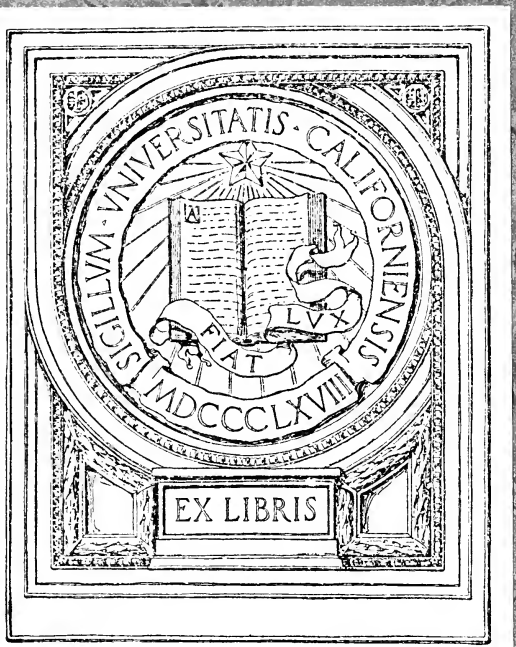
Curtis. Admission of Utah.



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STATE SOVEREIGNTY BY COMPACT WITH
THE UNITED STATES.

An Opinion

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GEORGE TICKNOR CURTIS.

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OPINION.

I have been requested to give my opinion on the Constitutional validity of certain clauses in the proposed State Constitution for Utah relating to polygamy and bigamy.

These clauses are the following:

ART. XV.—SEC. 12. Bigamy and polygamy being considered incompatible with "a republican form of government," each of them is hereby forbidden and declared a misdemeanor.

Any person who shall violate this section shall, on conviction thereof, be punished by a fine of not more than $1,000 and imprisonment for a term not less than six months nor more than three years, in the discretion of the Court. This section shall be construed as operative without the aid of legislation and the offences prohibited by this section shall not be barred by any statute of limitation within three years after the commission of the offence; nor shall the power of pardon extend thereto until such pardon shall be approved by the President ot the United States.

It will thus be seen that this provision requires for its operation no legislation whatever, but that indictments can be found under it and punishments inflicted, and the pardoning power in respect to the offence is limited by a check in the hands of the President of the United States.

This Constitution contains an article prescribing the manner in which amendments must be framed and adopted. But the power of amendment is limited by the following proviso, expressly drawn and devised so as to prevent any amendment or change in the anti-polygamy section without the assent of Congress:

Provided, That Section 12 of Article XV. shall not be amended, revised, or in any way changed until any amendment, revision or change, as proposed therein shall, in addition to the requirements of the provisions of this article, be reported to the Congress of the United States and shall be by Congress approved and ratified, and such approval and ratification be proclaimed by the President of the United States, and if not so ratified and proclaimed, said section shall remain perpetual.

My opinion has been requested upon the question whether the proposed check on the pardoning power, which this Constitution would vest in the hands of the President of the United States in the case of an offence prohibited by a State Constitution, and the proposed limitation on the power of amending the Constitution in regard to the polygamy and bigamy denounced by Section 12 of Article XV., are consistent with or repugnant to our system of government. This question of the limitation of a State sovereignty by a compact between the State and the United States is, in the precise aspect in which it here

arises, a new one ; but it is not a new question in principle, and there are precedents which will not only afford important aid in its solution, but which are conclusive.

As preliminary to the discussion of this question it will be useful to say something respecting the nature of the political system formed by the Union of the States under the Federal Constitution. The framers of that Constitution made a great discovery in the science of government, to which they were led by the consideration that the States were independent political communities, although then united by the Articles of Confederation for certain purposes common to them all.

The grand effort of the Federal Convention of 1787, which framed the Constitution of the United States, was to make a system of government for the Union, which, while having certain specific powers ceded to it by the people of each State, would still be consistent with the preservation of the State sovereignties in all other respects. The discovery that was made in the process of forming the Federal Constitution was that sovereignty, which, in our American sense, means only the political authority of the people, is divisible according to the subjects on which it acts ; that some powers of government can be vested in one class of public agents, and all others can be retained by the people in whom they primarily reside ; and thus that the individual inhabitants of separate political communities can be acted on by two distinct governments, each of which has its appropriate sphere. But this mode of constituting a mixed political system required that the Federal, or central government, should, by express provision, be made supreme and paramount in the exercise of all the powers ceded to it by the people of the several States. That the people of the several States would retain all the original and inherent powers not parted with by cession to the Federal Government was assumed to be a fundamental implication, resulting from the fact that the powers granted to the Federal Government were specific, described, limited and enumerated, and did not comprehend all the powers of sovereignty. But when the Constitution, as originally framed and promulgated, came before the people of the several States for adoption and ratification, they were not content to leave this very important matter to implication; they demanded an express reservation of all the powers which were not to be ceded by the people of the several States to the Federal Government, or which they were not to be prohibited from exercising. Accordingly the Tenth Amendment, adopted in 1789–91, was made to declare :

"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."

By this reservation, every State remains a self-governing political community, in respect to its own inhabitants, in every relation in which those inhabitants are not by the Constitution of the United States placed under the authority of the Federal Government.

