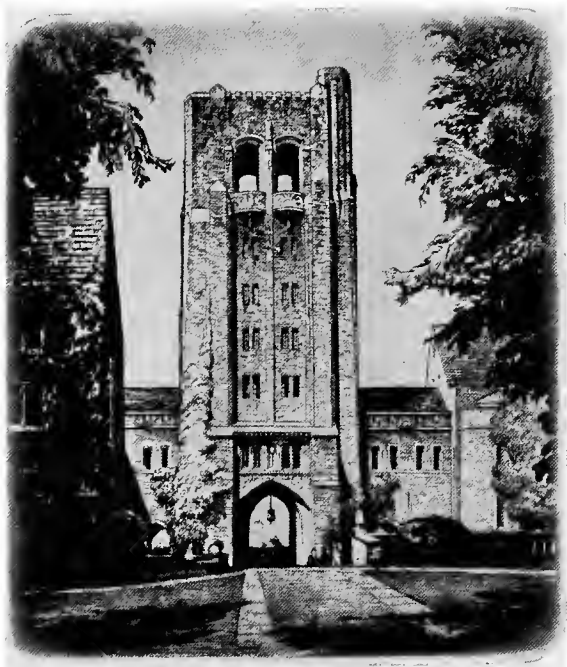




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THE  
GENERAL PRINCIPLES  
OF  
339  
CONSTITUTIONAL LAW  
IN THE  
UNITED STATES OF AMERICA.

BY  
*McINTYRE*  
THOMAS M. COOLEY, LL.D.,  
AUTHOR OF "CONSTITUTIONAL LIMITATIONS," ETC.



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## PREFACE.

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THE manual which follows has been prepared for the use of students in law schools and other institutions of learning. The design has been to present succinctly the general principles of constitutional law, whether they pertain to the federal system, or to the state system, or to both. Formerly, the structure of the federal constitutional government was so distinct from that of the States, that each might usefully be examined and discussed apart from the other; but the points of contact and dependence have been so largely increased by the recent amendments to the federal Constitution that a different course is now deemed advisable. Some general principles of constitutional law, which formerly were left exclusively to state protection, are now brought within the purview of the federal power, and any useful presentation of them must show the part they take in federal as well as state government. An attempt has been made to do this in the following pages.

The reader will soon discover that mere theories have received very little attention, and that the principles stated are those which have been settled, judicially or otherwise, in the practical working of the government.

THOMAS M. COOLEY.

UNIVERSITY OF MICHIGAN, ANN ARBOR,  
March, 1880.

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# CONSTITUTION

OF THE

## UNITED STATES OF AMERICA.

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

### ARTICLE I.

SECT. 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.

SECT. 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 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 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.

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 choose their Speaker and other officers; and shall have the sole power of impeachment.

SECT. 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 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.

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.

SECT. 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 choosing 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.

SECT. 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.

SECT. 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 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.

SECT. 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 Rep-



representatives, according to the rules and limitations prescribed in the case of a bill.

SECT. 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.

—SECT. 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.

SECT. 10. 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.

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.

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.

SECT. 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.

[The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then

be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President. — *Repealed by Amendment XII.*]

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.

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 increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

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.”

SECT. 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.

SECT. 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.

SECT. 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.

SECT. 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.

SECT. 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.

SECT. 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.

SECT. 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.

SECT. 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 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.

SECT. 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.

SECT. 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, anything 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.

[Signed by]

G<sup>o</sup>: WASHINGTON,  
*Presidt. and Deputy from Virginia,  
 and by thirty-nine delegates.*



## ARTICLES

IN ADDITION TO, AND AMENDMENT OF,  
THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

## ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

## ARTICLE II.

A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

## ARTICLE III.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

## ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand 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.

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

#### ARTICLE VII.

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

#### ARTICLE VIII.

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

#### ARTICLE IX.

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

#### ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

#### ARTICLE XI.

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.

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

SECT. 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.

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

## ARTICLE XIV.

SECT. 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.

SECT. 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.

SECT. 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.

SECT. 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.

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

#### ARTICLE XV.

SECT. 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.

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



**CONSTITUTIONAL LAW.**





# CONSTITUTIONAL LAW.

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## CHAPTER I.

### THE RISE OF THE AMERICAN UNION.

*Independence.* — The declaration which severed the political connection between the thirteen American Colonies and the British Crown bears date July 4, 1776, and was made by the representatives of the Colonies in General Congress assembled, severally empowered by the respective Colonies to make it. By this manifesto the representatives declare to the world, that, “appealing to the Supreme Judge of the world for the rectitude of our intentions, [we] do, in the name and by authority of the good people of these Colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do.” For more than a year previous to this the Colonies had been in the exercise of sovereign powers in hostility to the government of Great Britain, but without a repudiation of their allegiance; and

they now severally assumed the position of independent States, limited only by the concessions of authority, mostly tacit, which they made to their general Congress.

*Colonial Legislation.*—The people of the Colonies had previously exercised a somewhat indefinite power to make their own laws, which was very general in some Colonies and greatly restricted in others. In all of them the proprietary or royal Governor might defeat legislation by refusing his assent; and in some a council not chosen by the people formed a second legislative chamber, whose concurrence was necessary. Colonial legislation was also sometimes nullified in England, by the authority of an executive board or council, or by Parliament. Parliament itself also exercised the power to make laws for the Colonies, and in some cases the power was conceded, though its exercise in particular instances was complained of as an abuse, while in other cases the power itself was denied. It was conceded that, in all matters of what may be denominated imperial concern, the common legislature of the realm must legislate for all the dominions of the Crown, and that under this head fell the commerce of the Colonies with the mother country and with other nations and colonies. The most severe instances of the exercise of this authority were the Navigation Laws and the laws respecting manufactures in the Colonies, the general purpose of which was to subject the commerce and manufactures of the Colonies to such regulations and restraints as should be beneficial to the commerce and general business interests of the mother country. It was never disputed that the Colonies, like all other portions of the British dominions, must necessarily come under the control of the Crown and the Parliament in respect to all their foreign relations; and, though Indian affairs were for the most part left to the control and management of colonial authorities, yet these also were brought under imperial control to any

extent that to the home government at any time seemed politic or desirable.

The distinct claim of a right in the Colonies to make their own laws was not made until parliamentary legislation appeared to threaten oppression. The first actual resistance which assumed general importance was when an attempt was made to impose internal taxation by authority of the imperial Parliament. The proposed taxes were not in themselves a serious burden, and might possibly have passed unchallenged, if it had been certain that the tax law was not to be the herald and the pioneer of others of a different sort, and which would touch the colonists in particulars in which they were even more sensitive than in respect to their pecuniary interests. The power which could tax New England could impose an episcopal hierarchy upon it, and the disposition to do this, not only in New England but in New York, had often manifested itself to an extent that excited the most serious alarm. What vital powers of sovereignty in respect to American concerns might be asserted and exercised, no one could foresee; and the tax laws were therefore resisted rather as the representatives of unknown dangers than for the burdens they imposed. The government for a time abstained from pushing its claims to an extreme, but, lest its doing so might be understood as an assent to the claims of the Colonies, Parliament, when repealing the Stamp Act, which had been rendered abortive by the resistance of the people, took occasion to assert an unqualified right to legislate for the Colonies on all subjects whatever.<sup>1</sup> This claim afterwards assumed practical form in an attempt to collect a tax on tea imported for consumption in the Colonies. The levy of the tax was resisted as an invasion of the undoubted rights of

<sup>1</sup> Pitkin, *Hist. of U. S.*, ch. 6; Frothingham, *Rise of the Republic*, ch. 5, 6.

Englishmen, who, in taking up their home in the Colonies, had not lost their right to the protection of the ancient laws of the realm. In Massachusetts and New York cargoes of the taxed tea were destroyed by armed mobs; in Maryland the importer was compelled to set fire to the vessel by means of which he had offended, and in other colonies the taxed commodity was either refused a landing, or not suffered to be sold after the landing had been effected; and the tax law was by these means completely nullified.<sup>1</sup>

*Liberty a Birthright.* — The resistance in the cases mentioned, and in some others, was grounded on the claim that the colonists, as Englishmen, according to the Constitution of the realm, were entitled to certain rights which the government was attempting to override by the exercise of tyrannical power.<sup>2</sup> The evidence of these rights was to be found in part in certain historical documents which in both England and America had been looked upon and revered as the charters of liberty. The first of these was

*Magna Charta*, extorted from King John in 1215, as a restriction upon what was then an almost unlimited kingly power; the most important provision of which was, that “No freeman shall be taken or imprisoned or disseized or outlawed or banished or anyways destroyed, nor will the King pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land.” In the same instrument is foreshadowed parliamentary taxation in the clause which requires the common consent of the realm to the levy of unusual burdens.<sup>3</sup> Grounded upon this charter the fabric of constitutional liberty was

<sup>1</sup> Frothingham, *Rise of the Republic*, ch. 5; Pitkin, *Hist. of U. S.*, ch. 7.

<sup>2</sup> Pitkin, *Hist. of U. S.*, ch. 8.

<sup>3</sup> Blackstone's *Charters*; 4 *Bl. Com.* 424; Story on *Const.*, § 1779; Stubbs, *Const. Hist.*, ch. 12; Cooley, *Const. Lim.*, ch. 11.

slowly and patiently erected; parliamentary institutions acquired form and strength under the House of Lancaster; and though the promise of a regular administration of the law was as often violated as kept, the right of the subject to its benefits was never surrendered, and at length, at the beginning of the reign of Charles I., it received further assurance and confirmation in the royal assent to

*The Petition of Right.*<sup>1</sup>—By this petition it was prayed, among other things, “that no man be compelled to make or yield any gift, loan, benevolence, tax, or such like charge, without common consent by act of Parliament; that none be called upon to make answer for refusal so to do; that freemen be imprisoned or disseized only by the law of the land, or by due process of law, and not by the king’s special command without any charge.” In the next reign was enacted

*The Habeas Corpus Act,*<sup>2</sup> the purpose of which was to give speedy relief from all unlawful imprisonments, and to enforce upon judicial and other officers the duty of deliverance. The fourth of the great charters of English constitutional liberty was

*The Bill of Rights,*<sup>3</sup> which embodied in statutory form the principles enumerated in the Declaration of Rights presented by the Convention Parliament to the sovereigns called by that body to the throne on the Revolution of 1688. The purpose of this act was to enumerate and reaffirm such rights of the people as the House of Stuart in any of its reigning representatives had set aside, encroached upon, or ignored.

*The Common Law.*—The charters above mentioned declared general principles, but the common law was the expositor of these, and the extent of the protection they

<sup>1</sup> 1 Ch. I., ch. 1 (1626).

<sup>2</sup> 31 Ch. II., ch. 2 (1679).

<sup>3</sup> 1 Wm. & Mary, Ses. 2, ch. 2 (1689).

should give could only be determined by its rules. That law was the growth of many centuries; its maxims were those of a sturdy and independent race of men, who were accustomed in an unusual degree to freedom of thought and action, and to a share in the administration of public affairs.<sup>1</sup> So far as they declared individual rights, they were a part of the constitution of the realm, and of that "law of the land" the benefit of which was promised by the charter of King John to every freeman. They were modified and improved from age to age, by changes in the habits of thought and action among the people, by modifications in the civil and political state, by the vicissitudes of public affairs, by judicial decisions, and by statutes.

The colonists claimed that this code of law accompanied them, as a standard of right and of protection in their emigration, and that it remained their law, excepting as in some particulars it was found unsuited to their circumstances in the New World. Relying upon it, they had well known and well defined rules of protection; without it, they were at the mercy of those who ruled, and, whether actually oppressed or not, were without freedom.<sup>2</sup>

*Violations of Constitutional Right.* — The complaints of violation of constitutional right were principally directed to four points: — 1. Imposing taxes without the consent of the people's representatives. 2. Keeping up standing armies in time of peace to overawe the people. 3. Denying a right to trial by a jury of the vicinage in some cases, and providing for a transportation of persons accused of crimes in America for trial in Great Britain. 4. Expos-

<sup>1</sup> Cooley, Const. Lim., 4th ed., p. 81. *Van Ness v. Pacard*, 2 Pet. 137, 144.

<sup>2</sup> "Not the man alone who *feels*, but who is exposed to tyranny, is without freedom." — Sir Wm. Meredith, quoted in *Life of Iredell*, i. 212.

ing the premises of the people to searches, and their persons, papers, and property to seizures on general warrants. If Americans were entitled to the constitutional rights of Englishmen, it was unquestionable that in these particulars their rights were invaded; but the imperial government denied that the colonists could claim rights as against the exercise of its powers.

*Independence.* — The sovereignty passed forever from the British Crown and Parliament when the war of the Revolution was actually begun, waged on the one side by the government of Great Britain to reduce the colonists to submission, and directed on the other side by a Continental Congress which assumed the sovereign power of conducting belligerent affairs. This great fact was not perceived, and indeed not assured, for more than a year, and it was then proclaimed to the world in the solemn document known as the Declaration of Independence, and which has already been mentioned.

In pronouncing the dissolution of the political bonds with the mother country, the signers of this instrument declare that “we hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.” And proceeding to an enumeration of the grievances which justify their action, they close by declaring the dissolution of the ties that bind the Colonies to the British Crown,

and asserting their independence in the terms already given.<sup>1</sup>

*Revolutionary Government.* — The government of the Union under the Continental Congress was strictly revolutionary in character, and was constituted by an acquiescence of the people and the several States in the exercise by the Congress of certain undefined powers of general concern, the chief of which were the power to declare war, to conclude peace, to form alliances, and to contract debts on the credit of the Union.<sup>2</sup> The governments of the several States were also at first revolutionary, but their previous organization was such that the war disturbed them but little, and modified forms more than substance. All of them had local governments and the common law, which remained undisturbed; all of them had legislative bodies, which continued to perform their functions, but without the recognition of the pre-existing executive authority. The States, however, soon proceeded to adopt formal constitutions, apportioning, defining, and limiting the powers of the several departments of government, and with two exceptions they had completed this work before independence was acknowledged by Great Britain.<sup>3</sup> The liberal charter granted to Rhode Island by Charles II. in 1663 was found sufficient for the purposes of a free commonwealth, and was tacitly adopted as the constitution of the State, and remained such for two thirds of a century.<sup>4</sup>

<sup>1</sup> Curtis, History of the Constitution, chap. 3. This author well says: "The body by which this step was taken constituted the actual government of the nation at the time, and its members had been directly invested with competent legislative power to take it, and had also been specially instructed so to do." (p. 51.)

<sup>2</sup> Curtis, Hist. of Const., ch. 1, 2.

<sup>3</sup> See Mr. Bancroft's admirable chapter on "The Rise of Free Commonwealths," Hist. of U. S., vol. x. ch. 10; Centennial ed., vol. vi. ch. 46.

<sup>4</sup> Of the original States, Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Vir-



The charter of Connecticut was not superseded by a constitution until 1818.

But a merely revolutionary government could not long answer the purposes of the Union. The powers of the Continental Congress having never been formally conferred, or indeed agreed upon, by the States, that body was regarded by the people and by the State authorities as an advisory body rather than as a government, and the pressure of external necessity determined the degree of obedience its commands or advice should receive. In most important matters they were often disregarded, and the Confederation seemed at the point of falling to pieces for the want of a legal bond of union and of legal power to compel the performance of duties owing to it by its several members.

*Articles of Confederation.*—This evil it was sought to remedy by “Articles of Confederation and Perpetual Union,” prepared by the Congress and submitted to the States in 1777, and ratified subsequently by representatives of the States empowered by their respective legislatures so to do.<sup>1</sup>

These Articles declared that “Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States in Congress assembled”: that “The said States hereby severally enter into a firm league of friendship with each other, for

ginia adopted constitutions in 1776, Georgia and New York in 1777, Massachusetts in 1780, and Rhode Island in 1842.

<sup>1</sup> Curtis, *Hist. of the Const.*, ch. 5. All the States except two ratified the Articles in 1778; Delaware delayed till the next year, and Maryland till 1781. The delay in the case of Maryland was for the purpose of obtaining a permanent and satisfactory settlement of the claims to Western lands, and is fully explained in the monograph of Dr. H. B. Adams of Johns Hopkins University, read before the Maryland Historical Society (1878).

their common defence, 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 pretence whatever"; and that, "for the more convenient management of the general interests of the United States," delegates from the several States shall meet in a Congress, in which each one shall have an equal vote.

They further declared that "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"; that "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"; that "No State shall lay any imposts or duties which may interfere with any stipulations in treaties entered into by the United States in Congress assembled, with any king, prince, or state"; that "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"; and that except in such cases "the United States in Congress assembled shall have the exclusive right and power of determining on peace and war"; also of sending and receiving ambassadors, entering into treaties and alliances, establishing rules and courts for the determination of cases of capture and prize, granting letters of marque and reprisal in time of peace, and appointing courts for the trial of piracies and felonies committed on the high

seas. Also that the United States in Congress assembled shall be the last resort on appeal in all disputes and differences between two or more States concerning boundary, jurisdiction, or any other cause whatever.

The United States in Congress assembled were also empowered to borrow money, or emit bills on the credit of the United States, to build and equip a navy, to agree upon the number of land forces, and to make requisitions upon each State for its quota, in proportion to the number of white inhabitants of such State, but with the right to vary from this quota when the circumstances rendered it proper.

The delegates in Congress were to be maintained by their States respectively; but it was declared that "All charges of war, and all other expenses that shall be incurred for the common defence 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 United States in Congress assembled were given the right and power of regulating the alloy and value of coin struck by their own authority or by that of the respective States, of fixing the standard of weights and measures, and of establishing and regulating post-offices and postage.

It was further declared, that "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 defence 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 was empowered to appoint an executive committee, consisting of one from each State, to sit during the recess of Congress, who would be authorized "to execute 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." It was declared that the United States and the public faith were solemnly pledged for the public debts previously contracted by authority of Congress; that the States should abide by all the determinations of the Congress on all questions by the Confederation submitted to that body; and that "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 confirmed by the legislatures of every State."

*Failure of the Confederation.* — The defects in the Confederation were such as rendered speedy failure inevitable. It accomplished a temporary purpose in a very imperfect manner, but it was impossible that it should do more. The Confederation was given authority to make laws on some subjects, but it had no power to compel obedience; it might enter into treaties and alliances which the States and the people could disregard with impunity; it might apportion pecuniary and military obligations among the

States in strict accordance with the provisions of the Articles; but the recognition of the obligations must depend upon the voluntary action of thirteen States, all more or less jealous of each other, and all likely to recognize the pressure of home debts and home burdens sooner than the obligations of the broader patriotism involved in fidelity to the Union; it might contract debts, but it could not provide the means for satisfying them; in short, it had no power to levy taxes, or to regulate trade and commerce, or to compel uniformity in the regulations of the States; the judgments rendered in pursuance of its limited judicial authority were not respected by the States; it had no courts to take notice of infractions of its authority, and it had no executive. A further specification of defects is needless, for any one of those mentioned would have been fatal. "Obedience is what makes government, and not the names by which it is called";<sup>1</sup> and the Confederation had neither obedience at home nor credit or respect abroad. The people was one in promising and thirteen when performance was due, and it became at last difficult to enlist sufficient interest in its proceedings to keep up the forms of government through the meetings of Congress and of the executive committee.<sup>2</sup>

*The Constitutional Convention.*—In February, 1787, a resolution was adopted by the Congress recommending a convention in Philadelphia, in the May following, of delegates from the various States, "for the purpose of revising the Articles of Confederation, and reporting to Congress and the several legislatures such alterations and provisions

<sup>1</sup> Burke, Speech on Conciliation with America.

<sup>2</sup> The reasons for the failure have been dwelt upon at length by many writers, particularly Story on Const., ch. 4; Pitkin, Hist. of U. S., ch. 17; Curtis, Hist. of the Const., book 2; Von Holst, Const. Hist., ch. 1; and Madison, Hamilton, and Jay, in the Federalist, and Justice Wilson in his lectures.

therein as shall, when agreed to in Congress and confirmed by the States, under the Federal Constitution, be adequate to the exigencies of government and the preservation of the Union." This was in strict conformity with the provision for amendment contained in the Articles, and was acted upon by all the States except Rhode Island, which alone sent no delegates. The Convention when it met, after full consideration, determined that alterations in and amendments to the Articles would be inadequate to the purposes of government, and proceeded to recommend a new Constitution, and to provide that "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same." As this was in disregard of the provision in the Articles of Confederation, which required the assent of every State, it was a revolutionary proceeding,<sup>1</sup> and could be justified only by the circumstances which had brought the Union to the brink of dissolution.

Its revolutionary character appears more distinctly from the action under it, since eleven States only had ratified the Constitution when the government was organized in pursuance of its provisions,<sup>2</sup> and the remaining two, North Carolina and Rhode Island, were for a time excluded from the Union. Both gave their assent, however, and became members of the Union, the first in November, 1789, and the other in May, 1790.

*Sovereignty of the States.*—The term *sovereignty* in its full sense imports the supreme, absolute, and uncontrollable power by which any independent state is governed.<sup>3</sup>

<sup>1</sup> Van Buren, Political Parties, p. 50; Federalist, No. 43, by Madison.

<sup>2</sup> March 4, 1789, was the time fixed for the organization of the government, but it was not in fact inaugurated until the 30th of the following month.

<sup>3</sup> Burlamaqui, Politic. Law, ch. 5; 1 Bl. Com. 49; Story on Const., § 207; Wheat. Int. Law, pt. 1, ch. 2, § 5; Austin, Prov. of Juris., ch. 6; Chipman on Gov. 137.

From what has already been said it appears that, although the States were called sovereign and independent in the Declaration of Independence, they were never in their individual character strictly so, because they were always, in respect to some of the higher powers of sovereignty, subject to the control of some common authority, and were never separately recognized or known as members of the family of nations. This common authority was, *first*, the Crown and Parliament of Great Britain; *second*, the Revolutionary Congress; *third*, the Congress of the Confederation; and at length the government formed under the Constitution. The powers of these differed greatly, but in one most important particular there was uniformity: each had control of affairs of war for all the Colonies or States, and of all intercourse with foreign nations. Only North Carolina and Rhode Island are to be considered exceptions to this general statement: these for the little time while they were excluded from the Union by their neglect to ratify the Constitution were relieved from all common authority, and became wholly independent. It is to be said of them, however, that they remained in that condition for a period so brief that as sovereignties they neither obtained nor sought for recognition by foreign nations.<sup>1</sup>

*Bill of Rights.* — The several charters of English liberty to which reference has already been made had been much relied upon by the American people in the controversies resulting in independence, and their clear assertion of individual rights was of inestimable value in inspiring the people to resist tyrannical action of the government. Each of these charters had been more specific and enlarged in its provisions than that which preceded, and it might have been expected that the Convention of 1787 would

<sup>1</sup> Life and Writings of A. J. Dallas, 200-207; Von Holst, Const. Hist., ch. 1; Chisholm v. Georgia, 2 Dall. 419, 470, per Jay, Ch. J.; Texas v. White, 7 Wall. 700, 724.

have followed the examples, and that in their completed work would have been found a clear and full enumeration of those rights which were deemed indefeasible, and which might lawfully be asserted against the government itself. The importance of this, however, did not impress itself on the minds of the members of that body.<sup>1</sup> The Constitution did indeed insure the benefits of the *habeas corpus*; it precluded constructive treasons; it prohibited bills of attainder and *ex post facto* laws; and it provided for the trial of criminal accusations by jury; but there was no attempt at a systematic enumeration of fundamental rights, and the absence of this was made a ground of persistent opposition to the ratification of the Constitution. Some of the leading States, indeed, were only induced to ratify in reliance upon a bill of rights being added to the Constitution by amendments,<sup>2</sup> and this was done in eight articles, which were proposed and adopted as speedily as the necessary forms could be gone through with. For a proper understanding of these provisions it is essential to keep in mind that their purpose, as well as that of similar provisions in the original instrument, was to put it out of the power of the government now being created to violate the fundamental rights of the people who were to be subjected to its authority. They constitute limitations, therefore, upon the power of the Federal government only. The exceptions to this general statement are only of those few cases in which the States are named, and the exercise of certain powers by them expressly prohibited. For example, when the Constitution, in Art. I. § 9, declares that

<sup>1</sup> For reasons that might be urged against it, see *Federalist*, No. 84; compare Jefferson's Works, vol. iii. pp. 4, 13, 101, vol. ii. pp. 329, 358; *Life of Madison*, by Rives, vol. ii. p. 38 *et seq.*; *Hamilton's Hist. of the Republic*, vol. iv. p. 23.

<sup>2</sup> See the recommendations by Massachusetts, South Carolina, New Hampshire, Virginia, New York, North Carolina, and Rhode Island, in *Elliott's Debates*, i. 322-334.



“no bill of attainder or *ex post facto* law shall be passed,” it is still necessary, in order to extend the prohibition to the States, to provide, as is done in the next section, that “no State” shall pass such a bill or law. To state the rule of construction concisely, it is this: The restrictions imposed upon government by the Constitution and its amendments are to be understood as restrictions only upon the government of the Union, except where the States are expressly mentioned.<sup>1</sup>

<sup>1</sup> *Barron v. Baltimore*, 7 Pet. 243; *Smith v. Maryland*, 18 How. 71; *Pervear v. Commonwealth*, 5 Wall. 475; *Twitchell v. Commonwealth*, 7 Wall. 321; *Justices v. Murray*, 9 Wall. 274; *Edwards v. Elliott*, 21 Wall. 532; *Walker v. Sauvinet*, 92 U. S. Rep. 90.

## CHAPTER II.

## DEFINITIONS AND GENERAL PRINCIPLES.

*Nation and State.* — A state may be defined to be a body politic or society of men united together under common laws for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.<sup>1</sup> The term is often employed as importing the same thing with nation; but the latter is more nearly synonymous with people, and while a single state may embrace several different nations or peoples, a single nation will sometimes be so divided politically as to constitute several states.

In the following pages the word State will sometimes be employed in the general sense above expressed, but more commonly it will refer to the several members of the American Union, while the word Nation will be applied to the whole body of the people coming under the jurisdiction of the federal government.

A State is either sovereign or dependent. It is sovereign when there resides within itself a supreme and absolute power, acknowledging no superior, and it is dependent when in any degree or particular its authority is limited by an acknowledged power elsewhere.<sup>2</sup> It is immaterial to this definition whether the supreme power reposes in one individual, or one body or class of individuals, or in the whole body of the people; whether, in other words, the

<sup>1</sup> Vattel, b. 1, c. 1, § 1; Wheat. Int. Law, pt. 1, c. 2, § 2; Story on Const., § 207; Burlamaqui, Pol. Law, c. 5; Cooley, Const. Lim. 1.

<sup>2</sup> Vattel, b. 1, c. 1, § 2; Chipman on Government, 137; Halleck, Int. Law, 65.

government is a monarchy, an aristocracy, a republic, or a democracy, or any combination of these; for the form only determines the methods in which sovereign powers shall be exercised.

All civilized states recognize a body of rules or laws which is called the Law of Nations, and the rules are either rules of public international law, as they relate to and regulate the intercourse of states with each other, or of private international law, as they define and protect the rights, privileges, and obligations of the citizens or subjects of one state passing into another, or owning property, making contracts, or conducting operations that may be governed by the laws of another. In contemplation of the law of nations all sovereign states are and must be equal in rights, since from the very definition of sovereign state it is impossible that there should be in respect to it any political superior.

In theory sovereignty must be a unity, and the sovereignty of a state must extend to all the subjects of government within the territorial limits occupied by the associated people who compose it, so that the dividing line between sovereignties must be a territorial line. In the law of nations for the purposes of international intercourse some encroachment upon the theory is admitted, and the sovereignty of one state is projected within the jurisdiction of another, so as to retain within its rule its ambassadors, and ministers resident abroad, and its ships of war in foreign ports. In American constitutional law a peculiar system is established; the powers of sovereignty being classified, and some of them apportioned to the government of the United States for its exercise, while others are left with the States. Under this apportionment the nation is possessed of supreme, absolute, and uncontrollable power in respect to certain subjects throughout all the States, while the States have the like unqualified power, within

their respective limits, in respect to other subjects.<sup>1</sup> Over certain other subjects the States have a qualified dependent or defeasible power, inasmuch as their action is liable at any time to be overruled, and their powers to become dormant by the exercise of a superior power which is conferred upon the nation over the same subjects.<sup>2</sup>

*Constitution.* — The term *constitution* may be defined as the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.<sup>3</sup> A constitution is valuable in proportion as it is suited to the circumstances, desires, and aspirations of the people, and as it contains within itself the elements of stability, permanence, and security against disorder and revolution. Although every state may be said in some sense to have a constitution, the term *constitutional government* is only applied to those whose fundamental rules or maxims not only define how those shall be chosen or designated to whom the exercise of sovereign powers shall be confided, but also impose efficient restraints on the exercise for the purpose of protecting individual rights and privileges, and shielding them against any assumption of arbitrary power.<sup>4</sup> The number of such governments is not as yet great, but is increasing.

A constitution may be written or unwritten. If unwritten, there may still be laws or authoritative documents which declare some of its important principles; as we have seen has been and is still the case in England. The weakness of an unwritten constitution consists in this, that it is subject to perpetual change at the will of the law-making power; and there can be no security against

<sup>1</sup> License Cases, 5 How. 504, 588; *Ableman v. Booth*, 21 How. 506, 516; *United States v. Cruikshanks*, 92 U. S. Rep. 542.

<sup>2</sup> *Cooley v. Wardens, &c.*, 12 How. 299.

<sup>3</sup> *Duer*, Const. Juris. 26; *Cooley*, Const. Lim. 2.

<sup>4</sup> *Calhoun*, Disquisition on Government, Works, i. 11.

such change except in the conservatism of the law-making authority, and its political responsibility to the people, or, if no such responsibility exists, then in the fear of resistance by force. In America the leading principle of constitutional liberty has from the first been, that the sovereignty reposed in the people; and as the people could not in their collective capacity exercise the powers of government, a written constitution was by general consent agreed upon in each of the States. These constitutions create departments for the exercise of sovereign powers; prescribe the extent of the exercise, and the methods, and in some particulars forbid that certain powers which would be within the compass of sovereignty shall be exercised at all. Each of these constitutes for the state the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it. Whatever act or regulation of any department or officer is in excess of the power conferred by this instrument, or is opposed to any of its directions or regulations, is altogether void. The constitution, moreover, is in the nature of a covenant of the sovereign people with each individual thereof, under which, while they intrust the powers of government to political agencies, they also divest themselves of the sovereign power of making changes in the fundamental law except by the method in the constitution agreed upon. The Constitution of the United States creates similar governmental trusts and imposes similar restrictions. The weaknesses of a written constitution are, that it establishes iron rules, which, when found inconvenient, are difficult of change; that it is often construed on technical principles of verbal criticism, rather than in the light of great principles; and that it is likely to invade the domain of ordinary legislation, instead of being restricted to fundamental rules, and thereby to invite demor-

alizing evasions. But, the written constitution being a necessity in America, the attendant evils are insignificant as compared with the inestimable benefits.

In the following pages, where the Constitution is spoken of, the Constitution of the United States will be intended unless otherwise explained.

*Unconstitutional Law.* — A law is sometimes said to be unconstitutional, by which is meant that it is opposed to the principles or rules of the constitution of the state. An unconstitutional enactment is sometimes void, and sometimes not; and this will depend upon whether, according to the theory of the government, any tribunal or officer is empowered to judge of violations of the constitution, and to keep the legislature within the limits of a delegated authority by annulling whatever acts exceed it. According to the theory of British constitutional law the Parliament possesses and wields supreme power,<sup>1</sup> and if therefore its enactments conflict with the Constitution, they are nevertheless valid, and must operate as modifications or amendments of it. But where, as in America, the legislature acts under a delegated authority, limited by the Constitution itself, and the judiciary is empowered to declare what the law is, an unconstitutional enactment must fall when it is subjected to the ordeal of the courts. Such an enactment is in strictness no law, because it establishes no rule: it is merely a futile attempt to establish a law. The remedy for unconstitutional enactments in England must therefore be political or revolutionary, while in America they may be found in the ordinary process of the courts. Still even in America some cases must be beyond the reach of judicial cognizance, because the questions involved are purely political. Such, for example, were questions involved in the reconstruction of the States

<sup>1</sup> 1 Bl. Com. 161; Broom, Const. Law, 795; De Tocqueville, Democracy in America, c. 6.

recently in rebellion, and the question growing out of the attempt to overthrow the charter government of Rhode Island.<sup>1</sup>

*The Right of Revolution.* — The authority of the British Crown over the Colonies was rejected, and a government created by the people of the Colonies for themselves, and this afterwards radically changed and reformed in the adoption of the Federal Constitution under the great and fundamental right of every people to change their institutions at will, — in other words, under the right of revolution. It is true that the colonists in the incipient period of the change planted themselves upon established rights, instead of seeking or desiring a revolution. Their purpose, therefore, was to maintain old established principles of the Constitution, instead of overturning them; and they occupied a conservative position, resisting innovations which the imperial government was attempting to force. Nevertheless there was no settled principle of the constitution that limited in any manner the sovereign right of Parliament to change at will the laws protecting the life, liberty, and property of the subject; and had the same laws which in this particular oppressed the people of the Colonies been applied to the people of the realm, they would have been within the acknowledged power of the Parliament. So in regard to the Colonies the right of the imperial government to rule in all respects might be defended on precedent, and the leading publicists of the day affirmed it. It was nevertheless the fact that the exercise of imperial power in the particulars complained of was tyrannical and in disregard of constitutional principles, and that resistance was directly in the line of English precedents which at the time were almost universally approved in England itself. There was consequently ample ground for resistance, and if the other conditions for

<sup>1</sup> *Luther v. Borden*, 7 How. 1; *Mississippi v. Johnson*, 4 Wall. 475.

revolution existed, the colonists were right in attempting it.

The right of revolution may be said to exist when the government has become so oppressive that its evils decidedly overbalance those which are likely to attend a change, when success in the attempt is reasonably certain, and when such institutions are likely to result as will be satisfactory to the people.<sup>1</sup> In this last particular the probability of success will depend largely on the extent of the revolution attempted, — whether it extends to the laws in general, or only to the head of the government. In America only a change in the general sovereignty was intended; in respect to the general laws, the revolution was strictly preservative. It became necessary, nevertheless, to make considerable changes in state laws and institutions before the revolution was perfected, and when these were completed in the adoption of the Federal Constitution, the revolution was fully justified in the establishment of more satisfactory institutions than had existed before.

*The Constitution: by whom adopted.* — To a proper understanding and construction of the Constitution it becomes important to know at the outset who were the parties to it, — by whom it was adopted, and what it was meant to accomplish. In these particulars the present work cannot enter into the field of speculation or discussion, nor would it be important to do so. The general principles governing the case have been judicially determined, and the political departments of the government have accepted the conclusions. It therefore becomes sufficient for our purposes to say here, that the Constitution was agreed upon by delegates representing the States in convention; that it was submitted to the people of the several States by their respective legislatures; that it was adopted by the people through delegates elected for the express purpose of con-

<sup>1</sup> Woolsey, Pol. Science, i. 402.



sidering and deciding upon it, and that the people of the States, as well as the States themselves, thereby became parties to it. It was therefore properly declared in the preamble, that "We, the people of the United States, do ordain and establish this Constitution for the United States of America."<sup>1</sup> By the adoption of the Constitution the people of the States before united in a confederation became a nation under one government,<sup>2</sup> and the citizens of every State became also citizens of the United States.<sup>3</sup> The purpose of the Constitution is forcibly and clearly declared in the preamble. It was "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of <sup>liberty</sup> the people to ourselves and our posterity." These purposes collectively, it has been well said, "comprise everything requisite, with the blessing of Divine Providence, to render a people prosperous and happy."<sup>4</sup> By the new amendments to the Constitution the freedmen become a part of the people, and all the purposes for which it was made and established are to be deemed to have them in view, and to contemplate their protection and benefit as a part of the body politic.

*Not a mere Compact.*—The confederation of the States had existed by force of a mere compact, and for want of power in the common authority had so completely failed in the purposes of its formation as to justify its being superseded by revolutionary, though peaceful, means. Among its chief defects was the fact that it operated on States only, and that the highest sanction it could give to

<sup>1</sup> *Martin v. Hunter*, 1 Wheat. 304, 324; *Cohens v. Virginia*, 6 Wheat. 264, 413.

<sup>2</sup> *Lane County v. Oregon*, 7 Wall. 71, 76.

<sup>3</sup> *Minor v. Happersett*, 21 Wall. 162; *United States v. Cruikshanks*, 92 U. S. Rep. 542.

<sup>4</sup> *Chisholm v. Georgia*, 2 Dall. 419.

its lawful determinations was that of advice or entreaty; it could not command, and it could not enforce. The Constitution which was adopted to supersede it, on the other hand, is an instrument of government, agreed upon and established, and rendered efficient as such by being made operative upon the people individually and collectively, and, within the sphere of its powers, upon the States also.<sup>1</sup> This was the judicial view of the Constitution from the first,<sup>2</sup> and it has been practically and finally settled against opposing theories, by the action of the several departments of the government, extending over the whole period of the existence of the Union under the Constitution; by the acquiescence of the people in this view, and their forcible resistance to the attempt made to supersede it; and, finally, by the adoption of the thirteenth, fourteenth, and fifteenth articles of the amendments to further strengthen and consolidate the Union under the government of the Constitution.<sup>3</sup>

*The Union Indissoluble.* — By the Articles of Confederation “the Union was declared to be ‘perpetual.’ And when these Articles were found to be inadequate to the exigen-

<sup>1</sup> Webster, “The Constitution not a Compact,” Speeches, iii. 349; Jackson’s Proclamation on Nullification in 1833, Elliott’s Debates, iv. 610, Statesman’s Manual, i. 890.

<sup>2</sup> *Martin v. Hunter*, 1 Wheat. 304, 324; *M’Culloch v. Maryland*, 4 Wheat. 316, 402; *Gibbons v. Ogden*, 9 Wheat. 1, 187; *Rhode Island v. Massachusetts*, 12 Pet. 657, 720; *Texas v. White*, 7 Wall. 700, 726.

<sup>3</sup> Views either radically or in part opposed to those which have prevailed are presented in Calhoun’s Discourse on the Constitution and Government of the United States, Works, i. 11; and Address on the Relations of the State to the General Government, Works, vi. 59; Upshur on the Federal Constitution; Construction Construed and Constitution Vindicated, by John Taylor; New Views of the Constitution of the United States, by the same; The Constitutional View of the War between the States, by A. H. Stephens; The Kentucky and Virginia Resolutions of 1798–9, Elliott’s Debates, iv. 566, 572; and other publications too numerous for mention here.

cies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble, if a perpetual union made more perfect is not?"<sup>1</sup> When a State is once in the Union, there is "no place for reconsideration or revocation, except through revolution, or through the consent of the States."<sup>2</sup>

*The States Indestructible.*— "But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Without the States in union there could be no such political body as the United States.<sup>3</sup> Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may not unreasonably be said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution in all its provisions looks to an indestructible Union composed of indestructible States."<sup>4</sup>

*The Constitution a Grant of Powers.*— The government created by the Constitution is one of limited and enumerated powers, and the Constitution is the measure and the test of the powers conferred. Whatever is not conferred is withheld, and belongs to the several States or to the people thereof.<sup>5</sup> As a constitutional principle this must

<sup>1</sup> *Texas v. White*, 7 Wall. 700, 725.

<sup>2</sup> *Texas v. White*, 7 Wall. 700, 726.

<sup>3</sup> *Lane County v. Oregon*, 7 Wall. 71, 76.

<sup>4</sup> *Texas v. White*, 7 Wall. 700, 725.

<sup>5</sup> *Calder v. Bull*, 3 Dall. 386; *Gibbons v. Ogden*, 9 Wheat. 1, 187; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Gilman v. Philadelphia*, 3 Wall. 713; *Slaughter House Cases*, 16 Wall. 36; *United States v. Cruikshanks*, 92 U. S. Rep. 542, 550.

result from a consideration of the circumstances under which the Constitution was formed. The States were in existence before, and possessed and exercised nearly all the powers of sovereignty. The Union was in existence, but the Congress which represented it possessed a few powers only, conceded to it by the States, and these <sup>powers</sup> circumscribed and hampered in a manner to render them of little value. The States were thus repositories of sovereign powers and wielded them as being theirs of inherent right; the Union possessed but few powers, enumerated, limited, and hampered, and these belonged to it by compact and concession. In a confederation thus organized, if a power could be in dispute between the States and the Confederacy, the presumption must favor the States. But it was not within the intent of those who formed the Constitution to revolutionize the States, to overturn the presumptions that supported their authority, or to create a new government with uncertain and undefined powers. The purpose, on the contrary, was to perpetuate the States in their integrity, and to strengthen the Union in order that they might be perpetuated. To this end the grant of powers to the Confederacy needed to be enlarged and extended, the machinery of government to be added to and perfected, the people to be made parties to the charter of government, and the sanction of law and judicial authority to be given to the legitimate acts of the government in any and all of its departments. But when this had been done, it remained true that the Union possessed the powers conferred upon it, and that these were to be found enumerated in the instrument of government under which it was formed. But lest there might be any possible question of this in the minds of those wielding any portion of this authority, it was declared by the tenth article of the amendments, 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.”<sup>1</sup>

From what has just been said, it is manifest that there must be a difference in the presumption that attends an exercise of national and one of State powers. The difference is this. To ascertain whether any power assumed by the government of the United States is rightfully assumed, the Constitution is to be examined in order to see whether expressly or by fair implication the power has been granted, and if the grant does not appear, the assumption must be held unwarranted. To ascertain whether a State rightfully exercises a power, we have only to see whether by the Constitution of the United States it is conceded to the Union, or by that Constitution or that of the State prohibited to be exercised at all. The presumption must be that the State rightfully does what it assumes to do, until it is made to appear how, by constitutional concessions, it has divested itself of the power, or by its own Constitution has for the time rendered the exercise unwarrantable.<sup>2</sup>

*It is Supreme.* — By Article VI. it is declared that “This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges, in every State, shall be bound thereby, anything in the Constitution and laws of any State to the contrary notwithstanding.”<sup>3</sup> Upon this it is to be observed:—

1. The Congress of the United States derives its power

<sup>1</sup> The corresponding article in the Confederation was: “Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.”—Art. II.

<sup>2</sup> *Calder v. Bull*, 3 Dall. 386; *Golden v. Prince*, 3 Wash. C. C. 313; *Slaughter House Cases*, 16 Wall. 36; *United States v. Cruikshanks*, 92 U. S. Rep. 542.

<sup>3</sup> Const. U. S., Art. VI. § 2.

to legislate from the Constitution, which is the measure of its authority; and any enactment of Congress which is opposed to its provisions, or is not within the grant of powers made by it, is unconstitutional, and therefore no law, and obligatory upon no one.<sup>1</sup>

2. As between a law of the United States made in pursuance of the Constitution and a treaty made under the authority of the United States, if the two in any of their provisions are found to conflict, the one last in point of time must control.<sup>2</sup> For the one as well as the other is an act of sovereignty; differing only in form and in the organ or agency through which the sovereign will is declared. Each alike is the law of the land in its adoption, and the last law must repeal whatever that is of no higher authority is found to come in conflict with it. A treaty may therefore supersede a prior act of Congress;<sup>3</sup> and, on the other hand, an act of Congress may supersede a prior treaty.<sup>4</sup>

3. A State law must yield to the supreme law, whether expressed in the Constitution of the United States or in any of its laws or treaties, so far as they come in collision, and whether it be a law in existence when the "supreme law" was adopted, or enacted afterwards.<sup>5</sup> The same is true of any provision in the constitution of any State which is found to be repugnant to the Constitution of the Union.<sup>6</sup> And not only must "the judges in every State"

<sup>1</sup> *Ableman v. Booth*, 21 How. 506, 520; *United States v. Cruikshanks*, 92 U. S. Rep. 542.

<sup>2</sup> *Foster v. Neilson*, 2 Pet. 253, 314; *Doe v. Braden*, 16 How. 635.

<sup>3</sup> *Foster v. Neilson*, 2 Pet. 253.

<sup>4</sup> *The Cherokee Tobacco*, 11 Wall. 616; *Ropes v. Clinch*, 8 Blatch. 304; *Taylor v. Morton*, 2 Curt. C. C. 454; *Gray v. Clinton Bridge*, 1 Woolw. 150.

<sup>5</sup> *Ware v. Hylton*, 3 Dall. 199.

<sup>6</sup> *Dodge v. Woolsey*, 18 How. 331; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Cummings v. Missouri*, 4 Wall. 277; *Railroad*

be bound by such supreme law, but so must the State itself, and every official in all its departments, and every citizen.

4. The Constitution itself never yields to treaty or enactment; it neither changes with time, nor does it in theory bend to the force of circumstances. It may be amended according to its own permission; but while it stands, it is "a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances." Its principles cannot, therefore, be set aside in order to meet the supposed necessities of great crises. "No doctrine involving more pernicious consequences was ever invented by the wit of man, than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government within the Constitution has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."<sup>1</sup>

*State Rights.*—This phrase is common in political discussions, and especially in those which relate to the powers of the federal government, and its proper sphere of action under the Constitution. The meaning is likely to differ as do the constitutional views of those who make use of it. At certain constitutional crises it has been insisted by some persons that the right to nullify any congressional enactments which were deemed to be unauthorized by the Constitution, and the right when the Union became oppressive to withdraw the consent of the State thereto, and thereby secede from it, were within the compass of the

Co. v. McClure, 10 Wall. 511; White v. Hart, 13 Wall. 646; Gunn v. Barry, 15 Wall. 610; Pacific Railroad Co. v. Maguire, 20 Wall. 36.

<sup>1</sup> Ex parte Milligan, 4 Wall. 2, 120.

reserved rights of the States; and therefore State rights, as a generic term, would in the mind of such persons include these. By their opponents the term would then be used as a term of reproach, and as indicating that those who professed to be their advocates held disorganizing views, and perhaps indulged revolutionary purposes. These extreme views are now for the most part abandoned, and those who profess to be the special advocates and supporters of state rights put forward as their leading principle a strict construction of the federal Constitution, and insist that that instrument has been greatly perverted from its original purpose, and federal powers greatly enlarged at the expense of the States, under the doctrine of a grant of powers by implication. Among those who profess to be the special advocates of national rights are also persons of extreme views, some of whom contend that the nation is to be considered the fountain and source of all sovereignty, and the States as emanations from it; a view that would change radically the rules of constitutional construction which the courts have laid down. Thus the extreme views on one side tend to disintegration, and on the other to centralization; but the adherents to the national, as distinguished from the state rights idea, may be said to advocate only a liberal construction of national powers as being essential to accomplish the purposes for which the Union was formed, and therefore within the intent of those who formed it.

In a constitutional view, state rights consist of those rights which belonged to the States when the Constitution was formed, and have not by that instrument been granted to the federal government, or prohibited to the States. They are maintained by limiting the exercise of federal power to the sphere which the Constitution expressly or by fair implication assigns to it. This is a statement of the legal principle, but the parties who accept it may still in



applying it find ample occasion for differences respecting the proper scope of national and State powers respectively.

When a particular power is found to belong to the States, they are entitled to the same complete independence in its exercise as is the national government in wielding its own authority. Each within its sphere has sovereign powers.<sup>1</sup>

*Concurrent Powers.* — The mere grant of a power to Congress does not of itself, in most cases, imply a prohibition upon the States to exercise the like power. The full sphere of federal powers may, at the discretion of Congress, be occupied or not, as the wisdom of that body may determine. If not fully occupied, the States may legislate within the same sphere, subject, however, to any subsequent legislation that Congress may adopt. It is not the mere existence of the national power, but its exercise, which is incompatible with the exercise of the same power by the States.<sup>2</sup> The few exceptions in which the grant to Congress is necessarily exclusive will be mentioned further on.

*Reserved Rights.* — In the incorporation in the Constitution of a bill of personal rights and liberties by the first ten articles of the amendments, it was deemed important to declare in the ninth article that “the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” The occasion for this article is supposed to have been found in the apology of the Federalist for the absence of a bill of rights in the Constitution as first adopted, where the writer suggested that such a bill might be dangerous, since it would contain various exceptions to powers not granted, and on this very account would afford a tolerable pretext

<sup>1</sup> *Golden v. Prince*, 3 Wash. C. C. 313; *Calder v. Bull*, 3 Dall. 386; *Ableman v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397, 406.

<sup>2</sup> *Sturges v. Crowninshield*, 4 Wheat. 122, 196.

to claim more than were granted.<sup>1</sup> However unfounded such a fear might be, there could be no harm in affirming by this amendment the principle that constitutions are not made to create rights in the people, but in recognition of, and in order to preserve them, and that if any are specially enumerated and specially guarded, it is only because they are peculiarly important or peculiarly exposed to invasion.

*The Territories.* — The Constitution was made for the States, not for Territories. It confers power to govern Territories, but in exercising this the United States is a sovereign dealing with dependent territory according as in its wisdom shall seem politic, wise, and just, having regard to its own interests as well as to those of the people of the Territories.<sup>2</sup> It is believed, however, that the securities for personal liberty which are incorporated in the Constitution were intended as limitations of its power over any and all persons who might be within its jurisdiction anywhere, and that citizens of the Territories as well as citizens of the States may claim the benefit of their protection.

In this dependence of the Territories upon the central government there is some outward resemblance to the condition of the American Colonies under the British Crown; but there are some differences which are important, and indeed vital. The first of these is that the territorial condition is understood under the Constitution to be merely temporary and preparatory, and the people of the Territories while it continues are assured of the right to create and establish State institutions for themselves so soon as the population shall be sufficient and the local conditions suitable; while the British colonial system contained no

<sup>1</sup> Federalist, No. 84.

<sup>2</sup> American Ins. Co. v. Canter, 1 Pet. 511; Scott v. Jones, 5 How. 343.

promise or assurance of any but a dependent government indefinitely. The second is that above given, that the people of the American Territories are guaranteed all the benefits of the principles of constitutional right which protect life, liberty, and property, and may defend them under the law, even as against the action of the government itself; while in the Colonies these principles were the subject of dispute, and, if admitted, would be within the control of an absolute imperial legislature, which might overrule them at will. There is also a difference in respect to taxation, which, though not so striking, is still important. The Territories levy their own taxes for all local purposes, and they are never taxed separately for national purposes, but only as parts of a whole country, and under the same rules and for the same purposes as are the States. Nor is it intended to realize from them any revenue for the national treasury beyond what is expended by the United States in their interest.

*Amendments.* — In the adoption of the Constitution provision was made for amendments to be made under regular forms, which should not only give to the people an easy method of removing any evils that might be found to exist in their institutions, and of keeping them in sympathy with the prevailing sentiments and desires of the people, but should take away all reasonable excuse for attempts at revolution by force. Two methods of amendment were provided for. *First*, by Congress — two thirds of both houses assenting — proposing amendments for ratification by the legislatures or by conventions of the States, which shall be valid to all intents and purposes when ratified by three fourths of the States; and *Second*, by Congress on the application of two thirds of the States calling a convention for proposing amendments, which when ratified in like manner shall be valid as aforesaid. The only restriction imposed on the power to amend is this: that “No

State without its consent shall be deprived of its equal suffrage in the Senate.”<sup>1</sup> In theory, except as changes are so made, the Constitution is to remain the settled and definite law of the nation; meaning the same thing to-day, to-morrow, and forever; its written provisions, stipulations, and guaranties being subject to no such growth, amplification, and modification as inheres in the unwritten constitution of Great Britain.

But it is not in the nature of institutions to remain stationary, however they may be formulated and declared, especially when the government has within itself the power to determine its own jurisdiction, and to solve in its own favor at discretion all questions of disputed authority. It has been truly said that “power, when it has attained a certain degree of energy and independence, goes on generally to further degrees. But when below that degree the direct tendency is to further degrees of relaxation, until the abuses of liberty beget a sudden transition to an undue degree of power.”<sup>2</sup> The government of the United States was below the degree of self-protecting energy while the Articles of Confederation constituted the bond of union, but it attained at a bound to due energy and independence under the administration of Washington and Hamilton while the judiciary was in accord with their views, and if the period of relaxation ever came, its influence upon the authority asserted for the government was not great, and was only temporary. The principles that at one time applied the power over commerce to the regulation of navigation,<sup>3</sup> at a later day are found equally applicable to traffic and travel by railroad<sup>4</sup> and communication by telegraph;<sup>5</sup> and though these new applications

<sup>1</sup> Const., Art. V.

<sup>2</sup> Madison, *Life* by Rives, ii. 641.

<sup>3</sup> *Gibbons v. Ogden*, 9 Wheat. 1.

<sup>4</sup> *Railroad Co. v. Richmond*, 19 Wall. 584.

<sup>5</sup> *Pensacola Tel. Co. v. West. U. Tel. Co.*, 96 U. S. Rep. 1.

of principle do not in the least depart from or enlarge former doctrines, they nevertheless strengthen greatly the national power by the immensity of the interests it is thus invited to take under its control. So the authority to purchase territory at one time is found equal to the annexation of an independent state at another. The gradual energizing of federal authority has been accomplished quite as much by the course of public events as by the new amendments to the Constitution; and however careful every federal and state official and every citizen may be to so perform all political functions as to preserve under all circumstances the true constitutional balance of powers, and to sanction no unconstitutional encroachments, there can be no question that the new interests coming gradually within the purview of federal legislation, and the increase in magnitude and importance of those already under federal control, must have a still further tendency in the direction indicated.

*Majority Rule.* — Government in the United States and in the several States, in all its grades, is representative; the body of the people performing very few acts directly, except that of adopting the Constitution. When they act directly, the result of their will must be ascertained by such preponderating vote as the law shall prescribe. This may be a majority vote, or it may be merely the vote in which the largest number of electors agree. In determining upon a majority or plurality, those only are counted who actually participated in the election, except in a few cases where by some constitutional provision an actual majority of all the electors is required.

American government is frequently spoken of as a government based on faith in majorities, and the machinery of election as being provided merely to ascertain what the will of the majority is. But the government is never handed over to the absolute control of the majority, and

many precautions are taken to prevent its expressing exclusively their will:— 1. In the Constitution many permanent rules are prescribed which control the majority absolutely, and which cannot be changed except by the slow process of constitutional amendment. 2. The times and methods of election of legislative and executive officers are so contrived that in different branches of the government the majority of one period will be restrained and checked by the majority of another, and it is scarcely possible that any considerable minority shall not have its representatives, and be entitled to be heard through them in the legislature, in ways that shall at least hold the majority to due accountability for their conduct and measures. It must often be the case that one house of the legislature will represent the views of a popular majority, and the other those of a minority only; but for all purposes of enacting laws, the latter has as much authority as the former. 3. The electoral system is so contrived that the President is sometimes chosen by a minority of the people; but unless a majority is overwhelming, he may generally defeat its measures by his veto. 4. All the safeguards which under kingly government were ever interposed to the tyrannical power of rulers are incorporated in the bills of rights in the American constitutions as absolute limitations laid on the power of the majority for the protection of the liberty, property, privileges, and immunities of the minority, and of every individual citizen; and the judiciary is given a power to enforce these limitations, irrespective of the will or control of the legislature, such as it has never possessed in any other country. So far then from the government being based on unlimited confidence in majorities, a profound distrust of the discretion, equity, and justice of their rule is made evident in many precautions and checks, and the majority is in fact trusted with power only so far as is

absolutely essential to the working of republican institutions.

