. Until the 60th Congress the Speaker of the House was regularly chairman of this committee on rules, a position that enabled him to dominate the procedure of the House to a very large extent. During that Congress a rule was adopted eliminating the Speaker from the important position. The Senate, being more in the nature of a continuing body, has a set of standing rules.

The Power to Punish.—The right to punish, even to the extent of expelling members, seems to belong naturally to legislative bodies. Without it, rules are of little effect, and chaos is likely to reign. The phrase "disorderly behavior" is rather broad. It is generally understood to mean any conduct inconsistent with the trust and duty of a Congressman, whether during a regular session of Congress or not. Conduct to be punishable need not amount to a statutory offense. This power has been sparingly used, and the punishments that

have been imposed have usually been of a minor nature, such as reprimands, censures, loss of privileges, and small fines. On the concurrence of two-thirds, however, either House may expel a member.[26] But since expulsion creates a vacancy, it is not impossible for the rejected member to be returned to Congress by his State to fill the vacancy thus created.

Contempts.—Contempt is wilful disregard of a public authority, or disobedience to it. That either House of Congress may punish its members for contempt is not denied, but much has been written for and against its power to punish other people. Ordinarily, no such right exists; but when either body, or a part thereof, is acting in an authorized judicial capacity, such as sitting in impeachment, or conducting examinations of disorderly behavior, it may lawfully punish even non-members who persist in being unruly, or who refuse to obey a summons or other order of the assembly.[27] Punishment for contempt is limited to imprisonment, and the duress ceases with the adjournment of Congress. In the British Parliament each House has unlimited power to punish for contempt; in which respect Parliament is strong where Congress is weak.

Unlawful Duress.—Should any person be confined illegally by an order of either House, he can obtain no redress except by a suit against the sergeant-at-arms for executing an illegal process. Congressional members are not liable in such a case, by virtue of Article 1, Section 6, Clause 1, to wit, "for any speech or debate in either House, they shall not be questioned in any other place."[27]

[26] Members of Congress, not being subject to impeachment, cannot be expelled by this method (see p. 198, Note 27).

[27] Kilbourn *v.* Thompson, 104 U. S., 168 (overruling Dunn *v.* Anderson, 6 Wheaton, 204).

Section 5, Clause 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.

The Journals of Congress.—The journals of the two Houses of Congress contain the permanent records of the legislative proceedings, and are of considerable historic interest and value. Although compelled by law to publish these records now and then, either House may at discretion omit from publication all matter that seems to require secrecy. The meetings of Congress are usually open to the public, but there is no law to prevent either assembly from holding its meetings behind closed doors, and each does so occasionally. The Senate sometimes goes into "executive session," that is secret session, to consider treaties or confidential communications from the President, such as nominations to office; and the House now and then closes its doors to visitors while deliberating matters of especial importance. The records of these secret meetings are kept in a separate journal.

Methods of Voting.—Voting in Congress is commonly *viva voce*, that is, by acclamation. But in any case, if the presiding officer is in doubt as to the result, he may call for a rising vote. Should any member question the correctness of the chairman's count he may call for a division of the House, and then tellers are appointed to count the vote. On questions of great importance, and in all cases at the desire of one-fifth of the members present, the roll is called, when each member answers yea or nay, as the case may be, and all the votes are entered on the journal. Although this method has the advantage of putting a vote on record and enabling the people to know just how their representatives stand on certain questions, it is often used by a factious minority to delay proceedings and thus to hamper legislation. A member, for example,

moves to adjourn; another calls for a yea and nay vote on the motion. Accordingly, if one-fifth of the members present are found to desire a yea and nay vote, the roll is called and all the votes are entered on the journal—a proceeding that consumes much time. Furthermore, it often happens that the member making the motion votes against it, showing that he did not make it in good faith. Such a motion is called dilatory. The presiding officer has it in his power to refuse to recognize a member who in his opinion is about to indulge in dilatory tactics.

> **Section 5, Clause 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.**

Adjournment.—The provision in this clause was deemed necessary on account of the division of Congress into two bodies. The obvious purpose of it is to prevent either House from retarding the work of legislation by adjourning indefinitely, or to some place remote from the other House.

> **Section 6, Clause 1.—The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.**

Compensation.—It has always been the policy of the United States, and of the several States, to pay legislators a fair compensation. Under the Articles of Confederation the States paid their own delegates in Congress. The result of this arrangement was that some delegates were paid more than others, and certain States at times failed, for financial reasons,

to send any delegates at all. It was a wise policy for the members of the Constitutional Convention to decide that all national legislators should receive pay for their services, and out of the public treasury. On the one hand, this enables the government to get the services of many men of high minds but of limited means; on the other, it equalizes the salaries and enables Congress to be independent of the States. The provision that the compensation shall be "ascertained by law" places the matter entirely in Congress, away from the possible prejudice and pride of any section of the country, and makes it possible to change the compensation to meet the fluctuations in the value of money, and the ever-varying prosperity of the nation. True, it allows the question of salary increase to be settled wholly by those who are to be benefited thereby; yet this very fact has, perhaps, served to keep the compensation within reasonable limits. The salaries paid to Congressmen have ranged from $6.00 per day while the latter were in actual attendance upon their duties, to $7500.00 per year. At present (1913) they receive $7500.00. The Speaker of the House and the President of the Senate receive $12,000.00 each.

NOTE.—In Parliament, members of the House of Lords have always served without pay. Members of the House of Commons previous to 1677 were paid small sums by their constituencies; since then until 1911 they also served without pay. Since 1911, however, they have received 400 pounds annually. Members of the French legislature receive moderate salaries.

Other Compensation.—Besides salary, a Congressman receives a certain allowance for clerk hire, and is allowed mileage at twenty cents a mile both in going and returning home by the shortest route each session. He is also provided with stationery and various other necessaries incidental to legislative duties, and he has the privilege of franking mail on official business.

Special Privileges.—Freedom from arrest, and absolute freedom of speech in the halls of Congress, are by this clause insured to members in order that their work shall be reasonably free from interruption, and that they shall be able to act and to speak with independence. The privilege of freedom from arrest has belonged to most legislative bodies since time immemorial; but it has been a limited freedom. So it is with Congress. For such indictable offenses as treason, felony (murder, burglary, arson, etc.), and for breach of the peace (drunkenness, rioting, etc.), a legislator may suffer arrest and trial like any other citizen; but from the service of all process he is free. Thus he cannot be compelled to serve on a jury, or to appear in court as a witness. This rather slight immunity, as well as the larger freedom of speech, is extended to all delegates from Territories as well as to Representatives and Senators; and it has been held that one who goes to Congress duly commissioned is thus privileged, even though it afterwards appear that he was not entitled to his seat.[28]

Immunity from arrest begins, according to one writer,[29] at the moment of election, and before the member has been sworn in. This freedom is, however, a personal privilege, not extending to the member's family, or to his property.[30] If a Congressman is arrested the arrest is void, and the member may be freed on motion to the court, or by a writ of *habeas corpus,* or by a warrant from the House to which he belongs when executed by the proper authority. Since the arrest is illegal, the act is a trespass for which the parties making it may be proceeded against in a court of law. It is useless in such a case to plead ignorance of identity, for everybody is supposed to know who are the members of either House of Congress.[31]

[28] Dunstan *v.* Halstead, 4 Penn. L. J., 237.
[29] Jefferson's Manual, par. 3.
[30] Story's Constitution, 862.
[31] Jefferson's Manual, 4.

Freedom of Speech.—It is commonly said that in America everybody has freedom of speech. But even in this country one may not legally say things in public to the injury of somebody else, for liberty is not license. The expression, "freedom of speech," however, has a wider application in respect to Congressmen than to other citizens. For whatever they may say in the *course of official business in either House* they cannot be questioned in any other place. In the halls of Congress liberty of utterance is absolute. The presiding officer may caution a member for ill-chosen language, or refuse a member recognition who persists in slanderous speech, but the latter cannot be sued for slander in a court of law. As was said in a leading case,[32] "defamatory words uttered in debate, or in the course of official business, cannot be made the ground of judicial action." The privilege does not extend to the voluntary publication of matter by the member,[33] but only to utterances made in the course of duty on the floor of either House, or in committee rooms, or to publications authorized by the legislature. In other words, whatever one may do or say as a legislator he may do or say with absolute independence, but as a private citizen he must act and speak with a more strict regard for the rights and feelings of other citizens.

> **Section 6, Clause 2.**—No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

Incompatible Offices.—The first part of this clause has reference to members of Congress only; the last part to holders of other United States offices. The aim of the first is to prevent members of Congress from resigning in order to occupy lucra-

[32] Coffin *v.* Coffin, 4 Mass., 1.
[33] Story's Constitution, 866.

tive offices which they themselves have helped to create, or the emoluments of which they have helped to increase; the purpose of the last is to prevent members from holding offices under the United States incompatible with their duties as Congressmen. But there is nothing to prevent an ex-member of Congress from accepting such an office, for at the expiration of his term in Congress he is but a private citizen, who may aspire to any office under the government; and there is nothing to prevent a Congressman from accepting and holding a purely State office,[34] or from holding another office under the United States after his election and before he has taken his seat. In other words, if a member of Congress accepts any civil office under the government he forfeits his seat in Congress thereby; if, however, he is holding another office at the time of his election, he may continue in the office until he takes his seat in Congress, when he must resign. Although the Constitution is silent in this connection respecting State offices, it would seem not to be good policy for a Senator or a Representative to occupy a State office long, for he could hardly do so without seriously impairing his efficiency in one office or the other, or in both.

A member of Congress cannot at the same time be a judge of a Federal court, or a member of the President's Cabinet, for these are offices under the United States. In this respect the rule in Great Britain is very different, for there the ministry is usually composed of members of Parliament, and members may hold other offices under the government likewise. It is a striking peculiarity of the United States Constitution that it keeps the three great departments of government, executive, legislative, and judicial, in the main distinct and separate.

[34] Case of Senator David B. Hill, who continued to hold the office of Governor of New York until Dec. 31, 1891, though his term as Senator began March 4, 1891.

A Case in Point.—An interesting case illustrative of this clause is that of the Hon. P. C. Knox, Secretary of State under President Taft. Mr. Knox was Senator from Pennsylvania in the 60th Congress, when that body raised the salaries of the President from $50,000 to $75,000; of the Cabinet members from $8000 to $12,000; and of Congressmen from $5000 to $7500. Before his term had expired he resigned from the Senate to accept the position of Secretary of State, the highest Cabinet office. Before Mr. Knox was sworn in to the latter office, however, the attention of Congress was drawn to the fact that he was about to occupy an office the emoluments of which he, as Senator, had helped to increase. Considerable discussion followed, but the difficulty was finally settled, and Mr. Knox's appointment made constitutional, by reducing the salary of the Secretary of State, during the time that Mr. Knox would have served as Senator, to the former basis.

Section 7, Clause 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.

Raising Revenue.—Since taxation is the most common method by which a government obtains revenue, the phrase "raising revenue" has always been interpreted to mean "levying taxes." In Great Britain the power to raise revenue is in the House of Commons—and the Lords may not even amend—and in the several States of the Union, as well as in Congress, it is in the representative branch of the legislature. Thus in both England and the United States taxes are regulated, at least in theory, by the whole people.

Accordingly, any bill, the purpose of which is to create or to increase taxation, or to decrease or abolish it, must originate in the House of Representatives; although the Senate may propose amendments, as it may to any other bill. But all bills that incidentally may produce revenue do not come

within the limitation of this clause. Bills to regulate the post-office, for example, to establish mints, to further the sale of public lands, and numerous others, all have originated in the Senate. Although they produced revenue, they were not designed to tax. Tariff bills, on the other hand, have always come from the House, for one of their clear purposes is to raise money by taxation.

> **Section 7, Clause 2.**—Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it with his objections to that House in which it shall have originated, who shall enter the objections at large in 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.

Majorities.—We have already seen that for either House of Congress to transact business a quorum must be present; and that a quorum is a majority. It follows therefore that the majority vote of the quorum is sufficient, ordinarily, to pass a bill; that the majority vote of the whole House is not required. But to pass a bill over the President's veto demands a special majority, two-thirds. It has long been decided that even this means two-thirds of a quorum.[35] This, however,

[35] 9 Law Rep., 196.

Congress seems to have decided in accordance with the general custom among legislative bodies, rather than in accordance with the letter of the Constitution.

The Veto Power.—The act of the President in signing or vetoing bills is his only participation in legislative business. He may do nothing else concerning the making of laws, except to offer suggestion and advice. When a bill has passed both Houses of Congress and is presented to him, he must either sign it, or veto it by sending it back unsigned to the House in which it originated, and with his reasons therefor; or he may simply retain it in his possession and give it no further notice. If he signs the bill, it becomes a law by that act; if he vetoes the bill, it may still become a law by passing both Houses again with the required two-thirds majority; if he simply retains the bill in possession for ten days without signing it, by that very fact it may become a law, unless Congress should forestall his signature by a hasty adjournment. The President's power to veto is unlimited. He may exercise it for any reason, whether founded in wisdom or in ignorance. He cannot, however, veto one or two items in a bill and approve the rest; he must approve it or veto it in entirety.

This makes possible what is known among legislators as a "rider." This is a bill, to which the President is known or suspected to be unfriendly, which is made a part of a more important measure that he is known to be friendly to, or which is so essential to the needs of the country that he is not likely to veto it. Thus a bill to increase the salaries of certain officers, if attached to the general appropriation bill, is not likely to be vetoed, for the President cannot veto one without vetoing the other, and the bill for appropriations is too important a measure to be killed, or even seriously delayed.

The veto power is a check on unwise, hasty legislation. It is a great power for one man to have; but it is a necessary power, and in the hands of a good man it is a beneficent power.

Congress is not infallible or omniscient. It sometimes enacts unnecessary, unwise, and even unconstitutional legislation. It is well that such legislation be checked somewhere if possible; and where could such a check be better lodged than in the Chief Executive, who as the head of a great nation, somewhat removed from sectional prejudice and party clamor, cannot but feel a great sense of responsibility to the people, and a desire to have his administration clean, progressive and successful? The executive veto, however, has been sparingly used, and the bills that Congress has passed over the President's head have been comparatively few.

It may be noted here that while the Executive Department is a check on the Legislative Department, the Judicial Department is a check on both: for whatever Congress enacts, and the President approves, the Supreme Court may declare unconstitutional and void.

The Pocket Veto.—All bills received by the President within ten days of the probable adjournment of Congress run the risk of failure by action of law. If the Executive fails to sign them before Congress adjourns, then by force of the last sentence of Clause 2 of this Article, they cannot become laws. This way of killing bills is sometimes called the pocket veto. In effect, it is vetoing bills without having to assign any reasons, and with no possibility of their being repassed by a subsequent two-thirds vote of that Congress.

The Initiative and the Referendum.—Congress and the State legislatures are the normal law making bodies in the United States. This is in accordance with the theory of popular government, in which all legislative power is vested in the people's representatives. There is a growing demand, however, for the people to be more immediately concerned with legislation, especially with State and municipal legislation. Accordingly, some States have authorized the voters themselves to propose laws by petition. For example: In Ne-

braska fifteen per cent of the voters in municipalities may propose ordinances by petition, and twenty per cent may compel the mayor and council to submit the ordinances to a popular vote. This power of the people to propose legislation is commonly known as the *initiative*. Under the Constitution the initiative is impossible in respect to Federal laws.

The *referendum* is the corollary to the initiative. It is the submission of a proposed law to the people for their ratification or rejection. Under this system of legislation statutes and ordinances, however proposed, are of no force until sanctioned by the voters. The referendum has been in use more or less since the Revolution, especially among municipalities. In the Federal scheme of government it is of course unknown.

The initiative and the referendum usually go together; States that have adopted one have commonly adopted the other. Like the recall and primary elections, they show that the people of the United States are coming to have a much greater share in the business of governing than was ever intended by the framers of the Constitution.

Section 7, Clause 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 re-passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Purpose of Clause 3.—The purpose of this clause is to prevent Congress from enacting laws under the name of resolutions, etc., without conforming to the restrictions in the previous clause respecting bills. Whatever Congress may enact, whether bill, resolution, order, or vote, must, if intended to have the force of law, be signed by the President, or be passed over his veto by the required majority.

Resolutions, Concurrent and Joint.—Resolutions, as well as bills, are formal expressions of the will of Congress. If the purpose of a resolution is to bind the country to some course of action, that is, to have the force of law, it is called *joint,* and as such must be treated like a bill; if not, it is called *concurrent.* A concurrent resolution does not require the signature of the President. It is commonly nothing but the formal determination of Congress respecting a matter of minor importance, such as requesting the return of a bill from the Chief Executive, or directing the suspension of a rule for the rest of the session. The joint resolution, however, does require the signature of the President to be valid, or must be repassed by a two-thirds vote of each House. This form of resolution came into being in 1871, in the House of Representatives, to distinguish between temporary and permanent enactments, a distinction that has since been lost sight of. The only apparent difference now between a bill and a joint resolution is in the opening phraseology, and, rather broadly, in the purposes for which they are used. Ordinary legislation takes the form of a bill; inferior, incidental, or unusual legislation may be expressed in a joint resolution. The distinction is rather refined, and the present tendency is against the use of the latter. Some of the purposes for which it has been used are the following: to direct the printing of documents; to make sundry appropriations; to admit new States; and to propose amendments to the Constitution.[36]

Bills, Public and Private.—Bills (commonly called acts) are either public or private. Public acts concern the commonwealth, or some locality in it, rather than individuals, and courts take judicial notice of them; private acts relate rather to individuals, and are not noticed judicially by the courts.[37]

[36] A resolution proposing an amendment to the Constitution does not require the President's signature. See Art. 5.

[37] That is, courts will not accept them as facts without proof.

A bill to establish a light house, or to build a battleship, or to levy a tax, is public; a bill to relieve a citizen by a pension, or by removing political disabilities, is private. In number, the private bills introduced into Congress each year far outnumber the public bills. Both, however, as well as joint resolutions, must go through the same process before becoming laws.

Bills and Resolutions, Forms of.—The following excerpts from the enactments of the 61st Congress illustrate the forms of public and private bills, and of concurrent and joint resolutions:

PUBLIC ACT.

Chapter 152.—An Act for establishing a light and fog signal station on the San Pedro breakwater, California.[58]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of Commerce and Labor be, and he is hereby, authorized to establish a light and fog signal station on the San Pedro breakwater, California, at a cost not to exceed thirty-six thousand dollars.

Approved, February 24, 1911.

PRIVATE ACT.

Chapter 315.—An Act for the relief of Helen S. Hogan.[59]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the treasury not otherwise appropriated, to Helen S. Hogan, of Woodford County, Kentucky, the sum of three thousand dollars, etc.

Approved, March 4, 1911.

CONCURRENT RESOLUTION.

Resolved by the House of Representatives (the Senate concurring), That the President of the United States be, and is hereby,

[58] Statutes at Large, Vol. 36, 929.

[59] Statutes at Large, Vol. 36, 2123.

requested to return to the House the bill (H. R. 25081), "For the relief of Helen S. Hogan." [40]

Passed, February 21, 1911.

JOINT RESOLUTION.

Making appropriations for the payment of certain expenses incident to the first session of the Sixty-first Congress.[41]

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of money in the Treasury not otherwise appropriated, for purposes as follows: (naming them).

Approved, April 23, 1909.

Bills, Introduction of; First Reading.—Any member may introduce into Congress as many bills as he likes, and these bills may be drawn up by the member, or by any outsider, who may hand them to a member to be introduced. A public bill, when entered, is laid on the Speaker's table, and the Speaker refers it to the proper committee for further consideration; a private bill is delivered to the clerk informally, endorsed by the member with the name of the committee to which it shall go. In each case the clerk reads the title of the bill to the House. This is the first reading.

The Committees.—Before tracing the passage of a bill through Congress it is well to understand first the work of the committees. These are small groups of Congressmen, whose duties mainly are to give preliminary consideration to bills as they are introduced, and to report to Congress only those which they deem worthy of possible passage. In the House of Representatives are some half hundred or more regular committees, such as the Committee on Rules, the Committee on Elections, the Committee on Ways and Means, and all are chosen by the House at the beginning of each new Congress.

[40] Statutes at Large, Vol. 36, 2136.

[41] Statutes at Large, Vol. 36, 182.

The Speaker may, however, appoint select, or conference, committees as the need arises for them, and the House may resolve itself into what is known as a "Committee of the Whole." The latter is usually done to allow greater freedom in debate: the Speaker leaves the chair, appointing a member to take his place temporarily, the ordinary rules for parliamentary discussion are suspended, and the entire assembly, like a large committee, proceeds to discuss the matter at hand unhampered by any arbitrary restrictions. In the Senate are nearly as many committees as in the House, although each is necessarily composed of fewer members. These are chosen by the Senate.

Advantages and Disadvantages.—The chief advantage of the committee system is that it facilitates legislation by killing off worthless bills at an early stage in their existence, thus preventing waste of time by the House or the Senate. The bills introduced into Congress at every session run into the thousands, and obviously it would be quite impossible for either branch of Congress, as a whole, to give adequate consideration to so many. Furthermore, the system makes possible some co-operation between the executive and the legislative departments, for although cabinet members, for instance, may not appear in behalf of measures on the floor of either House of Congress, they may do so before committees. On the other hand the system is not wholly ideal, for it cramps debate, makes corruption easier, reduces responsibility, and lessens the unity of Congress as a constructive body. It has, however, been too long in use to admit of any radical change, and, after all, the advantages in it are so positive that it is regarded as good as any system that could be devised.

Work of Committees.—The committee to which a bill has been referred determines whether it shall come before either House for further consideration. Its determination in the matter is final, and its judgment cannot be questioned. If the

committee votes to drop the bill, it is killed at once, for it cannot be considered by the legislature unless re-introduced at a subsequent session. If the committee reports it adversely to the House, the latter commonly drops it at an early stage. If, however, the committee reports the bill favorably, it has a good chance of becoming a law, for unless it has strong opponents among the members of Congress outside the committee, the legislature will accept the recommendation of the committee and pass the bill. It is safe to say, however, that about nine-tenths of the bills are dropped by the committees.

Consideration by the House; Second and Third Readings.—A bill reported favorably to the House is read a second time, this time in full, and then placed on the calendar for later consideration. When in its proper time the bill comes before the legislature for discussion, it is said to reach its third reading, this time again by title, unless some member demands a full reading. Debate on the bill is opened by the Speaker's asking, "Shall the bill pass?" Debate may be closed at any time thereafter on the call of any member for "the previous question." Vote is then taken. If the bill is passed by the House, it is engrossed, that is written out in full in large hand (*en gros*), signed by the Speaker and the clerk, and then sent to the Senate.

Consideration by the Senate.—In the Senate a bill goes through about the same process as in the House. It is first referred to the appropriate committee, after which it comes before the Senate to be voted on. If the Senate rejects the bill, it is lost as certainly as though it had failed of passage in the House. If the Senate passes the bill, it is returned to the House where it is at once enrolled on parchment. After this it is inspected by the Committee on Enrolled Bills, signed by the Speaker of the House and the President of the Senate, then transmitted to the President of the United States.

Amendments.—Bills, except those for raising revenue (see Article 1, Section 7, Clause 1) may originate in either House

of Congress, and either House may offer amendments to the other's bills. When this is done both the original bill and its amendments must be returned to the body in which it originated for consideration of the amendments. If the House of Representatives, for example, accepts an amendment proposed by the Senate, the bill as amended passes at once. But if the House does not accept the amendment, it sends notice of the fact to the Senate, leaving it to that body to recede from its position, or to insist and ask for a conference.

Conferences.—Most disagreements between the House and the Senate over bills, or amendments to them, are settled in conference by special committees composed of members from each of the committees in the House and the Senate that considered the bills in the first place. The fate of the measures then depends almost entirely on the report of the conference committee. The latter may vote to accept or to reject a bill, or amendment, or it may substitute an entirely new one. In any case the report must be acted on by the body in which the bill originated. Usually, the judgment of the conference is accepted, and the bill assumes the form suggested by the committee.

CHAPTER III

THE POWERS OF CONGRESS

Article 1, Section 8

THE POWERS OF CONGRESS

Article 1

The Congress shall have power—

Section 8, Clause 1.—To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

In General.—Without power to lay and collect taxes the United States government could not long endure. The main weakness in the Articles of Confederation was in the fact that they gave the government no means of raising money.[1] It is well that, respecting this power, the Constitution speaks in no uncertain terms.

Limitations on the Taxing Power.—It has been aptly said that the power to tax involves the power to destroy.[2] In order that Congress may not go to unreasonable extremes in its exercise of this great power it is limited in various ways. 1st, Congress is limited in respect to the purpose for which it may tax: to wit, "to pay the debts, and provide for the common defense and general welfare." These purposes are broad enough to cover all the possible needs of the government; perhaps too broad, for much litigation has arisen over the "general welfare" phrase.[3] 2d. Congress is limited in respect to the manner in which it may lay the taxes herein mentioned.

[1] Art. of Confederation, Art. VIII.

[2] Marshall, C. J., in McCulloch *v.* Maryland, 4 Wheat., 316.

[3] It is obvious that the purpose must be public rather than private.

That is, all taxes levied under the authority of this clause must be uniform.[4] If an import tax, for example, is laid on hides, the tax must be the same for the same class of hides at every port of entry in the United States. 3d. Congress may be said to be limited in its taxing power by the very plan of representative government. Members of the House of Representatives, in which body all Federal taxation must originate, are chosen for short terms. A legislature, therefore, that imposes an oppressive tax, can soon be superseded by one more sensible of its limitations. Congress is not likely to impose taxes, either directly or indirectly, that do not meet the approval of a majority of the people. 4th, and lastly, Congress is limited by a necessary respect for the rights of the separate States. Both the United States and the individual States are supreme in the sphere of their lawful activities, and neither may interfere with the other by taxation. Thus it has been held that Congress may not tax a State municipal corporation, or its resources,[5] or the salary of a State officer,[6] or the process of State courts,[7] or a railroad owned by a State.[8] On the other hand, a State cannot tax the salary of a Federal officer,[9] or a national bank,[10] or land of the United States within the borders of the State.[11] The two cases of (a) U. S. *v.* R. R. Co., 17 Wall., 322, and (b) McCulloch *v.* Md., 4 Wheat., 316 are in point.

(a) In 1854 Baltimore City loaned the B. & O. R. R. Co. several million dollars secured by 5% bonds. The Federal

[4] Compare with Art. 1, Sec. 2, Cl. 3 of Constitution.
[5] U. S. *v.* Railroad Co., 17 Wall., 322.
[6] Collector *v.* Day, 11 Wall., 113.
[7] Warren *v.* Paul, 22 Ind., 276.
[8] Georgia *v.* Atkins, 1 Abb. (U. S. Cir. Ct.), 22.
[9] Dobbins *v.* Commissioners, 16 Peters, 435.
[10] M'Culloch *v.* Maryland, 4 Wheat., 316.
[11] Van Brocklin *v.* Tennessee, 117 U. S., 151.

government brought suit against the railroad company to compel the payment of the internal revenue tax on these bonds. The Supreme Court held that the tax was unconstitutional and void as a tax on the revenues of the municipal corporation of Baltimore. Such a corporation is a part of the sovereign power of the State, and neither it nor its revenues are subject to Federal taxation.

(b) The Bank of the United States, incorporated by act of Congress, and doing business in Philadelphia, established a branch bank in Baltimore, Md. A statute in Maryland required all banks in that State, not chartered by the State legislature, to pay an annual tax for the privilege. McCulloch, agent for the United States Bank in Baltimore, refused to pay the tax, and when sued by the State, set up as defense that the Maryland statute was unconstitutional in so far as it applied to the Bank of the United States. The court held: that (1) a State may not tax a superior power; (2) the Bank of the United States was a fiscal arm of the government, hence not to be taxed; (3) although a State may not tax the right of the bank to exist, it may tax personal property, building, etc., of the corporation, like any other private property in the State.

Duties, Imposts, and Excises; Indirect Taxes.—It is probable that Congress would have full authority to levy duties, imposts, and excises without specific mention of them in the Constitution. In the first place, the word taxes includes any financial charge imposed on the people for support of the government; and in the second place, the power to levy taxes is inherent in any government. The enumeration of specific taxes here, however, avoids possible confusion and trouble. *Duties* are taxes on both exports and imports, but since another clause of the Constitution absolutely prohibits charges on exports, the term has become generally synonymous with *imposts,* which are taxes levied only on imports. *Excises* are taxes on the manufacture, sale or production of commodities

within the country, and on the privilege of pursuing certain occupations. Thus taxes on the manufacture or sale of alcohol and cigars, and license fees for the privilege of selling those articles are excises.

These taxes are usually termed *indirect,* because the burden of them is borne by the ultimate consumer, or by the individual patrons, as the case may be. That is, the importing merchant who pays a duty on his goods adds enough to the selling price to cover that charge, and the tax therefore is really paid by those who purchase the goods. Likewise, one who pays a license fee for the privilege of conducting a business or profession may recoup on his patrons by charging a trifle more for his wares or for his services.

Direct Taxes.—We have seen that the taxes mentioned in the present clause of the Constitution must be levied uniformly. Clause 3, Section 2 of the 1st Article, however, says that *direct* taxes must be laid in proportion to the population. What then are *direct* taxes? In theory they are taxes paid absolutely by the person to whom they are assessed. The Constitution and the Supreme Court, however, have limited this rather broad definition. The Constitution, Article 1, Section 9, intimates that a poll, or capitation, tax is a direct tax, and the Supreme Court has decided that taxes on land and on all incomes from real or personal property are direct.[12] The Constitution does not say what things may or may not be taxed; but when Congress levies a tax on men, lands or incomes, such a tax is in its nature direct and must be laid proportionally. When such a tax is to be levied the procedure is as follows: Congress first decides the amount of money to be raised, then requires of each State its respective quota according to its population. The tax is then levied on the people, if it is a poll tax, or on the land or the houses, etc., according to the terms of the enactment providing for the tax.

[12] Pollock *v.* Trust Company, 158 U. S., 601.

In the history of the United States direct taxes have been levied but five times: viz., in 1798, 1813, 1815, 1816 and 1861. They are decidedly unpopular, difficult of accurate apportionment, and often unfair. They are unpopular, because they are in the nature of an assessment; hard to apportion with accuracy on account of the varying, shifting population of the States; and they are often unfair, since a State with a large population pays a greater tax than a State whose population is less, although the aggregate wealth of the former may not be any greater or so much. The Federal government usually provides for current expenses by indirect taxes, *i. e.*, customs, excises, etc. Until the Civil War the greater portion of the national revenue was derived from customs, but since then the sums derived from excises and from customs have been about equal. The individual States, on the contrary, meet their expenses by direct taxation. State officials determine the amount of money needed annually, and the counties, or districts, then are required to raise their respective shares. Thus, when one pays a tax for State or municipal purposes he pays a specific sum, proportionate to the value of the real or personal property he owns.

Income Taxes; Attitude of Supreme Court.—It is interesting here to note briefly the different attitudes of the Supreme Court towards taxes on incomes. In 1794 the court declared that direct taxes could be levied only on lands and on persons (capitation taxes), and for about a hundred years that limitation was observed.[13] In 1880 the court ruled explicitly that a tax on the income from real or personal property was *not a direct* tax.[14] The status of income taxes was argued again, however, in 1894, and the court held, overruling the former decision, that such taxes were direct taxes within the meaning of the Constitution, and should be laid according to popu-

[13] Hylton *v.* U. S., 3 Dallas, 171.
[14] Springer *v.* U. S., 102 U. S., 586.

lation.[15] Although this ruling was rendered by a divided court, two judges having filed strong dissenting opinions, and although it was not in accordance with political economy and the views of many publicists, it settled the legal status of income taxes in the United States. Since then direct taxes have been held to include taxes on incomes as well as capitation taxes and taxes on real or personal property. (For a further discussion of this subject see Amendment 16, p. 286.)

Section 8, Clause 2.—To borrow money on the credit of the United States;

Borrowing Money.—The United States is a corporation, a large public corporation, and as such it has the power to borrow money. Ordinarily, the government meets its expenses by taxation; but on extraordinary occasions, such as the outbreak of war, or the undertaking of a great public work like the Panama Canal, it becomes expedient to borrow money. It might be possible to meet such unusual burdens by taxation, but it seems the better policy to borrow money instead. To raise quickly a great sum of money by taxation creates an intolerable burden for the people; to borrow it does not, for it is offered freely by those who wish to lend; and the repayment of such money may be distributed over a long term of years, making the burden of it thus fall little by little on those future generations that may justly be asked to share the expense of the war, or that most enjoy the advantages of the public work.

United States Bonds.—When the government wishes to borrow money it issues for sale what are known as United States bonds. These are certificates, or notes, in which the government promises to pay the holder at a stipulated time the sum named therein with interest at a stated per cent. These notes are not money, nor are they designed to circulate as such, although they may be assigned, or passed from hand to hand, like any valuable commercial paper. They are cer-

[15] Pollock *v.* Farmers' L. & T. Co., 158 U. S., 429.

tificates of indebtedness merely. The purchaser of government bonds becomes in fact a creditor of the United States, for he virtually lends to the government the sum named in the certificates. When United States bonds are issued they find a ready sale, for, although they do not pay a high rate of interest, they are regarded as absolutely safe. In fact so great is the demand for such notes that they usually sell above their face value. Bonds issued in 1911, for the Panama Canal, bearing interest at only 3 per cent sold as high as 102½. Government bonds usually find their way into the hands of the people through the large banking houses, such as those on Wall Street, New York, that usually purchase the issue at once in large blocks.

"On the Credit of the United States."—When one buys the bonds of a private corporation he runs the risk of losing some of his money, for the assets of the corporation, should it fail, may or may not be enough to reimburse the bond holders. Theoretically, one who buys the bonds of the corporation known as the United States runs a risk of losing all of his investment. Should the United States become bankrupt there would be no definable assets for distribution among the bond holders, for the bonds are issued on credit only, nor is there any court in which suit for distribution could be brought. But so long as the financial standing of the United States remains high, that risk is reduced to a minimum. In fact, bankruptcy of the United States would be possible only as the result of a disastrous war, or on account of some tremendous shrinkage of values, or frightful cataclysm of nature.

Section 8, Clause 3.—To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

The Need of Federal Regulation.—After the Revolution and before the adoption of the Constitution the individual States regulated commerce about as they pleased, with little regard to the welfare of the whole commonwealth. They

levied duties on imports and exports, both from and to other countries and from and to each other. Thus communities that were favorably situated were able to exact a revenue from communities less favorably placed. The inevitable confusion and ill feeling resulting from this state of affairs finally reached such a pass that a convention of delegates from the several States was called in 1786 at Annapolis, Md., to consider the problem of interstate trade. For lack of a quorum the commissioners attending this convention, as told in a previous chapter, entered into no discussion of interstate commerce, but rather made certain recommendations regarding the need of a stronger general government. But the Constitutional Convention, which met the following year in pursuance of those recommendations, forever settled the vexed question of trade by placing commerce with foreign nations, among the several States, and with the Indian tribes wholly in the hands of Congress.

Extent of Federal Regulation.—The simple prepositional phrase, "To regulate commerce," gave to Congress an immense power, but a great amount of litigation has been necessary to demonstrate the full extent of that power. Briefly the phrase has been settled to mean: The power to control commercial intercourse between nations, and parts of nations, in all its branches by prescribing rules for carrying it on. Commerce therefore is more than traffic; it is intercourse. It includes navigation; it embraces ships and railroads as instruments of trade, as well as the men who manage them; it comprehends both passengers and cargoes, and even telegraphic lines and messages. In the case of the Pensacola Tel. Co. *v.* Western Tel. Co., 96 U. S., 1 (1877), the court said that the power of Congress to regulate commerce could not be confined to the instrumentalities in use at the time of the adoption of the Constitution, but kept pace with inventions and with the growth of the country. Hence the power of Congress extends

to all the means whereby commerce between States and with other nations is facilitated; it is exercised on the ocean as well as upon the land, and on all navigable waters within the United States not wholly included within the boundaries of a State.

Intrastate and Interstate Commerce.—Few things illustrate the parity of powers held by the United States and the several States better than the decisions relating to commerce. Every State may control the commerce carried on wholly within its borders; but the commerce that enters a State from without, or that passes out from within, is under the exclusive control of Congress. A State may regulate the traffic on a railroad that lies wholly within the State, and control the trade on a navigable river or lake similarly situated, provided that the water is not directly connected with the ocean or other highway of the world's commerce.[16] A State may likewise exercise the right of eminent domain over the shores of a navigable stream, if in so doing it does not hinder interstate trade or affect reciprocal rights in the Federal government.[17] On the other hand, a State law granting the exclusive privilege of running steam vessels for traffic on such a river as the Hudson is unconstitutional and void. This was decided as early as 1824, in the famous case of Gibbons *v.* Ogden, 9 Wheaton, 1, the facts of which were as follows:

"The State of New York granted to R. R. Livingston and R. Fulton the exclusive right to navigate all or any of the waters within the jurisdiction of that State. Later, this exclusive right was assigned by Livingston and Fulton to one Ogden, who brought suit against Gibbons for running a passenger steamboat about New York and on the lower Hudson. Gibbons set up as a defense that his boat was duly enrolled and licensed under acts of Congress to engage in the coasting trade."

[16] Veazie *v.* Moore, 14 Howard, 568.
[17] Gilman *v.* Philadelphia, 3 Wall., 726.

The court held, that the power of the United States to regulate commerce did not stop at the external boundaries of a State; and that, although a State might enact reasonable regulations for the navigation of waters within its jurisdiction, a statute which purported to give to any person or corporation the exclusive privilege of navigating that portion of its waters which served for the passage of commerce between the States was so unreasonable a statute, and so palpably a regulation of interstate trade, that it was unconstitutional. Reasoning in a similar way the Supreme Court later declared that a State law which required importers to pay a license fee of fifty dollars before selling imported goods was void;[18] and that a license tax imposed by a State on commercial agents coming into the State from without to solicit orders was illegal, even though a like tax was imposed on agents of corporations dwelling within the State.[19]

Police Power of a State.—Although the power of Congress to regulate commerce among the States is, in general, exclusive, it is limited indirectly in the following way. It has long been decided that the States, in the exercise of protective care over their inhabitants, may make and enforce local regulations, even though in so doing they remotely affect interstate commerce.[20] This power of the States to protect the lives, health, and property of their citizens, and to preserve good order and public morals, is known as the *police power*. Such a power is naturally incident to sovereignty in any form, and it cannot be said ever to have been surrendered by the States to the United States. Accordingly, a State may require engineers on all railroads running within, into, or through the State to pass an examination on eyesight;[21] it may regulate

[18] Brown *v.* Maryland, 12 Wheat., 419.
[19] Robbins *v.* Shelby County Taxing Dist., 120 U. S., 489.
[20] Pervear *v.* Commonwealth, 5 Wall., 475.
[21] Smith *v.* Alabama, 124 U. S., 465.

the sale of intoxicating liquors, including liquor imported;[22] it may impose reasonable wharfage rates along navigable waters, build bridges over streams, provided that they do not in so doing stop all commerce, and may enforce rules for pilotage;[23] it may even tax the property of those corporations within the State engaged in interstate commerce;[24] it may pass sanitary, quarantine, and inspection laws, and may take reasonable precautions to keep out of the State convicts, paupers, and all persons and animals afflicted with contagious diseases. But no State may, under cover of the police power, enact legislation that substantially burdens or restricts foreign or interstate trade.[25] It is not always easy to say, in respect to a State law which in some slight degree offers a bar to interstate commerce, whether or not it is to be justified under the police power. In a general way its legality may be said to depend on its *reasonableness* and the actual necessity for its existence, rather than on any absolute rule. (See also p. 280.)