It is this mass of rights, privileges and powers not vested in the Federal Government, but retained by the people of each State, that constitutes the State sovereignty. It follows as a necessary consequence from this system, that the people of every State in this Union have under their entire control every relation of their inhabitants that is not under the control of the United States, by reason of some provision in the Federal Constitution. With the domestic relations of their inhabitants the States can deal as they see fit.

There is another marked and prominent characteristic of our political system evinced by the provisions of the Federal Constitution. It is that each State, by and through that Constitution, enters into compacts and agreements with all the others. They are prohibited from making agreements with each other without the consent of Congress; but they may and do covenant perpetually and irrevocably, by and through the Constitution of the United States, that the Federal Government shall have, and exercise all the powers ceded to it by their assent to the Constitution, and that no State shall exercise any power prohibited to it by that instrument. The idea, therefore, of compacts, covenants and agreements between the separate States, as members of the Union, and the United States as the representative of all the States collectively, is imbedded in the Federal Constitution, and forms its principal strength. It is what gave the Federal Government authority to vindicate and assert its own existence and powers against an attempt of certain States to break the compacts which they had respectively made with the United States when they ratified and adopted the Constitution.

The 10th section of Article I. of the Constitution contains the prohibitions which it has laid upon the States. Some of these prohibitions are absolute; others relate to things that can be done only by the consent of Congress. Every one of them, both those that are absolute and those that are conditional, relate to things that every State would have a perfect right to do if it had not covenanted with the United States, in and by the Constitution, that it will not do them. But the prohibitions owe all their force, all their obligation, all their restraining efficacy, to the compact which every State has made with all the others, collectively styled the United States, whereby each State has limited its own sovereignty in

certain respects over which it would otherwise have retained full control.

It follows from this statement, as a legitimate deduction, that such a covenant, entered into between the several States and the United States, clothes the Federal Government with authority to enforce the prohibitions when a State undertakes to break the compact into which it has entered. Take, for example, one of the absolute prohibitions: "No State shall enter into any Treaty, Alliance or Confederation." If any State were to do what is thus prohibited, is it to be supposed that there would be no remedy? that the United States would have no constitutional power to prevent the operation of the treaty, alliance or confederation? Take one of the conditional prohibitions: "No State shall, *without the consent of Congress*, lay any duty of tonnage, keep troops or ships of war in time of peace." It is not to be imagined that if a State were to undertake to do one of these things the United States would be powerless in the matter. And if it is asked what the remedy would be, I answer that it would not be by Federal action against the State itself in its corporate, political or sovereign capacity; it would be by appropriate legislation to reach, restrain or punish individuals who should undertake to carry out the will of their State in respect to a thing that it had covenanted that it would not do or attempt to do. This authority, which results necessarily from the right of the United States to execute every part of the Constitution, rests for its foundation on the compact that every State has made with the United States that it will not exercise its own sovereignty in certain matters, but that in those matters it has submitted its own sovereignty to the control of Congress.

Commencing, then, with the frame-work of the Constitution alone, we find that it is largely and primarily founded in irrevocable compacts between each State and the United States, whereby every State has diminished its own sovereignty in certain important particulars. Other examples of the diminution or limitation of the State sovereignties will be found in the amendments adopted after the close of the Civil War, some of which largely curtailed the previous State powers. These curtailments and diminutions of State sovereignity rest on compacts made by the several States with the United States.

What, then, is to prevent a new State, or the people of a proposed new State, when they present themselves for admission into the Union under a Republican Constitution, from doing that which every State did when it ratified and accepted the Constitution of the United States, whether it was one of the original thirteen States, or was one that came into ex-

istence as a State since the year 1789? Is it said that the renunciations of State sovereignty which were made by the States when they entered the Union under the Constitution were made by all alike, and related to matters of common concern, whereas a matter that is peculiar to the social condition or situation of a proposed new State is not of that character? This would be a begging of the question; for the question here is what compacts in diminution or limitation of its own sovereignty is it constitutionally competent for any State to make with the United States? Must it be one that every other State has made or ought to make, or wishes to make? Or, if it is one that is peculiar to the situation of the proposed new State, growing out of the present or past social condition of that people, is it excluded from the category of agreements and covenants that a State can make with the United States? The precedents that will be cited in the course of this opinion answer this question emphatically in the negative.

Although it has sometimes, and generally, been the legislative practice of Congress, when admitting new States into the Union, to declare that they are admitted on an equal footing with the original States in all respects whatsoever, yet the Constitution does not require this declaration. It simply provides that "New States may be admitted by the Congress into the Union." The equality is an incident of the admission; which imports of itself that the State, after it has become a member of the Union, is to enjoy all the rights and privileges of such membership. But this in no way affects the conditions on which Congress may see fit to grant the admission. It is not necessary that those conditions should be such, and such only, as have been made with every other State that has been admitted under the power given in Section 3 of Article IV. Equality of membership in the Union means that every State shall enjoy the same rights and privileges as every other State. One of the rights of every member of the Union is a right to make covenants and agreements with the United States in any form in which the parties can unite. If, when it enters the Union, a new State makes a covenant with the United States in diminution or limitation of its sovereignty, in a way in which other States have not limited or diminished theirs, the new State is not placed in the Union on an inequality with the other States. There is no inequality in respect to any right, privilege or standing as a member of the Union. To use the present case as an illustration:

The people of Utah propose to covenant with the United States, in their State Constitution, that the State Executive shall not grant a pardon to a person convicted of polygamy or bigamy, without the con-

currence of the President of the United States; and that they, the people of the State of Utah, will never amend or change that part of the Constitution which makes and punishes the offences of polygamy and bigamy, without the consent of Congress. Why have they offered to make this compact? Because there is a peculiarity in their past social condition which requires that, in order to remove a possible objection to their admission into the Union as a State, they shall make this compact in diminution of what would otherwise be their unlimited sovereign right to change their Constitution in this respect at their own pleasure. It has nothing to do with the Constitutional validity of this compact that other States have not made it, or have not been in the same situation, or have not had the same motive. This will abundantly appear from the precedents which are to be cited.

I have always regarded Section 3 of Article IV. of the Constitution of the United States, as the source and the only source of the power of Congress, not only to admit new States, but to create and govern those peculiar dependencies which have come to be denominated "Territories," but which should be kept in that condition no longer than is necessary to allow of their development into communities fit for the rights and privileges of Statehood. It is thirty years since I had occasion to study this part of the Constitution and the legislation under it with peculiar care; and although the result in the case of Dred Scott, in the argument of which I took part in the Supreme Court of the United States, in 1856–7, was not what I hoped for and endeavored to bring about, I venture to say that the doctrine for which I then contended and which was accepted by Justices McLean and Curtis, is now almost universally conceded by Constitutional lawyers in all parts of the Union. The doctrine was this: That Section 3 of Article IV. of the Constitution, primarily designed to provide a legislative authority and process for bringing new States into the Union, clothed the Congress of the United States with a plenary legislative power to dispose of the public property denominated "the territory" of the United States, as well as all other property of the United States, and with a plenary legislative power to form the settlers on the public domain into political communities and to govern those communities so long as they should remain in a state of pupilage or preparation for admission into the Union as States.*

*"The Constitutional Power of Congress over the Territories." An argument delivered in the Supreme Court of the United States, December 18, 1856, in the case of Dred Scott, plaintiff in error, *v.* John F. A. Sandford, by George Ticknor Curtis: Boston, Little, Brown & Company, 1857.

But as the formation and admission of new States was the primary design of the section, it follows that Congress is placed under the obligation of a public TRUST to permit such communities to become States, and to bring them into the Union as States when the people desire it, and they have sufficient population and resources to sustain a State government, republican in its form and spirit. It is not a proper discharge of this public TRUST to keep any Territory indefinitely in the condition of a Territory, thereby keeping open a field for the continued exercise of Federal patronage and power. Territorial government is not self-government; and although it is necessary for a certain period for Congress to govern the settlers on the public domain—a period that may vary in different cases—yet where the Territorial community has become so large and so prosperous that its people are entirely capable of governing themselves, it is contrary to the spirit of our institutions and in my opinion to the intent of the Constitution, to withhold from them the full panoply, rights and privileges of Statehood, and to keep them in subjection to a distant power over which they have not even a partial control, as the citizens of every State in the Union have.

But so long as it is necessary for the Territorial condition to continue, so long Congress properly discharges the public TRUST imposed upon it by the Constitution, when it determines what shall be the social relations within the particular Territory, while it remains a territory. This is just as much within the province of Congress as it is to create the machinery of a Territorial government, and accordingly it was, and rightfully, the practice of Congress, in organizing a particular Territory, to prescribe whether the condition of slavery, or involuntary servitude, for example, should or should not be allowed therein. This continued to be the practice down to the time when the existence of slavery in Territories took on another form of public controversy; and undoubtedly the power of Congress, as the precedents presently to be cited will show, was exercised both for and against slavery, according to varying circumstances; and the authority of Congress to act either way could only be referred to Section 3 of Article IV. of the Constitution. It is to the same source that the power to enact the laws against polygamy in the Territories, which began to be enacted in 1862, and were re-enacted in 1882, must be referred.

But this matter of polygamy in Utah, where it has existed for forty years, and for a large part of which period it was practised without any interference on the part of the Federal Government, and under circumstances evincing at least great public indifference concerning it, has

now assumed an entirely new aspect. Of the voters of Utah who are Mormons in religious faith—a class of religionists whose religious belief is supposed to sanction polygamy—about 95 per cent. cast their votes at a recent election in favor of the Constitution, the provisions of which on the subject of polygamy are quoted at the head of this opinion. But few of the so-called "Gentiles" voted on this Constitution. Of the negative votes cast against the Constitution, 504 in number, only about one-half were cast by Mormons. If the Constitution is accepted by Congress as it is presented, and becomes the fundamental law of the new State of Utah, the Mormon population, which is very largely the majority, will be the governing people of the State. They have bound themselves to support and abide by a constitution which will limit their State sovereignty in the matter of polygamy by a public compact with the people of the United States. The question whether this will be a valid, efficient and Constitutional compact, must be largely determined by the precedents which have been made when other new States have been admitted into the Union under certain conditions.