*Instruction of Representatives.*—The care taken to impose restraints on the action of temporary majorities is sufficient to demonstrate the want of constitutional basis for the opinion that representatives are bound to obey the instructions of their constituents from time to time communicated to them. But it would be conclusive, also, against such an opinion, that no method is provided, or is available, by means of which instructions can be authoritatively given. A representative in Congress is chosen by popular vote, at an election of which all must take notice; but there is no machinery for gathering the voice of all electors again until the next general election, and it is then gathered only in the ballots which express a choice between candidates. Between the elections the constituents may speak through the press and by petitions, but these are not authoritative, and it can seldom be known from such expressions what is the popular will. Senators sometimes consider themselves bound to respect and obey the instructions of state legislatures; but these are composed only of delegates of the people, and they may represent the sentiments of the constituency no more than the Senator himself.

But aside from practical difficulties, the right to instruct representatives cannot on principle be sustained. Representatives are chosen in States and districts; but when chosen they are legislators for the whole country, and are bound in all they do to regard the interest of the whole. Their own immediate constituents have no more right than the rest of the nation to address them through the press, to appeal to them by petition, or to have their local interests considered by them in legislation. They bring with them their knowledge of local wants, sentiments, and opinions, and may enlighten Congress respecting these,

and thereby aid all the members to act wisely in matters which affect the whole country ; but the moral obligation to consider the interest of one part of the country as much as that of another, and to legislate with a view to the best interests of all, is obligatory upon every member, and no one can be relieved from this obligation by instructions from any source. Moreover, the special fitness to legislate for all, which is acquired by the association, mutual information, and comparison of views of a legislative body, cannot be had by the constituency, and the advantages would be lost to legislation if the right of instruction were recognized.



## CHAPTER III.

## DISTRIBUTION OF THE POWERS OF GOVERNMENT.

*Necessity of Separation of Powers.* — When all the powers of sovereignty are exercised by a single person or body, who alone makes laws, determines complaints of their violation, and attends to their execution, the question of a classification of powers can have only a theoretical importance, for the obvious reason that nothing can depend upon it, which can have practical influence upon the happiness and welfare of the people. But inasmuch as a government with all its powers thus concentrated must of necessity be an arbitrary government, in which passion and caprice is as likely to dictate the course of public affairs as a sense of right and justice, it is a maxim in political science that, in order to the due recognition and protection of rights, the powers of government must be classified according to their nature, and each class intrusted for exercise to a different department of the government. This arrangement gives each department a certain independence, which operates as a restraint upon such action of the others as might encroach on the rights and liberties of the people, and makes it possible to establish and enforce guaranties against attempts at tyranny. We thus have the checks and balances of government, which are supposed to be essential to free institutions.

*Classification.* — The natural classification of governmental powers is into legislative, executive, and judicial. The legislative power is the power to make laws and to alter them at discretion; the executive power is the power to see that the laws are duly executed and enforced; the

judicial power is the power to construe and apply the law when controversies arise concerning what has been done or omitted under it. Legislative power therefore deals mainly with the future, and executive power with the present, while judicial power is retrospective, dealing only with acts done or threatened, promises made, and injuries suffered.<sup>1</sup> The line of division is nevertheless somewhat indefinite, since in many cases the legislature may designate the agents for the execution of its enactments, and the judiciary is expected to enforce the law in such controversies as are brought before it; while the executive and the judiciary may respectively make rules which are in the nature of laws, for the regulation of its own course in the discharge of its duties. There are then powers strictly legislative, others strictly executive, and others strictly judicial; while still other powers may be exercised by one department or by another, according as the law may provide. For illustration the case may be taken of rules for regulating the practice of courts, which are sometimes made by the legislature and sometimes by the courts; and also the case of the appointment of officers and agents, subordinate to the chief executive, to see to the enforcement of the laws; which can be made by law except as the Constitution has conferred the power upon the executive.<sup>2</sup> And whenever a power is not distinctly either legislative, executive, or judicial, and is not by the Constitution distinctly confided to a department of the government designated, the mode of its exercise, and the agency, must necessarily be determined by law; in other words, must necessarily be under the control of the legislature.<sup>3</sup>

<sup>1</sup> *Wayman v. Southard*, 10 Wheat. 1, 46; *Bates v. Chapman*, 2 Chip. (Vt.) 77; *Greenough v. Greenough*, 11 Penn. St. 489; *Jones v. Perry*, 10 Yerg. (Tenn.) 59; *Shumway v. Bennett*, 29 Mich. 451; *Taylor v. Place*, 4 R. I. 324; *Ex parte Burns*, 1 Tenn. Ch. 83.

<sup>2</sup> *Field v. People*, 3 Ill. 80; *Bridges v. Shallcross*, 6 W. Va. 562.

<sup>3</sup> *Calder v. Bull*, 3 Dall. 386.

But when a department is created for the exercise of judicial authority, the act itself constitutes a setting apart to it for exercise of the whole judicial power of the sovereignty with such exceptions only as the Constitution itself may make.<sup>1</sup> As therefore the determination of a controversy on existing facts where there are adverse interests is judicial action, the act is not within the compass of legislation; neither is the setting aside of judgments and granting of new trials;<sup>2</sup> nor the opening of controversies after remedy under the general law is gone;<sup>3</sup> nor, it seems, the giving of an appeal after the time allowed by law has expired,<sup>4</sup> though as to this last there are decisions *contra*.<sup>5</sup> Neither can the legislature bind parties interested by a recital of facts, or prescribe conclusive rules of evidence, for either of these would be only an indirect method of disposing of controversies.<sup>6</sup> These cases will sufficiently suggest the proper rule of decision for others.<sup>7</sup>

*The Departments of Government.* — The Constitution of the United States creates three departments of government, and directly or by implication determines their powers.

*The Legislature.* — All the legislative powers granted by

<sup>1</sup> *Greenough v. Greenough*, 11 Penn. St. 489; *Alexander v. Bennett*, 60 N. Y. 204; *Van Slyke v. Ins. Co.*, 39 Wis. 390.

<sup>2</sup> *Lewis v. Webb*, 3 Me. 326; *Dorsey v. Dorsey*, 37 Md. 64; *Oliver v. McClure*, 28 Ark. 555; *Hooker v. Hooker*, 18 Miss. 599.

<sup>3</sup> *Bradford v. Brooks*, 2 Aik. (Vt.) 284; *Brent v. Chapman*, 5 Cranch, 358; *Leffingwell v. Warren*, 2 Black, 599.

<sup>4</sup> *Hill v. Sunderland*, 3 Vt. 507; *Burch v. Newberry*, 10 N. Y. 374. See *Carleton v. Goodwin's executor*, 41 Ala. 153.

<sup>5</sup> *Prout v. Berry*, 2 Gill, (Md.) 147; *Page v. Mathews's Admr.*, 40 Ala. 547; *Wheeler's Appeal*, 45 Conn. 306. To take away a statutory right of appeal is not an exercise of judicial authority. *Ex parte McCordle*, 7 Wall. 506.

<sup>6</sup> *Parmelee v. Thompson*, 7 Hill, (N. Y.) 77; *Lothrop v. Stedman*, 42 Conn. 583, 592; *McCready v. Sexton*, 29 Iowa, 356; *Groesbeck v. Seeley*, 13 Mich. 329.

<sup>7</sup> In *Cooley*, Const. Lim., ch. 5, is a large collection of authorities on this general subject.

the Constitution are vested in a Congress consisting of a Senate and House of Representatives,<sup>1</sup> subject to a qualified veto in the President.

The House of Representatives is composed of members chosen every second year by the people of the several States, and the electors in each State must have the qualifications requisite for electors of the most numerous branch of the State legislature.<sup>2</sup> Each State will determine for itself what these qualifications shall be.

No person can be a representative who has not attained the age of twenty-five years, and been seven years a citizen of the United States, or who at the time is not an inhabitant of the State in which he is chosen.<sup>3</sup>

Representatives are apportioned among the States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.<sup>4</sup>

The Senate is composed of two senators from each State, chosen by the legislature thereof for six years, and divided into three classes, so that one class is chosen every second year. 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.<sup>5</sup>

No person shall be a senator who shall not have attained 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 the State from which he shall be chosen.<sup>6</sup>

The House chooses its own Speaker, and other officers.<sup>7</sup>

<sup>1</sup> Const., Art. I. § 1.

<sup>2</sup> Const., Art. I. § 2.

<sup>3</sup> Const., Art. I. § 2, cl. 2.

<sup>4</sup> Const., Amendment 14, § 2. Note the qualification in the latter part of the section.

<sup>5</sup> Const., Art. I. § 3.

<sup>6</sup> Const., Art. I. § 3.

<sup>7</sup> Const., Art V. § 2.

The Vice-President of the United States is President of the Senate, but without a vote except in case of equal division. The Senate chooses its other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President.<sup>1</sup>

The times, places, and manner of holding elections for senators and representatives shall be provided in each State by the legislature thereof; but Congress may at any time by law make or alter such regulations, except as to the place of choosing senators.<sup>2</sup>

It is provided by law that representatives in Congress shall be chosen in single districts; <sup>3</sup> and that the elections shall take place on the Tuesday next after the first Monday of November.<sup>4</sup> Vacancies are filled as may be provided by state laws.<sup>5</sup> All votes for representatives in Congress must be by written or printed ballot, and all votes received or recorded contrary to this provision are of no effect.<sup>6</sup>

For the election of senators it is provided that the legislature of each State which is chosen next preceding the expiration of the time for which any senator was elected to represent such State in Congress, shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a senator.<sup>7</sup> If an election fails to be made the first day, at least one vote is required to be taken every day thereafter, during the session of the legislature, until a senator is chosen.<sup>8</sup> An existing vacancy is filled at the same time and in the same way; <sup>9</sup> and a vacancy occurring during the session is filled by election, the proceedings for which are had on the second Tuesday after the legislature has organized and has notice of such vacancy.<sup>10</sup>

<sup>1</sup> Const., Art. I. § 3.

<sup>2</sup> Const., Art. I. § 4.

<sup>3</sup> Rev. Stat. U. S. (1878), § 23.

<sup>4</sup> Rev. Stat. U. S. (1878), § 25.

<sup>5</sup> Rev. Stat. U. S. (1878), § 26.

<sup>6</sup> Rev. Stat. U. S. (1878), § 27.

<sup>7</sup> Rev. Stat. U. S. (1878), § 14.

<sup>8</sup> Rev. Stat. U. S. (1878), § 15.

<sup>9</sup> Rev. Stat. U. S. (1878), § 16.

<sup>10</sup> Rev. Stat. U. S. (1878), § 17.

When Congress convenes, the President of the Senate administers the oath to its members,<sup>1</sup> and takes charge of the organization. The clerk of the next preceding House of Representatives makes a roll of the representatives elect, and places thereon the names of those persons, and of those only, whose credentials show that they were regularly elected in accordance with the laws of their States respectively, or the laws of the United States.<sup>2</sup> In case of vacancy in the office of clerk, or of his absence or disability, the sergeant-at-arms of the next preceding house performs this duty; and, in turn, it may devolve upon the doorkeeper in case of vacancy in the office of sergeant-at-arms, or his absence or disability.<sup>3</sup> The clerk acts as temporary presiding officer of the House until a speaker is chosen. The Senate is supposed to have a presiding officer at all times.

Each house is judge of the elections, returns, and qualifications of its own members, and may determine the rules of its proceeding, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.<sup>4</sup> Each house shall also keep a journal of its proceedings,<sup>5</sup> and from time to time publish the same, excepting such parts as in their judgment may require

<sup>1</sup> Rev. Stat. U. S. (1878), § 28.    <sup>2</sup> Rev. Stat. U. S. (1878), § 31.

<sup>3</sup> Rev. Stat. U. S. (1878), §§ 32, 33.

<sup>4</sup> This is a power that by common parliamentary law would exist without being expressly conferred. It is "a necessary and incidental power to enable the house to perform its high functions, and is necessary to the safety of the State. It is a power of protection." And a member may be expelled for misconduct when away from the house on duty as a committee-man, as well as for misconduct during its sessions. *Hiss v. Bartlett*, 3 Gray, (Mass.) 468.

<sup>5</sup> Whether expunging a resolution, as was done by the Senate in the case of the resolution of censure of General Jackson, is not a violation of this provision, was much discussed in that case. Benton, *Thirty Years' View*, ch. 159-161; Webster's *Speeches*, iv. 259.

secrecy, and the yeas and nays of the members of either house on any question shall, at the demand of one fifth of those present, be entered on the journal.<sup>1</sup>

A majority of each house constitutes a quorum to do business, but a smaller number may adjourn from day to day, and compel attendance of absent members. But 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.<sup>2</sup>

Senators and representatives are paid by the United States a compensation determined by law.<sup>3</sup> They also, in all cases except treason, felony, and breach of the peace, are privileged from arrest during their attendance at the sessions of their respective houses, and in going to and

<sup>1</sup> Const., Art. I. § 5.

<sup>2</sup> Const., Art. I. § 5.

<sup>3</sup> Const., Art. I. § 6. The compensation of members of Congress was first fixed, by law at six dollars for each day's attendance, and six dollars for each twenty miles of the estimated distance by the most usual road in going to, and returning from, the capital. This in the case of senators was to be increased one sixth after March 4, 1795. 1 Stat. at Large (1789), p. 70. In 1796, the pay of senators and representatives was equalized at six dollars per day, and six dollars for every twenty miles' travel. 1 Stat. at Large, 448. In 1816, the *per diem* was changed to a salary of \$1,500. 3 Stat. at Large, 257. The act for this purpose was repealed the next year. 3 Stat. at Large, 345. In 1818, the compensation was fixed at eight dollars a day, and eight dollars for every twenty miles' travel. 3 Stat. at Large, 404. In 1856, a salary of \$3,000 was substituted for the *per diem* compensation. 11 Stat. at Large, 48. In 1866, the salary was increased to \$5,000, and the mileage reduced to twenty cents a mile. In 1873, the salary was increased to \$7,500, and actual travelling expenses were to be paid in lieu of mileage; but in 1874 the compensation was restored to what it was under the act of 1866. Laws of 1873-74, ch. 10; Rev. Stat. U. S. (1878), § 35. In 1816, 1866, and 1873, the increased compensation was made to date back to the coming in of the Congress which granted it.

returning from the same ;<sup>1</sup> and for any speech or debate in either house they shall not be questioned in any other place.<sup>2</sup>

All bills for raising revenue must originate in the House of Representatives, but the Senate may propose or concur with amendments.<sup>3</sup> All other bills may originate indifferently in either house, and any member of either house may introduce bills under its rules.

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.<sup>4</sup>

*The Veto Power.* — The power to veto legislation, which is conferred upon the President, makes him in effect a third branch of the legislature. The power is legislative,

<sup>1</sup> Const., Art. I. § 6. *Holiday v. Pitt*, 2 *Strange*, 985; *Hoppin v. Jenckes*, 8 R. I. 453. This privilege is that of the house to enable it to perform its functions with the aid of all its members, but it is also the privilege of the people, as well as of the member himself. *Coffin v. Coffin*, 4 *Mass.* 1.

<sup>2</sup> Const., Art. I. § 6. It is held in England that the privilege does not extend to the publishing by the member of his speeches. *The King v. Creevey*, 1 *M. & S.* 273; *The King v. Abingdon*, 1 *Esp.* 226. Compare *Davison v. Duncan*, 7 *El. & Bl.* 229. But in this country, where all debates are published by authority of law, the rule, we should say, must at least cover the official publication. But the privilege is confined strictly to what is said in the house or in committee in the discharge of legislative duty. *Coffin v. Coffin*, 4 *Mass.* 1.

<sup>3</sup> Const., Art. I. § 7. In this provision is incorporated a principle of the English constitution, which requires all revenue bills to originate in the House of Commons. As to what are revenue bills see *May*, *Const. Hist.*, chap. 7. The subject was much considered in debates in Congress in the year 1872.

<sup>4</sup> Const., Art. I. § 6.



not executive, and the questions presented to his mind are precisely the same as those the two houses of Congress must determine in passing a bill. Whether the proposed law is necessary or expedient, whether it is constitutional, whether it is so framed as to accomplish its intent, and so on, are questions transferred from the two houses to the President with the bill itself.

*The Executive.*—The executive power is vested in a President, who holds his office during a term of four years, and, together with a Vice-President, chosen for the same term, is elected by electors appointed in the several States for the purpose.<sup>1</sup> No person except a natural-born citizen, who has been fourteen years a resident within the United States, and has attained the age of thirty-five, is now eligible to the office of President<sup>2</sup> or of Vice-President.<sup>3</sup>

In case of the removal of the President from office, or his death, resignation, or inability to discharge its powers and duties, the same devolves on the Vice-President, and Congress may by law provide for the case of removal, death, or resignation, or inability both of the President and Vice-President, declaring what officer shall then act as President until the disability be removed or a President elected.<sup>4</sup>

<sup>1</sup> Const., Art II. § 1; Amendment 12. The manner of making choice, where no candidate has a majority of electoral votes, is explained by this amendment.

<sup>2</sup> Const., Art. II. § 1.

<sup>3</sup> Const., Amendment 12.

<sup>4</sup> Const., Art. II. § 1. If the Vice-President becomes acting President, he holds for the full term. Congress has provided by law that in case of removal, death, resignation, or inability of both the President and Vice-President, the President of the Senate, or, if there is none, then the Speaker of the House of Representatives for the time being; shall act as President until the disability is removed or a President is elected. The law provides for a speedy election in such case. Rev. Stat. U. S. (1878), §§ 146 to 149. Whether either of these officers could act as President if he did not possess the qualifications that would render him "eligible" to the office, may be a question.

*The Judiciary.* — The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish.<sup>1</sup> The judges both of the Supreme and inferior courts hold their offices during good behavior. As the Constitution does not determine the number of the judges of the Supreme Court, the number may be changed at pleasure, except that it cannot be diminished so as to deprive a judge of his office. The other courts exist at the will of Congress, and may be changed and modified at discretion, subject to a like limitation that a judge cannot be legislated out of his office while the office itself remains.<sup>2</sup>

In a time of war, when portions of hostile territory are in the military occupation of federal forces, the President as commander-in-chief may appoint provisional courts for the determination of controversies within such territory, and the administration of justice.<sup>3</sup> But such courts, established on foreign soil, are mere agents of the military power to assist in preserving order and protecting the inhabitants in their persons and property; and they cannot adjudicate upon questions of prize, or decide upon the rights of the United States or of individuals.<sup>4</sup>

The territorial courts are not created by Congress under the power conferred by the articles above referred to, but

<sup>1</sup> Const., Art. III. § 1. The power "to constitute tribunals inferior to the Supreme Court" is conferred upon Congress by Article I. § 8, cl. 9.

<sup>2</sup> The legislative precedent is in favor of the power in Congress to indirectly deprive judges of their offices by abolishing courts. Reference is here made to the abolition of district courts when Mr. Jefferson became President. There are state precedents of the same sort.

<sup>3</sup> *Jecker v. Montgomery*, 13 How. 498; *The Grape Shot*, 9 Wall. 129. See *Edwards v. Tanneret*, 12 Wall. 446.

<sup>4</sup> *Jecker v. Montgomery*, 13 How. 498.

in the exercise of the general sovereignty of the United States over the territory it may possess. The judges of such courts may therefore be appointed for definite terms, removable by the President.<sup>1</sup>

Upon judges<sup>2</sup> as such no functions can be imposed except those of a judicial nature. They cannot therefore be required to act as commissioners to determine questions subject to the consideration and supervision of Congress or of an executive officer;<sup>2</sup> or to make or review as appraisers the assessments that have been made of property for taxation;<sup>3</sup> nor can they by virtue of equity powers appoint officers to assess and collect taxes from municipalities, even to pay judgments against such municipalities standing on their own records.<sup>4</sup> When judicial authority is conferred by law upon a court, it must be exercised by the judges sitting and organized as a court, and not by the judge out of court.<sup>5</sup>

<sup>1</sup> *American Ins. Co. v. Canter*, 1 Pet. 511.

<sup>2</sup> Note to *Hayburn's Case*, 2 Dall. 409; *United States v. Ferreira*, 13 How. 40. The remark in the text has no reference to courts like the Court of Claims, which, being a tribunal created to consider demands against the government, may have its authority restricted to any extent that seems wise.

<sup>3</sup> *Auditor of State v. Railroad Co.*, 6 Kans. 500. In Massachusetts it has been held that courts cannot be empowered to appoint supervisors of election. *Case of Supervisors of Election*, 114 Mass. 247.

<sup>4</sup> *Rees v. Watertown*, 19 Wall. 107; *Heine v. Levee Commissioners*, 1 Woods, 246; 19 Wall. 655.

<sup>5</sup> Note by the Chief Justice to *United States v. Ferreira*, 13 How. 52.

## CHAPTER IV.

## THE POWERS OF CONGRESS.

*National Powers.* — In any sovereign state, the law-making department is the repository of most power, and it is also the most immediate representative of the sovereignty. Not that the others are subordinate within their respective spheres, but the exercise of governmental authority begins with the making of laws, and the other departments execute and administer what the law-making department enacts. For this reason the Constitution, in enumerating the powers which shall be exercised by authority of the general government, confers them in terms upon Congress. But this in legal effect is conferring them upon the United States, and by implication a corresponding executive and judicial power is also given, though to a large extent the exercise of these powers respectively is left to be provided for in the discretion of Congress.

## SECTION I. — TAXES, LOANS, AND DEBTS.

*The Power.* — In the specific enumeration of national powers, it is first declared that “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.”<sup>1</sup> Thus a power is conferred which is essential to the maintenance of independent government,

<sup>1</sup> Const., Art. I. § 8, cl. 1.

and the want of which was one of the principal causes of the failure of the Confederacy. The purposes for which the power may be exercised are also specified, but in such general terms that they comprehend all the needs of government. The requirement of uniformity in the levy of duties, imposts, and excises is an important limitation to a power which otherwise might have been exercised partially and oppressively.

*Definition.* — The word “taxes,” in its most enlarged sense, embraces all the regular impositions made by government upon the person, property, privileges, occupations, and enjoyments of the people for the purpose of raising public revenue.<sup>1</sup> As duties, imposts, and excises are laid or imposed for this purpose, they are in a strict sense taxes, and no doubt might have been levied by the government under that designation, without being here specifically mentioned. But as the term taxes is sometimes used in contradistinction to these levies, it conduced to certainty to name them separately. It was also a convenience in view of the special rule which was prescribed for their levy. The terms duties and imposts are nearly synonymous, and are usually applied to the levies made by government on the importation or exportation of commodities, while the term excises is applied to the taxes laid upon the manufacture, sale, or consumption of commodities within the country, and upon licenses to pursue certain occupations.<sup>2</sup>

Taxes are distinguished from arbitrary levies in that they are laid according to some rule which apportions the burden between the subjects thereof. An exaction which is made without regard to any rule of apportionment is

<sup>1</sup> Montesq., *Sp. of the L.*, b. 13, c. 1; *Perry v. Washburn*, 20 Cal. 318, 350; *Hilbish v. Catherman*, 64 Penn. St. 154, 159; *Loan Association v. Topeka*, 20 Wall. 655, 664; *Opinion of Judges*, 58 Maine, 590.

<sup>2</sup> *Cooley on Taxation*, 3.

therefore not a tax, and is not within the constitutional authority of the government.<sup>1</sup>

The power to tax is an incident of sovereignty, and is coextensive with the subjects to which the sovereignty extends. It is unlimited in its range, acknowledging in its very nature no limits, so that security against its abuse is to be found only in the responsibility of the legislature which imposes the tax to the constituency who are to pay it.<sup>2</sup> A people, however, in establishing their constitution, and delegating to their representatives this power, may impose at discretion limits to its exercise; and many effective limitations have been imposed in the constitutions of the States.

*The Power Discretionary.* — As respects the *kind* of tax that shall be laid, or the *subjects* upon which it shall be imposed, every government will regulate its action according to its own view of what will best accomplish the end, and best subserve the general interest. Therefore, taxes may be levied upon either land or personalty to the exclusion of the other, or upon occupations in preference to either or both, or they may be collected in the form of duties on imports or excises on domestic productions. The United States for the most part has collected its revenues from duties on imports, but at exceptional periods has levied taxes on land, occupations, manufactures, incomes, deeds and other contracts, and many other subjects. The basis of apportionment in the case of imports and excises has sometimes been value, sometimes weight, quantity, or quality, and sometimes other standards, while upon deeds

<sup>1</sup> *Sutton's Heirs v. Louisville*, 5 Dana, (Ky.) 28-31; *Grim v. School District*, 57 Penn. St. 433.

<sup>2</sup> *Veazie Bank v. Fenno*, 8 Wall. 533, 548; *McCulloch v. Maryland*, 4 Wheat. 316, 428; *Howell v. State*, 3 Gill, (Md.) 14; *People v. Brooklyn*, 4 N. Y. 419; *Pullen v. Commissioners*, 66 N. C. 361; *Taylor v. Palmer*, 31 Cal. 240; *State v. Newark*, 26 N. J. 519; *Williams v. Cammack*, 27 Miss. 209, 219; *Parham v. Justices*, 9 Geo. 341, 352.

and contracts the apportionment has been according to number or importance, and the tax has been collected by the sale of stamps. By the Constitution the United States is precluded from laying any tax or duty on articles exported from any State.<sup>1</sup> The requirement that an article intended for exportation shall be stamped, to prevent fraud and secure the carrying out of the declared intent, is not laying a duty, even though a small charge is made for the stamp.<sup>2</sup> It would be otherwise if the stamp were required for the purpose of revenue.<sup>3</sup>

*The Purposes.* — Constitutionally a tax can have no other basis than the raising of a revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical and unlawful. A tax on imports, therefore, the purpose of which is, not to raise a revenue, but to discourage and indirectly prohibit some particular import for the benefit of some home manufacture, may well be questioned as being merely colorable, and therefore not warranted by constitutional principles. But if any income is derived from the levy, the fact that incidental protection is given to home industry can be no objection to it, for all taxes must be laid with some regard to their effect upon the prosperity of the people and the welfare of the country, and their validity cannot be determined by the money returns. This rule has been applied when the levy produced no returns whatever; it being held not competent to assail the motives of Congress by showing that the levy was made, not for the purpose of revenue, but to annihilate the subject of the levy by imposing a burden which it could not bear.<sup>4</sup> Practically, therefore, a law purporting

<sup>1</sup> Const., Art. I. § 9, cl. 5.    <sup>2</sup> *Pace v. Burgess*, 92 U. S. Rep. 372.

<sup>3</sup> *Almy v. California*, 24 How. 169.

<sup>4</sup> *Veazie Bank v. Fenno*, 8 Wall. 533. Mr. Justice Story, in his Commentaries on the Constitution, asserts broadly that "the absolute power to levy taxes includes the power in every form in which it

to levy taxes, and not being on its face subject to objection, is unassailable, whatever may have been the real purpose. And perhaps even prohibitory duties may be defended as a regulation of commercial intercourse.

*Levies for Private Purposes.* — Where, however, a tax is avowedly laid for a private purpose, it is illegal and void. The following are illustrations of taxes for private purposes. A tax levied to aid private parties or corporations to establish themselves in business as manufacturers;<sup>1</sup> a tax the proceeds of which are to be loaned out to individuals who have suffered from a great fire;<sup>2</sup> a tax to supply with provisions and seed such farmers as have lost their crops;<sup>3</sup> a tax to build a dam which at discretion is to be devoted to private purposes;<sup>4</sup> a tax to refund moneys to individuals which they have paid to relieve themselves from an impending military draft;<sup>5</sup> and so on. In any one of these cases the public may be incidentally benefited, but the incidental benefit is only such as the public might receive from the industry and enterprise of individuals in their own affairs, and will not support exactions under the name of taxation.

But, primarily, the determination what is a public purpose belongs to the legislature, and its action is subject to no review or restraint so long as it is not manifestly color-

may be used, and for every purpose to which the legislature may choose to apply it. It therefore includes the power to levy protective duties, though the duties may in effect be prohibitory." — Story on Const., § 965.

<sup>1</sup> *Loan Association v. Topeka*, 20 Wall. 655, 663; *Allen v. Jay*, 60 Me. 124.

<sup>2</sup> *Lowell v. Boston*, 111 Mass. 454.

<sup>3</sup> *State v. Osawkee*, 14 Kans. 418.

<sup>4</sup> *Attorney-General v. Eau Claire*, 37 Wis. 400.

<sup>5</sup> *Tyson v. School Directors*, 51 Penn. St. 9; *Crowell v. Hopkinton*, 45 N. H. 9; *Usher v. Colchester*, 33 Conn. 567; *Freeland v. Hastings*, 10 Allen, (Mass.) 570; *Miller v. Grandy*, 13 Mich. 540.



able. All cases of doubt must be solved in favor of the validity of legislative action, for the obvious reason that the question is legislative, and only becomes judicial when there is a plain excess of legislative authority. A court can only arrest the proceedings, and declare a levy void, when the absence of public interest in the purpose for which the funds are to be raised is so clear and palpable as to be perceptible to any mind at first blush.<sup>1</sup>

But sometimes the public purpose is clear, though the immediate benefit is private and individual. For example, the government promises and pays bounties and pensions; but in every case the promise or payment is made on a consideration of some advantage or service given or rendered, or to be given or rendered, to the public, which is supposed to be an equivalent; and the law for the payment has in view only the public interest, and does not differ in principle or purpose from a law for the payment of salaries to public officers. The same is true where a State continues the payment of salaries to officers who have become superannuated in its service. The question whether they shall be paid is purely political, and resolves itself into this: whether the State will thereby probably secure better and more valuable service, and whether therefore it would be wise and politic for the State to give the seeming bounty.<sup>2</sup>

Where a law for the levy of a tax shows on its face the purpose to collect money from the people and appropriate it to some private object, the execution of the law may be resisted by those of whom the exaction is made, and the

<sup>1</sup> *Broadhead v. Milwaukee*, 19 Wis. 624, 652; *Cheaney v. Hooser*, 9 B. Monr. (Ky.) 330, 345; *Booth v. Woodbury*, 32 Conn. 118, 128; *Hammett v. Philadelphia*, 65 Penn. St. 146; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518.

<sup>2</sup> *Cooley on Taxation*, 74.

courts, if appealed to, will enjoin collection, or give remedy in damages if property is seized. But if a tax law on its face discloses no illegality, there can in general be no such remedy. Such is the case with the taxes levied under authority of Congress; they are levied without any specification of particular purposes to which the collections shall be devoted, and the fact that an intent exists to misapply some portion of the revenue produced, cannot be a ground of illegality in the tax itself. In cases arising in local government, an intended misappropriation may sometimes be enjoined; but this could seldom or never happen in case of an intended or suspected misappropriation by a State or by the United States, neither of them being subject to the process of injunction. The remedies for such cases are therefore political, and can only be administered through the elections.<sup>1</sup>

*Taxation of Government Agencies.* — The power to tax, whether by the United States or by the States, is to be construed in the light of, and limited by, the fact, that the States and the Union are inseparable, and that the Constitution contemplates the perpetual maintenance of each, with all its constitutional powers, unembarrassed and unimpaired by any action of the other. The taxing power of the federal government does not therefore extend to the means or agencies through or by the employment of which the States perform their essential functions, since, if these were within its reach, they might be embarrassed, and perhaps wholly paralyzed, by the burdens it should impose. “That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which ex-

<sup>1</sup> Cooley on Taxation, 541, 572, 575.

erts the control, — are propositions not to be denied.”<sup>1</sup> It is true that taxation does not necessarily and unavoidably destroy, and that to carry it to the excess of destruction would be an abuse not to be anticipated; but the very power would take from the States a portion of their intended liberty of independent action within the sphere of their powers, and would constitute to the State a perpetual danger of embarrassment and possible annihilation. The Constitution contemplates no such shackles upon state powers, and by implication forbids them.

The United States, therefore, cannot tax a state municipal corporation or its resources,<sup>2</sup> or the salary of a state officer,<sup>3</sup> or the process of state courts,<sup>4</sup> or a railroad owned by a State,<sup>5</sup> and so on.<sup>6</sup> And on the other hand a State cannot tax the salary or emoluments of federal officers,<sup>7</sup> or the bonds or other securities issued under the power to borrow money on the credit of the United States,<sup>8</sup> or the revenue stamps or treasury notes issued by the United States,<sup>9</sup> or a bank created by the United States as its fiscal agent,<sup>10</sup> and so on. But the sovereignty whose means or agencies of government would be affected by the tax might render it lawful by its assent, as has been done

<sup>1</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 431.

<sup>2</sup> *United States v. Railroad Co.*, 17 Wall. 322.

<sup>3</sup> *The Collector v. Day*, 11 Wall. 113.

<sup>4</sup> *Warren v. Paul*, 22 Ind. 276; *Moore v. Quirk*, 105 Mass. 49; *Union Bank v. Hill*, 3 Cold. (Tenn.) 325.

<sup>5</sup> *Georgia v. Atkins*, 1 Abb. U. S. 22.

<sup>6</sup> *Ward v. Maryland*, 12 Wall. 418, 427; *State v. Gustin*, 32 Ind. 1; *Sayles v. Davis*, 22 Wis. 225.

<sup>7</sup> *Dobbins v. Commissioners*, 16 Pet. 435.

<sup>8</sup> *Weston v. Charleston*, 2 Pet. 442; *Bank Tax Case*, 2 Wall. 200.

<sup>9</sup> *Palfrey v. Boston*, 101 Mass. 329; *Montgomery v. Elston*, 32 Ind. 27; *The Bank v. The Supervisors*, 7 Wall. 26.

<sup>10</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 368; *Osborn v. Bank of United States*, 9 Wheat. 738. See *United States v. Railroad Co.*, 17 Wall. 322.

in some cases. The fact that the general government has chartered and brought into existence a corporation with stipulations in the charter whereby the United States may have certain benefits from its use, does not exempt it from state taxation,<sup>1</sup> but restrictions to prevent unjust discriminations might be imposed, as has been done in the case of the existing national banks.

*Direct Taxes.*—It is provided in the Constitution that direct taxes shall be apportioned among the States according to their representative population.<sup>2</sup> What was meant by direct taxes in this provision is not entirely clear. Taxes are usually classed as direct when they are assessed upon the persons, property, business, income, &c. of those who are to pay them, and as indirect when they are levied on commodities before they reach the consumer, and are paid by those upon whom they ultimately fall, not as taxes, but as a part of the market price of the commodity.<sup>3</sup> But it has been generally conceded that the term direct tax as it is used in the federal Constitution had a more restricted meaning, and was perhaps to be limited to capitation and land taxes exclusively. A tax levied on carriages kept for use is not a direct tax;<sup>4</sup> and it is manifest that no apportionment of such a tax by representative population could possibly be just. The same ruling has been made in the case of a tax on income,<sup>5</sup> and a tax on the circulation of banks.<sup>6</sup> Succession taxes and all taxes of excise would come under these rulings.

*Collection.*—The power to tax includes the power to make use of all customary and usual means to enforce

<sup>1</sup> Railroad Co. v. Peniston, 18 Wall. 5.

<sup>2</sup> Const., Art. I. § 2. See Art. I. § 9, cl. 4.

<sup>3</sup> 1 Kent, 254; Story on Const., §§ 950-957.

<sup>4</sup> Hylton v. United States, 3 Dall. 171.

<sup>5</sup> Pacific Ins. Co. v. Soule, 7 Wall. 433.

<sup>6</sup> Veazie Bank v. Fenno, 8 Wall. 533.

payment. But legislation must prescribe these means and give full directions for their employment, and it is essential to the validity of the proceedings that the statute in all essential particulars shall be followed.<sup>1</sup>

*Borrowing Money.* — Congress is also empowered to borrow money on the credit of the United States.<sup>2</sup> This power may be exercised directly, in the usual mode, but the indirect method, of issuing government obligations for debts or services, is equally admissible. And all such obligations are excepted from the state power to tax, since otherwise they might be so burdened with taxation as to render it impossible for the government to negotiate them at all.<sup>3</sup>

*Public Faith and the Public Debt.* — In the Constitution it was declared that “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.”<sup>4</sup> This was perhaps intended merely as a solemn assurance to public creditors and the world that the public faith should be inviolably kept by the United States under its changed government; but it might have had a special significance and importance had one or more of the States failed to adopt the Constitution. In that event, although the general rule would apply that a public corporation remains liable for pre-existing debts notwithstanding the changes in its organization, or in its corporators, and notwithstanding any loss of territory, yet it would have been easy to raise cavils concerning it, had some States escaped the debt by rejecting the Union. It was therefore as politic as it was

<sup>1</sup> *Stead v. Course*, 4 Cranch, 403; *Williams v. Peyton*, 4 Wheat. 77; *Parker v. Overman*, 18 How. 137.

<sup>2</sup> Const., Art. I. § 8, cl. 2.

<sup>3</sup> *The Banks v. The Mayor*, 7 Wall. 16; *The Bank v. The Supervisors*, 7 Wall. 26.

<sup>4</sup> Const., Art. VI. cl. 1.

just to pledge the United States to the payment of the whole debt, that no one might be encouraged to raise questions respecting it afterwards. A like pledge was made in one of the amendments adopted after the close of the great civil war. It was then declared that "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 loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void."<sup>1</sup> The prohibitory portion of this provision was as unnecessary as the other for the purpose of settling any principle. No nation can be expected to, or does, make compensation for losses occasioned in war to its enemies. It might be said, however, that slave property of loyal and disloyal alike was destroyed by the government under circumstances rendering the destruction equivalent to an appropriation, and that the equitable claim to compensation was such as should be respected. But the prevailing view was that slavery was itself the cause of the civil war, with all its losses and calamities, and that its destruction was the destruction of a public enemy, and no just claim could arise from it. The example was therefore followed which was set at the Revolution, of making no compensation for the incidental losses of the war; and this was made impossible by expressly prohibiting it.

## SECTION II. — REGULATION OF COMMERCE.

*The Constitution.* — It is further provided by the Constitution, that Congress shall have power "to regulate com-

<sup>1</sup> Amendment 14.

merce with foreign nations, and among the several States, and with the Indian tribes.”<sup>1</sup>

*Commerce.* — The word *commerce* is not limited to traffic; to buying and selling and the exchange of commodities; but it comprehends navigation also, and all that is included in commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.<sup>2</sup> Navigation and intercourse, therefore, upon the natural highways by water is under the regulating control of Congress, wherever it is not exclusively limited to a single State.<sup>3</sup> So are transportation and intercourse by railroad between different parts of the country; and it is therefore competent for Congress to provide that all railroad companies may carry passengers, mails, and property over their roads, boats, bridges, and ferries, on their way from one State to another, and receive compensation therefor, and may connect with other roads so as to form continuous lines for the transportation of the same to their places of destination; also to provide for the construction of bridges over navigable rivers between States, and to provide that the bridges when constructed shall be free for the crossing of all trains of railroads terminating on the sides of the rivers respectively.<sup>4</sup> Congress may also regulate communication by telegraph between the States, and where a State has given exclusive privileges which would preclude free intercourse, it may under this power and the power to establish post-offices and post-roads, provide for the construction of competing lines. These powers “keep pace with the progress

<sup>1</sup> Const., Art. I. § 8, cl. 3.

<sup>2</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 189; *Passenger Cases*, 7 How. 283; *Henderson v. New York*, 92 U. S. Rep. 259; *Pensacola Tel. Co. v. West, &c. Tel. Co.*, 96 U. S. Rep. 1, 9.

<sup>3</sup> *Gibbons v. Ogden*, 9 Wheat. 1.

<sup>4</sup> *Railroad Co. v. Richmond*, 19 Wall. 584.

of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse\* with its rider to the stage-coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by state legislation.”<sup>1</sup>

*Commerce between States.* — To constitute commerce between States it is essential that it be not confined to one State exclusively, but concern more than one.<sup>2</sup> The ordinary trade of a State, the local buying, selling, and exchange, the making of contracts and conveyances, the rules for the regulation of local travel and communication, and all the infinite variety of matters which are of local interest exclusively, are left wholly to the regulation of state law. The commerce of a State which Congress may control must in some stage of its progress be extra-territorial. It can never include transactions wholly internal, between citizens wholly of the same community, or extend to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community. Nor can it be properly concluded, because the products of domestic enterprise in agriculture or manufactures or in the arts may ultimately become the subjects of commerce outside the State, that the control of

<sup>1</sup> Pensacola Tel. Co. v. Western, &c. Tel. Co., 96 U. S. Rep. 1, 9.

<sup>2</sup> Gibbons v. Ogden, 9 Wheat. 1, 189; The Passaic Bridges, 3 Wall. 782.



the means or the encouragements by which enterprise is fostered and protected is implied in this important grant of power.<sup>1</sup> Therefore Congress cannot legislate for the regulation of commerce on a stream whose navigable waters are exclusively within the limits of a State, and which does not, by connecting with other waters, form a continuous highway over which commerce is or may be carried on with other States or with foreign countries.<sup>2</sup> It is otherwise, however, with a river which, though wholly within a State, forms, with the lake into which it runs, a highway for inter-state commerce; and the regulations may extend to the vehicles of commerce which are used upon the river exclusively, but deliver merchandise upon the vessels navigating the lake.<sup>3</sup> So a law of Congress which undertakes to regulate the sale of an article within a State, and to impose penalties for preparing, offering for sale, or selling it, except after it has been subjected to a prescribed

<sup>1</sup> *Veazie v. Moor*, 14 How. 568, 574. It is well said in this case that "a pretension as far-reaching as this would extend to contracts between citizen and citizen of the same State, would control the pursuits of the planter, the grazier, the manufacturer, the mechanic, the immense operations of the collieries, the mines and furnaces of the country; for there is not one of these avocations the results of which may not become the subjects of foreign commerce, and be borne, either by turnpikes, canals, or railroads, from point to point within the several States, towards an ultimate destination. Such a pretension would effectually prevent or paralyze every effort at internal improvement of the several States; for it cannot be supposed that the States would exhaust their capital and their credit in the construction of turnpikes, canals, and railroads, the remuneration derivable from which, and all control over which, might be immediately wrested from them, because such public works would be facilities for commerce which, whilst availing itself of these facilities, was unquestionably internal, although immediately or ultimately it might become foreign."

<sup>2</sup> *Veazie v. Moor*, 14 How. 568.

<sup>3</sup> *The Daniel Ball*, 10 Wall. 557; *Withers v. Buckley*, 20 How. 84; *The Bright Star*, 1 Woolw. 266; *The Montello*, 20 Wall. 430.

test as a protection against explosions, is inoperative within state limits.<sup>1</sup>

*Commerce with Indian Tribes.* — It is immaterial to the power of Congress over commerce with an Indian tribe that the tribe resides within the limits of a State.<sup>2</sup> The power of regulation may extend to the prohibition of all intercourse except that carried on under license,<sup>3</sup> and at the discretion of Congress the prohibition may no doubt be made total.

*Embargo.* — At one notable period in the history of the country it was deemed wise to lay an embargo upon all commerce with Great Britain and France, as a means of obtaining redress against unfriendly action on their part, under which the commerce of the country was being seriously crippled. The embargo act was contested as unconstitutional. It was said that it was not a regulation of commerce, but a total destruction of commerce, and therefore not warranted by the power now under consideration. The act was nevertheless sustained in the District Courts.<sup>4</sup> The purpose was to protect and save commerce, not to destroy it. As an embargo is commonly intended to be hurtful to another nation, and is likely to be followed by hostilities if redress is not obtained, it would seem to be justified under the war power also. But the power that controls commerce must from the very nature of things include the power to restrict and limit, — to prohibit as to certain things, and to suspend altogether when for the time it seems wise. It is a sovereign power, and therefore knows no limit.

<sup>1</sup> *United States v. DeWitt*, 9 Wall. 41.

<sup>2</sup> *United States v. Holliday*, 3 Wall. 407; *Worcester v. Georgia*, 6 Pet. 515; *Johnson v. McIntosh*, 8 Wheat. 543; *Jackson v. Goodell*, 20 Johns. (N. Y.) 188.

<sup>3</sup> *United States v. Cisna*, 1 McLean, 254.

<sup>4</sup> *United States v. The William*, 2 Am. Law Jour. 255; *Wheeling Bridge Case*, 18 How. 421, 439.

*The Power Exclusive.*—The mere existence of this power in Congress does not necessarily exclude the States from all authority whatever which might affect the commerce falling within the control of Congress, provided no actual legislation of Congress is interfered with. Some regulations of minor importance it is usual to leave exclusively to the States; such, for example, as the regulation of pilots and the policing of harbors into which foreign and inter-state commerce is brought. So where foreign commodities are brought within a State and sold for retail trade between local merchants and consumers, they then become subjects of local commerce, and the control of Congress passes to the State. But in respect to the commerce that properly falls within the control of Congress, its authority is necessarily exclusive so far as it is exercised, and it is competent for Congress to extend its regulations to the most minute particulars. The lines of distinction between congressional and state jurisdiction will be best understood by a reference to the leading cases.

The State of New York granted to Robert Fulton and his associates, in consideration of the valuable service rendered in bringing the steamboat into practical use, the exclusive right to navigate the waters of the State with vessels propelled by steam for a series of years. The act was held void so far as concerned the waters which constituted the highways of foreign and inter-state commerce.<sup>1</sup>

The State of Maryland passed an act requiring importers of goods to take out a license and pay a license fee therefor. But this, whether regarded as the imposition of a tax, or a mere regulation, imposed a restraint, condition, or burden upon engaging in foreign commerce, and was therefore an encroachment upon the powers of Congress. No more important regulation can well be imposed than that of taxation, and a taxation of the importer because

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1.

of his business as importer is manifestly equivalent to a tax on the business itself.<sup>1</sup>

The State of Pennsylvania imposed a tax to be paid by railroads upon freights taken up within the State and carried out of it, and taken up without the State and brought within it. This was a tax upon inter-state commerce, and was pronounced invalid accordingly.<sup>2</sup>

The State of New York required every master of a vessel bringing passengers from other countries, and landing them within its limits, to pay to the State a certain sum per head for every such passenger. This requirement was clearly within the principle of the cases above referred to, and was also held unauthorized.<sup>3</sup> The State might nevertheless require a report from masters of vessels of the names, &c. of passengers brought by them; this being only a proper police regulation.<sup>4</sup>

The State of Alabama passed an act requiring the owners of steamboats navigating the waters of the State, before the boat should leave the port of Mobile, to file a statement with the probate judge of Mobile County, setting forth the names, residence, and interests of the owners. This was held invalid so far as it related to vessels enrolled and licensed for trade under the laws of Congress.<sup>5</sup>

<sup>1</sup> *Brown v. Maryland*, 12 Wheat. 419, 437; *Low v. Austin*, 13 Wall. 29. But articles imported may be taxed after they have passed from the hands of the importers, even though they remain in the original package. *Waring v. The Mayor*, 8 Wall. 110. See *Welton v. Missouri*, 91 U. S. Rep. 275. A state tax on a bill of lading of goods transported on the high seas is a regulation of commerce, and void. *Almy v. California*, 24 How. 169.

<sup>2</sup> *Case of State Freight Tax*, 15 Wall. 232.

<sup>3</sup> *Passenger Cases*, 7 How. 283.

<sup>4</sup> *New York v. Miln*, 11 Pet. 103. See this case examined and criticised in *Henderson v. New York*, 92 U. S. Rep. 259, where the principle of the *Passenger Cases*, that a State cannot impose any condition to the landing of passengers from a foreign country, is affirmed.

<sup>5</sup> *Sinnot v. Davenport*, 22 How. 227. See *Foster v. Master, &c.*, 94 U. S. Rep. 246; *Steamship Co. v. Port Wardens*, 6 Wall. 31.

The State of Louisiana enacted a law to compel all carriers of passengers to provide equal and impartial accommodations to those applying for carriage, irrespective of race, color, or previous condition. So far as this applied to vessels transporting passengers from Louisiana into other States, it was held inoperative.<sup>1</sup> A like decision was made in respect to a statute of Missouri which imposed a license tax on those who within the State dealt in goods, wares, and merchandise not the growth, produce, or manufacture of the State, while imposing no corresponding tax on those who dealt in goods, wares, and merchandise which were the growth, production, or manufacture of the State.<sup>2</sup>

The particular statement of these cases will suffice for our purpose.

Where state legislation is in its essence and of necessity a regulation of foreign or inter-state commerce, and therefore of national importance, it is an encroachment upon the power of Congress over the subject, and is therefore void, even though Congress may never have legislated upon the subject.<sup>3</sup> By refraining from action Congress in effect adopts as its own regulations those which the common law, or the civil law where that prevails, has provided for the government of such business, and those which the States, in the regulation of their domestic concerns, have established affecting commerce, but not regulating it within the meaning of the Constitution. In fact, congressional legislation is only necessary to cure defects in existing laws, as they are discovered, and to adapt such laws to new developments of trade.<sup>4</sup> Inaction by Congress is equivalent to a declaration that the commerce under its

<sup>1</sup> *Hall v. DeCuir*, 95 U. S. Rep. 485.

<sup>2</sup> *Welton v. Missouri*, 91 U. S. Rep. 275.

<sup>3</sup> *Welton v. Missouri*, 91 U. S. Rep. 275.

<sup>4</sup> *Hall v. DeCuir*, 95 U. S. Rep. 485, 490.

control shall remain free and untrammelled.<sup>1</sup> Therefore state legislation which undertakes to prohibit the driving or conveying of Texan, Indian, or Mexican cattle into the State during certain seasons of the year, is void though conflicting with no act of Congress.<sup>2</sup> So is legislation void which provides for the appointment of a state commissioner who is to satisfy himself whether or not any passenger (not a citizen) "who shall arrive in the State from any foreign port or place is lunatic, idiotic, deaf, dumb, blind, crippled, or infirm, and is not accompanied by relatives who are able and willing to support him, or is likely to become a public charge, or has been a pauper in any other country, or is from sickness or disease a public charge or likely soon to become so, or is a convicted criminal, or a lewd or debauched woman"; and who shall prevent any such person from landing unless the master, or owner, or consignee of the vessel shall give a bond in each case to save harmless every county, city, or town of the State against any expense incurred for the relief, support, or care of such person for two years thereafter. Such legislation is well characterized by the federal Supreme Court as "most extraordinary," not only as it assumes control over an important branch of foreign intercourse, with regulations nearly prohibitory, and intermeddles with matters which are properly the subject of treaty stipulations with foreign countries, but also as undertaking to confer despotic powers upon the commissioner, making him witness, judge of last resort, and officer to execute his own judgments.<sup>3</sup> So an act which imposes a burdensome and almost impossible condition on the shipmaster as a prerequisite to his landing his passengers, with an alternative payment of a small sum of money

<sup>1</sup> *Welton v. Missouri*, 91 U. S. Rep. 275, 282.

<sup>2</sup> *Railroad Co. v. Husen*, 95 U. S. Rep. 405.

<sup>3</sup> *Chy Lung v. Freeman*, 92 U. S. Rep. 275.

for each of them, is void, as being a tax on the ship-owner for the right to land his passengers, and in effect a tax on the passenger himself.<sup>1</sup>

In the cases above mentioned, the state legislation invaded a domain which is appropriated exclusively to the national power. But the regulation of the internal police of the State is with equal exclusiveness left to the States, so far as its rules will operate only within its own limits, even though indirectly foreign and inter-state commerce may be affected by it.<sup>2</sup> Therefore a state law granting to a state corporation the exclusive right for a term of years to control the slaughtering of cattle in and near to one of its cities, and requiring that all cattle and other animals intended for sale or slaughter in that district shall be brought to the yards and slaughter-houses of the corporation, and authorizing the corporation to exact certain prescribed fees for the use of its wharves and for each animal landed or slaughtered, may be maintained as a state regulation of police.<sup>3</sup> So the regulation of the sale of intoxicating drinks within a State belongs to the State itself, and it may require the taking out of a license as a condition to the dealing in intoxicating drinks, whether of home or foreign production, or may prohibit the sale of such drinks as a beverage, including those imported after they have passed from the hands of the importer and become a part of the general merchandise of the State.<sup>4</sup> So it is competent to require railroad companies to advertise annually, and adhere through the year to a tariff of fares.<sup>5</sup> Many other cases of regulation will be hereafter referred to.

<sup>1</sup> *Henderson v. New York*, 92 U. S. Rep. 259.

<sup>2</sup> *Purvear v. Commonwealth*, 5 Wall. 475; *United States v. De Witt*, 9 Wall. 41; *Sherlock v. Allen*, 93 U. S. Rep. 99.

<sup>3</sup> *Slaughter House Cases*, 16 Wall. 36.

<sup>4</sup> *License Cases*, 5 How. 504; *License Tax Cases*, 5 Wall. 462.

<sup>5</sup> *Railroad Co. v. Fuller*, 17 Wall. 560.

*Concurrent Jurisdiction.* — An example of state regulation on a subject which may at the discretion of Congress be brought within its control, is to be seen in the state pilot laws and harbor regulations. These have been recognized and their validity sustained from the organization of the government.<sup>1</sup> The States may also pass quarantine laws for their own protection against the introduction of disease from other States or foreign countries ;<sup>2</sup> but the power that controls the foreign and inter-state commerce of the country must undoubtedly have the authority to take this subject under its control as a part of its commercial regulations.

*Bridges, Dams, and Ferries.* — In general, every State establishes, regulates, and improves the highways within its own limits at discretion, and this is as true of highways by water as it is of any others. Sometimes the regulations go to the extent of establishing practical monopolies ; as in case of provisions in the lumber regions of the country, under which rafting companies are empowered to take control of all logs thrown into a public stream, and raft them to their destination, as the owners may direct. The States may also establish ferries across navigable waters, and require the owners of ferry-boats to take out license for running them, and pay fees therefor.<sup>3</sup> So the States may cause the navigable streams within their limits to be improved, and impose tolls on those making use of them to defray the expense.<sup>4</sup> But when a stream in its natural state constitutes a highway for foreign or inter-state commerce,

<sup>1</sup> *Cooley v. Wardens, &c.*, 12 How. 299 ; *The James Gray v. The John Fraser*, 21 How. 184 ; *Steamship Co. v. Joliffe*, 2 Wall. 450.