The Embargo Act.—Congress has stretched the great power to regulate commerce so far as to prohibit commerce altogether. This was the effect of the Embargo Act of 1807, which provided that all ships then in port, cleared or not cleared, should stay there, and that no vessel bound to a foreign port should be furnished clearance papers except under the immediate direction of the President. The purpose of the act was to prevent traffic with other nations, and it largely succeeded. It succeeded so well that exports in 1808 declined four-fifths, and foreign trade was at a standstill. So severe was its effect on the people that it nearly drove New England into a revolution. The act was repealed in 1809. It is doubtful if any

[22] The License Cases, 5 Howard, 504.

[23] Gibbons *v.* Ogden, 9 Wheat., 1. People *v.* S. & R. R. R. Co., 15 Wend. (N. Y.), 113.

[24] Transp. Co. *v.* Wheeling, 99 U. S., 273.

[25] R. R. Co., *v.* Husen, 95 U. S., 465.

other Congress will ever attempt to go to the extent of the Congress of 1807 in the exercise of the power to regulate commerce.

Act of 1887.—Since 1807 the most important legislation passed by Congress for the regulation of commerce is the Interstate Commerce Act of 1887. This act was made necessary by the growing tendency of certain great railroad lines to control to an unreasonable extent the internal traffic of the country by consolidating their interests, thus putting themselves in a position to raise freight and passenger rates and to secure other unfair advantages. Among other things the act provided: (1) That passenger and freight rates should be reasonable; (2) that there should be no unfair discrimination between persons, corporations or places; (3) that the charge for a short haul should not be greater than for a long haul under similar conditions; (4) that there should be no pooling agreements; and (5) that there should be created a commission to supervise the administration of the law. The commission created under the law is at present composed of seven members, appointed by the President and the Senate for seven years, and each is paid a salary of $10,000 per year. The powers of the commission now extend beyond railroad and steamship companies to include the supervision of express and sleeping car companies, and petroleum pipe lines. The commission is organized like a court of law and holds sittings at various places in the United States. Although it is not a part of the judicial system it determines cases like a court: it can summon witnesses and empower United States marshals to execute injunctions and other positive mandates. It has not like a court the power to execute all its findings, but its decisions may form the grounds for action by United States courts, and they are received with great respect.

Since the passage of the Interstate Commerce Act Congress has enacted several statutes forbidding combinations and

conspiracies in restraint of interstate trade. Under these acts any pooling or joining of interests, the result of which is to create a monopoly or trust, is illegal; and this is so even though the original purpose of such pooling was not to stifle free competition. The law looks at the probable result of such combining, rather than at the intent of the participants. The United States *v.* Freight Association, 166 U. S., 290 (1897), is a case in point. Eighteen railroads running through the middle west formed an association for the purpose of maintaining freight rates in the region between the Mississippi River and the Pacific Ocean. The managers maintained that it was not their purpose to increase rates, or to stifle competition. The United States sued to have the association dissolved. The Supreme Court, in granting the petition, said that the logical result of such an agreement between roads was to create a trust, and that since the parties were engaged in interstate trade it was illegal as a regulation of commerce.

"**With the Indian Tribes.**"—That Congress should control the trade with the Indian tribes is but just. If the regulation of that traffic were left to the several States, or to corporations, or to individuals, the way to sure abuse would be open. As long therefore as tribal relations exist, or until the race disappears, Indians will continue as wards of the government, and their political relations will be defined by statutes and treaties.[26] In their domestic government they are left to their own rules and traditions, but all commerce, whether between white persons and Indians, or between different Indian tribes or the individual members thereof, and whether upon reservations within the Territories or the States, is wholly to be carried on under rules prescribed by Congress.[27] Neither States nor individuals can purchase land from Indian tribes

[26] Cherokee Nation *v.* Georgia, 5 Peters, 1, 16.

[27] U. S. *v.* Holliday, 3 Wall., 418. U. S. *v.* Bridleman, 7 Fed. Rep., 894.

without the consent of Congress. The land set apart for Indian reservations is Federal property by right of conquest or of purchase, and even the Indians have but a right of occupancy there, which Congress may deprive them of at will. It follows therefore that offenses committed on Indian territory are offenses against the United States, and not against any State.

What has just been said respecting trade with Indians presupposes the existence of tribal relations. If such relations cease, as where individual Indians voluntarily give up the tribal life and adopt the ways of civilization, the dependence on Congress may end, and commerce with them may be carried on as with other persons.

Section 8, Clause 4.—To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

Mode of Naturalization.—Naturalization is the legal process of making an alien a citizen. The requirements for such citizenship and the mode of naturalizing are as follows: Before becoming a citizen of the United States an alien must reside within the continental limits of the country at least five years, and one year in the State where he makes application; he must show to the satisfaction of the court in which he makes application that he is of good moral character, attached to the principles of republican government, and has at the time a bona fide residence within the State; at least two years before he can legally ask for citizenship, he must register his intention of becoming a citizen; and lastly, at the time of final application he must declare on oath that he will support the Constitution, renounce his allegiance to any foreign State, and give up what claims he may have to any hereditary title, or order of nobility. In other words, an alien wishing to become a citizen must first register his intention. Two years

later, if his residence here amounts to five years, he may become a citizen by going before the proper court [28] and renouncing allegiance to the fatherland and swearing allegiance to the United States—provided he measures up to the few rather general requirements of domicil, character, etc.

Exceptions.—Not every foreign-born person has to go through this process before becoming a citizen. (a) The minor children of aliens, though born out of the United States, if dwelling within the United States when their parents are naturalized, become citizens by the naturalization of their parents. (b) Any woman who might lawfully be naturalized is deemed a citizen if married to a citizen of the United States. (c) Minor children that such a woman may have become citizens by the same act. (d) An alien soldier, 21 years of age or older, regularly discharged from the army of the United States, may be admitted to citizenship without previous intention, and after one year's residence. (e) An alien, 21 years of age or older, who has served five consecutive years in the United States navy, or one enlistment in the marine corps (four years), and has been honorably discharged, may be admitted to citizenship without previous declaration of intention. (f) An alien, who comes to the United States while a minor and continues to reside here until 21 years of age, may, if his residence amounts to five years, become a citizen without previous declaration of intention.

Who are Citizens?—The very pertinent questions arise in this connection, What is citizenship? and, Who are citizens of the United States? Citizenship may be defined as the state of being a citizen; an American citizen may be said to be any person owing allegiance to the government of the United States and entitled to its protection. The 14th Amendment to the Constitution defines the term by declaring that "all persons born or naturalized in the United States, and subject

[28] See p. 100.

to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." Thus citizenship depends on neither age, sex, nor suffrage. A baby is as lawfully a citizen as a mature man; so is a woman. Millions of citizens do not vote, and cannot vote; on the other hand some voters are not even citizens.[29] Indians while maintaining tribal relations are not citizens, or have but a limited citizenship. Chinese are not citizens of the United States, unless born of resident parents, and under the present laws they cannot become so by naturalization.[30] The children of foreigners who are touring America, or of diplomatic agents, though born in the United States, are not citizens of the United States, for they are not subject to the jurisdiction thereof.[31] Similarly, children born of American parents on the ocean, or in foreign countries, are citizens of the United States, for they take the status of their parents.

Expatriation.—England once proclaimed the doctrine, "Once an Englishman, always an Englishman"; and persistent adherence to that doctrine brought on the War of 1812. In other words England denied to her citizens the right of expatriation, that is, the right to throw off allegiance to the mother country and become citizens of some other country. The United States, however, has always recognized the right, and in 1868 Congress expressly declared it. Thus just as a foreigner may renounce allegiance to some other government and solicit citizenship in the United States, so a citizen of the United States may give up his allegiance and become a bona fide member of some alien commonwealth. Such a person could regain citizenship in his own country only through naturalization.

[29] See footnote 7, p. 34.

[30] 22 Stat. at Large, 26, 61.

[31] United States *v.* Wong Kim Ark, 169 U. S., 649, 693.

Immigration and Exclusion Laws.—In 1907 Congress enacted that every master, agent, owner or consignee of a vessel bringing alien immigrants into the United States should pay a tax of four dollars for every alien thus brought in. The money thus collected is to be paid into the treasury of the United States to become a special "immigrant fund," which the Secretary of Commerce and Labor may cause to be used to defray the expense of regulating the immigration of aliens into the United States.

Under this law the following classes of persons are excluded from admittance to the United States; all idiots, imbeciles and shoplifters; all paupers, or people likely to become a public charge; all seriously diseased persons; and all such generally undesirable persons as convicted criminals, polygamists, anarchists, prostitutes, and contract laborers.

Chinese.—In respect to citizenship within the United States the Chinese are in a class by themselves. No State or Federal court can now admit a Chinese to citizenship.[32] A certificate of naturalization issued by a State court to a Chinese is void on its face.[33] But children born of Chinese parents already residing in this country, who are not members of diplomatic corps, are citizens by virtue of the 14th Amendment.[34] But an immigrant Chinese is not entitled to citizenship, for he is not a white person in the meaning of the naturalization laws.[35] The Exclusion Acts of 1882-1884 are not applicable to Chinese born here. They are citizens, and no citizen can be excluded from the United States except for crime.[36] (See also p. 275.)

Naturalization of Communities.—The Constitution has provided for the naturalization of individuals. What is done,

[32] 22 Statutes at Large, 26, 61.

[33] In re Gee Hop, 71 Fed. Rep., 274 (1895).

[34] In re Gee Hop, 71 Fed. Rep., 274 (1895). In re Look Tin Sin, 21 Fed. Rep., 905. U. S. *v.* Wong Kim Ark, 169 U. S., 649.

[35] In re Ah Yup, 5 Sawyer, 155 (1894).

[36] In re Look Tin Sin, 21 Fed. Rep. 905.

however, when on the addition of new territory to the United States entire communities are ready for citizenship? Do the ordinary methods obtain? By no means. It would be obviously ridiculous for the United States courts to pass on the qualifications of the millions of applicants that such addition of territory might produce. Congress has therefore assumed the power to admit to citizenship by a single act all the inhabitants of such new territory. Accordingly, when Texas was admitted to the Union all its inhabitants were made citizens by a special resolution of Congress. It is not to be supposed, however, that the acquisition of new territory means, *ipso facto,* new citizens. It is a matter that rests entirely with Congress to decide.

"**A Uniform Rule.**"—Congress, under the authority of this clause in the Constitution, has provided a uniform rule for the naturalization of aliens by prescribing the manner in which it shall be done, and what courts shall have power to do it. The mode of naturalization has already been explained; the courts having naturalization powers are the U. S. District Courts, the District and Supreme Courts of Territories, and any State court of record having common law jurisdiction.[37] The fact that State courts may confer citizenship on foreigners does not mean that the power to naturalize is in the States themselves. These courts get their authority entirely from Congress; they can act only in accordance with uniform regulations prescribed in the Federal statutes.

The power of Congress over naturalization is exclusive. If it were not, if each State could invest aliens with citizenship at will, there might be as many modes of naturalization as there are States. This was the case under the Articles of Confederation, and it resulted in great confusion. Although States may define the rights of aliens and of naturalized citizens within their borders, they have no authority to make

[37] R. S., 2165.

citizens of the United States. The fact that Congress has the sole power over naturalization is in harmony with Article 4, Section 2, Clause 1, of the Constitution, which declares that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." It is hard to see how the "privileges and immunities of citizens in the several States" could be the same unless the method of making citizens were the same in all the States.

An Apparent Exception.—The query is sometimes raised: Can a naturalized citizen of the United States, on revisiting the land of his nativity, be made to serve his apprenticeship in the army, if he has not already done so, where such apprenticeship is regularly demanded? Yes, he may. This of course creates an anomalous situation, for the United States guarantees the same protection to naturalized citizens that is due to natural born citizens. The logic of the matter, however, seems to be as follows: In certain foreign countries military service is regarded as an obligation which attaches to every male child upon his birth, and is not discharged by his naturalization elsewhere. Naturalization, it is argued, in no way affects duties or obligations owed to the State of the nativity at the time when the naturalization is effected, and therefore it does not discharge an individual from his obligation to military service. The question has been raised and passed on a number of times.[38] With several countries of Europe this matter is covered by special treaty, in which case, of course, the treaty holds. Thus in the general treaty with Belgium there is an express provision upon this point.

Bankruptcy and Insolvency.—The object of insolvency and bankrupt laws is twofold: first, to free a person from perpetual bondage to creditors and thus give him another chance to succeed; second, to secure an equitable division of the prop-

[38] See on this point: Wharton's International Law Digest, 385, Sec. 181; Davis' International Law, 3d Ed., p. 144.

erty of the debtor among the various creditors. Generally speaking, an insolvent person is one whose debts exceed his assets; a bankrupt is one who has voluntarily or involuntarily gone into bankruptcy: that is, who has been adjudged a bankrupt by a court of competent jurisdiction. The condition of insolvency usually precedes bankruptcy, but not every insolvent person becomes a bankrupt.

The control of bankruptcy is placed by the Constitution wholly in Congress. In order that the credit of the country be stable, and that the method of obtaining freedom from indebtedness be the same in all the States, it is necessary that Congress should have such complete control. Under the Articles of Confederation the States regulated bankruptcy as they saw fit; and until Congress passed a uniform rule they continued to do so, even after the Constitution was adopted; and their laws were upheld.[39] But when Congress passed a national bankruptcy law, such law superseded State statutes on the subject, where the latter were antagonistic. The last national bankruptcy law was passed in 1898 by the 55th Congress. The main provisions of the law are as follows:

A. That the United States District Courts in the States and Territories, and the Supreme Court of the District of Columbia, shall have jurisdiction over cases in bankruptcy.

B. That acts leading to bankruptcy shall be: 1, any attempt to delay, hinder or defraud creditors by purposely conveying, concealing, or removing property; 2, any attempt to prefer, while insolvent, one creditor over another; 3, permitting one creditor to obtain a preference over another; 4, making a general assignment of property for the benefit of creditors; 5, admitting in writing a state of insolvency and a willingness to be adjudged a bankrupt.

C. That the District Court may appoint referees, or trustees, in bankruptcy, who shall inventory the property, make proper

[39] Sturgis *v.* Crowningshield, 4 Wheat., 122 (1819).

reports of the same to the court, and shall equitably distribute the proceeds of the estate, or the earnings of the corporation, among the creditors.

D. That any insolvent person, except a corporation, may become a *voluntary* bankrupt; and that any private banker, any incorporated company, or corporation, owing debts to the amount of $1000.00 or more, and any private person, except wage earner or farmer, may become an *involuntary* bankrupt. This means that any insolvent person, except a corporation, may petition to be declared a bankrupt; and that any corporation, private banker, or private person, except wage earner or farmer, may be forced into bankruptcy on the petition of creditors.

Results of Bankruptcy Proceedings.—When a person has been discharged from bankruptcy by a court of competent jurisdiction he is legally freed from all claims of creditors, even though his property may have been sufficient to pay only a small part of his debts. He is at liberty to engage in business again and is under no legal obligation to pay debts previously contracted.

When a corporation goes into bankruptcy the referees, or trustees, take charge of the business and run it for the benefit of the creditors. Sometimes their efforts result in paying off all the indebtedness and setting the corporation again on a sound basis, and sometimes they are obliged to sell out the business assets entirely. In this case the corporation as such goes out of existence.

State Laws.—The law of 1898 on bankruptcy did not necessarily make void all State laws on insolvency and bankruptcy. Where the latter are not repugnant to the Constitution or to the law of 1898, or do not attempt to operate outside of State limits, or affect any contract created before the law was conceived, they are valid.

Section 8, Clause 5.—To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures;

Money.—Section 10 (p. 150) suggests that only gold and silver, coined by the government and made legal tender in payment of debts, is money. In common parlance, however, any recognized medium of exchange is money. Thus in some of the Colonies before the Revolution hides and Indian wampum were used for purposes of exchange. To-day paper bills, stamped and issued by the government, as well as copper and nickel pieces, are so used. All these may reasonably be termed money, for they are such in a practical way, although they are neither gold nor silver, and their legal tender capacity is limited. The term "lawful money," however, has a limited signification. It includes gold coins, silver dollars, United States notes, and treasury notes.

Money Must Have Value.—Mediums of exchange, under whatever names they may go, must have a certain market value in themselves, or be based on that which has. Thus all coins in the United States are made of metal whose value in the markets of the world either equals or approaches their face value. This is true of all gold pieces. If we melt a gold dollar, we get a dollar's worth of pure gold, plus a little alloy, or hardening compound. If we melt silver, copper, or nickel coins, we get pure metal, whose value only approaches the face value of the coins. Their ability to circulate as mediums of exchange therefore must depend on something more than their intrinsic worth. This something more is the credit, or financial standing, of the government that issues them—a rather indefinite something, it is true, but none the less a thing to be reckoned with. For this reason alone, much of the paper money of the United States circulates at its face value. The worth of the material it is made of is slight, but backed as it is by the government's promise to redeem in that which has

value, it passes readily from hand to hand, and forms a large and convenient part of the nation's currency. So also of the minor coins, whose intrinsic value is less than their face value. Such parts of the nation's currency depend for their stability and value on the real or supposed ability of the government to maintain its credit before the world. Governments and persons are alike in this respect. The notes of a business man are valuable only so far as he is able, or supposed to be able, to pay them. So that part of a nation's currency that is based on credit is acceptable only so far as the financial standing of the nation is above suspicion.

Legal Tender.—This term is synonymous with "lawful money" mentioned above. It means that which the law authorizes a debtor to offer and compels a creditor to accept in payment of a debt. It is a creature of the law entirely. In the United States gold coins are and always have been legal tender for all sums. From 1792 till 1853 silver coins were likewise legal tender for all sums. Since 1853, however, subsidiary silver coins have been legal tender for limited amounts only,[40] and from 1853 till 1878 the silver dollar was not full legal tender. Since the last date, however, the silver dollar has been legal tender for all debts. Nickel and copper coins are now legal tender for sums not exceeding twenty-five cents. As to paper money, banknotes, and silver and gold certificates have never been legal tender. On the other hand, treasury notes and United States notes have been made legal tender by the authority of Congress.

Regulate Value.—This means to determine the value of coins in terms of some other. In order to have a currency consisting of more than one thing we must first have a standard, to which we may adjust all other weights and values. Congress cannot

[40] From 1853 to 1879 they were legal tender for $5.00; since 1879, for $10.00. They are redeemable, however, when presented in sums of $20.00 or more.

prescribe the value of the material out of which money is made; Congress can only ascertain its value by consulting the quotations in the markets, and then fix the size and the weight of the coins accordingly. If one metal is adopted as the standard, we have a mono-metallic currency; if two metals are selected, we have a bi-metallic currency. Congress, in its first coinage act (1792), adopted the bi-metallic standard by authorizing the minting of gold and silver coins, and their circulation on an equality at the ratio of 15 to 1. This meant that Congress, having ascertained gold to be worth fifteen times as much as silver, put into the silver coins fifteen times as much pure silver as it put pure gold into the gold coins, and authorized their circulation on a parity. That is, gold dollars and silver dollars were given the same purchasing power. But it is hard to maintain a bi-metallic currency. The market value of one of the two metals is always going up or down, and the government is frequently obliged to change the relative weights of the two coins in order to keep their values equal. So Congress found. By 1834 the relative values of gold and silver had so changed that Congress was under the necessity of changing the ratio from 15 to 1, to 16 to 1. Again Congress found that it could not control the market values of the two metals, and in 1853 it discarded the double standard by making gold legal tender for all sums, and making all other coins subsidiary to gold, reducing their weights enough to insure their remaining subsidiary. This, at least in theory, was the most sensible course. But in 1878 Congress again set up the double standard, by declaring that the silver dollar should be full legal tender again, and that it was the policy of the government to maintain the gold and the silver dollar on a parity. It was only a nominal double standard, however, that Congress set up, for the market value of the silver in the silver dollar was not equal to one hundred cents, and since then it has fallen so much lower, that the coin is practically sub-

sidiary. In 1908, for example, the pure metal in a silver dollar was worth only about forty-five cents.

One can readily see that in a time of extremity, when the government might be unable to meet its obligations, the exchange value of the silver dollar, and indeed of all currency whose intrinsic value is less than its face value, might become no more than what its basic metal would bring in the open market.

It is not worth while to discuss here the different coins now in use in the United States; their differences are obvious. It may be of interest, however, to point out the distinctive features of the paper coinage, for those are not so generally known.

Paper Currency.—For ease in handling, and to lessen the certain waste of the valuable metal in coins through erosion, and for other minor reasons, the United States government has found it practicable to issue paper currency. Such currency is based either on actual coin or bullion stored in the treasury, or on the credit of the government. If for every bill issued its equivalent in coin or bullion is deposited in the government's vaults, there is little danger of a depreciation; but when bills are issued entirely on the credit of the government they are based on that which is indefinite and unstable. If the nation is rich, and its credit high, its paper currency is acceptable at face value; but if the nation becomes poor, and its credit low, such bills at once depreciate. The paper currency of the United States consists of the following:

(A) Gold and Silver Certificates.—These bills have the words "Silver Certificate," or "Gold Certificate," as the case may be, stamped on one side; and on the other, the inscription, "This certifies that there has been deposited in the treasury of the United States one silver dollar," or whatever the metal or the amount may be. These are not legal tender, but being represented by actual coin in the treasury, they are a very stable kind of paper currency.

(B) United States Notes.—These are commonly called "greenbacks" or "legal tenders." They are issued in various denominations. They bear on the face the inscription, "United States Note," and "The United States will pay the bearer .... dollars." On the reverse side is printed, "This note is a legal tender at its face value for all debts public and private except duties on imports and interest on the public debt." This inscription is important. The student will notice that these bills are not based on coin or valuable metal of any kind. They are the government's promissory notes, and their value depends solely on the presumed ability of the government to pay its debts. But governments cannot always pay their debts, and in times of financial stress their notes tend to depreciate rapidly. This was exactly what happened at the time of the Civil War. So loth were the people to accept the government's notes, which were mere promises to pay, that they became nearly useless for exchange. In 1862, therefore, Congress, in order to make these notes receivable for debts, that is, for past obligations, added the legal tender feature to them. This, though objectionable, insured their circulation, and since then they have caused little disquiet, but have been as serviceable as any other kind of paper money. It was questionable finance to do this, for it arbitrarily forced the people to accept as money a medium of exchange that was not valuable in itself and was based on that which is naturally very uncertain. It did more: it made United States notes in a measure more useful than gold or silver certificates, for the latter have never been made legal tender. In spite of this, however, and the fact that the Supreme Court has upheld the legal tender acts of Congress,[41] it is hard to see how in a time of monetary stress even this legal tender clause can keep these notes from depreciation. The wondrous process of alchemy

[41] The Legal Tender Cases, 12 Wall., 457; 110 U. S., 421.

has not yet been discovered; not even the Congress of the United States can make something out of nothing.

(C) Treasury Notes.—These are not now in general circulation. They were issued under the Sherman Act of 1890 in payment of silver bullion, but have since been largely retired and cancelled. The Sherman Act required the government to purchase four and one-half million ounces of silver bullion per month, to coin two million ounces per month until July 1, 1891, and to store in the treasury the bullion then left uncoined. The notes issued for the payment of this raw silver bore on the face the promise "to pay the bearer on demand .... dollars *in coin.*" The purpose of this issue of bills, and the coinage of so much silver was to maintain gold and silver on a parity. The result was, however, that these notes began to be presented in great quantities at the treasury, and gold demanded in payment to such an extent that the fund of $100,000,000 in gold, reserved to insure the stability of greenbacks, was seriously diminished. A period of financial unrest followed. Financiers then saw that, so long as the government was bound to buy silver with treasury notes and then redeem these notes with gold, it would result in a severe strain on its resources. A special session of Congress was called therefore in 1893, which repealed the purchasing clause of the Sherman Act. Later acts of Congress have required the Secretary of the Treasury to coin the silver purchased under the Sherman Act into standard silver dollars, and with these dollars to redeem outstanding treasury notes as fast as presented. As these notes have been taken in and cancelled silver certificates have been issued in their places.

Both treasury notes and United States notes have always been reckoned as part of the national debt. They are analogous to government bonds; but unlike them they are designed to pass current as money; they bear no date of redemption; and they pay no interest.

(D) Banknotes.—These bills are issued by national banks, or banks chartered by the government. They are stamped with the name of the bank issuing them, their denomination, etc., to wit: "The First National Bank of New York will pay the bearer on demand . . . . dollars." Banknotes are just as good as notes of the United States, perhaps better, for they are all secured by bonds deposited in the treasury of the United States, and they are not evidence of indebtedness. State banks, or banks chartered by State legislatures, for many years issued paper currency, in the face of the constitutional prohibition, "No State shall emit bills of credit." Congress never expressly prohibited the issuance of such bills, but in 1865 it passed an act, amended in 1866, levying a tax of 10 per cent on the circulation of all State banks. This virtually drove State banknotes out of existence.

Retrospect.—It can readily be seen from the foregoing sketch of the monetary history of the United States that Congress has not found it easy to exercise the power of coining money, nor has it been at all times wholly successful. Yet in the main it has kept the nation sound financially; and there has been harmony in the matter of exchange among the people of the respective States, where, had the States the right to exercise this great power, must have been chaos.

Foreign Coin.—Congress has exercised the power to regulate the value of foreign coin by declaring at what rate it shall be received for duties on imports and in payment for public lands. This rate has always been based on the value of the pure metal in the coin. Congress has never presumed to declare the rate for contracts between private citizens. That is done in the open markets of the world, and is purely a matter of supply and demand.

Weights and Measures.—Beyond authorizing the troy pound for use in the national mint, and legalizing the metric system in the United States, Congress has done little or nothing to "fix the standard of weights and measures."

Section 8, Clause 6.—To provide for the punishment of counterfeiting the securities and current coin of the United States;

Counterfeiting.—Counterfeiting is the making of false coin in the likeness of the genuine. The coin need not be actually used as money; it is sufficient if the spurious article be capable of such use. It must, however, be base, and its resemblance to the genuine be so close as to be likely to deceive a person using ordinary precaution. As used in the present clause, however, the term counterfeiting has been construed more broadly to include, besides the making of false coin and securities, the intentional uttering or passing the same; or the possession of them or of the instruments for making them with the intent to defraud; or the act of bringing them into the country for the same purpose.[42] Although mere possession of dies or of false coin does not constitute the offense of counterfeiting, it is a suspicious circumstance; the essence of the crime lies in the intent to deceive. Federal statutes declare what the punishment for counterfeiting the coin or securities of the United States shall be.

Securities.—Under the term securities are included all certificates of indebtedness, such as stocks, bonds etc.; all forms of paper money, including banknotes; all revenue and postage stamps; all customhouse certificates, postal money orders, stamped envelopes, etc.; and all notes and bonds of foreign governments. The imitation of these things for the purpose of fraud is counterfeiting just as truly as the imitation of money, and is punishable under the laws of Congress.

Power Not Exclusive.—The power to coin money, as we have already noted, is exclusive in the Federal government. Hence it follows that if the power to punish counterfeiting were not expressly given to Congress, it would necessarily be implied by the power to coin money; otherwise the latter

[42] United States *v.* Marigold, 9 Howard, 560.

power would soon become a nullity. Whether the authority to punish counterfeiting is exclusive in Congress has been a mooted question.[43] The better opinion seems to be that in such a case, where the exercise by the States of any power granted to Congress can work no harm, but is rather productive of good, it is wise to construe the clause conferring it reasonably and broadly. To make an act punishable under both State and Federal laws will tend to decrease crime rather than to increase it. It has been held, therefore, that States may pass laws forbidding the counterfeiting and the circulation of United States currency within their borders, and may punish offenses against such laws, as being against the peace and good order of the State.[44] Furthermore, the punishment of such acts by a State does not preclude a second punishment by the United States: for an act may at once be an offense against both.[45]

Ordinarily the law presumes an accused person to be innocent until proved to be guilty. The contrary, strange as it may seem, may be the case when one is accused of counterfeiting. It is a reasonable presumption that, when a person attempts to pass counterfeit money, or has it in possession, it is with full knowledge of the fact, and the burden of proof in such a case is on the accused to show that the possession or the illegal act of passing was innocent.

Section 8, Clause 7.—To establish post-offices and post-roads;

In 1788 that remarkable early commentary on the Constitution, the *Federalist,* approaches this topic in a half apologetic manner. It remarks in brief that "the power of establishing post-roads must, in every view, be a harmless power, and may perhaps by judicious management become productive

[43] See Story's Constitution, §1123.

[44] Fox *v.* Ohio, 5 Howard, 410. Martin *v.* State, 18 Tex. App., 224. Houston *v.* Moore, 5 Wheaton, 1; Cooley's Prin. Const. Law, p. 94.

[45] Idem.

of great public conveniency.[46]" Could the author here quoted have foreseen that the Postoffice Department was to become one of the most useful and beneficent under the government, he would not have written in that cautious manner. As a matter of fact no department of the United States illustrates so well that the government is for the people, for no other department administers so well to the comforts, interests, and necessities of persons in every walk of life, and at so small an individual expense. The Postal Department was not created to make money, but to administer; and as a result it is often run at a loss. From a small and almost unimportant branch it has grown to immense size, and tremendous importance. It gives work to hundreds of thousands of persons; it receives and disburses tons of mail matter of every description, silently, swiftly, and with certainty; and it reaches out beneficent hands along thousands of miles of railways, highways and waterways, to every accessible corner of a vast country.

Post-Offices and Post-Roads.—The whole authority for putting into operation a system at once so intricate and so vast is vested in Congress by the simple and rather general sentence, "Congress shall have power to establish post-offices and post-roads." The power to establish has been interpreted to include the power to regulate, and Congress has therefore rightfully assumed the power to create, manage, and control this great business of transporting and delivering the mails, and to do many things that assist in making such transporting and delivery quick, efficient and safe. For many years the point was under discussion whether the phrase "to establish" meant to create, or to point out; and much effort was wasted to prove that, while Congress could designate what should be used as a post-office, and what road already existing should be a mail-road, it could construct neither one nor the other. It is the settled opinion now, however, that Congress can both

[46] The Federalist, No. 42.

designate and construct, and Congress has always acted under that interpretation—many times in the building of post-offices; and a few times in the making of post-roads.[47] Both State and private enterprise, however, have been so sufficient in road building that Congress has been under very little necessity to enter on such work. The terms post-offices and post-roads have both received judicial interpretation, and are to be taken in a broad sense. Any place where mail is officially received, opened, or delivered, whether house, office room, tent, booth, boat, wagon, or box, is a post-office[48]; and any route over which mail is carried is a post-road, whether it be railroad, highway, canal, navigable stream, or footpath.

Under the authority to regulate the postal system Congress may do anything that reasonable public policy may demand. Thus certain persons have for cause been deprived of the use of the mails; and obscene, injurious or libellous matter is excluded.[49] So Congress may cause to be punished those who introduce forbidden matter into the mails, and may assume the power likewise to define and punish as misdemeanors all acts that are a hindrance to the postal service.

Organization of the Postal Service; Expenses.—The mail system of the United States is under the direction of a Postmaster-General, who has a seat in the President's cabinet, and four Assistant Postmasters-General, all of whom are appointed by the President and the Senate. The first Postmaster-General was Benjamin Franklin, who organized the first system of mail distribution in America. The present Post-office Department is divided into four bureaus, each of which is supervised by one of the Assistant Postmasters-General. The work of these bureaus and the duties of the four Assistant Postmasters-General are clearly defined in the Federal

[47] Stat. at Large, Vol. 2, 42, 730.

[48] United States *v.* Marselis, 2 Blatch. Cir. Ct., 108.

[49] Ex parte Jackson, 96 U. S., 727.

statutes. Each of the bureaus is, furthermore, divided into divisions to facilitate the work, and the labor in them is carried on by corps of well-trained clerks. The number of employees in the postal service, including postmasters and their assistants, runs into the thousands; the yearly disbursement for salaries amounts to millions of dollars. A few figures will perhaps give a more definite idea of the present vast extent of the postal business, and of the cost which it involves. In 1800 the number of post-offices in the United States was but 903; in 1910 it was 59,580. In 1910 the expenditures of the Department amounted to $229,977,224, exceeding the revenues by about five million dollars; the compensation paid to postmasters was $27,521,013; the cost of transporting the mails was $84,882,281. In the same year the pieces of postal matter which passed through the mails reached the prodigious number of 14,850,102,559.

Section 8, Clause 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;

In General.—Just how much science and useful arts are promoted by this clause is wholly conjectural. It is both reasonable and just, however, that Congress should enact laws to protect authors and inventors in the enjoyment of the fruits of their brainwork; and it is the act of a beneficent and far-seeing government to hold out large recompense for original work of all kinds. The wisdom of placing copyrights and patents under the power of Congress is apparent. In America one has no common law right to enjoy alone the products of his genius; when once made public they are, in the absence of statutory provisions, available to all. Furthermore, a copyright or a patent protected by State law only would be but limited in its usefulness. The Constitution does not forbid

the States to enact patent or copyright laws, but the Supreme Court has decided that, although States under their police power may regulate the use of patented articles,[50] they may not grant patents or copyrights, or regulate such rights or the sale of them in any way.[51] The power to do these things is in Congress alone. It has always been understood, furthermore, that patent and copyright laws are solely for the benefit of authors and inventors,[52] and are not to be extended by Congress to the introducers of new works and inventions. The patent and copyright laws of America are modeled on those of England.

Copyrights.—A copyright is an exclusive privilege to publish a literary or artistic production. Although commonly applied to books the term is not so limited in fact, for musical compositions, photographs, paintings, engravings, and even statues may be copyrighted. The copyright of a musical composition carries with it the exclusive right to perform it in public, or to cause it to be performed. A copyright is a property right, which may be assigned.

The term of a copyright is twenty-eight years, from the time of recording the title thereof, with the privilege of renewal for twenty-eight more. The method of obtaining it is governed entirely by published statutes.[53] On the death of the original holder the right passes to his widow or children, even the right of renewal. Thus the grant of a copyright, and the same is true of a patent, creates a monopoly. But it is a limited monopoly. The general public also has rights to be observed, and at the expiration of a period reasonably long enough for the original grantee to reward himself for his labor or inge-

[50] Patterson *v.* Kentucky, 97 U. S., 501. State *v.* Tel. Co., 36 Ohio St., 296.

[51] Crawson *v.* Smith, 37 Mich., 309. Hollida *v.* Hunt, 70 Ill., 109.

[52] Livingston *v.* Van Ingen, 9 Johns. (N. Y.), 507.

[53] Rev. Stat. 4956-7-8 (Amend. 26, Stat. at Large, 1107).

nuity, the monopoly ceases, and the privilege formerly enjoyed by one, or by a few, is open to all.

For many years foreign governments did not allow American authors the privilege of copyright, and until 1891 aliens and non-residents were likewise debarred in the United States. By the Act of March 3, 1891, however, Congress substantially granted the privilege of American copyright to all foreigners whose own governments gave similar rights to citizens of the United States. Thus by the exchange of national courtesies it is possible to have one's copyright extended over more than one country.

Patents.—A patent is the exclusive right, secured by law to an inventor, to enjoy the fruits of his invention or discovery for a limited period. The life of a patent is seventeen years, but the right may be renewed for seven more, provided the holder can show that he has not received adequate compensation meantime. Like a copyright, a patent is a property right, which is assignable at law, and on the death of the holder the right descends to the heirs at law. A patent granted by Congress is confined to the limits of the United States; whether a person shall obtain a foreign patent on his invention depends entirely on the disposition of the foreign government. There are no reciprocal treaties covering patents, as in the case of copyrights. Under the laws of the United States an article to be patentable must have the following qualifications:

1. It must be *new*. That is, it must be original in conception, not a mere equivalent of something else, or a mere change in form, or a carrying forward of the same idea.

2. It must be *useful*. Inventions that are wholly useless, or merely trifling, or pernicious, are not patentable. This is a rather indeterminate quality, for the degree of usefulness is not always important; but, as said by Mr. Justice Bradley (107 U. S., 200), it is not the object of the patent laws "to grant a monopoly for every trifling device, every shadow of an idea."

3. It must be *prior in time*. That is, in case more than one person should apply for a patent on the same thing, the first to reduce the invention to a practical working condition is entitled to the patent, rather than the one who may have first conceived the idea.

4. It must not be *abandoned*. If it can be shown that the applicant has been unreasonably negligent, or has carelessly abandoned his invention to the use of the public, he may be denied the patent.[54] It is an old maxim of the law that "Negligence always has misfortune for a companion."

The method of obtaining a patent is governed by the public statutes.[55] The grant of a patent, however, gives the grantee absolute rights, and not even the United States government may use a patented invention without the consent of the patentee, or without making adequate compensation.[56] In such cases the government officers are themselves liable to personal suit.

Trade-Marks.—These cannot be patented or copyrighted, for they are neither inventions nor writings within the meaning of the Constitution.[57] Distinguishing marks on goods destined for interstate or export trade may, however, be registered at the Patent Office, and all unwarranted use, or wilful imitation of such registered mark is illegal.[58] A registered trade-mark endures for thirty years, and may be renewed for thirty more. Congress has no authority over marks on goods in purely domestic or intra-state trade, but in many States they are protected by State laws.

Section 8, Clause 9.—To constitute tribunals inferior to the Supreme Court;

[54] Gayler *v.* Wilder, 10 How., 477. Dable Shovel Co. *v.* Flint, 137 U. S., 41.

[55] R. S., 4883-4936.

[56] Belknap *v.* Schild, 161 U. S., 10.

[57] The Trade-mark cases, 100 U. S., 82.

[58] 33 Stat. at Large, 728.

Inferior Courts.—The Constitution established but one court for the United States—the Supreme Court. The present clause, however, gave Congress full power to establish other inferior courts, unlimited in number, jurisdiction, or complement; and Congress early proceeded to put that power into execution by establishing the District and Circuit Courts, and the Circuit Courts of Appeals. The power thus granted, however, is not exclusive: States may create judicial systems, as well as the United States, but with limited jurisdictions. In consequence, the system of legal administration within the United States has become rather complicated. Besides the great Federal system there are as many State systems as there are States, and hardly any two States are alike in their administrations of the law. A fuller discussion of the Federal courts, as well as some remarks on State systems, will be found in the pages devoted to Article 3.

Section 8, Clause 10.—To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

In General.—It is the manifest purpose of this clause to provide for the punishment of serious offenses committed in that part of the world that is under the jurisdiction of no nation. The authority for such power is derived from two sources: first, from the principle that international law allows any nation to pursue and punish wherever found those wild sea rovers that are inimical to civilized peoples and subject to no nation; secondly, from the principle that a nation's vessels are floating bits of the nation's territory. Offenses committed on vessels sailing under the American flag are, therefore, plainly within the scope of congressional legislation.