It is obviously immaterial, when a new State is admitted into the Union, whether the proposal of a peculiar condition or special compact on a particular subject, is first suggested by Congress, or is brought forward by the people who ask for admission under a Constitution which they present. In either case, if the Constitution, after it has received the sanction of Congress, contains a certain limitation of the State sovereignty, a compact has been made between the State and the United States, and the preliminary question is, whether it will be a valid, efficient and Constitutional compact or condition of admission into the Union, by whomsoever proposed. On this question the precedents will throw a flood of light.

The precedents to which I shall refer divide themselves into two classes. The first class comprehends cases which illustrate in a very striking manner the mode in which Congress at an early period dealt with slavery in particular Territories of the United States. These early cases are three in number: the first being that of Tennessee; the second is Mississippi; and the third is the Territory of Orleans.

On the 2d of April, 1790, Congress accepted a cession of the claim of North Carolina to a certain region of country west of that State which afterward became the State of Tennessee. One of the conditions of the deed of cession was "*that no* REGULATION *made or to be made by Congress shall tend to emancipate slaves.*" (Statutes at Large, vol. I., p. 106.) In this cession, North Carolina assumed that Con-

gress had power to regulate slavery in a Territory; and using the very word "Regulation" which the Constitution employs as synonymous with *Law*, the State of North Carolina lays the United States under a restriction with respect to the Territory of Tennessee. Congress, by an Act passed May 29, 1790 (Stat. at Large, vol. I., p. 123), organized a Territorial Government *upon the conditions of the deed of cession.* Here then was a compact made between the United States and the State of North Carolina, that in governing this Territory of Tennessee Congress would make no law tending to emancipate slaves. The otherwise unlimited sovereignty of the United States to govern Territories was in this instance limited by a compact with the State of North Carolina. This occurred in the Presidency of Washington, John Adams being Vice-President, Jefferson Secretary of State, Hamilton Secretary of the Treasury, and many of the framers of the Constitution being in Congress. The fact that Congress limited the sovereign authority of *the United States* in this particular case of Tennessee, does not make a difference in principle from the case of a compact limiting *the sovereignty of a State.*

The next case in chronological order relates to the Territory of Mississippi, which was organized by Act of Congress passed April 7, 1798. The 7th Section of the Act prohibited the importation of slaves into the Territory from any place out of the limits of the United States, leaving, by clear implication, a right to introduce them from places within the United States. The 3d Section made this implication conclusive; for it excluded the operation of the freedom clause in the Ordinance of 1787, by an exception which prevented its application to Mississippi. When the bill was pending in the House of Representatives, Mr. Thatcher, of Massachusetts, moved to strike out this exception, upon the ground that the Government of the United States originated in and was founded on the rights of man, and could not consistently establish a subordinate government in which slavery was to be both tolerated and sanctioned by law. A debate followed, but the motion to strike out received only twelve votes. The organic Act gave a clear and unequivocal sanction to slavery in the Territory of Mississippi. (Annals of Congress, 5th Cong., vol. 2, pp. 1306–1312.)

Afterward, March 26th, 1804, came the Act to organize the Territory of Orleans. It contained a prohibition against the introduction of all slaves, "except by citizens of the United States removing into the Territory for actual settlement, and being at the time of such removal *bona fide* owners of such slave or slaves; and every slave imported or brought into the Territory contrary to the provisions of this Act

shall thereupon be entitled to and receive his or her freedom." This Organic Act, therefore, regulated slavery in the Territory of Orleans in both ways—by permission and by prohibition. These two cases of Mississippi and Orleans are cited here, not as compacts made by the United States as in the case of Tennessee, but as evidence that in 1798 and 1804 Congress regarded itself as holding a full legislative authority over the domestic relations of the inhabitants of a Territory, and regulated the relation of slave-owner and slave as it saw fit. When we pass from this point of time (1804) we leave the immediate presence of the framers of the Constitution and their contemporary generation, and come to the first precedent of the second class that will be here cited; namely, the cases in which the people of a Territory have been admitted into the Union as a State, upon some condition in the nature of a compact between the new State and the United States. This first precedent of the second class is that of Indiana.

Indiana was formed out of a part of the North Western Territory which was ceded by Virginia to the United States, and it was organized as a Territory by Act of Congress passed May 7, 1800. It remained a Territory until 1815. Proceedings were then taken for its conversion into a State; and a State Constitution having been framed by a convention of delegates (June 20, 1816), Congress passed a joint resolution admitting the State of Indiana, which was approved December 11, 1816. The joint resolution recited that the Constitution which had been formed by the people of the Territory "is republican in form, and *in conformity with the principles of the articles of compact between the original States and the people and States in the Territory North West of the River Ohio*, passed on the 13th of July, 1787." This recital was followed by the resolution in these terms:

> *Resolved*, That the State of Indiana shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatsoever.