<sup>2</sup> *License Cases*, 5 How. 504, 632 ; *Railroad Co. v. Husen*, 95 U. S. Rep. 465.

<sup>3</sup> *United States v. The James Morrison*, Newb. Adm. 241 ; *Conway v. Taylor*, 1 Black, 603.

<sup>4</sup> *Palmer v. Cuyahoga Co.*, 3 McLean, 226 ; *McReynolds v. Smallhouse*, 8 Bush, (Ky.) 447 ; *Kellogg v. Union Co.*, 12 Conn. 7.



it is, as we have already seen, to be considered as constituting a part of the navigable waters of the Union, and as such it is subject to the superior regulation and control of the United States.<sup>1</sup> A State may authorize the bridging of a river constituting a part of the navigable waters of the Union, even though the bridge may to some extent be an impediment to commerce which is carried on upon the river under the protection of federal law.<sup>2</sup> But to justify such a bridge, its advantages to the general business of the country must be so great as to overbalance the inconvenience; and when such appears not to be the case, the bridge may be abated as a nuisance under the judgment of a competent court.<sup>3</sup> Nevertheless, even after a bridge has thus been judicially condemned, Congress in its plenary power over the subject may take away the grounds for its removal as an impediment to commerce, by declaring it a lawful structure.<sup>4</sup>

*State Duties on Imports and Exports.* — Further to preclude interference with the control by Congress over commerce it is declared by the Constitution that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.<sup>5</sup> It seems that the imports here intended are imports from foreign countries only,<sup>6</sup> but it is believed that a State cannot levy a tax upon property because of the intent of the owner to

<sup>1</sup> As to what are navigable waters of the United States, see *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245; *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Wall. 430.

<sup>2</sup> *Gilman v. Philadelphia*, 3 Wall. 713; *Jolly v. Terre Haute Bridge Co.*, 6 McLean, 237; *Silliman v. Bridge Co.*, 4 Blatch. 74, 395.

<sup>3</sup> *Wheeling Bridge Case*, 13 How. 518.

<sup>4</sup> *Wheeling Bridge Case*, 18 How. 421.

<sup>5</sup> Const., Art. I. § 10, cl. 2.

<sup>6</sup> *Woodruff v. Parham*, 8 Wall. 123. See *Almy v. California*, 24 How. 169.

export it to another, or discriminate in taxation between articles intended for consumption within the State and those sold to be taken into another.<sup>1</sup>

*Tonnage Duties.* — The States are also forbidden, without the consent of Congress, to lay any duty of tonnage.<sup>2</sup> It is, therefore, not competent to levy dues upon vessels measured by their capacity,<sup>3</sup> nor indeed any dues at all which are imposed upon the vessels as instruments of commerce, or are levied for the mere privilege of trading to a port.<sup>4</sup> But owners of vessels may be taxed by the State for their interests in them as property, by the same standards employed in other cases.<sup>5</sup> Wharfage dues are not taxes, and they may, therefore, be laid in proportion to tonnage.<sup>6</sup>

*Preferences.* — An important restriction is imposed upon the power of Congress in the provision that “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.”<sup>7</sup> The provision is plain, simple, and just, and requires no comment.<sup>8</sup>

*Possession of Imported Goods.* — Goods imported but not yet delivered to the importer are in the custody of the

<sup>1</sup> Jackson Iron Co. v. Auditor-General, 32 Mich. 488.

<sup>2</sup> Const., Art. I. § 10, cl. 3.

<sup>3</sup> Cannon v. New Orleans, 20 Wall. 577; State Tonnage Tax Case, 12 Wall. 204; Inman Steamship Co. v. Tinker, 94 U. S. Rep. 233.

<sup>4</sup> Steamship Co. v. Port Wardens, 6 Wall. 31; Peete v. Morgan, 19 Wall. 581; Wheeling, &c. Transp. Co. v. Wheeling (Sup. Ct. U. S.), 8 Reporter, 417.

<sup>5</sup> Peete v. Morgan, 19 Wall. 581. Only, however, where they have their home *situs*. St. Louis v. Ferry Co., 11 Wall. 423.

<sup>6</sup> Packet Co. v. Keokuk, 95 U. S. Rep. 80; St. Louis v. Ferry Co., 11 Wall. 423.

<sup>7</sup> Const., Art. I. § 9, cl. 6.

<sup>8</sup> It was somewhat considered in the Wheeling Bridge Case, 18 How. 421.

United States, and process from state courts will not reach them. They can only be delivered to the person entitled to receive them under the laws of Congress.<sup>1</sup>

### SECTION III. — NATURALIZATION.

*The Constitution.* — Congress is further empowered “to establish an uniform rule of naturalization.”<sup>2</sup> Naturalization is the act by which the rights, privileges, and immunities of citizenship are conferred upon a person born an alien. There is no doubt that, when Congress has prescribed a rule, its power is exclusive, since any regulation by a State, not in force in every other State, would break the rule of uniformity.<sup>3</sup> The States have, therefore, by their assent to this provision, made Congress the exclusive depository of the power to confer citizenship.<sup>4</sup>

A citizen, in the full acceptation of that term, may be said to be a member of the civil state entitled to all its privileges. The principal differences in privilege between an alien and a citizen consist in these: — the former when he resides in the country is there by sufferance merely; he cannot own real estate therein, and he cannot exercise political rights. But these differences do not always exist: the States of the Union recognize fully the right of aliens to reside within their limits without hindrance, and in many States they are permitted freely to hold, convey, and transmit to their descendants real estate. No less than twelve of the States also permit aliens, after a short residence therein, and after declaring their intention to become citizens, to exercise the elective franchise. When an alien is thus given the privilege permanently to reside within a

<sup>1</sup> *Harris v. Dennie*, 3 Pet. 292.

<sup>2</sup> Const., Art. I. § 8, cl. 4.

<sup>3</sup> *Chirac v. Chirac*, 2 Wheat. 259; *Houston v. Moore*, 5 Wheat. 1, 48; *Thurlow v. Massachusetts*, 5 How. 504; *Smith v. Turner*, 7 How. 283.

<sup>4</sup> *United States v. Villato*, 2 Dall. 370.

State, and to hold property of all kinds therein, and to exercise the privilege of suffrage, the distinction in right and privilege and immunity between him and a citizen is not very plain. Indeed, as the suffrage would seem peculiarly to belong to citizens, and as the voter for representatives in the state legislature may vote for representatives in Congress also,<sup>1</sup> it would seem that there might be some question whether a State could confer upon an alien this high privilege. It is a question, however, which has never been made. One privilege, at least, the State could not confer upon an alien. Without the power of naturalization she could not give him as a citizen a title to all those privileges and immunities of citizens of the several States which the federal Constitution guarantees and secures.<sup>2</sup>

#### SECTION IV. — BANKRUPTCY.

*The Constitution.* — Congress may also establish “uniform laws on the subject of bankruptcy throughout the United States.”<sup>3</sup> This is a power which Congress may or may not exercise, and when it abstains from doing so, the States are at liberty to legislate on the subject. Nevertheless their legislation must yield to the uniform laws whenever Congress shall see fit to pass them.<sup>4</sup> The power of Congress extends to voluntary as well as involuntary bankruptcy; and though formerly merchants and traders alone were subjected to the bankrupt laws, it is competent for Congress to bring all persons within their purview.<sup>5</sup>

*Exemptions.* — A bankrupt law may recognize and give

<sup>1</sup> Const., Art. I. § 2, cl. 1.

<sup>2</sup> Const., Art. IV. § 1, cl. 1.

<sup>3</sup> Const., Art. I. § 8, cl. 4.

<sup>4</sup> *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213; *Baldwin v. Hale*, 1 Wall. 223; *Ex parte Eames*, 2 Story, 322.

<sup>5</sup> *Re California Pac. R. R. Co.*, 3 Sawyer, 240; *Re Silverman*, 1 Sawyer, 410; 2 Abb. U. S. 243.

to those who become subject to its provisions the benefit of the exemption laws of the States in which they respectively reside, and the fact that these differ in liberality is not to be regarded as depriving the bankrupt law of the character of uniformity.<sup>1</sup> Indeed, this is a just and equal rule, since the bankrupt's debts are contracted on the understanding that he is entitled to the exemptions provided by the laws of his own State, and creditors cannot complain when he is allowed them.

#### SECTION V. — THE CURRENCY.

*Coining Money and regulating its Value.* — Among the most important of the powers conferred upon Congress is that “to coin money and regulate the value thereof and of foreign coin.”<sup>2</sup> This power would seem to be made exclusive by the further provision that no State shall “coin money,” or “make anything but gold and silver a tender in payment of debts.”<sup>3</sup> The general purpose intended to be accomplished by these provisions was, to confer upon Congress the power of general regulation of the currency of the country, with a view to uniformity.

To coin money is to stamp pieces of metal for use as a medium of exchange in commerce, according to fixed standards of value. When money is thus coined and

<sup>1</sup> Re Smith, 2 Woods, 458; Re Affold's Estate, 16 Am. Law Reg. 624. There are other decisions on the subject, and some of them are in conflict. See Re Deckert, 10 Bank. Reg. 1; Re Shipman, 14 Bank. Reg. 570.

<sup>2</sup> Const., Art. I. § 8, cl. 5.

<sup>3</sup> Const., Art. I. § 10, cl. 1. Practically, the power is made exclusive, though doubtless the States might legislate on the subject of legal tender, if at any time the legislation of Congress should be found not fully to cover the subject. And possibly a State might establish standards differing from those fixed by Congress, for the discharge of contracts subsequently made within the State. But when Congress alone can coin money and regulate its value, it is difficult to understand how this can be.

valued by sovereign authority, and when by law no other standard exists, it would by force of these facts become a lawful tender; but where money is coined of two or more metals, it is usual to restrict the legal tender quality of the baser metal to small sums, as has been done with silver, copper, and nickel coins in this country.

*Legal Tender Paper.* — It has been decided that Congress has power to make treasury notes a legal tender in the payment of debts previously as well as subsequently contracted.<sup>1</sup> It is not agreed from what clause or portion of the Constitution this power is derived; and as the legal tender act was passed during the existence of a civil war which put the existence of the Union in peril, some jurists have been inclined to justify the exercise of the power as they would any other act made imperative by the extreme exigencies of war. But a power whose justification rests upon necessity can never be restricted to any one period or exigency; and from the nature of the justification it must rest in the discretion of Congress, to be exercised whenever in its opinion the need is sufficiently urgent. In the law it is declared that “United States treasury notes shall be lawful money”;<sup>2</sup> as though the making them with the legal tender quality was the coining of money; but there is nothing in the debates attending the making and adoption of the Constitution, or in contemporary history, which would lead to the belief that the phrase “to coin money” was understood in a broader sense than is above expressed.

*Changing Values.* — Under the power to regulate, the legal value may be changed at discretion. As the relative

<sup>1</sup> Legal Tender Cases, 12 Wall. 457, overruling *Hepburn v. Griswold*, 8 Wall. 602.

<sup>2</sup> Rev. Stat. U. S. (1878), § 3588. See *Trebilcock v. Wilson*, 12 Wall. 687, 695, per Field, J.; and more particularly the opinion of Bradley, J., in *Legal Tender Cases*, 12 Wall. 554.

values of the different metals change from time to time, it becomes necessary to employ this power with a view to uniformity in standards, since otherwise the coin of least intrinsic value in proportion to its legal rating would in time drive the other from circulation. Any considerable change in the legal standards for any other reason is not to be expected, and, as it would operate to change the value of all existing credits, would be tyrannical.

*Dues to the States.* — The States, in the exercise of their own sovereignty, will determine for themselves in what currency they will collect their taxes, and the act making treasury notes a legal tender can have no application as between a State and those upon whom the State imposes pecuniary burdens for its own necessary purposes.<sup>1</sup> And private parties in their contracts may stipulate in what currency they shall be discharged, and the courts will enforce the stipulation.<sup>2</sup> And, on common-law principles, a tender in whatever passes current as money in the business transactions of the day is a sufficient tender, if not objected to by the creditor at the time the tender is made.<sup>3</sup>

#### SECTION VI. — BILLS OF CREDIT.

*Prohibition.* — The States are also prohibited to “emit bills of credit.” This inhibition was in furtherance of the same general policy which took from the States the power to coin money and restricted their power over the legal tender. Previous to the Revolution, the Colonies from time to time had issued paper obligations, promising to pay to the holders certain definite sums of money, and had put these in circulation as money among the people. These

<sup>1</sup> Lane County v. Oregon, 7 Wall. 71.

<sup>2</sup> Brownson v. Rodes, 7 Wall. 229; Butler v. Horwitz, 7 Wall. 258; Trebilcock v. Wilson, 12 Wall. 687.

<sup>3</sup> Warren v. Manis, 7 Johns. (N. Y.) 476; Snow v. Perry, 9 Pick. (Mass.) 540; Wheeler v. Knaggs, 8 Ohio, 169.

were bills of credit, based on the credit of the Colony issuing them; and they had had when issued an invariable tendency to depreciation and to the dishonor of the public credit. The Constitutional Convention, and the people in adopting their work, agreed that the States should surrender the power to repeat this painful history. The prohibition, however, does not go so far as to preclude the States from chartering banks of issue; for to "emit bills of credit" the State itself must put them out on its own credit.

*Definition.* — By bill of credit, then, is meant a bill issued by the State, involving the faith of the State, and designed to circulate as money on the credit of the State, in the ordinary uses of business.<sup>1</sup> And the bills of a bank chartered by the State are not bills of credit in this sense, even though the State is sole stockholder in the bank,<sup>2</sup> or though the State has pledged its credit for their payment in case the bank shall fail to do so.<sup>3</sup>

#### SECTION VII. — WEIGHTS AND MEASURES.

*Standards.* — Congress is further empowered "to fix the standard of weights and measures."<sup>4</sup> When this power is exercised it is exclusive, or there would be no "standard."

#### SECTION VIII. — COUNTERFEITING.

Congress may also "provide for the punishment of counterfeiting the securities and current coin of the United States."<sup>5</sup>

"This power," it has been said, "would naturally flow as an incident from the antecedent powers to borrow money

<sup>1</sup> *Craig v. Missouri*, 4 Pet. 410; *Woodruff v. Trapnall*, 10 How. 109.

<sup>2</sup> *Briscoe v. Bank of Kentucky*, 11 Pet. 257.

<sup>3</sup> *Darrington v. State Bank*, 13 How. 12.

<sup>4</sup> Const., Art. I. § 8, cl. 5.

<sup>5</sup> Const., Art. I. § 8, cl. 6.



and regulate the coinage; and, indeed, without it those powers would be without any adequate sanction.”<sup>1</sup> It would also naturally include the punishment of uttering and publishing the forged securities and coin, and the having them in possession for that purpose; and such has been the practical construction. Nevertheless, the States may punish these acts, as offences against themselves.<sup>2</sup>

#### SECTION IX. — POST-OFFICES AND POST-ROADS.

*The Constitution.* — Congress is further given power “to establish post-offices and post-roads.” Every road within a State, including railroads, canals, turnpikes, and navigable waters, existing or created within a State, becomes a post-road when by law or by the action of the post-office department provision is made for the transportation of the mail upon or over it. Whether by the power to establish post-roads any more was intended than a power to designate or point out what roads shall be mail roads, and the right of way along them when so designated, has always been and is still made a question. Many statesmen and jurists have contended that the power comprehends the laying out and constructing any roads which Congress may deem proper and needful for the conveyance of the mails, and the keeping them in due repair for the purpose.<sup>3</sup> This last view has been acted upon by Congress in some instances. The power to establish post-offices includes everything essential to a complete postal system under federal control and management, and the power to protect the same by providing<sup>4</sup> for the punishment as crimes of such acts as would tend to embarrass or defeat

<sup>1</sup> Story on Const., § 1123.

<sup>2</sup> *Fox v. Ohio*, 5 How. 410, 433. See *United States v. Marigold*, 9 How. 560; *Moore v. Illinois*, 14 How. 13.

<sup>3</sup> See 1 Kent, 268, and note; Story on Const., §§ 1128–1150, and notes; *Wheeling Bridge Case*, 18 How. 421; *Dickey v. Turnpike Co.*, 7 Dana, (Ky.) 113.

the purpose had in view in their establishment. And whatever place is officially kept as a place of deposit of mailable matter is a post-office, though it be merely a desk or a trunk or box carried about a house or from one building to another.<sup>1</sup>

#### SECTION X. — COPYRIGHTS AND PATENTS.

*The Constitution.* — Congress is further empowered “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.”<sup>2</sup> Under this power, exclusive copyrights are granted for a term of years to the authors, inventors, designers, or proprietors of books, maps, charts, pictures, prints, statues, models, etc., and exclusive rights to make, use, and vend new inventions. Acts of Congress undertaking to secure exclusive rights in the use of registered trade-marks have recently been held void, as not being within this grant of power.<sup>3</sup> The same cases hold that Congress cannot pass such acts under its power to regulate commerce with foreign nations and among the several States and with the Indian tribes; at least, if such laws are general in their operation, and not limited to the commerce over which Congress is given control.

*Common-Law Rights.* — An author has in the United States no exclusive property in a published work except under the federal laws.<sup>4</sup> But the common law protects him against the unauthorized publication of his manuscripts and letters.<sup>5</sup>

<sup>1</sup> *United States v. Marselis*, 2 Blatch. 108.

<sup>2</sup> *Const.*, Art. I. § 8, cl. 8.

<sup>3</sup> *United States v. Steffens*, U. S. Sup. Court, Oct. Term, 1879; *United States v. Witteman*, decided at the same time.

<sup>4</sup> *Wheaton v. Peters*, 8 Pet. 591.

<sup>5</sup> *Wheaton v. Peters*, 8 Pet. 591, 657; *Bartlett v. Crittenden*, 5 McLean, 32; *Pope v. Curl*, 2 Atk. 342.

*The Power Plenary.* — The power to legislate on the subject of patents is plenary, and may be exercised in the passage of either general or special laws.<sup>1</sup> But such laws have no extra-territorial effect whatever.<sup>2</sup>

SECTION XI. — PIRACIES, FELONIES ON THE HIGH SEAS, ETC.

*Punishment.* — Congress is further empowered “to define and punish piracies and felonies committed on the high seas, and offences against the law of nations.” Piracy is universally understood in the law of nations as robbery or a forcible depredation on the high seas, *animo furandi*. It is the same offence at sea with robbery on land,<sup>3</sup> and a statute for the punishment of piracy, “as defined by the law of nations,” is sufficient without further definition.<sup>4</sup> But the manifest purpose of this provision is to empower Congress to provide for the punishment as crimes of all such infamous acts committed on the high seas as constitute offences against the United States or against all nations.<sup>5</sup> But robbery committed on a ship belonging to subjects of a foreign state, by one not a citizen of the United States, is a crime only against such foreign state, and not punishable in the courts of the United States.<sup>6</sup> By high seas is intended all tide-waters below low-water mark.<sup>7</sup>

<sup>1</sup> *Evans v. Eaton*, Pet. C. C. 322; *Bloomer v. Stolley*, 5 McLean, 158; *Blanchard v. Sprague*, 2 Story, 164; *Blanchard's Factory v. Warner*, 1 Blatch. 258.

<sup>2</sup> *Brown v. Duchesne*, 19 How. 183.

<sup>3</sup> 1 Kent, 183; 4 Bl. Com. 71–73.

<sup>4</sup> *United States v. Smith*, 5 Wheat. 153. See *United States v. Brig Malek Adhel*, 2 How. 210.

<sup>5</sup> 1 Kent, 188.

<sup>6</sup> *United States v. Palmer*, 3 Wheat. 610; *United States v. Kessler*, Baldw. 15, 22.

<sup>7</sup> *United States v. Pirates*, 5 Wheat. 184; *United States v. Wiltberger*, 5 Wheat. 76, 94.

## SECTION XII. — WAR.

*The Constitution.* — It is further provided that Congress shall have power “to declare war, to grant letters of marque and reprisal, and make rules concerning captures on land and water.”<sup>1</sup>

*Definition.* — War is said to be “that state in which a nation prosecutes its right by force.”<sup>2</sup> It may exist without being declared, through the hostile acts of a foreign power, or through armed insurrection, and may then be recognized and repelled by the President as commander-in-chief of the army and navy.<sup>3</sup> The power to grant letters of marque and reprisal is included in the power to declare war; but there is a propriety in granting it specifically, since they are sometimes issued with a view to obtain redress for some national injury without resort to further hostile measures. Until rules are made concerning captures and confiscations, no private citizen can enforce rights of forfeiture, either with or without judicial assistance.<sup>4</sup> But as a legitimate means of prosecuting war the property of a belligerent may be seized and confiscated, and disposed of absolutely at the will of the captor.<sup>5</sup> And this right exists in favor of the United States in respect to its citizens engaged in rebellion against its authority.<sup>6</sup> So as a war measure the slaves of persons in rebellion may be freed by proclamation.<sup>7</sup> When war exists the government

<sup>1</sup> Const., Art. I. § 8, cl. 11.

<sup>2</sup> The Prize Cases, 2 Black, 635, 666.

<sup>3</sup> The Prize Cases, 2 Black, 635, 668.

<sup>4</sup> Brown v. United States, 8 Cranch, 110.

<sup>5</sup> Miller v. United States, 11 Wall. 268; Tyler v. Defrees, 11 Wall. 331.

<sup>6</sup> The Prize Cases, 2 Black, 635, 673; The Grape Shot, 9 Wall. 129, 132.

<sup>7</sup> Slabach v. Cushman, 12 Fla. 472; Dorris v. Grace, 24 Ark. 326; Weaver v. Lapsley, 42 Ala. 601; Hall v. Keese, 31 Texas, 504.

possesses and may exercise all those extreme powers which any sovereignty can wield under the rules of war recognized by the civilized world; and among these is the power to acquire territory, either by conquest or by treaty,<sup>1</sup> to create military commissions for the trial of military and other offences in districts where the civil law is displaced by warlike operations,<sup>2</sup> and to establish provisional courts in conquered territory.<sup>3</sup> But there is and can be no power to displace the guaranties and protections of the Constitution where the civil courts are discharging their functions and can enforce them.<sup>4</sup>

*Armies.* — Congress may also “raise and support armies; but no appropriation of money to that use shall be for a longer term than two years.”<sup>5</sup> The purpose of this restriction is to put it out of the power of the executive to keep on foot a standing army, when in the opinion of the legislature it is not needful.<sup>6</sup> Who shall compose these armies, and how they shall be raised, must be determined by law. Minors may be enlisted without the consent of their parents or guardians when the law fails to require such consent,<sup>7</sup> and all persons capable of performing military duty, irrespective of age or of previous exemptions, may be compelled to do so under laws for the purpose.<sup>8</sup>

<sup>1</sup> *American Ins. Co. v. Canter*, 1 Pet. 511, 542.

<sup>2</sup> *Ex parte Milligan*, 4 Wall. 2.

<sup>3</sup> *Jecker v. Montgomery*, 13 How. 498; *The Grape Shot*, 9 Wall. 129.

<sup>4</sup> *Ex parte Milligan*, 4 Wall. 2.

<sup>5</sup> Const., Art. I. § 8, cl. 12.

<sup>6</sup> Story on Const., § 1188. The same end is accomplished in Great Britain by passing mutiny laws only from year to year.

<sup>7</sup> *Ex parte Brown*, 5 Cranch, C. C. 554; *United States v. Bainbridge*, 1 Mason, 71.

<sup>8</sup> It was so held in the Confederate States, where the question would be the same. *Ex parte Coupland*, 26 Texas, 386; *Barber v. Irwin*, 34 Geo. 27; *Ex parte Tate*, 39 Ala. 254.

*Navy.* — Congress may also “provide and maintain a navy.”<sup>1</sup> What has been said respecting armies applies equally here. The powers of enlistment and conscription are the same, but conscription must operate under prescribed and impartial rules: the impressment of seamen, formerly practised in England, is not admissible in this country.<sup>2</sup>

*Military Law.* — Congress may also “make rules for the government and regulation of the land and naval forces.”<sup>3</sup> These rules must not be inconsistent with the proper authority of the President as commander-in-chief of the army and navy, which, being conferred by the Constitution, cannot be taken away by Congress.

*Militia.* — Congress may also “provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions.”<sup>4</sup> The militia consists of those persons who under the law are liable to perform military duty, and who are enrolled and officered so as to be ready for service when called upon; and they are state forces until actually called into the service of the Union. Congress may confer upon the President the power to call them forth, and this makes him the exclusive judge when the exigency has arisen for the exercise of the authority, and renders one who refuses to obey the call liable to punishment under military law.<sup>5</sup> The President may make his requisition directly upon the executive of the State, or upon the militia officers.<sup>6</sup>

Congress may also “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

<sup>1</sup> Const., Art. I. § 8, cl. 13.

<sup>2</sup> Cooley, Const. Lim., 4th ed., 367.

<sup>3</sup> Const., Art. I. § 8, cl. 14. See *In re Griner*, 16 Wis. 423.

<sup>4</sup> Const., Art. I. § 8, cl. 15.

<sup>5</sup> *Houston v. Moore*, 5 Wheat. 1; *Martin v. Mott*, 12 Wheat. 19.

<sup>6</sup> See cases cited in last note.

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.”<sup>1</sup> But though the States have the appointment of the officers, the bodies of militia called into the service of the United States are subject not only to the orders of the President as commander-in-chief, but also to those of any officer outranking their own, who may, under the authority of the commander-in-chief, be placed over them. An army obtained by conscription is not the militia, though conscripted from it.<sup>2</sup>

*State Power Subordinate.*—The intent of the foregoing provisions is to render the federal government supreme in all that pertains to war, with subordinate authority in the States. This is made more apparent by a subsequent provision that no State shall enter into any treaty, alliance, or confederation, or grant letters of marque and reprisal;<sup>3</sup> and by still another, which declares that no State without the consent of Congress shall 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.<sup>4</sup> By troops here are meant a standing force, in distinction to the militia which the States are expected to enrol, officer, equip, and instruct.<sup>5</sup> The agreements and compacts which may be entered into with the consent of Congress differ from the treaties, alliances, and confederations which are absolutely forbidden, in this: that the latter are made for perpetuity or for a considerable time, and generally have successive execution, while the former are made for temporary purposes, and are per-

<sup>1</sup> Const., Art. I. § 8, cl. 16.

<sup>2</sup> See the discussion in *Kneedler v. Lane*, 45 Penn. St. 238.

<sup>3</sup> Const., Art. I. § 10, cl. 1.

<sup>4</sup> Const., Art. I. § 10, cl. 3.

<sup>5</sup> See *Luther v. Borden*, 7 How. 1.

fects in their execution once for all.<sup>1</sup> An attempt by a State to deliver a fugitive from justice to a foreign sovereignty, in response to a demand therefor, would be an attempt to perfect and perform an agreement, and is therefore unauthorized.<sup>2</sup>

### SECTION XIII. — CEDED DISTRICTS.

*The Constitution.* — Congress is further empowered “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.”<sup>3</sup>

*District of Columbia.* — The cession contemplated by this clause was afterwards made by the legislatures of Maryland and Virginia, and Congress, as the legislature of the Union,<sup>4</sup> assumed the exercise of exclusive legislation over it, but creating municipal governments with limited powers. This exclusive legislation over people who have no voice in the selection of legislators is inconsistent with the right of self-government, on the recognition of which American institutions rest, and, like the control over territories, must be regarded as one of the necessary exceptions to which, in their application, such general principles are subject.<sup>5</sup> In respect to a portion of this territory Congress has relinquished its jurisdiction by retroceding it to Virginia, and for a time it gave to the remainder a territorial government. But the power in Congress thus

<sup>1</sup> *Holmes v. Jennison*, 14 Pet. 540, 572.

<sup>2</sup> *Holmes v. Jennison*, 14 Pet. 540.      <sup>3</sup> Const., Art. I. § 8, cl. 17.

<sup>4</sup> *Cohens v. Virginia*, 6 Wheat. 264, 424.

<sup>5</sup> *Loughborough v. Blake*, 5 Wheat. 317, 322.



to delegate its general legislative authority has been denied, with much apparent reason.<sup>1</sup>

*Exclusive Jurisdiction.* — A power of exclusive legislation carries with it exclusive jurisdiction,<sup>2</sup> and therefore the States cannot take cognizance of acts done in places thus acquired by the United States, and the inhabitants of those places cease to be inhabitants of the State, and can no longer exercise any civil or political rights under the laws of the State.<sup>3</sup> But state jurisdiction is not excluded over territory held or acquired by the United States without the consent of the State within which it lies.<sup>4</sup>

#### SECTION XIV. — TREASON.

*Punishment.* — Congress is further empowered “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.”<sup>5</sup> By this last clause the cruel feature of the old law, which punished the traitor in the persons of his descendants, was forever precluded.<sup>6</sup>

#### SECTION XV. — NON-ENUMERATED AND IMPLIED POWERS.

*General Powers.* — Congress is further empowered “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other

<sup>1</sup> *Roach v. Van Riswick*, Sup. Ct. Dist. Columbia, 20 Alb. Law Jour. 433.

<sup>2</sup> *United States v. Cornell*, 2 Mason, 60.

<sup>3</sup> *Commonwealth v. Clary*, 8 Mass. 72; *Sinks v. Reese*, 19 Ohio, N. S. 306.

<sup>4</sup> *People v. Godfrey*, 17 Johns. 225.

<sup>5</sup> Const., Art. III. § 3. See *United States v. Greathouse*, 2 Abb. U. S. 364; *Bigelow v. Forrest*, 9 Wall. 339; *Miller v. United States*, 11 Wall. 268.

<sup>6</sup> Forfeiture, except during the life of the person attainted, was abolished in England by Stat. 3 & 4 Wm. IV. c. 106.

powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”<sup>1</sup> The import of the clause is, that Congress shall have all the incidental and instrumental powers necessary and proper to carry into execution all the express powers. It neither enlarges any power specifically given, nor is it a grant of any new power to Congress, but it is merely a declaration, for the removal of all uncertainty, that the means for carrying into execution those otherwise granted are included in the grant.<sup>2</sup> The grant of the principal must include the necessary and proper incidents without which the grant would be ineffectual. It would be as undesirable as it would be impracticable to enumerate all the means by the use of which the powers expressly conferred shall be exercised, since what may be suitable and proper means at one period may be wholly unsuitable and ineffectual at another period, under conditions which had not been anticipated, and thus the iron rule of limitation to means specified would defeat the grant itself. The clause above recited distinctly negatives any suggestion that so unwise and impracticable a restriction was intended. Those who made the Constitution, conferred upon the government of their creation sovereign powers; they prescribed for it a sphere of action, limited, indeed, as respects subjects and purposes, but within which it should move with supreme authority, untrammelled except by the restraints which were expressly imposed, or which were implied in the continued existence of the States and of free institutions. But there cannot be such a thing as a sovereign without a choice of the means by which to exercise sovereign powers.

In any particular in which the powers of the United States are contemplated, the necessity for the exercise of incidental powers is apparent. Congress, as a means to

<sup>1</sup> Const., Art. I. § 8, cl. 18.

<sup>2</sup> Story on Const., § 1243.

the collection of its revenues, provides for the seizure, sale, or confiscation of property ; in its regulation of commerce, builds light-houses and removes obstructions from harbors ; in establishing post-offices, prescribes the rates of postage, provides for the appointment of postmasters and other agents, for the free delivery of postal matter, and for the sale and payment of postal money orders, &c. But whatever may be the power it exercises in these and other cases, it must provide against its being rendered nugatory, and its purpose thwarted, by enacting laws for the punishment of those who commit acts which tend to obstruct, defeat, or impair the force of their due execution, or who neglect duties essential to the accomplishment of the ends designed.<sup>1</sup> Without these and similar incidental powers, the government would be as completely without the means of perpetuating its existence as was the Confederation itself.

The necessity that shall justify the making of particular laws is not an absolute necessity, but Congress may make any law, not by the Constitution expressly or impliedly prohibited, which it shall deem conducive to the execution of any express power.<sup>2</sup> It may therefore charter a national bank as a necessary and useful instrument in the fiscal operations of the government.<sup>3</sup> It may give a preference to the demands of the United States in case of insolvent estates.<sup>4</sup> It may provide for the punishment of acts which interfere with, obstruct, or prevent navigation, though done on land.<sup>5</sup> And Congress is of necessity the exclusive

<sup>1</sup> *United States v. Bevans*, 3 Wheat. 336.

<sup>2</sup> *Legal Tender Cases*, 12 Wall. 457, 539; *Martin v. Hunter*, 1 Wheat. 304.

<sup>3</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 413; *Osborn v. United States Bank*, 9 Wheat. 738.

<sup>4</sup> *United States v. Fisher*, 2 Cranch, 358.

<sup>5</sup> *United States v. Coombs*, 12 Pet. 72.

judge of what is needful and proper, when the means chosen conduce to the end and are not forbidden.<sup>1</sup>

*Internal Improvements.*—How far Congress as an incident to powers expressly granted has a right to appropriate money or public lands to what are called internal improvements within the States, has been the subject of earnest discussion, almost from the foundation of the government, and is even now not authoritatively determined. It is for the most part conceded that such appropriations may be made for the improvement of the navigable waters which constitute highways of foreign and inter-state commerce, and the harbors which are important to such commerce, and to build breakwaters, light-houses, and piers; but it is contended by some that Congress may also assist in the making or improvement of highways, railroads, and canals, existing or authorized under state authority. To some extent such assistance has been given in money, but to a much greater extent in lands, and the question of right, like that of protective duties, has always been treated as exclusively political.<sup>2</sup>

*Alien and Sedition Laws.*—Two noted instances of the exercise of implied powers in the early history of the country led to much earnest and excited discussion of the theory of the Constitution, and to bitter and dangerous controversies respecting it. The first was in the *Alien Law*, so called,<sup>3</sup> which authorized the President to order out of the country such aliens as he should deem dangerous to the peace and safety of the United States, or should have reasonable grounds to suspect to be concerned in any treasonable or secret machinations against the government, and imposed severe penalties for disobedience to

<sup>1</sup> *McCulloch v. Maryland*, 4 Wheat. 316, 413. See *Anderson v. Dunn*, 6 Wheat. 204.

<sup>2</sup> Story on Const., ch. 26 and notes.

<sup>3</sup> Act of June 25, 1798.

the order. The other was in the *Sedition Law*,<sup>1</sup> which declared it to be a public crime, punishable with fine and imprisonment, for any persons unlawfully to combine and conspire together with intent to oppose any measure or measures of the United States, &c., or with such intent to counsel, advise, or attempt to procure any insurrection, unlawful assembly, or combination, or to write, print, utter, or publish, or cause or procure to be written, &c., or wilfully to assist in writing, &c., any false, scandalous, and malicious writings against the government of the United States, or either house of Congress, or the President, with intent to defame them, or to bring them into contempt or disrepute, or to excite against them the hatred of the people, or to stir up sedition, or to excite any unlawful combination for opposing or resisting any law, or any lawful act of the President, or to resist, oppose, or defeat any such law or act, or to aid, encourage, or abet any hostile designs of foreign nations against the United States.<sup>2</sup> Prosecutions were had under this last law, and it was sustained by the judiciary, but the prosecutions had the effect to excite a violent public clamor throughout the country, and were held up to the people as attempts to stifle constitutional discussion, and to prolong the ascendancy of the party in power, by holding the threat of punishment over the heads of those who would vigorously assail its conduct, measures, and purposes.<sup>3</sup>

*Resolutions of '98.* — These laws were the immediate incitement to the Kentucky and Virginia Resolutions of 1798–9, passed by the legislatures of those States respectively. The Virginia Resolutions, after avowing a firm attachment to the Constitution, and a determination to support it, declare that the legislature “views the powers

<sup>1</sup> Act of July 14, 1798.

<sup>2</sup> Story on Const., § 1293.

<sup>3</sup> The prosecutions under the Sedition Law are given in Wharton's State Trials.

of the federal government as resulting from the compact to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact, as no further valid than they are authorized by the grants enumerated in that compact, and that, in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact, the States, who are the parties thereto, have the right and are in duty bound to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them.”<sup>1</sup> Of the Kentucky Resolutions there were two sets, the first of which, after declaring that the Constitution was a compact between the States and the government founded by it, proceeded to assert that “this government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers, but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself as well of infractions as of the mode and measure of redress.”<sup>2</sup> The second, passed in the following year; declared that a nullification by the States of all unauthorized acts done under color of the Constitution is the rightful remedy.<sup>3</sup>

The Alien and Sedition Laws were temporary, and soon expired, and it has long been settled that there must be and is within the federal government authority to decide finally upon the extent and scope of its powers. The judicial decisions to this effect are numerous,<sup>4</sup> and the practice of

<sup>1</sup> Elliott's Debates, iv. 528, where Madison's report on the Resolutions is also published.

<sup>2</sup> Elliott's Debates, iv. 540.

<sup>3</sup> Elliott's Debates, iv. 544.

<sup>4</sup> *Martin v. Hunter's Lessee*, 1 Wheat. 304, 334; *Cohens v. Virginia*, 6 Wheat. 264; *Chisholm v. Georgia*, 2 Dall. 419; *Ableman v.*

the other departments, and of the States also, is in accord with them.

SECTION XVI. — RESTRICTIONS ON THE POWERS OF CONGRESS.

*Implied Restrictions.* — In the preceding chapter allusion has been made to certain restrictions on the powers of Congress, which are implied from the division of powers as between the nation and the States, and as between the several departments of the national government. *First*, that it must not exercise the powers, or any portion thereof, conferred by the Constitution on the executive or the judiciary; and, *second*, that it must not encroach upon the sphere of sovereignty which by the Constitution is left in or assigned to the States. Some others will now be mentioned.

1. No legislative body can delegate to another department of the government, or to any other authority, the power, either generally or specially, to enact laws. The reason is found in the very existence of its own powers. This high prerogative has been intrusted to its own wisdom, judgment, and patriotism, and not to those of other persons, and it will act *ultra vires* if it undertakes to delegate the trust, instead of executing it.<sup>1</sup> But this principle does not preclude conferring local powers of government upon the local authorities, according to the immemorial practice of our race and country,<sup>2</sup> nor the giving to

Booth, 21 How. 506; Tarble's Case, 13 Wall. 397. There was always a dispute whether the "nullification" intended by the Kentucky and Virginia Resolutions was anything more than a resort to such means of redress as were admissible under the Constitution, and to an amendment of that instrument if needful.

<sup>1</sup> Locke on Civil Government, § 142; *Barto v. Himrod*, 8 N. Y. 483; *Rice v. Foster*, 4 Harr. 479; *Cooley, Const. Lim.*, 4th ed., 141-152.

<sup>2</sup> *Durach's Appeal*, 62 Penn. St. 491; *Mills v. Charleton*, 29 Wis. 415; *People v. Kelsey*, 34 Cal. 470; *People v. Hurlbut*, 24 Mich. 44;

the territories a general authority to legislate on their own affairs. It is competent also, and sometimes necessary, to confer authority on the executive or the judiciary to determine in what cases a particular law shall be applied. For example, the act of Congress suspending the privilege of the writ of *habeas corpus* during the late civil war did not declare a general suspension, — which would have been entirely needless, and therefore an act of tyranny, — but it empowered the President to exercise his judgment, and supersede the writ in particular cases, as he might deem the public interest to require. A similar discretionary power is conferred upon the President, or upon one of the heads of department, in many cases.

2. No legislative body under its general authority can pass any act which shall limit or be derogatory to the authority of its successors. If one legislature could in any degree limit the power of its successors, the process might be repeated from time to time, until the State would be stripped of its legislative authority, and of the sovereignty itself. It is for this reason that a State can pass no irrepealable law; for an irrepealable law must necessarily remove something from the reach of subsequent legislation.<sup>1</sup>

3. Every legislative body is to make laws for the public good, and not for the benefit of individuals; and it is to make them aided by the light of those general principles which lie at the foundation of representative institutions. Here, however, we touch the province of legislative discretion. What is for the public good, and what is required by the principles underlying representative government, the legislature must decide under the responsibility of its members to their constituents.

*Cross v. Hopkins*, 6 W. Va. 323; *Stone v. Charlestown*, 114 Mass. 214; and many cases collected in *Cooley, Const. Lim.*, 4th ed., 141-152, where the validity of local option laws is discussed.

<sup>1</sup> 1 Bl. Com. 90; *Bloomer v. Stolley*, 5 McLean, 161.



*Express Restrictions.*— Those express restrictions upon the powers of Congress which are intended for the protection of personal rights and liberties, it will be more convenient to refer to hereafter, in connection with other protections. The following are some which concern general policy.

*Slave Trade.*— Congress was forbidden, though in obscure language, to prohibit the importation of slaves prior to the year 1808.<sup>1</sup> The forbidden power was exercised as soon as this time had expired.

*Titles, Presents, &c.*— The granting of titles of nobility is prohibited.<sup>2</sup> Their inconsistency with republican institutions, based upon perfect equality of rights, was so manifest as to render the prohibition an important security. It is also provided, that no person holding an office of profit or trust under the United States shall, without the consent of Congress, accept any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state. A wise jealousy of foreign influence in the affairs of government will amply justify this provision.<sup>3</sup>

<sup>1</sup> Const., Art. I. § 9, cl. 1.

<sup>2</sup> Const., Art. I. § 9, cl. 8.

<sup>3</sup> Story on Const., § 1352.

## CHAPTER V.

## THE POWERS OF THE EXECUTIVE.

*Commander-in-Chief.* — The President is Commander-in-Chief of the army and navy of the United States, and of the militia of the several States when called into actual service.<sup>1</sup> This important power is confided to him to be exercised in his discretion, but it is expected to be exercised through the War Department, and not by taking command in the field, or by any personal direction of armies.<sup>2</sup> As commander, while war prevails the President has all the powers recognized by the laws and usages of war, but at all times he must be governed by law, and his orders which the law does not warrant will be no protection to officers acting under them.<sup>3</sup> An example is where he appoints an unlawful military commission, which proceeds to try and punish offenders against the law.<sup>4</sup> The power to declare war being confided to the legislature, he has no power to originate it, but he may in advance of its declaration employ the army and navy to suppress insurrection or repel invasion.<sup>5</sup>

*The Cabinet.* — The President may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of

<sup>1</sup> Const., Art. II. § 2.

<sup>2</sup> United States v. Eliason, 16 Pet. 291.

<sup>3</sup> Little v. Barreme, 2 Cranch, 170.

<sup>4</sup> Milligan v. Hovey, 3 Biss. 13.

<sup>5</sup> The Prize Cases, 2 Black, 635, 668.

their respective offices.<sup>1</sup> The Constitution is silent respecting the convening of these officers as a council; but custom sanctions it, and it is usual for the President to call them together and act upon their joint advice on all important matters coming within his cognizance. The heads of departments do not act independently of the President, except in such cases as the law may specially provide for, nor are they responsible to Congress; but they are executive agents, and any official act done by any one of them is, in contemplation of law, done by the President himself, and the responsibility is upon him.<sup>2</sup> The responsibility, however, is only political; the President cannot be called to account in prosecutions, civil or criminal, impeachment alone excepted.<sup>3</sup> In customary language the heads of department collectively are spoken of as the Cabinet; but a cabinet council, not created or required by the Constitution or by law, can only be an advisory body, which the President will convene or consult in his own discretion.

*Reprieves and Pardons.*—The President has power to grant reprieves and pardons, for offences against the United States, except in cases of impeachment.<sup>4</sup> There are several ways in which this power may be exercised:—

1. A pardon may be given to a person under conviction by name; and this will take effect from its delivery, unless otherwise provided therein.
2. It may be given to one or more persons named, or to a class of persons by description before conviction, and even before prosecution

<sup>1</sup> Const., Art. II. § 2. These departments are created by law, and are increased as the exigencies of the public service seem to require.

<sup>2</sup> *Parker v. United States*, 1 Pet. 293; *Wilcox v. Jackson*, 13 Pet. 498; *United States v. Eliason*, 16 Pet. 291; *United States v. Freeman*, 3 How. 556; *Marbury v. Madison*, 1 Cranch, 137. But this is otherwise as to any duties imposed by law on heads of the departments specially. *Kendall v. United States*, 12 Pet. 524.

<sup>3</sup> *Durand v. Hollis*, 4 Blatch. 451.

<sup>4</sup> Const., Art. II. § 2.

begun. Such a pardon is rather in the nature of an amnesty or act of oblivion or forgiveness, blotting out the supposed offence, and relieving the parties from all actual or supposed criminality. 3. It may be given by general proclamation, forgiving all persons who may have been guilty of the specified offence, or offences,<sup>1</sup> and in this case the pardon takes effect from the time the proclamation is signed.<sup>2</sup> 4. It may in any of these ways be made a pardon on conditions to be first performed, in which case it has effect only on performance; or on conditions to be thereafter performed, in which case a breach in the condition will place the offender in the position occupied by him before the pardon was issued.<sup>3</sup> The power to pardon includes the power to reduce or commute the punishment, but not to substitute one of a different nature.<sup>4</sup> A reprieve is a withdrawal or withholding of punishment for a time after conviction and sentence, and is in the nature of a stay of execution.

By a full pardon the offender is relieved from all consequences of the criminal conduct,<sup>5</sup> except so far as third persons, by the prosecution of judicial proceedings, may themselves have acquired rights to a share in penalties, or to property forfeited and actually sold.<sup>6</sup>

<sup>1</sup> *Ex parte Garland*, 4 Wall. 333, 380; *United States v. Klein*, 13 Wall. 128, 147.

<sup>2</sup> *Lapeyre v. United States*, 17 Wall. 191.

<sup>3</sup> *United States v. Wilson*, 7 Pet. 150; *United States v. Greathouse*, 2 Abb. U. S. 382; *Haynes v. United States*, 7 Court of Claims, 443.

<sup>4</sup> *Ex parte Wells*, 18 How. 305.

<sup>5</sup> *Armstrong Foundry Case*, 6 Wall. 766; *Carlisle v. United States*, 16 Wall. 147; *Osborn v. United States*, 91 U. S. Rep. 474.

<sup>6</sup> *United States v. Lancaster*, 4 Wash. C. C. 64; *United States v. Harris*, 1 Abb. U. S. 110. In this last case it is decided that the pardon does not release from an uncollected judgment in favor of an informer for part of a penalty, but the contrary was held in *United States v. Thomasson*, 4 Biss. 336. The power to pardon extends to punishments for contempts. *Re Muller*, 7 Blatch. 23.

*Treaties.* — The President has power, by and with the consent of the Senate, to make treaties, provided two thirds of the Senators concur.<sup>1</sup> The Constitution imposes no restriction upon this power, but it is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the government or any of the States of its constitutional authority.<sup>2</sup> But foreign territory may be acquired by treaty;<sup>3</sup> the operation of acts of Congress as to the contracting parties may be modified and controlled, and the treaty will take effect as law from its enactment, provided it is capable of operating of itself without new legislation to give it effect.<sup>4</sup> Whether those with whom the President has dealt in making a treaty had proper authority from their own government for the purpose, and whether that government could give the right it has assumed by the treaty to transfer, are political questions, and the judiciary cannot inquire into them.<sup>5</sup> If by a treaty a sum of money is to be paid to a foreign nation, it becomes the duty of Congress to make the necessary appropriation; but in the nature of things this is a duty the performance of which cannot be coerced.<sup>6</sup> The payment of awards under arbitration is therefore, in one sense, discretionary, but only as the payment of public debts is discretionary, — that is, it cannot be compelled by any process of execution.

<sup>1</sup> Const., Art. II. § 2, cl. 2.

<sup>2</sup> Story on Const., § 1508; 1 Tucker's Bl., Ap. 332.

<sup>3</sup> American Ins. Co. v. Canter, 1 Pet. 511.

<sup>4</sup> Foster v. Neilson, 2 Pet. 253; United States v. Arredondo, 6 Pet. 691; Garcia v. Lee, 12 Pet. 511.

<sup>5</sup> Doe v. Braden, 16 How. 635; Fellows v. Blacksmith, 19 How. 366.

<sup>6</sup> This subject underwent much discussion at the time of the treaty of 1794, known as Jay's treaty, with England; at the time of the purchase of Alaska; and in the later case of the award to England by the Commission on the Fisheries.

*Appointments and Removals.* — The President 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 in the Constitution otherwise provided for, and which shall be established by law; but Congress may by law vest the appointment of such inferior officers in the President alone, in the courts of law, or in the heads of departments.<sup>1</sup>

The power to appoint includes the power to remove;<sup>2</sup> but this, *it seems*, equally requires the advice and consent of the Senate, or may by law be made to do so.<sup>3</sup> But the consent of the Senate to an appointment in the place of an incumbent is sufficient for the purpose.<sup>4</sup>

The President has power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.<sup>5</sup> But he cannot by removals make vacancies in

<sup>1</sup> Const., Art. II. § 2, cl. 3. As to who are inferior officers, see *United States v. Hartwell*, 6 Wall. 385; *United States v. Moore*, 95 U. S. Rep. 760; *United States v. Jermaine*, 99 U. S. Rep. 503; *United States v. Tinklepaugh*, 3 Blatch. 425; *Collins v. United States*, 99 U. S. Rep. 503.

<sup>2</sup> *Ex parte Hennen*, 13 Pet. 230.

<sup>3</sup> Act of Mar. 2, 1867, Rev. Stat. of U. S. (1878), § 1767 et seq. See *United States v. Avery, Dedy*, 204.

<sup>4</sup> *Ex parte Hennen*, 13 Pet. 230; *Bowerbank v. Morris*, Wall. C. C. 118.

<sup>5</sup> Const., Art. II. § 2, cl. 3. A newly created office, which has never been filled, is not a case of vacancy within the meaning of this provision. *McCrary*, Am. Law of Elections, § 237. The President has no authority to anticipate a vacancy, and make an appointment in advance to fill it. *Ibid.*, § 257. The decision of the executive that a vacancy exists is not conclusive. *Page v. Hardin*, 8 B. Monr. (Ky.) 648.

order that he may fill them. The President commissions all the officers of the United States.<sup>1</sup>

*Messages.* — The President from time to time shall 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; <sup>2</sup> he may on extraordinary occasions convene both Houses, or either of them, and, in case of disagreement between them in respect to the time of adjournment, he may adjourn them to such time as he shall think proper.<sup>3</sup>

*Veto Power.* — Every bill passed by the two houses shall, before it shall become a law, be presented to the President; if he approve, he shall sign it, but if not, he shall return it with his objections to the house in which it 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; if approved by two thirds of that house, it shall become a law. In the reconsideration the yeas and nays must be entered at large on the journals of the houses respectively. If any bill shall not be returned by the President within ten days — Sundays excepted — after it shall have been presented to him, it will become a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return.<sup>4</sup> All orders, resolutions, and votes to

<sup>1</sup> Const., Art. II. § 3. As to the time when a commission takes effect, see *Marbury v. Madison*, 1 Cranch, 137; *Bowerbank v. Morris*, Wall. C. C. 118; *United States v. Le Baron*, 19 How. 73.

<sup>2</sup> Const., Art. II. § 3. In practice, since Mr. Jefferson's time, this information is conveyed by written message, transmitted by the President's private secretary.

<sup>3</sup> See *People v. Hatch*, 33 Ill. 9, as to the circumstances which amount to such a disagreement as will justify his interference.

<sup>4</sup> Const., Art. I. § 7, cl. 2.

which the assent of both houses may be necessary, except on a question of adjournment, must take the course of bills.<sup>1</sup>

*Compensation.* — The salary of the President is fixed by law, and can neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive during that period any other emolument from the United States, or any of them.<sup>2</sup> According to the legislative precedent of 1873 an increase made after a President has been re-elected, but before the second term has begun, may apply to his salary during the second term.

*Appropriations.* — The provision that no money shall be drawn from the treasury but in consequence of appropriations made by law,<sup>3</sup> applies with peculiar force to the President, and is a proper security against the executive assuming unconstitutional powers. The further provision that periodical statements of receipts and expenditures shall be published, is intended as a means of holding all departments of the government, and particularly the legislature, under a due sense of responsibility to the people. The duty to see to this publication is properly executive.

*General Powers.* — The President “shall take care that the laws be faithfully executed,” and, the foreign intercourse of the country being committed to his charge, “he shall receive ambassadors and other public ministers”;<sup>4</sup> and this implies that, for reasons satisfactory to himself, he may refuse to receive those who are sent, or, after having received, may dismiss them, or request their recall, or refuse longer to hold relations with them.

<sup>1</sup> Const., Art. I. § 7, cl. 3.

<sup>2</sup> Const., Art. II. § 1, cl. 6. The salary was twenty-five thousand dollars until 1873, when it was increased to fifty thousand.

<sup>3</sup> Const., Art. I. § 9, cl. 7.

<sup>4</sup> Const., Art. II. § 3.



*Executive Independence.* — The judiciary cannot control the President in the performance of his executive duties, by mandamus,<sup>1</sup> injunction,<sup>2</sup> or otherwise.

<sup>1</sup> *Marbury v. Madison*, 1 Cranch, 137; *Gaines v. Thompson*, 7 Wall. 347; *The Secretary v. McGarrahan*, 9 Wall. 298, 311.

<sup>2</sup> *Mississippi v. Johnson*, 4 Wall. 475; *Georgia v. Stanton*, 6 Wall. 57.

## CHAPTER VI.

## THE JUDICIAL DEPARTMENT OF THE FEDERAL GOVERNMENT.

*Extent.* — The judicial power of the United States extends to all cases, in law and equity, arising under the Constitution, the laws of the United States, and the treaties 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.<sup>1</sup>

The power thus defined is commensurate with the ordinary legislative and executive powers of the general government, and the powers which concern treaties; but it is also still broader, and in some cases is made to embrace controversies from regard exclusively to the parties suing or sued, irrespective of the nature of the questions in dispute. The cases in which this authority has been given are cases in which the influence of state interests and jealousies upon the administration of state laws might possibly be unfavorable to impartial justice, and which for that reason it was deemed wise to remove to the federal jurisdiction.

<sup>1</sup> Const., Art. III. § 2.

*Laws for its Exercise.* — But although the Constitution extends the power to the cases specified, it does not make complete provision for its exercise, except in the few cases of which the Supreme Court is authorized to take cognizance. For other cases it is necessary that courts shall be created by Congress, and their respective jurisdictions defined; and in creating them Congress may confer upon each so much of the judicial power of the United States as to its wisdom shall seem proper and suitable, and restrict that which is conferred at discretion. In doing so it may apportion among the several federal courts all the judicial power of the United States, or it may apportion a part only, and in that case what is not apportioned will be left to be exercised by the courts of the States. Thus the States may have a limited jurisdiction within the sphere of the judicial power of the United States, but subject to be further limited or wholly taken away by subsequent federal legislation.<sup>1</sup> Such is the state of the law at this time: many cases within the reach of the judicial power of the United States are left wholly to the state courts, while in many others the state courts are permitted to exercise a jurisdiction concurrent with that of the federal courts, but with a final review of their judgments on questions of federal law in the United States Supreme Court.