Piracy.—At common law, piracy was robbery, *animo furandi*, on the high seas; and high seas, the ocean beyond low water mark. The present clause, however, plainly gives

to Congress the power to enlarge this definition of piracy; and Congress has so done. At common law, the slave trade was not deemed piracy, yet in 1820 Congress declared it to be punishable as such. Congress has also enlarged the definition of high seas to include the Great Lakes, and the Supreme Court has held likewise.[59] It follows, therefore, that any offense, committed on the high seas or on the Great Lakes, may be punished in the courts of the United States as piracy, if Congress has declared the act to be piracy; but that before Congress can declare an offense to be punishable, it must first define the offense. It is not necessary, however, that such acts be defined as piracy as are held to be piracy by the common law, or by the law of nations.

Felonies.—Under the common law of England felonies were those offenses for which a person might suffer loss of life or of property, or of both, according to the degree of his guilt. In American law the term felony is not clearly defined. It is used loosely to distinguish offenses of a serious nature from those of a less serious nature, or misdemeanors. But this distinction is slowly disappearing. State statutes usually define felonies as those crimes for which the punishment is death or incarceration in the State prison.[60] The Federal statutes have never defined the term, but under the authority of this clause Congress may declare any offense committed on the high seas a felony and cause it to be punished as such. Thus mutiny committed on a ship under American colors while on the ocean is punishable under the laws enacted by Congress. But robbery on a ship belonging to subjects of a foreign state, and by one not a citizen of the United States, would not be punishable in the courts of the United States, for the latter would have no jurisdiction over either persons or property on such a

[59] 26 Stat. at Large, 424; U. S. *v.* Rodgers, 150 U. S., 249.

[60] e. g., Mass. and N. Y.

vessel.[61] The principle to be grasped here is that all acts done on the high seas, or on navigable bays, lakes, harbors, and rivers, fall naturally under the purview of Congress, for all interstate and foreign commerce and all foreign relations are governed by Congress, rather than by the States, and under the power herein granted Congress may place crimes committed on such waters in any category it pleases, and cause them to be punished accordingly.

Offenses Against the Laws of Nations.—These are the acts, whether committed on the high seas or on the land, which tend to interrupt the peaceful relations between the United States and foreign nations. International law is a rather loose code of principles, unwritten except in commentaries, tending to promote harmony among civilized nations. It is for the best interests of the United States that these principles be observed, and that Congress should have the power to punish offenses against these principles, and to define and make punishable other offenses not included in the international code. Thus the so-called neutrality laws forbid citizens of a neutral nation to equip vessels of war or bodies of troops to aid a belligerent nation; and Congress has passed acts to forbid filibustering, and has made it a serious offense to organize or to set on foot armed expeditions against friendly nations.

Section 8, Clause 11.—To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

War; Declaration of, etc.—The evident purpose of this clause is to prevent the United States from engaging in war with other nations without the consent of the people, through their Representatives in Congress assembled. In England the

[61] U. S. *v.* Palmer, 3 Wheaton, 610.

power to declare war is in the Crown, but that power is limited by the fact that Parliament alone may make appropriations. In the United States the war power is somewhat limited, for, although Congress may declare war and appropriate money to carry it on, no Congress can make appropriations for that purpose for a longer term than two years.[62]

A state of war may exist, however, without any declaration by Congress, either through insurrection, or by the hostile acts of foreign nations. When such a state of war exists, the people and the courts of the country are bound to take notice of the fact[63]; and the President is authorized to take steps to suppress the insurrection or to repel the invasion.[64]

Congress has declared war twice: in 1812 against Great Britain; in 1898 against Spain. The war against Mexico, in 1846, was recognized as already existing by the hostile acts of that country. The conflict between the North and the South, although it assumed the magnitude of war, was in reality nothing but an insurrection. The insurrectionists were recognized by some foreign nations as belligerents, but never as an independent people. The conflict began while Congress was not in session, and the duty of coping with it at first fell entirely on the President. He could not declare war, but under the authority to put down insurrections he proceeded to order out the militia and to issue calls for volunteers. Later, when Congress assembled, it recognized the acts of the Executive, and empowered him to take further steps to put down the rebellion. In this connection an interesting constitutional question arose: Did the acts of the President in attempting to put down the rebellion before Congress had assembled and declared war to exist amount to war in fact? If so, then the capture of certain vessels attempting to run the

[62] Constitution, 1, 8, 12.

[63] The Prize Cases, 2 Black, 635.

[64] Statute passed in 1795.

blockade established by the President was legal; otherwise it was not. The Supreme Court decided in the affirmative: on the ground that, in order to constitute war, it is not necessary for both parties to be sovereign nations; but war may exist where one belligerent claims sovereign rights against the other.[65]

War Powers of Congress.—In the event of war Congress may wield all those extreme powers that are regarded as lawful by the civilized world. Thus Congress may acquire territory by conquest[66] it may try offenses by military commissions where civil law has been displaced by warlike operations[67]; and it may set up provisional courts in conquered territory.[68] It follows therefore that warlike acts by private parties, unauthorized by the government, are illegal. Hence irregular bands of marauders are likely to be treated if captured as lawless banditti; and those who prey on the enemy's commerce without lawful authority are rightfully classed as pirates. Furthermore, war between two nations makes private intercourse between the inhabitants thereof unlawful. The inhabitants of one are the enemies of the other (Opinions of the Attorney General, Vol. 11, p. 301), and all contracts between hostile parties are absolutely void.[69]

No State, of course, can declare war or make captures. Such power is exclusive in Congress. For subduing internal disorders, however, a State may use force to any extent within her means, even to marshaling State troops in the field, as though a real war were in progress.

Letters of Marque and Reprisal.—A letter of marque is a commission given by a civilized government to a private ship

[65] The Prize Cases, 2 Black, 635.

[66] Am. Ins. Co. *v.* Canter. 1 Peters, 511, 541.

[67] Ex parte Milligan. 4 Wallace, 2.

[68] The Grapeshot. 9 Wallace, 129.

[69] Kent's Commentaries, 67; Griswold *v.* Waddington. 15 Johns. (N. Y.), 57.

authorizing it to attack ships of the enemy. A ship bearing such a commission is commonly termed a privateer, and its operations are generally carried on against the enemy's commerce. Privateering has usually accompanied organized warfare; but letters of marque have been given to individuals when no war existed, allowing them to make reprisal, that is, to take private redress against foreign subjects for private injuries received. But this is rarely done now. During the Revolutionary War and the War of 1812 many American privateers sailed the seas, doing extensive damage to England's commerce. During the Civil War the Southern Confederacy issued such commissions, but the Northern Government did not. Although Congress authorized letters of marque, President Lincoln did not issue any. In the war with Spain in 1898 the United States did not grant commissions for private warfare. At the treaty of Paris, in 1856, certain European powers agreed to abolish privateering. The United States did not accede to that agreement; but so strong is modern public sentiment against private warfare that it is doubtful if Congress ever again legalizes the practice.

Rules Concerning Captures.—It rests with Congress to determine what shall be done with men, or ships, or cargoes, or property of every sort captured in time of war. Until Congress has acted, no private citizen can enforce rights of forfeiture, even with judicial assistance.[70]

Section 8, Clause 12.—To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

Section 8, Clause 13.—To provide and maintain a navy;

Section 8, Clause 14.—To make rules for the government of the land and naval forces;

The Army and the Navy.—Clauses 12, 13, and 14, since they are inseparably connected in thought, may well be considered

[70] Brown *v.* United States, 8 Cranch, 110.

together. Without these clauses Congress would no doubt have power to raise troops and equip ships to carry on war, for otherwise the power to declare war would be useless. But from the power to declare war one could hardly deduce the authority to maintain troops and ships of war in times of peace. Hence it is fair to assume that these clauses are meant to provide for the regular navy and the standing army.

Under the Articles of Confederation Congress was given no authority to raise armies in times of peace; nor could any such authority be deduced from its rather nominal power to declare war. Standing armies and navies were too suggestive of militarism and monarchism to be provided for by a nation that had just rid itself of both evils. Accordingly, whatever troops were maintained were organized, drilled and equipped by the various States; there was no national military organization. The system was, as Judge Story points out, "equally at war with economy, efficiency and safety." [71]

Under the Constitution the power of Congress to raise and maintain an army or a navy is unlimited, except in respect to the length of time for making appropriations to the use of the army; and such limitation applies only to the army. Congress may make either force so large as to become burdensome, or it may abolish both altogether. Thus far, however, the good sense of the people's Representatives, the comparative isolation of the United States, and its consequent freedom from European discords have kept Congress from one extreme, while potent, obvious reasons have kept it from the other. It has been the policy of the United States since 1799 to maintain a regular army of moderate size, but in respect to the navy its policy has undergone much fluctuation.

The Navy Since the Revolution.—From the close of the Revolutionary War until 1794 the United States had no navy —at least, none worth the name. In that year trouble with Algiers impelled Congress to pass a law which provided for

[71] Story's Constitution, Sec. 1179.

the construction of six frigates. This was the beginning of the American Navy. Naval matters were then managed by the War Department, and they continued to be so managed until 1798, when Congress created the office of Secretary of the Navy. Naval success in the war with France, 1799-1801, and greater success in the War of 1812, gave great impetus to the navy, and from the end of the latter struggle until 1861 Congress could muster a fair armament on the sea. The necessities of the Civil War caused a vast increase in both ships and personnel, but when the war ended Congress entered on a policy of retrenchment: the navy was allowed to decay, and in a few years the naval list contained hardly one respectable fighting ship. In 1881 Congress awoke to the fact that the navy was at its lowest ebb since the Revolution, and set to work to remedy conditions. In 1883 Congress provided for the construction of several vessels of modern design and armament; and since then it has added steadily to the naval strength of the country, until in 1911 the United States Navy took second place among the navies of the world. Such in brief has been the history of the American Navy since the Revolution.

Military Powers of Congress.—Under the power to raise and support armies Congress may resort to any means which exigency demands. When other means fail the draft act may undoubtedly be resorted to as a means of securing men for the service. Congress may appropriate money for military equipments; for the pay, transportation, rations, and clothing of troops; for the purchase or manufacture of arms and ammunition; for the support of hospital, engineer, and instruction corps; for the construction of forts, arsenals, barracks, and defenses of all kinds; for the establishment and maintenance of hospitals, and of schools for military instruction. In short, everything necessary or incidental to the preparation, equipment, and maintenance of a national mili-

tary force of any size, or to the building, fitting out and support of a national navy, is in the hands of Congress exclusively. Not even the President may attempt to maintain a navy, or to keep on foot a standing army, when in the opinion of the Federal legislature it is not necessary.

Appropriations.—Congress is not limited by the Constitution in appropriating money for the navy, but it cannot provide for the army for a longer term than two years. As a matter of custom Congress makes yearly appropriations for each. In 1911 Congress appropriated for the army $95,440,-567.55; for the navy $131,410,568.30. These sums do not include money expended on forts and fortifications, and on the Military Academy.

Military Rules.—Under the power conferred by Clause 14, Congress has from time to time formulated rules governing the conduct of men in the military and naval service of the United States, until the Army and the Naval Regulations fill rather capacious volumes. Some of these rules are applicable to men in military circles only; others express definitely rules that commonly govern civil conduct.

The power to make rules carries with it the power to enforce them, and to punish infractions thereof. Congress may therefore establish military courts for the trial of military offenders. Hence, one who joins the army or the navy, either voluntarily or by draft, puts himself out of the pale of civil authority. Thereafter he is governed by military law, and he may be punished by a military court, commonly called court-martial, whose judgments are just as binding as the judgments of other courts. All military courts, however, are strictly criminal in their nature, and cannot decide property rights or political questions. The jurisdiction of such courts, although exclusive over matters properly before them, may be enquired into by civil courts, and if jurisdiction is found wanting the civil courts may discharge a person improperly held.[72]

[72] In re Grimley, 137 U. S., 147.

Martial Law.—Military law must not be confounded with martial law. The former is a body of positive rules; the latter is in reality the suspension of all civil law. Martial law is a sort of war measure, which can legally be called into action only in times of great exigency, or as a means of waging war. When a district is under martial law every person in it becomes subject to military rules, and to the mandates of military courts. This so subverts the usual order of things, and makes possible such great and serious abuses, that it is justified only when civil law is powerless to act, and the situation demands military control. The weight of opinion seems to be that the power to declare martial law rests in the President, as commander-in-chief of the military and naval forces of the United States. He may, however, delegate it to commanding officers.

> **Section 8, Clause 15.**—To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;
>
> **Section 8, Clause 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;

The Militia are the citizen soldiers of the country, who are liable to be called into service in cases of emergency. Theoretically every male citizen between the ages of 18 and 45 is a militiaman; but in common parlance the word militia includes only those organized and uniformed bodies of citizen soldiers maintained by the respective States, as distinguished from the regular army of the United States. The control of the militia illustrates in a measure the concurrent powers of the nation and the States. In times of peace the militia are under State authority, except when participating in maneuvers with the regular army. They are drilled and officered

by State officials, and may be subjected to special defensive duty within the State at the command of the Governor. As part of the State constabulary members of the militia may be tried and punished for offenses by State courts-martial.[73] If the United States does not provide for any special system of tactics for the militia, each State may adopt a system for itself.

On the other hand, Congress may provide a special mode of training for militiamen, which must be adopted by the States; and in times of invasion or rebellion the President may call them into the service of the country at large. When this is done they form a part of the regular army, and as such may be subject to the orders of regular military officers, and may be tried for offenses by courts-martial.

Legislation Concerning the Militia.—Congress took early action in respect to the militia. In 1792 (Rev. Stat., 1625-1629) Congress provided for the organization of the militia of the several States; and in 1795 (Rev. Stat., 1642), it authorized the President to call out the militia for the general purposes of executing the laws of the nation, suppressing insurrections, and repelling invasions. It has been judicially decided that when the President acts under this authority his judgment cannot be questioned.[74] The power to act is exclusive in him, and he alone is responsible. To warrant the President's action in these cases, it is not necessary that invaders be actually present in the country, or that an insurrection be actually in progress; he may act whenever in his judgment either danger threatens. But since the laws of the Union have effect only within the boundaries of the country, and since invasion and rebellion can take place only within such boundaries, it follows that not even the Chief Executive can send the militia for service out of the country. The

[73] Houston *v.* Moore, 5 Wheaton, 1.

[74] Martin *v.* Mott, 12 Wheaton, 19.

service of the members of the militia when called out is limited by law (32 Stat. at Large, 776) to nine months. Congress may, however, under the power to raise armies, resort to the draft act, and thus enroll into the regular army even members of the organized militia, as well as plain civilians. When this is done, the restrictions noted above do not apply. The same is true of course when members of the militia enlist voluntarily in the army.

National Service of the Militia.—In the history of the United States the organized militia have been ordered out by the President three times: in 1794, to put down the Whiskey Rebellion, an insurrection in some of the western counties of Pennsylvania; in 1812, to repel invasion; and, lastly, in 1861, to put down the rebellion in the Southern States. In the first instance, the President acted by virtue of the Act of 1792; in the other two cases, by the same act as amended in 1795. This act has never been repealed. In the war with Mexico, 1846, and again in the war with Spain, 1898, it was expedient to send troops out of the country, and militia regiments were therefore not called out. All who participated in those wars were either regular troops or volunteers.

Organizing, Arming, etc.—By the authority of Clause 16, Congress early provided for a national militia. If Congress had not acted the States would have been at liberty to do so. By act of Congress, 1792, every able-bodied male citizen, with certain exceptions, is made available for military duty, or a member of the militia of the respective States and Territories. This was amended in 1903 (32 Stat. at Large, 775) to include all aliens who have declared their intention of becoming citizens. Congress provided, furthermore, by the same act, that the militia should consist of two bodies: 1st, the organized militia, known as the national guard of the respective States and Territories; 2d, the reserve, or unorganized, militia, consisting of all other male citizens who may be liable

to military duty. The national guard, although organized by act of Congress, armed and equipped by the national government, and drilled in tactics prescribed by the same authority, is composed of State organizations. These are commanded by State officers and are amenable to State authority. But when called into active service by the President they become national troops in fact, and are then entitled to the same pay and allowances, and the same general treatment accorded to members of the regular army. The members are entitled to pensions if disabled while in the performance of duty (32 Stat. at Large, 779). They are subject to court-martial; but the trial court in the case of militiamen must be composed of militia officers (idem, 776).

Section 8, Clause 17.—To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and,

The District of Columbia.—The original District of Columbia was a tract of land ten miles square ceded to the United States by the States of Maryland and Virginia in 1788 and 1789. Later, in 1846, that part lying south of the Potomac River was retroceded to Virginia. The present district therefore contains rather less than the original, about 70 square miles in all, and lies wholly within the original boundaries of Maryland. The government of the District is peculiar, in that the people have no voice in electing their legislators. Congress acts as the District's local legislature. Its daily government is administered by a board of three commissioners: two appointed by the President and the Senate

for three years; and the third, an officer of the Engineer Corps of the army, detailed by the President alone. These commissioners appoint all minor officials, and submit each year a detailed estimate of the District's expenses to the Secretary of the Treasury. When this estimate has been approved by Congress, one-half of the amount called for is paid out of the national treasury, the rest is assessed on the taxable property in the District. This method of government is not in accordance with American ideas, for it is a denial of the right of self-government; but like the control over Territories, it must be regarded as an exception arising out of necessity. Without the power of exclusive control over the seat of government Congress could not be assured of its freedom. During a very short period, from 1871 to 1874, the District had a local self-government, resembling that of a Territory.[75] But the right of Congress thus to delegate the general legislative authority conferred on it by the Constitution is very doubtful.

Lands Purchased for Forts, etc.—The power of the United States to exercise authority over all places purchased by the consent of the State legislatures for certain needful purposes is exclusive.[76] It follows therefore that the inhabitants of such places cease, by operation of law, to be citizens of the State from which the land was purchased, and can exercise no civil or political rights under the State. Federal laws there are supreme. Not even crimes committed there are punishable under State laws, but always under Federal statutes.[77]

The right to acquire property is, however, naturally incident to sovereignty and cannot be made to depend on the good will of State legislatures.[78] The United States as a sovereign power can therefore acquire land for needful purposes with or with-

[75] 16 Stat. at Large, 419; 18 Stat. at Large, 116.

[76] United States *v.* Cornell, 2 Mason (U. S. Cir. Ct.), 60.

[77] Kelly *v.* United States, 27 Fed. Rep., 616.

[78] Prin. Const. Law, Cooley, 104, Note 4.

out legislative consent. It may take without such consent through the process of condemnation known as eminent domain (see p. 262); or it may claim title on the ground of original proprietorship. But over places thus acquired Congress may not exercise exclusive control: State authority is not ousted, provided the exercise of it is not inconsistent with the public purposes for which the land was acquired.[79] Furthermore, a State may cede land to the United States, and in so doing make any reasonable restrictions or conditions. If, for example, a State reserves the right to serve legal papers within such ceded territory, or to tax private property therein, the acceptance of the grant by the United States will imply consent to such reservations.[80]

Section 8, Clause 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.

Implied Powers.—This clause merely declares what would be otherwise necessarily implied. The common maxim that the end justifies the means applies with force to the Constitution, for wherever that instrument gives to Congress a general power to act, the particular powers necessary for the performance of the act are included by implication. Why then was this clause inserted in the Constitution? Presumably it was to remove uncertainty, and to avoid any doubt which ingenuity, jealousy or specious reasoning might raise on the subject.

The framers of the Constitution might have done several

[79] People *v.* Godfrey, 17 Johns. (N. Y.), 225. Ft. Leavenworth *v.* Lowe, 114 U. S., 525.

[80] Ft. Leavenworth R. R. Co. *v.* Lowe, 114 U. S., 525; 16 Opinions of Attorney-General, 592.

other things. They might have made the Constitution an instrument of express powers only, prohibiting Congress from doing everything not expressly mentioned—in which case the Constitution could be so strictly construed as to disarm it of all real authority. They might have attempted an enumeration of all the powers that Congress would be likely to find use for—a quite impossible task. Lastly, they might have omitted Clause 18 altogether—in which event, if we would have the Constitution anything but a splendid nullity, all the auxiliary powers, as aforesaid, would have followed by necessary implication. Rather, they chose first to enumerate certain general powers of Congress, and to conclude with the broad and sweeping statement expressed in the present clause; the obvious import of which is that Congress shall have all the incidental and instrumental powers, necessary and proper to carry into effect all those powers specifically mentioned.

"Necessary and Proper."—These rather general terms have been judicially determined to mean appropriate and fitting, rather than absolutely needful and requisite, for the purport of the clause is to enlarge, not to diminish, the powers of the government.[81] Whenever a question comes up respecting the constitutionality of a power exercised by Congress, a power not expressly granted, the query arises, Is it properly incident to an express power, and reasonably necessary to its execution? In other words, is it consistent with the spirit of the Constitution? If so, and not among those acts which are expressly forbidden (Article 1, Section 9), it is constitutional; if it is not, then Congress has no authority to act.

A vast number of legislative acts illustrate this doctrine of incidental powers. The enumerated powers of Congress are but few; yet upon what thousands of things has not that body legislated, for which the Constitution gives no express authority? Under the power to regulate commerce Congress

[81] McCulloch *v.* Maryland, 4 Wheat., 413.

provided for the exclusion of Chinese laborers,[82] and in 1807 practically destroyed American commerce by the unwise Embargo Act. Although the Constitution nowhere expressly gives Congress the right to exclude anybody from the country, or to annihilate commerce, these acts were justified as reasonable and appropriate means of regulating commerce. The Constitution does not grant to Congress the right to acquire territory out of the limits of the United States; yet Congress has so done (Louisiana, Alaska, etc), and the acquisitions have been justified on the ground that to grow and expand is properly incident to sovereignty, and reasonably necessary to the common defense and general welfare. The Constitution gives no direct authority for the establishment of national banks, or to make paper money legal tender; but Congress has done both as reasonable means of carrying on the fiscal operations of the government, for which authority is given. It might be possible to fill volumes with illustrations of acts done under the implied authority of the Constitution, but these conspicuous examples are sufficient. One, however, who wishes a fuller discussion of this doctrine of implied powers, will find it in the great case of McCulloch *v.* Md., 4 Wheaton's Reports, 413. This case settled forever the question of power by implication, and presents the most exhaustive treatment of it on record. The opinion in that famous case was written by Chief Justice John Marshall in 1819. It was owing to the broad and liberal interpretations of that remarkable jurist that the Constitution early came to be regarded as an elastic instrument, rather than the rigid, unyielding document that a strict constructionist might have made of it.

[82] The Chinese Exclusion Cases, 130 U. S., 581; 149 U. S., 698.

CHAPTER IV

LIMITATIONS ON CONGRESS AND THE STATES

ARTICLE 1, SECTIONS 9-10

LIMITATIONS ON CONGRESS

Article 1

Section 9, Clause 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.

We have enumerated and discussed to some extent the powers of Congress. We have seen that the Constitution has expressly granted to Congress some rather general powers, and that the grant of those powers necessarily implies the right to exercise other powers. It is plain therefore that Congress may legitimately exercise any power expressly granted to it, or any power necessarily implied by such grant—except in respect to those things which the Constitution expressly prohibits to Congress. What these express limitations are forms the subject of the present chapter.

The Slave Trade.—Section 9, Clause 1, when written, had direct reference to the slave trade. Among the members of the Constitutional Convention there was a disposition to end the trade at once; but opposition among the Southern delegates was strong, and the States of South Carolina and Georgia even made the limitation in the present clause a condition precedent to their joining the Union. Section 9, Clause 1, therefore, is in the nature of a compromise. The limitation here is purely congressional, obviously leaving to the States for a short period the right to prohibit the trade or not as they chose. It is a noteworthy fact that Massachusetts had already prohibited slavery, and before the limitation on Congress had

expired several more had done likewise. Twenty years after the adoption of the Constitution Congress exercised its power to abolish the traffic in slaves, by passing a prohibitory act, March 2, 1807, to take effect on January 1, 1808. With the passage of that act the restrictive part of the clause under discussion became once and for all a dead letter in the Constitution. Except for this restriction, Congress, at any time after the adoption of the Constitution, might have abolished the slave trade as a reasonable regulation of commerce. It is curious to note, in passing, that, although there are several allusions to slavery in the Constitution, neither the word slave nor slave trade is mentioned in the original instrument.[1] The words slavery and slave do occur in the 13th and 14th Amendments respectively.

The words migration and importation, as used in this clause, have slightly different applications. The first applies to voluntary comers, the latter to involuntary comers. It was held in the case of Gibbons *v.* Ogden, 9 Wheaton, 206, that the power to regulate commerce applied equally to vessels engaged in transporting men who pass voluntarily from place to place, and those engaged in transporting men who pass involuntarily. Neither migration nor importation could be prohibited prior to 1808. The right to levy a tax of ten dollars on the importation of persons has never been exercised.[2]

Section 9, Clause 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.

The Writ of Habeas Corpus.—The writ of *habeas corpus* is a written order issued by a court directing that a person in

[1] Constitution, 4, 2, 3; 1, 2, 3.

[2] The masters of immigrant ships are required to pay a tax of $4.00 per head for every immigrant brought into the United States. 34 Stat. at Large, 898; see p. 99.

confinement be brought before it that the legality of the confinement may be determined. The name comes from the phraseology of the ancient form of the writ, the words *habeas corpus* meaning "you may have the body." The writ is never issued except on petition, either by the person in confinement, or by some one acting for him. The petition, which should be in writing and verified by affidavit, presents the facts in the case, to wit: In whose custody the prisoner is detained and by what authority, if any; and ends with a prayer for an immediate hearing. The paper is served by the court's executive officer: in the State courts, by the sheriff; in the United States courts, by the marshal. The person to whom the writ is directed must without delay produce the body of the prisoner before the court and show cause why the prisoner is held in restraint; or if unable to produce the body, show cause for that also. It is a sufficient return of the writ to show that the prisoner is detained by superior authority. In order that the writ may be always efficacious, no judge having jurisdiction may legally refuse to listen to the petition. If on the appearance of the body, and a recital of the evidence, the judge finds that the person is held without sufficient cause, he must order immediate release. In this connection it is well to bear in mind two things: first, that the writ of *habeas corpus* is a writ of right, but it is not a writ of course: for, although anyone in confinement may demand it, the judge is not bound to grant it except for cause shown; second, that the writ does not bring about a final determination of one's guilt or innocence, but merely compels an immediate hearing on the question of the legality of one's confinement. Before the writ came into general use in England men were thrown into prison on trumped up charges, there left to languish for months, and even years, having no power to compel an immediate hearing of their cases. This is hardly possible now.

The word confinement herein used includes not only cases

of actual imprisonment, but the exercise of any illegal authority by one person over another. Thus the writ may be employed by a parent to obtain possession of a child, or by a guardian for the possession of his ward. It is also used to secure the freedom of a sane person unjustly held in an asylum under color of insanity.

This great bulwark against oppression and tyranny is one of the oldest writs known. Its origin is lost in the mists of antiquity. Its beneficent principles are to be found in the Pandects of Justinian, and traces of the modern writ are in the Year Book of Edward III. The individual right to sue out the writ is recognized by the courts of every State in the Union, and most, if not all, the State constitutions secure the right by provisions similar to that in the Federal Constitution. Exigencies may arise, however, when the suspension of all *habeas corpus* privilege may be expedient; but such action is so conducive to oppression that it cannot be taken except when the safety of the general public demands rigorous measures.

The Power to Suspend.—In England, Parliament alone may suspend the privilege of the writ of *habeas corpus*. In the United States, similarly, the power to suspend rests in Congress.[3] A limited power to suspend, it is held, may be exercised by others than Congress: first, by State legislatures, when the power is not wholly forbidden by the State constitutions; second, by military chiefs in declaring martial law, for that is a practical bar to all civil process. This is not of course an actual suspending of the writ, as contemplated by the Constitution, but in effect it amounts to the same thing. A prisoner of war, therefore, or a person held under the law martial, or whose offense is properly cognizable before a court-martial, is not subject to the writ of *habeas corpus*.[4] No State

[3] Ex parte Merryman, 9 Am. Law. Register, 524.

[4] Johnson *v.* Sayre, 158 U. S., 109.

legislature has as yet suspended the privilege of the writ, except that of Massachusetts, which at the time of Shays's Rebellion, 1786, suspended it for eight months. Congress, by act of March 3, 1863 (12 Stat. at Large, 755), authorized President Lincoln to suspend the privilege of the writ in any part of the United States, whenever in his judgment it was necessary. The previous act of the President, April 27, 1861, in suspending the writ on his own authority was probably unconstitutional.[5]

Federal v. State Authority.—Practically any judge of any court of record, whether State or Federal, may issue the writ of *habeas corpus*. As a general principle, each of these powers, State and Federal, is supreme within its respective sphere of action, and neither may interfere with the enactments of the other, or intrude within its jurisdiction; but where there occurs a conflict of authority the national government is supreme, until the matter can be settled by the Federal courts.[6] It follows therefore that a person held in custody by the authority of the United States cannot be released by *habeas corpus* proceedings on the part of any State court. Neither may a United States judge release a person held under State authority—unless perhaps to secure his presence as a witness in a Federal trial.

Section 9, Clause 3.—No bill of attainder or ex post facto law shall be passed.

Bills of Attainder.—A bill of attainder is a legislative act imposing punishment without judicial trial. When the punishment imposed is less than death the act is called a bill of pains and penalties. Neither has any place in modern civilization. The English constitution does not prohibit bills of

[5] 3 Pol. Sc. Quart., 454; 5 Am. Law., 169.

[6] Ableman *v.* Booth, 21 How., 506. Tarble's Case, 13 Wall., 397.

attainder, and Parliament has in its long history passed many such acts; but it is doubtful if it ever passes another. In the United States, immediately after the Revolution, so strong was the feeling against English sympathizers, that many State legislatures passed acts in the nature of pains and penalties, depriving certain royalists of their property holdings, and thereby aroused much bitter feeling. The Constitution wisely prohibits both Congress and the States from passing bills of attainder, or anything in the likeness of them. Accordingly, the test oath law, passed by Congress at the close of the Civil War, which required all attorneys practicing before the United States courts to swear that they had never taken up arms against the government of the United States, was declared unconstitutional, for it was in effect a bill that imposed punishment on certain persons, without giving them opportunity for defense.[7] On similar grounds, that part of the constitution of Missouri, which required an expurgatory oath of all priests, teachers, and others, was held to be void.[8] These decisions, it is fair to say, were given by the Supreme Court at a time of high sectional feeling, and the minority judges rendered a strong dissenting opinion in each case. No sane person doubts, however, that such legislative enactments, although not literally bills of attainder, are so much like them in general effect, that the country is better off without than with them.

Ex Post Facto Laws.—These, like bills of attainder, are a part of the machinery of tyrants, and so contrary to the spirit of American institutions that they could not be tolerated in the United States, even if not expressly forbidden. The term *ex post facto* means literally "after the deed." An *ex post facto* law therefore is a law which makes an act criminal which was not so when committed; or which increases the punish-

[7] Ex parte Garland, 4 Wallace, 333.

[8] Cummings *v.* State, 4 Wallace, 277.

ment after the deed; or which so modifies the rules of evidence after the deed as to render conviction easier.[9] The term is of limited application, for it applies only to criminal, not to civil, proceedings. Such a law is retroactive, or retrospective; but all retroactive laws, although they may be against public policy and unjust, are not *ex post facto,* but only such laws as relate to crime. Neither Congress nor the States are forbidden to enact retroactive legislation, but both are forbidden to pass laws that are *ex post facto.*

In exception to the foregoing it should be said that retroactive laws that impose no hardship cannot be considered *ex post facto.* Thus legislation that mitigates the punishment after the deed is not to be condemned on this ground[10]; nor acts that effect merely technical changes in the procedure in criminal cases, not affecting the substantial rights of the accused[11]; or that allow a previous conviction to work a greater punishment of the crime in question[12]; or that allow accused persons to be extradited for acts done before a certain law or treaty is established.[13]

Section 9, Clause 4.—No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

Capitation Taxes.—A capitation tax is a poll tax: that is, a tax levied on the person. The necessary implication of this clause is that there are other direct taxes besides poll taxes, but what they are is left for the government to determine. It is interesting to note, however, that the only direct tax mentioned in the Constitution, the capitation tax, Congress has

[9] Thompson *v.* Utah, 170 U. S., 343.
[10] Ratzky *v.* People, 29 N. Y., 124.
[11] Duncan *v.* Mo., 152 U. S., 377; Gibson *v.* Miss., 162 U. S., 565.
[12] Rand *v.* Commonwealth, 9 Grattan (Va.), 738.
[13] In re Giacomo, 12 Blatch., 391.

never yet levied, although certain States have at various times done so.

The reason for thus restricting the levy of direct taxes is largely historical. It was not to render taxation of this kind impossible, or even more than ordinarily difficult, but to maintain some sort of equilibrium between representation in Congress and direct taxation—a matter already discussed in connection with Clause 3, Section 2, Article 1, of the Constitution. But slavery has long since disappeared from the United States, and there now seems to be no sufficient reason for perpetuating this requirement in the levy of direct taxes. To levy taxes according to the census in the several States has been found to be both inconvenient and difficult, but as a change in this respect would require a constitutional amendment, it is not likely to be soon brought about. It may be said, however, that of all taxes, direct taxes are the least popular. Hence, the difficulties attending the levy are not without a beneficent aspect: in a measure they are a guaranty that direct taxes will be levied only in times of great necessity.

Section 9, Clause 5.—No tax or duty shall be laid on articles exported from any State.

Export Taxes.—This clause has immediate reference to Congress; a later clause imposes a like restriction on the States (Article 1, Section 10, Clause 2). To exempt articles of export from taxation does in a measure foster home production and the export trade, but whether it was wise to incorporate such exemption in the Constitution and make it eternal and absolute is certainly open to question. It is worthy of note that in the Constitutional Convention such influential men as Washington and Madison strongly advocated the power to tax exports as well as imports.

In connection with this clause one must distinguish between an export tax levied as such, and from which revenue is de-

rived, and a tax in the form of an excise on articles of domestic growth or manufacture, which may be designed for the export trade. Where articles intended for export are required to bear a stamp, for which a nominal fee is paid, to show their purity or genuineness, such requirement is not an export tax.[14] But such a stamp required for purposes of revenue comes within the prohibition as a tax on exports.[15]

Section 9, Clause 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.

Commercial Preferences.—It will be remembered that commercial irregularities led to the Annapolis Convention, which in turn led to the Convention that framed the Constitution. It was the aim of this Convention to correct these troubles, and to make sure that in commercial matters, at least, the government should treat the States with absolute equality. In their zeal the members were led into repetition, for the present clause but reiterates what is already expressed in Section 8, Clause 1, that all duties shall be equal. But it further insures the equality of the States by saying that in no possible manner shall matters of commerce and revenue ever be so regulated by Congress as to result in the exaltation of the ports of one State over those of another.

Entering and Clearing.—The prohibition expressed in the last part of Clause 6 seems to repeat in a measure the thought given in the first part: for to compel vessels bound to or from one State to enter and clear from another is plainly preferring the ports of one over the ports of another. The restriction was doubtless inspired by the harassing conditions of pre-revo-

[14] Pace *v.* Burgess, 92 U. S., 372.
[15] Almey *v.* California, 24 How., 169.

lutionary days, when American vessels bound to any European port were obliged to enter and clear first from a British port. To-day it has lost much of its significance.

To enter a port is to report the ship to the proper official and obtain permission to land or to obtain cargo. To clear is to obtain from the proper officials the necessary papers for sailing from the port. Both of these requirements are for the good of the vessel and the country to which it comes, and often to the country to which it goes. The papers that a ship is generally required to carry as evidence of her character, quality and good intentions are: certificate of registry, sea letter or passport, crew list, log book, charter party—if under affreightment—invoice, and bill of lading. The list varies somewhat with different nations, but the want of the requisite papers, or any of them, gives a vessel a suspicious character. A vessel, however, that has gone through the necessary formality of clearing from any port in the United States cannot, by any act of Congress, or by any usurpation of sovereignty on the port of any State, be compelled to clear from another before reaching its destination; nor can a vessel bound to a port of the United States be compelled to enter first any special port at the designation of Congress, or of any State.

Although a State may not lay imposts, or substantially regulate commerce, it may make minor needful rules governing the shipping about its ports, even though in so doing it makes restrictions not demanded at other ports. Thus a State may make rules for pilotage, provided they are reasonable, and require ship owners to pay small pilotage fees.[16] But a State statute requiring every shipmaster to pay a fee for every steerage passenger brought by his vessel to the ports of the State is void as an attempt to lay duties and to regulate commerce unduly.[17]

[16] Cooley *v.* Port Wardens, 12 How., 299.

[17] The Passenger Cases, 7 How., 283.

Section 9, Clause 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.

Appropriations.—This clause is a check on the Executive. Congress holds the purse strings of the nation, and not a penny of national funds can be paid out except in consequence of Congressional appropriations. Were it otherwise, and had the Chief Executive unlimited power to draw on the treasury, there is no telling to what heights of despotism an ambitious President might lift himself by the lavish use of money. Not even a lawful debt against the government can be paid by any official until Congress has acted in the matter. In 1855 a Court of Claims was established to determine the legality of claims against the United States. But even the favorable decision of that court does not constitute a lien on Federal property,[18] or authorize a lien on the public funds. The function of that tribunal is merely to determine what claims against the government are legally valid, and what are not. A creditor of the national government has no means of compelling immediate payment; he must await the action of Congress.

It is the duty of the Treasurer of the United States to keep strict account of all government expenditures and receipts, and it is the duty of the Secretary of the Treasury to report the same annually to Congress. These financial reports are usually voluminous, and form a large part of the executive documents of the nation. Thus the financial operations of the country are kept open and above board. The meetings and discussions of Congress are for the most part public, and the published reports of the Secretary of the Treasury keep the people informed as to how their money is spent.

[18] United States *v.* Barney, 3 Hall's L. J., 130.

Section 9, Clause 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.

Titles of Nobility.—Equality is the foundation of American institutions; to create a privileged order would enter a wedge against democratic government. In Section 10 of this Article of the Constitution the States likewise are forbidden to grant titles of nobility. These two provisions are perhaps unnecessary, but they were deemed reasonable precautions to insure democratic equality in the United States.

Presents to Officers.—In forbidding public officials to accept presents from any king, prince, or foreign State, the framers of the Constitution placed a check on the possibly corrupting influence of European and other governments. That it is possible for one government to corrupt the officials of another has been evidenced too often in history to be scouted to-day. Hence, the prohibition herein expressed is wise. It applies to both military and civil officers. As early as 1803 an amendment was offered in Congress to extend the restriction to private citizens; but the proposed amendment was never ratified. It is, however, within the power of Congress to remove the prohibition, and in some instances this has been done.

Section 10, Clause 1.—No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

Treaties, Alliances, or Confederations.—Treaty making is exercising sovereign power. When one nation forms a treaty

with another the act is a formal recognition on the part of each that the other is an independent State. It is with reason therefore that the Constitution forbids to the States all acts suggestive of a separate national existence.