If we recur to the Ordinance of 1787, we find that among other fundamental compacts which it made between the original States and the people and States in the North Western Territory (meaning all future States that should be created therein), there was one that excluded slavery forever. If the Congress which sat under the Constitution in 1816 had not required this restriction to be incorporated in the Constitution of the State of Indiana, the Ordinance of 1787 would not have carried it into operation in that State by its own force. But by requiring the State Constitution to be in conformity with the compacts of the Ordinance, Congress bound the sovereignty of the people

of Indiana by a compact between that State and the United States. Yet this was not thought to produce any inequality between the State of Indiana, as a member of the Union, and all the other States. It was imposed as a condition of admission into the Union which the people of Indiana were willing to accept and offered to accept.

The next precedent that I shall cite, although four years earlier than that of Indiana, is strikingly in point on the present question. I have stated when the Territory of Orleans was organized. The people of that Territory in 1812 framed a Constitution for a State which they called Louisiana. It was part of the Territory ceded by France to the United States in 1803. The inhabitants were almost wholly of French descent; they spoke the French language, and their public proceedings had always been conducted and recorded in that language, and not in English. This peculiarity of their social condition continued down to the time when they applied for admission as a State. Congress imposed various conditions on their admission; one of which was that their Constitution should provide for keeping the public records of judicial and legislative proceedings in the English language. It was a matter of interest to the people of the United States to have the official language of the State of Louisiana the same that it was in all the other States, although the popular speech was the French tongue, and most of the inhabitants knew no other. But for this restriction, the people of the State of Louisiana could, by their sovereign right of self-government, have recorded their proceedings in what was their vernacular tongue. But because they were required to make, and did make, this limitation upon their State sovereignty, by compact with the United States, it has never been supposed that the State of Louisiana has ever since been in the Union on an inequality with the other States. It is a matter of interest to the people of the United States that monogamy shall be the marriage relation in Utah, as it is throughout all the States. If the people of the proposed State of Utah covenant in their Constitution that polygamy and bigamy shall be a misdemeanor against the State, and that they never will change their Constitution in this respect without the consent of Congress, what inequality would this limitation of their State sovereignty introduce between the State of Utah and the other States? The other States have no such practice as polygamy recognized in their social condition, and no reason and no motive for making or offering to make with the United States any compact on the subject of marriage.

The next precedent to be cited is the memorable case of Missouri, the admission of which convulsed the Union for a time, until, under

the lead of Mr. Clay, Congress, in 1821, settled a condition on which it was to be admitted into the Union; a condition which formed a compact between the State of Missouri and the United States, and one that unquestionably limited a certain provision of the State Constitution, and curtailed one of the State powers.

The Constitution presented by the people of Missouri, framed in 1820, contained the following provisions:

SEC. 26. The General Assembly shall not have power to pass laws—

1. For the emancipation of slaves without the consent of the owners; or without paying them, before such emancipation, a full equivalent for such slaves so emancipated, and,

2. To prevent *bona-fide* immigrants to this State, or actual settlers therein, from bringing from any of the United States, or from any of their Territories, such persons as may be deemed to be slaves, so long as any persons of the same description are allowed to be held as slaves by the laws of this State.

They shall have power to pass laws—

1. To prohibit the introduction into this State of any slave who may have committed any high crime in any other State or Territory.

2. To prohibit the introduction of any slave for the purpose of speculation, or as an article of trade or merchandise.

3. To prohibit the introduction of any slave, or the offspring of any slave, who heretofore may have been, or hereafter may be, imported from any foreign country into the United States, or any Territory thereof, in contravention of any existing statute of the United States.

4. *To permit the owners of slaves to emancipate them, saving the right of creditors, where the persons so emancipating will give security that the slave so emancipated shall not become a public charge.*

It shall be their duty, as soon as may be, to pass such laws as may be necessary—

1. To prevent free negroes and mulattoes from coming to and settling in this State, under any pretext whatever, and

2. To oblige the owners of slaves to treat them with humanity, and to abstain from all injuries to them extending to life or limb.

(Missouri Constitution of 1820.)

The controversy in regard to the admission of Missouri was finally narrowed down to the 4th clause of that part of the proposed Constitution which defined the laws that the General Assembly should be permitted to pass in regard to slavery; namely, the clause above printed in *italics*. On the 26th of February, 1821, Mr. Clay, from a joint committee, reported in the House of Representatives a joint "Resolution providing for the admission of Missouri into the Union, *on a certain condition*," which resolution was passed and approved March 2, 1821. The condition appears in the following proclamation of President Monroe, announcing the admission of Missouri into the Union:

A PROCLAMATION

By the President of the United States.

WHEREAS, The Congress of the United States, by a joint resolution of the second day of March last, entitled "Resolution providing for the admission of the State of Missouri into the Union on a certain condition," did determine and declare "That Missouri should be admitted into this Union on an equal footing with the original States, in all respects whatever, upon the fundamental condition, that