*Cases arising under the Constitution, Laws, and Treaties.* — The reasons for conferring jurisdiction of these cases upon the federal courts were manifest, and were also imperative. The alternative must be that the final decision upon questions of federal law must be left to the courts of the several States, and this multitude of courts of final jurisdiction of the same causes, arising upon the same laws, would, in

<sup>1</sup> It must always appear by the record that a case in the federal court is within its jurisdiction: the presumption is against it until it is shown. *Robertson v. Cease*, 97 U. S. Rep. 646; *Godfrey v. Terry*, 97 U. S. Rep. 171.

the language of the Federalist, be a hydra in government from which nothing but contradiction and confusion could proceed.<sup>1</sup> Uniformity of decision could seldom or never be expected, and never relied upon; and the federal law, interpreted and applied one way in one State and another way in another, would cease to be a law for the United States, because the decisions would establish no rule for the United States; and the Constitution itself thus administered would lose its uniform force and obligation. Such confusion in the laws which constitute the bond of union for the States must be intolerable while it existed, but could not be of long duration, for a speedy dissolution of the Union must follow. Any government that must depend upon others for the interpretation, construction, and enforcement of its own laws, is at all times at the mercy of those on whom it thus depends, and will neither be respected at home, nor trusted abroad, because it can neither enforce respect nor perform obligations.

These reasons, however, do not apply to the original jurisdiction over a case, but only to the final application in the case of the rule of law that shall govern it. The full purpose of the federal jurisdiction is subserved if the case, though heard first in the state court, may be removed at the option of the parties for final determination in the courts of the United States.<sup>2</sup> The legislation of Congress has therefore left the parties at liberty, with few exceptions, to bring their suits in the state courts irrespective of the questions involved, but has made provision for protecting the federal authority by a transfer to the federal courts, either before or after judgment, of the cases to which the federal judicial power extends. The exceptions will appear as we proceed.

A case may be said to arise under the Constitution, or under a law or treaty, when a power conferred or supposed

<sup>1</sup> Federalist, No. 80.

<sup>2</sup> *Gaines v. Fuentes*, 92 U. S. Rep. 10.

to be, a right claimed, a privilege granted, a protection secured, or a prohibition contained therein, is in question.<sup>1</sup> It matters not whether the party immediately concerned be the United States, in its sovereign capacity, asserting one of its most important powers, or a State defending what it believes to be its own reserved jurisdiction, or a humble citizen contending for a trivial interest: if the case turns wholly or in part on the interpretation or application of the Constitution, the validity or construction of an enactment of Congress, the force or extent of a treaty, the justification of any act of a federal officer or agent by the federal authority under which he assumes to act, or the validity of any state enactment, or any act under supposed state authority, which is disputed as an encroachment upon federal jurisdiction, or as being expressly or by implication forbidden by the federal Constitution, — in each instance the case is fairly within the intent of the provision under consideration, and within its reason and necessity.<sup>2</sup>

To give the necessary effect to this provision it has been provided that “a final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity

<sup>1</sup> Story on Const., § 1647.

<sup>2</sup> It is held that jurisdiction of all controversies to which corporations created by the United States are parties may be conferred on the federal courts. *Osborn v. Bank of the United States*, 9 Wheat. 738.

is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined, and reversed or affirmed in the Supreme Court [of the United States] on a writ of error.”<sup>1</sup>

A careful reading of this statute will show that the review in the federal Supreme Court is only provided for, when the decision in the state court is against the title, right, privilege, or immunity set up or claimed under the federal authority. Where the decision does not deny what is thus claimed, the reason for a review is wanting.<sup>2</sup> Nor is it sufficient to authorize the removal of the case to the federal Supreme Court that some one of the enumerated questions might have arisen in or been applicable to it; it must appear by the record itself, either expressly or by clear and necessary intendment, that some one of them did arise in the state court, and was there passed upon, and the right, title, privilege, or immunity denied.<sup>3</sup>

*Cases affecting Ambassadors, &c.* — In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court has original jurisdiction.<sup>4</sup> These are the only cases in which original jurisdiction is conferred upon that court, and it

<sup>1</sup> Act of Sept. 24, 1789, as amended. Rev. Stat. U. S. (1878), § 709.

<sup>2</sup> *Gordon v. Caldcleugh*, 3 Cranch, 268; *Burke v. Gaines*, 19 How. 388; *Ryan v. Thomas*, 4 Wall. 603.

<sup>3</sup> *Owings v. Norwood's Lessee*, 4 Cranch, 344; *Messenger v. Mason*, 10 Wall. 507; *Bolling v. Lersner*, 91 U. S. Rep. 594. Compare *Murray v. Charleston*, 96 U. S. Rep. 432.

<sup>4</sup> Const., Art. III. § 2, cl. 2. No act of Congress is needed to enable the court to exercise this jurisdiction. *Kentucky v. Dennison*, 24 How. 66.

cannot be extended by statute. Therefore the court cannot have jurisdiction to issue the writ of mandamus to one of the heads of the executive department,<sup>1</sup> or a writ of certiorari to one of the district judges sitting as commissioner under a treaty,<sup>2</sup> or to a military commission ordered by a general officer of the United States army, commanding a military department which has tried and sentenced a civilian to punishment,<sup>3</sup> or a writ of *habeas corpus*, except as an appellate process.<sup>4</sup> The rule of construction that is applied in these cases is this: that the affirmative words of the Constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases.<sup>5</sup> Giving the Supreme Court original jurisdiction does not exclude the jurisdiction of other courts, and therefore cases affecting foreign representatives may originate in other courts, but they will be subject in such courts to all the rules of privilege conferred by international law, and to the appellate jurisdiction of the federal Supreme Court. And Congress in its discretion may, as it has done,<sup>6</sup> exclude altogether the jurisdiction of state tribunals over suits against foreign representatives. As the privileges of ambassadors, ministers, and consuls are conferred, not for their own advantage, but as the privileges of their government, it is fit and proper that the courts of the government to which they are accredited, and with which alone they can have official dealings, should have exclusive cognizance of suits against them.<sup>7</sup>

*Admiralty and Maritime Cases.* — Although the grant of

<sup>1</sup> *Marbury v. Madison*, 1 Cranch, 137.

<sup>2</sup> *Ex parte Metzger*, 5 How. 176.

<sup>3</sup> *Ex parte Vallandigham*, 1 Wall. 243.

<sup>4</sup> See *Ex parte Yerger*, 8 Wall. 85.

<sup>5</sup> *Marbury v. Madison*, 1 Cranch, 137; *Ex parte Vallandigham*, 1 Wall. 243.

<sup>6</sup> Rev. Stat. U. S. (1878), § 687.      <sup>7</sup> *Davis v. Packard*, 7 Pet. 276.

jurisdiction in these cases is not in terms exclusive, it has been practically conceded, from the first, that it is exclusive in cases of prize, since those were always excluded from the cognizance of the courts of law. But it is also exclusive in all cases of maritime torts and contracts, and liens for maritime services,<sup>1</sup> though suits *in personam* in the same cases, whether authorized by the principles of the common law, or by state statutes, are cognizable only in the state courts.<sup>2</sup> The distinction between admiralty and maritime jurisdiction is thus explained: "The first respects acts or injuries done upon the high seas, where all nations claim common right and common jurisdiction; or acts or injuries done upon the coasts of the sea; or, at farthest, acts or injuries done within the ebb and flow of the tide. The second respects contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation. The former is again divisible into two great branches, — one embracing captures and questions of prize arising *jure belli*; the other embracing acts, torts, and injuries strictly of civil cognizance, independent of belligerent operations."<sup>3</sup> But it is now settled, overruling the early opinions and decisions, that the admiralty and maritime jurisdiction is not limited to the high seas, or to tide-water, or even to waters navigable from the ocean, but that it extends to the great lakes and their navigable waters,<sup>4</sup> and to the great rivers,<sup>5</sup> even though their navigable course may be entirely within the

<sup>1</sup> The *Lottawanna*, 21 Wall. 558.

<sup>2</sup> The *Moses Taylor*, 4 Wall. 411; The *Belfast*, 7 Wall. 624; *Leon v. Galceran*, 11 Wall. 185. A right given by a State, if of a maritime nature, may be enforced in the admiralty. *Ex parte McNiel*, 13 Wall. 236; The *Sea Gull*, Chase's Dec. 145; The *Lottawanna*, 21 Wall. 558.

<sup>3</sup> Story on Const., § 1666.

<sup>4</sup> The *Genesee Chief*, 12 How. 443; The *Eagle*, 8 Wall. 15.

<sup>5</sup> *Fretz v. Bull*, 12 How. 466.



limits of a single State.<sup>1</sup> "Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants."<sup>2</sup> The federal jurisdiction will therefore include the case of collisions on navigable lakes or rivers, of vessels engaged in commerce between ports of the same State, and occurring within the body of a county,<sup>3</sup> and also the case of contracts of affreightment, though to be performed within the State where made.<sup>4</sup> So cases of collision of vessels passing from one navigable body of water to another, through a connecting canal, like the Welland Canal, are of federal cognizance.<sup>5</sup> And admiralty has jurisdiction of collisions occurring on tide-water, though the vessel be at a wharf or pier in a harbor.<sup>6</sup>

The general jurisdiction over the place within a State which is subject to the grant of admiralty power adheres to the territory, as a portion of the sovereignty not given away, and the residuary powers of legislation remain in the States. Therefore the admiralty jurisdiction does not divest the state jurisdiction to punish crimes.<sup>7</sup> Neither does it divest the state jurisdiction to regulate the fisheries, and to punish those who transgress the regulations.<sup>8</sup>

<sup>1</sup> *Jackson v. The Magnolia*, 20 How. 296; *The General Cass*, 1 Brown, Adm. 334. The first of these cases arose on the Alabama River, and the second on the Saginaw.

<sup>2</sup> *The Commerce*, 1 Black, 574, 579.

<sup>3</sup> *The Commerce*, 1 Black, 574; *Waring v. Clark*, 5 How. 441.

<sup>4</sup> *The Belfast*, 7 Wall. 624.

<sup>5</sup> *Scott v. The Young America*, Newb. Adm. 101; *The Avon*, 1 Brown, Adm. 170; *The Oler*, 14 Am. Law Reg., N. S. 300. Compare *McCormick v. Ives*, Abb. Adm. 418.

<sup>6</sup> *The Lotty*, Olcott, 329.

<sup>7</sup> *United States v. Bevans*, 3 Wheat. 336.

<sup>8</sup> *Corfield v. Coryell*, 4 Wash. C. C. 371; *Smith v. Maryland*, 18 How. 71; *McCready v. Virginia*, 94 U. S. Rep. 391.

*Suits by and against the United States.*—The United States, like any other sovereignty, is not suable in its own courts, except with its own consent; but it may consent, as has been done by creating and defining the jurisdiction of the Court of Claims. Neither is the United States suable in a state court, for the United States is supreme within its sphere, and the States cannot subordinate it to their authority.<sup>1</sup> It has been quite authoritatively conceded, however, by the federal judiciary, “that land within a State, purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of other proprietors, under the rights of eminent domain”;<sup>2</sup> and the concession will cover all cases of appropriations for public purposes.<sup>3</sup> A right to appropriate implies a right to provide the means whereby a court may obtain jurisdiction, which in these cases may be some other means than the ordinary writs. But the States can have no right to appropriate any portion of the land which has been purchased, or otherwise acquired, by the United States, as a means in the performance of any of its governmental functions; such as land held for a fortification,<sup>4</sup> or for an arsenal and government manufactory of arms.<sup>5</sup>

As a corporation the United States may sue as plaintiff, in either its own or the state courts, or in the courts of a foreign country, as occasion may require.<sup>6</sup>

<sup>1</sup> *Ableman v. Booth*, 21 How. 506.

<sup>2</sup> *United States v. Chicago*, 7 How. 185, 194. Opinion by Mr. Justice Woodbury, concurred in by the whole court, except one judge, who dissented on a point of jurisdiction.

<sup>3</sup> The right was asserted to the fullest extent by Mr. Justice McLean in *United States v. Railroad Bridge Co.*, 6 McLean, 517.

<sup>4</sup> *United States v. Chicago*, 7 How. 185.

<sup>5</sup> *United States v. Ames*, 1 Wood. & M. 76.

<sup>6</sup> *Queen of Portugal v. Grymes*, 7 Cl. & Fin. 66; *United States v. Wagner*, Council Reports, 2 Ch. Ap. 582.

*Controversies between States.*—Many questions might arise under this clause concerning the reach of the federal jurisdiction over controversies between States, the subjects that may be dealt with and determined, and how far the sovereign rights of the States, and the extent of their respective territorial jurisdictions, may be brought within the cognizance and final determination of the federal judiciary. The clause conferring jurisdiction of such controversies is general, and only as cases arise can it be determined whether they present questions which are properly of judicial cognizance as between the States. A question of boundary is plainly such a question,<sup>1</sup> and so is the question whether the conditions in a compact between two States, on the performance of which certain territory was to be detached from the one and become a part of the other, have ever been complied with, so as to effect the transfer.<sup>2</sup>

By “States,” in the provision of the Constitution conferring this jurisdiction, is intended the States in the Union.<sup>3</sup> An Indian tribe is neither a State in the Union in this sense, nor a foreign state, and entitled as such to sue in the federal courts.<sup>4</sup>

*Suits by States.*—The federal jurisdiction extends to suits by States against citizens of other States, and against foreign states, citizens, or subjects. The States intended here are States holding their constitutional relations to the United States. A State which has been in rebellion, and is not restored to peaceful relations as a member of the Union, cannot sue in the federal courts.<sup>5</sup> The fact

<sup>1</sup> *Rhode Island v. Massachusetts*, 12 Pet. 657; *Missouri v. Iowa*, 7 How. 660; *Florida v. Georgia*, 17 How. 478; *Alabama v. Georgia*, 23 How. 505.

<sup>2</sup> *Virginia v. West Virginia*, 11 Wall. 39.

<sup>3</sup> *Scott v. Jones*, 5 How. 343, 377.

<sup>4</sup> *Cherokee Nation v. Georgia*, 5 Pet. 1.

<sup>5</sup> *Texas v. White*, 7 Wall. 700.

that, in a suit between two individuals to which a State does not appear to be a party of record, a question of boundary between States may incidentally arise, does not make the case one to which the State is a party within the meaning of the provision which gives to the Supreme Court original jurisdiction of suits where a State is a party.<sup>1</sup> A suit against a state agent for moneys or securities wrongfully taken by him under a void law, is not a suit against the State;<sup>2</sup> but a suit by the Governor of the State, in his title of office and in the interest of the State, is a suit by the State.<sup>3</sup>

*Suits against States.* — The clause of the Constitution which at first conferred the federal jurisdiction extended to suits against States by other States, by citizens of other States, and by foreign states, citizens, or subjects.<sup>4</sup> But by amendment to the Constitution this jurisdiction has been so limited as to be confined to suits brought by States in the Union, and by foreign states, and the States are no longer subject to be sued in the federal courts by private persons.<sup>5</sup> But the fact that a State has an interest in the controversy, however extensive, will not bring the case under the amendment and exclude the federal jurisdiction so long as the State itself is not a party.<sup>6</sup> Therefore a state corporation may be sued in the federal courts, notwithstanding the State is the sole stockholder.<sup>7</sup> It is not believed, however, that a State can be indirectly sued

<sup>1</sup> *Fowler v. Lindsey*, 3 Dall. 411.

<sup>2</sup> *Osborn v. Bank of United States*, 9 Wheat. 738.

<sup>3</sup> *The Governor v. Madrazo*, 1 Pet. 110, 124.

<sup>4</sup> *Chisholm v. Georgia*, 2 Dall. 419.

<sup>5</sup> Const., Amendment 11.

<sup>6</sup> *Osborn v. Bank of United States*, 9 Wheat. 738.

<sup>7</sup> *Bank of Kentucky v. Wister*, 2 Pet. 318. This decision is in harmony with that in *Darrington v. State Bank*, 13 How. 12, in which it was held that bills issued by a bank of which the State owns all the stock are not bills of credit.

by making its agent or officer the nominal defendant, where the agent or officer merely holds the state property or securities, or occupies a position of trust under the State, and in the performance of its duties commits upon others no trespass, so that the cause of action relied upon must be one in which he would be responsible only as such agent, officer, or trustee. If such action were permitted, the eleventh amendment might be nullified. But where an officer makes himself a trespasser<sup>1</sup> by attempting to enforce a void authority, it is immaterial to the jurisdiction who undertook to confer the void authority, since he is responsible individually, on well settled common-law principles.<sup>2</sup>

The force of the eleventh amendment is restricted to original suits, and it does not preclude a review in the federal Supreme Court of decisions in the state courts where is drawn in question any title, right, privilege, or exemption under the Constitution, laws, or treaties of the United States.<sup>3</sup>

*Other Controversies.* — Where the jurisdiction of a case depends upon the citizenship of parties, the fact should appear on inspection of the record.<sup>4</sup> But citizenship in the sense of this provision means nothing more than residence.<sup>5</sup> A resident in one of the Territories, or of the District of Columbia, is not entitled to sue or be sued as a citizen of a State.<sup>6</sup> A corporation created by and transacting business within a State is for this purpose to be

<sup>1</sup> As was the case in *Osborn v. Bank of United States*, 9 Wheat. 738.

<sup>2</sup> See *New Jersey v. Babcock*, 4 Wash. C. C. 344.

<sup>3</sup> *Cohens v. Virginia*, 6 Wheat. 264.

<sup>4</sup> *Brigham v. Cabott*, 3 Dall. 382; *Jackson v. Ashton*, 8 Pet. 148; *Bailey v. Dozier*, 6 How. 23; *Robertson v. Cease*, 97 U. S. Rep. 646.

<sup>5</sup> *Gassies v. Ballou*, 6 Pet. 761; *Shelton v. Tiffin*, 6 How. 163.

<sup>6</sup> *Hepburn v. Ellzey*, 2 Cranch, 445, 448; *Scott v. Jones*, 5 How. 343, 377.

deemed to represent corporators who are citizens of the State,<sup>1</sup> and a foreign corporation is to be deemed to represent corporators who are aliens.<sup>2</sup> As a declaration of intention to become a citizen under the naturalization laws does not make one a citizen, it will not preclude an alien suing as such.<sup>3</sup> The courts will not be open to suits by aliens when their country is at war with our own.

*Legislation assigning the Jurisdiction to Courts.*—In the exercise of its authority to assign to courts such portion of the judicial power as it shall determine is proper or needful, Congress has provided by law that the jurisdiction vested in the courts of the United States, in the cases and proceedings following, shall be exclusive of the courts of the several States:—

1. Of all crimes and offences cognizable under the authority of the United States;

2. Of all suits for penalties and forfeitures incurred under the laws of the United States;

3. Of all civil causes of admiralty and maritime jurisdiction; saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it;

4. Of all seizures under the laws of the United States, on land or waters not within admiralty and maritime jurisdiction;

5. Of all cases arising under the patent-right or copyright laws of the United States;

6. Of all matters and proceedings in bankruptcy;

7. Of all controversies of a civil nature where a State is

<sup>1</sup> *United States Bank v. Planters' Bank*, 9 Wheat. 904; *Ohio, &c. R. R. Co. v. Wheeler*, 1 Black, 286; *Insurance Company v. Francis*, 11 Wall. 210. A stockholder resident in another State may nevertheless as such stockholder be the antagonistic party. *Dodge v. Woolsey*, 18 How. 331.

<sup>2</sup> *Society, &c. v. New Haven*, 8 Wheat. 464.

<sup>3</sup> Story on Const., § 1700.

a party, except between a State and its citizens, and between a State and citizens of other States or aliens.<sup>1</sup>

Federal courts are also given original jurisdiction of causes of action arising under the postal laws ; suits for drawback of duties ; suits for violations of the statute of the United States for the protection of civil rights, or for the deprivation of rights, privileges, or immunities secured by the Constitution or laws of the United States ; suits to recover the possession of any office, — except legislative offices and the office of Elector of President and Vice-President, — where the sole question touching the title thereto arises out of the denial of the 'right to vote to any citizen offering to vote, on account of race, color, or previous condition of servitude ;<sup>2</sup> proceedings for the removal from office of any one holding the same contrary to the provisions of the third section of the fourteenth amendment ; and suits by or against the national banks.<sup>3</sup>

Also of suits at common law, where the United States, or any officer thereof, suing under authority of an act of Congress, is plaintiff ; suits arising under the revenue laws ; suits arising under any law relative to the slave trade ; and suits brought by any person to recover damages for an injury to person or property on account of any act done by him under any law of the United States for the protection or collection of any of its revenues, or to

<sup>1</sup> Rev. Stat. U. S. (1878), § 711.

<sup>2</sup> This is conferred with a proviso "that such jurisdiction shall extend only so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the Constitution of the United States and secured by any law to enforce the right of citizens of the United States to vote in all the States." Federal courts have no jurisdiction over contested state elections, except in this single case. *Harrison v. Hadley*, 2 Dill. 229. Neither this nor the next provision seems as yet to have had authoritative examination.

<sup>3</sup> Rev. Stat. U. S. (1878), § 563.

enforce the rights of citizens of the United States to vote in any State.<sup>1</sup>

Also of suits of a civil nature, at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum of five hundred dollars, and an alien is a party, or where the suit is between a citizen of the State where it is brought and a citizen of another State, and suits in equity where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners.<sup>2</sup>

*Transfer of Causes from State Courts.* — As suits may be instituted in the state courts in all cases in which the jurisdiction of the federal courts is not made exclusive, the purpose had in view in conferring the federal power would often be defeated if there were not some provision under which a cause brought in a state court might be removed to a federal court. For example, if a citizen of one State should bring suit in one of its courts against a citizen of another State, the case would be one which by the Constitution is embraced in the grant of the federal power; and the reason why it was included is that it may sometimes happen that local feelings, sentiments, prejudices, or prepossessions may preclude a fair trial in the state court, or at least give rise to fears or suspicions that such may be the case. But it may be and is entirely proper to allow the suit to be thus brought in the first instance, because in most cases no such influences will be suspected or feared, and the parties would go to trial in the state court without objection. But if they are feared, the reasons for referring the case to the federal court are then apparent. A case of more importance to the federal jurisdiction is where a federal officer is sued in a state court, for some act or omission in his office. For many such acts or omissions there is no civil responsibility in any court, but for

<sup>1</sup> Rev. Stat. U. S. (1878), § 629.

<sup>2</sup> Rev. Stat. U. S., § 629.



some there is. The general rule is, that, if a duty imposed upon an officer is exclusively of a public nature, his neglect to perform it can only be punished by some proceeding, either civil or criminal, instituted by the proper public authorities; but if a duty is imposed upon him for the benefit of an individual, the latter has his private action to recover damages for any failure in performance whereby he is injured. The difference between the public and the private duties is well illustrated in cases arising under the post-office laws. The Postmaster-General has duties to perform, which are of high importance to the nation and to all its people; but they are public duties exclusively, and he never becomes charged with obligations to any particular person, so as to be liable to individual actions.<sup>1</sup> It is different with a local postmaster. When mail matter is received at his office, directed to a particular person, it becomes his duty to that person to deliver it on demand, and he is liable to a suit for damages in case of refusal.<sup>2</sup> A like distinction exists between the duties of the Secretary of the Treasury and the collector of the customs at a port: the former is responsible only to the government for the faithful performance of duty; but the latter owes duties to those whose imported goods pass through his hands, and he may become liable to private suits for oppressive conduct and illegal charges.<sup>3</sup> So the duties of the United States marshal, which resemble those of the sheriff, are to a large extent duties to individuals, and may frequently subject him to suits. So any federal officer may become involved in private suits on allegations that, in the pretended discharge of duty, he has tres-

<sup>1</sup> *Lane v. Cotton*, 1 Ld. Raym. 646; S. C. 12 Mod. 472, and 1 Salk. 17; *Smith v. Powditch*, Cowp. 182; *Rowning v. Goodchild*, 2 W. Bl. 906; *Whitfield v. LeDespencer*, Cowp. 754, 765.

<sup>2</sup> *Teall v. Felton*, 1 N. Y. 537; S. C. in error, 12 How. 284.

<sup>3</sup> *Barry v. Arnaud*, 10 Ad. & El. 646.

passed on the rights of third parties. All these, and many others which might be named, are cases coming within the scope of the federal judicial power, and many of them are cases in which it might be exceedingly important to the federal authority that they be referred to the federal courts for final adjudication.

For these cases it is provided by statute that causes may be removed from state to federal courts where the amount in controversy exceeds five hundred dollars, in the following cases: <sup>1</sup> —

1. Where the suit is against an alien, or is by a citizen of the State wherein it is brought and against a citizen of another State, it may be removed on petition of the defendant.

2. Where the suit is against an alien and a citizen of the State wherein it is brought, or is by a citizen of such State against a citizen of the same and a citizen of another State, it may be removed, as against such alien or citizen of another State, on his petition, and the case may proceed in the state court as against the other defendant or defendants. <sup>2</sup>

3. Where the suit is between a citizen of the State in which it is brought and a citizen of another State, it may be removed on petition of the latter, be he plaintiff or defendant, on his filing an affidavit that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such state court. <sup>3</sup>

<sup>1</sup> Proceedings to appropriate property to public uses under the eminent domain are cases removable to the federal courts, where the alienage or citizenship is such as to give the right. *Warren v. Railroad Co.*, 6 Biss. 425; *Patterson v. Boom Co.*, 3 Dill. 465; *Boom Co. v. Patterson*, 98 U. S. Rep. 403.

<sup>2</sup> See *Osgood v. Railroad Co.*, 6 Biss. 330; *Warren v. Railroad Co.*, 6 Biss. 425.

<sup>3</sup> Rev. Stat. of U. S. (1878), § 639. See *Barkley v. Levee Commissioners*, 1 Woods, 254.

Also, any suit commenced against any corporation other than a banking corporation organized under a law of the United States, or against any member thereof, as such member, for any alleged liability of such corporation, or such member as a member thereof, may be removed on petition of the defendant, verified by oath, stating that such defendant has a defence arising under or by virtue of the Constitution or any treaty or law of the United States.<sup>1</sup>

Also, when any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied, or cannot enforce, in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States; or against any officer, civil or military, or other person, for any arrest or imprisonment, or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid; or for refusing to do any act on the ground that it would be inconsistent with such law,—such suit or prosecution may, upon the petition of the defendant stating the facts and verified by oath, be removed for trial into the next Circuit Court to be held in the district.<sup>2</sup>

Also, when any suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States; or against any person acting under or by authority of such officer, on account of any act done

<sup>1</sup> Rev. Stat. U. S. (1878), § 640; *Turton v. Railroad Co.*, 3 Dill. 366.

<sup>2</sup> Rev. Stat. U. S. (1878), § 641. See *Texas v. Gaines*, 2 Woods, 342.

under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or is commenced against any officer of the United States, or other person, on account of any act done under the provisions of the laws of Congress respecting the elective franchise, or on account of any right, title, or authority claimed by such officer or other person under any of said provisions, — such suit or prosecution may be removed for trial into the Circuit Court of the United States for the district, upon the petition of the defendant setting forth the nature of the suit or prosecution, and duly verified.<sup>1</sup>

Also, whenever a personal action is brought, in any state court, by an alien, against a citizen of a State who is, or when the action accrued was, a civil officer of the United States, being a non-resident of the State where suit is brought, the action may be removed into the

<sup>1</sup> Rev. Stat. U. S. (1878), § 643. This section is a modification and enlargement of Section 3 of what was known as the "Force Bill" of March 2, 1833 (4 Stat. at Large, 632), which was passed to provide the means for defeating attempts being made by state legislation in South Carolina to nullify the federal revenue laws. The Force Bill also contained a provision under which the defendant, if in custody, might be brought before a federal court or judge on *habeas corpus*, to be dealt with according to the rules of law and the order of the court or judge. That act did not in terms apply to criminal cases, but to "suit or prosecution," and it was enlarged to embrace criminal cases by the act of Feb. 28, 1871 (16 Stat. at Large, 488). While these sheets are passing through the press, it is decided by the federal Supreme Court (March 2, 1880), in the cases of *Strander v. West Virginia* and *Tennessee v. Davis*, that criminal prosecutions for alleged offences against state laws may be removed from the state to the federal court when the facts are such as to bring them within the terms of Rev. Stat. U. S. § 643, above cited.

Circuit Court of the United States for the district, in the manner provided for the cases last above mentioned.<sup>1</sup> A subsequent section makes provision for the removal of a cause from the state court where one party claims land in dispute under a grant from another State than that in which suit is brought.<sup>2</sup>

In some of the cases in which removal of causes is provided for, there is no act of Congress which would give to the federal courts original jurisdiction. Nevertheless, it is competent to give jurisdiction of cases removed, provided they come within the grant of judicial power by the Constitution.<sup>3</sup>

The right of removal cannot be taken away or limited by state laws. Therefore, a right to recover damages for a personal injury arising under a state statute may be enforced in the federal court by a citizen of another State against a citizen of the State where suit is brought, notwithstanding the state statute undertakes to limit the remedy to suits in its own courts.<sup>4</sup> And the right of a foreign corporation to do business in a State cannot be made conditional on its waiving the right to remove suits against it to the federal courts, and the waiver itself, if made, would be void.<sup>5</sup>

The right to transfer a cause to the federal court being statutory, the case shown by the petition must come clearly within the statute, or it will be ineffectual.<sup>6</sup> If the transfer is actually made on insufficient papers, the federal court will remand the case on its attention being called to

<sup>1</sup> Rev. Stat. U. S. (1878), § 644.

<sup>2</sup> Rev. Stat. U. S. (1878), § 647.

<sup>3</sup> *Gaines v. Fuentes*, 92 U. S. Rep. 10.

<sup>4</sup> *Railway Co. v. Whitton*, 13 Wall. 270.

<sup>5</sup> *Insurance Co. v. Morse*, 20 Wall. 445; *Hartford Fire Ins. Co. v. Doyle*, 6 Biss. 461.

<sup>6</sup> *Insurance Co. v. Pechner*, 95 U. S. Rep. 183; *Gold Washing, &c. Co. v. Keyes*, 96 U. S. Rep. 199.

the defect;<sup>1</sup> but if they are sufficient, the state court can take no further proceedings in the cause except such as are incident to the removal.<sup>2</sup>

*Habeas Corpus.* — The Supreme Court and the Circuit and District Courts have power to issue the writ of *habeas corpus*, and the several justices and judges thereof, within their respective jurisdictions, have also power to issue it, for the purposes of an inquiry into the cause of restraint upon liberty. But in no case shall the writ extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States; or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof;<sup>3</sup> or is in custody in violation of the Con-

<sup>1</sup> *Gold Washing, &c. Co. v. Keyes*, 96 U. S. Rep. 199.

<sup>2</sup> Where a case has once been tried in the state court, and the rule of law settled for its determination in the highest state court, if afterwards a new trial is granted, and the case then transferred to the federal court, the latter will apply the same rule of law in disposing of it. *Hazard v. Railroad Co.*, 4 Biss. 453.

<sup>3</sup> This particular case was provided for by what was known as the "Force Bill," of March 2, 1833 (4 Stat. at Large, 632), passed to counteract South Carolina measures looking to the nullification of federal revenue laws. It was first called in requisition, however, to prevent the nullification of the Fugitive Slave Law. The United States Marshal for the District of Ohio, disregarding an order by a state judge for the discharge from custody of a person held by him as a fugitive slave, was proceeded against as for a contempt of court. He was brought before Mr. Justice McLean at chambers, and discharged. The proceedings showed on their face that the state judge had no jurisdiction, and the discharge of the Marshal followed as of course. *Robinson ex parte*, 6 McLean, 355. See *Ex parte Bridges*, 2 Woods, 428. In *United States v. The Jailer of Fayette Co., Ky.*, 2 Abb. U. S. 265, the same law was applied to a different case. The relator who sued out the writ was in the custody of the jailer under a regular commitment, made by a court of competent jurisdiction under the laws of Kentucky, charging him with murder. Nothing

stitution, or of a law or treaty of the United States; or, being a subject or citizen of a foreign state and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations;<sup>1</sup> or unless it is necessary to bring the prisoner into court to testify.<sup>2</sup> This last is a provision for facilitating the investigation of facts in federal tribunals, and all the other cases mentioned are cases in which the national authority is in some way involved. The federal Supreme Court also has authority to issue the writ in the exercise of its appellate jurisdiction.<sup>3</sup>

The general authority to examine, by means of this writ, into unlawful restraints upon personal liberty, has

on the face of the papers indicated that the case was any other than a common case of the crime charged. The relator, however, offered to show that the act with which he was charged was done by him under the authority of the United States in the execution of its revenue laws. Judge Ballard, United States District Judge, entered upon an examination of the facts, and, reaching the conclusion that the prisoner was justified, ordered him discharged. See also *Ex parte Jenkins*, 2 Wall. Jr. C. C. 521. The principal question which the above cases present must be regarded as settled by *Strander v. West Virginia*, *The Commonwealth of Virginia*, Petitioner, *The Commonwealth and Coles*, Petitioner, and *Tennessee v. Davis*, decided by the federal Supreme Court, March 2, 1880. The decisions sustain the power of Congress to provide for the removal of a criminal cause from a state to a federal court for examination and trial, when a right under the Constitution of the United States is denied to the accused in the state court.

<sup>1</sup> This provision was made by act of Aug. 29, 1842 (5 Stat. at Large, 529), and was enacted in consequence of the prosecution in New York of a British subject for an act which his government avowed.

<sup>2</sup> Rev. Stat. U. S. (1878), §§ 751-753.

<sup>3</sup> *Ex parte Watkins*, 7 Pet. 568; *Ex parte Milburn*, 9 Pet. 704; *Matter of Kaine*, 14 How. 103.

not been conferred upon the United States, and therefore remains with the States.<sup>1</sup> But if state tribunals issue the writ for a prisoner detained under federal authority, it must be dismissed when return is made showing the facts.<sup>2</sup> A prisoner held under state process for extradition to another State may have a *habeas corpus* from a federal court or judge; the process of extradition being provided for by, and taken under, the Constitution of the United States.<sup>3</sup>

*Appellate Jurisdiction.* — In all cases to which the federal judicial power extends, except those in which original jurisdiction is conferred upon it, the Supreme Court has appellate jurisdiction, both as to law and fact, with such exceptions and under such reservations as Congress shall make.<sup>4</sup> What the cases are in which appeals may be taken from the state courts has been shown; and provision has also been made by various statutes for the exercise of appellate jurisdiction in cases heard in the federal courts. But many cases are allowed to be finally determined in the Circuit and District Courts and the Court of Claims.

*General Principles.* — The federal courts exercise the jurisdiction conferred upon them, and restrain their action within it, according to certain general principles, some of which are declared by statute, but the most of which arise from a consideration of the general nature of the constitutional structure, and from rules of comity recognized and acted upon between independent jurisdictions, or between jurisdictions having concurrent authority, according as the case may be. The principal of these may be here mentioned.

*The Law administered.* — It has been mentioned in

<sup>1</sup> *Ex parte Dorr*, 3 How. 103; *Dekrafft v. Barney*, 2 Black, 704.

<sup>2</sup> *Ableman v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397.

<sup>3</sup> *Ex parte Smith*, 3 McLean, 121.

<sup>4</sup> Const., Art. III. § 2, cl. 2.



another place that each of the several States has a common law of its own, derived in the case of most of them from the common law of England, but modified more or less in adoption by circumstances, usage, or statutes. This common law determines to a large extent the civil rights of the people, and it also makes many acts punishable as crimes. But the United States as such can have no common law. It derives its powers from the grant of the people made by the Constitution, and they are all to be found in the written law, and not elsewhere.<sup>1</sup> It must therefore find its power to punish crimes in laws of Congress passed in pursuance of the Constitution, defining the offences and prescribing what courts shall have jurisdiction over them. No act can be a crime against the United States which is not made or recognized as such by federal constitution, law, or treaty.<sup>2</sup> But the federal courts sitting in the several States, where their jurisdiction depends upon the character or residence of the parties who sue or are sued, administer for the most part the local law, and they take notice of the state common law, usages, and statutes, and apply them as the state courts would apply them in like controversies.<sup>3</sup> In all such cases if the decisions of the state courts afford precedents for their guidance, the federal courts are to follow them for uniformity, and the state decisions will thus become the final rule and authority on questions of state law, for like reasons to those which require finality to federal decisions on questions of federal law.<sup>4</sup> And the federal courts will be particularly careful to follow state decisions on questions

<sup>1</sup> *Wheaton v. Peters*, 8 Pet. 591, 658.

<sup>2</sup> *United States v. Hudson*, 7 Cranch, 32.

<sup>3</sup> *Livingston's Lessee v. Morse*, 7 Pet. 469; *Tioga R. R. Co. v. Blossburg, &c. R. R. Co.*, 20 Wall. 137.

<sup>4</sup> *Townsend v. Todd*, 91 U. S. Rep. 452; *Elmwood v. Marcy*, 92 U. S. Rep. 289; *Railroad Co. v. Georgia*, 98 U. S. Rep. 359.

involving the title to land or other permanent property.<sup>1</sup> It is therefore a general rule, that, upon questions of the construction, operation, or force of any provision of the state constitution or laws, or of the validity of any state enactment, or any power, right, privilege, or exemption claimed under state authority, or of the force or application of the local common law or usages, the decisions of the state courts will furnish the rule of decision for the federal courts,<sup>2</sup> and if the judgments of the state court of last resort are found to be in conflict, the federal courts will follow the last settled adjudications.<sup>3</sup>

But there are certain cases in which this rule cannot be applied, because the reasons on which it rests are inapplicable. It cannot, for example, be applied in any case where the decision of the state court involved a question of national authority, or any right, title, privilege, or exemption derived from or claimed under the Constitution or any law or treaty of the United States.<sup>4</sup> Nor can it be applied to questions not dependent upon local statutes or usages; such as the construction, operation, and negotiability of bills of exchange and other commercial contracts, contracts of insurance and bailment, and questions of injury dependent on principles which are of general recognition.<sup>5</sup> Nor are state decisions upon the validity or construction of a state statute binding when the statute is

<sup>1</sup> *Irvine v. Sim's Lessee*, 3 Dall. 425; *Walker v. Harbor Commissioners*, 17 Wall. 648.

<sup>2</sup> *Shelby v. Guy*, 11 Wheat. 361; *Elmwood v. Marcy*, 92 U. S. Rep. 289.

<sup>3</sup> *Green v. Neal's Lessee*, 6 Pet. 291; *Suydam v. Williamson*, 24 How. 427.

<sup>4</sup> *State Bank v. Knoop*, 16 How. 369; *Jefferson Branch Bank v. Skelley*, 1 Black, 436. The question in these cases was whether a state statute impaired the obligation of a contract contained in the charter of banks.

<sup>5</sup> *Chicago v. Robbins*, 2 Black, 418; *Boyce v. Tabb*, 18 Wall. 546; *Venice v. Murdock*, 92 U. S. Rep. 494.

in the nature of a contract, and private rights have accrued under it, or when contracts have been made under it sanctioned by state decisions afterwards overruled.<sup>1</sup>

The States cannot enlarge the federal jurisdiction, and confer authority over new cases upon the federal courts. But the federal laws, nevertheless, recognize such new rights as are given by state statutes, and administer remedies in respect to them when cases arise over which they have jurisdiction under the laws of Congress.<sup>2</sup> For example, where a state statute gives an action in its courts for the recovery of damages where death has been caused by wrongful act, neglect, or default, the party entitled to bring the action may at his option sue in the federal court, if, by reason of citizenship or alienage, he would be at liberty to enforce other rights in that court.<sup>3</sup> On the other hand, Congress can confer no part of the federal judicial power on the state courts, or on any courts not established by its own authority ;<sup>4</sup> and a State cannot give to its own courts authority to enforce or assist in the enforcement of a law of Congress, such, for example, as the Fugitive Slave Law,<sup>5</sup> nor can it authorize proceedings in its own courts to enforce an exclusively national power.<sup>6</sup>

*Conflict of Jurisdiction.* — In strictness there can be no such thing as a conflict of laws between State and nation. The laws of both operate within the same territory, but if in any particular case their provisions are in conflict, one

<sup>1</sup> *Gelpcke v. Dubuque*, 1 Wall. 175; *Olcott v. Supervisors*, 16 Wall. 678.

<sup>2</sup> *Ex parte McNeil*, 13 Wall. 236; *Clark v. Smith*, 13 Pet. 195.

<sup>3</sup> *Railway Co. v. Whitton*, 13 Wall. 270.

<sup>4</sup> *Martin v. Hunter's Lessee*, 1 Wheat. 304; *Stearns v. United States*, 2 Paine, 300.

<sup>5</sup> *Prigg v. Pennsylvania*, 16 Pet. 539.

<sup>6</sup> Such as the power to take lands for some governmental purpose of the United States, and assess the compensation to be paid by the United States therefor. *Kohl v. United States*, 91 U. S. Rep. 367.

or the other is void. If a law of Congress is passed upon a subject which is within its constitutional powers, any state legislation opposed to it is a mere nullity. For this reason state statutes which in their operation would impede the execution of the Fugitive Slave Law were mere futile attempts to make laws, and were to be held void by the state judiciary as well as by the federal.<sup>1</sup> So are all state laws which tend to impede or obstruct the laws passed by Congress under its power to regulate commerce,<sup>2</sup> all which undertake to levy taxes on the means selected by the general government for use in the exercise of its essential powers,<sup>3</sup> and so on. On the other hand, a federal enactment taxing a State or its municipal corporations is inoperative,<sup>4</sup> and so is one undertaking to establish regulations of local commerce within the States, and it cannot interfere with the operation of state laws on the same subject.<sup>5</sup> In these cases the federal and state courts, if the question came before them, would recognize the same rule, and each administer the same law. If they chanced to differ in opinion, an appeal to the federal Supreme Court must determine the controversy.

But questions of much delicacy sometimes arise, when the federal and state courts, under their concurrent authority, may find their respective jurisdictions invoked in the same controversy. This might lead to collisions, and to unseemly and perhaps dangerous controversies, if the action of the courts were not directed by certain rules of

<sup>1</sup> *Sims's Case*, 7 Cush. (Mass.) 285; *Bushnell's Case*, 8 Ohio, N. S. 77.

<sup>2</sup> *State v. Steamship Constitution*, 42 Cal. 578; *Council Bluffs v. Railroad Co.*, 45 Iowa, 338; *Foster v. County Commissioners*, 7 Minn. 140; *State Treasurer v. Railroad Co.*, 4 Houst. (Del.) 158.

<sup>3</sup> *Palfrey v. Boston*, 101 Mass. 329; *Montgomery Co. v. Elston*, 32 Ind. 27.

<sup>4</sup> *United States v. Railroad Co.*, 17 Wall. 322.

<sup>5</sup> *United States v. De Witt*, 9 Wall. 41; *License Tax Cases*, 5 Wall. 462.

good sense and comity devised to preserve harmony and insure an orderly administration of justice.

The most important of these rules is that the court which first obtains jurisdiction of a controversy by the service of process, will not be interfered with by the other in the exercise of that jurisdiction until final judgment and execution.<sup>1</sup> The federal courts will not therefore enjoin the proceedings in a suit in a state court, nor a state court those in a federal court.<sup>2</sup> In every respect except where the acts of Congress have made special provision, the courts of the State and of the United States are as distinct and independent in the exercise of their powers as the courts of two separate and independent nations.<sup>3</sup> Therefore, where property is in the official custody of the ministerial officer of the courts of one jurisdiction, it cannot be taken from his custody on replevin or other process issued by the courts of the other,<sup>4</sup> even though it be alleged that the officer holding it seized on process against one person the property of another.<sup>5</sup> The rule applies where the property and franchises of a corporation have been taken judicial control of by a state court and ordered sold;<sup>6</sup>

<sup>1</sup> *Mallett v. Dexter*, 1 Curt. 178; *Tobey v. Bristol*, 3 Story, 800; *Wadleigh v. Veazie*, 3 Sum. 165; *Shoemaker v. French*, Chase's Dec. 305; *The Celestine*, 1 Biss. 1; *Ruggles v. Simonton*, 3 Biss. 325; *Daly v. The Sheriff*, 1 Woods, 175. This remark will of course be understood as subject to the right to remove causes from the state to the federal courts in the cases provided by law.

<sup>2</sup> *Diggs v. Wolcott*, 4 Cranch, 179; *City Bank of New York v. Skelton*, 2 Blatch. 14; *Ex parte Cabrera*, 1 Wash. C. C. 232; *Rorer's Inter-State Law*, 12-14.

<sup>3</sup> *Rogers v. Cincinnati*, 5 McLean, 337, 339; *Riggs v. Johnson County*, 6 Wall. 166.

<sup>4</sup> *Taylor v. Carryl*, 20 How. 583.

<sup>5</sup> *Freeman v. Howe*, 24 How. 450; *The Oliver Jordan*, 2 Curt. 414. But the party claiming the property may at his election sue the officer in trespass in such case. *Buck v. Colbath*, 3 Wall. 334.

<sup>6</sup> *Fox v. Hempfield R. R. Co.*, 2 Abb. U. S. 151.

and also where property is in the hands of a receiver appointed by a court; <sup>1</sup> and any attempt to disturb the possession of the receiver, except by permission of the court appointing him, will be a contempt of the authority of the court. <sup>2</sup>

The possession of the state courts, however, will not be allowed to defeat claims under the United States revenue laws, or under laws imposing forfeitures for offences. <sup>3</sup>

*Essential Powers.* — The federal courts have all the powers which inhere in courts in general, and may exercise them for the full enforcement of their jurisdiction, until the judgments they render are performed or satisfied. <sup>4</sup> For this purpose they are authorized by law to issue all the customary writs. <sup>5</sup> But they cannot exercise state powers, even though without doing so they are powerless to enforce their judgments. They may compel officers to levy taxes in proper cases, to satisfy judgments rendered by them against municipal corporations; <sup>6</sup> but they cannot appoint officers to make the levies when there are none to act. <sup>7</sup>

*Territorial Courts.* — The provisions of the Constitution which define the limits of the judicial power have no application to the Territories. It is therefore competent for Congress to create courts for the Territories, and confer upon them such jurisdiction as may seem necessary or proper. And these courts are commonly empowered to

<sup>1</sup> *Wiswall v. Sampson*, 14 How. 52.

<sup>2</sup> *DeVisser v. Blackstone*, 6 Blatch. 235; *Wiswall v. Sampson*, 14 How. 52.

<sup>3</sup> *United States v. The Reindeer*, 2 Cliff. 57.

<sup>4</sup> *Bank of United States v. Halstead*, 10 Wheat. 51.

<sup>5</sup> Rev. Stat. of U. S. (1878), § 716.

<sup>6</sup> *Von Hoffman v. Quincy*, 4 Wall. 535; *Memphis v. Brown*, 97 U. S. Rep. 300.

<sup>7</sup> *Rees v. Watertown*, 19 Wall. 107; *Heine v. Commissioners*, 19 Wall. 655.

exercise within the Territories all the powers which within the States are exercised by both the state and federal courts.<sup>1</sup> They are created by Congress, but the practice, pleadings, and forms and modes of proceeding, are left to be regulated by the territorial legislatures.<sup>2</sup>

*Courts-Martial.* — It is competent for Congress, by the rules and articles of war, to provide for the ordering of courts-martial for the trial of offences arising in the military and naval service;<sup>3</sup> and these courts, except as may be otherwise provided, will execute their duties and regulate their mode of proceeding by the customary military law.<sup>4</sup> But a person not enrolled or liable to be enrolled for service cannot be subjected to the jurisdiction of such courts;<sup>5</sup> nor can the courts proceed against those who are liable without giving notice and an opportunity of defence to the accused.<sup>6</sup> Where a court-martial proceeds without authority, and restrains a party of his liberty or inflicts punishment, all the parties responsible for the action are liable to suits therefor in the common-law courts.<sup>7</sup>

*Military Courts or Commissions.* — Offences against martial law and the laws of war, and all acts not justified by the laws of war, which are calculated to impede or obstruct the operations of the military authorities, or to render abortive any attempt by the government to enforce its authority, may be punished by military courts or commissions organized by the President as commander-in-chief, or by the immediate military commander, or established

<sup>1</sup> *American Ins. Co. v. Canter*, 1 Pet. 511; *Clinton v. Englebrecht*, 13 Wall. 434.

<sup>2</sup> *Hornbuckle v. Toombs*, 18 Wall. 648.

<sup>3</sup> *Re Bogert*, 2 Sawyer, 396.

<sup>4</sup> *Martin v. Mott*, 12 Wheat. 19.

<sup>5</sup> *Wise v. Withers*, 3 Cranch, 331.

<sup>6</sup> *Meade v. Deputy Marshal*, 2 Car. Law Repos. 320.

<sup>7</sup> *Milligan v. Hovey*, 3 Biss. 13. See *Mostyn v. Fabrigas*, Cowp. 161.

under the authority of Congress. But these tribunals cannot try offences against the general laws when the courts of the land are in the performance of their regular functions, and no impediment exists to a lawful prosecution there.<sup>1</sup> An impediment does exist, however, when martial law is lawfully declared;<sup>2</sup> and this creates an exception to the general rule that the military in times of peace must be in strict subordination to the civil power, and in times of war also, except on the theatre of warlike movements.<sup>3</sup> The military tribunals may also take cognizance of offences alleged to have been committed by soldiers upon citizens within the field of military operations against an armed rebellion, while the civil law is for the time suspended, and to the exclusion of the ordinary jurisdiction when restored.<sup>4</sup>

*Political Questions.* — Over political questions the courts have no authority, but must accept the determination of the political departments of the government as conclusive. Such are the questions of the existence of war, the restoration of peace,<sup>5</sup> the *de facto* or rightful government of another country,<sup>6</sup> the authority of foreign ambassadors and ministers,<sup>7</sup> the admission of a State to the Union,<sup>8</sup> the restoration to constitutional relations of a State lately in rebellion,<sup>9</sup> the extent of the jurisdiction of a foreign power,<sup>10</sup> the right of Indians to recognition as a tribe,<sup>11</sup> and so on.

<sup>1</sup> Milligan's Case, 4 Wall. 2.      <sup>2</sup> Luther v. Borden, 7 How. 1.

<sup>3</sup> 1 Bl. Com. 413-415.

<sup>4</sup> Coleman v. Tennessee, 97 U. S. Rep. 509.

<sup>5</sup> United States v. Anderson, 9 Wall. 56.

<sup>6</sup> The Hornet, 2 Abb. U. S. 35; Gelston v. Hoyt, 3 Wheat. 246.

<sup>7</sup> Foster v. Neilson, 2 Pet. 253.

<sup>8</sup> See Luther v. Borden, 7 How. 1; Marsh v. Burroughs, 1 Woods, 463.

<sup>9</sup> Georgia v. Stanton, 6 Wall. 50.

<sup>10</sup> Williams v. Suffolk Ins. Co., 13 Pet. 415.

<sup>11</sup> The Kansas Indians, 5 Wall. 737; United States v. Holliday, 3 Wall. 407.



*Final Authority in Construction.* — The several departments of the government are equal in dignity and of co-ordinate authority, and neither can subject the other to its jurisdiction, or strip it of any portion of its constitutional powers. But the judiciary is the final authority in the construction of the constitution and the laws, and its construction should be received and followed by the other departments. This results from the nature of its jurisdiction; questions of construction arise in legal controversies, and are determined by the courts, and when determined the courts have power to give effect to their conclusions. Their judgments thus become the law of the land on the points covered by them, and a disregard of them, whether by private citizens or by officers of the government, could only result in new controversy, to be finally determined by the judiciary in the same way. But the courts have no authority to pass upon abstract questions, or questions not presented by actual litigation, and have therefore nothing to do with questions which relate exclusively to executive or legislative authority; nor is there any method in which their opinions can be constitutionally expressed, so as to have binding force upon either the executive or the legislature when the question presents itself, not as one of existing law, but as one of what it is proper or politic or competent to make law for the future. The judiciary, though the final judge of what the law is, is not the judge of what the law should be.<sup>1</sup>

It is very proper, however, that the judiciary, in passing upon questions of law which have been considered and acted upon by the other departments, should give great

<sup>1</sup> Some few of the States make provision by their constitutions whereby the executive or the legislature may call upon the highest court of law of the State for its opinion upon important questions as a guide to their own action.

weight to their opinions, especially if they have passed unchallenged for a considerable period.<sup>1</sup> The judiciary have often yielded to it when the correctness of a practical construction of the law by the executive departments, in the performance of their own duties, was in question;<sup>2</sup> but they cannot do this when, in the opinion of the court, the construction is plainly in violation of the Constitution.<sup>3</sup>

<sup>1</sup> *Stuart v. Laird*, 1 Cranch, 299; *Bank of United States v. Halstead*, 10 Wheat. 51, 63.

<sup>2</sup> *Edwards's Lessee v. Darby*, 12 Wheat. 210; *Surgett v. Lapice*, 8 How. 48; *Bissell v. Penrose*, 8 How. 317; *Union Ins. Co. v. Hoge*, 21 How. 35; *United States v. Gilmore*, 8 Wall. 330; *United States v. Moore*, 95 U. S. Rep. 760.

<sup>3</sup> *Story on Const.*, § 407; *Cooley, Const. Lim.*, 4th ed., 84.

## CHAPTER VII.

## CHECKS AND BALANCES IN GOVERNMENT.

*What they are.* — The American system of government is an elaborate system of checks and balances. As enumerated by one of the early statesmen of the country, these are as follows : — First, the States are balanced against the general government. Second, the House of Representatives is balanced against the Senate, and the Senate against the House. Third, the executive authority is in some degree balanced against the legislature. Fourth, the judiciary is balanced against the legislature, the executive, and the state governments. Fifth, the Senate is balanced against the President in all appointments to office, and in all treaties. Sixth, the people hold in their own hands the balance against their own representatives by periodical elections. Seventh, the legislatures of the several States are balanced against the Senate by sexennial elections. Eighth, the Electors are balanced against the people in the choice of President and Vice-President. And this, it is added, is a complication and refinement of balances which is an invention of our own, and peculiar to this country.<sup>1</sup>

The invention, nevertheless, was suggested by the British constitution, in which a system almost equally elaborate was then in force. In its outward forms that system still remains ; but there has been for more than a century a gradual change in the direction of a concentration of legislative and executive power in the popular House of Parliament, so that the government now is sometimes said,

<sup>1</sup> Letter of John Adams to John Taylor, Works, vi. 467.

with no great departure from the fact, to be a government by the House of Commons. The judiciary, indeed, retains its independence and power, and these have been somewhat strengthened as bills of attainder are discontinued, and as the judicial authority of the House of Lords is narrowed by legislation.