It is not unconstitutional, however, for States to have communication with each other as States, and to enter into agreements, so long as such acts in no way prejudice the supremacy of the United States.[19] A phrase in Clause 3 of this Section expressly allows such compacts with the consent of Congress, for it is plain that there are many matters on which States may agree, matters that promote more harmonious relations, etc., that do not work any serious political changes or affect the nation at large in any way. The consent of Congress herein required may be expressly given, or it may be implied by the subsequent action of Congress—as where two States agree to a change in their boundary lines, and Congress afterwards districts the two in accordance with this change.[19] An attempt, however, on the part of a State to deliver up a fugitive from justice to a foreign State has been construed as an attempt to enter into an unauthorized agreement, as a usurpation of power belonging to independent sovereignty.[20] So any compact between two States, or among several, tending to enlarge the political powers of any one of them would certainly come within this constitutional limitation. (See also p. 162.)

Letters of Marque and Reprisal.—To issue letters of marque and reprisal is, like treaty making, the exercise of sovereign power. Had the individual States the authority to grant such letters, it would be within their power to embroil the entire country in war with its certain costliness and possible disaster. All war powers, great and small, are more safely vested in the national legislature. Congress may, however, even delegate

[19] Virginia *v.* Tenn., 148 U. S., 503. Wharton *v.* Wise, 153 U. S., 155.

[20] Holmes *v.* Jennison, 14 Peters, 540.

this great power to the States; and in certain extreme cases the latter may engage in defensive war without the permission of Congress. (See Clause 3 of this Section.)

Coining Money.—As to the wisdom of forbidding to the States the coinage of money, one has but to review the monetary history of the States just previous to the adoption of the Constitution. Then each State coined money and adopted its own monetary standards. There was uniformity nowhere. It is utterly impossible to have a stable system of finance in the United States, unless all power over the common medium of exchange is vested in one authority.

Bills of Credit.—What constitutes a State bill of credit has been the subject of many legal battles. It has long been settled, however, that any written or printed certificate, issued by a State, involving the credit of the State, and appropriate for circulation as money, is a bill of credit. Certain loan certificates, issued by the State of Missouri in 1821, although not made legal tender nor designed to circulate as money, did in fact so circulate, and were therefore classed as bills of credit, and the statute authorizing them was declared void.[21] Although the Constitution is silent as to the power of Congress to issue bills of credit, it expressly forbids the power to the States. But what a State may not do in this respect, it seems that its fiscal agents may do. Thus notes issued by a bank, chartered by a State, have been declared good, and not in conflict with this prohibition.[22] But since the imposition of the Federal tax of 10 per cent on the notes of State banks, these institutions have no longer found it profitable to issue such paper. On the other hand, State certificates of stock and State bonds are not bills of credit, for they do not circulate as money. To prohibit their issuance on such grounds would be to deprive the States of power to borrow money.

[21] Craig *v.* State of Mo., 4 Peters, 410.

[22] Briscoe *v.* Bank of Ky., 11 Peters, 257. Darrington *v.* Bank of Ala., 13 How., 12.

Legal Tender.—The restriction in respect to legal tender, as well as the two limitations preceding, was the result of an effort on the part of the framers of the Constitution to secure a uniform standard for all commercial transactions. Without this restriction a State might declare any convenient medium of exchange legal tender, with the result that there might be as many different ways of satisfying a debt as the minds of different legislators could conceive. But this is not the worst. It is not to be supposed that all State legislatures would agree upon the same legal tender, and if they did not, the result would be financial chaos. Coining money, emitting bills of credit, and creating legal tender—these are serious acts, and the power to perform them can better be lodged in one authority than in many.

Bills of Attainder, etc.—This restriction requires little comment. It would be obviously absurd to allow States, even by implication, to exercise powers that are forbidden to the general government.

Contracts.—A contract is an agreement between two or more parties. It may be *express,* as where the terms are openly avowed; or *implied,* as where common reason, or justice, supplies the terms from the nature of the transaction, or from the acts of the parties—for it is an axiom of the law that every man intends the natural consequences of his acts. A contract may also be *executory,* as where one binds himself to do, or not to do, something in the future; or *executed,* as where the terms of the agreement have been performed. A mutual contract may thus be executed by one party, and remain executory as to the other. The word contract, as used in this clause of the Constitution, includes all four kinds.[23]

The Obligation of Contracts.—The obligation of contracts is their enforcibility, or that power of the law, read into every valid contract, which may be called into action to compel

[23] Holmes *v.* Holmes, 4 Barber, 295.

the keeping of the terms of the agreement. To illustrate: If A promises to pay B one hundred dollars in return for work performed, this mutual agreement is an express, executory contract. If after the work is performed A refuses to pay B, the latter can enforce his legal right against A. If B performs work for A at the instance of the latter, and nothing is said about the price, A is under an implied contract to pay B a reasonable sum; and the obligation of that contract is as good as the other. But if, meanwhile, by a change in the municipal law, A is somehow released from his contract to pay B, or the latter is deprived of his right of action against A, the obligation of the contract is said to be impaired. It was to prevent State legislatures from thus interfering with the vested contract rights of its citizens, either wilfully or otherwise, that the present clause was inserted in the Constitution. To impair the obligation of contracts, however, a law must, like an *ex post facto* law, be passed subsequent to the contract, States have full power to enact laws regulating future contracts among their citizens.

What Impairs a Contract.—Any law that enlarges, abridges, or changes the intentions of the contracting parties impairs the obligation of the contract; and the degree of such change is not important. Any law which imposes conditions not before expressed or understood, or which does away with those that are expressed, impairs the obligation. Likewise, a law which makes a contract invalid, which was valid when made, or which releases either party, impairs the obligations.[24] On the other hand, a law that reasonably limits the rights of either party to enforce the contract, or that extinguishes some remedy, does not impair the obligation, provided some substantial remedy is still left. Thus statutes of limitation and laws that discharge debtors from prison, or that forbid their incarceration, are valid. They are sensible limitations, and do not deprive the creditor of his substantial remedies.

[24] **Sturgis *v.* Crowningshield, 4 Wheat., 197.**

Charters.—A charter, as understood in municipal law, is a legislative document creating a corporation. Charters may be either public or private. They are public if granted to public corporations, such as a city or township; they are private if granted to private corporations, such as a private bank or a bridge company. A private charter is a contract in the meaning of the Constitution[25]; a public charter is not. The reason for this distinction is not hard to understand. A private charter is a grant of privileges, under which multifarious private rights become vested; a public charter is practically a statute enacted for the public good. Municipal corporations are created as necessary conveniencies in government. They are parts of the governing power of the State, and hence their powers and privileges are subject to legislative modification and recall.

Exceptions.—There are some exceptions to the general principles stated above. If a charter contains a clause reserving to the State legislature the right of repeal, or modification, that right remains. To repeal or to modify is then in accordance with the charter itself. The same is true if the State constitution provides that all charters shall be subject to legislative control.[26] Furthermore, all charters are subject to the superior right of the State to exercise the power of eminent domain,[27] and to the restraints of the State's police power,[28] and all other reasonable regulations imposed by State authority. There is no reason why contract rights should be any better off in these respects than any other property within the State. It should ever be borne in mind that the welfare of

[25] Dartmouth College *v.* Woodward, 4 Wheat., 518.

[26] Murray *v.* Charleston, 96 U. S., 432. Railroad Co. *v.* Georgia, 98 U. S., 359.

[27] Const. Limitations, Cooley, 6 Ed. 339. West River Bridge Co., *v.* Dix, 6 How., 507.

[28] U. S. *v.* Dewitt, 9 Wall., 41.

the people is of supreme importance, and that while a State may irrevocably bind itself by contracts with persons, or corporations, or with other States, it cannot do so to the serious detriment of its people, or at a loss of any of the essential powers of sovereignty. In the exercise of its police power, a State may lawfully modify or annul many of its agreements having contractural elements in them, when such action results in moral or physical good to the people. Thus no license laws are valid, even though they deprive some individuals of the right to manufacture and sell liquor; and railroad companies may be compelled to fence in their tracks, or to slow down their trains at exposed places. Such regulations are reasonable precautions for the public safety.

Grants.—There is no discrimination between public and private grants, as with charters; each is irrevocable when completed. A grant extinguishes the right of the grantor, and implies a promise on his part not to reassert it. In this respect a State has no greater power than its humblest citizens. A grant is an executed contract, and as such is not to be impaired by future legislation. Thus when a State makes a grant of land to an individual, or to a corporation, the grant cannot be repealed or modified by any succeeding legislature. In 1758 the Colonial legislature of New Jersey authorized the purchase of a tract of land within the State for the use of the Delaware Indians, and exempted the land from taxation. In 1803, the Indians having all died, the land was sold by legislative authority to private persons, and in 1804 the legislature repealed the law of 1758 exempting the land from taxation. It was decided, however, that the act of 1758 was in the nature of a contract and irrepealable, and the act of 1804 was therefore unconstitutional.[29] This case established the constitutional principles that a State cannot annul a conveyance, when once made, or repudiate an exemption when once created.

[29] N. J. *v.* Wilson, 7 Cranch., 164.

A State may therefore exempt parties or lands from taxation, and if the terms of the exemption are clear, and the exemption is not made as a mere favor, it becomes irrevocable.[30]

Public Offices.—An office holder gets his position either by election or by appointment. While a State or municipality is always under an implied contract to pay for services rendered in office, the office itself is not such a contract as may not be impaired by subsequent legislation. A public office may be modified or abolished at any time, unless some constitutional provision expressly prohibits such change.

Special Privileges.—Generally speaking, all special privileges obtained under the general law of the State, such as licenses to carry on a business not open to the general public, or exemptions from military or jury duty, or exemptions of property from taxation, may be taken away by subsequent legislation. These are looked upon as special favors, and are not contracts within the prohibition of the Constitution forbidding the impairment of contracts.[31] The case of Stone *v.* Miss., which is in point, was as follows:

"In 1867 the legislature of Mississippi granted permission to a certain lottery company to carry on its business for twenty-five years. In 1867, however, the State amended its Constitution by a clause forbidding lottery companies to do business within the State. Stone, for conducting the lottery organized under the Act of 1867, was sued by the attorney-general of Mississippi. He maintained in defense that the amendment under which he was sued was unconstitutional in so far as it applied to him. The court, distinguishing between a *charter* and a mere *license* to enjoy privileges for a time, held that—

"1. While a private charter is irrevocable, a license may be revoked at any time.

"2. Lotteries are public evils, and no legislature can for-

[30] New Orleans *v.* Houston, 119 U. S., 265.

[31] Stone *v.* Miss., 101 U. S., 814. Fell *v.* State, 42 Md., 71.

ever defeat the will of the people in respect to such business by granting an irrevocable charter.

"3. Under the so-called police power a State may depart from the strict letter of the constitution where such departure is reasonable and for the general good of the people."

Titles of Nobility.—The Federalist, No. 84, has the following to say regarding this restriction: "Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner-stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people."

> **Section 10, Clause 2.**—No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

States May Not Lay Duties.—This clause, in a general way, reiterates the fact that all interstate and foreign commerce is under the exclusive control of Congress: for to tax imports or exports is to control commerce in a greater or less degree. The framers of the Constitution determined that the commercial interests of the nation would prosper better under the control of one central authority than under many scattered ones. At the same time they recognized the fact that the individual States were entitled to some discrimination in the matter of imports and exports; and, furthermore, that the restriction of their right to tax articles of commerce should not interfere with their inherent right to tax the property of their own citizens for municipal purposes. In other words, they realized the necessity of State inspection laws, and of ordinary State

taxation; and the courts have many times distinguished between export or import duties, levied as such, and reasonable restrictions on exports and imports imposed in the interests of public health, and internal revenue taxes on goods that might or might not become subjects of interstate or foreign commerce.

Taxes on Exports.—Although the States are forbidden to levy export taxes, they may pass various laws, in the interests of public health, even if the result of such laws is to limit the export trade. For example, a State may entirely prohibit the exportation of game shot within its borders[32]; and it may prohibit the manufacture of liquor, including liquor intended wholly for the export trade.[33] Furthermore, since States may undoubtedly tax the property of their citizens for domestic purposes, the fact that certain goods produced or manufactured within the State are designed for shipment beyond the State does not exempt them from such taxation.[34] The solution in these cases, as in so many others, depends on the question of reasonableness and intent. If the tax, or the restriction, is reasonable, and the purpose of it is not to limit trade beyond the State, it is not likely to be pronounced invalid by the courts.

Inspection Laws.—These are undoubtedly restrictions on commerce, but they are expressly allowed by the Constitution. They provide for the examination and approval of goods intended for export or for domestic use; their object is to preserve the character of the goods and to protect the community against fraud. The tax, or duty, necessary for the execution of such laws is in the nature of a fixed fee paid for the labor of the inspection. The net proceeds of these fees, however, are for the use of the treasury of the United States. Thus States

[32] Geer *v.* Conn., 161 U. S., 519.
[33] Kidd *v.* Pearson, 128 U. S., 1.
[34] Coe *v.* Errol, 116 U. S., 517. Pace *v.* Burgess, 92 U. S., 372.

are effectually prevented from gaining a revenue from imports or exports under the cover of inspection fees.

Character of Imported Goods.—The general rule is that imported goods do not lose their character as imports until the original package has been broken up for use or for retail by the importer, or until the package has passed from his hands to the hands of the purchaser. Goods in the original package, or bale, while in the hands of the importer, are not subject to State taxation, but become so when the package, or bale, is broken up by the importer, or when the goods pass to the hands of a purchaser. Goods in transit are articles of interstate commerce until received at their destination. If received at the ports of one State, but destined for the ports of another, they are not taxable until they have arrived at their destination.[35] It has been held in a number of cases that the words imports and exports, as used in this connection, refer to foreign commerce only, not to commerce between the States. Thus, although States may not levy an import tax on goods brought in from other States, they may tax such goods as property of their citizens, even in the original package.[36]

Indirect Taxation.—For a State to tax imports or exports indirectly is quite as unlawful as to tax them directly. The State of Maryland once enacted a law requiring all importers of foreign goods to take out a license costing fifty dollars. The State of California enacted a law requiring a stamp on all bills of lading for gold exported from the State. Both laws were declared unconstitutional by the Supreme Court: the first as an indirect tax on imports[37]; the second as an indirect tax on exports.[38] Neither could be justified as an inspection law.

[35] Brown *v.* Maryland, 12 Wheat., 419.

[36] Brown *v.* Houston, 114 U. S., 622. Woodruff *v.* Parham, 8 Wall., 123.

[37] Brown *v.* Maryland, 12 Wheat., 419.

[38] Almey *v.* Cal., 24 How., 169.

Section 10, Clause 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.

Tonnage Dues.—Tonnage is the carrying capacity of a vessel reckoned in tons. In England tonnage is the number of tons burden a ship can carry; in the United States it is the vessel's internal cubic capacity, reckoned in tons of 100 cubic feet each.[39] Since this is estimated rather generally, however, the official tonnage of a vessel in the United States is below its actual capacity to carry freight.[40] The duty of tonnage, prohibited by this clause in the Constitution, is a charge upon a vessel based on its tonnage for the privilege of entering or leaving port, or of navigating certain waters. If this restriction were not in the Constitution, States might seriously hamper both interstate and foreign commerce under the guise of tonnage dues. Hence, any charge levied upon a vessel as an instrument of commerce, or for the privilege of trading at a port, is void.[41]

A ship, however, is property, and as such may be taxed by the State in which the owners reside.[42] Furthermore, wharfage charges, or fees for the privilege of lying at wharves and discharging cargo there, are not duties of tonnage, even if graded according to the carrying capacity of a vessel.[43]

Troops and Ships of War.—The word troops used in this clause means "standing army," not militia. The Constitu-

[39] R. S., 4150, *et seq.*

[40] Roberts *v.* Opdyke, 40 N. Y., 259.

[41] Steamship Co. *v.* Wardens, 6 Wall, 31. Peete *v.* Morgan, 19 Wall., 581.

[42] Transp. Co. *v.* Wheeling, 99 U. S., 273. St. *v.* Ferry Co., 11 Wall., 483.

[43] Packet Co. *v.* Keokuk, 95 U. S., 80.

tion recognizes the necessity and value of the States' militia; in fact the 2d Amendment declares that a well regulated militia is necessary to the security of a free State. But for a State to maintain regular troops and vessels of war would be to assume the appearance of a sovereign and independent power. The general power to declare war, and to maintain armies and navies, is wisely placed in the Federal government. But in cases of sudden invasion, or of imminent danger of such, a State may take the necessary steps for self-defense without waiting for Congress to act.

Agreements and Compacts Forbidden.—It should be noticed that the restrictions in the first clause of Section 10 are absolute; those in the second and third clauses are qualified. In the first all treaties, alliances and confederations among the States are wholly forbidden; in the third States may enter into compacts and agreements if Congress consents. What the precise difference is between "treaties, alliances and confederations," and "compacts and agreements," the Constitution does not make clear. But the reasonable, if not probable, intent of these two restrictions so different in character is, on the one hand, to forbid absolutely all acts that would tend to increase the power and influence of one State, or group of States, at the expense of other States, or of the national government, or that would tend to clothe a State, or group of States, with the dress of sovereignty; on the other hand, it is not to make impossible that reasonable intercourse and mutual action concerning questions of boundary and other matters of common interest which should tend to promote harmony among adjoining States, but which do not immediately concern the Federal government. This matter was discussed somewhat under Section 10, Clause 1, page 151, and need not be further treated here.

When the consent of Congress is necessary to legalize the act of a State that consent may be expressly given, or it may be

implied from the subsequent attitude of Congress. It is implied when Congress adopts the particular act by sanctioning its objects and enforcing them. Where a State is admitted into the Union upon a compact between it and the State of which it was formerly a part the act of admitting the State is an implied consent to the compact.[44]

Retrospect.—Here, at the end of the first Article to the Constitution, it is well for the student to reflect a little upon what he has read. It was the task of the makers of the Constitution to set up a strong central government without making it despotic, to bring into harmony thirteen jarring States, and to make them subordinate to that government, without making them subject to it. That they did the task well, later history has amply shown. In the language of Chief Justice Story, "We cannot but be struck with the reflection, how admirably this distribution and division of legislative powers between the State and the national governments are adapted to preserve the liberty and promote the general happiness of the people of the United States." [45]

[44] Case of the admission of Kentucky. (See Green *v.* Biddle, 8 Wheat., 85.)

[45] Story's Constitutional Law, Vol. 2, 312.

CHAPTER V

THE EXECUTIVE POWER

ARTICLE 2, SECTIONS 1-4

THE EXECUTIVE POWER

Article 2

Section 1, Clause 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:

Executive Power.—The judicial and the legislative powers are vested in many persons, the executive in one. Executive power is directing power. Human experience has shown that such power is best lodged in a single responsible hand; that to divide it is to divide responsibility and thereby open the way to dissension, feebleness, and probable failure. One defect of Rome as a republic was that it had too many executives; the great trouble with the Articles of Confederation was that they provided for no executive, but placed all powers of government in a congress of a varying size. On the other hand, laws can best be made and judgments most fairly rendered by assemblies of men, for such matters require deliberation, discussion, and the meeting of many minds.

Executive Immunity.—It is the work of the Chief Executive to see that the laws passed by Congress are faithfully carried out, and in a large sense to direct the business policy of the nation. In carrying out his work the President is assisted by an army of minor officials, who are responsible to him or to the courts for the faithful performance of their duties. But the President is responsible to none. He is above the law in the exercise of the functions of his office. For willful misfeasance he may be impeached by Congress and removed from office, and if at the end of his term he has been found weak or in any way undesirable he may fail of re-election to a second term; but in

no other way can he be made to suffer for acts done in the performance of official duty. He cannot be controlled by the judiciary by mandamus proceedings,[1] by injunction,[2] or by any other means.[3] Executive officers of lesser rank, such as heads of departments, are likewise exempt from judicial interference in respect to acts that involve their discretion, but not in respect to ministerial acts, or acts required by the law to be done.[4] As to *unofficial* acts done by the President and other executive officers there is no immunity. That is, for unlawful acts done as private citizens they are probably as amenable to the courts as are other private citizens.

Term of Office.—In the Constitutional Convention it was suggested that the presidential term be limited to seven years, and that there should be no re-election. Both these suggestions failed of adoption. The office was finally limited in length to four years, and no clause was inserted in the Constitution forbidding a re-election. Under the law there is no limit to the number of presidential terms to which a man may be elected; but the general feeling among the people has always been that third-term Presidents are not desirable. A number of Presidents have, however, served two terms.

Whether one term is better than two, and whether re-election should be forbidden, are perhaps idle questions to discuss here. On general principles it would seem that the term of office of the Chief Executive should not be so long as to allow a bad man in office to bring ruin on the country, or so short, or the number of terms so limited, as to deprive the nation prematurely of the services of a good man.

[1] Boynton *v.* Blaine, 139 U. S., 306.

[2] New Orleans *v.* Paine, 147 U. S., 261. Miss. *v.* Johnson, 4 Wall., 475.

[3] Spaulding *v.* Vilas, 161 U. S., 483.

[4] Kendall *v.* U. S., 12 Peters, 524.

Section 1, Clause 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.

Presidential Electors.—Historically this clause is a remarkable illustration of how a part of a written constitution may be changed in its obvious purpose without repealing a word or blotting a line. By it the framers of the Constitution evidently meant to do two things: to take the election of the President out of the hands of the people, and to place it above popular clamor and party prejudice. They failed largely in both. That the President should not be chosen by the people they placed his election in the hands of a few electors to be appointed by the States in such manner as the legislatures thereof should direct. Uniformity was not required, and for many years there was none. For a time the legislatures of some States appointed the electors; in others they directed that the electors should be chosen by the people voting in districts; in others by general ticket. Since 1872, however, all the States have chosen their electors by the last method. That is, in every State at presidential elections the people vote for the electors, who in turn vote for the President. Thus, indirectly at least, the people vote for the Chief Executive. That the appointment of electors has failed to remove the election of the President from popular clamor and party prejudice is obvious to the most indifferent student of politics. It may be that the first two or three bodies of electors chosen cast their ballots quite independent of parties. But the machinery of politics has since grown with the development of the country, and the high purpose and significance of the electoral body have become quite lost. Presidential electors to-day, instead of being free from party politics, are bound entirely by them.

An independent elector is unknown. Republican electors cast their ballots for the Republican nominee, Democratic electors cast theirs for the Democratic nominee. Thus, although the people actually vote for the presidential electors—for their names appear on the official ballots, practically they vote for the President, since the election of a majority of Republican electors means the election of a Republican President, and vice versa. As soon therefore as the electors have been voted in, it is known who is to be the next President; and the act of the electors in casting their ballots later, though a solemn function, has come to be an empty form.[5]

The letter of this clause of the Constitution has thus been kept, but its purpose evaded. It is better so, for there is little reason why, in a republic, the President should not represent as nearly as possible the choice of the people. On general principles it is better to interpret a constitution literally rather than figuratively; strictly rather than loosely. But the electoral system, as made imperative by the Constitution, is at best awkward. It is complex in operation, and it sometimes fails to register the wish of a majority of the people, even as at present developed, for the candidate receiving the most electoral votes is not always the choice of the majority of the people.

A simple hypothetical case will show how this is possible. Suppose five States only are concerned in the election of a President. Suppose four of these States control three electoral votes each, and the other State ten. The four small States may go Democratic by the slight plurality of 1000 each; the large State may go Republican by a large plurality of 100,000.

[5] So strong is this adherence to party that the presidential vote of a State may be divided, according to the political faith of the electors. In Maryland, in 1909, five Democratic electors were chosen and one Republican, and each cast his ballot for the candidate of the party that chose him.

What is the result? Under the electoral system the Democratic candidate is elected, for he receives twelve electoral votes against the Republican's ten. Under any other system, on the other hand, the Republican would be elected, for his plurality of 100,000 in the one State would offset the sum of the small Democratic pluralities in the other four States. This is somewhat the situation that developed in 1888. Mr. Cleveland in that year received a plurality of 95,534 votes, yet from the electors he received but 168 votes against Mr. Harrison's 233.

The Electoral College.—The whole body of electors is commonly known as the electoral college. Its size varies with the growth of Congress, for each State is entitled to as many electors as it has national Senators and Representatives. As to the qualifications of the electors, the Constitution is negative rather than positive. National legislators, and Federal office holders, and those barred by the 14th Amendment, may not be appointed electors. Anybody else may be.

AMENDMENT 12 [6]

The electors shall meet in their respective States, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate; the president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the

[6] Adopted in 1804.

whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the 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.

Election of President. 12th Amendment.—Until 1804 the President was elected by the method prescribed in the 3d Clause of Section 1, Article 2. The adoption of the 12th Amendment in that year made the clause a dead letter, and since then the election of the President has been carried on in accordance with the Amendment. The provisions of the 12th Amendment are plain. The difference between it and the clause which it abrogated may readily be seen by a careful comparison of the two. It is not necessary to discuss this difference here, but it may be worth while to draw attention to certain contingencies for which the 12th Amendment makes wise provision. (For the repealed clause see p 327.)

Contingencies.—1. If no candidate receives a majority of the electoral votes, the choice then devolves on the House of Representatives, which must decide by ballot, from those persons on the list of candidates not exceeding three, who shall be President. This duty has devolved on the House twice: once before the adoption of the 12th Amendment, and once after it. In 1800 Thomas Jefferson and Aaron Burr tied for first choice. The election therefore went to the House, and it required 36 ballotings by that body to break the tie. This dilemma was largely responsible for the adoption of the 12th Amendment. The other instance occurred in 1824 when John Quincy Adams was chosen over Andrew Jackson and others.

2. If no person receives a majority of the electoral votes for Vice President, the Senate must choose from the two highest on the list of candidates. This has happened once: Richard M. Johnson was chosen by the Senate in 1836. That this contingency should be settled by the Senate is peculiarly fitting, for the Vice President becomes the Senate's presiding officer.

3. In case the House, when the choice of President devolves upon it, fails to elect before the 4th of March next following, then the Vice President becomes President, as he would naturally on the latter's death or permanent disability. This has never yet happened. As to what must be done should both the House and the Senate fail to perform their electoral duty by the 4th of March the Constitution does not provide.

State Influence on Elections.—In presidential elections the influence of the States as separate commonwealths is strongly felt. In the first place, the method of appointing electors is left to the State legislatures. In the second place, although the people do indirectly elect their President, they do not act in so doing as a collective unit, but as segregated into their local commonwealths, that is, the States. And in the third place, in case the election of either President or Vice President goes to the House or the Senate, the voting there is strictly by

States, each State having one vote. In this proceeding the smallest and least populous State has as much authority as the largest and most populous.

In the transaction of this business a quorum in each House consists of a representation from two-thirds of the States; whereas in ordinary legislation a bare majority of the members is sufficient, with no reference to States: and although a bill may be passed by a majority vote of a quorum, the President or Vice President is elected by a majority vote of all the States. It requires little mathematics to show that such an important thing as the election of the Chief Executive may be done when left to the House by a much smaller number than is necessary to transact ordinary legislation.

Presidential Nominations; Primaries.—The Constitution does not even suggest how candidates for the office of President shall be chosen. The method in vogue to-day is the result of expediency and convenience rather than of law. Until 1832 nominations were made usually by the legislatures of the States; since then they have been made by conventions of delegates. These conventions are strictly party affairs, the several political parties in the country holding their separate meetings for the specific purpose of nominating candidates for the presidency. To these nominating conventions each State is allowed to send twice as many delegates as it has Senators and Representatives in Congress. But it has so often happened that a few leading spirits have been able to control the conventions and virtually to name the person that later was to become President, that many States now hold primary, or preliminary, elections, in which the people are given a chance to indicate their choice for President. These "presidential primaries," as they are called, are not binding, they merely make plain the wishes of the majority of the Republicans, or of the Democrats, or of any other great party in the State, respecting the men from whom their delegates in the conven-

tion are later to choose a candidate. After such preliminary elections, however, the delegates are more likely to vote for the man who has been the choice of the majority in their respective parties than for some other who is not. Thus primary elections are a part of the present-day progressive movement to prevent the control of elections and the dictation of candidates by the few. They are but another step in the direction of the popular election of Presidents; another step away from the method prescribed by the Constitution.

Section 1, Clause 4.—The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

Election Day.—By the authority of this clause Congress has passed several statutes regulating presidential elections, but since 1845 the electors have been chosen on the Tuesday next after the first Monday in November, of every fourth year. Since 1887 the electors have been required to meet in their respective States and cast their ballots on the second Monday in January immediately following their election.

How the Election is Officially Determined.—By the act of 1887 the Governor of each State is required, as soon as possible after the results of the general election are known, to make out a certificate stating that there has been a proper ascertainment of electors in his State, and giving the names of the electors and the number of votes for each. He is then required to transmit one copy of this election certificate to the Secretary of State, and to deliver three to the State electors on or before the day of their meeting, all copies to be under the seal of the State. When the electors meet on the second Monday in January in their respective States they are required to make out and sign three certificates of all the votes given by them for President and Vice President, and to enclose in each of these certificates one of those received from the Governor.

One of these certificates, with its enclosure, is then sent by messenger to the President of the Senate; another is forwarded to the same person by mail; the third is deposited with the judge of the district in which the electors are assembled.

On the second Wednesday in February following, at one o'clock in the afternoon, both Houses of Congress are required to convene in the Representative chamber to hear the result of the voting. The President of the Senate presides and opens the certificates of election in the alphabetical order of the States. Tellers previously appointed read and record the votes, and when this has been done, the presiding officer announces the result. The names of the newly elected President and Vice President, together with the list of votes, are then entered on the journals of the two Houses. This proceeding is very formal and quite in keeping with the dignity of the high office of President; but coming as it does three months after the people have voted, when everybody knows who the new Executive is to be, it is not without a certain droll aspect to those critics who are humorously inclined.

Double Returns.—It sometimes happens that two sets of certificates of election, each purporting to be a correct return of the electoral vote, are sent in from the same State.[7] Where voting is close it is possible for the Democratic electors to

[7] The Hayes-Tilden election, in 1876, is a case in point. The result of the election depended on disputed returns from several States. Congress finally settled the controversy by appointing a commission of fifteen members: five Senators, five Representatives, and five Justices from the Supreme Court. As it happened, the five Senators were Republican, the Representatives were Democratic; two of the five judges were Democratic, and three were Republican; and all voted on strict party lines. In each case the commission decided in favor of the Republican returns by the close vote of eight to seven. Hayes was accordingly elected by a vote of 185 to 184. The law under which this determination was made was not intended to apply to future disputes.

believe that they are elected, when in fact the Republican electors receive a slight majority instead, or vice versa, and each group of electors sends in its certificate of election. To meet this dilemma the act of 1887 provides that each State may by law provide a method for determining the correct vote of that State. If such determination is reached at least six days before the meeting of the electors, it shall be final; if not, provision is made for its settlement by Congress. It has been decided that such a matter, because it is political, not judicial, is not within the jurisdiction of any court.

Section 1, Clause 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.

Qualifications of the President.—The qualifications of the President, like those of Senators and Representatives, relate to citizenship, age and residence. Naturalized citizens are not now eligible to the presidency; but only citizens of native birth. At the time of the adoption of the Constitution, however, many prominent inhabitants were of foreign birth, some of whom were members of the Convention. These were excepted from the general rule. Whether it was wise to forever prohibit citizens of alien birth, except those in being at the time of the adoption of the Constitution, from aspiring to the high office of President is open to question, for certainly many able, distinguished and patriotic citizens of the United States have been foreign born. But the evident purpose of the restriction was to make the office purely American. Nothing in the clause debars women from the presidency; but this possibility was probably not contemplated by the Convention.

The fourteen years residence required by this clause does

not bar citizens who have been abroad in the public service,[8] or on private business. The fourteen years need not be consecutive. If a citizen, natural born, has had for fourteen years previous to his nomination to the presidency such an inhabitancy as includes a domicile in the United States, he is eligible.

The Vice President.—The Constitution does not prescribe the qualifications of the Vice President. The 12th Amendment, however, declares that "no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States." Furthermore, the Vice President is the lawful successor to the President in the event of the latter's death or disability. It would necessarily follow from this, even without the 12th Amendment, that the qualifications for the two Federal offices must be the same.

> **Section 1, Clause 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 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.

Presidential Succession.—Should the office of President become vacant by either death, removal or resignation, the Vice President immediately becomes President by operation of law, and he may hold office until the end of the original term. Should the President become temporarily disabled instead, the Vice President assumes the duties of the office only until the disability is removed. But in case the offices of both the President and the Vice President become vacant during the term, the duty of filling the Chief Executive's chair devolves on

[8] James Buchanan was minister to England just prior to his election to the presidency.

Congress. Accordingly, in 1792, Congress provided that, in such a case, the president *pro tempore* of the Senate should act as President, or if there were no such person to act, then the Speaker of the House of Representatives. In 1886, however, this law was repealed, and the present law of presidential succession was enacted. This provides that, in case of the default of both the President and Vice President, the duties of the office of the Chief Executive shall devolve on the members of the cabinet in order of seniority, to wit: 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, etc. It is probable that a cabinet minister would not in this case become President in fact; he would merely fulfill the duties of the office until a new President could be elected, or until the disability of either the President or the Vice President, if that were the cause of the vacancy, should be removed. But no cabinet member can, by the law of 1886, act as President, who does not have the constitutional qualifications of age, citizenship, and residence.

Several Presidents have died in office.* Several Vice Presidents also have died in office, and one has resigned,[10] but at no time have the offices of both the President and the Vice President become vacant during the alloted term. No President has as yet resigned from office, and none has been removed. If one should desire to resign, Congress has provided that the resignation must be in writing, subscribed by the President, and delivered to the office of the Secretary of State.[11]

Section 1, Clause 7.—The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period

* W. H. Harrison, 1841; Zachary Taylor, 1850; A. Lincoln, 1865; J. R. Garfield, 1881; W. McKinley, 1901.

[10] J. C. Calhoun, 1832.

[11] R. S., 151.

> 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.

The President's Compensation.—Men do not aspire to the presidency for the salary alone; that, in comparison with the emoluments received by the executives of certain other nations, is relatively small.[12] If the office paid no salary, it would not lack worthy aspirants, for the honor is greater than mere money compensation. But in order not to limit the nation's highest office to men of independent means, it was wisely made a salaried position. The salary of the first President was fixed by Congress at $25,000 per year; that of the Vice President at $5000. In 1873 these amounts were increased respectively to $50,000 and $10,000 per year. The latter was reduced in 1874 to $8000. In 1909 the President's salary was further increased to $75,000, that of the Vice President to $12,000. These salaries are paid in monthly installments.

Besides salary, the President receives other emoluments, making the office really more compensative than it appears to be. A furnished house, the White House, is provided for the President and his family at Washington; a fast vessel is at his disposal for transportation on the sea; mileage is allowed for inland travel; and there are numerous minor accessories. But whatever the compensation is, Congress must provide for it before the Executive enters on his term of office, for by the present clause of the Constitution it cannot be done during his incumbency; nor can it be diminished within the period.

The provisions of this clause secure the complete independence of the President, for Congress may neither weaken his fortitude by working on his necessities, nor corrupt his integrity by appealing to his avarice; and what Congress and

[12] The King of England receives £470,000; the Emperor of Russia receives no stated sum, but income from over one million square miles of crown lands; the President of France, 1,200,000 fr.

the nation at large may not do in this respect, may not be done by any individual State.

Section 1, Clause 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."

Oath of Office.—It has become customary, though not required by law, for the Chief Justice of the Supreme Court to administer the oath of office to the President-elect. Anybody legally qualified to administer oaths could perform the ceremony, but it is perhaps fitting that the highest executive officer should be sworn in by the highest judicial officer. The ceremony of swearing in the President-elect, which is a part of the formalities of inauguration, takes place at noon on the 4th of March next succeeding his election. Weather permitting, it is done in the open air before the Capitol in the presence of the two Houses of Congress and of the assembled people.

The Constitution does not require the Vice President-elect to take any special oath other than the general oath to support the Constitution which is required by Article 6, Clause 3, of every executive officer of the United States and of the several States. On succeeding to the office of President, in the event of the latter's death, resignation or removal, the Vice President takes the prescribed oath of office.

Section 2, Clause 1.—The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

The War Power.—The President, as Chief Executive of the nation, has supreme directing power over the military and the naval forces of the United States. In peace and in war this amounts to the same thing: namely, that the President controls the movements of the army and the navy; he prescribes the stations and duties of both offices and men; he plans campaigns, establishes blockades and sieges, and directs all marches and cruises. He may order United States troops and ships anywhere to protect Federal property, or American citizens and their property. To suppress insurrection, or to repel invasion, he may call the militia into the service of the government, and then he may exercise the same authority over them as over United States troops—except that he cannot send them beyond the confines of the country. The President may not declare war. That great power is vested in Congress alone; but when Congress has declared war, it is incumbent on the President to direct all military and naval operations. He does not take the field in person; he promulgates his orders through the proper officials of the War and the Navy Departments; or, what amounts to the same thing, he approves or disapproves their orders and suggestions. Neither the courts nor the legislatures may interfere directly with the President as commander-in-chief. Indirectly, however, Congress might hamper the President considerably, for the House of Representatives might refuse to appropriate funds for the maintenance of war, and the Senate might refuse to confirm the President's nominations to office.

Executive Departments.—The executive departments herein mentioned are nowhere defined in the Constitution, or their number limited by it; but from time to time as necessity has demanded, they have been provided by law. There are now ten of these: the Department of State, the Department of the Treasury, the Department of War, the Department of Justice, the Post-Office Department, the Department of the

Navy, the Department of the Interior, the Department of Agriculture, and the Departments of Commerce and Labor. The chief officer of each of these departments is styled Secretary, except the heads of the departments of justice and of the post-office, who are titled respectively Attorney-General, and Postmaster-General. The general purpose of these departments is to assist the President in his executive business. Thus the Department of War controls the operations of the army, the Department of State is the medium through which the government communicates with foreign governments, and so on. Collectively the heads of the executive departments form the President's cabinet; they are appointed by the President, and they act in an advisory capacity to him. At any time he may demand their opinions in writing on any subject relating to their offices. This perhaps has been most frequently done of the Attorney-General, whose published opinions now fill many printed volumes. As authoritative statements of the law, these opinions are entitled to great respect.

For the origin of the cabinet we must look to custom rather than to law. The Constitutional Convention did not contemplate the creation of an advisory council to the President, but rather that there should be heads of departments, whom he might consult individually and at his pleasure. Washington, however, formed his department heads into an advisory body, and the custom of so doing has since been followed.

The Pardoning Power.—Recognizing that human justice is not infallible, that in the long run justice is best when tempered with mercy, the framers of the Constitution placed in the President the great and almost unlimited power of executive clemency. In so doing, however, they evolved no new principle: the power to pardon has been inseparably connected with sovereignty since time immemorial. But it is a vast power for one man to have. By it the President may

render null and void the decision of the highest tribunal; by it he may remit all fines and debts due to the government; by it he may open the doors of all the Federal prisons; and neither Congress nor any court may restrict him in the slightest degree.[13] But it was expected that he would use this power with reason, and thus far the people of the United States have had little cause to complain against the misuse of executive grace.

A reprieve is a temporary suspension of punishment, a stay of execution; a pardon is a complete release from penalty. The law recognizes four kinds of pardons. First, a pardon may be complete, unlimited. As such it restores a criminal to the condition of a free citizen, remitting all punishment. Second, it may be conditional,[14] as where its force is made to depend on the criminal's doing some positive act, such as leaving the country, or accepting a penalty in lieu of that imposed by the court. Third, it may be before conviction as well as after. Fourth, it may apply to individuals or to masses of people. Where masses of people are pardoned, as in the case of an unsuccessful rebellion, the executive act is known as amnesty. The President may issue any kind of pardon known to the law.