the fourth clause of the twenty-sixth section of the third article of the Constitution submitted on the part of said State to Congress, shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen of either of the States of this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States. *Provided*, That the Legislature of the said State, by a solemn public act, shall declare the assent of the said State to the said fundamental condition, and shall transmit to the President of the United States, on or before the first Monday in November next, an authentic copy of said act; upon the receipt whereof, the President, by proclamation, shall announce the fact: whereupon, and without further proceedings on the part of Congress, the admission of the said State into this Union shall be considered as complete." And, whereas, by a solemn public act of the Assembly of the said State of Missouri, passed on the twenty-sixth day of June, in the present year, entitled, "A solemn public act declaring the assent of this State to the fundamental condition contained in a resolution passed by the Congress of the United States, providing for the admission of the State of Missouri into the Union on a certain condition," an authentic copy whereof has been communicated to me, it is solemnly and publicly enacted and declared, that that State has assented, and does assent, that the fourth clause of the twenty-sixth section of the third article of the Constitution of said State "shall never be construed to authorize any law, and that no law shall be passed in conformity thereto, by which any citizen of either of the United States shall be excluded from the enjoyment of the privileges and immunities to which such citizens are entitled under the Constitution of the United States." Now, therefore, I, James Monroe, President of the United States, in pursuance of the resolution of Congress aforesaid, have issued this, my Proclamation, announcing the fact, that the said State of Missouri has assented to the fundamental condition required by the resolution of Congress aforesaid; whereupon the admission of the said State of Missouri into the Union is declared to be complete.

In testimony whereof, I have caused the seal of the United States of America to be affixed to these presents, and signed the same with my hand.
[L. S.] Done at the City of Washington, the tenth day of August, 1821, and of the Independence of the said United States of America the forty-sixth.

JAMES MONROE.

By the PRESIDENT.
JOHN QUINCY ADAMS,
Secretary of State.

One other precedent completes the list of those that need to be cited in this opinion; namely, the case of Nebraska.

The following is part of the Act of Congress which prescribed the conditions on which Nebraska was to be admitted:

Provided, That the Constitution when formed shall be republican, and not repugnant to the Constitution of the United States and the principles of the Declaration of Independence; *and provided further*, That the said Constitution shall provide, by an article forever irrevocable, without the consent of the Congress of the United States—

First. That slavery or involuntary servitude shall be forever prohibited in said State.

Second. That perfect toleration of religious sentiment shall be secured, and no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship.

Third. That the people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory, and that the same shall be and remain at the sole and entire disposition of the United States, and that the lands belonging to citizens of the United States residing without the said State shall never be taxed higher than the land belonging to residents thereof, and that no taxes shall be imposed by said

State on lands or property therein, belonging to or which may hereafter be purchased by the United States.

Appendix to the *Congressional Globe*, pt. 3, 1864. 38th Cong., 1st Sess., p. 153.

Extract from the act admitting Nebraska:

SEC. 6. This Constitution is formed, and the State of Nebraska asks to be admitted into the Union on an equal footing with the original States, on the condition and faith of the terms and propositions stated and specified in an act of Congress, approved April 19th, 1864, authorizing the people of the Territory to form a Constitution and State government, the people of the State of Nebraska hereby accepting the conditions in said act specified.

Nebraska. Act of admission, 1867. The Federal and State Constitutions, etc., of the U. S., part II. 2d ed. p. 1212.

From these precedents—and it is unnecessary further to multiply citations—the following appear to be settled as established principles of Congressional action on the admission of new States into the Union :

1st. That Congress can prescribe conditions on which a new State shall be admitted into the Union ; and that such conditions do not necessarily relate to matters on which any other State has been required to make provision in its Constitution, but that in each case they may grow out of the particular predicament or situation of the State asking admission.

2d. That Congress may prescribe the conditions in advance, so that when the State Constitution is presented for the approval of Congress, it may be found to contain the conditions ; or the people of the proposed new State may themselves, without previous requirement, present such conditions as they are willing to make. In either mode of action, when the conditions have been sanctioned by Congress, and the State is admitted into the Union with those conditions embodied or fulfilled in its constitution, a compact has been made between the State and the United States.

3d. That the compact so made may be one that curtails, limits, or diminishes either the sovereignty of the people of the State, or the power of its legislature, in some domestic matter, or it may be one that concerns some property interest or some right of the United States, or of some other State.

4th. That such compacts, limiting or curtailing the sovereignty of a State, may be absolute, or they may be made in a form that will require the assent of Congress to any change.

Hence it follows, that the proposal of the Constitution for Utah, whereby the people of that Territory, if admitted under this Constitution, would bind themselves never to change their Constitution in respect to polygamy and bigamy without the assent of Congress, would

not be a new and unprecedented compact, but that it would be in the same form and the same terms in which similar compacts have been made with other new States.

The objection, therefore, which has been made to the proposed Constitution for Utah—that the clauses relating to polygamy and bigamy would be of no value, and of no binding force or efficacy, because the sovereignty of a State, after it is once in the Union, cannot be thus controlled—is entirely untenable. Nor is the argument *ab inconvenienti* of any greater force. The question, as a matter of public policy, is whether the polygamy that has existed in Utah for so long a period can most effectually, easily, and with the least irritation be ended by keeping up the Territorial form of government and by Federal legislation, or by admitting Utah as a State under the proposed Constitution, with its prohibition against polygamy and bigamy made operative forever without the previous assent of Congress to any change. The balance of convenience and advantage is by a great weight on the side of admitting the State under the proposed Constitution. It can never be otherwise than inconvenient and embarrassing for Congress to continue to legislate on the subject of polygamy in such a community as Utah, or to deal with the social relations that have grown out of it. It is supposed that the practice of polygamy has arisen out of a peculiar religious faith; and such is undoubtedly the fact. While it is unquestionably true that the legislative power, wherever it resides, can restrain and punish any practice or conduct that is injurious to the welfare of society, although that practice or conduct may be dictated by a sincere religious belief, yet there is always danger of encroachment on the rights of religious belief when repressive measures are resorted to in respect to any practice or conduct that has its origin in or is connected with a religious faith. Hitherto the legislation of Congress against polygamy in the Territories has not escaped this danger; for, in one respect at least, that legislation has been so interpreted and administered by the Territorial Courts in Utah, that the rights of religious belief have been disregarded, because men have been punished in the penitentiary for conduct that was perfectly innocent in itself, and could have been dictated only by a sense of religious and moral duty. Congress could never have intended such a result of its legislation. It has been one of the consequences of the form of Territorial Government, and of the spirit which that form of government is apt to engender in the administration of laws aimed at a particular offence in