*Electors of President.*—Of the checks in American government above enumerated, some have proved wholly illusory. This is emphatically true of the eighth. The theory of the Constitution is that there shall be chosen by each State a certain number of its citizens, enjoying the general confidence of the people, who shall independently cast their suffrages for President and Vice-President of the United States, according to the dictates of their individual judgments. This theory was followed in the first three presidential elections, but from that time it fell into practical disfavor, and now not only is the theory obsolete, but it would be thought in the highest degree dishonorable if an Elector were to act upon it. In practice, the persons to be voted for are selected by popular conventions, in advance of the choice of Electors, and these officers act as mere automata in registering the will of those who selected them.

*States and Nation.*—The Constitution itself imposes very effectual checks on the powers of the States for the protection of federal jurisdiction, by expressly restraining them from the exercise of some of the most important powers of sovereignty, and by subordinating others to the authority of Congress. These are all alluded to elsewhere. To maintain these unimpaired, the federal government is made, as against the States, the final judge of its own powers. Nothing more need be said to show that encroachment upon the federal jurisdiction is effectually provided against.

On the other hand, there were various ways in which

the States were expected to constitute a balance to the powers of the federal government. First, in the division of powers between States and nation, the larger portion, including nearly all that touched the interests of the people in their ordinary business relations and in their family and social life, were reserved to the States. All that related to the family and the domestic relations, the administration and distribution of estates, the forms of contract and conveyance, the maintenance of peace and order in the States, the punishment of common-law offences, the making provision for education, for public highways, for the protection of personal liberty and liberty of worship, — all these powers were withheld from the jurisdiction of the federal government, and retained by the States, and their retention was calculated to give to the body of the people a larger interest in a proper administration of state authority than in that of the nation. Second, the States elected the representatives in Congress and chose the senators, and these would naturally be expected to represent the opinions, feelings, and sentiments of their constituents, and to so act in their official positions as to avoid all encroachments on the powers of the States. The President was also chosen by persons selected by the States for the purpose, who would naturally reflect the local views. Third, the States were given the privilege to originate amendments to the Constitution of the United States whenever they should be found necessary, and it was expected that they would make use of this privilege if at any time the federal government should be found relatively too strong, or should be thought to have unwarrantably extended its jurisdiction. From the nature of the case, however, it was impossible that the powers reserved to the States should constitute a restraint upon the increase of federal power, to the extent that was at first expected. The federal government was necessarily

made the final judge of its own authority, and the executor of its own will, and any effectual check to the gradual amplification of its jurisdiction must therefore be found in the construction put by those administering it upon the grants of the Constitution, and in their own sense of constitutional obligation. And as the true line of division between federal and state powers has from the very beginning been the subject of contention, and of honest differences of opinion, it must often happen that to advance and occupy some disputed ground will seem to the party having the power to do so a mere matter of constitutional duty. The effectual checks upon the encroachment of federal upon state power must therefore be looked for, not in state power of resistance, but in the choice of representatives, senators, and presidents holding just constitutional views, and in a federal Supreme Court with competent power to restrain all departments and all officers within the limits of their just authority, so far as their acts may become the subjects of judicial cognizance.<sup>1</sup> Such amendments to the Constitution as have hitherto been made have originated with the Congress, and, with the single exception of that which takes from the federal judiciary the power to take cognizance of suits by individuals against States, none of them has taken from the United States any real authority.

Some other checks which are continuous and more effective are the following.

*Judicial Restraints on Legislative Encroachments.*—The business of the courts is, to apply the law of the land in such controversies as may arise and be brought before them. Their authority is co-ordinate with that of the

<sup>1</sup> It is no doubt true that, "in reference to all doubtful questions incident to our governmental system, the line of approach [should] be kept carefully in the foreground, and any intrusion thereon most vigilantly avoided." — Rorer, *Inter-State Law*, p. 10.

legislature, neither superior nor inferior; but each with equal dignity must move in its appointed sphere.<sup>1</sup> But the judiciary, in seeking to ascertain what the law is which must be applied in any particular controversy, may possibly find that the will of the legislature, as expressed in statute form, and the will of the people, as expressed in the Constitution, are in conflict, and the two cannot stand together. In such a case, as the legislative power is conferred by the Constitution, it is manifest that the delegate has exceeded his authority; the trustee has not kept within the limits of his trust. The excess is therefore inoperative, and it is the duty of the court to recognize and give effect to the Constitution as the paramount law, and, by refusing to enforce the legislative enactment, practically nullify it.

The obligation to perform this duty, whenever the conflict appears, is imperative; but the duty is nevertheless a delicate one, because the court in declaring a statute invalid must necessarily overrule the decision of the legislative department, made in the course of the performance of its peculiar duties, and where it must be assumed to have acted on its best judgment. The task, therefore, is one to be entered upon with caution, reluctance, and hesitation, and never until the duty becomes manifestly imperative. The following general propositions will be found to state the obligations of duty and of forbearance for such cases which are generally recognized.

1. The duty to pass upon a question of constitutional law may devolve upon a court of any grade, and of either the federal or the state jurisdiction. Wherever the question can arise in court of the conformity of a statute to the Constitution, the court to whom the question is addressed must in some manner dispose of it, and the power of the court to apply the law to the case necessarily em-

<sup>1</sup> *Lindsay v. Commissioners*, 2 Bay, (S. C.) 61; *Bates v. Kimball*, 2 Chip. (Vt.) 77.

braces the power to determine what law controls. In the absence of authoritative precedents, there can be no other test of this than the judgment of the court. The validity of a federal statute may therefore be a necessary question for consideration in a state court, and that of a state statute in a federal court. Nevertheless, when the court to whom the question is addressed is not the court of last resort in respect thereto, it may well be expected to proceed with more than ordinary caution and hesitation, and to abstain altogether from declaring a statute invalid unless in the clearest cases, especially if, without serious detriment to justice, the decision can be delayed until the superior court can have opportunity to pass upon it. There may be cases where, by inadvertence or accident, a bill which has gone through all the forms required for valid legislation is, nevertheless, clearly and without question invalid; but except in such cases the spectacle of an inferior magistrate, having merely police or other limited jurisdiction, assuming to pass judgment upon the legislation of his State or country, and declare it invalid, can only be ludicrous.<sup>1</sup>

2. The judicial sense of propriety and of the importance of the occasion will generally incline the court to refuse a consideration of a constitutional question without the presence of a full bench of judges. With many courts this is a rule to which few exceptions are admitted, and those only which seem to be imperative.<sup>2</sup>

3. Neither, as a rule, will a court express an opinion adverse to the validity of a statute, unless it becomes absolutely necessary to the determination of a cause before it.<sup>3</sup>

<sup>1</sup> Some courts have intimated that only the superior courts should assume to deny validity to a statute. *Ortman v. Greenman*, 4 Mich. 291. Compare *Mayberry v. Kelly*, 1 Kans. 116.

<sup>2</sup> *Briscoe v. Bank of Kentucky*, 8 Pet. 118.

<sup>3</sup> *Hoover v. Wood*, 9 Ind. 286; *Smith v. Speed*, 50 Ala. 277.



Therefore, in any case where a constitutional question is raised, if the record presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, the court will adopt that course, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it, and when, consequently, a decision upon such question will be unavoidable.<sup>1</sup> This course has not always been followed; but it has seldom occurred that a constitutional question has been considered settled, or been allowed to remain without further dispute and question, where the opinion given upon it was rendered in a case not necessarily requiring it. Want of jurisdiction of the particular case is always reason why the court should abstain from expressing opinions on other questions which parties may attempt to raise.

4. The court will not listen to an objection made to the constitutionality of an act by one whose rights are not affected by it, and who consequently can have no interest in defeating it.<sup>2</sup> For example, one who has received compensation for property appropriated by statute to a public use will not be suffered afterwards to dispute the constitutional validity of the statute.<sup>3</sup> The statute is assumed to be valid until some one complains of it whose rights it invades. The power of the court can be invoked only when it is found necessary to secure and protect a party before it against an unwarranted exercise of legislative power to his prejudice.<sup>4</sup>

<sup>1</sup> *Ex parte Randolph*, 2 Brock. 447; *Freer v. Ford*, 6 N. Y. 177.

<sup>2</sup> *Marshall v. Donovan*, 10 Bush, (Ky.) 681; *Mobile, &c. R. R. Co. v. State*, 29 Ala. 586.

<sup>3</sup> *Embury v. Connor*, 3 N. Y. 511; *Haskell v. New Bedford*, 108 Mass. 208.

<sup>4</sup> *Wellington, Petitioner*, 16 Pick. (Mass.) 96; *State v. Rich*, 20 Mo. 393.

5. Nor can a court declare a statute unconstitutional and void when the objection to it is merely that it is unjust and oppressive, and violates rights and privileges of the citizen, unless it can be shown that such injustice is prohibited, or such rights and privileges guaranteed by the Constitution. The propriety or justice or policy of legislation, within the limits of the Constitution, is exclusively for the legislative department to determine; and the moment a court ventures to substitute its own judgment for that of the legislature, it passes beyond its legitimate authority, and enters a field where it would be impossible to set limits to its interference, except as should be prescribed in its own discretion.<sup>1</sup> The protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but courts cannot assume their rights.<sup>2</sup> The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and

<sup>1</sup> It has been well said by one judge: "If the legislature should pass a law, in plain and unequivocal language, within the general scope of their constitutional powers, I know of no authority in this government to pronounce such an act void, merely because in the opinion of the judicial tribunals it was contrary to the principles of natural justice; for this would be vesting in the court a latitudinarian authority which might be abused, and would necessarily lead to collisions between the legislative and judicial departments, dangerous to the well-being of society, or at least not in harmony with the structure of our ideas of natural government." *Commonwealth v. McCloskey*, 2 Rawle, (Pa.) 374. See *Bebee v. State*, 6 Ind. 515, 528. Many judges think laws laying protective duties are contrary to natural justice; but if they were at liberty to decide the validity of legislation on such grounds, the ordinary legislation could not be carried on except with their assent.

<sup>2</sup> *Bennett v. Bull*, Baldw. 74; *Pennsylvania R. R. Co. v. Riblet*, 66 Penn. St. 164.

expediency with the law-making power.<sup>1</sup> The question of the validity of a statute must always be one of legislative competency to enact it; not one of policy, propriety, or strict justice.

6. Nor can a statute be declared unconstitutional merely because in the opinion of the court it violates one or more of the fundamental principles of republican liberty, unless it shall be found that those principles are placed beyond legislative encroachment by the provisions of the Constitution itself. The principles of republican government are not a set of inflexible rules, vital and active in the Constitution even when unexpressed; but they are subject to variation and modification from motives of policy and public necessity, and it is only in those particulars in which experience has demonstrated that any departure from the settled course must work injustice and confusion, that it is customary to incorporate them in the Constitution in such a way as to make them definite rules of action and decision. The following are illustrations. The principle that taxation and representation go together is important and valuable, and should never be lost sight of in legislation; but, as commonly understood, it can never be applied universally without admitting every person to the elective franchise; for taxes in some form fall upon all,—the rich and the poor, the infant and the adult, the male and the female,—and federal taxes reach the unrepresented Territories as well as the represented States. So the principle that local affairs shall be managed in local districts, and that these shall choose their own local officers, constitutes one of the chief excellencies of our system of government; but in applying it the difficulty is at once encountered of determining what are local concerns and what general; and it may perhaps be

<sup>1</sup> Madison, &c. *R. R. Co. v. Whiteneck*, 8 Ind. 217; *Bull v. Read*, 13 Grat. (Va.) 98.

found in a given case that the concerns that are set apart as local, if neglected or imperfectly performed, subject the whole State to embarrassment, so that state intervention becomes necessary. And it is obvious that, wherever a recognized principle of free government requires legislation for its practical application and enforcement, the body that passes laws for the purpose must determine, in its discretion, what are the needs of legislation and what its proper limits. The courts cannot take such principles as abstract rules of law, and give them practical force.<sup>1</sup>

7. When a question of federal constitutional law is involved, the purpose of the Constitution, and the object to be accomplished by any particular grant of power, are often most important guides in reaching the real intent; and the debates in the Constitutional Convention, the discussions in the *Federalist* and in the conventions of the States, are often referred to as throwing important light on clauses in the Constitution which seem blind or of ambiguous import. We may discover from these what the general drift of opinion was as to the division line between federal and state power on many subjects, and we can sometimes judge from that whether a particular authority lies on one side of the line or on the other. But we shall be misled if we attempt in this manner to judge of state legislative power when the limitations of the federal Constitution are not in question. We cannot test the validity of any state statute by a general spirit which is supposed to pervade the state constitution, but is not expressed in words. Presumptively, when the people of the State, by their constitution, call into existence a legislative department, and endow it with the function of making laws, they confer upon it the full and complete legislative power,—as full and complete as the people, in the exercise of sover-

<sup>1</sup> *People v. Draper*, 15 N. Y. 532; *Baltimore v. State*, 15 Md. 376; *People v. Mahaney*, 13 Mich. 498.

eignty, could themselves have wielded it, — subject only to such restrictions as were by the same instrument imposed. “The law-making power of the State recognizes no restraints, and is bound by none except such as are imposed by the Constitution. That instrument has been aptly termed a legislative act by the people themselves, in their sovereign capacity, and is therefore the paramount law. Its object is, not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute. These limitations are created and imposed by express words, or arise by necessary implication. The leading feature of the Constitution is the separation and distribution of the powers of the government. It takes care to separate the executive, legislative, and judicial powers, and to define their limits. The executive can do no legislative act, nor the legislature any executive act, and neither can exercise judicial authority.”<sup>1</sup> Presumptively, therefore, if an act of the legislative department is not an encroachment upon executive or judicial power, it is valid. To show its invalidity, it is necessary to point out some particular in which, either in form or substance, it is inconsistent with the Constitution. The inconsistency may consist, either, (1.) in the failure to observe some constitutional form which is made essential to a valid enactment, such as the taking of the final vote thereon by yeas and nays when the Constitution requires it; or (2.) in the disregard of an express prohibition, as where it consists in a special charter of incorporation when the Constitution forbids incorporation except under general laws; or (3.) in the disregard of some fundamental right declared in the bill of rights, as would be a statute compelling support of sectarian worship or schools when the Constitution pro-

<sup>1</sup> *Sill v. Corning*, 15 N. Y. 297; *Sears v. Cottrell*, 5 Mich. 251; *Danville v. Pace*, 25 Grat. (Va.) 1.

claims religious liberty. And in all these cases it is not the spirit of the Constitution that must be the test of validity, but the written requirements, prohibitions, and guaranties of the Constitution itself.<sup>1</sup>

8. A statute may sometimes be valid in part and invalid in other particulars. This often happens under state constitutions that require an act to contain but one object which shall be expressed in the title. If in such a case the act embraces two objects while the title expresses but one, the act will be unconstitutional and void as to the one not so expressed. So in the absence of such a requirement the act might be void as to one object because the legislation attempted was expressly forbidden by the constitution, while in other particulars it was plainly within the legislative competency. The general rule therefore is, that the fact that part of a statute is unconstitutional does not justify the remainder being declared invalid also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the act otherwise than as a whole. It is immaterial how closely the valid and invalid provisions are associated in the act; they may even be contained in the same section, and yet be perfectly distinct and separable, so that the one may stand though the other fall.<sup>2</sup> If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. But if the intent of the act is to accomplish a single purpose only, and some provisions are void, the

<sup>1</sup> Cooley, *Const. Lim.*, 4th ed., 208-214.

<sup>2</sup> *Commonwealth v. Hitchings*, 5 Gray, (Mass.) 482; *Hagerstown v. Dechert*, 32 Md. 369; *State v. Clarke*, 54 Mo. 17.

whole must fail unless sufficient remains to effect the object without the invalid portion. And if they are so mutually connected with and dependent on each other as conditions, considerations, or compensations, as to warrant the belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions that are thus dependent, conditional, or connected must fall with them.<sup>1</sup>

9. A doubt of the constitutional validity of a statute is never sufficient to warrant its being set aside. "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."<sup>2</sup> "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt."<sup>3</sup> To be in doubt, therefore, is to be resolved, and the resolution must support the law.

This course is the opposite to that which is required of the legislature in considering the question of passing a proposed law. Legislators have their authority measured by the Constitution; they are chosen to do what it permits, and nothing more, and they take solemn oath to obey and support it. When they disregard its provisions, they usurp authority, abuse their trust, and violate the

<sup>1</sup> *State v. Commissioners*, 5 Ohio, N. S. 497; *State v. Dousman*, 28 Wis. 541; *Campau v. Detroit*, 14 Mich. 276; *Willard v. People*, 5 Ill. 461; *Commonwealth v. Potts*, 79 Penn. St. 164; *Baker v. Braman*, 6 Hill, (N. Y.) 47.

<sup>2</sup> *Fletcher v. Peck*, 6 Cranch, 87, 128.

<sup>3</sup> *Ogden v. Saunders*, 12 Wheat. 213, 270.

promise they have confirmed by an oath. To pass an act when they are in doubt whether it does not violate the Constitution, is to treat as of no force the most imperative obligations any person can assume. A business agent who would deal in that manner with his principal's business would be treated as untrustworthy; a witness in court who would treat his oath thus lightly, and affirm things concerning which he was in doubt, would be held a criminal. Indeed, it is because the legislature has applied the judgment of its members to the question of its authority to pass the proposed law, and has only passed it after being satisfied of the authority, that the judiciary waive their own doubts, and give it their support.<sup>1</sup>

10. The validity of legislation can never be made to depend on the motives which have secured its adoption, whether these be public or personal, honest or corrupt. There is ample reason for this in the fact that the people have set no authority over the legislators with jurisdiction to inquire into their conduct, and to judge what have been their purposes in the pretended discharge of the legislative trust. This is a jurisdiction which they have reserved to themselves exclusively, and they have appointed frequent elections as the occasions and the means for bringing these agents to account. A further reason is, that to make legislation depend upon motives would render all statute law uncertain, and the rule which should allow it could not logically stop short of permitting a similar inquiry into the motives of those who passed judgment. Therefore the courts do not permit a question of improper legislative motives to be raised, but they will in every instance assume that the motives were public and befitting the station.<sup>2</sup>

<sup>1</sup> *Osburn v. Stanley*, 5 W. Va. 85; *Kellogg v. State Treasurer*, 44 Vt. 356.

<sup>2</sup> *Ex parte McCardle*, 7 Wall. 506, 514; *Doyle v. Insurance Co.*, 94 U. S. Rep. 535.



They will also assume that the legislature had before it any evidence necessary to enable it to take the action it did take.<sup>1</sup>

11. When a legislative enactment proves to be invalid, it is for all legal purposes as if it had never been.<sup>2</sup> It can support no contract, it can create no right, it can give protection to no one who has acted under it, it can make no one an offender who has refused obedience to it. And this is true of any particular provision of a statute which proves invalid, while the remainder is sustained.<sup>3</sup> It is true that one who assumes to disobey a statute as invalid does so at the risk of being punished for his disobedience if the law is sustained; but this is a risk which every one takes when he acts in any matter in respect to which the law is in doubt.

*Suits against Officers.*—The exemption of legislators from inquiry into motives would of itself protect them against suits by private individuals who may suffer damage from their action; but they are also exempt on the further ground that the duties they perform are of a public nature exclusively, and they are therefore under responsibility only to the public. There is a like exemption in favor of inferior bodies who exercise a *quasi* legislative authority,<sup>4</sup> though it may be otherwise in respect to particular duties with which such bodies are sometimes charged for the benefit of individuals, and which each member is expressly required to recognize and perform. The case of inferior officers exercising severally a discretionary duty to individuals is different. They are protected while they act in good faith, but they are generally held responsible if they take advantage of their position

<sup>1</sup> Johnson v. Railroad Co., 23 Ill. 202; Lusher v. Scites, 4 W. Va. 11.

<sup>2</sup> Sumner v. Beeler, 50 Ind. 341.

<sup>3</sup> Cooley, Const. Lim., 4th ed., 227.

<sup>4</sup> Baker v. State, 27 Ind. 485; Freeport v. Marks, 59 Penn. St. 253.

to injure another maliciously and without cause.<sup>1</sup> This is the rule which is applied to election officers who are found guilty of having wrongfully refused to register voters or to receive their ballots.<sup>2</sup> Mere ministerial officers must always at their peril keep within the limits of the law, for their duties are not discretionary, and the law is supposed to make plain for them what their duty is. Nor will the immunity of the legislative department cover the acts of its ministerial agents with a like shield of protection. And this is an important check which the judiciary holds upon the law-making departments: if the members are not directly responsible for exceeding their constitutional authority, the ministerial agents and officers through whom the legislature acts will always be so.<sup>3</sup>

*Check on the Treaty-making Power.*—The full treaty-making power is in the President and Senate; but the House of Representatives has a restraining power upon it in that it may in its discretion at any time refuse to give assent to legislation necessary to give a treaty effect. Many treaties need no such legislation; but when moneys are to be paid by the United States, they can be appropriated by Congress alone; and in some other cases laws are needful. An unconstitutional or manifestly unwise treaty

<sup>1</sup> *Bennett v. Fulmer*, 49 Penn. St. 155; *Billings v. Lafferty*, 31 Ill. 318; *Shoemaker v. Nesbit*, 2 Rawle, 201; *Parmelee v. Baldwin*, 1 Conn. 313.

<sup>2</sup> *Lincoln v. Hapgood*, 11 Mass. 350; *Jeffries v. Ankeny*, 11 Ohio, 322; *Bevard v. Hoffman*, 18 Md. 479; *Goetcheus v. Mathewson*, 61 N. Y. 420; *Weckerly v. Geyer*, 11 S. & R. 35; *Miller v. Rucker*, 1 Bush, (Ky.) 135; *Carter v. Harrison*, 5 Blackf. (Ind.) 138; *Gordon v. Farrar*, 2 Doug. (Mich.) 411; *Dwight v. Rice*, 5 La. An. 580; *State v. Porter*, 4 Harr. (Del.) 556; *Wheeler v. Patterson*, 1 N. H. 88; *Fausler v. Parsons*, 6 W. Va. 486; *Peavey v. Robbins*, 3 Jones, (N. C.) 339; *Rail v. Potts*, 8 Humph. (Tenn.) 225. The Massachusetts and Ohio cases hold the officers responsible for refusing a legal ballot, even when they err in good faith.

<sup>3</sup> *Stockdale v. Hansard*, 9 Ad. & El. 1; *Milligan v. Hovey*, 3 Biss. 13.

the House of Representatives may possibly refuse to aid ; and this, when legislation is needful, would be equivalent to a refusal of the government, through one of its branches, to carry the treaty into effect. This would be an extreme measure, but it is conceivable that a case might arise in which a resort to it would be justified.<sup>1</sup>

*Judiciary and Executive.*—From the foregoing it will appear that the judiciary has no control whatever over legislation, and no power whatever to question its purpose or animus, provided always that legislation is kept within the limits of the constitutional grant. The remark is equally true when applied to executive power. Within the sphere of his authority under the Constitution the Executive is independent, and judicial process cannot reach him.<sup>2</sup> But when he exceeds his authority, or usurps that which belongs to one of the other departments, his orders, commands, or warrants protect no one, and his agents become personally responsible for their acts. The check of the courts, therefore, consists in their ability to keep the Executive within the sphere of his authority by refusing to give the sanction of law to whatever he may do beyond it, and by holding the agents and instruments of his unlawful action to strict accountability.<sup>3</sup>

The Executive can have no corresponding authority to pass upon the validity of either legislative or judicial action. His judgment of proposed legislation may be expressed in his veto, but if that is overruled the Executive is as much bound as is any private citizen. He is also equally concluded by the judgment of a competent court,

<sup>1</sup> See *ante*, p. 103.

<sup>2</sup> *Marbury v. Madison*, 1 Cranch, 137 ; *Hawkins v. Governor*, 1 Ark. 570 ; *State v. Governor*, 25 N. J. 331 ; *People v. Governor*, 29 Mich. 320 ; *Mauran v. Smith*, 8 R. I. 192 ; *State v. Warmouth*, 22 La. An. 1 ; *Rice v. Austin*, 19 Minn. 103.

<sup>3</sup> *Milligan v. Hovey*, 3 Biss. 13 ; *Kendall v. United States*, 12 Pet. 524 ; *Little v. Barreme*, 2 Cranch, 170.

and it may become his duty as Executive to assist in enforcing a judgment he believes erroneous, should enforcement by the ordinary process of the court and by its own officers become impossible. Nevertheless it is conceivable that the Executive may refuse to obey either a statute or the judgment of a court. Indeed, such cases have occurred in the history of the federal government, notably in the case of the Georgia Indians,<sup>1</sup> and in cases arising under the proclamation of President Lincoln purporting to suspend the *habeas corpus*.<sup>2</sup> It can be said of such cases only this, that the responsibility of the President for a refusal to regard the judicial mandate is on the one hand to the people and on the other to the process of impeachment.

*Impeachments.* — The two very effective restraints which the legislature may interpose to the abuse of executive and judicial authority are, first, that which consists in its control over their jurisdiction, and, second, the proceeding by impeachment. Much of executive authority comes, not from the Constitution, but from statute, and what is thus given may at any time be taken away. The same is true of the courts. Some of them are purely statutory courts, and may be modified or abolished; all of them derive the most of their jurisdiction from statutes, and whenever this is abused it can be restricted or taken away.<sup>3</sup> But it may also be modified or taken away on grounds of expediency or policy merely. Impeachment is for the purpose of punishing misconduct. By the Constitution of the United States the House of Representatives

<sup>1</sup> *Worcester v. Georgia*, 6 Pet. 515; Webster's Works, i. 268. The papers and documents are collected in Niles's Register, vols. xxxix.-xliv.

<sup>2</sup> Merryman's Case, Taney's Dec. 246; S. C. 9 Am. Law Reg. 524; 14 Law Rep., N. S. 78.

<sup>3</sup> *Ex parte McCardle*, 7 Wall. 506.

has the sole power of impeachment,<sup>1</sup> and the Senate the sole power to try its presentments. When the President is tried, the Chief Justice shall preside, and no person shall be convicted without the concurrence of two thirds of the members.<sup>2</sup> Judgment in case 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, provided the impeachable offence is also an indictable offence.<sup>3</sup> The President's power to grant reprieves and pardons does not extend to impeachments.<sup>4</sup>

The offences for which the President or any other officer may be impeached are any such as in the opinion of the House are deserving of punishment under that process: They are not necessarily offences against the general laws. In the history of England, where the like proceeding obtains, the offences have often been political, and in some cases for gross betrayal of public interests punishment has very justly been inflicted on cabinet officers. It is often found that offences of a very serious nature by high officers are not offences against the criminal code, but consist in abuses or betrayals of trust, or inexcusable neglects of duty, which are dangerous and criminal because of the immense interests involved and the greatness of the trust which has not been kept. Such cases must be left to be dealt with on their own facts, and judged according to their apparent deserts.<sup>5</sup>

*The Veto Power.* — The view most commonly taken of

<sup>1</sup> Const., Art. I. § 2, cl. 5.

<sup>2</sup> Const., Art. I. § 3, cl. 6.

<sup>3</sup> Const., Art. I. § 3, cl. 7.

<sup>4</sup> Const., Art. II. § 2, cl. 1.

<sup>5</sup> The law and the precedents on the subject were largely examined on the impeachment trial of President Johnson, and on the previous trials of Judges Chase and Peck.

the veto power is perhaps that of Mr. Webster, that it is "an extraordinary power, to be exercised only in peculiar and marked cases"; that "it was vested in the President, doubtless as a guard against hasty and inconsiderate legislation, and against any act, inadvertently passed, which might seem to encroach on the just authority of other branches of the government,"<sup>1</sup> or, it may be added, on the rights of the States or of individuals. The first six Presidents made use of it very sparingly, — some of them not at all; but for this an important reason is found in the fact that the legislature and the President were generally in accord on important measures. It was used more freely by President Jackson, and still more freely by Presidents Tyler, Johnson, and Hayes. This might well occur, even with the same views of the proper functions of the veto, since the Presidents last named were confronted with Congresses of opposing political views, and had occasion to consider and pass upon a large amount of legislation that was not in accord with their own opinions of what was right in policy or sound in constitutional law. The reasons assigned for the vetoes have seldom been unimportant, and have often been the unconstitutionality of the legislation to which assent was withheld. In some cases there has been a species of silent veto, through a neglect of the President to return a bill transmitted to him within the last ten days of the session, whereby it would fail to become a law. It was not contemplated by the Constitution that the President should purposely defeat legislation in that mode; and no doubt it has sometimes occurred through the impossibility of giving careful examination to the provisions of bills referred to him, during the last days of the session, in the limited time allowed.

To what extent the veto shall be resorted to must always be matter of discretion with the President. The

<sup>1</sup> Webster's Works, i. 267.

writer in the *Federalist* evidently imagined that its chief use would be the protection of the executive department against attempted encroachments. He speaks of "the propensity of the legislative department to intrude upon the rights and to absorb the powers of the other departments," "the insufficiency of a mere parchment delineation of the boundaries of each," and "the necessity of furnishing each with constitutional arms for its own defence," and says: "From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left at the mercy of the other, but ought to possess a constitutional and effectual power of self-defence."

It is added, however, that "the power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body."<sup>1</sup>

Occasions for frequent differences between the legisla-

<sup>1</sup> No. 73, by Hamilton. And see Madison's Works, iv. 369, letter to Edward Coles.

ture and the executive, on questions of constitutional right or power, seem not to have been anticipated; but it is in these that the use of the veto has been most important. No one has ever questioned the right and duty of the President to make use of his negative when it was believed the proposed law was subject to objection on constitutional grounds. It has been claimed, however, that when the point of constitutional law which the case presents is one which has previously received judicial examination and decision, he may not rightfully disregard this decision and base his negative on his own opinion opposed to that of the judiciary.

That the President has a discretionary power to veto a bill, for any reason that appears to him sufficient, is undoubted. The Constitution gives the power, and makes no exceptions. That it is proper he should pay great deference to the judicial authority on such questions as have already been authoritatively determined, may also be conceded. But that he is guilty of any violation of duty, or is disrespectful to the judiciary, or disregards any just principle of government, when he acts upon his own judgment of constitutional right, power, or obligation involved in any proposed law, is not admitted. When he does not approve a bill, he is to withhold his approval; and when he may do so on grounds of mere expediency, it would be remarkable if he were not at liberty to do so when his objection goes to the very right of the legislature to pass the bill at all.

The act making treasury notes a legal tender was authoritatively passed upon, and finally sustained, by the federal Supreme Court. The decision settled the law as to that act, and was binding upon the President as much as upon any private citizen. But should any great emergency hereafter seem to present to Congress a sufficient reason for passing a similar act, what possible reason



could exist for the President withholding his approval which would be more forcible than that in his opinion the Constitution did not warrant it? He has deferred to the judgment of the court as to what the law was; must he now defer to it in deciding what the law shall be? The court itself, in a new case, might overrule its own decision, and it would be the plain duty of the court to do so if the justices should reach the conclusion that so great an error had been committed as the sanction of a violation of the charter of government. But the President overrules no decision in such a case: he simply acts upon his own judgment as a legislator. And it can never be disrespectful to the judiciary that any branch of the legislature differs with it in opinion when acting within the sphere of its powers.

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CHAPTER VIII.

## THE GOVERNMENT OF THE TERRITORIES.

*The Constitution.* — By Article IV. of the Constitution it is declared that Congress shall have power “to make all needful rules and regulations respecting the territory or other property belonging to the United States.”<sup>1</sup>

*The Purposes.* — Rules and regulations for the territory of the United States may be of two kinds: *First*, those having regard to it as property merely, and intended to guard and improve it as such, and perhaps to prepare it for sale and sell it; <sup>2</sup> and, *second*, those which concern the government of the people who may reside within the territory before it is formed into States. This provision of the Constitution differs from most others contained in that instrument in this: that by it the States concede nothing, at least so far as the territory outside their own limits is concerned, since over this they had no power whatever to make rules themselves. Indeed, as to such territory the provision would be needless, for the United States as a sovereignty would have inherent power to govern at discretion such territory as it possessed beyond state limits. The States could not restrict the right, and no restrictions could come from any other authority.

*Control by Congress.* — The peculiar wording of the provision has led some persons to suppose that it was intended Congress should exercise in respect to the ter-

<sup>1</sup> Const., Art. IV. § 3, cl. 2.

<sup>2</sup> United States v. Gratiot, 14 Pet. 526.

ritory the rights only of a proprietor of property, and that the people of the Territories were to be left at liberty to institute governments for themselves. It is no doubt most consistent with the general theory of republican institutions, that the people everywhere should be allowed self-government; but it has never been deemed a matter of right that a local community should be suffered to lay the foundation of institutions, and erect a structure of government thereon, without the guidance and restraint of a superior authority. Even in the older States, where society is most homogeneous and has fewest of the elements of disquiet and disorder, the State reserves to itself the right to shape municipal institutions; and towns and cities are only formed under its direction, and according to the rules and within the limits the State prescribes. With still less reason could the settlers in new territories be suffered to exercise sovereign powers. The practice of the government, originating before the adoption of the Constitution, has been for Congress to establish governments for the Territories; and whether the jurisdiction over the district has been acquired by grant from the States, or by treaty with a foreign power, Congress has unquestionably full power to govern it, and the people, except as Congress shall provide therefor, are not of right entitled to participate in political authority, until the territory becomes a State.<sup>1</sup> Meantime they are in a condition of temporary pupilage and dependence; and while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can constitute the measure by which the participation of the people can be determined. If territory is acquired from a foreign country with a *de facto* govern-

<sup>1</sup> American Ins. Co. v. Canter, 1 Pet. 511, 542; Territory v. Lee, 2 Montana, 124; Reynolds v. People, 1 Colorado, 179; Carpenter v. Rogers, 1 Montana, 90.

ment in full operation, this government will continue, with the presumed consent of the people, until Congress shall provide for them a territorial government. "The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact, that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest." The limitation to the power of this *de facto* government is, that it shall "exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land."<sup>1</sup>

*Forms of Territorial Governments.* — Two general forms of territorial government have from time to time been established by Congress for different Territories. The first of these is a government with an executive and judges appointed by the President with the advice and consent of the Senate, who together constitute the legislature for the Territory. The second is a government in which, while the executive and judiciary will be of national appointment, the legislature is composed of representatives chosen by the people of the Territory. Some of the Territories have had both forms, and also between the two a third, which was a modification of both. By the Ordinance of 1787, for the government of the Northwest Territory, the governor and judges, or a majority of them, were empowered to adopt for the Territory such laws of the original States, criminal and civil, as might be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws were to be in force until the organization of the General Assembly therein, unless disapproved by Congress; but afterwards the legis-

<sup>1</sup> *Cross v. Harrison*, 16 How. 164, 184.

lature was to have authority to alter them as it should think fit. And the people were to have the right to elect representatives to a General Assembly so soon as there should be five thousand free male inhabitants of full age in the Territory. The legislative power of the governor and judges, it is seen, was limited to a selection of laws from the States; but when a territorial legislature has been provided for, the authority conferred upon it has extended to all rightful subjects of legislation,<sup>1</sup> and it might therefore grant charters of incorporation,<sup>2</sup> endow institutions of learning,<sup>3</sup> provide for the exercise of the right of eminent domain,<sup>4</sup> and so on. Congress may at any time control the legislation of the Territories, or legislate independently for them,<sup>5</sup> but the territorial laws not in conflict with the Constitution or any act of Congress would stand, unless disapproved.<sup>6</sup>

*The Public Domain.* — Of that portion of the Territories which belongs to the public domain, and of which, therefore, the United States has proprietary title, Congress provides for the disposition and sale, under such regulations as are deemed important. In respect to this, the government occupies the two positions of proprietor and of sovereign of the country, and may deal with it at discretion, and pass title to it in any manner it may choose.

<sup>1</sup> *Miners' Bank v. Iowa*, 12 How. 1; *Vincennes University v. Indiana*, 14 How. 268; *Wisconsin v. Doty*, 1 Pinney, (Wis.) 396; *State v. Young*, 3 Kan. 445.

<sup>2</sup> *Miners' Bank v. Iowa*, 12 How. 1.

<sup>3</sup> *Vincennes University v. Indiana*, 14 How. 268, 273.

<sup>4</sup> *Swan v. Williams*, 2 Mich. 427; *Carson River, &c. Co. v. Barrett*, 2 Nev. 249; *Lewis Co. v. Hayes*, 1 Wash. Ter. 128.

<sup>5</sup> *Reynolds v. United States*, 98 U. S. Rep. 145.

<sup>6</sup> *Clinton v. Englebrecht*, 13 Wall. 434. This case reviews and explains the territorial legislation. And see *Ferris v. Higley*, 20 Wall. 375; *Moore v. Koubly*, 1 Idaho, 55; *Smith v. Odell*, 1 Pinney, (Wis.) 449; *Morton v. Sharkey*, McCahon, (Kan.) 113.

The proviso that "nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State," had in view claims, some of which were recognized and some disputed, but all of which were subsequently adjusted amicably.

The "other property belonging to the United States" of which Congress is empowered to dispose, might be any which was then, or in the course of time might become, their property, whether acquired as a government, or as an individual or corporation might acquire it.

*Judiciary of the Territories.*—While the territorial condition remains, the courts of the Territory exercise the customary jurisdiction of both state and federal courts under congressional and territorial legislation.<sup>1</sup> Their powers cease as soon as the Territory is admitted to the Union, and judicial acts afterwards performed are void for want of jurisdiction.<sup>2</sup> Congress will provide, by appropriate legislation, for the transfer of cases begun in the territorial courts to the proper courts for further proceedings.<sup>3</sup>

<sup>1</sup> *American Ins. Co. v. Canter*, 1 Pet. 511.

<sup>2</sup> *Benner v. Porter*, 9 How. 235; *Forsyth v. United States*, 9 How. 571; *United States v. Simpson*, 9 How. 578.

<sup>3</sup> *Express Co. v. Kountze*, 8 Wall. 342.

## CHAPTER IX.

## THE ADMISSION OF NEW STATES.

*Original States.* — The Constitution provided that the ratification by the conventions of nine States should be sufficient for the establishment of the Constitution between the States so ratifying the same ;<sup>1</sup> but it contemplated the accession of all the thirteen States, if all should ratify, even though some might delay until after the government should have been put into operation.

*New States.* — The Constitution also provided that new States may be admitted by Congress into the Union ;<sup>2</sup> but whether they should be formed of territory at that time belonging to the States, or from territory that might thereafter be acquired, or taken in as existing States previously independent, was not expressly determined by that instrument. By the Ordinance of 1787, however, which the Constitution left in force,<sup>3</sup> it had been agreed that States not exceeding five might be formed from the Northwest Territory, and received into the Union ; and it may be assumed as unquestionable that the constitutional provision contemplated that the territory then under the dominion of the United States, but not within the limits of any one of them, was in due time to be formed and organized into States and admitted into the Union, as has since in many cases been done. Indeed, it could never have been understood that any territory which by pur-

<sup>1</sup> Const., Art. VII.

<sup>2</sup> Const., Art. IV. § 3.

<sup>3</sup> *Spoooner v. McConnell*, 1 McLean, 337.

chase, cession, or conquest should at any time come under the control of the United States, should permanently be held in a territorial condition, and the new States, which have been formed of territory acquired by treaty, must be supposed to have been received into the Union in strict compliance with the Constitution.<sup>1</sup> So must Texas, which as an independent State was annexed to the Union. It is true that nothing in the express terms of the Constitution indicates that it was contemplated, by those who framed and adopted it, that the bounds of the Union should be extended by the acquisition of territory, either by purchase or annexation. Nevertheless, the power in any sovereignty to acquire territory is indisputable, and of right pertains to the power to declare war and form treaties. It therefore belongs to the United States, and is denied to the States, which are forbidden to enter into treaties.<sup>2</sup> And when territory is acquired, the right to suffer States to be formed therefrom, and to receive them into the Union, must follow of course, not only because the Constitution confers the power to admit new States without restriction, but also because it would be inconsistent with institutions founded on the fundamental idea of self-government that the federal government should retain territory under its own imperial rule, and deny the people the customary local institutions. The power to admit to the Union existing States, as in the case of Texas, may be questioned with more reason;<sup>3</sup> but the dealings of one sovereignty with another must always be

<sup>1</sup> Compare *Scott v. Sandford*, 19 How. 393, 447.

<sup>2</sup> Const., Art. I. § 10.

<sup>3</sup> The debates which took place in Congress while the subject of the annexation of Texas was under discussion, and the contemporaneous political discussions elsewhere, give the opposing views on this subject. Most of the discussions, however, involved policy rather than constitutional power.



under subjection to the great law of necessity, and what the requirements of that law may be in any particular case only the sovereignty itself can judge when the emergency is upon it. If, therefore, an independent State is received into the Union, it must be supposed to have been accepted on sufficient and conclusive reasons.

*Preliminary Steps.*—The Constitution does not point out what steps shall be taken for the admission of a State to the Union, but, the power having been conferred upon Congress without limitation, it is left to the discretion of that body to determine the circumstances under which the admission shall be allowed, and the steps that shall be taken to obtain it. Nevertheless, certain requisites are necessarily implied. There must be a State to admit; and a State must have a government and laws; and the government must be republican in form because States with such a government can alone be members of the Union. But how the State shall come into existence; who shall be its electors and form its government and establish its laws; how many of the electors there shall be; what shall be the extent of territory incorporated within the limits of their State; and whether any constitution the people may have formed shall be received as satisfactory or shall be required to be amended, — these and many other questions must be determined under the discretionary power conferred upon Congress.

States have been admitted, — (1.) where the people of a Territory of suitable size have, either by spontaneous action or in accordance with some territorial statute or executive proclamation, formed a constitution and elected officers to administer it, and presented the constitution to Congress and applied for admission under it; (2.) where Congress has first passed an enabling act, authorizing the people to form a constitution, prescribing rules of suffrage and other conditions, and providing for the admission

of the State when the constitution should be adopted and the conditions complied with; (3.) when a constitution, formed with or without previous congressional authority, has been presented to Congress, and that body has accepted it conditionally, requiring the consent of the people, evidenced in some form indicated, to some condition precedent to the admission, such as the consent to yield some portion of the territory claimed, or some rule of suffrage established by the state constitution, &c. Besides these there have been other peculiarities of admission, but this statement is sufficient to show that the control of Congress is exercised according to the circumstances. In one instance, admission has been refused, though the population was ample, because of objection to local laws and usages.<sup>1</sup>

With full discretionary power over the admission of States, it must be expected that the action of Congress will not always be governed by uniform sentiments and uniform rules, and it has at times confessedly been controlled by party or sectional considerations. The Constitution neither does nor can establish effectual safeguards against the control of such influences.

*Seceded States.* — Those States whose people undertook to sever them from the Union, under claim of a right to secede, were nevertheless not released from their constitutional relations.<sup>2</sup> Until the rebellion was overthrown their position was peculiar; they had disloyal governments exercising all the ordinary powers of sovereignty, with courts administering justice between man and man, and

<sup>1</sup> The case of Utah. The facts concerning the admission of States to the Union are all collected, and the principles discussed, in Jameson on Constitutional Conventions.

<sup>2</sup> *White v. Cannon*, 6 Wall. 443; *Texas v. White*, 7 Wall. 700; *Shortridge v. Macon*, Chase's Dec. 136; *Keith v. Clark*, 97 U. S. Rep. 454.

legislatures passing laws of general, but also of purely local concern. When resistance to the federal government ceased, regard to the best interests of all concerned required that such governmental acts as had no connection with the disloyal resistance to government, and upon the basis of which the people had acted and had acquired rights, should be suffered to remain undisturbed.<sup>1</sup> But all acts done in furtherance of the rebellion were absolutely void, and private rights could not be built up under, or in reliance upon them.<sup>2</sup> To restore the States to their former place in the Union, no new admission was required, but they were restored to their full constitutional powers as rightful members of the Union, when the fact was recognized by the political departments of the government, and their senators and representatives were admitted to seats in Congress.<sup>3</sup>

*States from other States.* — The Constitution further provides that “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.”<sup>4</sup> The political departments of the government practically decided in the case of Virginia that, when a State goes into rebellion, any part of it, however small, which remains loyal, may with the consent of Congress maintain a loyal state government for the whole State, and that this government

<sup>1</sup> *Keppel v. Railroad Co.*, Chase’s Dec. 167; *Cook v. Oliver*, 1 Woods, 437; *Hatch v. Burroughs*, 1 Woods, 439; *Thorington v. Smith*, 8 Wall. 1; *Horn v. Lockhart*, 17 Wall. 570; *Sprott v. United States*, 20 Wall. 459; *Ford v. Surget*, 97 U. S. Rep. 594.

<sup>2</sup> *Hanauer v. Doane*, 12 Wall. 342; *Hanauer v. Woodruff*, 15 Wall. 439; *Sprott v. United States*, 20 Wall. 459; *Ford v. Surget*, 97 U. S. Rep. 594.

<sup>3</sup> *Texas v. White*, 7 Wall. 700; *Keith v. Clark*, 97 U. S. Rep. 454.

<sup>4</sup> Const., Art. IV. § 3, cl. 1.

may give consent to the erection of a new State within the limits of the old, and the legislatures of the old and new States may agree upon conditions. It is competent in such a case to make the annexing of a certain part of the old State to the new depend upon a favorable vote of the electors within such territory; and when that is done, and the governor is given power to certify the result, his certificate that the vote was favorable, especially if accepted and acted upon by the new State by the extension of jurisdiction over the territory, is conclusive.<sup>1</sup> It is not necessary that the consent of Congress to the formation of the new State should be given in express terms, but it may be implied from its legislation recognizing such State.<sup>2</sup>

*Territorial Laws.*—A State coming into the Union brings with it the pre-existing law, except so far as expressly or by necessary implication it is changed by the Constitution, or by the passage from a territorial to a state condition. All those laws which relate to the territorial condition and circumstances exclusively become of necessity inoperative.

*Conditions to Admission.*—In several instances Congress has prescribed conditions to the admission of States to the Union. When Missouri applied for admission, the constitution which was presented contained a clause requiring the legislature to pass such laws as might be found necessary “to prevent free negroes and mulattoes from coming to and settling in this State, under any pretext whatsoever.” The State was received into the

<sup>1</sup> *Virginia v. West Virginia*, 11 Wall. 39; *Kanawha Coal Co. v. Kanawha, &c. Coal Co.*, 7 Blatch. 391.

<sup>2</sup> *Virginia v. West Virginia*, 11 Wall. 39. There is a provision in the joint resolution for the annexation of Texas for the formation of four other States from its territory, with the consent of the State; but no action to that end was ever taken.

Union on condition that a solemn pledge should be given by its legislature that the constitution should never be construed to authorize the passage of any act, and that no act should be passed, by which any of the citizens of other States should be excluded from the enjoyment of any of the privileges and immunities to which they are entitled under the Constitution of the United States. Presumably this would cover the privilege of colored citizens of other States to emigrate into Missouri, if they should see fit.<sup>1</sup>

The State of Michigan was admitted to the Union upon the express condition that she should surrender to the State of Ohio certain territory which had been the subject of dispute between them, and her assent thereto was required to be given by a convention of delegates chosen by the people for the sole purpose of giving such assent.<sup>2</sup>

The State of Arkansas was admitted to representation in Congress, June 22, 1868, on the fundamental condition "that the constitution of Arkansas shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote, who are entitled to vote by the constitution [then presented by the State], except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted, under laws equally applicable to all the inhabitants of said State." The purpose was to protect colored citizens in the enjoyment of the elective franchise. The States of North Carolina, South Carolina, Louisiana, Alabama, and Florida were admitted to representation, the same month, on a similar condition. On the State of Georgia the same condition was imposed; also the further conditions, that the fourteenth amendment to the federal Constitution should be ratified, that certain

<sup>1</sup> Benton's *Thirty Years' View*, ch. 2.

<sup>2</sup> Campbell's *Hist. of Mich.*, ch. 14.

provisions in her own constitution, not important to be here repeated, should be "null and void," and that the General Assembly of the State should by solemn public act declare the assent of the State to the condition. The State of Virginia was admitted to representation in Congress, January 28, 1870, on the same condition with the others mentioned, in respect to suffrage, and on the further conditions, "that it shall never be lawful for the said State to deprive any citizen of the United States, on account of his race, color, or previous condition of servitude, of the right to hold office under the constitution and laws of said State, or upon any such ground to require of him any other qualification for office than such as are required of all other citizens"; and "that the constitution of Virginia shall never be so amended or changed as to deprive any citizen or class of citizens of the United States of the school rights and privileges secured by the constitution of said State." The States of Mississippi and Texas were admitted to representation in the following month, on the like conditions to those imposed on Virginia.

The State of Nebraska was admitted to the Union in 1868, with a proviso in the act of admission that it should not take effect "except upon the fundamental condition that within the State of Nebraska there shall be no denial of the elective franchise, or of any other right, to any person by reason of race or color, except Indians not taxed, and upon the further fundamental condition that the legislature of said State, by a solemn public act, shall declare the assent of said State to the said fundamental condition, and shall transmit to the President of the United States an authentic copy of said act. Upon receipt whereof the President by proclamation shall forthwith announce the fact; whereupon said fundamental condition shall be held as a part of the organic law of the State; and thereupon,

and without any further proceeding on the part of Congress, the admission of said State into the Union shall be considered as complete." The proclamation of the President announcing the passage of such an act, and the receipt of an authentic copy thereof, was issued on March 1, 1868.<sup>1</sup>

Other conditions have been imposed; and a common requirement on the admission of a State is, that it shall waive all right to impose taxes on the lands of the United States. Some of these conditions are beyond question irrevocable by the States. Such, for example, are those last mentioned, which are irrevocable because they constitute articles of compact between the State and the nation, which would render the taxation void. Such also would be a condition respecting boundary, as in the case of Michigan. The condition in the case of Missouri merely required the State to observe one of the stipulations in the federal Constitution, which was as much obligatory upon the State without the condition as with it. Whether the legislature can give binding effect to a condition which changes the constitution established by the people, is at least doubtful. But when a State comes into the Union, it is received on an equal footing with the original States, and with all their rights and privileges.<sup>2</sup> It must therefore have the same power to amend its constitution which is possessed by the other States, and a condition which should undertake to limit its power in this regard must, in a legal sense, be wholly inoperative. It is to be observed of those which have been imposed, and which would limit the power of amendment, that they have since been rendered unimportant by amendments to the federal Constitution.

<sup>1</sup> See *Butler v. People*, 2 Nebraska, 198.

<sup>2</sup> *Pollard's Lessee v. Hagan*, 3 How. 212; *Strader v. Graham*, 10 How. 82; *Weber v. Harbor Commissioners*, 18 Wall. 57.

## CHAPTER X.

## CONSTITUTIONAL RULES OF STATE COMITY.

*Conflict of Laws.*—It often happens that a right asserted or privilege claimed in one State will depend for its validity upon something done by the parties concerned, or by one of them, in some other State, whereby the right or privilege became initiate, or perhaps perfected. In such case the laws of both States are to be considered in order to determine how they respectively affect the claims made. In these cases the questions which arise are questions of inter-state comity, and, except as the provisions of the federal Constitution affect and modify them, they are to be governed by the rules of private international law, as they would be if the two States had been to each other foreign nations.

The rules of private international law are taken notice of and enforced by the courts just as are the general principles of the common law; and the federal courts, like those of the States, when administering justice within a State between suitors entitled to bring suits therein, will recognize and be governed by them. But, like other rules of law, they are subject to be varied and controlled by state legislation, and there may be and often is a general state policy upon some particular subject before which the rules of private international law which are opposed to it must give way.

A familiar instance of these rules is that which concerns the title and transmission of personal property. The doc-



trine universally accepted is that chattels have no *situs*, but in contemplation of law adhere to the person of the owner, wherever he may be.<sup>1</sup> If actually in one State while the owner has his domicile in another, the latter may dispose of them according to the law of the domicile, and his contracts or conveyances which are sufficient under the law there will be held sufficient everywhere. So his will, valid according to the laws of his domicile, will be sufficient to dispose of them, and, if he dies intestate, they will be distributed as they would be if actually with him in fact, as they were in contemplation of law.<sup>2</sup> But while this case illustrates the general law, it also enables us to appreciate and understand some important exceptions. One of these is that no sovereignty is bound to recognize and give effect to a transfer of property which at the time is within its jurisdiction, unless all just claims which it may have, or which any of its citizens may have, in respect to such property, are first satisfied. Therefore, in a case of intestacy, if the State where the property is has unsatisfied claims upon it for taxes, or if any of its citizens have demands against the estate, it may justly provide that all such claims and demands shall be satisfied before the property will be handed over to an administrator for distribution at the forum of the domicile.<sup>3</sup> Another is that a transfer actually made abroad, in which both parties contemplate some use of the property in contravention of the laws of the State where it has its *situs*, and participate in a purpose to violate those laws, will not

<sup>1</sup> Harvey v. Richards, 1 Mason, 381; Oakey v. Bennett, 11 How. 33; Story, Conf. L., §§ 376-382.

<sup>2</sup> Sill v. Worswick, 1 H. Black. 665; Bank of Augusta v. Earle, 13 Pet. 519; Ennis v. Smith, 14 How. 400; Despard v. Churchill, 53 N. Y. 192; Fuller v. Steiglitz, 27 Ohio, N. S. 355; 4 Kent, 513; Whart., Conf. L., § 585; Story, Conf. L., § 464.

<sup>3</sup> Swearingen v. Morris, 14 Ohio, N. S. 424; Grattan v. Appleton, 3 Story, 755; Hill v. Townsend, 24 Tex. 575.

be recognized and supported in the last-mentioned State.<sup>1</sup> In neither of these cases can there be any ground of interstate comity that could require the one sovereignty to surrender its own claims, or those of its citizens, in favor of claims abroad which could be no more substantial or equitable, or that could call upon it to waive its local laws in favor of those who might choose a foreign territory as the theatre of their operations, for the express purpose of evading and defeating them. But the general rule is, that, when made in good faith, the validity and interpretation of contracts are to be governed by the law of the State where they are made, unless they are to be performed in another State, in which case they will be governed by the law of the State of performance.<sup>2</sup> And under these rules all States will furnish suitable remedies for the enforcement of contracts within their own limits, as it may become necessary. The remedies in any case, however, will be such only as are provided by its own laws.<sup>3</sup>

The cases of marriage and divorce raise frequent questions growing out of differences in the law where a marriage or a divorce may take place, and the law where the parties may afterwards be found domiciled. The rule of law with respect to marriages is, that, if they are valid where entered into, they are valid everywhere ;<sup>4</sup> but this is

<sup>1</sup> *Waymell v. Reed*, 5 T. R. 599; *Armstrong v. Toler*, 11 Wheat. 258; *Webster v. Munger*, 8 Gray, (Mass.) 584; *Smith v. Godfrey*, 28 N. H. 379; *Wilson v. Stratton*, 47 Me. 120; *Rorer*, *Inter-State Law*, 198; *Story*, *Conf. L.*, § 246 et seq.