The sole exception to the President's pardoning power is in cases of impeachment. Since the main object of impeachment is to purify public offices, it is well that the President should not have it in his power to prevent a thorough investigation of the conduct of public officials, or to relieve them from punishment if convicted. Furthermore, since the President himself is liable to impeachment, he might, if it were not for this exception, pardon himself, should occasion arise.

Power of the Legislature.—The only way in which the legislature can relieve offenders from the consequences of their

[13] Ex parte Garland, 4 Wall., 333, 380.

[14] Ex parte Wells, 18 How., 307; 1 Opinions of Att'y-Gen., 341.

acts is by repealing the law that defines the crime and apportions the punishment. The Constitution gives to Congress no pardoning power and no authority either to aid or to hinder the Executive in the act of clemency. Herein the United States differs from Great Britain, where the power to pardon is in both Parliament and the Crown.

Pardoning Power in the States.—The power to pardon offenses against State laws is usually in the Governor. The constitution of the State of Maryland, for example, grants the power to the Governor in precisely the language that the United States Constitution grants it to the President. In some States, however, the authority is vested in commissions, or pardon boards.[15] This, on the whole, seems to be the better way. Executive clemency originated far back in history, when the king was absolute, and kingly grace was akin to Heaven's grace. But absolutism in earthly rulers has largely passed away. In America, at least, executive officers are elected by the votes of the people, and their terms of office are limited. Frequently they are not learned in the law, and their general caliber is often not above that of many of the electorate. That an ordinary citizen, therefore, raised for a brief while by popular votes to an exalted position, should be able to set free those whom courts and juries have deemed it wise to shut up is little short of the preposterous.[16]

Section 2, Clause 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

[15] In Massachusetts it is in the Governor and council; in Pennsylvania, it is in the Governor and the legislature.

[16] An instance of the extreme use of gubernatorial clemency occurred in 1909, when Governor Patterson, of Tennessee, unconditionally pardoned Duncan Cooper, accessory to the murder of United States Senator Carmack. Of Cooper's guilt there does not seem to have been any question.

> 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.

Treaties.—A treaty is an agreement, or contract, between sovereign States. In England, the power to make treaties is in the Crown; under the Articles of Confederation, it was vested in Congress alone; under the Constitution, it is in the President and the Senate. The Senate, however, acts in a checking capacity only, for the power of negotiation and inception is in the Executive alone. Acting through the Secretary of State and foreign representatives, the President makes all treaty stipulations, and the Senate may neither dictate a word concerning foreign relations, nor force the President into any particular line of action. It is for the Senate merely to approve or to disapprove when the treaty is presented to that body for consideration. The words "advice and consent" are usually determined to mean consent only. Although it is not without precedent for the Chief Magistrate to consult the Senate before drawing up a treaty,[17] he usually goes elsewhere for advice.

Kinds of Treaties.—Treaties are either executed or executory. An executed treaty brings into existence at once a certain state, or right. Such is a treaty of peace. Hostilities are expected to cease, and a state of peace to begin, with the signing of the treaty, and without further action by either the Executive or the legislature. An executory treaty, on the other hand, necessitates further action by one or both parties

[17] President Polk in connection with the Oregon treaty.

to the treaty, before the thing agreed to may be said to be accomplished. Thus an agreement between the United States and Great Britain to maintain a fleet on the African coast in 1842 for the suppression of the slave trade was an executory treaty.

Weakness of Treaties.—Suppose in the case just mentioned the President had neglected to order warships to the African coast; what could have been done? Probably nothing. Neither Congress nor the courts could have forced the President to execute the terms of the treaty. Furthermore, a statute of the United States can be enforced by the courts, but no common and superior tribunal exists anywhere, able to compel either party to a treaty to keep its agreements—except the great tribunal of war.[18] Therein lies the weakness of all international agreements.

Treaty Power Limited.—In general, the treaty making power extends to every kind of treaty. The Constitution places no limits to its exercise, but common sense may suggest some. The power plainly cannot be so used as to override the Constitution itself, or to weaken or destroy the fundamental principles of government. A treaty that should attempt to deprive Congress, or the judiciary, or the Executive of general powers granted by the organic law would be absolutely null and void.[19] So would a treaty that materially altered the boundary lines of any State without the latter's consent; or that tended to deprive the citizens of one State of rights enjoyed by the citizens of other States.

Concurrence of the Senate.—Every treaty to which the United States is a party must be approved by the Senate. Although the latter cannot take the initiative, its consent is absolutely necessary before any treaty can become a law. The Senate may, however, after a treaty is presented to it for

[18] Foster *v.* Neilson, 2 Peters, 253; Pomeroy's Const. Law, 450.
[19] Geofrey *v.* Riggs, 133 U. S., 258, 267.

approval, suggest alterations or amendments, or it may approve or condemn it in entirety. If amendments are suggested, they must be accepted by the President and the representatives of the foreign State before the treaty thus changed can become binding. In any case, the approval of the Senate and the signature of the President are essential. A treaty dates from the day it is signed.[20]

The House of Representatives has nothing to do with originating, making, or ratifying a treaty. It is possible, however, for the House to render a treaty a nullity by refusing, or neglecting, to pass the legislation necessary to give it effect. This is in respect to an executory treaty. To illustrate: should the treaty require the payment of money, as in the case of the purchase of territory, the agreement can have no effect until the House has voted the necessary funds. It is the evident duty of that body to appropriate money when it is required by the terms of a treaty, but neither the Executive nor the judiciary can compel it to do so.[21]

A State of the Union, not being a sovereign power, can be a party to no treaty.

Appointments to Office.—Before a person can be appointed to office the office must exist. The Constitution provides for certain offices; Congress has created many more, and may create others, as necessity demands. We have seen how the offices of President and Vice President, Senators and Representatives, Speaker of the House, and certain minor positions in both branches of the legislature are filled. These are the only purely elective offices under the government. All other Federal offices, and there are many thousands of them, are

[20] Shepard *v.* Ins. Co., 40 Fed. Rep., 341. Davis *v.* Police Jury, 9 How., 280.

[21] Before the purchase of Louisiana, of Florida, and of California, Presidents Jefferson, Monroe, and Polk ascertained the wishes of Congress, thus apparently recognizing the power of the House to refuse to make appropriations.

filled in the four ways provided by this clause: by the President and the Senate, by the President alone, by heads of departments, and by courts of law. The Constitution directs that "Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not otherwise herein provided for" shall be appointed by the President and the Senate. It allows Congress to vest the appointment of all other officers in any of the authorities mentioned above. Accordingly, Congress has vested the appointment of certain officers in the President alone; of certain others in heads of departments; and of still others in courts of law. For example: the President alone appoints the Librarian of Congress; the Postmaster-General appoints all postmasters whose salaries are less than $1000.00 per annum; Federal courts provide their own stenographers and clerks, the Supreme Court, its own marshal and reporter. There are no officers mentioned in the Constitution, "whose appointments are not herein otherwise provided for," unless the heads of departments are such. These are appointed by the President and the Senate. Should Congress create an office and fail to direct how it should be filled, it follows from this clause that the appointment thereto would vest in the President and the Senate.

Power to Remove.—History teaches, and most writers on constitutional law agree, that the power to appoint to a national office is a ruler's prerogative, and that the power to remove from office is a necessary consequent of the power to appoint. The Constitution limits the appointing power of the President somewhat by compelling him to send the nominations to certain offices to the Senate for approval; it is silent regarding the power to remove from office. Had the Constitution said nothing about appointments to office, the President's right to fill all Federal offices by personal appointees

would have been absolute. In the absence of any reference in the instrument to the matter of removal, it follows that the Executive's right thereto is without limitation. This, at least, has been the opinion of Story, Pomeroy, Cooley, and other eminent publicists; it was the opinion of the majority in the Convention; every President has exercised the right, and the matter may be regarded as settled. The Tenure of Office Act, passed in 1867, denied to the President the power to remove from office in all cases where the consent of the Senate was necessary to fill the office, without first consulting the Senate. The constitutionality of the Tenure of Office Act was doubtful, for if Congress cannot deprive the President of a right expressly granted by the Constitution, how could it do so of a right implied? This act, however, was repealed in 1887, so that the right of the President to remove a Federal officer is the same to-day as in the day of Washington.[22]

This is a vast power for one man to have; but like the power to pardon it is not likely to be exercised without reasonable cause. A nation must have an executive, and that executive must, if he is to be anything but a puppet, have sweeping powers. There is little danger that any President will ever become a Cæsar. The checks in the Constitution itself, backed by an intelligent people, are ample protection. Furthermore, in the language of Mr. Madison: "The wanton removal of meritorious officers would subject him (the President) to impeachment and removal from his own high trust."

Section 2, Clause 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.

[22] The judges of the courts of the United States are protected from sudden removal by Art. 3, Sec. 1 of the Constitution. Military and naval officers are protected by the Act of 1866, which provided for their removal only after conviction by court-martial.

Vacancies in Office.—Vacancy in this clause seems to mean a state of inoccupancy after the office has once been filled by lawful appointment. Hence, an office created by Congress, but remaining unfilled at the end of the session, does not make a vacancy during the recess of the Senate which the President should fill. This, at least, is the opinion of most law writers; but the President, in his executive position, may take the other view and act accordingly.[23] Vacancies may happen from many causes, such as death, resignation, removal, and the accepting of incompatible offices.[24] Whatever the cause may be, it is expedient that the vacancy be filled immediately, if the work of the government in that department is to go on. The Chief Executive is therefore given power to act at once and alone on these cases. But to guard against the possibility of the President's creating vacancies by arbitrary removal and filling them with favorites while the Senate is not convened, the commission herein authorized to be granted expires at the end of the next session of Congress. If, meanwhile, the President nominates the same person to the office, and the Senate when convened confirms the nomination, a new commission is made out, and the incumbent remains in office.

State Offices.—These are filled according to the dictates of State constitutions or State legislatures. As in so many other political matters, there is no uniformity among the States.

> 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

[23] President Washington adopted this other view in October, 1786, when he appointed Rufus Putnam to the office of Surveyor General. The office was created in May of that year, but remained unfilled at the end of that session.

[24] Failure of the Senate to reject or confirm a nomination before adjournment creates a vacancy which the President may fill.

> 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.

Special Sessions; Adjournment.—Article 1, Section 4, Clause 2 of the Constitution provides for the regular meetings of Congress. But under the authority of the present clause the President may at any time, if necessity demands, convene either House of Congress, or both of them, in extra session; and in case of disagreement between them on the question of adjournment he may adjourn them to such time as he alone deems fit. These are great powers, but necessary. Normally Congress is not in session for from six to nine months of the year; during which time many things may happen, such as financial crises, insurrection, or invasion, demanding the attention of the Federal legislature. It is well therefore that the Executive should be able to summon that body to his assistance. Since the adoption of the Constitution many special sessions have been called. The Senate has been convened frequently to act on treaties and nominations to office, but the House has never been convened alone. The power to dismiss Congress has never been used by any President, a fact that speaks well for the sanity of Federal legislatures. It is wise that the power should exist, however, in order to put a stop to unseemly wrangling over a matter of only minor importance. In England, the king may dissolve Parliament at will, as he may call extra sessions at will.

The President's Message.—Legislation originates in Congress, but the President may advise and recommend; and from his official position as Chief Executive his advice and recommendations are often of value. The Executive Depart-

ment has better means for getting information of the state of the Union than has Congress. Such matters as foreign relations, revenue and expense, the condition of the army and the navy, postal needs and many others are directly under its cognizance; and it is vital that the Chief Executive should, from time to time, impart such intimate knowledge to the law-making body, as he in his official position may acquire.

The Constitution does not say how or when this information shall be communicated to Congress, but it has become customary for the President to present it at the opening of each session in the form of a written message. Presidents Washington and John Adams read their messages in person in the two Houses in joint assembly; Jefferson instituted the custom, which has been followed by all Presidents since,[25] of sending his message to each House to be read by the clerk. No answer is given, and none expected. To these documents the members of Congress usually give respectful attention, but it is reasonable to suppose that they do not hold them all in quite the same awe, as the ancient Greeks held the utterances of the oracle at Delphi. Presidents are but men, their wisdom is limited, and their recommendations are not always followed to the letter. The President holds no whip over Congress, a fact which that body is well aware of. Indeed, whenever it happens that the President and the majority in either House of Congress are of opposite political faiths, or when for any reason lack of harmony prevails between the Executive and the Legislative Departments, measures that the President recommends are likely to make slow progress.

Not all the Executive's messages are presented at the opening of a session of Congress. The President may at any time transmit information to that body, or recommend special measures, and either House of Congress may at any time

[25] President Wilson, in 1913, revived the old custom by delivering his message to Congress in person.

request such information as may seem desirable, even on matters over which it has no direct legislative power. On the other hand the President may decline to communicate facts, if in his judgment the public welfare demands their secrecy. These irregular executive documents are termed "special messages."

Ambassadors and other Public Ministers.—These are diplomatic agents, representing the sovereignty of the nations which accredit them. To receive such a political representative is to recognize the nation from which he comes as a sovereign State. The language of this clause is imperative: "He shall receive." This does not mean, however, that any and every foreign diplomatic agent must be accepted; but only such as are agreeable to the United States are to be formally received by the President. States, Congress, and courts of law have nothing to do with foreign relations; these are carried on entirely by the President and the Department of State. The President alone is judge of the sovereignty of the foreign State, and of the fitness of its representatives. It follows therefore that the power to receive carries with it the power to refuse to receive, and to demand the recall of an accepted agent—either on the ground that he is personally undesirable, or that the relations between the two governments have become too far strained to admit of his further continuance in office.[26] All this is delicate business. To refuse to receive a foreign diplomatic agent, or to demand his recall, may be looked upon by the other nation concerned as a very unfriendly act. Hence it is highly essential that the person to whom is intrusted this delicate power should be one of tact and sound judgment.

[26] Mr. Genet, French minister, was recalled on demand in 1793; Mr. Jackson, British minister, 1809; Mr. Poussin, French, in 1849; Sir John Crampton, British, 1856; Mr. Catacazy, Russian, 1872; Lord Sackville, British, 1888.

Until 1893 no ministers from the United States were styled Ambassadors. In that year Congress authorized the President to confer the title on the ministers to all foreign governments that sent agents of such rank to the United States. Ambassadors are now sent to the following countries: Great Britain, France, Germany, Russia, Italy, Japan, Mexico, Austria-Hungary, Brazil, Turkey, Spain, Argentina, and Chili.

The duty of an Ambassador, and of any other foreign minister, is in general to foster pleasant relations with the government to which he is accredited. He is his nation's mouthpiece. Whatever he may say in public of a political nature is supposed to reflect the sentiments of his home government. All intercourse between the foreign nation and his own is carried on through him. His position therefore requires a distinct gift for diplomacy.

Other Public Ministers.—These are in order of rank: Envoys Extraordinary, Ministers Plenipotentiary, Ministers Resident, and Chargé d'Affaires. Like Ambassadors, these are purely political agents. The difference between them is not easy to determine, for their duties are the same. Their relative ranks depend on the importance of the country to which they are sent. Ministers Resident from the United States are few in number. The title is often merged in that of Consul-General. Chargé d'Affaires are not often sent out.

Consuls.—These are commercial, rather than diplomatic, agents. Their purpose is to further the business interests of their respective countries. Their duties are rather various. They hold the required papers of all American vessels while in their ports; they hear complaints of seamen; they reclaim deserters; they appoint examiners for vessels reported unseaworthy, they cause mutinous sailors to be arrested and sent home for trial; they take possession of the personal property of American citizens dying abroad; they take measures to save stranded vessels and their cargoes; they report the condition

of business in their respective localities; and they are *ex officio* notaries for all the States of the United States. Consular reports are published frequently, and they often are of great service to American business men engaged in foreign trade.

The Constitution is silent respecting the reception of consuls. The term "public ministers" does not embrace them. The power of the President to receive them may, however, be fairly implied by the Constitution. In fact foreign consuls always receive their *exequatur* from the President through the State Department. The consular corps is far larger than the diplomatic corps. In 1911 there were over 1100 consular representatives abroad. Formerly these agents were paid by fees, but since 1906 all have been paid regular salaries. Fees which they may collect are accounted for to the United States government.

Exterritoriality of Public Ministers.—By a political fiction, public ministers are not subject to the jurisdiction of the countries to which they are accredited, but to the home country. That is, they carry with them into the foreign land the rights and privileges accorded them by their own sovereign, and are amenable only to his laws. Consuls, not being public ministers, do not usually enjoy these exterritorial privileges, but are answerable to the laws of the country in which they may be serving.

Execution of the Laws.—To execute the law is to enforce it. The laws of the United States which the President is required to enforce comprise the Constitution itself, the treaties with foreign nations, and the statutes yearly enacted by Congress. For this purpose, he may ask Congress for appropriations that are necessary under the provisions of a statute, and as commander-in-chief he may call into action United States troops or ships. The duty is wholly on the President; neither Congress, nor the judiciary, nor any other department of the government may lawfully hinder him in enforcing the law, or

take any initial steps therein. The case of Miss. *v.* Johnson, 4 Wall., 475, is illustrative.

This was a petition by Messrs. Sharkey and Walker, on behalf of the State of Mississippi, for a perpetual injunction to restrain Andrew Johnson, President, from executing certain acts of Congress. The petition asserted that the acts in question were unconstitutional, and had been vetoed by the President but passed over his veto. The court held: that the injunction could not be issued; that the President was bound by the Constitution to execute the laws, and it made no difference whether he believed the laws to be unconstitutional or not. The courts could not restrain him.

Although the President may exercise a certain discretion respecting the manner or the means of executing the law, he has no discretionary power over the law itself. That is, he may not lawfully refuse to execute it on the ground that it is invalid or impolitic. Whatever Congress enacts is presumptively valid, and the President must see that it is faithfully executed, whether it is passed in the usual manner, or over his veto by the requisite two-thirds. It is for the judiciary to determine, in a case properly before it, the validity or invalidity of a statute.

Commissions.—Appointing to office and commissioning officers are not the same. All Federal officers duly appointed are commissioned by the President, but not all officers of the United States are appointed by him, as has been pointed out in a previous paragraph. A commission is, in the sense understood here, a document issued by the President, signed by him and bearing the seal of the United States, authorizing the person named therein to hold a Federal office, and to enjoy all its rights and privileges. The commission is not the appointment; it is but the evidence of it, and the appointee's right to the office does not depend on the possession of the commission. As was well said in the case of the United States *v.*

Le Baron, 19 Howard, 74, "The transmission of the commission to the officer is not necessary to his investiture of the office."

Officers of the United States.—From this phrase it is reasonable to infer that those only are officers of the United States who receive their commissions from the President.

> **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.

Who May be Impeached.—It is a logical inference from this clause that the President, Vice President, and all civil officers of the United States may be impeached. The term civil officers is not defined in the Constitution. It is used, apparently, in contradistinction to military and naval officers, who may be court-martialed, but not impeached. It may be said to include all other officers of the United States who derive their appointments from the national government, rather than from the State governments, or from the people. Senators and Representatives cannot be impeached.[27] They are not "civil officers of the United States," for they derive their appointments from the States, or from the people. On the other hand, cabinet members, Federal judges, public ministers and consuls are such civil officers as may be impeached, for they derive their appointments from the national government.

One President, Andrew Johnson, has been impeached,[28]

[27] Senator William Blount, of South Carolina, was impeached in 1797. When the Senate convened as a court, counsel for Blount entered a plea to the jurisdiction: to wit, that when the offense was committed Blount was not an officer of the United States. By a vote of 14 to 11, the plea was allowed, and the case dismissed.

[28] 1868. Acquitted. See Blaine's "Twenty Years in Congress," Vol. 2, Chap. 14.

but no Vice President. One cabinet member, Secretary Belknap, has been impeached. This was in 1876. The Secretary was acquitted. Six judges have been impeached. They are as follows: Judge Pickering, 1803; Judge Chase, 1804; Judge Peck, 1830; Judge Humphries, 1862; Judge Swayne, 1905, and Robt. W. Archbald, 1912. Of these Judges Pickering, Humphries, and Archbald were convicted. "Judge Pickering, of the District Court of New Hampshire, lost his reason, and to get him off the bench it was necessary to go through the form of impeachment."[29] Judge Humphries was convicted of "aiding the Rebellion, ill-treating loyal men, confiscating their property, etc." Robert W. Archbald, Associate Judge of the Commerce Court, formerly U. S. District Judge for middle Pennsylvania, was impeached on July 11, 1912, for corrupt collusion with certain coal mine owners and railway officials while in office. He was removed from the bench and disqualified for further holding any office under the government. The last two have been the only ones to suffer the extreme punishment provided by the Constitution for those convicted in impeachment trials.

Offenses Leading to Impeachment.—The Constitution makes a very general enumeration of the offenses for which an officer may be impeached: "treason, bribery, and other high crimes and misdemeanors." Treason is the act of levying war against the government, or adhering to its enemies, giving them aid and comfort. Bribery is the act of receiving any undue reward by a person whose profession is the administration of public justice, or the act of offering an undue reward to such person, in order to influence his behavior in office. The phrase "other high crimes and misdemeanors" is very general. In all probability it was purposely made so in order to give Congress a wide latitude in the matter of impeachment. It would be futile to attempt, within the limits of the Consti-

[29] Baldwin's "American Judiciary," 323.

tution, to enumerate all the possible crimes and misdemeanors for which one might be impeached. It may be regarded as settled that, in addition to such conspicuous crimes as treason and bribery, at which society revolts, a Federal office holder may be impeached for innumerable lesser acts which render him an undesirable official.

The Punishment.—Since the object of impeachment is not so much to punish the person as to purify the office, the penalty is comparatively light. Congress may neither fine, imprison, nor pronounce sentence of death, all of which the British Parliament, sitting in impeachment, may do. The Constitution limits Congress in its infliction of punishment to two things, one of which it makes compulsory, the other permissive. Congress must, on conviction, remove the offender from office; it may further disqualify him to enjoy any other office under the United States. In any case, the findings of the Senate cannot be reviewed by any other authority, and not even the President may pardon one whom the Senate has convicted.[30]

[30] Const., 2, 2, 1. *Ante*, p. 184.

CHAPTER VI

THE FEDERAL JUDICIARY

ARTICLE 3, SECTIONS 1-3

THE FEDERAL JUDICIARY

Article 3

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

The Judicial Power.—The judicial power is the right to hear and determine a controversy according to the rules of established law. The Constitution vests this power in one Supreme Court, and in such inferior courts as Congress may from time to time establish. The word court here means a tribunal for the administration of justice. It may consist of one judge or several. As a judicial body it is to be distinguished from both counsel and jury.

The Supreme Court.—This is the highest court in the United States, the court of last resort, as the name implies. It consists of nine members, one Chief Justice and eight Associate Justices, of whom six make a quorum. The court holds one annual term in the city of Washington, D. C., commencing on the second Monday in October, and such special, or adjourned, terms as the business before it may require. This subject is considered further under Article 3, Section 2, Clause 2, page 216.

Inferior Courts.—The "inferior courts" that Congress has created are the following: Circuit Courts, Circuit Courts of Appeals, District Courts, the Court of Claims, the Commerce

Court, and Territorial Courts (including those of the District of Columbia). The Circuit Courts, established in 1789, were abolished by act of Congress in 1911; the Commerce Court, established in 1911, was abolished in 1913. These courts therefore are no longer in the judicial system of the United States. In addition to these Congress has provided for certain *quasi* courts, like the Interstate Commerce Commission, and for such occasional tribunals as courts-martial and consular courts.

Circuit Courts of Appeals.—For systematizing judicial business Congress has divided the country into nine circuits, corresponding in number to the justices of the Supreme Court. Each of these circuits includes several States. For example, the first circuit consists of Maine, New Hampshire, Massachusetts, and Rhode Island. In each of the nine circuits is one Circuit Court of Appeals, consisting normally of three circuit judges,[1] two of whom make a quorum. By law the nine judges of the Supreme Court are assigned to duty on the circuits, one to each. The allotment is made by the Chief Justice. In addition to these, the several District Judges within a circuit are competent to sit in the Circuit Court of Appeals. Hence three classes of judges may sit in this court, Supreme, Circuit and District Judges. But no judge, before whom a case has been tried in the District Court, may hear the same case in the Court of Appeals. The work of this court is to review cases coming to it from the District Court on appeal or by writ of error. Its decision is final in some of these cases; in others it is not, these being appealable to the Supreme Court.

District Courts.—As Congress has divided the whole country into circuits, so it has divided the States into districts. Unlike circuits, judicial districts are entirely within State lines. Large States, such as New York, Pennsylvania, California,

[1] The number varies from two to four.

Texas, etc., contain from two to four districts; smaller States, but one. Usually one judge is appointed to a district, but where the districts are large, there are two. At present (1912) there are 77 judicial districts, but 84 District Judges.

The jurisdiction of the United States District Courts is very extensive. It includes practically all Federal cases except a few that by law go at once to the Supreme Court. For example, offenses against the Federal government; prize cases; civil causes (a) arising under the Constitution, laws and treaties of the United States, or (2) between citizens of different States, or between citizens and aliens; and cases arising under the patent, copyright, postal, immigration, or bankruptcy laws, or the Sherman Anti-Trust Act—all these are triable before the United States District Courts.

The Court of Claims.—This court consists of one Chief Justice and four Associate Justices, who hold one annual session, beginning on the first Monday in December. It was established in 1855 for the purpose of deciding the legality of claims against the government. The United States cannot be sued in the ordinary sense, but a claim, or debt, against the government may be laid before the Court of Claims for adjudication. If the decision of the court is favorable to the claimant, it is so reported to Congress, and a bill may then be prepared to give the decision effect. The court is thus a kind of standing committee on claims. Before its establishment there was no way of collecting a debt against the government, except by engineering a bill through Congress—a lengthy, indeterminate proceeding, in which there was no legal interpretation of the claim except that given by the members of Congress. Under the present system Congress must still be appealed to, it is true, but only when the justice of the claim has been judicially determined, when it becomes possible for that body to make the necessary appropriation.

Territorial Courts.—Congress has established supreme and inferior courts in the Territories, by virtue of the general power prescribed by Article 4, Section 3 of the Constitution. The judges in these courts are appointed by the President and the Senate for definite terms, usually four years, but may be removed by the President at any time previous to the expiration of their terms.

Consular Courts.—Provision has been made by treaties with certain non-Christian foreign countries, such as China, Siam, Japan, Madagascar, Egypt, Persia and Turkey, for the establishment of consular and ministerial courts. In other words, both consuls and ministers appointed to these countries are invested with power to try cases of both civil and criminal nature, to which citizens of the United States may be parties. Appeal is allowed from the decisions of consuls in certain cases to the accredited minister, and in more serious cases, to the Circuit Court for the District of California.

(For the Interstate Commerce Commission, see p. 94.)

Military Courts.—These are tribunals for the trial of offenses arising in the military or naval forces. Their jurisdiction is limited; their existence, temporary. They are occasional courts, coming into existence when necessity demands, and dissolving when their special work is finished. In the naval service they are of two kinds, general and summary. In the army, besides the general courts, there are regimental and garrison courts. General courts-martial have jurisdiction over every offense for the trial of which a military court may be convened. When organized, these military tribunals consist of from five to thirteen commissioned officers, of whom at least one-half must be superior in rank to the person to be tried. In the navy they may be convened by the President or the Secretary of the Navy, or by the commander-in-chief of a fleet or squadron with the express permission of the Presi-

dent.[2] In the army, they are convened by any general commanding an army, or colonel commanding a department; or in time of war by a brigade or division commander. The presiding officer of a general court-martial is termed the president; the prosecuting officer is called the judge advocate. Conviction may be had on a majority vote of the court, except where the sentence of death is to be imposed, when two-thirds must concur. Summary courts-martial are for the trial of petty offenses and persons of inferior ratings. In the navy they consist of three officers, not below the rank of ensign, and a recorder. They may be convened by the commander of any vessel in the naval service, or by the commandant of any navy yard, naval station, or marine barracks.

The findings of both general and summary courts-martial must be reviewed by the convening authority before the sentence of the court can be carried into effect. When the findings of a military court having jurisdiction have been reviewed and confirmed, it is not proper for any other court, military or civil, to review the case. It is always proper, however, for a civil court to inquire into the jurisdiction of a military court.[3]

Besides being temporary tribunals, military courts differ from ordinary courts in other respects. The members are usually not versed in the law, and their proceedings, although they must be in conformity to the law, are commonly free from the technicalities so often seen in municipal trials. The courts have neither judge nor jury; or better, perhaps, the members act in both capacities, sifting the evidence on the one hand, and weighing the facts on the other. Lastly, a person to be subject to trial by a military court need not be first indicted by a grand jury, and conviction does not depend on the unanimity of the court.

[2] This permission not necessary when the fleet is in foreign waters.

[3] In re Grimley, 137 U. S., 147.

The Military Power Subordinate.—When martial law is declared in any district, all offenses calculated to impede the operations of the military authorities are triable before military commissions. But if conditions are reasonably peaceful, and the civil courts are in operation, military commissions have no power to try persons not attached to the military or naval forces.[4] The rule is that the military power is subordinate to the civil, unless necessity demands the contrary.

State Courts.—All that has just been said about courts relates to the Federal courts, that is, tribunals established by Congress under the authority of the Constitution. The vast majority of courts in the United States, however, have very little to do with Congress or the Federal judicial system. These are the State courts. Just as the general government operates a judicial system, every State has its system. Consequently, there are as many systems for the administration of justice in the United States as there are States, and among them are great differences in title, jurisdiction, and manner of operation. To illustrate: in Connecticut is one Supreme Court, corresponding to the Supreme Court of the United States; Superior Courts, similar in a general way to the Federal Circuit Courts of Appeals; Courts of Common Pleas; Probate Courts (tribunals for the settlement of wills and estates); and Justice, or Police Courts. In Maryland, on the other hand, the highest court is called the Circuit Court of Appeals. Below that is the Circuit Court, and below that is the Justice Court. Here the Probate Courts are termed Orphans' Courts. There is no Federal tribunal for the administration of wills and estates. Thus the courts of these two States, although designed to attain the same ends, differ greatly from each other in name, and do not altogether resemble the courts in the Federal system. An examination of the courts of other States would disclose still further varia-

[4] Ex parte Milligan, 4 Wallace, 2.

tions, but enough has been said to show that the system for the interpretation of laws and the administration of justice in the United States is very complex.

Federal and State Systems are in Harmony.—Notwithstanding this apparent confusion of titles and systems, Federal and State courts work together smoothly. Federal courts are sanctioned wholly by the Constitution and statutes of the United States; State courts derive their functions entirely from the constitutions and laws of the respective States, or from the common law as adopted by them. Both systems within their respective spheres are supreme.[5] The decisions of the courts of one State are given full faith and credit in the courts of other States, and in the courts of the United States. Most of the litigation arising in any State is settled by the courts of that State, only those cases being appealable to the Federal courts that concern the Constitution, treaties and laws of the United States.

Tenure of Office; Salary.—Federal judges hold office practically for life.[6] They may resign at pleasure, and on reaching the age of seventy years they may retire from active duty; but they are excepted by the present clause from the President's sweeping power of removal. The sole way of removing a Federal judge from office is by the long and tedious process of impeachment. Much more than a century has now elapsed since the adoption of the Federal Constitution, and although several judges have been impeached, only three have been pronounced guilty of the offense charged and removed from office[7] —a fact that testifies as much perhaps to the cumbersomeness of that method of removal as to the rectitude of judges. The

[5] Collector *v.* Day, 11 Wallace, 113.

[6] Exception: judges in the Court of Claims, and in territorial courts are appointed for limited periods.

[7] See p. 199.

salary of Federal judges is determined by Congress; when once fixed it may not be diminished during their respective terms of office. These provisions insuring tenure of office and continuance of salary were intended to secure the complete independence of the Federal judiciary, without which it would be difficult to insure the proper administration of public justice.

In State Courts.—There is some variation among the States in respect to the appointment and tenure of office of judges. In some States judges are appointed by the Governor, in others they are elected by the people; in some States they hold office during good behavior, in others, for limited periods only; in others they are subject to the recall.

Recall of Judges.—The "recall," as the term implies, is a process by which elective officers may be ousted from their positions by popular vote. On the petition of a certain percentage of the voters in a district the question whether an official, against whom some complaint has been made, shall be continued in office is put to the ballot. Like the "initiative" and the "referendum" the "recall" is regarded by many people as a panacea for all official malfeasance and incompetence. They argue that, especially in a democratic country, holders of public offices are public servants, and as such they should be directly responsible to the people. Accordingly, in some States the "recall" has been adopted by constitutional amendment for administrative and executive officers; in other States it includes the judiciary as well. In respect to Federal officers, the "recall" is unknown.

The chief objection to the "recall," and especially to the "recall" of judges is that it tends to weaken the office by lessening the independence of the occupant. One who holds a public office of any importance should be free to act without fear or favor; he cannot feel free if liable at any time to be voted out of office on the petition of any section of the com-

munity that he may displease by his act or decision. On the other hand, one who is secure for life or for a limited period in a public office is in a position to do more or less mischief. To find the best means of limiting this power in a public officer to do harm, and at the same time to secure his complete independence, is a great problem in practical politics.

Officers of the Courts.—The officers of the Federal courts are: attorneys, marshals, commissioners, reporters, and clerks. In a broad sense, every lawyer practising before a United States court is an officer of the court. The Attorney-General, however, and his immediate assistants are the only attorneys having distinct duties before the court. This officer is charged with the duty of conducting all suits in the Supreme Court to which the United States is a party. As head of the Department of Justice, he has a seat in the cabinet, and is required to give legal advice to the President, and to the heads of the other departments as well, when requested.

United States marshals are executive officers appointed for each judicial district, whose duties are to carry out all mandates of the court. They correspond to the sheriffs in the State courts.

United States commissioners are justices of limited jurisdiction appointed by the District Courts. In a general way, they are like justices of the peace in the States.

The duty of a court reporter is to keep a record of the facts in all the cases adjudicated by a court, together with the opinions of the court, and cause the same to be published. The Supreme Court reports now fill many volumes. In the early days, these reports were named after the reporter who made them. Thus a reference to 5 Wheaton, 317, means the 5th volume of Wheaton's Supreme Court Reports, page 317. To-day, however, these reports are arranged in a numerical series and are called United States Reports. A reference to 169 U. S., 17, means volume 169 of the Supreme Court Reports, page 17.

Clerks of the court care for the seals and records, sign and seal all process, and record the decrees of the court. The word process here includes all those means necessary to compel the performance of the orders of the court, such as summonses, warrants, and subpœnas.

Section 2, Clause 1.—The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

Admiralty and Maritime Jurisdiction.—The words "admiralty" and "maritime," as used in the Constitution, are not synonymous. The difference is broadly this: Admiralty jurisdiction extends to cases that occur or have their origin on the high seas, including navigable rivers, lakes and ship canals, as well as the ocean; a maritime cause is one arising from a maritime contract, whether made at sea or on land. Prize cases, and all offenses committed at sea come under the admiralty jurisdiction. Contracts to insure ships or cargoes, and contracts for launching or for removing ballast are maritime contracts. The court of original admiralty and maritime jurisdiction is the United States District Court.

Judicial Precedents.—When a court has once applied the law to a set of facts, its decision becomes a sort of judicial precedent for the guidance of the same court, or of other courts, in the settlement of other cases. Judges, in their determination of legal questions, give great consideration to the previous decisions of other courts bearing on the same or

similar questions; and students of law find it quite as useful to study actual law cases, as to study the principles of law laid down in text-books. A case that has established some principle of law is called a leading case. Such is the case of Dartmouth College *v.* Woodward, 4 Wheaton, 518, which established the principle that the charter of a college is such a contract as the State legislature cannot annul or impair.

This adherence to precedent is both good and bad. It is good in that it helps to preserve a sort of continuity and harmony among judicial decisions, thus tending to make the law more sure and stable; it is bad in that it fails to allow for that change in sentiment and belief which is more or less linked with human evolution.

Cases Under the Constitution, Laws and Treaties.—A case is said to arise under the Constitution, the laws of the United States, and treaties made, when its correct decision depends on the construction of any clause in the Constitution, or law, or treaty of the United States. It is the character of the suit that gives the court jurisdiction. Thus any controversy which raises the question of the constitutionality of a Federal law or treaty may be tried in a Federal court, regardless of the amount involved.

Other Cases.—The other seven classes of cases, over which the national courts have jurisdiction, are less general. Power over these is given to the Federal judiciary, either because they involve foreign relations, or because the Federal government is directly concerned, or because it is desirable that they be taken before a common superior tribunal, free from pernicious, partisan influence. Cases affecting public ministers, and admiralty and maritime cases may involve foreign relations; cases to which the United States may be a party directly affect the government; and cases between States, or between a State and citizens of another State, or between citizens of different States or between citizens of the same State claiming

lands under grants of different States, all are less liable to partisan influence if tried before national courts than if tried before State courts. Again, the jurisdiction is not as a general thing exclusive. For example, controversies between citizens of different States may be instituted in the State courts, and they very frequently are. The United States, as a party to a suit, may commence proceedings in a State court, or in a Federal court, as circumstances may require.[8]

"**Cases in Law and Equity.**"—Courts are not legislative, executive, or advisory bodies. Their duty is solely to interpret the law in relation to facts, which when presented in the form of a controversy between parties constitute a "case." It is not the province of the judicial department of the United States to advise, or control in any way, the executive or the legislative departments, for each in its sphere is supreme. No court, furthermore, will of its own volition decide the validity of a law; it does so only when that question is at issue in a case legally before the court. Neither do courts decide concurrent, or contingent matters, or questions suggested by a case in hand. They determine the point at issue, and nothing more.

A case in law is one that must be decided by strict legal principles; a case in equity is decided by equitable principles. By the latter is meant those broader principles of right and fairness which a petitioner in court may invoke to obtain substantial justice, in cases where the strict rules of the law do not grant it. Both the common law and the statutes are limited in their scope. Neither covers every conceivable situation. When a suitor therefore asks for relief which the law cannot grant, a court having equitable powers may give equitable relief. Injunctions are common equitable remedies. To illustrate: A dams a stream, causing the back flow to injure B's property. At law the utmost relief that B can obtain is money damages. But this may not be adequate compensation. The

[8] Principles of Constitutional Law, Cooley, 133, and cases cited.

relief that B seeks is the restoration of his land to its former state, not money damages. In such a case a court of equity might supplement the inadequacy of the law by issuing an injunction compelling A to remove the dam, or restraining him from so building it as to injure B's property. By the authority of the present clause of the Constitution Federal courts administer both legal and equitable principles.