a peculiar state of society.* As the alternative to the longer continuance of Utah under the Territorial government, there is now presented a plan for remitting this whole matter of polygamy to the people of Utah themselves, under the guaranty of a public compact with the United States that it shall be forever an offence against the State, and that in this respect the Constitution of the State shall never be changed without the assent of Congress. No reasonable person can doubt that the people of Utah will live up to what they thus promise, because it is plain that they must live up to it after they have made with the United States the compact which they propose.

In regard to the clause which proposes to require the assent of the President of the United States to a pardon of the offence of polygamy or bigamy, there can be no possible objection to it as a limitation of the State sovereignty, if the precedents above cited are to be regarded. In principle, it stands upon the same footing as the compacts which have required the assent of Congress to any change in the conditions on which a State has been admitted into the Union. The only possible objection that can be made to it would be that it might be inconvenient to the President. But this inconvenience would practically be very slight. The convict would know that to obtain a valid pardon, he must get the consent of the State Executive and also the consent of the President of the United States. The State Executive would never be likely to send up a case for the consideration of the President without careful investigation ; the papers would come before the President in a shape to enable him to form his judgment very easily ; and there would not be imposed upon him an amount of labor to be compared to what he has to perform whenever he is asked to pardon a person who has been convicted in a Federal Court of an offence against the United States. As the pardon of the State Executive must first be obtained, the responsibility resting on the President would be far less than in the case of offences against the United States.

Finally, it is to be noted that the Supreme Court of the United States has expressly held it to be no objection to the validity of a compact made by a State, that it diminishes the State sovereignty. It was so held in relation to a special compact that was peculiar to the situation of the State in question. In 1823 the Supreme Court held that it is not a valid objection to a compact made between two States, with the consent of Congress, that it restricts the legislative power of one of them in certain par-

* See *The Forum* for November, 1887, article entitled "Shall Utah Become a State," for an explanation of the Federal legislation and the mode of its judicial administration in the Territory of Utah.

ticulars. (Green *v.* Biddle, 8 Wheaton, 1. See also Spooner *v.* McConnel, 1 McLean, 337.)

The Supreme Court of the United States has also had occasion to pass upon compacts made between a State and the United States, and has upheld them as valid and binding.

(See Wright *v.* Stokes, 3 Howard, 151; Neal *v.* Ohio, *Ibid.*, 720. Atchison *v.* Huddleston, 12 Howard, 293.)

Perhaps it is not strictly within the scope of the opinion that I have been asked to give, for me to point out in what way there would be a remedy, if the people of Utah, after they had been admitted as a State under the proposed Constitution, were to undertake to repeal or change their Constitution, in the particulars in question, without the assent of Congress, and thus to give a tacit toleration or sanction to the further practice of polygamy. This would be a rather wild supposition, inasmuch as such action could give no legal existence whatever to plural marriages, and there is, therefore, no likelihood that they would ever be entered into. But let the supposition be made. Inasmuch as the corner-stone of my position is that the breach of the proposed compact would not be without remedy, I will, in consistency with myself, state what I hold that remedy to be.

There is a clause in the Constitution of the United States which was designed to confer on Congress legislative power to carry into effect every part of that Constitution which requires legislative action for its execution. The clause is the last in Section 8 of Article I., and is in these words:

"The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

It has never been my tendency to magnify the scope of *implied powers*. But on the construction and operation of the clause just quoted, in the matter now under consideration, I cannot have any doubt whatever. One of the express powers vested by the Constitution in Congress is the power to admit new States into the Union. It has been seen that by a course of very strong precedents this power has been considered as embracing a clear authority to prescribe conditions of admission. Such a steady and uniform practical construction of this power is of very great weight; and assuming that the power to impose conditions exists in ample authority, because it has been repeatedly exercised without ever being successfully denied, the question is whether Congress is not clothed with authority to make all laws

which shall be necessary and proper to enforce those conditions, in case they are broken. I cannot doubt that it is. The legislation that would be appropriate and necessary would be that which would reach and restrain or punish individuals who should undertake to avail themselves of the State authority or assent to a practice which the State has covenanted with the United States shall not be tolerated in her borders.