<sup>2</sup> *Bank of United States v. Donnally*, 8 Pet. 361; *Andrews v. Pond*, 13 Pet. 65; *De Wolf v. Johnson*, 10 Wheat. 367; *Story*, *Conf. L.*, § 242.

<sup>3</sup> *Bank of United States v. Donnally*, 8 Pet. 361; *Wilcox v. Hunt*, 13 Pet. 378; *Scudder v. National Bank*, 91 U. S. Rep. 406, 413; *Story*, *Conf. L.*, § 556.

<sup>4</sup> *Medway v. Needham*, 16 Mass. 157; *Ponsford v. Johnson*, 2 Blatch. 51; *Whart.*, *Conf. L.*, § 127.

subject to exceptions in the case of polygamous marriages, and marriages which would be incestuous according to the laws of nature as commonly understood, by which we must perhaps understand only marriages between brothers and sisters, and marriages in the direct lineal line of consanguinity.<sup>1</sup> The importance of this relation is so great, and the mischiefs that would flow from its being held invalid where the parties have intended that it should exist, are so serious, that marriages are sustained even where parties, who are not allowed to marry by the laws of the State of their domicile, have gone abroad and been married, subsequently returning to reside.<sup>2</sup> In respect to divorce a like rule prevails, that a divorce valid where granted is valid everywhere; but every State will protect any of its own citizens against being defrauded by a divorce obtained abroad by fraud, or granted without jurisdiction.<sup>3</sup>

*Penal Actions.*—In some cases rights of action are given by a sovereignty which others are not expected to recognize, and which therefore can only be enforced within the territorial limits of the sovereignty creating or giving the right. Of these is the right to recover a statutory penalty. Being given by statute, this is recoverable only where the statute is law.<sup>4</sup> So where by statute an action is given against one who, by wrongful act, neglect, or default, shall cause the death of another, a recovery in such a case not being allowed at the common law, the courts of

<sup>1</sup> *Sutton v. Warren*, 10 Met. (Mass.) 451; *Wightman v. Wightman*, 4 Johns. Ch. (N. Y.) 343.

<sup>2</sup> *Sutton v. Warren*, 10 Met. (Mass.) 451; *State v. Ross*, 76 N. C. 242; *Commonwealth v. Lane*, 113 Mass. 458; *Bishop*, Mar. and Div., ch. 21.

<sup>3</sup> *Rorer*, *Inter-State Law*, 181, 182.

<sup>4</sup> *First National Bank v. Price*, 33 Md. 487; *Barnes v. Whittaker*, 22 Ill. 606; *Graham v. Monseigh*, 22 Vt. 543; *Richardson v. Burlington*, 33 N. J. 190.

other states and countries will not recognize and enforce the right.<sup>1</sup>

*Local and Transitory Actions.* — There are also some cases of common-law actions in which the remedy was always held to be local, and which consequently must be brought within the jurisdiction where the injury complained of was committed. From the necessity of the case, actions for the recovery of lands must belong to this class, since process to enforce the right when it should be established could be served only where the land was situated. But all actions for injuries to real estate are in the same category, and, even when they may be instituted in the federal courts, they must be brought in the district within which the land lies.<sup>2</sup> On the other hand, all actions for merely personal injuries, or for injuries to personal estate, and all actions upon contract, may be brought wherever personal service may be obtained, and it is immaterial to the remedy in what jurisdiction the cause of action arose, though the local law must be looked to in order to determine the validity and construction of the contract, and the liability of the party sued in respect to that which is complained of. In cases of contract the remedies which other States give are not usually limited to those in which a personal service is obtained, but attachment and garnishment process are allowed to reach property and debts where personal service cannot be had; though in cases of tort process for attaching property and demands when the defendant himself cannot be found is not commonly allowed.

*Corporations.* — In strict law the corporations chartered

<sup>1</sup> *Selma, &c. R. R. Co. v. Lacy*, 43 Geo. 461; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *McCarthy v. Railroad Co.*, 18 Kan. 46; *Richardson v. Railroad Co.*, 98 Mass. 85.

<sup>2</sup> *Livingston v. Jefferson*, 1 Brock. 203; *McKenna v. Fiske*, 1 How. 241; *Rundle v. Del. & Rar. Canal*, 1 Wall. C. C. 275; *Worster v. Lake Co.*, 25 N. H. 525.

by one sovereignty have no authority to exercise their franchises in another, except as the latter shall permit; <sup>1</sup> but by comity they are suffered to do so, where it would not contravene any principle of local policy, or any general statute, but subject to such restrictions as the State may see fit to impose.<sup>2</sup> The power to impose restrictions, however, must be subordinate to the Constitution and laws of the United States. A State could not, for example, interpose a restriction that would in effect constitute a regulation of inter-state commerce,<sup>3</sup> or that would restrain the corporation from resorting to the federal jurisdiction in cases within the laws of Congress.<sup>4</sup> But no corporation can of right hold real property in a State except by permission of the State; and though the permission will be implied wherever there appears no state statute or policy to the contrary,<sup>5</sup> yet, as against an express inhibition to give lands by will to any but natural persons, not even the United States can receive a valid devise.<sup>6</sup>

*The Constitution.* — There are some cases which it was deemed wise, in framing the Constitution, not to leave to comity merely, because they concerned so intimately the relations of the people of the several States to each other that any differences in legislation in respect to them, or any divergency in judicial decision, might lead to infinite contentions and mischiefs. One of these concerned the use in the States respectively of the statutes, records,

<sup>1</sup> *Lafayette Ins. Co. v. French*, 18 How. 404; *Bank of Augusta v. Earle*, 13 Pet. 519; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Whart., Conf. L.*, § 48.

<sup>2</sup> *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410; *Re Comstock*, 3 Sawyer, 218; 2 Kent, 284, 285.

<sup>3</sup> *Pensacola Tel. Co. v. West. Un. Tel. Co.*, 96 U. S. Rep. 1.

<sup>4</sup> *Insurance Co. v. Morse*, 20 Wall. 445.

<sup>5</sup> *Runyan v. Coster*, 14 Pet. 122; *Thompson v. Waters*, 25 Mich. 214.

<sup>6</sup> *United States v. Fox*, 94 U. S. Rep. 315.

and judicial proceedings of other States, whether as matters of evidence or as muniments of title. The common law had rules under which these might be proved, but these rules were subject to legislative modification at discretion, and it was not improbable that, if the States were left to themselves to establish independent regulations, those made by them would not only be wanting in uniformity, but they would tend to breed discord, instead of preserving fraternal feeling, among the States. It is easy to understand how a State, from temporary prejudices or adverse interests, or even from more reprehensible reasons, might legislate to prevent the reception in evidence of the records, and especially the judicial proceedings, of other States. It is conceivable, for example, that, in a time of great financial distress in a new State, legislation might be obtained to protect people emigrating to and settling within the State even as against the just judgments rendered against them in the States from which they came, and still remaining unsatisfied. This would not only be unjust in itself and disgraceful to the State, but it would almost certainly lead to retaliatory legislation.

*State Acts, Records, &c.* — Among the preventive measures of the Constitution is the provision that “Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.”<sup>1</sup>

By this provision a rule of comity becomes a rule of constitutional obligation. It also becomes a uniform rule, and the common authority is empowered to pass laws whereby the courts may govern their action in receiving or rejecting the evidences presented to them of the public

<sup>1</sup> Const., Art. IV. § 1.

acts, records, and judicial proceedings of other States. Nor is this of more importance to the States as such, than to those whose individual interests may be involved or affected; and indeed the interests involved are usually private and individual, rather than public.

The full faith and credit to which the public acts, records, and proceedings are entitled in other States is the same faith and credit to which they are entitled in the State whose acts, records, and judicial proceedings they are.<sup>1</sup> When, therefore, suit is brought in one State upon a judgment rendered by a court of another State, and it appears that by the law of the last-mentioned State it is conclusive upon the defendant, it must be held equally conclusive in the court in which suit upon it is brought.<sup>2</sup> Whatever pleas would be good to it in the State where it was pronounced, and none others, might be pleaded to it in any other court within the United States.<sup>3</sup> But the judgment can have no greater or other force abroad than at home, and therefore it is always competent to show that it is invalid for want of jurisdiction in the court rendering it.<sup>4</sup> So anything that goes in release or discharge of the judgment may be shown;<sup>5</sup> and the statute of limitations of the State where suit is brought will be available, if the case comes within it.<sup>5</sup> But it is not competent for any State to pass an act of limitations

<sup>1</sup> *Armstrong v. Carson*, 2 Dall. 302; *Mills v. Duryea*, 7 Cranch, 481; *Hampton v. McConnell*, 3 Wheat. 234; *Field v. Gibbs*, Pet. C. C. 155; *Bryant v. Hunters*, 3 Wash. C. C. 48; *Nations v. Johnson*, 24 How. 195, 203.

<sup>2</sup> *Mills v. Duryea*, 7 Cranch, 481.

<sup>3</sup> *Hampton v. McConnell*, 3 Wheat. 234; *Green v. Van Buskirk*, 7 Wall. 139.

<sup>4</sup> *Harris v. Hardeman*, 14 How. 334; *Cheever v. Wilson*, 9 Wall. 108; *Galpin v. Page*, 18 Wall. 350; *Thompson v. Whitman*, 18 Wall. 457; *Arnott v. Webb*, 1 Dillon, 362; *Whart.*, Conf. L., §§ 811, 819.

<sup>5</sup> *Jacquette v. Hugunon*, 2 McLean, 129.

which would in effect nullify judgments rendered in other States, and allow no remedy upon them whatever. Reasonable opportunity to enforce a demand must always be afforded.<sup>1</sup>

Constructive service of process by publication or attachment of property is sufficient to enable the courts of a State to subject property within it to their jurisdiction, in such cases as the statutes of the State may provide therefor; but such a service cannot be the foundation of a personal judgment.<sup>2</sup> Process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailable in proceedings to establish his personal liability.<sup>3</sup> But in respect to the *res*, a judgment *in rem*, rendered with competent jurisdiction, is conclusive everywhere.<sup>4</sup>

*Legislation.*—Congress has legislated upon this subject by providing that “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 or 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

<sup>1</sup> *Christmas v. Russell*, 5 Wall. 290.

<sup>2</sup> *Boswell's Lessee v. Otis*, 9 How. 336; *Cooper v. Reynolds*, 10 Wall. 308.

<sup>3</sup> *Pennoyer v. Neff*, 95 U. S. Rep. 714, 727.

<sup>4</sup> *D'Arcy v. Ketchum*, 11 How. 165; *Williams v. Armroyd*, 7 Cranch, 423.



certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.”<sup>1</sup> This law provides what shall be sufficient in all cases, but it does not preclude the States making other regulations, not in conflict with these, for themselves, nor does it prevent making proof of records in common-law modes.<sup>2</sup>

*Privileges and Immunities of Citizens.* — The next succeeding provision is that “the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.”<sup>3</sup>

The privileges and immunities here in question are those only which belong to state citizenship, and which, but for this provision, might be within the reach of unfriendly state legislation. A complete enumeration of them has never been attempted. Mr. Justice Washington thought they might be “all comprehended under the following general heads: protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise, to claim the benefit of the writ of *habeas corpus*, to institute and maintain actions of every kind in the courts of the State, to take, hold, and dispose of property, either real or personal, and an exemption from higher taxes or impositions

<sup>1</sup> Rev. Stat. U. S. (1878), § 905.

<sup>2</sup> *Gaines v. Relf*, 12 How. 472; *White v. Burnley*, 20 How. 235.

<sup>3</sup> Const., Art. IV. § 2, cl. 1.

than are paid by the citizens of other States, may be mentioned as some of the principal privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental."<sup>1</sup> Other judges, while approving of this general enumeration, have been careful to say that they deem it safer and more in accordance with the duty of a judicial tribunal to leave the meaning "to be determined in each case upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief."<sup>2</sup>

This much it is safe to say, that, "according to the express words and clear meaning of this clause, no privileges are secured by it but those which pertain to citizenship."<sup>3</sup> And the term citizens, as here used, applies only to natural persons, members of the body politic, owing allegiance to the State, and not to corporations, which are artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed. It is true that corporations are permitted to sue in the federal courts on an assumption that their members are citizens of the State in which they have corporate being; but it has never been held that they are citizens in the sense here intended.<sup>4</sup>

It is not a privilege of a citizen of Mississippi that he

<sup>1</sup> *Corfield v. Coryell*, 4 Wash. C. C. 371, 380. And see *Smith v. Maryland*, 18 How. 71; *Conner v. Elliott*, 18 How. 591; *Ward v. Maryland*, 12 Wall. 418.

<sup>2</sup> *Conner v. Elliott*, 18 How. 591, 593; *McCready v. Virginia*, 94 U. S. Rep. 391, 395.

<sup>3</sup> *Conner v. Elliott*, 18 How. 591, 593.

<sup>4</sup> *Paul v. Virginia*, 8 Wall. 168, 177, 178.

shall have in Louisiana such rights in property under and by virtue of the marriage relation as are given by the laws of the latter State to those who are married or reside therein. Every State regulates these rights for its own people according to its own views of right and policy.<sup>1</sup> Neither is it a privilege of state citizenship to take fish in the public waters of other States. Fisheries in public waters belong to the State in which they are, and the State may provide how they may be made available for the advantage of its people. Therefore a state enactment by which others than citizens of the State are forbidden to plant oysters in the soil covered by tide waters, is not unconstitutional. The people of the State, and they alone, own the property; and they own it, not by virtue of citizenship merely, but of citizenship and domicile united; that is to say, by virtue of a citizenship confined to that particular locality.<sup>2</sup>

That the taxation of a State which discriminates against the citizens of other States is repugnant to the provision under consideration, has been generally conceded. A statute imposing license fees on those carrying on mercantile business, but discriminating against those not permanent residents of the State, is therefore invalid.<sup>3</sup>

*Extradition of Offenders.* — The Constitution further provides that “a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered

<sup>1</sup> *Conner v. Elliott*, 18 How. 591.

<sup>2</sup> *McCready v. Virginia*, 94 U. S. Rep. 391, 396; *State v. Medbury*, 3 R. I. 138; *Crandall v. State*, 10 Conn. 340; *Slaughter v. Commonwealth*, 13 Grat. 767; *People v. Coleman*, 4 Cal. 46. Before slavery was abolished, it was not one of the privileges of state citizenship for a master to take his slaves with him in passing through a free State, and hold them there in servitude. *Lemmon v. People*, 20 N. Y. 562.

<sup>3</sup> *Ward v. Maryland*, 12 Wall. 418.

up, to be removed to the State having jurisdiction of the crime." <sup>1</sup>

Whatever doubt there may have been formerly on the subject, it is now settled that statutory crimes, though of recent creation, are as much within this provision as crimes existing at the common law or created by statute previous to the adoption of the Constitution. <sup>2</sup> It is not clear, however, that every possible offence against the laws was meant to be included. The word *crime* is made use of very commonly as embracing only serious offences, in contradistinction to misdemeanor, which is given to such trivial offences as are but lightly punished; <sup>3</sup> but the line of division between the two is not clearly drawn, and is not the same in different States.

No case comes within the Constitution unless there has been a fleeing from justice. This implies that the person accused must have been within the jurisdiction of the State accusing him, and must have fled therefrom. If in fact he was never within it, he cannot have fled from its justice; and therefore a person who in another State may have conspired with others to commit an offence in Missouri, is not demandable by Missouri as a fugitive. <sup>4</sup> But if he was within the State at the time of committing the offence, he is to be held a fugitive if he left without awaiting the consequences of his conduct. <sup>5</sup>

The charge against the accused must be made in some due form of law, in some species of judicial proceeding instituted in the State from which he is a fugitive. It will

<sup>1</sup> Const., Art. IV. § 2, cl. 2.

<sup>2</sup> *Kentucky v. Dennison*, 24 How. 66; *Matter of Clark*, 9 Wend. (N. Y.) 212.

<sup>3</sup> *Hughes's Case*, 1 Phil. (N. C.) 57, 64; *Morton v. Skinner*, 48 Ind. 123; *Taylor v. Taintor*, 16 Wall. 366.

<sup>4</sup> *Ex parte Smith*, 3 McLean, 133.

<sup>5</sup> *Matter of Voorhees*, 32 N. J. 141; *Spear on Extradition*, 313, 314.

not be sufficient unless it contains all the legal requisites for the arrest of the accused and his detention for trial, if he were then within the State. Therefore, nothing short of an indictment, or a complaint under oath, making out a *prima facie* case, can be sufficient.<sup>1</sup> This is to be presented to the executive of the same State as the foundation for his demand; but the fact that he makes a requisition based upon it is not conclusive of its sufficiency, and this may be inquired into, not only by the executive on whom demand is made, but also by the courts on *habeas corpus* in case the accused is arrested. It has been decided in some cases, however, that the courts of the State making the demand should be left to decide on the sufficiency of their own papers;<sup>2</sup> and this is a very proper course unless the defects are very clear and unquestionable.

When demand is made in due form, it is the duty of the executive on whom it is made to respond to it, and he has no moral right to refuse.<sup>3</sup> Nevertheless, if he does refuse, no power has been conferred on the federal courts to compel obedience,<sup>4</sup> and the governors of States have often refused compliance with the demand, when in their opinion substantial justice did not require it. The process is no doubt sometimes made use of to compel the settlement of private demands; but this is an abuse which it is specially incumbent on the authorities of the State making the demand to guard against, and if the executive of the other State assumes to decide upon the good faith of the demand, he takes upon himself a questionable responsi-

<sup>1</sup> *People v. Brady*, 56 N. Y. 182; *State v. Hufford*, 28 Iowa, 391; *Kingsbury's Case*, 106 Mass. 223; *Ex parte Cubreth*, 49 Cal. 436; *Commonwealth v. Deacon*, 10 S. & R. 125.

<sup>2</sup> *Johnson v. Riley*, 13 Geo. 97; *State v. Buzine*, 4 Harr. (Del.) 572; *Matter of Voorhees*, 32 N. J. 141; *Davis's Case*, 122 Mass. 324; *Matter of Manchester*, 5 Cal. 237; *Ex parte Thornton*, 4 Texas, 635.

<sup>3</sup> *Kentucky v. Dennison*, 24 How. 66.

<sup>4</sup> *Kentucky v. Dennison*, 24 How. 66.

bility, with very inadequate means of discharging it intelligently and justly.

A person brought into a State on process of extradition, it would seem, should be held privileged from prosecution on any other charge until he has had opportunity to return to the State which has surrendered him.<sup>1</sup> But this privilege has not always been recognized.

If the State to which an offender has fled has herself against him some unsatisfied demand of justice, it is proper for her to proceed to enforce it before honoring a requisition. No higher duty can be imposed upon her than that to satisfy the demands of her own laws.<sup>2</sup>

*Legislation.* — The extradition of fugitives as between the States has commonly been made under state legislation, and the States in passing laws on the subject appear to have assumed that the duty imposed by the Constitution was a state duty, performance of which was to be demanded by one State and made by the other. Whether this is strictly true, or whether, on the other hand, the principles apply which govern in the surrender of fugitives from service, and which would exclude legislation by the States,<sup>3</sup> has never been decided. Congress, however, at an early day enacted that, "Whenever the executive authority of any State or Territory demands any person, as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as

<sup>1</sup> *Commonwealth v. Hawes*, 13 Bush, (Ky.) 697; *Wharton*, Conf. of Laws, § 2965. *Contra*, *United States v. Lawrence*, 13 Blatch. 295.

<sup>2</sup> *Taylor v. Taintor*, 16 Wall. 366; *Matter of Troutman*, 24 N. J. 634.

<sup>3</sup> *Prigg v. Pennsylvania*, 16 Pet. 539.

authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged." "Any agent so appointed, who receives the fugitive into his custody, shall be empowered to transport him to the State or Territory from which he has fled."<sup>1</sup>

*Fugitives from Service.* — The provision that "no person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due,"<sup>2</sup> was intended for the case of fugitive slaves, and is of little value or force since slavery was abolished. The States cannot legislate for the enforcement of this provision, but Congress may.<sup>3</sup>

<sup>1</sup> Rev. Stat. U. S. (1878), §§ 5278, 5279.

<sup>2</sup> Const., Art. IV., § 2, cl. 3.

<sup>3</sup> *Prigg v. Pennsylvania*, 16 Pet. 539.

## CHAPTER XI.

THE GUARANTY OF REPUBLICAN GOVERNMENT TO  
THE STATES.

*The Constitution.* — It is imposed as a duty upon the United States to guarantee to every State in the Union a republican form of government.<sup>1</sup> The requirement sprang from a conviction that governments of dissimilar principles and forms were less adapted to a federal union than those which were substantially alike, and that the superintending government ought to possess authority to defend the system agreed upon against innovations which would bring with them discordant and antagonistic principles.<sup>2</sup>

The terms of this provision “presuppose a pre-existing government of the form that is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions.”<sup>3</sup>

*What is Republican.* — By republican government is understood a government by representatives chosen by the people; and it contrasts on one side with a democracy, in which the people or community as an organized whole wield sovereign powers of government, and on the other

<sup>1</sup> Const., Art. IV. § 4.

<sup>2</sup> Federalist, Nos. 21 and 43.

<sup>3</sup> Federalist, No. 43.



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

As the original States must be understood to have had the proper form of government when the Constitution was adopted, so the subsequent admission of a State to the Union by Congress must be received as a decision that its constitution is not objectionable.

*Changes in Government.* — A republican government once established in a State may be endangered or set aside, so as to demand the action of Congress under this provision, in the following several ways: —

*First.* By the hostile action of some foreign power, in taking military possession of the territory of a State and setting up some government therein not established by the people themselves. Such a government would not be republican, whatever its form, because not expressing the

will of the people governed, but of the foreign power establishing it.

*Second.* By the revolutionary action of the people themselves in forcibly rising against the constituted authorities, and setting the government aside, or attempting to do so, for some other. In this case the United States would be called upon to act, whatever the form of the government proposed. Adequate provision having been made for changes in constitutions under regular and peaceful forms, and without resort to revolution, it is not contemplated that revolution by force shall ever be suffered. The theory that the people at will may change their institutions is for the time subordinated to their constitution, which they provide may be changed in a certain specified mode, but by implication agree shall not be changed otherwise.

When an attempt is made to change institutions in either of the modes above specified, it will become the duty of the federal government to interpose and protect the people of the State in their existing government by the employment of the military force, to the full extent, if need be, of the national power.<sup>1</sup>

*Third.* In strict observance of the forms prescribed by a state constitution for revising or amending it, it would be possible for the people of the State to effect such changes as would deprive it of its republican character. Thus they might in that manner set up a monarchy, or so restrict suffrage as to deprive representation altogether of its popular character, and thereby establish an aristocracy; and it would then become the duty of Congress to interfere. But first the question would present itself, whether the changes made are so radical in their nature as to render the government unrepresentative; and a decision by Congress in the negative would be final and conclusive against interference.

<sup>1</sup> *Texas v. White*, 7 Wall. 700; *Luther v. Borden*, 7 How. 1.

It is always possible that Congress may assume changes in state government to be unwarranted when they are not, and thereupon interfere to overturn institutions with which they have no right to meddle. This is only saying that any power, however necessary and however well guarded, may be abused; but in every State there must be some final tribunal for the determination of all probable controversies; and as Congress is made the final judge in this case, there can be no appeal from its decision except to forcible resistance.

*Reconstruction.* — Whenever a state government has been displaced by rebellion or other force, it will become necessary for some existing authority to institute proceedings for restoring it. The proper authority for this purpose would seem to be the legislature of the Union. As in the case of Territories, if the people of the State by spontaneous action should originate an unexceptionable government for themselves, it might be recognized, and the State admitted to representation under it. But to prevent confusion some enabling action would generally be found advisable, if not absolutely essential.

*Conflicting Claims to Government.* — When a dispute arises respecting whether a particular instrument has become established as the constitution of a State, and there are parties claiming under and in opposition to it, or when the executive or legislative offices of a State are the subject of contest, it is always supposed that there exists within the State itself proper, legitimate, and effectual authority for determining the contest. It is not the business of the federal authority to interfere in such cases, unless regularly called upon to give protection against violence. Such contests must be settled by the state judicial tribunals when the case is such as to admit of it, or by the legislature, or even by the acquiescence of the people in the claims of one of the parties; and the federal government

should accept the settlement as final. The federal authorities can have no concern with questions of regularity in state proceedings, or with questions of what is proper or just in state affairs. Nevertheless in the case of a disputed state government it may become necessary for the political departments of the United States government, in the performance of their own duties, to recognize one of the two as rightful; and when this takes place the recognition will bind the government of the United States in all its departments, and also the people.<sup>1</sup>

*Invasion and Insurrection.* — The United States are also required to protect each State against invasion, and, on application of the legislature, or of the executive when the legislature cannot be convened, against domestic violence.<sup>2</sup> This article, as has been truly said, becomes an immense acquisition of strength and additional force to the aid of any state government in case of internal rebellion or insurrection against lawful authority; while, on the other hand, by the requirement of a demand for aid every pretext for intermeddling with the internal concerns of any State, under color of protecting her against unlawful violence, is taken away.<sup>3</sup>

*Titles of Nobility.* — The States are prohibited, as Congress is, from bringing an anti-republican feature into American institutions by the grant of titles of nobility.<sup>4</sup> The prohibition executes itself, as the titles, should a grant be attempted, would be simply void.

<sup>1</sup> Luther v. Borden, 7 How. 1.

<sup>2</sup> Const., Art. IV. § 4; Federalist, No. 43.

<sup>3</sup> 1 Tuck. Bl., App. 367.

<sup>4</sup> Const., Art. I. § 10, cl. 1.

## CHAPTER XII.

## THE AMENDMENTS TO THE CONSTITUTION.

*Amendments adopted.* — The Constitution provides a simple, easy, and peaceful method of modifying its own provisions,<sup>1</sup> in order that needed reforms may be accepted and violent changes forestalled. Fifteen amendments have already been made. The most of these have for their object to give new rights, or further protection to rights before existing. The eleventh amendment merely imposes a restriction upon the federal judicial power, so as to exclude from it all cognizance of suits against States brought by citizens of other States, or citizens or subjects of foreign states; and the twelfth introduces a change in the mode of making choice of President and Vice-President. The first ten amendments and the last three naturally range themselves in two classes, each of which, by its subject-matter and purpose, is distinctly referable to a particular period in the constitutional history of the country. One class consists of those which impose limitations on the powers of the several departments of the federal government, with a view more completely to protect the liberties of the people and the reserved rights of the States; and the other is confined in the main to taking from the States the power to oppress particular classes of the people, to discriminate unjustly between classes, and to take away such rights as are fundamental. The first ten belong to the one class, and the last three to the other.

<sup>1</sup> Const., Art. V.

*The First Ten Amendments.* — The ten amendments the purpose of which was to establish guaranties against an abuse of the powers which had been granted to the general government, were adopted in pursuance of recommendations by state conventions when giving assent to the Constitution.<sup>1</sup> They all sprung from a distrust of power remote from the people, — a distrust which the colonial experience had inculcated, and which the events leading to the Revolution had intensified. The central government, in exchanging the Articles of Confederation for the Constitution, was receiving an immense accession of power, and it was possible to abuse this power to the oppression of the citizen, and to the destruction of rights in the States which had never been surrendered. Up to that time the States were the special objects of the regard and affection of their people respectively. They had enjoyed liberty and a large measure of prosperity under state laws, they held their property and protected themselves in their domestic relations under the same laws, and when oppression had come and grown until it seemed intolerable, its source was to be traced to a distant authority, which overruled or displaced the local laws and took away the protection they would have given. Jealousy of centralization was therefore a strong, if not a paramount sentiment, and it found expression in these amendments, in which it is declared that certain enumerated liberties of the people shall not be taken away or abridged; that the enumeration in the Constitution of certain rights should not be construed to deny or disparage others retained by the people; and that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, were reserved to the States respectively or to the people.

<sup>1</sup> They were ratified by a sufficient number of the States to secure their adoption before December 15, 1791.

*The Last Three Amendments.* — In the lapse of ninety years, a stage in political history is reached in which the fears and anxieties of the people took a new direction. In rapid succession one State after another in one third of the Union had rejected and thrown off the federal authority, and it had only been restored through a war prosecuted on both sides with great bitterness and with enormous destruction of life and property. The temporary displacement of federal power had been accomplished by the action of the States in their corporate capacity, and the admirable system of self-government had naturally and most effectively co-operated in the action. Wide divergencies in sentiment regarding matters of internal policy, ripening into great estrangement of feeling between the sections, had led to the disruption, and when the exhausting war was over the same divergence in sentiment and a like estrangement in feeling still prevailed, and were now found to centre on the policy to be adopted for restoring and strengthening the shattered fabric of government. The sentiment of national unity had encountered on the field of arms the sentiment of devotion to State and section, and, though the struggle was over, the causes to some extent remained, and might possibly produce like fruit in the future. It had been found in vain that the federal authorities held, and the federal courts decided, that under the Constitution a State had no right to withdraw from the Union; it was undeniable that for a time certain of the States had succeeded in severing their relations and setting up a new government; and though the federal authority had demonstrated that it had, under the Constitution, ample power for self-defence and protection, it was deemed wise and prudent to require the States to surrender the institution that was the immediate occasion of the civil war, as well as the power to deal unjustly and partially with classes of the people against whom there might

be jealousies, prejudices, or antipathies, growing out of the struggle through which the country had passed, or out of some of the antecedent or concomitant circumstances. While, therefore, the first amendments were for the purpose of keeping the central power within due limits, at a time when the tendency to centralization was alarming to many persons, the last were adopted to impose new restraints on state sovereignty, at a time when state powers had nearly succeeded in destroying the national sovereignty.<sup>1</sup>

*Justice of the Amendments.* — Of these amendments it may be safely affirmed that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the States the surrender of no power which any free government should ever employ.<sup>2</sup> If the thirteenth, fourteenth, and fifteenth amendments are subject to any just criticism, it must concern not what the States are required to surrender so much as the incidental expansion of federal legislative and judicial power.

*How adopted.* — It is a valuable tribute to the general excellency of the Constitution that no convention for its revision has ever been convened, nor indeed ever very seriously proposed except at a time immediately before the civil war, and when a settlement of existing controversies in that mode seemed to most people an impossibility. All the amendments originated in Congress, were proposed by Congress to the States, and by the States were ratified. The questions which their proposal raised

<sup>1</sup> These amendments were declared adopted as follows: the thirteenth, Dec. 18, 1865; the fourteenth, July 28, 1868; and the fifteenth, March 30, 1870.

<sup>2</sup> Those who claim that emancipated slaves should be paid for have generally agreed that the United States, and not the States, should make the payment.



were in the main political, but there were two questions of law of no little importance and nicety. Neither of these, however, received authoritative settlement, because in the end such a settlement became unnecessary. These questions were the following:—

1. The Constitution<sup>1</sup> requires for the adoption of any proposed amendment that it shall be ratified by the legislatures or conventions of three fourths of the States. At the time when amendments were first proposed some of the States had not been restored to their normal and constitutional relations to the Union, and had not been admitted to representation in Congress. Until they should be, it was by no means certain that the assent of three fourths of all the States could be obtained to any amendment, and the question was made whether States not then holding their constitutional relations to the others in the Union were to be counted at all. Fortunately, in the delay that occurred while ratification was in progress, enough of the States were admitted to representation in Congress, and joined in the ratification, to render the question unimportant.

2. Two States after giving their consent to the fourteenth amendment, afterwards, but before three fourths of all had ratified, through their legislatures declared the consent withdrawn.<sup>2</sup> It was scarcely pretended that this could have been done if the proper majority of the States had previously ratified; but it was insisted that it might be done at any time before the amendment had become incorporated in the Constitution. This question also was rendered immaterial, and in the same way with the other.

<sup>1</sup> Const., Art. V.

<sup>2</sup> The two States were Ohio and New Jersey. New York declared her consent to the fifteenth amendment withdrawn under like circumstances. Oregon made a like declaration in respect to the fourteenth amendment, some time after the proclamation of the Secretary of State announcing its ratification.

It is interesting, however, to note that, in a somewhat analogous case, it has been repeatedly decided that consent once given is given finally. Where by statute a municipality is permitted, with the consent of a majority of its electors, to raise exceptional taxes or assume exceptional burdens, an election once held which results in a favorable vote is conclusive. If, however, the first election results in a majority against the proposal, and there is nothing in the law which negatives the right to vote again, the case stands as if no election had been had, and the sense of the people may be taken again and again, and a favorable vote at the last election is as effectual as if it had been obtained at first.<sup>1</sup>

<sup>1</sup> *Woods v. Lawrence County*, 1 Black, 386; *Woodward v. Supervisors*, 2 Cent. Law Jour. 396; *Society for Savings v. New London*, 29 Conn. 174.

## CHAPTER XIII.

## CIVIL RIGHTS AND THEIR GUARANTIES.

## SECTION I. — RELIGIOUS LIBERTY.

*The Constitution.* — The Constitution as originally adopted declared that “no religious test shall ever be required as a qualification to any office or public trust under the United States.”<sup>1</sup> By amendment it was further provided that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>2</sup> Both these provisions, it will be seen, are limitations upon the powers of Congress only. Neither the original Constitution nor any of the early amendments undertook to protect the religious liberty of the people of the States against the action of their respective state governments. The fourteenth amendment is perhaps broad enough to give some securities if they should be needful.

*Establishment of Religion.* — By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others.<sup>3</sup> It was never intended that by the Constitution the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a proper recognition of Divine Providence in the working of government might seem to require it, and

<sup>1</sup> Const., Art. VI. cl. 3.

<sup>2</sup> Const., Amendment I.

<sup>3</sup> 1 Tuck. Bl. Com., App. 296; 2 Ibid., App., Note G.

where it might be done without drawing any invidious distinctions between different religious beliefs, organizations, or sects. The Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly. The propriety of making provisions for the appointment of chaplains for the two houses of Congress, and for the army and navy, has been sometimes questioned; but the general sentiment of the country has approved it, and the States make corresponding provision for legislative bodies and state institutions. The federal legislation has never gone farther; it has never undertaken to prescribe a religious test for any purpose. Neither has it ever assumed the authority to prohibit the free exercise of religion anywhere.

*State Guaranties.* — With the exception of the provisions above made, the preservation of religious liberty is left to the States, and these without exception have constitutional guaranties on the subject. In the main these are alike, and they may be summed up as follows: —

1. They establish a system, not of toleration merely, but of religious equality. All religions are equally respected by the law; one is not to be favored at the expense of others, or to be discriminated against, nor is any distinction to be made between them, either in the laws, in positions under the law, or in the administration of the government.

2. They exempt all persons from compulsory support of religious worship, and from compulsory attendance upon the same.

3. They forbid restraints upon the free exercise of religion according to the dictates of conscience, or upon the free expression of religious opinions.

These are adopted as fundamental principles. No man in religious matters is to be discriminated against by the law, or subjected to the censorship of the State or of any public authority; and the State is not to inquire into or take notice of religious belief or expression so long as the citizen performs his duty to the State and to his fellows, and is guilty of no breach of public morals or public decorum.<sup>1</sup>

*Blasphemy, &c.* — But the courts of the Union and of the States, in administering the common law, find it necessary to take notice that the prevailing religion of the country is Christian,<sup>2</sup> and that because of that fact certain conduct may constitute a breach of public decorum, and therefore be illegal, though it might not be where a different religion prevailed. The law of blasphemy depends largely for its definition and application upon the generally accepted religious belief of the people; and in the law of contracts many provisions might be found to be illegal in a Christian country which would be enforced where the Mohammedan or some other form of religion prevailed. Questions of public policy, as they arise in the common law, must always be largely dependent upon the prevailing system of public morals, and the public morals upon the prevailing religious belief.<sup>3</sup> Legislation may also recognize the general religious sentiments of the people in the police regulations it establishes and in the statutory offences it defines. Thus, it may prohibit secular employments on the first day of the week, that day being observed as a day of rest and worship by religious people generally; <sup>4</sup> and it

<sup>1</sup> Cooley, Const. Lim., ch. 13.

<sup>2</sup> *Vidal v. Girard's Executors*, 2 How. 127.

<sup>3</sup> *People v. Ruggles*, 8 Johns. (N. Y.) 290; *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 206; *State v. Chandler*, 2 Harr. (Del.) 553.

<sup>4</sup> *Commonwealth v. Wolf*, 3 S. & R. (Penn.) 48; *Frolickstein v. Mobile*, 40 Ala. 725.

may condemn and provide for the punishment of any conduct which is condemned by the common voice of Christian nations, though admitted elsewhere, such as cruel sacrifices, the practice of polygamy, &c.<sup>1</sup> And it may require that all religious worship and observances shall be conducted in accordance with the ordinary rules of order, and punish whatever extravagances tend to a breach of the public peace. But even the law of blasphemy must be so administered as to preserve liberty of discussion and argument upon the most vital points.<sup>2</sup>

*Exemptions.* — Whether or not it be wise or politic to exempt the property used for religious purposes from taxation, as is commonly done, it cannot be said to be in a legal sense unconstitutional to do so. As has before been said, the selection of subjects for taxation is always a matter of policy, and the legislation will exempt from the burden such as a general regard to the interests of the political community may seem to render advisable.<sup>3</sup> If it be unwise or unjust, legislation must correct the evil. But exemptions, to be valid, must be impartial as between sects.

## SECTION II. — SECURITY OF THE DWELLING, AND OF PERSON AND PAPERS.

*Quartering Soldiers, &c.* — The third article of the amendments provides that “no soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war but in a manner to be prescribed by law.” The evil at which this is aimed has been

<sup>1</sup> Spear, Religion and the State, 315–318.

<sup>2</sup> *People v. Ruggles*, 8 Johns. (N. Y.) 290, 293.

<sup>3</sup> But such exemptions are mere favors; they are to be strictly construed. *Matter of Mayor, &c. of New York*, 11 Johns. (N. Y.) 77; *Broadway Baptist Church v. McAtee*, 8 Bush, (Ky.) 508. And they may be repealed. *Christ Church v. Philadelphia*, 24 How. 300.

so long unpractised in this country, that it is difficult to suggest to the mind the possibility that security against it may be necessary in a country governed by settled principles of law. Nevertheless, a declaration of the indefeasible right of the citizen can never be wholly needless.

Soldiers will be quartered upon the people, if at all, under the orders of a superior, and either because of some supposed imperious necessity, or in order to annoy and injure those who are compelled to receive them. The plea will always be that of necessity; but this can never be a truthful plea in time of peace, and if the necessity is likely to arise in time of war, the first principles of justice demand that it should be provided for by law, and limitations and restraints imposed. At best it is an arbitrary proceeding: it breaks up the quiet of home; it appropriates the property of the citizen to the public use without previous compensation, and without assurance of compensation in the future, unless the law shall have promised it. It is difficult to imagine a more terrible means of oppression than would be the power in the executive, or in a military commander, to fill the house of an obnoxious person with a company of soldiers, who shall be fed and warmed at his expense, under the direction of an officer accustomed to the exercise of discretionary authority within the limits of his command, and in whose presence the ordinary laws of courtesy, not less than the rules of law which protect person and property, may be made to bend to whim or caprice.<sup>1</sup> Such oppressions were fresh in the minds of the people when the Declaration of Independence was made, and they then denounced what they prohibited by this amendment. It is proper to add that this protection has no application in time of war to the enemies of the country.

*Unreasonable Searches and Seizures.* — The fourth article

<sup>1</sup> Cooley, Const. Lim., 4th ed., 378.

of the amendments has in view invasions of right which are more frequent, and of which others may be guilty besides those who command the military force of the State. Most commonly, perhaps, they consist in a disregard of that maxim of constitutional law which finds expression in the common saying that every man's house is his castle. The meaning of this is that every man under the protection of the laws may close the door of his habitation, and defend his privacy in it, not against private individuals merely, but against the officers of the law and the state itself. The amendment declares that "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."

The latter clause of the amendment sufficiently indicates the circumstances under which a reasonable search and seizure may be made. *First*, a warrant must issue; and this implies, (*a.*) a law which shall point out the circumstances and conditions under which the warrant may be granted; (*b.*) a court or magistrate empowered by the law to grant it; (*c.*) an officer to whom it may be issued for service. *Second*, a showing of probable cause; by which is meant the production of satisfactory evidence to the court or magistrate, (*a.*) showing that a case exists in which the issue of a warrant would be justified by the law; (*b.*) pointing out the place to be searched, and the persons or things to be seized if they shall be found there. *Third*, a particular description, in the warrant, of place, person, or things sufficient to guide the officer in executing it. Nothing less than this can be sufficient.<sup>1</sup>

The law providing for search-warrants should be limited

<sup>1</sup> Bishop, Crim. Procedure, §§ 240-246.



to cases of actual crime, in which the thing which was the subject or the instrument of the crime, or the supposed criminal, is concealed, or supposed to be concealed, on individual premises. The following are the most frequent cases: for property stolen, and the supposed thief; for property brought into the country in violation of the revenue laws, and the supposed smuggler; for implements of gaming unlawfully kept; and for liquors unlawfully stored for sale. No doubt the right of search may be extended by statute to other offences; but any search to obtain evidence of an intent to commit a crime can never be legalized.<sup>1</sup>

The warrant must be executed by a search in the very place described, and not elsewhere; the service should be made in the day-time, and without the presence of a crowd of people;<sup>2</sup> and the subject of the search must be brought before the court or magistrate, to be disposed of according to law.<sup>3</sup> If the officer obeys the command of his warrant, and is guilty of no excess or departure, he is protected, even though the search proves to be fruitless and the showing of cause unfounded.

Without a search-warrant the doors of a man's dwelling may be forced for the purpose of arresting a person known to be therein, for treason, felony, or breach of the peace, or in order to dispossess the occupant when another, by the judgment of a competent court, has been awarded the possession. In extreme cases this may also be done for the enforcement of sanitary and other police regulations; but, in general, the owner may close the outer door against any unlicensed entry, and defend it even to the taking of life if that should become necessary.<sup>4</sup>

<sup>1</sup> Wilkes's Case, 2 Wils. 151, and 19 State Trials, 1405; Broom, Const. Law, 613; De Lolme, Const. of England, ch. 18.

<sup>2</sup> 2 Hale, P. C. 150; Arch. Cr. Law, 7th ed., 145.

<sup>3</sup> Fisher v. McGirr, 1 Gray, (Mass.) 1; Greene v. Briggs, 1 Curt. 311.

<sup>4</sup> Bohannon v. Commonwealth, 8 Bush, (Ky.) 481; S. C., 8 Am. Rep. 474; Pond v. People, 8 Mich. 150.

The protection of the Constitution is not, however, confined to the dwelling-house, but it extends to one's person and papers, wherever they may be. It is justly assumed that every man may have secrets pertaining to his business, or his family or social relations, to which his books, papers, letters, or journals may bear testimony, but with which the public, or any individuals of the public who may have controversies with him, can have no legitimate concern; and if they happen to be disgraceful to him, they are nevertheless his secrets, and are not without justifiable occasion to be exposed.<sup>1</sup> Moreover, it is as easy to abuse a search for the purpose of destroying evidence that might aid an accused party, as it is for obtaining evidence that would injure him, and the citizen needs protection on the one ground as much as on the other. Even a search-warrant to seize private papers, letters, and memoranda, must be wholly unwarranted, except possibly in cases of frauds upon the revenue, where the papers to be searched for have been the agencies or instruments by means of which the frauds have been accomplished or aided.<sup>2</sup>

*General Warrants.* — A general warrant is one which either, (1.) describes or names no offender, but leaves the ministerial officer to discover and apprehend at discretion; or (2.) describes no place to be searched, but gives the officer unlimited authority to invade the privacy of indi-

<sup>1</sup> Cooley on Torts, 295.

<sup>2</sup> The seizure of the papers of Algernon Sidney, which were made use of as the means of convicting him of treason, and of those of Wilkes about the time that the controversy between Great Britain and the American Colonies was assuming threatening proportions, was probably the immediate occasion for this constitutional provision. See *Leach v. Money*, Burr. 1742; S. C., 1 W. Bl. 555, 19 State Trials, 1001, and *Broom*, Const. Law, 525; *Entick v. Carrington*, 2 Wils. 275; S. C., 19 State Trials, 1030, and *Broom*, Const. Law, 558; *May*, Const. Hist., ch. 10; *Trial of Algernon Sidney*, 9 State Trials, 817.

viduals without restraint. Such warrants were not uncommon in England previous to the decision in Wilkes's case, which forever determined their illegality; <sup>1</sup> and there were instances in the Colonies also which were among the grievances complained of when the Revolution was inaugurated. <sup>2</sup>

*Arrests without Warrant.* — There are a few cases in which arrests may be made without warrant; but the law gives little countenance to such arrests, and whoever makes one must show that the exceptional case existed which would justify it. Any one may arrest another whom he sees committing or attempting to commit a felony or forcible breach of the peace; and a peace officer may arrest, on reasonable grounds of suspicion of felony; but the person arrested must be at once taken before some court or magistrate of competent jurisdiction to take cognizance of the offence. A peace officer may also make arrests without warrant when municipal by-laws are being violated in his presence; <sup>3</sup> but he will be a trespasser if he handcuffs or confines without necessity a person so arrested. <sup>4</sup>

### SECTION III. — THE PROHIBITION OF SLAVERY.

*Historical.* — When the Constitution was adopted slavery existed in every State save one. The exception was the State of Massachusetts, in which it had been judicially held, that a provision in the constitution which declared that "all men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their

<sup>1</sup> See last note.

<sup>2</sup> Quincy's Mass. Rep. 51 and 395. A form for a writ of assistance, prepared by Gov. Hutchinson, is given in these Reports, on p. 418.

<sup>3</sup> Mitchell v. Lemon, 34 Md. 176.

<sup>4</sup> Griffin v. Coleman, 4 H. & N. 265.

lives and liberties ; that of acquiring, possessing, and protecting property ; in fine, that of seeking and obtaining their safety and happiness," — was inconsistent with the status of slavery, and therefore entitled every man to his freedom.<sup>1</sup> It is not certain that this provision was deliberately adopted in this sense, and it is probable that in other States it would not have been construed as conferring freedom upon slaves ; but neither the clause itself, nor the fact that a few slaves obtained their liberty under it, attracted general attention at the time, and the relation of slavery elsewhere was not sensibly affected.

But although slavery prevailed in twelve of the original States; the interest in and feeling towards it in the northern and southern portions of the country were so radically different, that it became exceedingly difficult to agree upon the method in which it should be dealt with by the Constitution. Its very existence seemed to some persons a reproach to those who had just emerged from a successful struggle for their own liberties, and were now framing a government for their further protection ; and the compromises upon the subject which were finally agreed upon, after much difficulty, would perhaps have been impossible, had it not been believed by many people in all sections that the institution could have but a temporary existence, and must before many years be wholly done away with.<sup>2</sup> And it is a significant fact that the word *slave* or *slavery* does not appear in the Constitution, but servitude and the slave-trade are vaguely referred to under other designa-

<sup>1</sup> Draper, Civil War in America, vol. i. p. 317 ; Bancroft's Hist. of U. S., vol. x. p. 365. Slavery thus disappeared in Massachusetts very much as it did in England under the decision in Sommersett's Case, 20 State Trials, 1 ; Lofft's Reports, 18 ; Broom, Const. Law, 105.

<sup>2</sup> It was prohibited by common consent in the Northwest Territory in 1787.

tions, as if they were things not to be more plainly mentioned in a free constitution.<sup>1</sup>

The foreign slave-trade was abolished in 1808, — as soon as the compromise in the Constitution on that subject would permit, — and the existence of slavery in the States did not become the subject of serious national controversy and disturbance until the application made in 1819 by the Territory of Missouri for admission to the Union as a State. The immediate occasions for excitement at that time were the provisions in the constitution which was offered for acceptance, which not only recognized the existence of slavery, but excluded from the legislature the power to abolish it, and, in order to give additional security to the institution, required the adoption of legislation to prohibit the admission of free negroes within the State. The controversy, which for a time seemed to threaten the existence of the Union, was quieted by the admission of the State upon the fundamental condition that no law should be passed “by which any citizen of either of the States in the 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,” and by providing that “in all that territory ceded by France to the United States under the name of Louisiana, which lies north of thirty-six degrees thirty minutes north latitude, excepting only such parts thereof as are included within the limits [of Missouri], slavery and involuntary servitude, otherwise than in the punishment of crime whereof the party shall have been duly convicted, shall be and is hereby expressly prohibited.”<sup>2</sup> This compromise proved eventually unsatisfactory to both sections; the one insist-

<sup>1</sup> Everett's Orations, vol. iv. p. 390; Madison's Works, vol. iii. p. 150; Frothingham, Rise of the Republic, 602.

<sup>2</sup> Benton, Thirty Years' View, ch. 2; Writings of Madison, iii. 156-199; Stephens, War between the States, ii. 131-175.

ing that citizens of any of the States were of right entitled to settle in the Territories with every species of property recognized by the state laws, and to be protected therein, while in the other the sentiment grew and became dominant that the federal government ought to prohibit slavery in any territory subject to its jurisdiction, and to discountenance it in every way. A new and further compromise became necessary in 1850, but this was followed, two years later, by the repeal of the prohibition of slavery north of the Missouri Compromise line, and in the rapidly settling Territory of Kansas armed conflicts took place between those who proposed to introduce slavery and those who determined to exclude it. During the decade beginning with 1850 the animosity and estrangement between the sections increased, until in 1860 a President was chosen as an avowed opponent of any further extension of slave territory; and, taking this as conclusive evidence of a determination to make unconstitutional war upon their interests, all the slaveholding States, with the exception of Delaware, Maryland, Kentucky, and Missouri, announced their withdrawal from the Union, and in the two States last named there were also proceedings which assumed to do the same.

It had never been claimed by any considerable number of persons that, as matter of constitutional law, the United States could interfere with slavery within the States. The whole subject of the domestic relations was left exclusively by the Constitution to the States.<sup>1</sup> Only when slaves escaped from service and fled into other States did the power of the United States attach, and then it had exclusive jurisdiction to legislate for their return to their masters.<sup>2</sup> The point chiefly in dispute as a proposition of law was that Congress might prohibit or abolish slavery in the

<sup>1</sup> *Barry v. Mercein*, 5 How. 103; *Ex rel. Hobbs & Johnson*, 1 Woods, 537.

<sup>2</sup> *Prigg v. Pennsylvania*, 16 Pet. 539.

Territories and in the District of Columbia. This was denied, as being opposed to the spirit of the constitutional compromises, and as establishing differences in right and privilege as between the citizens of the several States desiring to remove into such Territories or District with their property, or having occasion to visit or pass through them and take their servants. Some of the subjects of dispute were less mooted; and among these were the right of the United States to regulate and prohibit the traffic in slaves as between the States, and the right of colored persons to the privileges of citizenship in the States. The latter was denied by the federal Supreme Court in a case decided in 1857, and the court, though that particular point disposed of the case, took occasion to go further, and to deny the power of Congress to prohibit slavery in the Territories.<sup>1</sup> By those who disputed this last position the opinion of the court was denounced as an unwarrantable attempt of the court to settle a political controversy by an *ex cathedra* and extrajudicial opinion, and a new bitterness was brought into the existing excitement, much to the detriment of the proper influence and authority of the court.

The war ended in the practical destruction of slavery in all the States which had been in rebellion. The President had declared emancipation by proclamation, and the armies had accomplished it as they advanced.<sup>2</sup> The provisional governments all recognized it, and, when the reorganized States came with new constitutions for admission to representation in Congress, these contained an express prohibition of slavery. Still slavery existed in the border States, and in order to abolish it there, as well as to give constitutional formality to the national antislavery proceedings, the thirteenth amendment to the Constitution was proposed and adopted.

<sup>1</sup> *Scott v. Sandford*, 19 How. 393.

<sup>2</sup> Story on Const., 4th ed., § 1923.

*The Constitution.* — This amendment declares, adopting the language of the Ordinance of 1787, that “neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” The word *slavery* in this country has acquired a somewhat technical meaning, and is limited to that sort of servitude which has prevailed under the state laws, namely, to servitude for life. The prohibition of slavery merely might therefore seem to be limited to this sort of service, leaving the legislative authorities at liberty to establish compulsory service for terms of years at discretion. Indeed, such servitude had existed in the early history of the country in cases of immigrants known as redemptioners, and of some others, and it would be easy to suggest exceptional cases in which excuses might exist to enact laws for compulsory service, were the legislature so disposed. It was deemed important, therefore, that the prohibition should include, not slavery merely, but all classes of involuntary servitude not imposed as a punishment.

*Involuntary Servitude.* — The prohibition was not unimportant. Immediately following emancipation, laws were passed in some of the late slaveholding States for the compulsory apprenticeship of colored persons, on terms which were made applicable to them alone; and the provisions of the indenture were such as evidently assumed the inferior and degraded condition of this class of persons, and had a strong tendency to perpetuate it. In some States, also, colored persons were forbidden to engage in certain ordinary employments except on payment of a large license-fee, or on producing to the authorities satisfactory proof of good moral character. It was soon decided that compulsory apprenticeship under these partial and invidious laws was involuntary servitude within the



meaning of this amendment, and was therefore forbidden.<sup>1</sup> It can scarcely be doubted that exclusion from employment may as effectually establish involuntary servitude as any use of physical force. In so far as one is excluded from entering upon common vocations, the sphere of his choice is narrowed; and if the prohibition may be made applicable to one or two employments, it may be extended to all but one, and at last the class discriminated against may be forced to serve in a menial employment, and the nominal freedom then becomes degrading slavery. It is therefore a just conclusion, that any discrimination which narrows to one class, while leaving unrestricted to others, the freedom of choice in employments, must be regarded as the establishment of involuntary servitude, and therefore forbidden.

But the amendment is not designed to interfere with such regulations of service in the domestic relations as were formerly admissible, including the service of minors in apprenticeship under general laws. The involuntary servitude forbidden was such as would not be tolerated by the free principles of the common law, and not such as that code permitted in the case of dependent relations.

*Enforcement Laws.* — The same amendment also provides that “Congress shall have power to enforce this article by appropriate legislation.” Whether this provision has any importance must depend upon whether the prohibitory clause itself falls short of furnishing a complete and sufficient protection. A constitutional provision is sometimes, of itself, a complete law for the accomplishment of the purpose for which it was established, and sometimes it merely declares a principle which will be dormant until legislation is had to give it effect. When the former is the case, the provision is sometimes spoken of as self-executing.

<sup>1</sup> Matter of Turner, 1 Abb. U. S. 84.