Section 2, Clause 2.—In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

Jurisdiction.—In law the term jurisdiction is synonymous with judicial power, *i. e.,* the power of a court to try a legal controversy. The word legal is important here. It is not the business of a court to settle diplomatic, business, or political questions. The jurisdiction of a court may be either *exclusive* or *concurrent; original* or *appellate.* It is exclusive in a case, if no other court has power to act; it is concurrent where two or more courts have authority to try a case at the option of the suitor; it is original where the court has power to try a cause in the first instance; it is appellate where the court may review the decision of another court. Judicial tribunals in the United States, and likewise in the several States, are arranged in a sort of ascending series, so that while the lowest courts have usually only original jurisdiction, the intermediate and the highest courts have mainly appellate jurisdiction, but are given original jurisdiction over some cases. The United States District Courts, for example, hear causes in the first instance only; the Circuit Court of Appeals has appellate power only; but the Supreme Court is given original power over some cases, and appellate over others. Neither the Supreme Court, nor any other court that has

original and appellate jurisdiction, may review its own decisions, although it may *re-try* the same cause. To re-try a cause is to hear the facts a second time as if they were new; to review is to examine the record of proceedings in the original case.

The Original Jurisdiction of the Supreme Court.—The Constitution gives the Supreme Court of the United States original jurisdiction over two classes of cases: 1st, those affecting ambassadors, other public ministers and consuls; 2d, those in which a State shall be a party. It has been decided that Congress can neither enlarge nor abridge this jurisdiction.[9] Furthermore, the jurisdiction of the Supreme Court is not exclusive. Congress has provided that in all cases *brought by* ambassadors or other public ministers, or in which a consul is concerned, other Federal courts may have jurisdiction concurrently with the Supreme Court; and in cases between a State and its citizens, or between a State and citizens of another State, or aliens, the jurisdiction is likewise concurrent; in other cases it is exclusive in the Supreme Court.[10]

The Appellate Jurisdiction.—This is much more extensive than the original jurisdiction. It includes all the cases mentioned in the first clause of this Article. The first item in that clause makes the Supreme Court the court of last resort for all so-called constitutional cases. This is a wide range. Any case, whether between high functionaries over extensive claims, or between the humblest citizens involving but a trivial interest, if it turns wholly or in part on the application or interpretation of the Constitution, the validity of an act of Congress, or the force and extent of a treaty, comes fairly under the Constitution, laws or treaties of the United States, and may properly be appealed to the Supreme Court. The question of appeal in these cases depends, not on the bigness of

[9] Marbury *v.* Madison, 1 Cranch, 137.
[10] R. S., 687.

the claim, or the importance of the parties, but on the principle at stake. Both questions of law and questions of fact may be carried to the Supreme Court for review, but the majority of the cases decided by that court involve questions of law only. By such questions is meant: the validity or meaning of a law or statute, or the rulings of the lower court on matters of procedure and evidence. These questions are always determined by the judges without a jury. Questions of fact, on the other hand, are triable before a jury; but jury trials in this court are rare.

The Power of Congress to Make Exceptions.—The matter of appeal is wholly subject to the legislative power of Congress, as shown by the phrase, "with such exceptions and under such reservations as the Congress shall make." Under this authority Congress has determined that certain cases decided in the State courts may be appealed to the Supreme Court—as where the highest State court decides *against* the validity of a law or treaty of the United States, or decides, on the other hand, that a State statute is *not* repugnant to the United States Constitution.[11] Congress has enacted, furthermore, that some cases may be decided finally by the Circuit Courts of Appeals, some by the District Courts, and some by the Court of Claims. To determine in any case whether a controversy should come properly before a Federal court, or is properly appealable to the Supreme Court, one must consult the statutes enacted by Congress.

Limitations of the Federal Courts.—The Federal courts have no common law jurisdiction. That is to say, all their powers are derived from the Constitution or the Federal statutes. This is especially evident in regard to crimes. There are no common law crimes in the United States, except as recognized by the several States. Hence no act is triable as an offense before a Federal tribunal, unless Congress has

[11] R. S., 709.

previously declared the act to be an offense against the United States.[12]

> **Section 2, Clause 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.**

The Trial of Crimes by Jury.—The phrase "trial of all crimes," refers to offenses against the United States only. Such offenses, as we have said, must be defined by the public statutes before they can be tried in the Federal courts, for there are no common law offenses against the United States. The jury which the Constitution requires for the trial of crimes is a body of twelve impartial men, chosen from the district where the violation of law occurred, all of whom must concur in the guilt of the accused before he can be convicted. It is not improper for the States to provide for juries of a greater or less number than twelve for the trial of State offenses, or to allow conviction by the vote of a majority. Most of the States, however, still cling to the old idea that the trial jury should consist of twelve men, and that conviction should be only on a unanimous verdict. This trial body is called the petit jury.

Need of Change in the Jury System.—The Constitution requires all crimes to be tried before a jury. The requirements of a jury to-day, however, are practically the same as the requirements of centuries ago, and it is becoming more and more a question whether trial by jury should not be abolished, or drastic reforms made in the method of procedure. At present the system is hedged about by straight-laced demands and restrictions, and burdened by arbitrary, antiquated forms. So many classes of men are excused from jury duty by law, and so many drawn by lot are excused by the court for various

[12] U. S. *v.* Hudson, 7 Cranch, 32. U. S. *v.* Bevans, 3 Wheaton, 336. Baldwin's American Judiciary, 142.

reasons, that it is becoming more and more difficult to impanel a full jury. Furthermore, the requirement that a juryman shall have no previously formed opinion of the case before the court seems, in these days of almost universal education and rapid dissemination of knowledge, almost an absurdity. But legal methods are slow to change, and this way of determining justice will probably continue for a good many years to come.

Exceptions.—Not all cases at law, it should be noticed, are tried by jury in the Federal courts; but only criminal cases, and those issues of fact which the Constitution and the judiciary acts require to be so tried. Equity cases are rarely taken before the jury, but are determined by the court. Civil causes in admiralty are likewise heard by the court without a jury, except in a few special cases (R. S., 566).

Place of Trial.—The trial of all crimes must be in the State where they are committed. By this provision the accused is made to suffer as little inconvenience as possible; witnesses are more easily summoned, and information is more readily obtained, than if the trial should be held in some place remote from the scene. Ordinarily the trial takes place in or near the locality where the crime was committed, but if for any reason the defendant cannot be assured of a fair trial in that locality, the case may be taken to some other. This is called change of venue. All these things, as well as the requirements regarding the number and unanimity of the jury, favor the accused. Offenses "not committed in any State" are those committed in the District of Columbia, in the Territories, on lands owned by the Indians, in the forts and arsenals of the United States, and on the high seas. Congress has provided for all these: those committed on the high seas being triable in the State where the vessel first arrives. In the case of an American vessel outward bound to a foreign port, it would be the duty of the American consul at that port to cause the offender, on the arrival of the vessel, to be arrested and sent back to the United States for trial.

Section 3, Clause 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.

Section 3, Clause 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.

Treason Limited to Definite Acts; Constructive Treason.—The definition of treason in the Constitution serves two purposes: first, it makes conspicuous the acts which may be punished as treason; second, it absolutely excludes all other acts from being considered treason. The latter purpose is the greater. The substance of this definition was taken directly from the English Statute of Treasons, 25, Edward III. Before the enactment of that statute judges sometimes determined acts to be treasonable that were not believed to be such when committed. From their decisions arose what was known as *constructive* treason. Under the Constitution constructive treason is absolutely impossible. The common law, furthermore, distinguished between *high* and *petit* treason; high treason being practically what the Constitution defines as treason, petit treason being the killing of a husband by his wife, or of a master by his servant. The old distinction between *high* and *petit* treason, known to the common law and still adhered to by some nations, does not exist in the United States.

What is Treason?—The Constitution recognizes only two classes of acts as treasonable: first, levying war against the United States, or any one of them; second, adhering to their enemies, giving them aid and comfort. To constitute the offense of levying war there must be an actual breaking out of hostilities for the purpose of subverting the government.

A conspiracy to overthrow the government, although an indictable offense, is not in itself treason.[13] Adhering to the enemies of the United States, giving them aid and comfort, is a broad phrase. It embraces every act which renders any assistance to the enemy, unless such act is done under compulsion. Among these treasonable acts are: joining with the enemy to give assistance, delivering up forts, arsenals, and ships of war, and supplying the enemy with money, supplies and ammunition. Mere personal sympathy for the enemy is not necessarily treason. Only the overt act is criminal. In this connection, however, even acts that are not intended as treasonable may sometimes be so construed, if the effect of them is to render assistance to the public enemy. To illustrate: in the Civil War, when the loyal owners of two steamboats which had been seized by the Confederates were offered pay for them by the Southern government, they were informed by the Secretary of State that the acceptance of pay would be considered treasonable, as showing adherence to the enemy. In any event, it is not necessary that material damage be done, or that the aid given be of tangible assistance to the enemy. It is enough if a hostile, overt act is committed. Since treason, however, is really a breach of allegiance, it can be committed only by one who owes allegiance, that is, by a citizen.[14]

Conviction.—Treason is the most serious crime that a man can commit, for it strikes at the foundations of the government. For this reason more than ordinary proof is required to establish guilt. Mere circumstantial evidence is not enough; a private confession amounts to nothing. To convict of treason, there must be the evidence of two witnesses to the same overt act, or confession in open court.

[13] Ex parte Bollman, 4 Cranch, 75.

[14] U. S. *v.* Villato, 2 Dallas, 370. U. S. *v.* Wiltberger, 5 Wheaton, 97.

Punishment of Treason; Attainder.—Under the old English law, the punishment of treason was death in some horrible form. Congress has declared the punishment of treason against the United States to be imprisonment, or death by hanging. The Constitution has further softened the old punishment by declaring that "no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted." The word attainder, as used in this clause, means simply judicial conviction. To work corruption of blood is to destroy all power of inheriting or transmitting property according to the regular laws of descent. Under the old English law, not only might a man convicted of treason be put to death, but his property might be confiscated by the State, and all right in his descendants to inherit property either from him, or through him, be forever cut off. His blood was said to be corrupted, and his punishment was visited upon his descendants for successive generations. Corruption of blood in this sense is forever prohibited by the Constitution, and forfeiture of property is possible only to a limited extent. The case of Day *v.* Micou, 18 Wall., 156 (1873), will perhaps illuminate this point.

In 1858 J. P. Benjamin mortgaged his land to Madame Micou. In 1865 Benjamin was adjudged guilty of treason against the United States, and his property was confiscated by the government and sold to Madison Day. Later, Madame Micou brought suit against Day to recover the mortgage debt. Day resisted the suit on the ground that forfeiture and sale of the property by the government had relieved it of all encumbrances. The court held that punishment for treason cannot work a forfeiture of estate beyond the life of the person attainted. Forfeiture took away merely Mr. Benjamin's interest in the property, which was a life estate; it could not deprive anyone else of his interest. The mortgagee's claim was still good, since it attached to the property previous to the forfeiture.

Treason and Rebellion.—When entire communities levy war against the government they create a state of treason rather difficult of settlement. During the Civil War all who were in arms against the government were technically guilty of treason, but the government chose rather to regard them as belligerents than as traitors. Although Congress passed many acts for the disposition of captured property, and both legislative and judicial acts of the Confederacy were held to be absolutely void,[15] no steps were taken at the close of the war to punish the offenders according to statute. "You cannot indict a whole people," said Edmund Burke; and both the President and Congress saw the absurdity of trying to punish a rebellious community. Accordingly, the offense of having levied war against the government was pardoned by general proclamations of amnesty, issued by Presidents Lincoln and Johnson. Later, the 14th Amendment, Clause 3, imposed disabilities on certain ones who had engaged in rebellion, but more for the purpose of rewarding and insuring loyalty than for punishing disobedience. In 1898 these disabilities were removed.

Misprision of Treason.—Since Congress may declare the punishment of treason, it also must have the power to declare the punishment of lesser crimes in the nature of treason. Accordingly, "misprision of treason," or the willful concealment of known treason by one who takes no part in the same, has been declared an offense and made punishable. Guilty knowledge here constitutes the wrong. Congress has likewise provided for the punishment of conspiracy against the government, where no overt act has been committed.[16]

[15] Knox *v.* Lee, 12 Wall. (79 U. S.), 457. In this case Lee, a loyal citizen whose property had been confiscated under Confederate statutes, was allowed to recover from Knox, the purchaser, on the ground that the sale of property under void statutes was illegal.

[16] R. S., 5440.

CHAPTER VII

MISCELLANEOUS

ARTICLE 4, SECTIONS 1-4

AMENDING THE CONSTITUTION

ARTICLE 5.

VALIDITY OF DEBTS; FUNDAMENTAL LAW; OATH OF OFFICE

ARTICLE 6, SECTIONS 1-3

RATIFICATION OF THE CONSTITUTION

ARTICLE 7

MISCELLANEOUS

Article 4

Section 1.—Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Faith and Credit.—The full faith and credit to which the public acts, records, and judicial proceedings are entitled in other States is the same faith and credit to which they are entitled in the State where they originate.[1] But all such things are facts to be proved, in case the question of their existence arises; for the courts of one State are not required to take judicial notice of the public proceedings in other States, that is, to accept them as matters of common knowledge.

Proving Public Acts, etc.; Act of Congress.—Congress has provided for this in the following way: "The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seal of such Territory, State, or country affixed thereto. The records, and judicial proceedings of the courts of any State, Territory, or of any such country, shall be proved, or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice, or presiding magistrate, that the attestation is in due form."[2]

"Public acts" are the State's legislative enactments. "Records" are the registration of deeds, wills, legislative

[1] Mills *v.* Duryea, 7 Cranch, 481.

[2] R. S., 905.

journals, etc. "Judicial proceedings" are the judgments, orders, and due procedure of organized courts.

Section 2, Clause 1.—The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

The General Purpose.—The general purpose of this amendment was to settle all uncertainty regarding the rights of citizens of any State while passing through, sojourning, or residing in any other State. No state may pass laws discriminating against citizens of other States. Conversely, citizens of one State may not carry into another State privileges that are not enjoyed by citizens of the latter. To illustrate: John Doe, of New Hampshire, on removing to Maine, may enjoy all the privileges and immunities of the citizens of Maine. He may claim police protection; he may acquire and hold property; he may institute suits in the State courts, and in respect to most matters may act as a citizen of Maine. But he may not carry into that State any rights and privileges not allowed by the laws of Maine to its own citizens. Thus he may not engage in a business there which is illegal under Maine statutes, on the ground that such business is legal in New Hampshire.

Exceptions; Political Privileges.—What has just been said is true of citizens in respect to their private, or business relations. In respect to their relations with the State a different rule may obtain. Political privileges, such as the right to vote, to hold State offices, etc., may certainly be reserved by the State to its own citizens. Furthermore, on the ground of public ownership, a State may with reason limit certain other privileges, such as shooting on public game preserves and fishing in public waters, to its own body politic.

Although corporations are often called artificial citizens, in no sense are they citizens in fact. Hence, a State is not bound

to accord to corporations created by other States all the privileges and immunities granted to its own corporations or enjoyed by its private citizens.[3] But all restrictions imposed by a State on corporations chartered by other States must be in conformity with the Constitution and laws of the United States. For example, a State may forbid foreign corporations to acquire real property within the State by devise,[4] that is by will or testament, but it cannot restrict the navigation of its waters to domestic citizens or corporations, for that would be a regulation of interstate commerce; nor may it deny to foreign corporations, which it allows to do business within its borders, privileges and immunities which its own citizens enjoy. This, at least, was the decision of the Supreme Court in the case of Blake *v.* McClung, 172 U. S., 239 (1898), as follows:

A Tennessee statute gave the citizens of that State priority over citizens of other States in the settlement of the estates of insolvent foreign corporations doing business in Tennessee, although foreign corporations were allowed to operate in Tennessee by permission of the legislature.

The Supreme Court held that the State of Tennessee could not deny to citizens of other States whom it allowed to do business there privileges and immunities that its own citizens enjoyed. The terms privileges and immunities, it said, were not easy to define, but they must include the right of creditors to participate on terms of equality in the assets of a debtor.

Section, 2, Clause 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] Paul *v.* Va., 8 Wallace, 168. Horn Silver Mining Co. *v.* N. Y., 143 U. S., 305.

[4] U. S. *v.* Fox, 94 U. S., 315.

Fugitives From Justice.—A fugitive from justice is a person who, having committed a crime in one jurisdiction, flees to another to avoid punishment. The matter of returning such persons by one nation to another is regulated by treaties. The United States government has such treaties with most, but not all, foreign States. In the United States, the matter is provided for by the present clause in the Constitution. Without this regulation the several States would become asylums for the fleeing criminals of each other, for the courts of one have no jurisdiction in any other, and the States are forbidden by the Constitution to make treaties, or, without the consent of Congress, to enter into any compact or agreement with each other. The act of returning escaped criminals, or fugitives from justice, from one nation to another, or from one State to another, is called *extradition*. The formal demand for such delivery is termed *requisition*.

The Procedure.—The procedure in extradition was prescribed by Congress in 1793. Substantially it is as follows: First, formal demand by the executive of the State from which the alleged criminal has fled must be made on the executive of the State to which he has fled. Second, this demand must be accompanied by a copy of the indictment found against him, or by an affidavit made before a magistrate charging the fugitive with the commission of a crime. Third, when it has been shown to the satisfaction of the executive on whom the demand is made that a crime against the demanding State has been committed by the person named in the requisition, he shall cause the latter to be arrested and delivered up to officers from the demanding State. The law in these cases allows the Governor little discretion. But the charge against the person must be in the nature of a crime; he cannot legally be extradited to satisfy a private demand. What seems like an exception to this is in the law providing for the extradition of bankrupts. Whenever a bankrupt is suspected of an intention

to leave the district in which the court is sitting the court may issue a warrant for his detention. Should he then remove to some other district he may be extradited, as in the case of a fugitive against whom an indictment is pending.[5] The phrase, "fugitive from justice," implies an actual fleeing from one jurisdiction to another. Accordingly, if the person in question has never been in the demanding State, he cannot be said to have fled from it, and he is not demandable as a fugitive.[6]

It is not always necessary to resort to these formal proceedings in order to secure a fugitive for trial. He may be enticed back into the State from which he has fled, or kidnapped and brought back, then arrested, tried, and punished, and such proceedings have been declared valid.[7] In any case, whether returned by extradition, or by less formal proceedings, he may be tried for the alleged offense, or for any other that he may be afterwards charged with.[8]

This Clause not Mandatory.—No doubt the framers of the Constitution intended that this clause should be mandatory. Time and the courts have decreed otherwise. The imperative *shall* has become in practice the permissive *may*. That is, the Governor of the State on whom the demand is made, although morally bound in a proper case to deliver up the alleged criminal, cannot be compelled to do so,[9] for Congress has as yet made no provision to coerce an obstinate State executive. Furthermore, in case the fugitive is arrested in the State to which he has fled, it is always proper for the courts of that State to inquire by *habeas corpus* proceedings into the

[5] Statutes at Large, 30, 549.

[6] Ex parte Smith, 3 McLean, 133.

[7] Ker. *v.* Ill., 119 U. S., 456. Mahon *v.* Justice, 127 U. S., 700. Cook *v.* Hart, 146 U. S., 183.

[8] Lascelles *v.* Georgia, 148 U. S., 537.

[9] Kentucky *v.* Dennison, 24 Howard, 66.

sufficiency of the charge against him[10]; and unless the requisition papers are complete, and show at least a *prima facie* case against the accused, he may be released.

> **Section 2, Clause 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.

Fugitives from Labor.—This clause is mainly of historic interest to-day. It was doubtless intended to apply both to slaves and to apprentices; but as the 13th Amendment has forever abolished slavery, and as the custom of apprenticing is falling into disuse, the clause is practically a dead letter.

> **Section 3, Clause 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.

Western Claims.—At the conclusion of the Revolutionary War a vast unorganized territory lay west of the thirteen States. Some of this land was claimed by the various States; the rest was owned by other nations. In 1780 Congress pressed on those States that had claims to western land the advisability of giving up their conflicting holdings for the common good. This they did one by one, until at the time of the adoption of the Constitution only two States, South Carolina and Georgia,[11] retained their western claims; all the rest

[10] Roberts *v.* Reilly, 116 U. S., 80. Ex parte Reggel, 114 U. S., 642.

[11] By 1802 Georgia and South Carolina had relinquished their claims.

of the land west of the original colonies, not owned by other nations, had come into the possession of the United States. Gradually Congress acquired possession of the western continental territory held by other nations; but before this was completed the work of dividing western lands into States and Territories had begun.

Status of New Territory.—Although Section 3, Article 4, had immediate reference to the western claims of the original States, the language is broad enough to cover whatever land the United States might acquire, and by whatever means. The Constitution does not expressly empower Congress to add to the national domain by purchase, conquest, treaty, or by any other mode; but the United States has repeatedly exercised the power as appertaining to national sovereignty. Normally, land acquired by the government to be added to the national domain passes through two stages before reaching the dignity of statehood. First, whether it be barbarous land, or land with a *de facto* government, it is a dependency, a mere possession, and ruled entirely by the general government; secondly, it becomes a territory with a greater or less degree of organization, and with a limited self-government. From this status it may develop into a State with self-government and a highly developed political organization.[12]

The fact that a dependency, or Territory, is contiguous to the established Union does not make its statehood any more certain, nor the fact that it lies remote, forever keep it from that desirable status. Whether a Territory shall become a State rests entirely on the will of Congress.

How States are Admitted.—The mode of admitting new States into the Union has not been entirely uniform. It is usually done as follows: When a Territory has sufficient population it draws up and sends to Congress a memorial, or petition, asking for permission to form a State constitution, and

[12] Texas, the single exception, was admitted a full-fledged State.

to be admitted to the Union. Congress then passes an "enabling act," authorizing the inhabitants of the Territory to form a constitution. When this is done the document is sent to Congress for approval. If the proceedings have been regular, and the constitution is free from objections, Congress passes an act, commonly a joint resolution, admitting the new State into the Union, "on an equal footing with the original States in all respects whatsoever." The example of Louisiana is typical. In 1804 the great region purchased from France, under the name of Louisiana, was divided by Congress into the district of Louisiana and the district of Orleans. In 1811 Congress passed an act "to enable the people of Orleans to form a State constitution and State government." In 1812 an act was passed "for the admission of the State of Louisiana into the Union, and to extend the laws of the United States to the said State."

Exceptions.—The power of Congress to make new States has two limitations. It may not divide a State, or amalgamate two or more, without the consent of the legislatures of the States concerned. But such consent may be implied by subsequent acts as well as expressly given.[13]

> **Section 3, Clause 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.

General Provisions.—Territories are portions of the national domain having a more or less developed political organization for purposes of government. The land is owned by the Federal government; the political rights of the people depend on the will of Congress. The executive and the judicial

[13] Virginia *v.* West Virginia, 11 Wallace, 39.

officers are appointed by the President and the Senate for limited terms, and are subject to removal by the President at any time. The provisions of the Constitution defining the limits of judicial power have no application to the Territories. Congress may make the jurisdiction of territorial courts what it pleases, or abolish them altogether. The legislature of a Territory is usually elected by the people; but its enactments are subject to the supervision of Congress, and the latter may make void any or all of them.[14] Territories levy their own taxes for local purposes. They may be taxed for national purposes, but only under the same rules and for the same purposes as are the States.

The territorial condition is generally regarded as temporary and preparatory. The inhabitants, as soon as they are sufficient in numbers, and local conditions are suitable, may, at the discretion of Congress, establish State institutions for themselves. It has not been the policy of the United States to keep any people, or section of country, in a position of dependence longer than conditions make necessary. At present, 1913, the Territories of the United States consist of Alaska, Hawaii, Porto Rico, the Philippine Islands, and the small islands of Guam and Tutuila. As these differ politically in some particulars, it may be well to point out what those particulars are.

Alaska.—Alaska was purchased from Russia in 1867. It is not yet a fully organized Territory. Although it has a Governor, courts, attorneys, marshals, and commissioners, it has no legislature. For many years the laws of Oregon were, so far as applicable, extended over Alaska; but in 1898 and 1900, respectively, special criminal and civil codes were enacted by Congress for its government. Alaska is represented in Congress by one delegate, who may participate in the discussions of the House and serve on committees, but who has no vote.

[14] Mormon Church *v.* United States, 136 U. S., 1.

Hawaii.—The Hawaiian Islands were annexed to the United States in 1898 by the terms of a joint resolution of Congress. Previously they had been at various times a kingdom under native rulers, a United States protectorate, and a republic. Since 1900 Hawaii has been an organized Territory. It has a Governor appointed by the President, a delegate in Congress, elected by the people, and a legislature consisting of a Senate and a House of Representatives. The judiciary consists of a Supreme Court, a Circuit Court, and such inferior courts as the legislature may establish. The judges are appointed by the President and the Senate.

Porto Rico.—This island came into the possession of the United States in 1898, as a result of the war with Spain. From then until May 1, 1900, when Congress established a civil government for the island, it was governed by the President through the War Department. Porto Rico now has a Governor, appointed by the President and the Senate. The legislature consists of a council, appointed by the President and the Senate, and a House of Delegates chosen by the people. It has Supreme and District Courts, the judges of which are appointed by the President and the Senate. Instead of having a delegate in Congress, Porto Rico maintains a resident commissioner "near the Congress," who represents the island in all official matters.

The Philippine Islands.—These islands were ceded to the United States in 1898, for $20,000,000. For two years thereafter the government was purely military, the Filipinos carrying on the same desultory warfare against the United States that they had previously waged against Spain. In 1900 the President appointed a commission of five men to establish a civil government for the islands; in 1902 the head of this commission was made civil governor of the Philippines, with the title of Governor-General. In 1907 provision was made for the election of a native assembly. The commissioners (now

nine in number) and the assembly together form the legislature. The judiciary consists of a Supreme Court and a number of lesser courts. The judges are appointed by the President and the Senate. The islands are represented in the United States by two commissioners.

The condition of both Porto Rico and the Philippines is at present unsatisfactory. Both are under the absolute control of Congress; both are regarded as domestic territory; but they have not yet been incorporated as part of the United States within the meaning of the revenue laws, or of that clause of the Constitution requiring "all duties, imposts, and excises to be uniform throughout the United States." Hence the law providing for a small tax on goods shipped from the United States to Porto Rico, and from the latter place to the United States, was held to be valid.[15] The political status of the inhabitants of the Philippines has not yet been fully determined.

Guam and Tutuila.—Guam was ceded to the United States in 1899. Tutuila, a part of the Samoan Islands, came into the possession of the United States in 1900, through a treaty entered into by Great Britain, Germany and the United States, concerning the final disposition of this group. Politically, both Guam and Tutuila are little more than dependencies. They are governed by the President through the Navy Department, and have no official representative in the United States.

> **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.**

Republican Government.—The obvious meaning of the first part of this clause is that only a republican form of govern-

[15] Dooley *v.* United States, 183 U. S., 151. Stat. at Large, 77. Downes *v.* Bidwell, 182 U. S., 244.

ment shall be allowed to exist in the United States. By republican is meant *representative,* rather than monarchical, oligarchical, or democratic. In a monarchy the government is hereditary; in an oligarchy it is restricted to a certain class; in a pure democracy it is vested in the whole people; in a republic the people are the source of all power, although the actual business of governing and law making is in the hands of officers regularly chosen by the people to act for them. The government is "representative." Such was the character of the governments in the several States at the time of the adoption of the Constitution, and such is the character of the Federal government. It is to be presumed therefore that this is the form of government guaranteed by the Constitution to every State in the Union. It is not expected, however, that every State government shall correspond in every detail with the governments of all or any of the thirteen original States, or with that of the United States, for there are many shades of republicanism; but that every State government in the Union shall be representative in character. In every case, Congress is the final judge of the character of the government set up in any State. In the exercise of this power Congress, at the close of the Civil War, provided for the reconstruction of republican governments in the States that had passed ordinances of secession.

Foreign Invasion and Domestic Violence.—It would plainly be the duty of the Federal government, without this Constitutional guaranty, to use its great powers to protect any State against invasion, for injury to one is injury to all; but it is plainly not its duty to interfere in every domestic disturbance. Most cases of domestic violence are local in character. They affect distant States and the Federal government indirectly, or not at all. They are easily within the power of State or municipal authorities to settle. For the United States to intermeddle on any and every such occasion would tend to pro-

voke dissension, since the States are naturally zealous of their ability to take care of themselves. But on the demand of the State legislature, or of the Governor (when the legislature cannot be convened), it is the duty of the United States government to bring its vast strength to the aid of any State having domestic trouble. And in any case, it is proper and lawful for the United States to protect Federal property and the interests of the people at large, whether threatened by internal or external violence. This was conclusively shown at the time of the

Chicago Riots.—In 1894 occurred a great strike among railroad employees. At Chicago, where the chief disturbances were, the strikers attempted to prevent trains from operating in the city. Their acts amounted to such serious interference with interstate commerce and the passage of United States mails, that President Cleveland, without the demand of the Governor of Illinois, and even against his protest, called out the Federal troops to suppress the disorder. The Supreme Court sustained the act of the President, thus establishing the principle stated above.[16]

[16] In re Debs, 158 U. S., 564.

AMENDING THE CONSTITUTION

ARTICLE 5

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.

Methods of Proposing and Ratifying Amendments.—The 5th Article provides two ways of proposing and of ratifying the Constitution. Since the Constitution was adopted it has been amended seventeen times, and each time the amendment was proposed by Congress and ratified by the legislatures of the States. The other method of obtaining the same end has been regarded as cumbersome, if not actually dangerous. It is perhaps well that the legislatures of two-thirds of the States have never yet petitioned Congress to call a convention for proposing amendments. A large convention called together for that purpose would be likely to arouse endless excitement, and to keep business at a standstill awaiting the result of the deliberations; and the members of the convention, although assembled to propose one amendment, might in their zeal be led to propose a great many more. It has been far better for that deliberative body which is annually in session, namely, the Congress of the United States, to do such proposing, and

for the ratification to be left to those similar deliberative bodies in the States which are yearly in readiness to act.

The President's Signature Unnecessary.—A proposal by Congress to amend the Constitution has always taken the form of a joint resolution. It has been decided that such a resolution is legal without the President's signature.[17] This is a point which hardly seems to need judicial interpretation, since the majority required to propose an amendment, two-thirds, is precisely the majority required to pass a bill over the President's veto. Furthermore, a proposal by Congress to amend the Constitution does not bind the country until accepted by three-fourths of the States.

State Equality in the Senate.—It is said that the last clause in Article 5 is the one part of the Constitution not susceptible to amendment. In other words, no matter how many amendments are proposed to limit the suffrage of any State in the United States Senate, that State has an absolute veto on every one of them. The idea that any State should consent freely to a limitation of its suffrage is not conceivable.

Amendments Prior to 1808.—The provision that no amendment made prior to the year 1808 should affect the 1st and the 4th Clauses of the 9th Section of the 1st Article of the Constitution has no longer any force.

Reason for Allowing Amendments.—The Constitution is the fundamental law of the land. It is a written document of fixed and very definite principles. The makers of the instrument recognized the fact that their judgment was not infallible, their foresight but limited. They could not foresee the vast expansion which the nation was to achieve, and provide at once for all the possible needs of the people, or for the exigencies to which they might come. Realizing therefore that a written constitution to be successful must be made to conform to changes which progress and development bring,

[17] Hollingsworth *v.* Va., 3 Dallas, 378.

they provided ways for amending the instrument which they had made. But in so doing they had regard for two possible dangers: 1st, of making amendments so easy that their number might in time become a burden, if not a jest among other nations; 2d, of making them so difficult as to be impossible, or so that revolution might seem in comparison to be the surer way of effecting the desired change.

Are Further Amendments Possible?—The methods of proposing and of ratifying amendments, as finally agreed to, seemed at the time of the Convention to be such as to avoid as much as possible the two extremes just mentioned. When the nation was young these methods worked well. Within seventeen years after the adoption of the Constitution twelve amendments were added. For sixty years thereafter, though many were proposed in Congress, no more were adopted by the States. Meanwhile, the number of States, and consequently the number of Congressmen, was increasing, and it was becoming more and more difficult for two-thirds of both Houses of Congress to agree to propose an amendment, and for three-fourths of the States to ratify it when proposed. Then during that time of unrest and political excitement immediately following the Civil War, three more amendments were proposed and ratified. It is very possible that these three amendments would not have been made but for the unsettled condition of politics at the time. Forty-three years after the 15th Amendment was added to the Constitution the 16th and 17th were proposed and ratified, settling forever vexed questions of very long standing. Thus in one hundred and twenty-four years but seventeen amendments have been added to the Constitution, and most of these at wide intervals. More amendments may possibly be made from time to time; but the truth of the matter is that population has so increased, States have become so many, and business interests are now so amazingly extensive and intricate that amending the Constitution has come to be a

gigantic task. What was but reasonably difficult one hundred years ago is now possible only after a very wide demand and a prolonged agitation.

VALIDITY OF DEBTS, FUNDAMENTAL LAW. OATH OF OFFICE

ARTICLE 6

Section 1, Clause 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.

Section 1, Clause 2.—This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Section 1, Clause 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.

Pre-existing Debts.—Section 1, Article 6, is now only of historical and ethical interest. At the time of the Convention, however, the insertion of this clause validating previous debts and engagements was both just and politic. It was just, since there is no more reason for a nation to escape self-made indebtedness than for an individual; it was politic, for it set forth to all the world the fact that the United States government was honest. The clause, however, established no new idea. It has long been a settled principle of law that whenever

a nation changes its form of government, the new government succeeds not only to all the rights and privileges of the old, but to all its obligations. Hence the United States government could hardly have repudiated any honest indebtedness to which it had fallen heir.

The Supreme Law.—The besetting weakness of the Confederation was that no member of it recognized a "supreme law of the land." Each State was sufficient unto itself. Section 2, Article 6 of the Constitution plainly establishes the superiority of the Federal government and states expressly what the supreme law is. Categorically the meaning of this is as follows:

1. The Constitution is supreme over every constitution enacted in the States, and over every law created by Congress or by any State, and over every Federal treaty.

2. Every Federal law and treaty, made in conformity with the Constitution, is also supreme over every law enacted by the States.

3. But every law and treaty of the United States, not in conformity with the Constitution, is null and void.

4. And every State statute, not in conformity with the Federal Constitution, laws or treaties, or with its own constitution, is also void.

5. Lastly, every judge in every State is bound to observe these principles.

The last sentence means this: Every judge, whether sitting in a State or a Federal court, not only may decide a State law or a United States law to be unconstitutional, but he is bound to do so if it so appears to him in a regularly instituted case. But every law and treaty is deemed to be constitutional until it has been declared otherwise by a competent court. The court of last resort for all cases involving the constitutionality of a law or treaty is, of course, the Supreme Court.

Oath of Office.—A previous clause (Article 2, Section 1, Clause 7) prescribes the oath of office for the President. Congress, in its first session, 1789, devised the following oath for all Federal and State officers: "I, A. B., do solemnly swear, or affirm (as the case may be), that I will support the Constitution of the United States." This simple oath was in use for many years, but in 1871 it was superseded by the following: "I, A. B., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." [18]

Test Oath of 1862.—Moved no doubt by the very tense and exalted state of public feeling Congress, in 1862, adopted a very stringent oath of office for all persons elected or appointed to any position under the government. The act required the appointee to swear that he had never taken up arms against the United States, or aided its enemies; that he had not sought or held office under, or yielded any support to, any pretended government hostile to the United States. The act was broadened by amendment in 1865 to include attorneys practicing in the Federal courts. This oath, commonly known as the "Ironclad oath," practically excluded all Southerners from holding office under the government. With the close of the Rebellion this unpopular restriction began to appear more and more unnecessary. It was pronounced unconstitutional by the Supreme Court in 1867, in so far as it related to attorneys practicing before that court [19] as being *ex post facto* and a bill of attainder. In 1884 it was repealed.

Religious Toleration.—Toleration, especially in religious matters, is a striking characteristic of American freedom.

[18] Rev. Stat., 1757.

[19] Ex parte Garland, 4 Wallace, 334.

The members of the Convention realized the fact that a man may be a very good office holder despite a lack of religion. No general desire has ever been shown to remove the prohibition contained in the last clause of Section 3 of Article 6, and to introduce a religious test as a qualification to public office.

Among the States this broad spirit of toleration has not been universal. In some States no man who denies the existence of a Supreme Being can hold public office. For example, the State of Maryland requires all holders of public offices to profess the Christian religion, or a belief in a future state of rewards and punishments.

RATIFICATION OF THE CONSTITUTION

ARTICLE 7

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

Ratification.—The chief thing to note here is that the establishment of the Constitution depended on a fractional, rather than unanimous, vote of the thirteen States. Had unanimous consent been required, it is possible that the Constitution would never have gone into operation. One stubborn State could have put to naught the tremendous labors of the Convention. As soon as nine States, however, had signified their willingness to accept the Constitution, steps were taken to organize the government and put it in operation. What would have been the status of any State that had persisted in refusing to join the Union is to-day an interesting question, perhaps, but not profitable to discuss here.

Organizing the New Government.—The Constitution was signed by the members of the Convention September 17, 1787, and forwarded immediately to the Continental Congress, with a request that it be transmitted to the several States for their

ratification. On the 28th of September the Congress voted unanimously to transmit the Constitution to the State legislatures, with the request that they submit it to "conventions of delegates chosen in each State by the people thereof." This plan was followed in all the States, and the Constitution was ratified by the people through their delegates in the following order: Delaware, Pennsylvania, New Jersey, Georgia, Connecticut, Massachusetts, Maryland, South Carolina, New Hampshire, Virginia, New York, North Carolina and Rhode Island. Hence it became truly a people's Constitution. The last two States deferred their consent until November 21, 1789, and May 20, 1790, respectively. Meanwhile, as soon as New Hampshire, the ninth State to take favorable action, had ratified the Constitution, Congress set to work to put the new government into operation. This labor devolved naturally on the Continental Congress, for until a new government should be actually established by the election of a new Congress and of a President and a Vice President, that body was still the source of authority. In September, 1788, provision was made for the immediate election of two Houses of Congress, and of a President and a Vice President, and the first Wednesday in March of the next year was selected as the day on which the new government should commence operations. When the first Wednesday in March, 1789, came, which that year was the fourth day of the month, the Continental Congress ceased to be, and the first term of Congress under the Constitution officially began.

CHAPTER VIII

AMENDMENTS TO THE CONSTITUTION

ARTICLES 1-17

AMENDMENTS TO THE CONSTITUTION

In General.—Twenty-one amendments have been proposed by Congress; seventeen have been accepted and ratified by the States. Instead of being inserted in various suitable places in the text of the Constitution, these amendments have been appended to the instrument in succession, and numbered accordingly. They have as much legal force as any clause in the original document.

The first ten amendments, which in substance form a group by themselves, were proposed by the first Congress, 1791. They were proposed at a time when fears were rife that the people were in danger of oppression by the Federal government They were intended to be a sort of bulwark for the people against the possible tyranny of that government. They are in the nature of a bill of rights, the necessity for which does not now seem so apparent as it did when they were adopted.

The 11th and 12th Amendments form a second group. The 11th Amendment, adopted in 1798, merely put a restriction on the Federal judiciary. The 12th Amendment, adopted in 1804, established the present method of electing the President of the United States.

The 13th, 14th and 15th Amendments, adopted shortly after the Civil War, make a third group. The general purpose of these acts was to improve the status of the negroes, and to prevent the oppression of citizens by the States.

The 16th and the 17th Amendments, adopted in 1913, forever settled two great questions. The 16th Amendment gave Congress the power to tax incomes, a matter that had been in dispute for a century and more; the 17th Amendment gave the

people the right to elect the members of the United States Senate, a question that had been agitated quite as long.