Take as an illustration one of the prohibitions resting on the States: "No State shall, without the consent of Congress * * * enter into any agreement or compact with any other State." If any State were to do so, Federal legislation would easily reach, restrain or punish individuals who should do any act in carrying out the unconstitutional compact or agreement, or claim any benefit from it. The reason why we have not had such legislation has not been because it could not constitutionally exist.

Before 1860–61, no State broke a special compact which it made with the United States when it entered the Union. After that period, when some of the States undertook, by secession from the Union, to break the grand compact between themselves and the United States that is embraced in the Constitution, we had abundant Federal legislation to reach, restrain and operate upon the inhabitants of those States; and it will not do at the present day to question the fundamental principle on which much of that legislation was based.

It has been urged that a preferable mode of dealing with polygamy would be by an amendment of the Constitution of the United States, rather than by admitting Utah under the proposed State Constitution. An amendment was introduced in the last Congress, which was drawn in the following terms:

SEC. 1. The marriage relation, by contract or in fact, between one person of either sex and more than one person of the other sex, shall be deemed polygamy. Neither polygamy nor any polygamous association or cohabitation between the sexes shall exist or be lawful in any place within the jurisdiction of the United States or of any State.

SEC. 2. The United States shall not, nor shall any State, make or enforce any law which shall allow polygamy or any polygamous association or cohabitation between the sexes, but the United States and every State shall prohibit the same by law within their respective jurisdictions.

SEC. 3. The judicial power of the United States shall extend to the prosecution of the crimes of polygamy and of a polygamous association or cohabitation between the sexes under this article, and Congress shall have power to declare by law the punishment therefor.

SEC. 4. Nothing in the Constitution or this article shall be construed to deny to any State the exclusive power, subject to the provisions of this article, to make and enforce all laws concerning marriage and divorce within its jurisdiction, or to vest in the United States any power respecting the same within any State.

The objections to this proposed amendment may be thus summarized :

1st. The Constitution of the United States should not be amended without some public necessity, to accomplish an object of common cencern to the people of the United States, which cannot be accomplished as well, or cannot be accomplished at all, by some other method. Multiplication of Constitutional amendments, and the invocation of the necessary machinery, are very undesirable.

2d. No State in this Union has ever had any practice of polygamy among its people, as a recognized social relation, having its origin in or being in any way connected with a religious faith, or having its origin in anything else. The crime of bigamy, sporadically occurring, and always clandestinely, is punished by State statutes, and needs no Federal interference. The normal and unchangeable relation of marriage in all the States is monogamy : and no State is in any peril of polygamy, or needs to invoke the aid of the United States to prevent any change in its civilization in this respect.

3d. Polygamy is a practice that has existed as an open and recognized relation between the sexes only in two or three of the Territories of the United States. It has existed more extensively in Utah than in any other Territory, but it is a well ascertained fact that even in that Territory, where a large majority of the inhabitants hold the religious faith that is supposed to sanction this form of the marriage relation, only two or three cases of prosecution for new polygamous marriages have come before the criminal courts of the Territory in the past two years, under the Federal statutes. To put in motion the machinery of amending the Constitution of the United States, in order to end this social evil in a certain locality, rather than to rely on the provisions and compacts of the State Constitution proposed by the Mormon inhabitants of Utah, would be manifestly inexpedient and unnecessary.

4th. The proposed amendment of the Federal Constitution is objectionable in the following particulars :

Section 1, which prohibits polygamy in any State, proposes to interdict something that does not now exist in any State, and is in no likelihood of ever existing there.

Section 2 requires every State to prohibit polygamy within its jurisdiction, although in every State a polygamous marriage is now bigamy by statute law.

Section 3 extends the judicial power of the United States to the prosecution of the crime of polygamy, although that offence is now a crime in every State against the State itself.

Section 4 introduces what would be found to be an embarrassing confusion between the State jurisdiction over marriage and divorce, and the proposed Federal jurisdiction over polygamy.

All the sections 1, 2 and 3 introduce, beside the definition of polygamy, the undefined and uncertain offences of "polygamous association or cohabitation between the sexes." Polygamy is easily defined as the marriage of one man and more than one woman. Polygamous association or cohabitation between the sexes is either a needless tautology, or, if it was intended to make a distinct offence, the framers of the amendment have not defined it, and they probably could not. What comes of leaving the definition of "cohabitation" to judicial interpretation, as an offence distinct from polygamy, has been abundantly and cruelly illustrated by the judicial administration of the Federal statutes in Utah, where men who did not live with any plural wife have been consigned to the penitentiary for supporting and showing perfectly innocent and harmless attentions to women whom they married long before there was any law prohibiting such marriages.

Speaking as a citizen of the United States and of one of the States of the Union, I should be unalterably opposed to a cession to the Federal Government of any power to regulate the marriage relation, in any form, in the States. In the Territories and in the District of Columbia, the United States have now all the authority over the marriage relation that is needful, and in respect to the Territories more authority than has been wisely used. I should gladly do anything in my power to end what polygamy remains, in a merciful and Christian spirit; and, speaking as a lawyer, I have no hesitation in saying that the compact which the Mormon inhabitants of Utah now offer to make with the United States would be, in my judgment, perfectly valid, consistent with our system of government, and efficient for everything that can be desired.

GEO. TICKNOR CURTIS.

New York, Oct. 25, 1887.