Nearly all the provisions of the federal Constitution, which confer legislative or judicial power, are inoperative for the practical purposes intended until legislation under them has given the means, and pointed out the methods, by which the powers shall be exercised. The case of the judicial power is an apt illustration: it extends to controversies between citizens of different States, but, before it can be applied in actual suits, there must be legislation which prescribes what classes of these controversies the federal courts shall be permitted to take cognizance of. In like manner, the courts do not take cognizance of cases of bankruptcy until the jurisdiction is expressly conferred by law, though the judicial power is extended to those cases by the Constitution itself.

With some provisions of the Constitution, however, and especially the prohibitory clauses, it is different. A prohibition of a power in the federal Constitution defeats any attempt at its exercise, and any court, state or federal, that may have cognizance of a case in which the power can come in controversy, whether directly or incidentally, must take notice of, and act upon, the prohibition. Thus the mere declaration that "no bill of attainder shall be passed" has been found ample to protect all the people against legislative punishment, in cases not within their proper cognizance, though no legislation has ever been had looking to its enforcement. The case of the prohibition of laws impairing the obligation of contracts is a still more striking illustration of the force of certain provisions standing independently. In a multitude of forms laws have appeared which were supposed to violate this provision, and in no case has a court, either state or national, had any difficulty in dealing with it, or in declaring the law null if it was believed to be within the prohibition. Such a provision may well be declared self-executing: it is a complete and perfect law in itself, which all courts

must take notice of and enforce whenever a disregard of it comes to their judicial notice, without any statute requiring or expressly permitting it.

The prohibition of slavery and involuntary servitude is self-executing in this sense. All state laws then in existence which were inconsistent with it were by its inherent force nullified, and all state legislation which should thereafter be attempted inconsistent with it was rendered null in its incipiency. And while courts shall be in existence competent to issue the writ of *habeas corpus* and to administer common-law remedies, it seems difficult to imagine a case of attempt at a violation or evasion of this declaration of universal liberty that shall be wanting in appropriate redress.

#### SECTION IV. — THE GUARANTIES OF LIFE, LIBERTY, AND EQUALITY.

*The Constitution.* — It is declared by the fourteenth article of the amendments, that “no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” This provision is directed at state action only; but state action in violation of it may be taken by any of the departments of state government, and it is competent for Congress to legislate for its prevention, and for the punishment of state agents who participate in it. A state officer may therefore be punished for excluding persons from jury service because of their race.<sup>1</sup>

*Due Process of Law.* — To a proper appreciation of this guaranty it is important, first, to have correct understanding of the terms made use of. The terms are general, and can only be understood when their known and customary application is explained. This is especially the case with the phrase “due process of law.” It has long been in

<sup>1</sup> Coles, Petitioner, U. S. Sup. Court, March 2, 1880.

use among law writers, and in judicial decisions, as implying correct and orderly proceedings, which are due because they observe all the securities for private right which are applicable in the particular case. In this sense it is synonymous with "law of the land," as used in the famous twenty-ninth chapter of Magna Charta, which declared that "no freeman shall be taken, or imprisoned, or dis-seized, or outlawed, or banished, or anyways destroyed, nor will the king pass upon him or commit him to prison, unless by the judgment of his peers or the law of the land." The identity of the two in meaning and purpose is now well settled.<sup>1</sup>

Admitting the identity of meaning, however, does not of itself bring us to an understanding of the purpose and effect of this guaranty. "What is the law of the land? It cannot be the common law merely. Statute law is in the highest sense the law of the land; and the legislative department, created for the very purpose of declaring from time to time what shall be the law, possesses ample powers to make, modify, and repeal, as public policy or the public need shall demand. Such being the case, the question presents itself whether anything may be made the law of the land, or may become due process of law, which the legislature under proper forms may see fit to enact? To solve this question we have only to consider for a moment the purpose of the clause under examination. That purpose, as is apparent, was individual protection by limitation upon power; and any construction which would leave with the legislature this unbridled authority, as has been well said by an eminent jurist, 'would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. The people would be made to say to the two Houses, You shall be vested with the legislative power of the State, but

<sup>1</sup> Murray's Lessee v. Hoboken Land Co., 18 How. 272, 276.

no one shall be disfranchised or deprived of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, You shall not do the wrong unless you choose to do it.’<sup>1</sup>

“To quote the words of an eminent advocate and statesman, ‘Everything which may pass under the forms of an enactment is not to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man’s estate to another, legislative judgments, decrees, and forfeitures in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all the powers in the legislature. There would be no general permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country.’ And he gives us a definition of his own, in the concise and comprehensive language of which he was so eminently the master: ‘By the law of the land is most clearly intended the general law, — a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.’<sup>2</sup> ‘As to the words from Magna

<sup>1</sup> *Taylor v. Porter*, 4 Hill, (N. Y.) 140, 143. See *Hoke v. Henderson*, 4 Dev. (N. C.) 1; *Kinney v. Beverley*, 1 Hen. & M. (Va.) 531; *Norman v. Heist*, 5 W. & S. (Penn.) 171; *Janes v. Reynolds*, 2 Tex. 250. Also the recent case of *Davidson v. New Orleans*, 96 U. S. Rep. 97.

<sup>2</sup> Webster in *Dartmouth College v. Woodward*, 4 Wheat. 518; Webster’s Works, v. 487.

Charta,' says another eminent jurist, 'after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.'<sup>1</sup>

"Such have been the views of able jurists and statesmen; and the deduction is that life, liberty, and property are placed under the protection of known and established principles, which cannot be dispensed with either generally or specially; either by courts or executive officers, or by legislators themselves. Different principles are applicable in different cases, and require different forms and proceedings; in some they must be judicial; in others the government may interfere directly, and *ex parte*; but due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one being dealt with belongs.

"When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal, with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted."<sup>2</sup> But the States will prescribe their own modes of proceeding and trial; the accusation may be by grand jury or without one; the trial, by jury or by court;<sup>3</sup> and whatever is established will be due process of law, so that it be general and impartial in operation, and disregard no provision

<sup>1</sup> *Bank of Columbia v. Okely*, 4 Wheat. 235.

<sup>2</sup> Story on Const., 4th ed., §§ 1943-1946.

<sup>3</sup> *Walker v. Sauvinet*, 92 U. S. Rep. 90.

of federal or state constitution. In general, however, an accused person will be entitled to the judgment of his peers, unless that mode of trial is expressly dispensed with by law. There may be military tribunals for the trial of military offences, but these must keep strictly within the limits of their legal authority. The common law is over and above all tribunals administering any other code, and is watchful and vigilant to keep them within the limits of their jurisdiction, and to punish their members if they usurp authority not belonging to them.<sup>1</sup>

*Life and Liberty.*—These words are used in constitutional law as standing for and representing all personal rights whatsoever, except those which are embraced in the idea of property. The comprehensive word is *liberty*; and by this is meant, not merely freedom to move about unrestrained, but such liberty of conduct, choice, and action as the law gives and protects. Liberty is sometimes classified as natural liberty, civil liberty, and political liberty. The first term is commonly employed in a somewhat vague and indeterminate sense. One man will perhaps understand by it a liberty to enjoy all those rights which are usually regarded as fundamental, and which all governments should concede to all their subjects; but as it would be necessary to agree what these are, and the agreement could only be expressed in the form of law, the natural liberty, so far as the law could take notice of it, would be found at last to resolve itself into such liberty as the government of every civilized people would be expected by law to define and protect. Another by natural liberty may understand that freedom from restraint which exists before any government has imposed its limitations. But as without government only a savage state could exist, and any liberty would be only that of the wild beast, in which every

<sup>1</sup> Story on Const., § 1947; Cooley, Const. Lim., ch. 11; Milligan's Case, 4 Wall. 2.

man would have an equal right to take or hold whatever his agility, courage, strength, or cunning could secure, but no available right to more, it is obvious that a natural liberty of the sort would be inconsistent with any valuable right whatever. A right in any valuable sense can only be that which the law secures to its possessor, by requiring others to respect it, and to abstain from its violation. Rights, then, are the offspring of law; they are born of legal restraints; by these restraints every man may be protected in their enjoyment within the prescribed limits; without them possessions must be obtained and defended by cunning or force.

*Civil Liberty and Political Liberty.* — Civil liberty may be defined as that condition in which rights are established and protected, by means of such limitations and restraints upon the action of individual members of the political society as are needed to prevent what would be injurious to other individuals, or prejudicial to the general welfare. This condition may exist in any country, but its extent and securities must depend largely upon the degree of political liberty which accompanies it. Political liberty may be defined as consisting in an effectual participation of the people in the making of the laws.

*Equality.* — The theory of our institutions is, that every man's civil liberty is the same with that of others, — that all men are equal before the law in rights, privileges, and legal capacities. This theory is expressed and emphasized in the fourteenth amendment. A State, therefore, has no business to bestow favors or to establish unjust discriminations. It nevertheless becomes important to the general welfare that special privileges should be granted in some cases, because from the nature of the case there cannot be a general participation. If a national bank is essential, everybody cannot be a corporator; if a railroad is to be built, the franchise must necessarily be given into the hands



of a few persons. In these and other cases falling within similar reasons, special charters may be granted without giving cause for complaint. But it is a just rule of construction that all grants of franchise and privilege are to be strictly construed; the State will be presumed to have granted in plain terms all it intended to grant at all.<sup>1</sup>

*The Police Power.* — The authority to establish, for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a corresponding enjoyment by others, is usually spoken of as the authority or power of police. This is a most comprehensive branch of sovereignty, extending as it does to every person, every public and private right, everything in the nature of property, every relation in the State, in society, and in private life.<sup>2</sup> The use of the public highways is regulated under it; so are the public fisheries and mines if any, and so are all the occupations of life. The domestic relations are formed, regulated, sustained, and dissolved under the rules it prescribes: the age at which a child becomes emancipated, the terms under which he may be allowed to apprentice himself or be forced by the public authorities to do so, and the measure of independent action in the marriage relation, are all determined by its rules. These rules seldom raise any question of constitutional authority, but it is possible for them to be pushed to an extreme that shall deny just liberty.

*Marriage.* — This is a relation formed by the consent of two persons of opposite sexes under natural laws, and in

<sup>1</sup> *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544; *Perine v. Canal Co.*, 9 How. 172.

<sup>2</sup> *Commonwealth v. Alger*, 7 Cush. (Mass.) 53; *Thorpe v. Railroad Co.*, 27 Vt. 140.

a general sense the right to form it is universal. But, as with every other conventional right, circumstances create exceptions, and general rules become necessary by means of which the exceptions may be determined. The relation is the most important that can exist in the State; the well-being of society depends on its preservation in its purity, and it is of the highest importance that those marriages should be prohibited that would be unfit, and that would tend to demoralize the community, or in their progeny to give to society a debased offspring. On these grounds the marriages of immature persons are prohibited, and also those of persons unsound in mind. No doubt these regulations might go much farther than they do; and they are supplemented by others which require certain forms, in order to publicity and certainty of evidence, and to guard against frauds. The legal right may therefore be expressed thus: every one has lawful right to marry, who possesses the capacity and qualifications required by law, with a person of the opposite sex having the like capacity and qualifications, whose consent is obtained, and with whom the legal conditions to marriage are observed.

If the regulations apply universally and impartially, a question of constitutional law can scarcely arise upon them, for every independent State must be at liberty to regulate the domestic institutions of its people as shall seem most for the general welfare. A regulation, however, that should apply to one class exclusively, and which should not be based upon any distinction between that class and others which could be important to the relation, must be wholly unwarranted and illegal. This principle is conceded, but it is not easy to determine what regulation would come within it. Many States prohibit the intermarriage of white persons and negroes; and since the fourteenth amendment this regulation has been contested as the offspring of race prejudice, as establishing an un-

reasonable discrimination, and as depriving one class of the equal protection of the laws. Strictly, however, the regulation discriminates no more against one race than against the other: it merely forbids marriages between the two. Nor can it be said to so narrow the privilege of marriage as practically to impede or prevent it. Race prejudice no doubt has had something to do with establishing it, but it cannot be said to be so entirely without reason in its support as to be purely arbitrary. The general current of judicial decision is, that it deprives a citizen of nothing that he can claim as a legal right, privilege, or exemption.<sup>1</sup>

*Divorce.* — As with marriage, so with divorce; every State will establish such rules as seem best for the associated people. The following rules of law may be considered settled: — 1. That the legislature may lay down general rules of divorce, or it may prescribe a particular rule for a particular case; in other words, may grant special divorces at will. This is the rule in the absence of constitutional provisions on the subject, but in a majority of the States legislative divorces are now prohibited. 2. That the idea of vested rights, as it applies to property, has no application to the domestic relations. Therefore, one cannot complain that he is deprived of a vested right though the rule prescribed under which his marriage is dissolved seems to him unreasonable or unjust.<sup>2</sup> 3. That a mere legislative act, where legislative divorces are not prohibited, is due process of law for this purpose, and, as in the case of the passage of any other law, its justice cannot become the subject of judicial inquiry. 4. That, when

<sup>1</sup> *State v. Gibson*, 36 Ind. 389; *State v. Hairston*, 63 N. C. 451; *Lonas v. State*, 3 Heisk. (Tenn.) 287; *Ex parte Hobbs and Johnson*, 1 Woods, 537.

<sup>2</sup> *Starr v. Pease*, 8 Conn. 541; *Crane v. Meginnis*, 1 Gill & J. (Md.) 463.

divorce is by law made a judicial proceeding, the right to a hearing is the same that exists in controversies over property rights, and is indefeasible. 5. No State can establish rules for divorce for any but its own people, nor grant divorces to those not domiciled within its own limits. It is under this principle that questions of constitutional right are likely to arise. The principle is clear, but attempts are often made to avoid it by going from one jurisdiction, and obtaining a merely colorable residence in another, for the purposes of divorce. A divorce obtained under such circumstances is wholly unauthorized, and void for want of authority in the State whose courts assume to grant it.<sup>1</sup> Nor can the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings, &c. of every other State require such a divorce to be respected elsewhere, because it is not entitled to respect in the State in which it takes place.<sup>2</sup>

*Education.* — That civil liberty would be exceedingly imperfect that did not permit the citizen to educate himself in such proper ways as might be open to him, and to such extent as he should choose. The State, however, usually makes provision for public education, establishing schools and laying down rules respecting those who shall be received into them. Formerly it was held that such a provision was in the nature of state bounty, and that the State might limit the bounty at discretion. Therefore colored children might be excluded from the public schools.<sup>3</sup> But since the adoption of the fourteenth amendment this is unlawful,<sup>4</sup> though it seems to be admissible to require

<sup>1</sup> *Hanover v. Turner*, 14 Mass. 227; *Leith v. Leith*, 39 N. H. 20; *People v. Dawell*, 25 Mich. 247; *Hoffman v. Hoffman*, 46 N. Y. 30; *Reel v. Elder*, 62 Penn. St. 308.

<sup>2</sup> *Chase v. Chase*, 6 Gray, (Mass.) 157.

<sup>\*</sup> *Roberts v. Boston*, 5 Cush. (Mass.) 198.

<sup>4</sup> *Ward v. Flood*, 48 Cal. 36.

colored persons to attend separate schools, provided the schools are equal in advantages, and the same measure of privilege and opportunity is afforded in each.<sup>1</sup>

*Employment.* — The general rule is that every person *sui juris* has a right to choose his own employment, and to devote his labor to any calling, or at his option to hire it out in the service of others, This is one of the first and highest of all civil rights, and any restrictions that discriminate against persons or classes are inadmissible. The right to reside in a country implies the right to labor there, and therefore if by treaty with a foreign country its people are given the liberty to reside in this, no State can have the right to forbid their employment, as this would be in conflict with the rights given by the treaty.<sup>2</sup>

Employments are nevertheless subject to control under the state power of police, and may be regulated in various ways, and to some extent restricted.

1. The State may forbid certain classes of persons being employed in occupations which their age, sex, or health renders unsuitable for them; as women and young children are sometimes forbidden to be employed in mines and certain kinds of manufacture.

2. The State may require special training for some employments, and forbid persons engaging in them who have not proved their fitness on examination, and been duly licensed. Such are the cases of practitioners of law and of medicine. Similar regulations cannot be extended to members of the clerical profession, since it is a part of the religious freedom of the people that they should be left at liberty to listen to such ministrations as they please,

<sup>1</sup> *Cory v. Carter*, 48 Ind. 327; *State v. McCann*, 21 Ohio, N. S. 198; *County Court v. Robinson*, 27 Ala. 116.

<sup>2</sup> *Baker v. Portland* (U. S. Dist. Ct. Oregon), 8 Reporter, 392; 12 Chicago Legal News, 375; *Chapman v. Toy Long*, 4 Sawyer, 36.

and to select their own teachers, whether learned or unlearned, wise or foolish.

Where an employment is in the nature of a privilege, as is the practice of the law, it may be restricted, as suffrage is, to persons of the male sex.<sup>1</sup>

3. An occupation opposed to public policy, like that of gaming, may be prohibited altogether. And where one is peculiarly liable to abuses, it may be surrounded by all such securities as may seem calculated to prevent them. The case of the sale of intoxicating drinks is an illustration. Sometimes this is prohibited altogether,<sup>2</sup> because the evils are supposed to exceed any possible benefits; and the prohibition invades no principle of constitutional liberty.<sup>3</sup> Sometimes the business is only subjected to stringent regulations; such as that the dealer shall give evidence of good moral character, be approved by some local board, give security not to sell to minors or habitual drunkards, &c. Recently statutes have gone much further, and made dealers responsible for all injuries, direct and indirect, that may result from their sales, to the wife, child, parent, or employer of the purchaser; and it is held competent for the State to impose this severe responsibility.<sup>4</sup> Some statutes even make the owners of property on which liquors are sold by others responsible for the resulting injury.

*Innkeepers and Common Carriers.* — In general every person may make rules for the regulation of his own business, and may deal with whomsoever he pleases, and refuse to deal with others. Exceptional rules have grown up at

<sup>1</sup> *Bradwell v. State*, 16 Wall. 130; *Matter of Goodell*, 39 Wis. 232; *Ex parte Spinney*, 10 Nev. 323.

<sup>2</sup> *Beer Company v. Massachusetts*, 97 U. S. Rep. 25; *License Tax Cases*, 5 Wall. 462.

<sup>3</sup> *License Cases*, 5 How. 504; *Lincoln v. Smith*, 27 Vt. 328; *Reynolds v. Geary*, 26 Conn. 179.

<sup>4</sup> *Wilkerson v. Rust*, 57 Ind. 172; *State v. Ludington*, 33 Wis. 107.

the common law in respect to certain occupations, on account of their public nature. One of these is that of an innkeeper, whose obligation at the common law is to receive all who come, and entertain them impartially, provided he has sufficient accommodations, and they come in an orderly and decent manner, not intoxicated or subject to a contagious or infectious disease.<sup>1</sup> A common carrier is under similar obligations, and has similar rights. But he may discriminate in the accommodations he affords, so long as the distinctions are not wholly unreasonable; as some railroad companies do in furnishing different carriages for male and female passengers;<sup>2</sup> and it has been decided in some cases that the carrier may discriminate in the same way between persons of different races, provided the accommodations afforded to all are equal.<sup>3</sup> No doubt state legislation might lawfully forbid such discriminations,<sup>4</sup> and Congress might do the same, so far as concerns the commerce that falls within its control;<sup>5</sup> but Congress can have no power within the States to legislate for equal and impartial accommodations in public inns, theatres, &c.<sup>6</sup>

Where the common carrier is a railroad company, existing and operating its road under a grant of important state franchises, among which is that of exercising the right of eminent domain for the acquisition of right of way, &c., and especially if by the charter the State has

<sup>1</sup> *Howell v. Jackson*, 6 C. & P. 723; *Markham v. Brown*, 8 N. H. 523.

<sup>2</sup> *Chicago, &c. R. R. Co. v. Williams*, 55 Ill. 185; *Hutchinson on Carriers*, § 542.

<sup>3</sup> *Westchester, &c. R. R. Co. v. Miles*, 55 Penn. St. 209; *Green v. Bridgeton* (U. S. Dist. Ct. Georgia), 9 Cent. Law Jour. 206.

<sup>4</sup> *DeCuir v. Benson*, 27 La. An. 1.

<sup>5</sup> See *Hall v. DeCuir*, 95 U. S. Rep. 485.

<sup>6</sup> *Charge of Emmons*, U. S. Circ. Judge, 2 Am. Law Times R., N. S. 198. *Contra*, *United States v. Newcomer*, E. Dist. Pa., 22 Int. Rev. Rec. 115.

reserved the right of alteration and repeal, the State may extend its regulations so far as to fix the rates of transportation, and to compel submission to the constant supervision of commissioners, whose duty it shall be to see that the laws are obeyed, and that absolute impartiality is observed.<sup>1</sup>

*Regulation of Prices.* — Formerly it was common by legislation to regulate wages, and the prices of merchandise, or whatever any one person might have to dispose of to another. To some extent this was done in this country in colonial days, but never generally; and the old laws on the subject were unquestionably innovations on common right, and usurpations of authority. In some cases, however, the right to regulate charges is still exercised, and in the following cases may be justified on principle: —

1. Where the business is one the following of which is not a matter of right, but is permitted by the State as a privilege or franchise. Under this head may be classed the business of setting up lotteries, of giving shows, &c., of keeping billiard-tables for hire, of selling intoxicating drinks, and of keeping a ferry or toll bridge.

2. When the State on public grounds renders to the business special assistance by taxation, or under the eminent domain, as is done in the case of railroads.

3. When, for the accommodation of the business, special privileges are given in the public streets, or exceptional use allowed of public property or public easements, as is the case with hackmen, draymen, &c.

4. When exclusive privileges are granted in consideration of some special return to the public, or in order to secure something to the public not otherwise attainable.<sup>2</sup>

<sup>1</sup> Chicago, &c. R. R. Co. v. Iowa, 94 U. S. Rep. 155; Peik v. Chicago, &c. R. R. Co., 94 U. S. Rep. 164.

<sup>2</sup> Slaughter House Cases, 16 Wall. 36.



To these may be added : —

5. Those employments which are *quasi* public, and essential to the business of the country, but of which the circumstances give to a few persons a virtual monopoly at each important commercial centre, — such as those who own elevators for the storage of grain have in the city of Chicago.<sup>1</sup>

6. The case of money loans. This last is an exception difficult to defend on principle ; but the power to regulate the rate of interest has been employed from the earliest days, and has been too long acquiesced in to be questioned now.

*Monopolies.* — Every exclusive privilege is to some extent an infringement upon equal rights, and therefore ought to be capable of being defended on some ground that under the circumstances justifies it. But monopolies are undoubtedly admissible in some cases. An illustration is had in the case of a patent, and another in the case of a copyright of a book or print. Monopolies in all kinds of business were at one time common in England ; but they were held to be illegal at length, the court declaring that “ the sole trade of any mechanical artifice, or any other monopoly, is not only a damage and prejudice to those who exercise the same trade, but also to all other subjects ; for the end of all these monopolies is for the private gain of the patentees.”<sup>2</sup> It is certain that they cannot be granted in such ordinary vocations as can be left open to all to the common benefit ; but they sometimes may be given as a matter of regulation, where the business is such that the public interest can be best subserved and protected by confiding it to one person, or association of persons, who shall manage it exclusively. For example, the exclusive right to supply water or gas-light in a city or

<sup>1</sup> *Munn v. People*, 69 Ill. 80 ; *Munn v. Illinois*, 94 U. S. Rep. 113.

<sup>2</sup> *Darcy v. Allain*, 11 Rep. 84 ; *Broom*, Const. Law, 500.

part of a city is sometimes granted,<sup>1</sup> or the exclusive right to lay railway tracks in its streets; and it has been held that a corporation may be given the exclusive right to slaughter cattle for the markets of a city, it being required to do so impartially for all who apply, and at reasonable rates.<sup>2</sup> This obligation to serve the public impartially would seem to be an essential incident to any grant of a monopoly, since without it it would be impossible to justify the grant on public grounds.

Combinations to effect monopolies are opposed to the public interest, and may be forbidden and punished. So combinations to prevent men being employed by others, through force or threats or any other means beyond the employment of reason or solicitation, are illegal, and if successful will be actionable at the common law.<sup>3</sup>

*Sumptuary Laws.* — Montesquieu thought sumptuary laws essential to prevent extravagance in a republic,<sup>4</sup> but the notion has long been exploded. They are plain invasions of individual liberty, and therefore are forbidden. Every person must be allowed to judge of his own table, and to dress as he pleases, subject to such police regulations as may be established for the preservation of public order and public morals. Women, for example, may be forbidden to go about in the ordinary garb of men, as a necessary regulation against immorality and indecency. So every person must be allowed to deal with his property as he pleases, subject to reasonable regulations for the protection of others. He cannot, for example, be compelled against his will to improve his real estate.<sup>5</sup>

<sup>1</sup> *State v. Milwaukee Gas Co.*, 29 Wis. 454.

<sup>2</sup> *Slaughter House Cases*, 16 Wall. 36.

<sup>3</sup> *Carew v. Rutherford*, 106 Mass. 1. See *Hornby v. Close*, L. R. 2 Q. B. 153.

<sup>4</sup> *Spirit of the Laws*, b. 7.

<sup>5</sup> *Gaines v. Buford*, 1 Dana, (Ky.) 479; *Violett v. Violett*, 2 Dana, (Ky.) 323.

*Impartial Protection.* — Every person, however low, or degraded, or poor, is entitled to have his rights tested by the same general laws which govern others. A supposed pauper is as much entitled to a hearing before he can be consigned to the workhouse, as is any other person whose liberty is threatened.<sup>1</sup> A supposed insane person cannot be committed to an asylum against his will without a judicial investigation; <sup>2</sup> nor can a man's property be seized and destroyed, or moved off as a nuisance, at the mere discretion or on the judgment of a ministerial officer.<sup>3</sup>

*Suffrage.* — Participation in the suffrage is not of right, but it is granted by the State on a consideration of what is most for the interest of the State. Nevertheless, the grant makes it a legal right until it is recalled, and it is protected by the law as property is. In the following chapter the conditions of suffrage and of the holding of office will be noticed.

#### SECTION V. — JURY TRIAL IN CIVIL CASES.

*The Constitution.* — The seventh amendment provides that “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 right of persons accused of crimes to be tried by jury is secured by another provision, and will be examined in another place.

“The trial by jury,” it has been said, “is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment

<sup>1</sup> *Portland v. Bangor*, 65 Me. 120.

<sup>2</sup> *Van Deusen v. Newcomer*, 40 Mich. 90.

<sup>3</sup> *Fisher v. McGirr*, 1 Gray, (Mass.) 1; *Darst v. People*, 51 Ill. 286; *State v. Paul*, 5 R. I. 185; *Miller v. Burch*, 32 Tex. 208.

upon it has been watched with great jealousy.”<sup>1</sup> The privilege in criminal cases has been looked upon as a necessary part of the liberties of the people, and a sentiment attaches to it which will scarcely suffer its value to be questioned. Every state constitution preserves it for suits in the state courts, and every new or revised constitution repeats a guaranty of it. Even the common-law requirement of unanimity in the verdict, which is of more than doubtful value, is retained without inquiry or question, because it has existed from time immemorial.

The tribunal was almost peculiar to the common-law courts, and issues joined in other courts went to a jury only under peculiar circumstances and in exceptional cases. It is important to know, however, that the form of the proceeding will not determine the right of the party to this method of trial. By the common law in this amendment “is meant what the Constitution denominated in the third article ‘law’; not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit.”<sup>2</sup> It is immaterial, therefore, what changes may be made in the forms of action or pleadings, since the nature of the controversy and the right in dispute must determine the privilege, and not the form of remedy provided.<sup>3</sup> But as the amendment only preserves the right, and does not extend it, the privilege is demandable of right only in those cases in which the law gave it before.<sup>4</sup>

<sup>1</sup> *Parsons v. Bedford*, 3 Pet. 433, 446.

<sup>2</sup> *Parsons v. Bedford*, 3 Pet. 433, 447.

<sup>3</sup> *Backus v. Lebanon*, 11 N. H. 9; *Tabor v. Cook*, 15 Mich. 322.

<sup>4</sup> *Rhines v. Clark*, 51 Penn. St. 96.

*Waiver.* — In criminal cases — at least in cases of felony — the accused cannot waive this privilege, the jury being a necessary part of the tribunal that tries him; <sup>1</sup> nor can it be made to depend on any condition, as, for example, upon an appeal from a court that sits without a jury to a court which allows one. <sup>2</sup> But civil rights in general may be waived, and a provision for civil cases that trial by jury should be deemed waived unless demanded would seem unobjectionable. It has been held, also, that it sufficiently preserves the privilege to make provision by law for jury trial in an appellate court. <sup>3</sup>

*Incidents.* — The peculiar characteristic of jury trial is this: that the jury sit with the judge to try the facts of the controversy, receiving from him the law, and applying it, according as they find the facts to be, in a verdict which embodies both fact and law in a general conclusion. Or, at their option, the jury may find the facts specially, and report them to the court, who will then determine what judgment the facts require. The court is thus the trier of the law, and the jury are the triers of the facts; but the judge may nevertheless rightfully express his opinion upon the facts to the jury, who will be at liberty to accept his conclusions, or to disregard them, as their judgment shall dictate. <sup>4</sup> The jury have also the legal power to disregard the instructions in matter of law, and to render a verdict which the instructions would not warrant; but their doing so would be misconduct, which the judge should correct by granting a new trial. <sup>5</sup> But the judge will not grant a new trial merely because his opinion upon disputed or uncertain

<sup>1</sup> *Cancemi v. People*, 18 N. Y. 128.

<sup>2</sup> *Matter of Dana*, 7 Benedict, 1.

<sup>3</sup> Many cases are collected in Cooley, *Const. Lim.*, 4th ed., 513, note. Compare *Greene v. Briggs*, 1 Curt. C. C. 311.

<sup>4</sup> *Consequa v. Willings*, Pet. C. C. 225.

<sup>5</sup> *Wilkinson v. Greely*, 1 Curt. C. C. 63.

facts differs from that of the jury ;<sup>1</sup> though, if there were no evidence fairly tending to support their verdict, it will be erroneous not in point of fact merely, but in law, and it will be the duty of the judge to set it aside, and, if he shall refuse to do so, then for a court of error to reverse it on that ground.<sup>2</sup>

*Rehearings.* — The rule that the facts shall not be otherwise re-examined than according to the rules of the common law, is essential to a preservation of the right. It could be of no importance that one should have a jury trial in the first instance, if his adversary might then remove the case to another court to be tried by the judge himself. The finding of the jury upon the facts when no error has intervened to influence it, and no fraud or surprise, must be taken as conclusive. When it becomes necessary to re-examine the facts tried by a jury, it must be done by another jury on a new trial. An appellate court examines the facts only so far as may be necessary to ascertain whether any error of law has been committed to the prejudice of the party complaining of the verdict ;<sup>3</sup> but the trial court may, in its discretion, grant a new trial where for any reason it is believed justice was not done by the first verdict.

The seventh amendment applies not only to cases tried by jury in the federal courts, but also to such as are tried by jury in the state courts and afterwards removed to the federal Supreme Court for review under its appellate jurisdiction.<sup>4</sup>

<sup>1</sup> *Stanley v. Whipple*, 2 McLean, 35; *Carr v. Gale*, 3 Wood. & M. 38.

<sup>2</sup> *Insurance Co. v. Rodel*, 95 U. S. Rep. 232.

<sup>3</sup> *Hickman v. Jones*, 9 Wall. 197.

<sup>4</sup> *The Justices v. Murray*, 9 Wall. 274.

## CHAPTER XIV.

## POLITICAL PRIVILEGES AND THEIR PROTECTIONS.

*Political Privileges in General.* — In the main, political privileges arise under state constitutions and laws, and are left to their protection. The few exceptions will be specified in the pages which follow.

## SECTION I. — CITIZENSHIP.

*The Fourteenth Amendment.* — The fourteenth article of the amendments declares that “all persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.” The importance of this provision connects itself with the earnest and violent controversy which for more than ten years previous to its adoption had agitated the country respecting the status of colored persons. Such persons, when not enslaved, had been considered citizens in one section of the Union; and whether they were or were not citizens in the other States had been the subject of very little discussion or consideration previous to the disturbing and exciting events of which the repeal of the restriction upon the extension of slavery, imposed by the legislation known as the Missouri Compromise, was most important. In the case in which the federal Supreme Court expressed the opinion that that restriction was unconstitutional, it was decided that a colored person of the African race, whose ancestors were imported into this country and sold as slaves, could

not become a member of the political community brought into existence by the Constitution of the United States, and as such entitled to the rights, privileges, and immunities guaranteed by that instrument to citizens, and that he could not therefore, as a citizen, bring suits in the courts of the United States.<sup>1</sup> To this extent the opinion of the court was authoritative, and was entitled to respect and observance as such so long as it stood unreversed. A very large party in the country, however, was not satisfied with the reasoning of the court, but protested against it; and when the government of the country, by the election of 1860, passed into the hands of this party, the decision was wholly ignored by the political departments of the government. It may perhaps be said that it was ignored by the judicial department also, since persons of African descent were admitted to practice in the federal courts on the same terms with others.<sup>2</sup> But a mere tacit recognition of rights which are still disputed cannot be the most satisfactory settlement of a question so important. A ruling of the executive department under one administration may be set aside under the next. Even an act of Congress might be repealed when another party succeeded to power; or it might be adjudged unconstitutional by the courts, as had been done with the Missouri Compromise. But as the solemn adjudication already had was still standing unreversed, it obviously constituted a most serious and dangerous impediment to the peaceful and full enjoyment of rights which it denied. Under these circumstances the propriety and importance of having the controversy settled in the most authoritative and conclusive mode are apparent.

*How Citizenship is acquired.*—The fourteenth amendment indicates the two methods in which one may become

<sup>1</sup> *Scott v. Sandford*, 19 How. 393.

<sup>2</sup> This was without objection or discussion.



a citizen : *first*, by birth in the United States ;<sup>1</sup> and, *second*, by naturalization therein. But a citizen by birth must not only be born within the United States, but he must also be subject to the jurisdiction thereof ; and by this is meant that full and complete jurisdiction to which citizens generally are subject, and not any qualified and partial jurisdiction, such as may consist with allegiance to some other government. The aboriginal inhabitants of the country may be said to be in this anomalous condition, so long as they preserve their tribal relations and recognize the headship of their chiefs, even when they reside within a State or an organized Territory, and owe a qualified allegiance to the government of the United States. It would obviously be inconsistent with the semi-independent character of such a tribe, and with the obedience yielded by them to their tribal head, that they should be vested with the complete rights, or, on the other hand, charged with the full responsibilities of citizens.<sup>2</sup> But when the tribal relations are dissolved, or when any individual withdraws and makes himself a member of the civilized community, adopting the habits of its people and subjecting himself fully to the jurisdiction, his right to protection in person, property, and privilege becomes as complete as that of any other native-born inhabitant.<sup>3</sup>

*Naturalization.* — Naturalization may be effected, *first*, by special laws which confer the privilege upon individuals named ; *second*, by proceedings under general laws, whereby individuals severally renounce any foreign allegiance, and take upon themselves the obligations of citizenship ;

<sup>1</sup> This would include, also, birth abroad of children of American citizens temporarily residing or travelling in other countries. Rev. Stat. U. S. (1878), § 1993.

<sup>2</sup> *Goodell v. Jackson*, 20 Johns. (N. Y.) 693, 710 ; *McKay v. Campbell*, 2 Sawyer, 118 ; *Ex parte Reynolds*, 18 Alb. Law Jour. 18.

<sup>3</sup> Story on Const., 4th ed., § 1933.

*third*, by the acquisition by the United States of foreign territory, with its people, who thereby become citizens of the United States. In this manner the people brought within the jurisdiction of the Union by the acquisition of Louisiana, Florida, and portions of Mexico, became citizens. The second method above named is that provided by acts of Congress; and the first and third must always be exceptional.

*Loss of Citizenship.* — It is declared by act of Congress that “expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness,” and that “any declaration, instruction, opinion, order, or decision of any officer of the United States, which denies, restricts, impairs, or questions the right of expatriation, is inconsistent with the fundamental principles of the republic.”<sup>1</sup> The judicial doctrine had previously been, that no one could expatriate himself without express authority of law.<sup>2</sup> It is also provided by act of Congress, that desertion from military or naval service, and going abroad to avoid being lawfully drafted into the same, shall be deemed a voluntary relinquishment and forfeiture of the rights of citizenship.<sup>3</sup>

*Citizenship in State and Union.* — The fourteenth amendment recognizes the fact that there is a citizenship of the United States, and also a citizenship of the several States, and that the two coexist in the same persons. Both governments owe a duty of protection to the persons who are subject to their jurisdiction, and both are entitled to the allegiance of such persons, and may punish breaches of this allegiance. It is impossible to conceive of such a status as citizenship of a State unconnected with citizen-

<sup>1</sup> Rev. Stat. U. S. (1878), § 1999.

<sup>2</sup> 2 Kent, 48–50, and notes.

<sup>3</sup> Rev. Stat. U. S. (1878), §§ 1996–1998.

ship of the United States, or of citizenship of the United States within a State unconnected with citizenship of the State. The States cannot naturalize, though they may confer special privileges upon aliens; and the act of naturalization by the United States is the grant of citizenship within the State where the naturalized person resides. It is only in the Territories and other places subject to their exclusive jurisdiction that there can be a citizenship of the United States unconnected with citizenship of a State.<sup>1</sup>

*Abridgment of Privileges and Immunities.* — In a previous chapter, the section of the Constitution which entitles the citizens of each State to all the privileges and immunities of citizens of the several States has been examined, and some attempt made to describe those privileges and immunities.<sup>2</sup> By the fourteenth amendment it is declared that “no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” The line of distinction between the privileges and immunities of citizens of the United States and those of citizens of the several States must be traced along the boundary of their respective spheres of action, and the two classes must be as different in their nature as are the functions of their respective governments. A citizen of the United States as such has a right to participate in foreign and inter-state commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, and to pass from State to State, and into foreign countries, because over all these subjects the jurisdiction of the United States extends, and they are covered by its laws.<sup>3</sup> These, there-

<sup>1</sup> *Prentiss v. Brennan*, 2 Blatch. 162. The inhabitants of districts within a State over which the State has ceded exclusive jurisdiction to the United States are not citizens of the State. *Sinks v. Reese*, 19 Ohio, N. S. 306; *Commonwealth v. Clary*, 8 Mass. 72.

<sup>2</sup> See page 187.

<sup>3</sup> Story on Const., 4th ed., § 1937.

fore, are among the privileges of citizens of the United States. So every citizen may petition the federal authorities which are set over him in respect to any matter of public concern; may examine the public records of the federal jurisdiction; may visit the seat of government without being subjected to the payment of a tax for the privilege;<sup>1</sup> may be purchaser of the public lands on the same terms with others; may participate in the government if he comes within the conditions of suffrage; and may demand the care and protection of the United States when on the high seas, or within the jurisdiction of a foreign government.<sup>2</sup> The privileges suggest the immunities. Wherever it is the duty of the United States to give protection to a citizen against any harm, inconvenience, or deprivation, the citizen is entitled to an immunity which pertains to federal citizenship.

One very plain and unquestionable immunity is exemption from any tax, burden, or imposition under state laws, as a condition to the enjoyment of any right or privilege under the laws of the United States. A State therefore cannot require one to pay a tax as importer, under the laws of Congress, of foreign merchandise,<sup>3</sup> nor impose a tax upon travellers passing by public conveyances out of the State,<sup>4</sup> nor impose conditions to the right of citizens of other States to sue its citizens in the federal courts.<sup>5</sup> These instances sufficiently indicate the general rule. Whatever one may claim as of right under the Constitution and laws of the United States by virtue of his citizenship, is a privilege of a citizen of the United States. Whatever the Constitution and laws of the United States

<sup>1</sup> *Crandall v. Nevada*, 6 Wall. 35.

<sup>2</sup> *Slaughter House Cases*, 16 Wall. 36.

<sup>3</sup> *Ward v. Maryland*, 12 Wall. 163.

<sup>4</sup> *Crandall v. Nevada*, 6 Wall. 35.

<sup>5</sup> *Insurance Co. v. Morse*, 20 Wall. 445.

entitle him to exemption from, he may claim an immunity in respect to.<sup>1</sup> And such a right or privilege is abridged whenever the state law interferes with any legitimate operation of federal authority which concerns his interest, whether it be an authority actively exerted, or resting only in the express or implied command or assurance of the federal Constitution or laws. But the United States can neither grant nor secure to its citizens rights or privileges which are not expressly or by reasonable implication placed under its jurisdiction; and all not so placed are left to the exclusive protection of the States.<sup>2</sup>

*Necessity of the Provision.* — It may well be questioned whether the provision just considered was necessary. It is certainly not clear that there can exist any privilege or immunity of a citizen of the United States which, independent of the fourteenth amendment, is not beyond state control. The mere fact that the Constitution and laws of the United States have created a privilege, or given an immunity, is of itself sufficient to put it beyond the reach of unfriendly legislation. The reason is obvious. State laws operate, and can only operate, within the sphere of state sovereignty; but privileges and immunities of citizens of the United States arise within the sphere of national sovereignty, where, in express terms the Constitution and laws of the United States are made paramount and supreme.<sup>3</sup> It is plain that state laws cannot impair what they cannot reach. The right, for example, of every citizen to have the benefit of postal facilities, was as little open to question before the amendment as it is now. The law must have been then as it is now, — namely, that state law is powerless

<sup>1</sup> Slaughter House Cases, 16 Wall. 36.

<sup>2</sup> United States v. Reese, 92 U. S. Rep. 214; United States v. Cruikshanks, 92 U. S. Rep. 542; Hall v. DeCuir, 95 U. S. Rep. 485; Kirtland v. Hotchkiss, Sup. Ct. U. S. Oct. Term, 1879.

<sup>3</sup> Const., Art. VI. cl. 2; Ableman v. Booth, 21 How. 506.

to take away, restrain, or abridge that which the federal authority has lawfully given. And it is immaterial whether the privilege or immunity exists as an implication under some provision of the Constitution or laws, or is expressly declared and established. The right to visit the national capital is nowhere expressly declared, but it results from the very nature of free government;<sup>1</sup> and for a State to undertake to deny or obstruct the right, would as plainly be an intrusion on federal sovereignty, as would an attempt to encroach on the war power, or the power over foreign commerce. Nevertheless this portion of the fourteenth amendment has its importance in the fact that it embodies in express law what before, to some extent, rested in implication merely; just as in the Constitution bills of attainder are forbidden, though without the prohibition they would undoubtedly be incompetent, because of the separation of legislative and judicial authority which has been made by the American constitutions. Many abuses of power are forbidden more than once in the federal Constitution, under different forms of expression.

## SECTION II. — SUFFRAGE AND ELECTIONS.

*Basis of Suffrage.* — During the last quarter of a century, while the agitation for an enlargement of civil rights has been violent, sentiment has had a great and extraordinary influence on public affairs in America. It has much affected the discussion of political privileges, and considerable numbers have insisted that suffrage was a natural right, corresponding to the right to life and liberty, and equally unlimited. Unless such a doctrine is susceptible of being given practical effect, it must be utterly without substance; and so the courts have pronounced it.<sup>2</sup> In

<sup>1</sup> *Crandall v. Nevada*, 6 Wall. 35.

<sup>2</sup> *Spencer v. Board of Registration*, 1 M'Arthur, (D. C.) 169; *United States v. Anthony*, 11 Blatch. 200.

another place it has been shown that liberty itself must come from law, and not in any institutional sense from nature;<sup>1</sup> and still less can that come from nature in which all the people cannot possibly participate, and in respect to which, therefore, positive law becomes absolutely essential, in order to prescribe qualifications, the possession of which shall be the test of right to enjoyment. A gift by nature must be absolute, and not contingent upon the State, coming forward afterwards with uncertain and changeable enactments to name conditions, and point out the persons who may enjoy the bounty. But there is a further objection which is equally insurmountable: suffrage cannot be the natural right of the individual, because it does not exist for the benefit of the individual, but for the benefit of the State itself.

Suffrage is participation in the government: in a representative country it is taking part in the choice of officers, or in the decision of public questions. The purpose is to keep up the continuity of government, and to preserve and perpetuate public order and the protection of individual rights. The purpose is therefore public and general, not private and individual. Whatever suffrage is calculated to defeat the general purpose, — whatever, if permitted, would tend to break up the government, to introduce anarchy, and to bring upon the people the innumerable mischiefs which would follow from the destruction of public order, — is not only inadmissible on reason, but is proved by the consequences which follow to be condemned by the great Author of government. To say that one whose participation in government would bring danger to the State, and probable disaster, has nevertheless a right to participate, is not only folly in itself, but it is to set the individual above the State, and above all the manifold interests which are represented by it and bound up in its destiny. Such

<sup>1</sup> *Ante*, pp. 225, 226.

a doctrine is idle. Suffrage must come to the individual, not as a right, but as a regulation which the State establishes as a means of perpetuating its own existence, and of insuring to the people the blessings it was intended to secure.

*Suffrage a State Privilege.* — The Constitution of the United States, (except in particulars specified further on in this chapter) does not in any manner intermeddle with state and municipal elections, and they are consequently (in most respects) left exclusively to state regulation and control. States establish for their own people the rules of suffrage, and it is in state constitutions and laws, and in the decisions of state courts, that the rules and principles are to be looked for which govern such elections. Suffrage is never a necessary accompaniment of state citizenship, and the great majority of citizens are always excluded, and are represented by others at the polls. Sometimes, also, suffrage is given to those who are not citizens; as has been done by no less than twelve of the States, in admitting persons to vote who, being aliens, have merely declared their intention to become citizens.

*Congressional Elections.* — Under the Constitution each State elects such number of representatives as is apportioned to it by the laws of Congress, and the qualifications of electors for such representatives are to be the same as those for the most numerous branch of the state legislature.<sup>1</sup> The State is therefore left to fix these qualifications without any restraint or limitation, except that which is imposed by the fifteenth amendment. The legislature of each State also prescribes the times, places, and manner of holding elections for senators and representatives in Congress, but Congress is also empowered to make or alter such regulations, except as to the places of choosing senators.<sup>2</sup> When the constitution of the State and the

<sup>1</sup> Const., Art. I. § 2.

<sup>2</sup> Const., Art. I. § 4.



legislation of the State conflict respecting the times and places when and where votes may be cast for the election of representatives in Congress, the legislation, under the provision of the Constitution last referred to, must control.<sup>1</sup>

*Qualifications of Electors.* — As elections are the means whereby the people express their sovereign will, the qualifications for taking part therein are usually prescribed by constitution, that they may not be subject to continual changes from year to year by legislators of differing views. When the qualifications are once fixed by the constitution, it is not in the power of the legislature to add to or modify them, but they must remain until the constitution is revised or amended,<sup>2</sup> and whoever claims the right must show that he comes within the intent of the existing law.<sup>3</sup> A provision giving the right generally to persons possessing certain qualifications must be understood as excluding idiots and insane persons, even though not expressly mentioning them as exceptions, since these persons are incapable of exercising legal volition.<sup>4</sup>

It is competent to provide by law for a forfeiture of the right to participate in elections, as a punishment for conduct which the law forbids; but such punishment can only be imposed after trial and conviction. The election judges

<sup>1</sup> *Baldwin v. Trowbridge*, 2 Bartlett, 46.

<sup>2</sup> *State v. Williams*, 5 Wis. 308; *Monroe v. Collins*, 17 Ohio, N. S. 655; *Rison v. Farr*, 24 Ark. 161; *Randolph v. Good*, 3 W. Va. 551; *St. Joseph, &c. R. R. Co. v. Buchanan Co. Court*, 39 Mo. 485; *Green v. Shumway*, 39 N. Y. 418; *State v. Baker*, 38 Wis. 71; *Quinn v. State*, 35 Ind. 485; *People v. Canaday*, 73 N. C. 198; *Brown v. Grover*, 6 Bush, (Ky.) 1; *Davies v. McKeeby*, 5 Nev. 369; *McCafferty v. Guyer*, 57 Penn. St. 109.

<sup>3</sup> *Minor v. Happersett*, 21 Wall. 162.

<sup>4</sup> *Cushing, Legislative Assemblies*, §§ 24, 27; *Cooley, Const. Lim.*, 4th ed., 753; *McCrary, Am. Law of Elections*, §§ 4, 50, 73.

cannot be authorized for supposed guilt to inflict the forfeiture.<sup>1</sup>

*Regulations of the Franchise.* — Even where qualifications are fixed by the constitution, it is competent for the legislature to prescribe by law such conditions to the exercise of the elective franchise as shall seem reasonable to protect the privilege, and to prevent impositions and other frauds; and also to prescribe all proper regulations for receiving and canvassing the votes. One very proper condition is, that every voter, previous to the day of election, shall cause his name to be entered on a registry of voters, which is provided for as a guide to the judges of election in receiving the votes, and that no ballots shall be received from those not registered. The power of the legislature to require such a registry is settled,<sup>2</sup> and the voter has no cause for complaint if he fails to register. If a board of registration neglects or refuses to perform its duty as required by law, the members may be compelled to do so by mandamus, or they may be punished as public offenders; but their misconduct cannot entitle unregistered electors to vote unless by law provision is made for such cases.<sup>3</sup>

*Secrecy in Voting.* — Election by ballot is now practically universal in this country, and representatives in Congress are required to be chosen by that method.\* The ballot is provided because it is believed most effectually to protect the elector against improper influences, as it enables him to exercise the right without any person, even the officers of election, having a knowledge for whom his suf-

<sup>1</sup> *Huber v. Reilly*, 53 Penn. St. 112; *State v. Symonds*, 57 Me. 148; *Burkett v. McCarty*, 10 Bush, (Ky.) 758. Compare *Delano v. Bartlett*, 2 Bartlett, 168.

<sup>2</sup> *Hyde v. Brush*, 34 Conn. 454; *McCrary*, *Am. Law of Elections*, §§ 7-10; *Cooley*, *Const. Lim.*, 4th ed., 757.

<sup>3</sup> *People v. Koplekom*, 16 Mich. 342; *Zeiler v. Chapman*, 54 Mo. 502; *Nefzger v. Railroad Co.*, 36 Iowa, 642.

\* *Rev. Stat. U. S.* (1878), § 27.

frage is given. To fully protect the constitutional right to secrecy as against the importunities, browbeatings, or inquisitive intermeddling of others, it is provided by law in some States that the ballots shall be written or printed on white paper, without any marks or figures thereon to distinguish one ballot from another; and where such a regulation exists, all ballots not in conformity with it when cast are to be rejected, and all contrivances of political managers or election officials to evade it are illegal.<sup>1</sup>

*Notice of Elections.* — Notices of the times and places when and where elections are appointed to be held are generally required to be given by some public officer, in some method designated by law. If the election to be held is exceptional or special, the failure to give this notice must be fatal, even should there be a general attendance of electors, since every one has the same right to participate with all others. But if the election is one which is provided for by public law, and the law itself gives all the particulars of time and place, the failure to give the notice will not defeat the election, since every one is supposed to take notice of what is in the law.<sup>2</sup>

*Ballots, Sufficiency of.* — In elections by ballot, the voter must take care that his ballot shall be complete in itself, so that it shall express his intention without resort to extraneous evidence for explanation of apparent ambiguities. The general rules of law do not permit a written instrument to be varied or added to by parol; and in case of ballots, the parol evidence would be specially objectionable and dangerous, since public interests of the highest importance depend upon the elections, and the induce-

<sup>1</sup> *Williams v. Stein*, 38 Ind. 89; *Opinions of Judges*, 45 Me. 602; *Brisbin v. Cleary* (Minn.), 20 Alb. Law Jour. 250.

<sup>2</sup> *People v. Cowles*, 13 N. Y. 350; *People v. Hartwell*, 12 Mich. 508; *State v. Orvis*, 20 Wis. 235; *People v. Brenahm*, 3 Cal. 477. Compare *Foster v. Scarff*, 15 Ohio, N. S. 532.

ments to corruption and perjury would sometimes be enormous. Therefore, if one places upon his ballot two names for one office when only one is to be voted for, the ballot, so far as concerns that office, must be rejected for ambiguity, from the obvious impossibility of determining the voter's intention without resorting to parol explanation.<sup>1</sup> So, if the voter puts one name upon his ballot where he intends to put another, he will not be allowed to explain the mistake, but it must be counted as he wrote and deposited it.<sup>2</sup> But the fact that a name is abbreviated should not prevent its being counted where the intent is clear.<sup>3</sup> Neither should the fact that the office is not described with precise accuracy, if the description is such that no doubt concerning it can exist.<sup>4</sup> And in any case where a doubt in applying a ballot perfect in itself is raised upon extraneous facts, it may be removed by showing all such facts surrounding the canvass and election as would tend to throw light upon it. For example, if two persons of the same name reside within a certain election district, and ballots are cast having that name upon them for a specific office, it may be shown, in order to enable the ballots to be applied, that one of these persons was publicly known and understood to be a candidate for the office specified, and the other was not.<sup>5</sup>

*Irregularities in Elections.* — All the rules of law governing elections should aim at obtaining the full and free expression of the views of those entitled to vote; and whenever there is reasonable ground for believing that

<sup>1</sup> *People v. Seaman*, 5 Denio, (N. Y.) 409. Compare *People v. Saxton*, 22 N. Y. 309.

<sup>2</sup> *Hart v. Evans*, 8 Penn. St. 13.

<sup>3</sup> *People v. Ferguson*, 8 Cow. (N. Y.) 102; *Attorney-General v. Ely*, 4 Wis. 429; *State v. Gates*, 43 Conn. 533; *Talkington v. Lurner*, 71 Ill. 234. Compare *People v. Cicotte*, 16 Mich. 283.

<sup>4</sup> *People v. Matteson*, 17 Ill. 167; *People v. McManus*, 34 Barb. 620.

<sup>5</sup> *People v. Cook*, 8 N. Y. 67.

this has been had, a ballot should not be set aside because of mere irregularities. The following are illustrations. The erroneous rejection by the judges of election of the ballot offered by a qualified voter;<sup>1</sup> the accidental substitution of another book for the Bible in the administration of an oath; the holding of the election by persons who were not officers *de jure*, but were officers *de facto*, and acted as such in good faith; the neglect of the judges to appoint clerks of the election; the closing at sundown of the outer door of the room in which the election was held, and then permitting the electors within the room to vote, it not appearing that illegal votes were received or legal excluded; the failure of the judges and clerks to take the prescribed oath of office, they being nevertheless *de facto* officers;<sup>2</sup> the neglect of the judges to certify the result within the time fixed by statute;<sup>3</sup> or any other irregularity which does not cast uncertainty on the result, or affect the interests of the party complaining of it.<sup>4</sup> But the following are not mere irregularities. The submission of a question to vote in such manner as to exclude a portion of those who are entitled to take part in the election,<sup>5</sup>

<sup>1</sup> *Newcum v. Kirtley*, 13 B. Monroe, (Ky.) 515.