ARTICLE 1

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Religion and the Law.—The student will remember that Clause 3 of Article 6 states that "no religious test shall ever be required as a qualification to any office or public trust under the United States." The 1st Amendment goes beyond that by forbidding Congress to make any religion the established religion of the United States, or to prevent the free exercise of any religion. To the last, however, there is this exception: namely, that Congress is not to be prevented from legislating against any religion which, in the common sense of mankind, is not harmonious with public morals. For example, polygamy and bigamy are none the less crimes because encouraged by a religious sect. To call their advocacy a tenet of religion is to offend the common sense of mankind.[1]

Acts of Congress providing for chaplains in the two Houses of the national legislature, and in the army and the navy, are not to be regarded as establishing a religion. They merely recognize in a general way the benefits of the Christian religion. Although criticized by some, they have received the general approval of the nation.

The restriction in this amendment, it should be noticed, applies only to Congress. As a matter of fact, however, most, if not all, the States have similar constitutional guaranties, so that religious freedom within the United States is permanently assured.

Freedom of Speech and of the Press.—The restriction on Congress to abridge the freedom of speech and of the press

[1] Davis *v.* Beason, 133 U. S., 333.

has been construed with liberality. Liberty is not license, and it cannot be insisted that even in the United States one may, with perfect impunity, speak or print what he pleases. What, in fine, is meant by this popular phrase is that one may speak, or write, or print anything, provided the result is not injurious to some one else, or subversive of public morals. Liberty of speech, like liberty of action, is always subject to reasonable limitations, for certainly a person has no greater constitutional right to injure another by word than he has by deed.

Libel and Slander.—According to the common law of Great Britain, one who made false and defamatory statements to the injury of another was guilty of slander, and one who published such matter was guilty of libel, and for either he could be prosecuted. The 1st Amendment to the Constitution alters these rules in no degree. Any person therefore who suffers injury through slander or libel may maintain action against the wrong-doer to recover damages for the injury suffered; and if the spoken or printed matter is such as to disturb the public peace, or to impair public morals, the author may be criminally liable. Laws enacted by the United States, or by the States, tending to prevent such abuse of the constitutional privilege of free speech are valid, if not to be condemned on other grounds.

Censorship of the Press.—In Great Britain, prior to the independence of the American colonies, the government exercised supervision over the press, charging officials to allow nothing to be published that was likely to injure either the government or the people, and to suppress all publications of such a character that were in print. In some European countries such oversight of the press is still carried on to some extent. In America official censorship is impossible. The 1st Amendment to the Constitution is intended rather to deny this power to the Federal government than to relieve from liability any person guilty of the abuse of the great privilege of free speech.

Privileged Matter.—The general rule regarding defamatory matter has some exceptions. The saying that circumstances alter cases is often true in respect to libel and slander. Thus, words that in their nature are slanderous, and matter that is *per se* libelous, may nevertheless be spoken or printed without the incurrence of liability, if circumstances justify them. Among such cases of privilege are the following:

1. Matter that is true.
2. Matter contained in the records of judicial cases.
3. Speeches and publications of legislators made in the course of official business.[2]

Right to Assemble and Petition.—The right of the people to assemble and petition for redress of grievances, guaranteed by the 1st Amendment, is highly prized. Perhaps such a guaranty in a republican constitution may seem superfluous, but the insertion of it makes assurance doubly sure. The privilege has been much used: statutes have been enacted, and even the Constitution has been amended, as results of persistent popular demand. But the right of assembly is regulated by law, and any gathering that becomes riotous may be dispersed. The prohibition herein binds Congress only; but since to petition Congress for redress of grievances is a privilege of the United States' citizenship, it cannot be abridged by any State.[3]

ARTICLE 2

> 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.

Right to Bear Arms.—The purpose of this amendment evidently is twofold: first, to check the government from arbitrarily disarming the people and reducing them to the con-

[2] Constitution, 1, 5, 3; 1, 6, 1.
[3] U. S. *v.* Cruikshank, 92 U. S., 542.

dition of serfs; secondly, to allow men so to familiarize themselves with weapons as to keep the nation ever ready for emergencies. This amendment is not necessary to give the States the right to maintain militia, for that right is recognized elsewhere in the Constitution.[4] Neither does it restrain the States or Congress from regulating the matter of bearing arms, or preventing the needless parade of the same, or their careless use to the peril of the public. Hence, statutes forbidding private citizens to carry concealed weapons are constitutional.[5]

ARTICLE 3

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.

Quartering of Troops.—The 3d Amendment is a recognition of the common law principle that every man's house is his castle, which he may defend against the entrance of any person except the authorized officers of the law. The 4th Amendment recognizes the same principle. The quartering of troops in the houses of private citizens might become an almost unbearable species of tyranny. Such tyranny was fresh in the minds of the members of the first Congress, being one of the many acts of the British sovereign denounced in the Declaration of Independence.[6] Under this amendment the quartering of troops is impossible in times of peace, and impossible in times of war, except in ways prescribed beforehand by law; that is, by the people themselves. The amendment, however, could hardly be stretched to protect the enemies of the country in time of war.

[4] Constitution, 1, 8, 16.

[5] Andrews *v.* State, 8 Am. Rep. 8. State *v.* Shelby, 90 Mo., 302. Presser *v.* Ill., 116 U. S., 252.

[6] Dec. of Ind., Par. 13-17.

ARTICLE 4

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.

Warrants.—A warrant, within the meaning of this amendment, is a document issued by a justice or other competent authority, authorizing the arrest of some person named therein, or the examination of a house or other place particularly described for stolen or other goods alleged to be concealed therein. The first is a warrant for arrest; the latter, a search warrant. They are alike hedged about with peculiar, stringent rules. They must particularly describe the person to be arrested, or the place to be searched. A warrant calling for the arrest of John Brown would be invalid for the arrest of James Brown; or one authorizing the search of a certain house on B street would be invalid for the search of a similar house on any other street. Again, a warrant calling for the seizure of liquors would not authorize the confiscation of counterfeit dies found in the same place. Furthermore, a warrant requiring the search of house A, and the seizure of anything illegal found therein, would be void for generality. The Constitution requires that warrants shall be issued only upon probable cause—that is, on the complaint of some party who has reasonable grounds to suspect that an offense has been committed; and that the complaint shall be supported by oath or affirmation. These requirements, which are as old as the common law, tend to secure the people against willful interference by the State.

General Warrants.—A general warrant names or describes no person to be arrested, or place to be searched, or goods to be seized, but allows the officer to whom it is directed full

discretion. They are such convenient instruments for oppression and annoyance that they have never been in use in the United States. The 4th Amendment forbids them by implication. They had been in use in England prior to the American Revolution, and were not unknown in the colonies. The writs of assistance, issued in Massachusetts in 1761, were general warrants.

Searches and Arrests Without Warrants.—Without a warrant, search of a house may be made for the purpose of arresting a person known to be concealed within it charged with treason, felony, or breach of the peace; or for the purpose of evicting an unlawful occupant; or perhaps to enforce sanitary or police regulations. Furthermore, one person may without a warrant arrest another whom he sees committing, or attempting to commit, a felony or breach of the peace; and a peace officer may arrest without warrant at any time on reasonable grounds for suspicion, or when municipal laws are violated in his presence. All these are exceptions to the constitutional guaranty of private liberty, but are justified on the ground of necessity. The privacy of the dwelling should not unduly hinder the proper execution of the law, and the house should not become a sanctuary for crime; nor should the Constitution become a technicality to hinder swift justice in serious cases. But the burden of proof that the search or the arrest without a warrant was made under such justifiable circumstances is always on the person who conducted the search or made the arrest.

ARTICLE 5

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy

> of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Crimes.—A capital crime is punishable by death where such punishment is allowed; an infamous crime subjects the guilty person to infamous punishment. The courts have held that infamous punishment is confinement in prison or penitentiary.[1]

Presentments and Indictments.—The distinction between these two methods of bringing a person to trial is of no great value. Properly, a presentment is the charge, or finding, of a grand jury, based on their own knowledge or observation, and laid before the court for further action; an indictment is a document drawn up by the prosecuting officer of the court—in the United States courts, the District Attorney—charging some person, or persons, with offenses, and laid before the grand jury for their investigation. An indictment is the formal statement of an offense, prepared by the duly authorized officer of the State; a presentment is only formal notice to the court that an offense has been committed. If well founded, a presentment leads to an indictment, for it is the duty of the court, on receiving such formal notice, to cause the prosecuting officer to frame a proper indictment and submit it to the grand jury. Hence, the effect of each is the same. It is rare, however, that Federal grand juries make presentments. The criminal business of the Federal government is small, and it is usually brought before the courts by indictment only.

The Grand Jury.—The jury mentioned elsewhere in the Constitution is the well-known petit, or trial jury, composed of twelve men. The grand jury is very different in both number and purpose. It is generally larger than the petit

[1] Ex parte Wilson, 114 U. S., 417.

jury; it does not try offenses, but investigates charges; and its determinations do not depend on unanimity, or settle one's guilt or innocence.

At common law the grand jury consisted of from twelve to twenty-three men. In the various States the number to-day is a matter of local regulation. In many the common law rule is followed, but in others it has been changed. The tendency is to reduce the number. In the Federal courts, however, the number is regulated by statutes, which declare that the grand jury shall consist of at least sixteen and not more than twenty-three, of whom twelve must concur to find an indictment.

Members of the grand jury are summoned at intervals by the sheriff in the State courts, by the marshal in the Federal courts, from among the male inhabitants of the vicinity. The purpose of these men, as has been intimated, is to investigate, either on their own initiative or at the instance of the prosecuting officer of the court, all offenses within the jurisdiction of the court. Although they may make charges on their own volition, they rarely do so, but confine their attention to matters brought to their notice by formal indictment. Their sessions are usually in secret, and they have authority like a court to summon and examine witnesses. If on investigation of a charge they find sufficient evidence to warrant a public prosecution they return the indictment endorsed "A true bill." If they do not find sufficient evidence, they endorse the indictment "Not found," and proceedings against the accused are quashed. The finding of a true bill by the grand jury does not mean that the accused is guilty of the offense charged; that is a question to be settled later by the trial jury. Thus both juries are bulwarks of the people's liberties. Before a person can be made to suffer judicial punishment for a serious illegal act, he must first be charged with the offense by the grand jury or by the proper officer; the charge must then be investigated by the grand jury, after which he must be tried

before the petit jury, all of whom must concur before pronouncing him guilty.

Exceptions.—Cases excepted from the operation of this amendment are those arising in the land or naval forces, or in the militia while in actual service of the United States. Congress, as we have seen, may provide for calling forth the militia to suppress insurrections or repel invasions. When thus called forth, the militia of the States cease to be State troops; they belong to the military arm of the government, and as such are subject to military regulations. In order to enforce discipline, offenses in the army, navy, and the militia while in service, are triable before martial courts, the proceedings of which have already been explained.

Second Trial.—The clause, "nor shall any person....be twice put in jeopardy of life or limb," is an old expression belonging to the common law. It means simply that no one shall be tried twice for the same offense. It includes misdemeanors as well as capital offenses.[8] The provision binds only the United States,[9] but the majority of the States, if not all, have adopted the same rule. Immunity from second trial exists, however, only when there has been actual jeopardy, and when the offenses are identical. That is, when by the verdict of a jury duly impanelled before a court having jurisdiction, a person has been acquitted of an accusation, he cannot again be put to trial on the same charge. Conviction is likewise a bar to further action except on the petition of the prisoner himself. Offenses are said to be the same when evidence to support one indictment will equally sustain the other. In case of a mistrial this clause has no application. Thus if the jury disagree,[10] or are discharged before reaching a verdict,[11]

[8] Bishop's Criminal Law, 1, 990; Ex parte Lange, 18 Wall., 163.

[9] Fox *v.* Ohio, 5 Howard, 410. Maxwell *v.* Dow, 176 U. S., 581.

[10] U. S. *v.* Perez, 9 Wheaton, 579.

[11] Bishop's Criminal Law, 1, 1033. Dreyer *v.* Ill., 178 U. S., 71.

or judgment is arrested after a verdict, there is no jeopardy for which the accused can claim immunity from a second arraignment.

Self-Incrimination.—The 5th Amendment restates another principle of the common law in declaring that no person shall be compelled in any criminal case to be a witness against himself. Herein the common law, as administered in England and in the United States, is far more favorable to the accused than the civil law, as administered in certain other countries. Under the civil law an accused may not only be forced to testify in respect to the point at issue, but to disclose his previous history, whether it is relative to the case or not; and in times past torture was not uncommon as a means of wringing from him a confession of guilt. The freedom from self-incrimination, guaranteed by the 5th Amendment, applies not only to accused persons, but also to all who give testimony in criminal cases: no one can be compelled to answer questions rendering him liable to a subsequent prosecution. It is generally held, however, that a prisoner, although he cannot be forced to give testimony against himself, may take the witness stand on his own volition, in which case he may be cross-examined like other witnesses on his voluntary evidence.

The rule against self-incrimination does not apply to civil cases, and it is questionable if in criminal cases it is best for all concerned. It is supported by reverence for the past, and it is quite in keeping with the principle that the entire burden of proving a criminal charge is on the accuser; but it closes at once the most direct path of inquiry leading to the truth.

Due Process of Law.—This phrase is not self-explanatory. Not every thing done in the name of law is due process; not every proceeding engineered by legislators is law in the accepted sense. That is due process of law which is in accordance with the general law of the land. In judicial proceedings due process demands a hearing before condemnation, a judg-

ment before dispossession or punishment; in legislative matters it allows only such exertion of the powers of government as the settled maxims of the law permit. A judicial decree therefore after proper investigation, however onerous it may be, is due process, but lynch law is not; taxation and the exercise of the right of eminent domain, which divest persons of property somewhat against their wills, and draft acts, which arbitrarily restrain men of their liberty, are due process, because they are all in accordance with established principles of law; but bills of attainder, acts of confiscation, legislative judgments and forfeitures, although made in the likeness of law, are not due process within the meaning of the 5th Amendment. The individual, no matter how insignificant, is thus secured against the arbitrary exercise of power; the maxim that might makes right loses its significance.[12]

Eminent Domain.—The right to take private property for public use, commonly called the right of eminent domain, has been an attribute to sovereignty since time immemorial. It is an arbitrary exercise of governmental power, but sanctioned by necessity, and softened by compensation. Although the government may take private property, it may do so only for public purposes and after reasonable payment.

Exercised by Whom.—1st, The Federal government may, for national purposes, exercise this power anywhere within the geographical limits of the United States.[13] 2d, Every State may exercise the power for State purposes anywhere within its boundaries. 3d, Every State may delegate the right to municipal corporations,[14] or to private persons or corporations

[12] For a fuller discussion of this phrase see the argument of Daniel Webster in the case of Dartmouth College *v.* Woodward, 4 Wheaton, 519; Webster's Works, 5, 487.

[13] Cherokee Nation *v.* Kans. R. R., 135 U. S., 641. Kohl *v.* United States, 91 U. S., 367.

[14] Dallas *v.* Hallock, 44 Oregon, 246.

engaged in public business.[15] Accordingly, railroad and canal companies are allowed to exercise the power, since their business is public.

Public Use.—What constitutes public use is a question to be decided by the merits of every case. It is sufficient if the use to which the property is put is generally advantageous to the community, but there is no rule as to the degree of the advantage to be thus gained. Among the uses that have been declared public sufficiently to support this arbitrary right are the following: highways, canals, bridges, railroads, wharves, waterworks, parks, school houses, and telegraph and telephone lines.

Property.—Almost any kind of property, real and personal, tangible and intangible (such as franchises), may be taken,[16] unless already put to a public use. Money cannot be seized, for the payment must be in money.[17]

Proceedings.—The Constitution does not prescribe how the right of eminent domain shall be exercised; that is left entirely to the discretion of the legislature which exercises or delegates the power. In general, offers to purchase are made first. If these are not accepted, notice that condemnation proceedings are about to begin is then sent to the owner—although this is not compulsory. Appraisers then view the property to estimate its fair value, and on their report, what is judged to be a fair compensation is given to the owner, and the property is ready to be put to the desired use. The proceedings thus result in a sort of forced sale of property for the benefit of the public at large.

[15] Young *v.* Buckingham, 5 Ohio, 485.

[16] West River Bridge Co. *v.* Dix, 6 Howard, 507.

[17] Burdett *v.* Sacramento, 12 Cal., 76. Cary Library *v.* Bliss, 151 Mass., 364.

ARTICLE 6

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

Privileges of Accused Persons.—The Constitutional guaranties to persons accused of crime are many. Summed up in one paragraph, including those in the present amendment and in other clauses in the Constitution, they are as follows: The trial of all crimes, except in cases of impeachment, shall be by jury, and shall be held in the State where the crime was committed, or where Congress may provide; the jury shall be chosen from the district in which the crime shall have been committed; before trial, the accused shall be presented, or indicted, by a grand jury, except in military circles, and shall be informed of the charge against him; the trial shall be speedy and public; the accused shall be confronted with the witnesses against him, shall have compulsory process for obtaining witnesses in his favor, and shall be allowed counsel for his defense; after one acquittal or conviction, the accused cannot be tried again for the same offense; he cannot be forced to testify against himself, or be deprived of life or liberty without due process of law; and lastly, excessive bail shall not be required of him, cruel and unusual punishments shall not be imposed on him, and excessive fines shall not be demanded.

By these provisions the Constitution safeguards the citizen against many things: against secret and inquisitorial trials; against long delays; against confinement without cause, accusation without defense, judgment without proof, and punishment that is inhuman. To realize how much less stringent the

criminal law and procedure of to-day is than was that of long ago, one has but to read history. Time was when men languished in prison on trumped up charges for indefinite periods; when brought to trial they had not the assistance of witnesses or of counsel, and upon conviction they suffered punishment to the extreme of barbarity. To-day, at least in those countries where the English common law prevails, it is the aim of criminal jurisprudence to give accused persons every possible chance of defense. Not only is the burden of proving every criminal charge on the State, but the State enables the accused to obtain witnesses, and even provides him with counsel, if he is unable to obtain such assistance himself.

These constitutional guaranties have force only in connection with Federal offenses. States are not bound by them, except where so commanded by the 14th Amendment; but most, if not all, of the States have similar provisions in their own constitutions. Furthermore, some of these are not to be taken in the narrow, literal sense. For example, the Constitution provides for a "speedy and public trial." But only such speed and publicity can be given as is consistent with the nature of the crime. It is often necessary to postpone a trial, much against the wishes of the accused, on account of the press of other business before the court, or to allow time in which to investigate fully the circumstances of the case; and although criminal trials are usually open to the public, it is sometimes necessary to exclude certain persons from the court, either because they have no connection with the case, or for fear of their being morally corrupted by the facts brought out. Again, the Constitution provides that the accused shall be confronted by witnesses against him, in order that he may hear their testimony and cross-examine them: but in homicide cases the dying declarations of the person killed are allowed as evidence, and the sworn testimony given in a former trial by witnesses long since dead is admitted in a second trial; and these do not

admit of cross-examination. Finally, although these constitutional provisions are worded imperatively, there is no doubt that the accused may waive most of them, if he so desires and the court consents.

ARTICLE 7

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.

The General Purpose.—The general purpose of this amendment was to preserve the jury for all issues of fact, where the value in controversy should exceed a certain amount; and, furthermore, to prohibit a review by a court without a jury of the conclusion of fact reached by a jury in the first instance. In other words, if a cause is tried before a jury in the first place, the issue of that cause, if re-examined at all, must be re-examined before a jury. The common law recognized two methods of bringing about the review of a case: 1st, by the grant of a new trial before the court in which the action was first tried; 2d, by a writ of error to a higher court. When, however, a case is carried to a higher court on a writ of error, the court reviews nothing but the rulings in law of the lower court, not the facts. In case the review court finds error in the proceedings of the other, it usually remands the cause back to it for retrial. Most of the cases removed to the Supreme Court are carried there on writs of error. Appeal is a process of civil law origin, not known to the common law. An appealed case is reviewed by a superior court both as to law and fact.

Waiver of Trial.—The phrase, "right of trial by jury shall be preserved," is not imperative. In any civil suit, the right to trial by a jury may be waived by the party entitled to it, and it frequently is.

The Common Law.—What is the common law? It is that system of jurisprudence which has prevailed in England since time immemorial and has been adopted in the United States to a greater or less extent—a system which rests for its authority, not on the will of legislatures, but on the universal consent and long-continued practice of the people. It is sometimes called the *lex non scripta,* and *customary law,* because its principles were not created offhand and expressed in written form like statute law, but developed by slow degrees out of custom and tradition. A custom long in use among a people may come in time to have the binding force of law; it becomes an established legal principle when sanctioned by judicial decisions. Such, in brief, was the origin of the common law.

There is no distinct body of American common law. Jurisprudence in the United States is based on the English common law as it existed in the colonies at the time of their severance from the mother country. Many of the most valued principles of the common law were embodied in the Constitution of the United States, particularly in the first ten amendments, and in the constitutions of the several States; and in many States the common law is by their constitutions declared to be the law until repealed or superseded by statute. That is, where there is no express statute that can be applied to settle a controversy, it is settled if possible according to the principles of the English common law, as adopted in the State where the controversy arose. To illustrate: in the absence of a statute to the contrary, a married woman would, on the death of her husband, be entitled to a life estate in one-third of the real property of her husband, providing she had had a child by him capable of inheriting the property. This dower right of a married woman is one of the oldest principles of the common law.

The Common Law Modified.—Many common law principles were severe as suited to harsh times. For example, the legal

existence of a woman was, by marriage, merged in that of the husband. She and all her property were his. But this hard feature of the law has since been so modified, both in England and in the United States, that a married woman has many rights to-day that were utterly unknown to the old law. Similarly, although some of the rules of the common law still remain unchanged, most of them have been greatly modified, and some altogether blotted out, by statutes.

Common Law Crimes.—Since there is no common law of the United States, no act can be declared an offense against the Federal government which has not been previously so declared by statute.[18] In other words, there are no common law crimes of which Federal courts can take cognizance.

The Civil Law.—The phrase common law is often used in contradistinction to civil law. Briefly, the latter is the system of jurisprudence used as the basis of law and judicial procedure in all the continental countries of Europe, and in all the western world except the United States. It is a written code, many principles of which may be traced back to the Institutes of Justinian, or the Roman law. It differs materially from the common law in many of its rules and methods of procedure, and in its origin, having been compiled by law writers, not founded on custom. It is the fundamental law of one State in the Union—Louisiana.

"Suits at Common Law."—This phrase has been interpreted to mean: "suits in which *legal* rights were to be ascertained and adjusted, as distinguished from purely equitable rights and remedies; suits which the common law recognized as among its old and settled proceedings."[19] Actions for debt, for bailment, for trespass, and for slander are examples of well-known suits at common law.

[18] U. S. *v.* Hudson, 7 Cranch, 32. U. S. *v.* Britton, 108 U. S., 199.
[19] Parsons *v.* Bedford, 3 Peters, 433, 447.

ARTICLE 8

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

Bail.—Bail, as used here, is the security offered or demanded for the temporary release of persons under arrest. It is in accordance with modern progress to inflict as little inconvenience on accused persons as possible, until they have been tried and found guilty. Hence, it is the rule, rather than the exception, to allow such persons their liberty during the time between arrest and trial, provided some other responsible person or persons will become surety for their appearance at the trial. The person, so delivered or bailed, is thereafter in the custody of his sureties, and may, at any time or place, be arrested by them personally, or on their warrant, and surrendered to the court in discharge of their liability. If the bailee appears in court at the time specified, the sureties are discharged; if he fails to appear, the bond of the sureties is forfeited, and may be collected like any property due to the State. The provision that "excessive bail shall not be required" prevents the courts from placing the amount of the bond so high as to be prohibitive, or out of proportion to the crime. Whether in any case bail is excessive depends on the circumstances. For very serious cases, like murder, it may be reasonable to make the amount very great, or to refuse it altogether; but for slight offenses a moderate sum should be sufficient. The same principles apply, of course, to the imposing of fines.

Cruelties.—The prohibition respecting cruel and unusual punishments was intended to soften the rigors of the common law, which allowed such punishments as drawing and quartering, burning, branding, and mutilating. Death by hanging or by electricity, life imprisonment, disfranchisement, forfeiting of civil rights—these, although severe, are not regarded as cruel and unusual; nor is whipping, which in some States

is legalized and regarded as salutary. In all cases, it is for the legislature to determine the punishment for offenses, and only in extraordinary cases would its judgment be questioned.

ARTICLE 9

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

The first eight amendments to the Constitution simply record certain popular common law rights. The fact that such a specific statement is made might lead some to infer that other rights were not to be recognized. To check any such inference the 9th Amendment explicitly declares that this enumeration of rights shall not mean a denial of other rights naturally incident to the people. In other words, the Federal government may not, on the strength of this incomplete enumeration, deny the people liberties not herein mentioned. The very language of the amendment shows the utter impossibility of making any complete enumeration of rights.

ARTICLE 10

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 meaning of this is clear. The Constitution has given to the general government certain large powers: the power to tax, to declare war, to regulate commerce, etc. Furthermore, the Constitution prohibits to the States the exercise of certain enumerated powers: to coin money, to emit bills of credit, to lay export duties, etc. All other powers, the 10th Amendment declares, are reserved to the States in their corporate capacity, or to the people, which amounts to the same thing.

In effect, the amendment is a recognition of the fact that the people are the source of power in the United States. The

people have organized a double government, that of the United States, and that of the States. Whatever powers of government the people have not delegated by their Constitution to the United States, or prohibited to the several States, they have reserved to themselves, as segregated in their respective States.

Thus the people of the States may not coin money, for that is forbidden to the States by the Constitution; but they may establish private banks for the circulation and deposit of money, for that is not forbidden. Again, the people of the States may not make regulations of commerce affecting other States or foreign nations, for the Constitution delegates that power to the United States; but they may regulate commerce within their own borders to any reasonable extent, for the Constitution neither delegates that power to Congress, nor forbids it to the States. It is such a right as is "reserved to the States respectively, or to the people."

ARTICLE 11

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.

Suits against States.—This amendment became a part of the fundamental law in 1798. A few years previous the Supreme Court, in the case of Chisholm *v.* Georgia,[20] had decided that, according to the Constitution and the Judiciary Act of 1789, a State of the Union could be sued in a Federal court by citizens of another State, or by citizens or subjects of foreign nations. The decision caused much apprehension. Theoretically, sovereignty cannot be sued, because sovereignty is above the law; hence, to say that States could be made un-

[20] 2 Dallas, 419.

willing defendants to suits at law by private citizens, was, in the opinion of many, an entering wedge in the principle of State rights. The 11th Amendment was therefore proposed and ratified shortly after to correct this situation. By it the dignity of the States was no doubt bolstered up, but in the minds of many people, the power of the national judiciary to work substantial justice to the citizens was in many cases weakened. The law regarding the suability of States is now settled as follows:

1. The United States cannot be sued at all except with its own consent, but that consent has been given by the establishment of the Court of Claims.

2. A State cannot be sued by any private citizen without its consent[21]; and suits against a State's executive officers are suits against the State.[22] Most of the States, however, have made provision for the maintenance of suits against them by citizens in their own courts.

3. A State may be sued without its consent by the United States, by another State, and probably by a foreign government.

The restriction in the 11th Amendment applies only to original suits. It does not preclude a review of the decisions of other tribunals in the Supreme Court, although the review may cause a State to become defendant.[23]

ARTICLE 12

This has been already discussed in connection with Article 2, Section 1, Clause 3. See *ante,* page 171.

ARTICLE 13

Section 1, Clause 1.—Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the

[21] Hans *v.* La., 134 U. S., 1. R. R. Co. *v.* Tenn., 101 U. S., 337.
[22] N. C. *v.* Temple, 134 U. S., 22.
[23] Cohens *v.* Virginia, 6 Wheaton, 264.

party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 1, Clause 2.—Congress shall have power to enforce this article by appropriate legislation.

Slavery.—In the 13th Amendment is the only occurrence of the word slavery in the Constitution. Undoubted reference to the system of slavery is made in three places in the instrument,[24] but each time by a euphemism. The 13th Amendment put an end forever to a social system that for nearly a century had caused more trouble within the United States than almost anything else. It had stirred up political bitterness and sectional strife, which culminated in the costliest war in history. Congress, from time to time, had legislated around and about it; but not until the Rebellion had given the system its mortal hurt, and the Chief Executive had proclaimed officially against it, were the people sufficiently united to end it. It is impossible in this book to go extensively into the history of slavery and the slave trade, but the following brief summary presents the most important steps taken by the government in the matter.

1. In 1787 the Continental Congress, in the Ordinance for the Government of the Northwest Territory, forbade slavery in that Territory.

2. In 1794 Congress prohibited the slave trade with foreign nations.

3. In 1808 Congress made the importation of slaves unlawful.

4. In 1820 Congress declared the slave trade to be piracy.

5. In 1862 Congress abolished slavery in the District of Columbia and in the Territories.

6. In 1863 President Lincoln issued the Emancipation Proclamation.

[24] Constitution, 1, 2, 3; 1, 9, 1; 4, 2, 3.

7. In 1865 Congress passed, and the required number of the States ratified, the 13th Amendment.

Involuntary Servitude.—It is probable that the 13th Amendment was aimed chiefly at negro slavery, but the phrase "involuntary servitude" is broad enough to include any system of compulsory service, even though limited to a term of years, such as the padrone system common in Italy, or the peonage system in Mexico. Laws that allow convicts to be employed at involuntary labor in penitentiaries are not unconstitutional, for such labor is part of "a punishment for crime, whereof the party shall have been duly convicted." But the constitutionality of State statutes that allow convicts to be let out on contract to the highest bidders is certainly open to question.

Power to Enforce.—Prohibitory statutes are self-executing. The present amendment therefore hardly needs the power to enforce it given in the 2d Clause of this act. Furthermore, under the theory of implied powers, a theory established years before this amendment, Congress would certainly have power to legislate in this matter.

ARTICLE 14

Section 1, Clause 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.

Citizens.—The 13th Amendment freed the slaves; the 14th made them citizens. It did more: it defined citizenship, stating clearly and briefly the two qualifications. All persons *born or naturalized* in the United States, and *subject to the jurisdiction* thereof, are citizens. The phrase "all persons" in-

cludes men, women, and children, black or white, and of every degree. A child is a citizen as truly as a man, but without as many political privileges. He is entitled to protection, and we may say that he owes allegiance, but he has not the political privilege of voting. Suffrage, or the right to vote, is purely a privilege; citizenship is a state of being—a matter of accident. A child born of American parents in the United States is at once a citizen, whether he or his parents wish it or not. But he cannot possess suffrage until he reaches a certain age, and the State where he resides gives it to him. But not all children born within the United States are, *ipso facto,* citizens. They are not, unless they are subject to the jurisdiction of the United States. In brief, birth and jurisdiction must combine to produce a citizen. Perhaps ninety-nine per cent of the children born in the United States are at once citizens. The small per cent that are not include the following:

1. Indians whose parents are not wholly subject to the jurisdiction of the United States by reason of being members of Indian tribes. These, however, may become citizens by naturalization.[25]

2. Chinese. (See citizens by naturalization, below.)

3. Children of foreign ambassadors, and other public ministers, temporarily residing in the United States.

4. Children of aliens having temporary residence in the United States. In this case a right of choice is recognized. If the child remains in the country until he reaches his majority, he may claim citizenship by birth.

Citizens by Naturalization.—The mode of naturalizing citizens has been already explained (see page 96). Any alien, white or black, may become a citizen of the United States by this process, unless prevented from entering the country on the ground of pauperism, or disease, or criminality. Although Chinese cannot be naturalized, the children of Chinese parents

[25] Elk *v.* Williams, 112 U. S., 94.

who reside in the country and were citizens before the exclusion acts were passed, or who have a permanent residence in the United States, are citizens.[26]

United States Citizenship.—It was maintained by many statesmen during the half century and more preceding the Civil War that the people of the United States were citizens of States only, or that national citizenship resulted entirely from State citizenship. The 14th Amendment asserts the opposite. It plainly suggests a twofold citizenship, a double allegiance. "Citizens of the United States and of the States wherein they reside"; this is the language, and if it means anything it is that an American, whether such by birth or by naturalization, is first a citizen of the United States, and second a citizen of that State wherein he maintains his residence. It is impossible to be a citizen of a State and not of the United States; but it is not impossible for a citizen of the United States to have no State citizenship. The latter is largely a matter of residence. Many members of the army and the navy have no residence in any State. They are citizens of no State; but they are citizens of the United States. Inhabitants of the Territories, if citizens at all, are citizens of the United States, but of no State. To the United States they owe allegiance, and from the general government alone may demand protection.

Privileges and Immunities.—The provision in the 14th Amendment, that no State shall abridge the privileges and immunities of citizens of the United States, affirms expressly what before was a matter of implication merely. Since the government of the United States is superior to that of the States, it necessarily follows that privileges and immunities granted by the United States are beyond the reach of State legislation; and any unreasonable abridgment of them by any

[26] In re Look Tin Sing, 21 Fed. Rep., 905. U. S. *v.* Wong Kim Ark, 169 U. S., 649.

State is at once illegal. The immediate reason for stating this and the other restrictions on the States in this amendment was to insure equality of protection to the negroes in the several States. But so important are the provisions, and so broad their application, that a formal statement of them is almost essential.

What are these privileges and immunities? The privileges are such as naturally go with Federal, rather than State, citizenship. A State may not even restrict its own citizens in respect to privileges conferred by the United States. Among such privileges are the right to use the postal service, to participate in foreign or interstate commerce, to use the navigable waters of the United States, to pass unhampered from State to State, and many others. The privileges of course suggest the immunities. The case of Crandall *v.* Nevada, 6 Wall., 35 (1867), is somewhat illustrative of these principles.

The State of Nevada passed a law to compel the owners of all railroad and stage coach lines to pay a tax of one dollar per head on all passengers transported *out* of the State. Crandall, agent for a stage coach line, was arrested and put on trial for refusing to pay the tax. The court in this case held that the statute was inconsistent with the doctrines of Federal government and the rights of the people. The United States may require the services of the citizens at the seat of government at any time; it has the right to transport troops through any State, and the people have the right to visit the seat of government and all Federal offices in the States. The statute of Nevada interfered with these rights. The power to tax is unlimited. If any State could levy a tax of one dollar per head on all travelers passing through it, it could lay a tax of one thousand dollars per head, thus practically destroying the rights of the government and of the citizens as mentioned above.

Liberty and Property.—Judicial decisions have widened the ordinary meaning of these terms. Liberty has been held to be

more than freedom from restraint; property, more than lands and goods. Thus the right to pursue a livelihood or calling, and for that purpose to enter into such contracts as may be proper, is liberty which no State can take away without due process of law. Property may be both tangible, such as lands and goods, and intangible, such as debts, franchises, incorporeal hereditaments, and the right to labor. Both are within the scope of this amendment.

Due Process of Law.—This phrase has been discussed fully under Amendment 5. There the prohibition is on Congress; here it is on the States. Most State constitutions have similar provisions. We may add this here: A statute is not necessarily due process of law, for such an interpretation would render this clause of the amendment nugatory. Thus an act cannot be defended as due process of law, unless the statute authorizing it is above criticism; or unless sanctioned by age, custom, or established authority.

Equal Protection of the Laws.—In general, this part of the 14th Amendment is a prohibition against discriminating laws. Although enacted primarily for the benefit of the colored people, it applies to all irrespective of color. Corporations are persons within the meaning of the amendment[27]; so also are aliens[28] and Chinese[29]; and State laws that deprive them of privileges which they as citizens are entitled to are void. Legislation is not contrary to the amendment, however, if all persons subject to it are treated substantially alike under similar circumstances. Accordingly, a State may establish one set of laws for one section, a different set for another section, and the arrangement denies to no one equal protection of the laws, if all persons are treated alike under the laws of any section.

[27] Howe Ins. Co. *v.* New York, 134 U. S., 594. Gulf R. R. Co. *v.* Ellis, 165 U. S., 150.

[28] In re Ah Fong, 3 Sawyer (U. S.), 144.

[29] In re Lee Sing, 43 Fed. Rep. 359.

The prohibition in the amendment is aimed rather against social, racial, or class distinctions. To illustrate: a statute denying to colored people the privilege of sitting on a jury has been held to be a denial of the equal protection of the laws[30]; likewise, a law excluding colored children from schools[31]; and one forbidding corporations to employ Chinese or Mongolians.[32] On the other hand, statutes that provide separate schools for white and colored children do not discriminate against either class, if the accommodations for each are substantially equal[33]; neither do statutes that provide separate cars, or compartments, for colored passengers on railroad lines operating within the State.[34] In respect to lines operating through several States, however, such a statute might be void as a regulation of commerce.[35]

Monopolies.—The grant by a State of exclusive privileges creates a monopoly, and is thus an infringement on equal rights. Theoretically, all such monopolies should be banned by the 14th Amendment, but in fact they are often justified on the ground that the public interests are best served by confiding a certain business to one person, or to a group of persons, rather than by allowing it to be spread about among many. Accordingly, the grant of the exclusive right to supply water to a city, or to slaughter cattle for a city market, doing so impartially to all who apply, is not unconstitutional. Not every monopoly is illegal, but only those that are unreasonable. The reasonableness of a thing often justifies it in the eyes of the law, when technically it is illegal. Hence, it has

[30] Strauder *v.* West Va., 100 U. S., 303.

[31] State *v.* Duffy, 7 Nev., 342.

[32] In re Parrott, 6 Sawyer, 349.

[33] Ward *v.* Flood, 48 Cal., 36.

[34] The Sue, 22 Fed. Rep., 843. Murphy *v.* Railroad, 23 Fed. Rep., 637.

[35] Hall *v.* De Cuir, 95 U. S., 485.

come to be the accepted rule that even private monopolies, so long as they are reasonable in their scope, are justifiable. As a general rule a monopoly may be said to be unreasonable when it ceases to serve the public impartially—a question to be settled in every case by the courts.

The Police Power.—The meaning of this phrase has already been discussed, see *ante* page 92. A State may, under its police power, pass many acts in defiance of the 14th Amendment, provided the general welfare of the people require them. Thus, although a State may not deprive any one of property without due process of law, it may arbitrarily cause property to be removed or destroyed that is dangerous to the public health; and it may prohibit miners to work in mines more than a certain number of hours per day. Both of these are deprivations of property, but justified under the police power. Again, although a State may not deprive any person of the equal protection of the laws, it may compel a certain business or trade to be carried on in a specified way, or confine it to a limited area, if the nature of it demands such adverse legislation.[36] But the legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unnecessary and unusual restrictions upon lawful occupations. Its determination of what is lawful in the exercise of its police power is not final, but subject to the supervision of the courts.[37]

Section 1, Clause 2.—Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial

[36] Slaughter House Cases, 16 Wall., 36.
[37] Lawton *v.* Steele, 152 U. S., 133, 137.

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.

"**Respective Numbers.**"—According to Art. 1, Sect. 2, Cl. 3, of the Constitution, the respective numbers, that is, the population of a State, should be ascertained by adding to the free inhabitants, excepting Indians not taxed, three-fifths of all other persons. But with the abolition of slavery, and the acceptance of the 14th Amendment, that provision became a dead letter. The respective numbers of the States must now include *all* persons, excepting Indians not taxed.

Purpose of this Clause.—The purpose of this clause was to secure colored citizens in their right to vote. Neither the Constitution nor the amendments define suffrage: but the present clause implies that normally it shall be in the hands of male citizens, twenty-one years of age. When the slaves were freed, and by the first clause in this amendment were made citizens, they became at once eligible to the suffrage. For fear therefore that certain States, through hatred or jealousy of former slaves, or of their descendants, might arbitrarily deprive its colored male citizens of their right to vote, Congress added this clause to the 14th Amendment. The clause does not bestow the ballot on the negro, or upon anyone. It does not refer in terms to the colored race. It simply provides that when suffrage is restricted, representation in Congress shall also be restricted, and proportionately. In other words, it declares that no State shall *count out* any number of its male citizens in making up its electorate, but *count in* all such citizens for the purposes of population, and therefore representation in Congress.

Denial of Suffrage.—What constitutes a denial of suffrage within the meaning of this amendment? Is any limitation of the right to vote such a denial? Probably not. To demand, as a prerequisite of the right to vote, that a citizen shall pay a poll tax, or reside in the county and be registered there, or pass a fair educational or property test—these are not generally regarded as denials of suffrage. They are reasonable and flexible limitations within the power of any man to overcome; they create no class distinctions and impose no special hardship. A denial, as understood here, must be something insurmountable in its nature, such as one based on color, foreign birth, or class.

Enforcement of this Clause.—Although certain States have been accused of denying to many of their colored male citizens, twenty-one years old and citizens of the United States, the right to vote, either by imposing unreasonably severe restrictions, or by the tyranny of their election officials, Congress has never yet legislated to enforce the penalty provided by this amendment. It has perhaps recognized that to do so would be both futile and dangerous, and until there occurs an open and purposed violation of this clause, it is probable that Congress never will so legislate. In the first place, it would be very difficult for Congress to estimate the number of voters denied the ballot, and thus be able to make any proportionate and accurate reduction in representation; in the second place, the object of the clause has been better gained by the 15th Amendment; and in the third place, the clause is unjust, for its threat includes the innocent as well as the guilty without discrimination, and is so in the nature of a perpetual menace as to be a constant irritation to a spirited race. For these and other reasons, the 14th Amendment has been severely arraigned by its enemies, and even its friends have been forced to admit that its passage was an error. Not to prohibit an act, but to allow it under a penalty, does not seem the best of statesmanship.

Section 1, Clause 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.

Clause 3 of the 14th Amendment has only historic interest to-day. Its purpose was to debar from public office all who had taken up arms against the government. Shortly after its passage, Congress began in individual cases to remove the disability created by it, and in 1898, by special act, it removed all such disabilities outstanding. Although the clause has no force to-day, the prohibition in it would revive in the event of another rebellion.

Section 1, Clause 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 1, Clause 5.—The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Public Debt.—The immediate purpose of this clause in the 14th Amendment was to pledge the payment of all lawful debts incurred in putting down the Rebellion; but the lan-

guage is broad enough to include public debts whenever they may be made. The principle expressed in the first sentence is the same as that already discussed under Article 6, Section 1.

War Claims; Void Debts.—No nation can be expected to make compensation to its enemies for losses occasioned by war. Such losses are the fortunes that follow unsuccessful strife. All debts incurred in the aid of unsuccessful rebellion are uncollectable, and all such contracts are void. These rules are unpleasant; but so is rebellion, and the government cannot be expected to indemnify those who bring the unpleasantness about. Since the Civil War bills have been presented in Congress to pension Southern soldiers or their widows, or to commemorate Southern heroism, but as yet none of these has passed. It is doubtful if such bills, should they become laws, could be regarded as constitutional in the face of this amendment.

The prohibition regarding slave property cannot be regarded as altogether equitable, for many loyal owners as well as the disloyal owners suffered the loss of their slave property, and their losses cannot be said to have been incurred in aid of insurrection. But it was felt at the time of the passage of the amendment that, since slavery was largely the cause of the war and its attendant calamities, its destruction was the destruction of a public enemy, and that no just claim should arise from it. Mrs. Alexander's Cotton, 2 Wall., 417, is a case in point. In May, 1864, a party from the Ouachita, a gunboat belonging to Admiral Porter's expedition on the Red River, captured 72 bales of cotton belonging to Mrs. Alexander, which were then stored in a gin one mile from the river. The cotton was confiscated and sold by the Federal government. After the war Mrs. Alexander sued the purchasers in the District Court for the value of the cotton. Mrs. Alexander maintained that she had been loyal to the United States through the war. The court held: (1) that since cotton was the main reliance

of the South for securing means to prosecute the war it was contraband, and hence liable to confiscation; (2) that contraband goods belonging to loyal people residing among the enemy were not to be distinguished from enemy's property.

ARTICLE 15

Section 1, Clause 1.—The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

Section 1, Clause 2.—The Congress shall have power to enforce this article by appropriate legislation.

Why Adopted.—The 15th Amendment, like the 13th and the 14th, was adopted during the unsettled period that followed the Civil War. Its purpose was twofold: first, to prosper the nation—for it was thought at the time that the presence in the South of so large a body of freedmen lacking the political privileges of other citizens would be a constant source of discontent and consequent danger to the country; second, to protect the colored man in his political rights—for it was manifestly the duty of the general government, having freed the negro and given him citizenship, to secure to him the suffrage which that status had opened to him. For the latter reason the second clause in the 14th Amendment had been adopted, but that having failed in its object, the 15th Amendment was proposed and ratified.

What the Amendment Does.—The 15th Amendment does not confer the right to vote on the negro or anybody else. That right comes to a citizen only by State laws and processes. The amendment is intended to prevent discrimination in popular suffrage on account of race, color, or previous condition of servitude. The language is plain, offering little or no room for quibbling. Though passed obviously as a protective measure for the colored people in the United States, it is sweeping

enough in its terms to include citizens of every race. There has been little litigation over this amendment, and Congress has not yet been called on to enforce it by appropriate legislation. Indeed, the amendment is self-executing, since any State or Federal statute that denies or abridges the right of citizens of the United States to vote on account of race, color, or servitude, is unconstitutional, and may be declared void by any court.

Power of States Narrowed.—The 10th Amendment 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." Previous to the adoption of the 15th Amendment, Congress possessed no power to legislate respecting *State* elections. That was reserved to the States respectively, or to the people, since the Constitution did not confer it on the United States, or prohibit it to the States. But with the passage of the 15th Amendment Congress obtained such power. In this respect therefore the power of the Federal government was augmented slightly at the expense of the States.

ARTICLE 16

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 census or enumeration.

In 1894, the student will remember, the Supreme Court ruled that income taxes were direct taxes, and that, since the income tax law of that year did not provide for levying the tax according to population, it was unconstitutional and void. The decision in effect prohibited Congress from ever again imposing an income tax, for it is next to impossible to apportion such a tax according to representation. Incomes, however, have long been deemed proper subjects for taxation, and it was

considered very unfortunate that Congress should be deprived of that great source of revenue. Partly, therefore, to enable Congress to obtain revenue from that source, and partly to satisfy a growing, insistent demand that the swollen fortunes of the wealthy be made to contribute more directly to the public expense, Congress finally proposed the present amendment. The clause was introduced at the first session of the 61st Congress. It passed the Senate July 5, 1909, by a unanimous vote; it passed the House, July 12, by a vote of 317 to 14, and was later approved by the President. It was submitted at once to the legislatures of the several States. In January, 1913, having been ratified by three-fourths of the States, it became an integral part of the Constitution.

This amendment settles forever a perplexing question. It makes no difference now whether we regard income taxes as direct or indirect so far as their availability for purposes of revenue is concerned. Congress may now tax incomes, without apportionment, and without regard to census or enumeration. Until Congress acts under this power, however, and the courts interpret whatever questions may arise under such acts, it is impossible even to suggest the possible limitations to this addition to the Constitution.

Income Tax Law.—The first income tax law under the 16th Amendment was passed during the special session of Congress convened by President Wilson in the spring of 1913. This law calls for the assessment of a graduated tax on all incomes, from whatever source derived, above $3000 per annum as follows: On incomes above $3000 per annum and not exceeding $20,000, a tax of one per cent; on incomes above $20,000 and not exceeding $50,000, a tax of two per cent; on incomes above $50,000 and not exceeding $75,000, a tax of three per cent; on incomes above $75,000 and not exceeding $100,000, a tax of four per cent; and on all incomes exceeding $100,000, a tax of five per cent.

Every resident within the United States, whether citizen or not, and every citizen of the United States, whether residing at home or abroad, is liable to this tax. Every person thus liable is required annually to make a true return of his total net income from all sources during the preceding calendar year to the Commissioner of Internal Revenue, under rules prescribed by him and approved by the Secretary of the Treasury. Failure to make such true return is made punishable under heavy penalties.

Exemptions.—Certain exemptions and deductions are allowed by the income tax law as follows:

1. Incomes from State and municipal bonds and obligations of the United States are not taxable; nor are the salaries of the President, United States judges, or of State or municipal officers.

2. All persons are entitled to the minimum exemption of $3000; but a married man living with his wife, or a married woman living with her husband, is allowed a further exemption of $1000, provided that the said wife or husband has not also a taxable income. In no case, however, is the exemption allowed to both husband and wife at the same time.

3. Every person in making out his return of net yearly income for assessment may deduct from his gross income (a) all necessary business expenses, not including living and family expenses; (b) all interest on indebtedness; (c) all national, State, county, and municipal taxes paid within the year; (d) all losses sustained during the year and not covered by insurance; (e) all debts and claims charged off as worthless; (f) a reasonable amount for wear and tear of property in use; (g) dividends on stock in corporations which are themselves subject to the tax; and (h) all incomes already taxed at the source. By the last is meant income derived from interest on bonds, mortgages, deeds of trust, etc.

It is idle at this date (1913) to speculate on the validity and

usefulness of this law. On its face, however, it appears to be a reasonable enactment, which while making available for taxation sources of revenue that have hitherto been exempt, at the same time is very liberal in its exemptions. It is the hope of its framers that the law will provide revenue enough to more than make up for possible losses from reductions in the tariff, besides distributing the burden of Federal taxation more equitably than has hitherto been thought to be the case.

ARTICLE 17

The 17th Amendment has already been discussed on page 46.

CHAPTER IX

LEADING CASES

LEADING CASES

1

VAN BROCKLIN *v.* TENNESSEE, 117 U. S., 151 (1886)

Certain lots of land in the city of Memphis, Tenn., were sold to the United States for non-payment of direct taxes. After a lapse of several years the former owners redeemed the land from the government. Whereupon, the State of Tennessee made formal demand on the owners (Van Brocklin and others) for taxes due on the lots in the interim. The case was first tried in a State court, which decided that the tax was collectable. Van Brocklin then carried the case before the U. S. Supreme Court, which reversed the decision. Why?

2

FORT LEAVENWORTH R. R. *v.* LOWE, 114 U. S., 525 (1885)

The State of Kansas ceded to the United States exclusive jurisdiction over the land occupied by the Fort Leavenworth Military Reservation, "saving to the State the right to tax railroad, bridge, or other corporations on said property."

The plaintiff, a corporation organized under the laws of Kansas, was the owner of a railroad in the reservation, and was taxed therefor by the board of assessors of the State. The corporation paid the tax under protest, and then brought suit to recover the money paid, on the ground that since the property was entirely within the reservation it should be exempt from taxation by the State. What are the rights of the parties concerned?

3

TRANSPORTATION CO. *v.* WHEELING, 99 U. S., 273 (1878)

The Wheeling Transportation Company, whose home port and principal offices were at Wheeling, operated boats running to various ports up and down the Ohio River. These

boats were licensed under acts of Congress to engage in the coasting trade. The city of Wheeling laid a tax on these vessels as personal property in the city. The company refused to pay the tax, holding that it was an unwarranted regulation of interstate commerce, and therefore unconstitutional. How would you decide this?

4

PACKET COMPANY *v.* KEOKUK, 95 U. S., 80 (1877)

A packet, or steamboat company, engaged in interstate commerce, and duly licensed by Congress to engage in the coasting trade, refused to pay fees to the city of Keokuk for the privilege of using the city wharves, maintaining that the fees were in effect a burden on interstate commerce, and that the law imposing them was null and void. How would you decide this?

5

VEAZIE *v.* MOORE, 14 HOWARD, 568 (1852)

The State of Maine granted to Moor and others the exclusive right of navigating the Penobscot River above Bangor. It was impossible to navigate a vessel into these waters from below because of natural obstructions in the stream. Veazie, being sued by Moor for running a steamboat on the water above Bangor in contravention of the statute, set up the following defense: 1st, that he had a Federal license to engage in the coasting trade; 2d, that the Maine statute was unconstitutional, since it amounted to a regulation of commerce. Ought the court to regard this defense good?

6

MCREADY *v.* VIRGINIA, 94 U. S., 391 (1876)

A law of Virginia made it illegal for anyone not a citizen of Virginia to plant oysters in the tidal waters of that State. McReady, a citizen of Maryland, was arrested and tried for

violation of this law. His defense was that the law was unconstitutional, being in violation of Article 1, Section 8, Clause 3; Article 14, Section 1. It is established law that each State owns the beds of tidal waters within its jurisdiction.

7

KELLY *v.* RHOADS, 188 U. S., 1 (1902)

Rhoads, tax collector for Laramie County, Wyo., collected from Kelly $250 in taxes on a herd of sheep. The sheep were being driven across Wyoming from Utah to Nebraska, supporting themselves on the way by grazing. A statute of Wyoming authorized the taxing of live stock brought into the State for the purpose of grazing. Kelly sued to recover the tax on the ground that the law, as applied to him, was void as a regulation of commerce.

8

GEER *v.* CONNECTICUT, 161 U. S., 519 (1896)

The plaintiff, indicted for violating a statute of Connecticut which forbade the killing of game for the purpose of transportation out of the State, or having it in possession for that purpose, set up as his defense that the statute was unconstitutional, being an unreasonable regulation of interstate commerce, besides unduly depriving him of his property.

9

MINNESOTA *v.* BARBER, 136 U. S., 313 (1889)

Barber, a dealer in fresh meats, was convicted before a Minnesota court of violating a statute, which forbade the sale of any fresh beef, veal, mutton, pork or lamb, that had not been inspected before slaughter by an inspector within the State. Barber maintained that the statute in question was unconstitutional, and his conviction therefore illegal. Was he right?

What constitutional principles apply? What writ would be available to secure for him an immediate hearing?

10

UNITED STATES *v.* WONG KIM ARK, 169 U. S., 649 (1897)

Wong Kim Ark was born in 1873 of Chinese parents domiciled in San Francisco. On returning from a visit to China he was refused permission to land in the United States, on the ground that he was not a citizen of this country. Previous to this time he had lived in San Francisco 21 years. What should be the decision in this case?

11

ELK *v.* WILLIAMS, 112 U. S., 94 (1884)

Elk, the complainant, brought suit against Williams because the latter, as registrar of voters in Omaha, Nebraska, had refused to register him as a qualified voter. Elk stated that he was an Indian born in the United States, but had voluntarily severed all tribal relations and had become a bona fide resident of the city of Omaha, State of Nebraska; that under the 14th Amendment, therefore, he was a citizen of the United States, and entitled to all privileges as such. How would you decide this case?

12

UNITED STATES *v.* VILLATO, 2 DALLAS, 370 (1797)

Francis Villato, a citizen of Spain, moved in 1793 from Louisiana to Philadelphia, where he subsequently swore allegiance to the State of Pennsylvania, and became according to the existing requirements a bona fide resident of that State. Some years later he took service with the French against the United States and was captured while in command of a prize brig. He was tried for treason, as having levied war against the United States and adhered to their enemies. He was acquitted. Why?

13

PARKER *v.* DAVIS, 12 WALLACE, 79 U. S., 461 (1870)

Parker promised, in payment of a certain sum of lawful money, to convey a lot of land to Davis. Later he refused to execute the contract. Whereupon, the case being brought to the Massachusetts Supreme Court, 1867, Davis was ordered to pay into court the sum promised and Parker to execute the deed for the land. Davis paid into court the sum named in notes of the United States, known as "greenbacks." Parker then refused to execute the deed on the ground that he was entitled to have the sum in coin. Was the latter's position good?

14

FOX *v.* OHIO, 5 HOWARD, 46 U. S., 410 (1847)

Malinda Fox, for the offense of passing counterfeit currency in the State of Ohio, was convicted in the highest courts of that State. She appealed her case to the United States Supreme Court, on the ground that the offense with which she was charged was national in character, and that the courts of the State of Ohio did not have jurisdiction over it. How would you decide this?

15

WHEATON *v.* PETERS *et al.*, 8 PETERS, 223 (1834)

Wheaton, author of 12 volumes of cases decided by the Supreme Court, sued Peters *et al.* to recover damages for publishing a volume entitled, "Condensed Reports of Cases in the Supreme Court," which contained among others all the cases in the first volume of Wheaton's reports, in violation of the complainant's copyright. Wheaton claimed (1) a common law right in his own published works; (2) a copyright in them under the statutes of the United States. The fact was brought out, however, that he had failed to conform to the law of 1790

(Stat. at Large, 124), requiring an applicant for copyright to give public notice of his work in the newspapers, and to deposit a copy of it in the Department of State.

16

DIAMOND MATCH CO. *v.* ONTONAGON, 188 U. S., 82 (1902)

The complainant company floated logs down the Ontonagon River to the village of Ontonagon, where they kept them in boom, shipping them out from time to time as required. The defendant, tax collector for the village of Ontonagon, levied a tax on these logs. Thereupon the complainant filed a bill in equity to restrain the collection of the tax on the following grounds: 1st, that it was a tax on exports; 2d, that it was a burden on interstate commerce, since the logs were shipped out of the State. Do you think the complainant's position good?

17

CORNELL *v.* COYNE, 192 U. S., 418 (1903)

A Federal statute provided: "That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof." The plaintiff protested this tax on the ground that the cheese which he manufactured was intended for export and under the Constitution was exempt from taxation. Was his position good?

18

U. S. *v.* SMITH, 5 WHEATON, 597 (1820)

Smith and others, part of the crew of a private armed vessel (commissioned by Buenos Ayres, then at war with Spain), mutinied, left their vessel in Margaritta, and seized by violence a ship called the Irrestible, a private vessel commissioned by the government of Artigas, also at war with

Spain. They then proceeded to sea without documents or commission, and in 1819 plundered a Spanish ship on the high seas. Later they were indicted before the Circuit Court for the District of Virginia for the crime of piracy. Their defense was: that since Congress had not yet defined piracy, they could not be punished for piracy; that before the Federal courts could punish an act as a crime, Congress must first define the act to be a crime. They based their contention on Article 1, Section 8, Clause 10.

19

HOLMES *v.* JENNISON, 14 PETERS, 540 (1840)

Holmes, a Canadian, fled from arrest in Canada and took refuge in the State of Vermont. Here he was arrested by the authority of the Governor of the State of Vermont and held for the action of Canadian officials. He applied for a writ of habeas corpus on the ground that the act of the Governor was unconstitutional. Should it have been so regarded by the court?

20

STURGIS *v* CROWNINGSHIELD, 4 WHEATON, 122 (1819)

The defendant in this case had made two promissory notes due in August, 1811. He did not pay, and when sued in 1817 for the debt he set up as defense the fact that, under a statute passed in 1812 by the State of New York, he had passed through bankruptcy and was discharged from all liability. He offered in court the certificate of discharge from all debts, dated 1812.

21

CUMMINGS *v.* STATE OF MISSOURI, 9 WALL., 323 (1866)

An amendment to the constitution of the State of Missouri, adopted in 1865, forbade any person to act as professor or teacher in any educational institution within the State without

first taking a prescribed oath that he had never been in armed hostility to the United States. The Rev. Mr. Cummings was, soon after the adoption of this amendment, indicted and convicted in a Missouri court for the crime of teaching and preaching without having taken the prescribed oath, and was fined $500. The case was taken to the U. S. Supreme Court on writ of error, and that court declared the Missouri statute unconstitutional and void. On what grounds?

22

MORMON CHURCH *v.* UNITED STATES, 136 U. S., 1 (1890)

The charter granted in 1851 by the Territory of Utah to the Church of Latter Day Saints was repealed by act of Congress in 1887. When proceedings were instituted by the United States to enforce this act the corporation resisted on the ground that the act was unconstitutional. How would you decide this case?

23

MORGAN S. S. CO. *v.* LOUISIANA BOARD OF HEALTH, 118 U. S., 455 (1886)

A statute of Louisiana allowed the resident physician on the Mississippi River the following fees for the inspection of vessels entering the ports of that State: $30 for a ship; $20 for a bark; $10 for a schooner, etc. The plaintiff company resisted the payment of the fees, maintaining:

1. That the law imposed a tonnage tax and was void.
2. That it was void as a regulation of commerce.
3. That it was repugnant to Article 1, Section 9, Clause 6.

24

OWINGS *v.* SPEED, 5 WHEATON, 688 (1820)

In 1780 the State of Virginia granted to Bard and Owings a tract of 1000 acres of land, on which the town of Bardstown was later laid off. In 1788 the Virginia legislature vested 100 acres of this land in trustees to be laid off in lots. Thereupon

Owings sued Speed, one of the trustees, on the ground that the act of 1788 was unconstitutional as impairing the obligation of contracts.

25

HAWKER *v.* NEW YORK, 170 U. S., 189 (1898)

In 1893 the legislature of New York enacted that any person who should practice medicine after conviction of a felony should be fined accordingly. Hawker, who had been convicted in 1878 of a statute felony was indicted in 1896 for violating this enactment. He maintained that the law, at least in respect to himself, was *ex post facto*. Can this case be distinguished from *ex parte* Garland? See pp. 144, 145.

26

ALMY *v.* STATE OF CALIFORNIA, 24 HOWARD, 169 (1860)

The State of California enacted a law requiring a stamp to be placed on all bills of lading of gold shipped out of the State. The plaintiff refused to buy and affix the required stamps, holding that the law was unconstitutional. Was his position correct? The California courts upheld the statute.

27

PEETE *v.* MORGAN, 19 WALLACE, 581 (1873)

The State of Texas established quarantine stations at various Texas ports, and enacted: "That every vessel arriving at a port having such quarantine station should pay a fee for the support of the same, of $5.00 for the first 100 tons and 1½ cents for every additional ton." Morgan, a ship owner in Louisiana, engaged in transportation business with Texas ports, refused to pay the tax, and brought bill to enjoin Peete, the collector of the taxes, from collecting any more fees under that statute. The Court granted the injunction, holding that the Texas law was unconstitutional. Why? Would it be possible to lay a tax for the purpose that would be constitutional?

28

IN RE GREEN, 134 U. S., 377 (1890)

Charles Green, disfranchised by the laws of Virginia for petty larceny, was imprisoned by order of the city court of Manchester, Va., for knowingly voting at an election for the presidential electors. He sued out a writ of *habeas corpus* on the ground that his act, if an offense at all, was an offense against the Federal government, and hence not triable before a State court. How should this be decided?

29

DAVIS *v.* PACKARD, 7 PETERS, 276 (1833)

Packard and others brought suit against Davis in the courts of New York and obtained judgment against him. Davis was then Consul-General from Saxony, stationed in the city of New York. The Supreme Court, on writ of error, reversed the decision of the State court. Why?

30

SCHOONER EXCHANGE *v.* MCFADDON, 7 CRANCH, 116 (1812)

The schooner Exchange, a public armed vessel of France, was libelled in the port of Philadelphia by McFaddon, on the ground that it had formerly belonged to him but had been forcibly seized by certain persons and disposed of under the orders of Napoleon. The Circuit Court ordered the vessel restored to its former owners; the Supreme Court reversed the decision. Why?

31

CHEROKEE NATION *v.* GEORGIA, 5 PETERS, 1 (1831)

The Cherokee Nation, occupying lands in the State of Georgia, filed an original bill in the Supreme Court, as though it were a foreign State, praying for an injunction to restrain

Georgia from enforcing its laws within the territory occupied by the Cherokees. The court refused the injunction. *Questions:* 1. What may have been the grounds for this refusal? 2. Was it proper to bring the original suit in the Supreme Court? 3. Why was not the suit barred by the 11th Amendment?

32

WALLACH *v.* VAN RISWICK, 92 U. S., 202 (1875)

The complainants, children and heirs of Wallach, a Confederate officer whose property had been condemned and sold by the Federal government, sought to obtain an interest in the property now possessed by Van Riswick, on the grounds: 1. That Congress could not compel the forfeiture of the property beyond the life of the offender (Constitution, 3, 3, 2). 2. That the proclamation of amnesty pardoning all who had taken up arms against the government restored the property to its original status.

33

LASCELLES *v.* GEORGIA, 148 U. S., 537 (1892)

Lascelles, extradited from New York to Georgia for larceny, was indicted by the jury on the charge of forgery. His defense was that, having been extradited for one offense, he could not be tried for another. Was the defense good?

34

AMERICAN PUBLISHING CO. *v.* FISHER, 166 U. S., 464 (1897)

Plaintiffs sued the defendant for $20,000 in the District Court, Salt Lake City, Territory of Utah, before a jury of twelve men. Nine of the latter gave verdict for the defendant, the others not concurring. The court accepted the verdict, Section 3171 of the laws of Utah allowing decisions by nine or more of a jury. The Supreme Court found the law to be unconstitutional. Why?

35

HYATT *v.* PEOPLE, 188 U. S., 691 (1902)

Hyatt was arrested by the authority of the Governor of New York, acting in pursuance of requisition papers from the Governor of Tennessee. The papers recited that Hyatt had been indicted in Tennessee for grand larceny, and that he was a fugitive from justice from that State; but in the papers it did not appear that he was in Tennessee when the alleged offense was committed. Should Hyatt be held under these facts?

36

UNITED STATES *v.* FOX, 94 U. S., 315 (1876)

Charles Fox, of the city of New York, died, bequeathing his property to the United States. The heirs contested the devise on the following grounds:

1. That the Federal government could not acquire property by such means.

2. That the laws of New York governing the descent of property limited devises to natural persons, or to such artificial persons (corporations) as were created under the laws of the State.

37

PATTERSON *v.* BARK EUDORA, 190 U. S., 169 (1902)

A Federal law made it unlawful for any person to pay to any seaman wages in advance of services performed, or to pay such wages to anyone else. Patterson and others, seamen on the British bark Eudora, sued for their wages in the District Court for the Eastern District of Pennsylvania, alleging that part of their wages had been paid in advance to the shipping agent at Portland, Me., through whom they had been employed. It was admitted at the trial that such advance payment was not contrary to the shipping laws of Great Britain.

The District Court dismissed the suit. The Supreme Court reversed the decision. Why?

38

Davis *v.* Beason, 133 U. S., 333 (1889)

A statute of Idaho forbade anyone to vote at any election, or to hold any office of honor, trust, or profit in the Territory, who was a bigamist or polygamist, or who belonged to any organization that encouraged bigamy or polygamy. Davis, indicted for procuring himself to be made an elector in violation of the statute, contended that the 1st Amendment to the Constitution made the statute unconstitutional. Was his contention valid?

39

Presser *v.* Illinois, 116 U. S., 252 (1885)

A statute of Illinois, after providing for an organized militia, forbade all other bodies of men to associate together as military organizations, or to drill in public or parade with arms, without the consent of the Governor. Presser, indicted and tried for parading at the head of a private military company in violation of the statute, contended that the statute was unconstitutional, being repugnant to the 2d Amendment and to Section 1 of the 14th Amendment. Was it?

40

Boyd *v.* United States, 116 U. S., 616 (1885)

The court in this case decided that the fifth section of the act of June 22, 1874, authorizing a court of the United States in revenue cases, on motion by the government attorney, to require the defendant to produce in court his private books, invoices, papers, etc., or else the charge against him should be taken as confessed, was repugnant to certain amendments to the Constitution. To which was it repugnant, and why?

41

EX PARTE LANGE, 18 WALLACE, 163 (1873)

Lange was convicted of the crime of embezzling from the U. S. mails, the punishment for the offense, as provided by statutes, being fine *or* imprisonment. The court sentenced him to pay a fine of $200 and to be imprisoned for one year. He paid the fine and began to serve his sentence. Next day he was returned to the court, and the same judge remanded the fine, but resentenced him to imprisonment. Lange then sued out a writ of habeas corpus, on the ground that the sentence was contrary to the 5th Amendment. Was his contention correct?

42

U. S. *v.* PEREZ, 9 WHEATON, 579 (1824)

Joseph Perez was put to trial for a criminal offense. The jury, being unable to agree on a verdict, were discharged by the court without the consent of the prisoner or his counsel. The latter then demanded the discharge of his client, on the ground that further trial would subject him to be twice tried for the same offense.

43

DREYER *v.* ILLINOIS, 187 U. S., 71 (1902)

In the case of Dreyer, who was prosecuted for a misdemeanor, the jury, unable to agree, were discharged without the consent of the accused. Dreyer then demanded his discharge, on the ground that another trial would not be due process of law. Was he right?

44

MAXWELL *v.* DOW, 176 U. S., 581 (1899)

A statute of the State of Utah allowed trial on an information, and conviction by juries of eight persons. The plaintiff in this case protested that his conviction under the law was

unconstitutional: that it was not "due process of law"; and that he had a constitutional right to an indictment and to be tried by twelve jurors instead of eight.

45

Knox *v.* Lee, 12 Wall., 457 (1870)

During the Civil War the property of Lee, a loyal citizen residing in Texas, was confiscated and sold under statutes enacted by the Confederate government. After the war Lee sued Knox, the holder of the property, to recover the value thereof. Had he any rights in the case?

46

McDonald *v.* Massachusetts, 180 U. S., 311 (1901)

In 1887 the legislature of Massachusetts enacted that whoever should be convicted of a felony thereafter, who had been twice convicted before and sentenced to three or more years for each offense, should be deemed an habitual criminal and be sentenced to prison for twenty-five years. The plaintiff, adjudged and sentenced as an habitual criminal under this law, contended that it was unconstitutional. Was he right?

47

Pervear *v.* Commonwealth, 5 Wallace, 475 (1866)

Pervear, a resident of Massachusetts, was indicted in the courts of that State for selling intoxicating liquor without a license. His defense was: 1. That he had already paid the internal revenue tax demanded by the Federal government and could not be taxed therefore by the State. 2. That the law of Massachusetts, under which he was indicted, was unconstitutional because it imposed an excessive fine. The statute imposed a fine of fifty dollars for each offense.

48

HANS *v.* LOUISIANA, 134 U. S., 1 (1889)

The plaintiff, citizen of Louisiana, brought suit against the State in the Federal Circuit Court to recover the value of certain bonds issued by the State, alleging a case under the Constitution and laws of the United States. Was he right? The case finally came to the Supreme Court, which decided that the Federal courts had no jurisdiction. Why?

49

NORTH CAROLINA *v.* TEMPLE, 134 U. S., 22 (1890)

The original suit was brought by Temple against the State of North Carolina and its auditor, W. Brooks, to compel the State and its officials to levy a tax for the payment of the interest on certain bonds. The Circuit Court granted the decree, whereupon the defendants carried the case to the Supreme Court on writ of error. What should the decision be?

50

TINDAL *v.* WESLEY, 167 U. S. (1896)

Wesley, citizen of New York, sued Tindal and Boyles, citizens of South Carolina, to recover possession of certain property wrongfully held by them in the city of Columbia, S. C. The defendants replied that they held the property in behalf of the State, Tindal as Secretary of State, Boyles as his clerk, and that the suit was therefore void under the 11th Amendment to the Constitution. The record of the case as presented to the Supreme Court did not show any evidence in support of their assertion. What should the decision be?

51

PLESSY *v.* FERGUSON, 163 U. S., 540 (1895)

Plessy, one-eighth African, was fined for occupying a seat in a railway car set apart for whites, in defiance of a statute com-

pelling separate accommodations for the two races on railroads within the State of Louisiana. He pleaded in defense that the statute was unconstitutional, violating Amendment 13, and Section 1 of Amendment 14. Plessy was not an interstate passenger.

52

Bradwell *v.* Illinois, 16 Wallace, 130 (1872)

Mrs. Bradwell, born in Vermont but residing at the time in Chicago, Ill., on being refused admission to the bar of that State on the grounds that females were not eligible under the laws of Illinois, carried her case to the Supreme Court, alleging among other things: 1. That as a citizen of Vermont and of the United States she was denied the privileges and immunities of the citizens of the several States. Was her contention sound?

53

Atkin *v.* Kansas, 191 U. S., 207 (1902)

A Kansas statute made it unlawful for laborers to be employed on behalf of the State or any of its municipalities for more than eight hours per day. Atkin, engaged in building a road for Kansas City, employed one Reese to work ten hours per day at the eight hour rate. When prosecuted he contended that the statute was unconstitutional as depriving him of property without due process of law.

54

In re Parrott, 1. Fed. Rep., 481 (1880)

Parrott was accused of violating the following act of the legislature of California: "No corporation now existing, or hereafter formed under the laws of this State, shall employ any Chinese or Mongolian." What possible defense was open to him under the Constitution?

55

SLAUGHTER HOUSE CASE, 16 WALL., 36 (1872)

The legislature of Louisiana granted to a certain corporation the exclusive right to maintain slaughter houses, landings and yards for cattle within the parishes of Orleans, Jefferson and St. Bernard; it further provided that all cattle intended for beef in that district should be brought to the yards and houses of the said corporation, and that the latter should charge a prescribed fee for the use of its yards and for the slaughter of animals.

1. Does this constitute an unlawful monopoly?

2. To what clause of the Constitution does the enactment appear to be repugnant?

3. Under what principle might it be declared valid?

APPENDICES

A. The Articles of Confederation

B. The Constitution of the United States

APPENDIX A

ARTICLES OF CONFEDERATION

ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN THE STATES OF NEW HAMPSHIRE, MASSACHUSETTS BAY, RHODE ISLAND AND PROVIDENCE PLANTATIONS, CONNECTICUT, NEW YORK, NEW JERSEY, PENNSYLVANIA, DELAWARE, MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, AND GEORGIA.

Article I.—The style of this confederacy shall be, "The United States of America."

Article II.—Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled.

Article III.—The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

Article IV.—The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided, also, that no imposition, duties, or restrictions, shall be laid by any State on the property of the United States or either of them.

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

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

Article V.—For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years, in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each State shall maintain its own delegates in any meeting of the States and while they act as members of the committee of the States.

In determining questions in the United States in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonments during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

Article VI.—No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No States shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessels of war shall be kept up in time of peace, by any State, except such number only as shall be deemed necessary, by the United States in Congress assembled, for the defense of such State or its trade; nor shall any body of forces be kept up, by any State, in time of peace, except such number only as, in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States, in Congress assembled, can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled, and then only against the kingdom or state, and the subjects thereof against which war has been so declared, and under such regulations as shall be established by the United States, in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.

Article VII.—When land forces are raised by any State for the common defense, all officers of or under the rank of colonel, shall be appointed by the legislature of each State respectively by

whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

Article VIII.—All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States, in Congress assembled, shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States, in Congress assembled.

Article IX.—The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States, shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of captures; provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice

thereof shall be given by order of Congress, to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward." Provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same claimed to have originated antecedent to such settlement

of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States, regulating the trade and managing all affairs with the Indians not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating post-offices from one State to another throughout all the United States, and exacting such postage on the papers passing through the same, as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "A Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requistion shall be binding; and thereupon the Legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm, and equip them in a soldier-like manner at the expense of the United States; and the

officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled; but if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the Legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared, and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations as in their judgment require secrecy; and the yeas and nays of the delegates of each State, on any question, shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

Article X.—The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by the consent of nine States, shall, from time to time, think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States, in the Congress of the United States assembled is requisite.

Article XI.—Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted into the same unless such admission be agreed to by nine States.

Article XII.—All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

Article XIII.—Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards currence of two thirds of the Members present.

And whereas it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union, Know ye, that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them; and that the Articles thereof shall be inviolably

observed by the States we respectively represent, and that the Union shall be perpetual. In witness whereof, we have hereunto set our hands in Congress. Done at Philadelphia, in the State of Pennsylvania, the ninth day of July, in the year of our Lord 1778,* and in the third year of the Independence of America.

APPENDIX B

THE CONSTITUTION OF THE UNITED STATES OF AMERICA, WITH THE SEVERAL AMENDMENTS

Printed from the official records, in conformity with the original orthography.

CONSTITUTION OF THE UNITED STATES OF AMERICA.

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

ARTICLE I.

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.—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.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen

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* Only ten states took action upon the Articles at this time. New Jersey, Delaware, and Maryland did not ratify them until later.

of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to 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.

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

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

Section 3.—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.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

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.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

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.

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 the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4.—The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators.

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.—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.

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

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.

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

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.—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.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

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 Repre-

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

Section 8.—The Congress shall have Power To Lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

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

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

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

To provide for the punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

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;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

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

To raise and support Armies, 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, 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 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

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.—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.

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.

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

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

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

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

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.

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.—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.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

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.—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

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.

[*Repealed by XIIth Amendment, page* 336.]

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.

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.

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.

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.

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.

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.—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.

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.

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.—The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the laws of

the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be 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.

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.—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 Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV.*

Section 1.—Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every

* Cf. Art. of Confederation;

"Art. IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and

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.—The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

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.

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.—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.

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.

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egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the Owner is an inhabitant, provided also that no imposition, duties or restriction, shall be laid by any state, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any state, shall flee from Justice, and be found in any of the united states, he shall upon demand of the Governor or executive power, of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given in each of these states to the records, acts and judicial proceedings of the Courts and magistrates of every other state."

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.

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.

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.

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.

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.

New Hampshire	JOHN LANGDON NICHOLAS GILMAN
Massachusetts	NATHANIEL GORHAM RUFUS KING
Connecticut	WM. SAML. JOHNSON ROGER SHERMAN
New York	ALEXANDER HAMILTON
New Jersey	WIL: LIVINGSTON DAVID BREARLEY WM. PATERSON JONA: DAYTON
Pennsylvania	B. FRANKLIN THOMAS MIFFLIN ROBT. MORRIS GEO. CLYMER THOS. FITZSIMMONS JARED INGERSOLL JAMES WILSON GOUV MORRIS
Delaware	GEO: READ GUNNING BEDFORD Jun JOHN DICKINSON RICHARD BASSETT JACO: BROWN
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
Attest	WILLIAM JACKSON, *Secretary*

AMENDMENTS OF THE CONSTITUTION.

[ARTICLE I.—1791.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[ARTICLE II.—1791.]

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.—1791.]

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

[ARTICLE IV.—1791.]

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.—1791.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE VI.—1791.]

In all criminal prosecution, 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.—1791.]

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.—1791.]

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

[ARTICLE IX.—1791.]

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

[ARTICLE X.—1791.]

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.—1798.]

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.—1804.]

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of

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* Cf. Art. II of the Articles of Confederation. "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled."

Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President: a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the 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.—1865.]

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

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

[ARTICLE XIV.—1868.]

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

Section 2.—Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male 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.—1870.]

Section 1.—The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

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

[ARTICLE XVI.—1913.]

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 census or enumeration.

[ARTICLE XVII.—1913.]

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.

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.

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

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