<sup>2</sup> *People v. Cook*, 8 N. Y. 67; *Taylor v. Taylor*, 10 Minn. 112; *Day v. Kent*, 1 Oreg. 123. This doctrine has not always been recognized in Congress; but the cases of *Barnes v. Adams* (2 Bartlett, 760), and *Eggleston v. Strader* (2 Bartlett, 897), in the House of Representatives (1870) support it in approving careful reports of the committee on elections.

<sup>3</sup> *Ex parte Heath*, 3 Hill, 42; *People v. Sackett*, 14 Mich. 320.

<sup>4</sup> *People v. Cook*, 8 N. Y. 67; *Lanier v. Gallatas*, 13 La. An. 175; *Dobyns v. Weadon*, 50 Ind. 298; *Bourland v. Hildreth*, 26 Cal. 161; *McKinney v. O'Connor*, 26 Tex. 5; *Pike Co. v. Barnes*, 51 Miss. 305; *Wheelock Election Case*, 82 Penn. St. 297; *Loomis v. Jackson*, 6 W. Va. 613; *Chicago v. People*, 80 Ill. 496; *Reid v. Julian*, House of Rep., 2 Bartlett, 822.

<sup>5</sup> *Attorney-General v. Supervisors*, 11 Mich. 63. See *People v. Salomon*, 46 Ill. 415; *Fort Dodge v. District Township*, 17 Iowa, 85; *Barny v. Lauck*, 5 Cold. (Tenn.) 588.

holding the polls open but forty minutes when the law requires three hours,<sup>1</sup> and holding it at a different time or different place from that fixed by law,<sup>2</sup> though even in these cases an election may be supported if it is made to appear that no one lost his vote as a consequence of the law being disobeyed.<sup>3</sup> When an election is contested because of the reception of illegal votes, the effect which shall be allowed to that circumstance must depend very much upon other facts. If the judges have erroneously, but in good faith, received incompetent votes, the election will not in general be defeated thereby;<sup>4</sup> but when it can be shown for whom they were cast they will be deducted from the count, and the case determined without them.<sup>5</sup> If, however, they have been received fraudulently, and the whole number is so great that the entire poll is tainted with the illegality, the election in that precinct may be set aside altogether, as has frequently been done in Congress.<sup>6</sup> If a legal vote is wrongfully rejected, it cannot be counted on any showing of the intent to cast it for a particular candidate;<sup>7</sup> though if the number rejected is so great that they might possibly have changed the result, the election may be declared void for that reason.<sup>8</sup>

<sup>1</sup> *State v. Wollem*, 37 Iowa, 131.

<sup>2</sup> *Dickey v. Hurlburt*, 5 Cal. 343.

<sup>3</sup> *Dale v. Irwin*, 78 Ill. 170.

<sup>4</sup> *Ex parte Murphy*, 7 Cow. (N. Y.) 153; *Judkins v. Hill*, 50 N. H. 140.

<sup>5</sup> *State v. Hilmantel*, 21 Wis. 566; *Harbaugh v. Cicotte*, 33 Mich. 241.

<sup>6</sup> *Howard v. Cooper*, 1 Bartlett, 275; *Dodge v. Brooks*, 2 Bartlett, 78; *Myers v. Moffett*, 2 Bartlett, 564; *Switzer v. Dyer*, 2 Bartlett, 777. Sometimes the return of the election has been rejected, and only those votes counted which can be shown to have been legally cast. *Washburn v. Voorhies*, 2 Bartlett, 54. Compare *Chadwick v. Melvin*, *Brightley's Election Cases*, 251.

<sup>7</sup> *Renner v. Bennett*, 21 Ohio, N. S. 431, 450.

<sup>8</sup> *Renner v. Bennett*, 21 Ohio, N. S. 431. In Congress, votes wrongfully rejected have generally been counted on evidence being given

*Eligibility to Office.* — The Constitution and laws of the United States determine what shall be the qualifications for federal offices, and state constitutions and laws can neither add to nor take away from them. This has been repeatedly decided in Congress, in the case of persons elected to seats therein when provisions in the state constitution, if valid, would render them ineligible.<sup>1</sup> When the law is silent respecting qualifications to office, it must be understood that electors are eligible, but no others.<sup>2</sup> The question has often been made, what shall be the rule when an ineligible person receives a sufficient number of votes to elect him if he were qualified; and the authorities are greatly divided on the subject. In England under such circumstances the person receiving the next highest number of votes will be declared elected, especially if the ineligibility of the leading candidate was notorious;<sup>3</sup> and some of the American States follow this course.<sup>4</sup> The decided weight of authority in this country, however, is that in such case the election has failed; the votes cast for the disqualified person, though not electing him, being enough to show that the people have not intended to choose any other person.<sup>5</sup> Such has been the conclusion of both

to show how the electors intended to cast them. See *Delano v. Morgan*, 2 Bartlett, 168. It would certainly be very proper to provide by statute that votes offered and rejected should be marked and preserved, in order that they might be counted in case it should afterwards appear that there was error in rejecting them.

<sup>1</sup> *Taney v. Marshall*, 1 Bartlett, 167; *Trumbull's Case*, *Ibid.* 619.

<sup>2</sup> *State v. Smith*, 14 Wis. 497.

<sup>3</sup> *French v. Nolan*, 2 Moak, 711; *McCrary*, *Am. Law of Elections*, § 231; *Cooley*, *Const. Lim.*, 4th ed., 781, 782.

<sup>4</sup> *Gulick v. New*, 14 Ind. 93; *Price v. Baker*, 41 Ind. 570; *Hatcheson v. Tilder*, 4 H. & McH. (Md.) 279.

<sup>5</sup> Decisions to that effect in Wisconsin, Rhode Island, Pennsylvania, Missouri, Michigan, Maine, Louisiana, California, Mississippi, and Georgia are given in *Cooley's Const. Lim.*, 4th ed., 781. And see *Stephens v. Wyatt*, 17 B. Monr. (Ky.) 547.

houses of Congress.<sup>1</sup> The forfeiture of eligibility to office, it is sometimes declared, shall follow some specified breach of the law ; such, for example, as the giving or receiving a bribe, the sending or accepting a challenge to fight a duel, &c. This renders the act which is thus condemned a public offence, and the disqualification becomes a punishment. The determination whether the offence has been committed involves an inquiry into the law and the facts, and this, being in its essence a judicial inquiry, must be had before a judicial tribunal, and the disqualification regularly adjudged before the punishment can be inflicted. The determination cannot be left to a canvassing board, or to mere ministerial officers.<sup>2</sup>

*Freedom of Elections.* — An election fails in its legitimate purpose when the electors are subjected to such influences that they abstain from depositing their ballots at all, or give them unintelligently, or from improper and corrupt motives, or under the influence of fear or compulsion. When any considerable number of voters are kept from the polls through reasonable fear of personal injury from riotous mobs, or from abuse of legal authority, the election should be deemed altogether void. Congressional elections have often been declared void because of intimidation, when there was reason to believe that electors sufficient in number to have changed the result were deterred from depositing their ballots through fear or actual violence. A careful writer of much experience gives the following rules as deductions from the decisions in Congress : —

<sup>1</sup> Cushing, Leg. Assen., 66. The subject was fully and carefully considered in the contested election case of *Smith v. Brown*, in the House of Representatives (1868), and the doctrine of the text has been acted upon repeatedly since.

<sup>2</sup> *Commonwealth v. Jones*, 10 Bush, (Ky.) 725, approving *In re Dorsey*, 7 Port. (Ala.) 293, and *Huber v. Reily*, 53 Penn. St. 112. See *Ex parte Garland*, 4 Wall. 333.



“1. If the violence and intimidation have been so extensive and general as to render it certain that there has been no fair and free expression by the great body of electors, then the election must be set aside, notwithstanding the fact that in some of the precincts or counties there was a peaceable and fair election.

“2. When there has been an election embracing a number of counties or precincts in which there have been violence and intimidation, enough to exclude from the count one or more precincts or voting places, but not enough to destroy the freedom and fairness of the election as a whole, such violence will not invalidate the election, nor affect the results of it,” unless it be shown affirmatively that but for it the results would have been different.

“3. The question must be, has the great body of the electors had an opportunity to express their choice through the medium of the ballot and according to law; and this fact must be decided in the light of all the facts and circumstances shown in the evidence.”<sup>1</sup>

The presence of a military force at or near the polls of an election, commanded by those who favor a particular candidate or party, is almost of necessity a menace to the electors, and an interference with them in giving their suffrages freely;<sup>2</sup> and in England and some of the States of the Union, even the training of the militia on election day is forbidden by law. It is usual, also, to forbid the service of legal process on election day, lest it be employed as a measure of intimidation to voters who are in debt. Betting upon the results of elections is illegal at common law because it tends to bring improper influences to bear upon the results. So are all contracts which have the same tendency.<sup>3</sup>

<sup>1</sup> McCrary, *Am. Law of Elections*, § 429. See *Hunt v. Sheldon*, House of Rep. (1869).

<sup>2</sup> McCrary, *Am. Law of Elections*, §§ 418, 421.

<sup>3</sup> *Nichols v. Mudgett*, 32 Vt. 546; *Meacham v. Dow*, 32 Vt. 721; *Piatt v. People*, 29 Ill. 54; *Duke v. Asbee*, 11 Ired. (N. C.) 112.

A vote may properly be rejected in a contest over an election when it appears that it was obtained for a valuable consideration.<sup>1</sup> Treating electors to intoxicating drinks on the day of election is very commonly prohibited, not only because it is a species of bribery, but also because it tends to unfit the voters for the intelligent discharge of their duties.

*Canvass and Return of Votes.* — Ballots cast are to be canvassed in the various electoral districts or precincts, and a report made of the results. If the officers to be chosen are for that district only, the judges of the election are usually empowered to decide who is elected; but if they are for a division of the State embracing several election districts, the local judges will be required to make returns to a canvassing board, authorized to canvass the returns for the whole division, and to declare the election as it appears upon such returns. The general rule in the several States is that these division or district canvassers act in the performance of their duties in a ministerial way only; that is, that they are to receive the returns that are transmitted to them in apparent conformity to the law as correct, and they are not to assume the judicial function of going behind them to inquire into facts, but must leave any allegation of error, mistake, or fraud to be inquired into in some regular judicial contest, if the parties concerned shall afterwards see fit to institute it.<sup>2</sup> If a return is void on its face, it must of course be rejected;<sup>3</sup> but it would be almost a matter of course to permit errors of form to be corrected

<sup>1</sup> *State v. Olin*, 23 Wis. 309, 327; *State v. Purdy*, 36 Wis. 213.

<sup>2</sup> *Ex parte Heath*, 3 Hill, (N. Y.) 42; *Opinions of Justices*, 64 Me. 588; *Phelps v. Schroder*, 26 Ohio, N. S. 549; *People v. Hilliard*, 29 Ill. 413; *State v. Governor*, 25 N. J. 344; *State v. Harrison*, 38 Mo. 540; *Taylor v. Taylor*, 10 Minn. 107; *Switzer v. Dyer*, House of Rep. (1870).

<sup>3</sup> *State v. State Canvassers*, 36 Wis. 498; *Perry v. Whittaker*, 71 N. C. 475.

by the local board when the case admitted of it. Forgery in the returns the canvassing board must necessarily inquire into, since a forged return is in law no return at all.<sup>1</sup>

In a few of the States during the unsettled times following the civil war, returning boards were provided for by law, with powers far surpassing those which any judicial body can exercise; for they were empowered to revise and reject returns on *ex parte* showing, and thus to proceed without trial and condemn parties not heard. It may no doubt be safely assumed that the time when such excessive powers could be created or tolerated has passed away.

Canvassing boards in the performance of their duties are, like other ministerial or administrative bodies, under the control of judicial authority, and when they neglect or refuse to obey the law may be coerced by means of the writ of mandamus.<sup>2</sup>

*Contesting Elections.* — It is no doubt competent to provide by the state constitution that the decisions of the canvassing board upon the election of any officers under the State shall be conclusive.<sup>3</sup> This, however, is unusual; and in general the party who claims to have been deprived of an office unjustly by the results of the canvass may have his claim tried in the courts. In some cases it has been held that jury trial upon such a claim is matter of right,<sup>4</sup> but this is denied in others;<sup>5</sup> and there is much

<sup>1</sup> Attorney-General *v.* Barstow, 4 Wis. 567.

<sup>2</sup> Commonwealth *v.* Emminger, 74 Penn. St. 479; Clark *v.* McKenzie, 7 Bush, (Ky.) 523; State *v.* Gibbs, 13 Fla. 55; Bank *v.* Supervisors, 4 W. Va. 371; Kislner *v.* Cameron, 39 Ind. 488.

<sup>3</sup> Grier *v.* Shackelford, Const. Rep. (S. C.) 642; Batman *v.* Megowan, 1 Met. (Ky.) 533; State *v.* Marlow, 15 Ohio, N. S. 114; People *v.* Goodwin, 22 Mich. 496; Baxter *v.* Brooks, 29 Ark. 173.

<sup>4</sup> State *v.* Bennett, 2 Ala. 140; People *v.* Railroad Co., 57 N. Y. 160.

<sup>5</sup> Ewing *v.* Fuller, 43 Penn. St. 384; Commonwealth *v.* Leech, 44 Penn. St. 332; State *v.* Johnson, 26 Ark. 281.

reason for saying that the State may provide any method that seems most consistent with public policy for determining who, by the result of an election, is entitled to be recognized as the official administrator of its laws.<sup>1</sup> It is different when the question is one of the forfeiture of an office; for when once acquired, the incumbent has property rights in it.

Legislative elections are determined by the body for a seat in which the election is had. This is expressly provided by the Constitution in the case of the two houses of Congress,<sup>2</sup> and the judiciary can in no manner interfere with their conclusions. The evidence in a legislative contest is usually taken by committees, and the case decided on the committee's report. On general principles a case once decided should be considered closed forever.<sup>3</sup>

*Fifteenth Amendment.*—By the fifteenth article of the amendments it is provided that “the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.” This provision gives to the freedmen and other colored persons the right to impartial consideration in the law of suffrage in the several States.

The second clause of the fourteenth article was intended to influence the States to bring about by their voluntary action the same result that is now accomplished by this amendment. It provided that when the right to vote was denied to any of the male inhabitants of a State, being twenty-one years of age and citizens of the United States,

<sup>1</sup> *Kennard v. Louisiana*, 92 U. S. Rep. 480.

<sup>2</sup> Const., Art. I. § 5. Provisions for contested elections to Congress are made by Rev. Stat. U. S. (1878), ch. 8.

<sup>3</sup> Mr. McCrary, in the sixth chapter of his treatise on the Law of Elections, has gone at some length into the evidence receivable by legislative committees.

or any way abridged except for participation in crime, the basis of representation in Congress should be reduced in the proportion which the number of such male citizens should bear to the whole number of male citizens twenty-one years of age in such State. By this, the purpose was to induce the States to admit colored freemen to the privilege of suffrage by reducing the representation and influence of the States in the federal government, in case they refused. No opportunity occurred for testing the efficacy of this plan previous to the adoption of the fifteenth article, and it cannot therefore be affirmed whether it would or would not have been successful. Important questions, however, may still arise under it. The provision is general; it is not limited to freedmen, but it applies wherever the right to vote is denied to male citizens of the proper age, or is abridged for other cause than for participation in crime. ( The State of Connecticut denies the right of suffrage to all who cannot read, and Massachusetts and Missouri to all who cannot both read and write; and many of the States admit no one to the privilege of suffrage unless he is a tax-payer. So in the majority of the States a citizen absent therefrom, though in the public service, cannot vote, because the State requires as a condition the personal presence of the voter at the polls of his municipality.) Possibly it may be said, in respect to such cases, that the representation of the State should be reduced in proportion to the number of those who are excluded because they cannot read and write, or do not pay taxes, or are absent. It is not likely, however, that any such position would be sustained. To require the payment of a capitation tax is no denial of suffrage; it is demanding only the preliminary performance of public duty, and may be classed, as may also presence at the polls, with registration, or the observance of any other preliminary to insure fairness and protect against fraud.

Nor can it be said that to require ability to read is any denial of suffrage. To refuse to receive one's vote because he was born in some particular country rather than elsewhere, or because of his color, or because of any natural quality or peculiarity which it would be impossible for him to overcome, is plainly a denial of suffrage. But ability to read is something within the power of any man; it is not difficult to attain it, and it is no hardship to require it. On the contrary, the requirement only by indirection compels one to appropriate a personal benefit he might otherwise neglect. It denies to no man the suffrage, but the privilege is freely tendered to all, subject only to a condition that is beneficial in its performance, and light in its burden. If a property qualification, or the payment of taxes upon property when one has none to be taxed, is made a condition to suffrage, there may be room for more question.

*Discriminations in Naturalization.* — Although the fifteenth amendment forbids discriminations founded on race, color, &c. as between citizens, it does not forbid discriminations in the naturalization laws. Indeed, at the time when this amendment was adopted only white persons were permitted to become citizens by naturalization, and the amendment to the laws since made only extends the privilege to persons of African descent.<sup>1</sup>

*Reasons for the Amendment.* — The experiment of impartial suffrage, though confessedly under the circumstances one of much danger, was entered upon under the influence of two sets of reasons; the first of which had in view the interest of the colored people, and the second contemplated the general interest of the country. The experiment, it was believed, would benefit the colored race, first, because it would give to them importance, secure to them respect, and protect them against unfriendly action or legislation;

<sup>1</sup> Rev. Stat. U. S. (1878), § 2169; Act of July 14, 1870.

and, second, because it would be to them an educational process of the highest importance, not only, as it would incite them to prepare themselves for the duties of citizenship, but as it would accustom them to the practical performance of such duties.

An opinion has been expressed that these were the real purposes of the amendment.<sup>1</sup> But as all rules of suffrage contemplate the benefit of the state rather than that of individuals, we may assume that the advantage to individuals was only a secondary purpose. The reasons why the change was thought to be important on public grounds were, first, that unless the ballot was given to the freedmen the government of the Southern States must for a considerable time be in the hands of those lately in rebellion, and who might be expected not to co-operate in government heartily and cordially with those from whose political association they had so strenuously endeavored to break away; and, second, that the existence in the political community of a great body of citizens, against whom the laws discriminate in a particular which makes the discrimination a stigma and a disgrace, must always be an occasion of discontent, disorder, and danger.

The experiment, however fraught with danger, was directly in the line of others which began with the organization of the government. All changes had been in the direction of enlarging the basis of suffrage, and this amendment did not originate the embarrassments and dangers attending unintelligent participation in elections, but only added to them.

*Legislation.* — The fifteenth amendment empowers Congress to enforce it by appropriate legislation. It is unquestionable that the amendment is self-executing to this extent, that all laws and all provisions of state constitutions which conflict with it were at once annulled. Con-

<sup>1</sup> Hunt, J., in *United States v. Reese*, 92 U. S. Rep. 214, 217.

gressional legislation could only be needed to prevent the impartial rule of the Constitution being nullified by failure of officers to give effect to it.

Congress has made elaborate provisions for protecting the political rights which are given by the fifteenth amendment, and also the right to the equal protection of the laws, secured by the fourteenth amendment. The most important of these are the provisions for the appointment by the United States Circuit Courts of supervisors to watch and oversee the registration of voters and the elections for representatives in Congress; for the appointment of deputy United States marshals to assist in the preservation of order at the elections, and to aid the supervisors in the performance of their duties; for the punishment as crimes of such acts as tend to invade, hinder, or obstruct the enjoyment of the political rights which the amendments were intended to confer and secure; and for the conferring upon the federal courts of jurisdiction in election cases where a federal right, privilege, or immunity is in question.<sup>1</sup> The legislation thus adopted has received the attention of the Supreme Court, and the following general principles have been laid down:—

1. (The Constitution of the United States confers the right to vote upon no one. That right comes to the citizens of the United States, when they possess it at all, under state laws, and as a grant of state sovereignty.) But the fifteenth amendment confers upon citizens of the United States a new exemption; namely, an exemption from discrimination in elections on account of race, color, or previous condition of servitude. This exemption the United States may protect by appropriate legislation.

2. The power in Congress to legislate at all on the subject of voting at state elections rests upon the fifteenth amendment. The whole subject was in the hands of the

<sup>1</sup> Rev. Stat. U. S. (1878), ch. 24 and 26.



States before, and Congress obtained a right to intervene only by the amendment, and to the extent that should be needful to protect the exemption to which citizens of the United States thereby became entitled.

3. The third and fourth sections of the act of May 31, 1870, which undertook to punish election officers and others for denying or abridging the right of citizens to vote, not being limited in their operation to unlawful discriminations on account of race, color, or previous condition of servitude, were beyond the limit of the fifteenth amendment, and therefore beyond the power of Congress. Parties cannot be punished under them, even though their acts may have contemplated or accomplished the unconstitutional discrimination.<sup>1</sup>

### SECTION III. — THE RIGHT OF ASSEMBLY AND PETITION.

*The Constitution.* — The first amendment to the Constitution further declares that Congress shall make no law abridging the right of the people peaceably to assemble and to petition the government for a redress of grievances. Two rights are protected by this provision: the right of the people to assemble themselves together, and the right of petition; but they are protected as against federal action only.<sup>2</sup>

*The People.* — When the term *the people* is made use of in constitutional law or discussions, it is often the case that those only are intended who have a share in the government through being clothed with the elective franchise. Thus, the people elect delegates to a constitutional convention, and determine by their votes whether the completed work of the convention shall or shall not be adopted; the people choose the officers under the consti-

<sup>1</sup> United States v. Reese, 92 U. S. Rep. 214; United States v. Cruikshanks, 92 U. S. Rep. 542.

<sup>2</sup> United States v. Cruikshanks, 92 U. S. Rep. 542.

tution, and so on. For these and similar purposes the electors, though constituting but a small minority of the whole body of the community, nevertheless act for all, and, as being for the time the representatives of sovereignty, they are considered and spoken of as the sovereign people. But in all the enumerations and guaranties of rights the whole people are intended, because the rights of all are equal, and are meant to be equally protected. In this case, therefore, the right to assemble is preserved to all the people, and not merely to the electors, or to any other class or classes of the people.

*Right to Assemble.* — The right to assemble may be important for religious, social, industrial, or political purposes; but it was no doubt its political value that was in view in adopting the amendment. To assemble for religious purposes is a part of the religious liberty of the people, and required no additional protection. Social meetings and industrial meetings are seldom likely to be disturbed by the authorities, except when they are believed to contemplate public disorder, and are in open defiance of the law; but there must be an actual breach of the law before they can be intermeddled with. Individuals may perhaps render themselves liable to arrest by threats, but these only constitute individual misconduct.

A political meeting by electors may have one purpose, and that by non-electors another. The former will usually meet for some purpose preparatory to the exercise of the political franchise, such as to hear addresses, select candidates for their suffrages, and the like, or perhaps to petition those for the time in authority in respect to something in which they may take special interest. The non-electors may also meet for petition or remonstrance, or, on the other hand, they may meet to express their sense of wrong at being excluded from political privileges, and to demand a right to participate with others. A demand for equality

of political privilege by a disfranchised class, persistently made and pressed, has often made itself heard, and the Constitution of the land has been altered in response to it. Still more often statutes have been enacted, modified, or repealed, in deference to the appeals of those who were not allowed the right to vote; and perhaps the right of assembly on their part is more important to the state than the same right on the part of those who may make themselves heard through their direct participation in the government.

The right of assembly always was, and still is, subject to reasonable regulations by law. Parliament has sometimes been compelled to interpose strict regulations, when a great and tumultuous body of people threatened to appear at its doors to present a demand for a change in the law.

*Right to Petition.* — The right to petition is not co-extensive with the right to assemble; for in its nature it can have no place in merely social affairs, though it has a limited range in religious and industrial organizations. Petition is for the redress or prevention of grievances, and is addressed to some person or body having, in respect to the matter in hand, superior authority. It is a generic term, however, and applies to all recommendations to office or public position or privilege, as well as to remonstrances against them, and to appeals of every sort, and for every purpose, made to the judgment, discretion, or favor of the person or body having authority in the premises.<sup>1</sup>

A petition is, nevertheless, merely a privileged publication, and the right to be heard by means of it may be so abused as to take away the privilege. One must not resort to it for the purpose of visiting his malice upon others,

<sup>1</sup> *Kershaw v. Bailey*, 1 Exch. 743; *Bradley v. Heath*, 12 Pick. (Mass.) 163.

through the publication of false charges; but when the occasion is proper for petition, good motives in presenting it will be presumed, and the fact that it contains false and injurious aspersions of character will not make out a right of action, but malice in the petitioner must be established also.<sup>1</sup> The petition must be for something within the authority of the person or body addressed to grant, or must in good faith be supposed to be;<sup>2</sup> and when it is, it will be protected while circulating for signatures, as well as after it has been presented.<sup>3</sup> But if a false charge is merely put in the form of a petition, without the intent to present it, it is not within the privilege.<sup>4</sup>

#### SECTION IV. — THE RIGHT TO KEEP AND BEAR ARMS.

*The Constitution.* — By the second amendment to the Constitution it is declared that, “a well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.”

The amendment, like most other provisions in the Constitution, has a history. It was adopted with some modification and enlargement from the English Bill of Rights of 1688, where it stood as a protest against arbitrary action of the overturned dynasty in disarming the people, and as a pledge of the new rulers that this tyrannical action should cease. The right declared was meant to be a strong moral check against the usurpation and arbitrary power of rulers, and as a necessary and efficient means of regaining rights when temporarily overturned by usurpation.<sup>5</sup>

<sup>1</sup> Gray v. Pentland, 2 S. & R. (Penn.) 23; Howard v. Thompson, 21 Wend. (N. Y.) 319.

<sup>2</sup> See Fairman v. Ives, 5 B. & Ald. 642.

<sup>3</sup> Vanderzee v. McGregor, 12 Wend. (N. Y.) 545.

<sup>4</sup> State v. Burnham, 9 N. H. 34.

<sup>5</sup> 1 Tuck. Bl. Com., App. 300.

*The Right is General.* — It might be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. The militia, as has been elsewhere explained, consists of those persons who, under the law, are liable to the performance of military duty, and are officered and enrolled for service when called upon. But the law may make provision for the enrolment of all who are fit to perform military duty, or of a small number only, or it may wholly omit to make any provision at all; and if the right were limited to those enrolled, the purpose of this guaranty might be defeated altogether by the action or neglect to act of the government it was meant to hold in check. The meaning of the provision undoubtedly is, that the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose. But this enables the government to have a well-regulated militia; for to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.

*Standing Army.* — A further purpose of this amendment is, to preclude any necessity or reasonable excuse for keeping up a standing army. A standing army is condemned by the traditions and sentiments of the people, as being as dangerous to the liberties of the people as the general preparation of the people for the defence of their institutions with arms is preservative of them.

*What Arms may be kept.* — The arms intended by the Constitution are such as are suitable for the general defence of the community against invasion or oppression,

and the secret carrying of those suited merely to deadly individual encounters may be prohibited.<sup>1</sup>

#### SECTION V. — FREEDOM OF SPEECH AND OF THE PRESS.

*The Constitution.* — The first amendment to the Constitution further provides that Congress shall make no law abridging the freedom of speech or of the press. What is first noticeable in this provision is that it undertakes to give no rights, but it recognizes the rights mentioned as something known, understood, and existing, and it forbids any law of Congress that shall abridge them. We are thus referred for an understanding of the protection to the pre-existing law; and this must either have been the common law, or the existing statutes of the States. The statutes, however, will be found to be nearly silent on this important subject, and the common law must be our guide.

*Freedom of the Press.* — De Lolme, who wrote upon the Constitution of England just before the meeting of the Constitutional Convention, and who undertook to gather from the common law the meaning of this among other principles of liberty, has expressed his conclusion thus: “The liberty of the press as established in England consists in this, that neither the courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed, and must in these cases proceed by the trial by jury.”<sup>2</sup> Mr. Justice Blackstone adopted this view as undoubtedly correct,<sup>3</sup> and in this country it has been accepted as expressing the views of those who framed and adopted this amendment.<sup>4</sup> If it

<sup>1</sup> *Andrews v. State*, 3 Heisk. 165, found also with notes in 1 Green’s Cr. Rep. 466, and 8 Am. Rep. 8.

<sup>2</sup> De Lolme, *Const. of Eng.*, ch. 10.

<sup>3</sup> 4 Bl. Com. 151.

<sup>4</sup> Rawle on *Const.*, ch. 10; 2 Kent, 17; Story on *Const.*, § 1889; *Commonwealth v. Blanding*, 3 Pick. (Mass.) 304, 313.

expresses their views fully, we must conclude that the amendment is aimed only at such censorship of the press as had sometimes been exercised in England, and to some extent in the Colonies also, and that, while forbidding this, and leaving every one to publish what he might please, it left him, at the same time, to such responsibility for his publications as the law might provide.

It seems more than probable, however, that the constitutional freedom of the press was intended to mean something more than mere exemption from censorship in advance of publication. Such censorship had never been general in the Colonies: it did not exist at all at the time of the Revolution, and there was no apparent danger of its ever being restored. To forbid it, therefore, and especially just at a time when the people had been taking a larger share in the government into their own hands, and when the command would be laid on their own representatives, would appear to savor somewhat of idle ceremony. But the history of the times shows that the people believed a right of publication existed which might be invaded and abridged by oppressive prosecutions, and by laws which admitted the liberty to publish, but enlarged beyond reason the sphere of responsibility; and the evils they feared had no necessary connection with any established or threatened censorship. Nor could any valuable purpose be accomplished by introducing in the Constitution a provision which should forbid merely a previous supervision of intended publications, if the law might be so made, or so administered; as to inflict punishment for publications which might be not only innocent, but commendable. The citizen might better have the arm of the government interposed for prevention, than reached out afterwards to inflict penalties; his just freedom would be restrained in the one case as well as in the other.

Light may be thrown upon the intent by a consideration

of the purposes which the enjoyment of the right subserves. The press is a public convenience, which gathers up the intelligence of the day to lay before its readers, notifies coming events, gives warning against disasters, and in various ways contributes to the happiness, comfort, safety, and protection of the people. But in a constitutional point of view its chief importance is, that it enables the citizen to bring any person in authority, any public corporation or agency, or even the government in all its departments, to the bar of public opinion, and to compel him or them to submit to an examination and criticism of conduct, measures, and purposes in the face of the world, with a view to the correction or prevention of evils; and also to subject those who seek public positions to a like scrutiny for a like purpose. These advantages had been fully realized and enjoyed by the people during the revolutionary epoch; the press had been the chief means of disseminating free principles among the people, and in preparing the country to resist oppression; and its powers for good in this direction had appeared so great as to cast its other benefits into the shade. It is a just conclusion, therefore, that this freedom of public discussion was meant to be fully preserved; and that the prohibition of laws impairing it was aimed, not merely at a censorship of the press, but more particularly at any restrictive laws or administration of law, whereby such free and general discussion of public interests and affairs as had become customary in America should be so abridged as to deprive it of its advantages as an aid to the people in exercising intelligently their privileges as citizens, and in protecting their liberties.

The freedom of the press may therefore be defined to be the liberty to utter and publish whatever the citizen may choose, and to be protected against legal censure and punishment in so doing, provided the publication is not so far



injurious to public morals or to private reputation as to be condemned by the common-law standards, by which defamatory publications were judged when this freedom was thus made a constitutional right. And freedom of speech corresponds to this in the protection it gives to oral publications.<sup>1</sup>

Blasphemous and indecent publications, and the exhibition of indecent pictures and images, were always punishable at the common law, and their punishment may be provided for by Congress in any territory under its exclusive control. Libellous written, printed, or pictorial attacks upon individuals, maliciously made, were also criminal; and if, in respect to these offences, the common law should be found defective, statutory law may supply the defects, — not, however, enlarging the general scope of liability. Besides the criminal, there was always a civil responsibility, in the case of any false and malicious publication calculated to disgrace or injure an individual, and damages might be recovered by the party wronged, whether the publication was made by writing or print, or was merely oral. These rules are consistent with a just freedom, and they remain undisturbed.

The cases which are important in a constitutional point of view are those which are said to be privileged; by which is meant, that the party is protected against responsibility, either civil or criminal, notwithstanding his publication may prove both unfounded and injurious. There are two classes of privilege; the one absolute, or where the protection is complete and perfect, and the other conditional and dependent on motive. Some of these cases rest on grounds of private confidence merely, and are not important here; but others rest on public and general reasons.

*Cases of Absolute Privilege.* — One of these is provided

<sup>1</sup> Cooley, Const. Lim., 4th ed., 527.

for specially in the clause of the Constitution which declares that members of Congress, for any speech or debate in either house, shall not be questioned in any other place.<sup>1</sup> Another relates to what is said by a witness in the course of judicial proceedings, and which is not allowed to be made the ground of a civil action, however false and malicious it may be, though the State may punish the perjury.<sup>2</sup> A like protection is thrown around what a juror may say to his fellows in the jury-room, concerning the parties to the case submitted to them, or concerning those who may have given evidence therein.<sup>3</sup> Complaints for the purpose of bringing a supposed offender to trial, and the preliminary information on which the officers may act in originating proceedings have a similar privilege,<sup>4</sup> and so do pleadings and other papers in the progress of litigation, where in their statements they do not depart from the matter in controversy.<sup>5</sup> The Executive of the United States and the governors of the several States are exempt from responsibility for their official utterances, and so are all judges of courts, and all officers performing functions in their nature judicial, while acting within the limits of their jurisdiction.<sup>6</sup> The party to a cause, summing it up to jury or court, must have the utmost liberty of dealing with the actions, conduct, and motives of the opposing party and the witnesses, and the law protects this liberty and extends it to his counsel also; and the latter, so long as he keeps to the case in hand and does not wander from it for the purpose of detraction and abuse, may freely

<sup>1</sup> Const., Art. I. § 6.

<sup>2</sup> *Marsh v. Ellsworth*, 50 N. Y. 309; *Terry v. Fellows*, 21 La. An. 375.

<sup>3</sup> *Dunham v. Powers*, 42 Vt. 1.

<sup>4</sup> *Dawkins v. Lord Pawlet*, L. R. 5 Q. B. 94.

<sup>5</sup> *Garr v. Selden*, 4 N. Y. 91; *Strauss v. Meyer*, 48 Ill. 385.

<sup>6</sup> *Townshend, Slander and Libel*, § 227; *Cooley on Torts*, 214.

urge in the interest of his client what he believes the case demands.<sup>1</sup>

*Libels on Government.* — At the common law it was a criminal offence to publish anything against the constitution of the country or the established order of government. This was upon the ground that the tendency of such publications was to excite disaffection with the government, and thus to induce a revolutionary spirit. But a calm and temperate discussion of public events and measures was always in theory allowed, and every man had a right to give to every matter of public importance a candid, full, and free discussion. It was therefore only when a publication went beyond this, and tended to excite tumult, that it became criminal. But as the government itself will institute and conduct the prosecutions, and as the offence will consist in a criticism of the constitution and system of government as the authorities administer them, it is never likely that anything very effectual in criticism will be found by the prosecution to be either calm or temperate. The government prosecutions for libel in England, have been so manifestly and notoriously unjust, unreasonable, and oppressive, that one advocate won a great name and a great place in the regard of the people in resisting them; and at length public sentiment compelled their abandonment. A publication in criticism or condemnation of the government or Constitution of the United States is not punishable at the common law, for the reason that the United States as such has no common law, and can therefore punish as crimes only those acts which are made punishable by express statute.<sup>2</sup> Nor is it by any means clear that such publications could be made crimes by legislation. The right of the people to change their institutions at will is expressly recognized by

<sup>1</sup> Hoar v. Wood, 3 Met. (Mass.) 193.

<sup>2</sup> United States v. Hudson, 7 Cranch, 32.

federal and state constitutions, and this implies a right to criticise, discuss, and condemn, and a right if possible to bring the people to the point of consenting to any change short of the abolition of republican institutions. It is believed that the sedition law of 1798 went to the very verge of constitutional authority, if not beyond it;<sup>1</sup> and the entire failure to re-enact any similar legislation since is satisfactory evidence that it is regarded as unnecessary, if not unsound in principle. But conspiracies to overturn the government by force are always punishable, and seditious publications are usually a part of the *res gestæ* of such offences.

*Reports of Trials, &c.* — Full and fair reports of what takes place publicly in legislative bodies and their committees, and in the courts high and low, are also absolutely privileged. The citizen has a right to be present at such proceedings, but the reasons which throw them open to spectators justify publication for the benefit of those who cannot or do not attend. It is only by publicity of proceedings that those to whom the liberty and civil and political rights of their fellows are submitted, can be kept under a due sense of responsibility, and within the limits of the rules that should govern their conduct.<sup>2</sup> But the report must be confined to the proceedings themselves, and must not indulge in defamatory observations, headings, or comments.<sup>3</sup> The privilege, however, has never been extended to *ex parte* proceedings or examinations, the reason being that they tend to mislead the public

<sup>1</sup> The prosecutions under this law, reported in Wharton's *State Trials*, pp. 333, 659, 684, and 688, are very instructive. They did more to excite disaffection to the government than all the misconduct complained of.

<sup>2</sup> *Hoare v. Silverlock*, 9 C. B. 20; *Gazette Co. v. Timberlake*, 10 Ohio, N. S. 548.

<sup>3</sup> *Pittock v. O'Neil*, 63 Penn. St. 253; *Storey v. Wallace*, 60 Ill. 51.

rather than to enlighten it.<sup>1</sup> One may publish these, but at the peril of being held responsible if any untrue statement made in the publication proves injurious to the standing, reputation, or business of individuals.

*Cases conditionally Privileged.* — In cases of absolute privilege the motive of the party making the publication is not suffered to be gone into, because the public benefit to be accomplished in the exercise of the privilege cannot be fully had without the most full and absolute exemption from civil responsibility. But there are some cases which are privileged in which it is perfectly reasonable to require that the privileged party shall publish only what he believes, and that the occasion of the publication shall be such as to justify it if true. The following are such cases.

*Criticism of Officers and Candidates.* — When one offers himself as a candidate for a public position, he voluntarily puts in issue his fitness for the place, and those who question it have a right to be heard before the people, and to give their reasons freely. When one holds a public office the issue offered is still broader, for the manner in which official duties have been performed comes in with his personal qualities, character, and habits, and may be discussed as something in which the public are concerned. Any citizen may speak freely, not only what he knows, which bears upon the subject, but also what he believes and what he suspects, provided he has only the public interest in view and does not act maliciously. It must be said, however, that, while the authorities have conceded this rule, they have in some cases applied it with so little liberality as nearly to destroy its value.<sup>2</sup>

*Discussion of Public Affairs.* — A like liberty of comment and discussion is allowed upon subjects in which the gen-

<sup>1</sup> Usher v. Severance, 20 Me. 9.

<sup>2</sup> King v. Root, 4 Wend. (N. Y.) 113; Lewis v. Few, 5 Johns. (N. Y.) 1; Cooley, Const. Lim., 4th ed., 539-551.

eral public may reasonably be supposed to have an interest, and the discussion will be privileged if conducted within the bounds of moderation and reason, though individuals may incidentally suffer therefrom.<sup>1</sup> The English authorities limit this privilege to cases of general, and not merely local interest,<sup>2</sup> though the reason for any distinction between them is not very apparent. But in matters of private interest, such as the affairs of a private corporation, there is no such liberty of comment, except by and among the parties concerned.<sup>3</sup>

*Criticisms of Books, &c.* — The publication of books, magazines, pamphlets, &c. is an assumption that they are fit to be read by the public, useful, and therefore proper for publication; and whoever disputes this may freely publish his reasons, doing so in good faith, and taking care not to make his criticisms of the publication an excuse for assailing the author.<sup>4</sup>

*The Truth as a Protection.* — When the party complaining of an injurious publication brings suit for the recovery of damages, the truth of the publication is a complete defence, whether the case was or was not one of privilege. If nothing but the truth is published of an individual it is no ground for the recovery of damages by him that the truth is so derogatory to his reputation that it injures him. But written or printed slander may be the ground for a criminal prosecution also, and in criminal prosecutions a different principle applies. The injury then complained of is an injury to the public; and when private reputation and conduct are needlessly dragged before the public to the

<sup>1</sup> *Wason v. Walter*, L. R. 4 Q. B. 73; *Kinyon v. Palmer*, 18 Iowa, 377.

<sup>2</sup> *Powell v. Lawler*, L. R. 1 C. P. Div. 481; *Gassett v. Gilbert*, 6 Gray, (Mass.) 94.

<sup>3</sup> *Wilson v. Fitch*, 41 Cal. 363.

<sup>4</sup> *Reade v. Sweetzer*, 6 Abb. Pr. (N. S.) 9, note.

disturbance of the peace of society, the public injury may be as great when only the truth is spoken, as when the publication is wholly untrue. The truth, therefore, is not in all cases a defence to a prosecution for criminal libel, but the publisher, in addition to the truth, must show that he made the publication with good motives and for justifiable ends. This is recognized in the constitutional provisions of the several States, which declare in substance that the truth shall be a complete defence in all prosecutions for libel, provided it was published with good motives and on justifiable occasion. If the publication was one proper to be placed before the public, either for the accomplishment of some commendable public purpose, or for warning and protection to the public or to individuals, or even for the amendment of the person arraigned, the proper motives may be inferred;<sup>1</sup> but where none of these things is apparent the burden of proof is on the publisher to establish good motives and show a just occasion. But blasphemous and indecent publications could not be justified at all, since the necessary tendency must be evil. And the fact that the publication was merely the repetition of a charge made by another is by itself no defence whatever.<sup>2</sup>

*The Jury Judges of the Law.* — A provision in state constitutions that the jury shall be judges of the law in criminal prosecutions for libel is common, and sometimes the provision is broader, and embraces all suits for libel and slander. These provisions had their occasion in early rulings of the courts, that the jury in suits for defamation of character must confine their attention to the fact of publication, and must receive the opinion of the court on the libellous or innocent character of the publication as conclusive. This doctrine was overruled by statute in England, and the jury are now permitted to judge of the whole case,

<sup>1</sup> *State v. Burnham*, 9 N. H. 34.

<sup>2</sup> *Regina v. Newman*, 1 El. & Bl. 268.

and to decide, not merely upon the responsibility of the publication, but upon the *animus* with which it was made, and whether within the rules of law the publication is libellous. The instructions of the judge upon the law become under this rule advisory merely, and the jury may disregard them if their judgment is not convinced.

*Publication of News.* — No privilege has ever been accorded to the publishers of mere items of news except to this extent: that when the publication is made in good faith, in the ordinary course of business, and without intent to defame, the party injured will be restricted in his recovery to the actual damages.<sup>1</sup> Generally in suits for defamation of character the jury have a large discretion in awarding what are called exemplary damages.

*Meaning of "the Press."* — The freedom of the press is not limited to any particular form or method of publication, but it extends to all modes of putting facts, views, and opinions before the public. Books, pamphlets, circulars, &c. are therefore as much within it as the periodical issues.

<sup>1</sup> *Daily Post Co. v. McArthur*, 16 Mich. 447; *Perrett v. N. O. Times*, 25 La. An. 170.





## CHAPTER XV.

### PROTECTIONS TO PERSONS ACCUSED OF CRIME.

#### SECTION I. — LEGISLATIVE ADJUDICATIONS.

*General Considerations.* — It is shown in a previous chapter that the people, by creating separate legislative and judicial departments of the government, by implication forbid the former from exercising any powers that properly belong to the latter. Under this principle it might well be held that the power in the legislature to deal with crimes and their punishments, otherwise than by the establishment of general laws by which conduct should be judged in the future, was by implication forbidden. Even without the aid of that principle, it might well be said that to judge the conduct of men otherwise than by established laws existing when the acts complained of took place, or otherwise than by a judicial tribunal, must be understood as forbidden by necessary implication in the very organization of a free state. By general consent a legislative body, by its organization, its numbers, its direct responsibility to the popular majority, and the fact that it is chosen for other duties, is not a fit tribunal for the trial of alleged offences, and the temptation to use the power of punishment as a political weapon is one to which a wise people would never deliberately subject their legislature. But in forming the Constitution it was judged best to leave nothing of this sort to mere implication, and accordingly we have the most positive prohibitions.

*Bills of Attainder.* — Both the United States<sup>1</sup> and the

<sup>1</sup> Const., Art. I. § 9, cl. 3.

several States<sup>1</sup> are forbidden to pass bills of attainder. As known in English history, bills of attainder were enactments of Parliament, charging persons named with criminal misconduct of some sort, convicting them thereof, and adjudging the punishment of death, with forfeiture of property. Sometimes the proceeding was resorted to because the obnoxious persons were out of the realm, and therefore out of the reach of process, sometimes because the evidences of guilt might not be sufficient for judicial conviction, and sometimes because the obnoxious conduct had never been made criminal by law, and consequently the person whom the authorities desired to make way with was not subject to punishment in any judicial proceeding. It was quite possible in these cases for the bill to go through all its stages without the accused party being allowed any opportunity whatever for a hearing; and he might be denied a hearing at the will of the legislature in all cases. In the highest degree, therefore, such proceedings were likely to be unjust and tyrannical; and if a purpose existed to deal fairly in any particular case, the very organization of the tribunal rendered it practically impossible. But in most cases there was no such purpose, and the legislature, in passing a bill of attainder, was the tool of a tyrant.<sup>2</sup> And what might take place at the will of a king, under a monarchy, might also happen, at the demand of an excited and passionate majority, at some periods in the history of a republic.

Besides bills of attainder there were also bills called bills of pains and penalties, which differed from the former only in this, that the punishments imposed were less than death. Many instances of these had occurred in American history, particularly in the case of Americans who had remained loyal to the British Crown after the revolt

<sup>1</sup> Const., Art. I. § 10, cl. 1.

<sup>2</sup> This was particularly true of the reign of Henry VIII.

of the Colonies.<sup>1</sup> It is conceded on all sides, that the purpose of the constitutional inhibition is to take away the power to pass either the one or the other; in short, wholly to deprive the government of any power to inflict legislative punishment for criminal, or supposed criminal conduct.<sup>2</sup> And a case in which the punishment is imposed indirectly, as by depriving one of the right to follow his occupation,<sup>3</sup> or to institute suits,<sup>4</sup> unless he will take an oath that he has not been guilty of certain specified conduct, is as much a bill of attainder as is an act directly imposing a punishment.

*Ex Post Facto Laws.*—The United States<sup>5</sup> and the States,<sup>6</sup> alike, are also forbidden to pass *ex post facto* laws. In its natural and ordinary sense this term embraces all retrospective laws; but in the Constitution the sense is more restricted, and is limited exclusively to laws of a criminal nature. Of retrospective laws in general, therefore, there is no occasion to speak in this connection; but they will receive some attention when the constitutional rules for the protection of property are given. One of the early justices of the Supreme Court has classified *ex post facto* laws as follows:—“1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law

<sup>1</sup> *Cooper v. Telfair*, 4 Dall. 14. One of the New York bills of attainder not only confiscated the property of the loyalists named, but actually condemned them to death in their absence, and without trial.

<sup>2</sup> *Ex parte Garland*, 4 Wall. 333. Excepting, of course, such conduct as may be punished under parliamentary law as contempt.

<sup>3</sup> *Cummings v. Missouri*, 4 Wall. 277.

<sup>4</sup> *Pierce v. Carskadon*, 16 Wall. 234.

<sup>5</sup> Const., Art. I. § 9, cl. 3.

<sup>6</sup> Const., Art. I. § 10, cl. 1.

annexed to the crime when committed. 4. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offence, in order to convict the offender."<sup>1</sup> And to these classes may be added, — 5. Every law which, assuming to regulate civil rights and remedies only, in effect imposes a penalty or the deprivation of a right for something which when done was lawful. And 6. Every law which deprives persons accused of crime of some lawful protection to which they have become entitled; such as the protection of a former conviction or acquittal, or of a proclamation of amnesty.<sup>2</sup>

But a law is not obnoxious to this provision which changes the punishment by mitigating it;<sup>3</sup> or which changes the practice in criminal cases, still preserving to the defendant his substantial rights;<sup>4</sup> or which takes from him the privilege of mere technical objections;<sup>5</sup> or which limits the number of peremptory challenges to jurors,<sup>6</sup> or modifies not unreasonably the grounds of challenge for cause;<sup>7</sup> or permits a change of venue for the purposes of a fair trial.<sup>8</sup> Nor is it incompetent, in providing for the trial of such offences as may be committed in the future, to permit the punishment to be increased on proof of a previous conviction; though the previous conviction took place before the law; for it is the subsequent offence only that is punished in such a case, and it was committed with constructive, if not actual, notice of what the punishment might

<sup>1</sup> *Calder v. Bull*, 2 Dall. 386, 390.

<sup>2</sup> *State v. Keith*, 63 N. C. 140.

<sup>3</sup> *Clarke v. State*, 23 Miss. 261; *Ratzky v. People*, 29 N. Y. 124.

<sup>4</sup> *State v. Manning*, 14 Texas, 402; *State v. Corson*, 59 Me. 137.

<sup>5</sup> *Commonwealth v. Hall*, 97 Mass. 570.

<sup>6</sup> *Dowling v. State*, 13 Miss. 664.

<sup>7</sup> *Stokes v. People*, 53 N. Y. 164.

<sup>8</sup> *Gut v. State*, 9 Wall. 35.

be.<sup>1</sup> And a person may be extradited under a treaty, though he had obtained asylum in the country before the treaty was made.<sup>2</sup>

## SECTION II. — TREASON: ITS DEFINITION AND PUNISHMENT.

*The Constitution.* — It is declared in the Constitution, that “treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.”<sup>3</sup> The provision is taken from the Statute of Treasons, 25 Edw. III., before the passage of which, as the ancient common law was administered, it was in the breast of the judges to determine what conduct was treason and what not, whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons; that is, by forced and arbitrary constructions to raise offences into the crime and punishment of treason, which never had been suspected to be such.<sup>4</sup> The statute did not fully accomplish its purpose in England, as was proved by the conviction and execution of Algernon Sidney, whose real offence was the combating in argument the arbitrary doctrines which were then popular at the court;<sup>5</sup> but the wrongs of that arbitrary period had been avenged upon the perpetrators, and similar perversions of law and justice were not again to be looked for either in England or in America. If the attempt to revive constructive treasons should be made, the Constitution by this clause provided against it as far as was possible.

*What is Treason?* — A mere conspiracy by force to subvert the established government is not treason; but there

<sup>1</sup> *Rand v. Commonwealth*, 9 Grat. (Va.) 738.

<sup>2</sup> *In re De Giacomo*, 12 Blatch. 391.

<sup>3</sup> Const., Art. III. § 3.

<sup>4</sup> Instances are given by Blackstone, 4 Com. 75.

<sup>5</sup> *Trial of Sidney*, 9 State Trials, 817.

must be an actual levying of war.<sup>1</sup> War, however, is levied when men are assembled with the intent of effecting by force a treasonable purpose ; and all persons who then perform any act, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered traitors.<sup>2</sup> And one is adherent to the enemies of the country, and giving them aid and comfort, when he supplies them with intelligence, furnishes them with provisions or arms, treacherously surrenders to them a fortress, and the like.<sup>3</sup> But coming from an enemy's ship to the shore peaceably to procure provisions for him is said not to be treason.<sup>4</sup>

*Evidence.* — A conviction of treason must be on the testimony of at least two witnesses to the same overt act, or on confession in open court.<sup>5</sup> This, like the first, was a provision of the Statute 25 Edw. III., and had been equally perverted to the destruction of innocence.

### SECTION III. — THE WRIT OF HABEAS CORPUS.

*The Constitution.* — The right to the important writ by means of which the liberty of the citizen is protected against arbitrary arrests is not expressly declared in the Constitution, but it is recognized in the provision that “The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.”<sup>6</sup> This writ was the offspring of the common law, but its benefits and securities were enlarged and guarded by the Habeas Corpus Act of Charles II., the general provisions of which are either

<sup>1</sup> *Ex parte Bollman*, 4 Cranch, 75.

<sup>2</sup> *Ex parte Bollman*, 4 Cranch, 75, 126. See *Fries's Case*, Whart. State Trials, 634, and the voluminous report of *Burr's Trial*.

<sup>3</sup> 4 Bl. Com. 76.

<sup>4</sup> *United States v. Pryor*, 3 Wash. C. C. 234.

<sup>5</sup> Const., Art. III. § 3.

<sup>6</sup> Const., Art. I. § 9, cl. 2.

adopted by recognition, or by express legislation, in the several States.

*Suspension of the Writ.* — The privilege of the writ consists in this: that, when one complains that he is unlawfully imprisoned or deprived of his liberty, he shall be brought without delay before the proper court or magistrate for an examination into the cause of his detention, and shall be discharged if the detention is found to be unwarranted. The suspension of the privilege consists in taking away this right to an immediate hearing and discharge, and in authorizing arrests and detentions without regular process of law. Such suspension has been many times declared in Great Britain, or in some section of the British empire, within the present century; sometimes in view of threatened invasion, and sometimes when risings among the people had taken place or were feared, and when persons whose fidelity to the government was suspected, and whose influence for evil might be powerful, had as yet committed no overt act of which the law could take cognizance. It has been well said that the suspension of the *habeas corpus* is a suspension of Magna Charta,<sup>1</sup> and nothing but a great national emergency could justify or excuse it. The Constitution limits it within narrower bounds than do the legislative precedents in Great Britain.

The power to suspend this privilege is a legislative power, and the President cannot exercise it except as authorized by law.<sup>2</sup> The suspension does not legalize what is done while it continues; it merely suspends for the time this particular remedy. All other remedies for illegal arrests remain, and may be pursued against the parties mak-

<sup>1</sup> May, Const. Hist., ch. 11.

<sup>2</sup> *Ex parte Merryman*, 9 Am. Law Reg. 524; S. C., 14 Law Rep. N. S. 78; Taney, 246; *McCall v. McDowell*, 1 Abb. U. S. 212; *Ex parte Field*, 5 Blatch. 63.

ing or continuing them. It is customary, after the writ has been suspended in Great Britain, to pass acts of indemnity for the protection of those in authority, who, in the performance of their duties to the State, felt themselves warranted in arresting suspected persons while the suspension continued. Something similar has been done in this country by provisions in state constitutions;<sup>1</sup> but as a right of action arising under the principles of the common law is property as much as are tangible things, it is not believed the right could be destroyed by statute.<sup>2</sup>

*State Suspensions.* — Nothing in this provision hinders the States from suspending the privilege of this writ issuing from their own courts, and the declaration of martial law in the State has the effect of suspending it.<sup>3</sup>

#### SECTION IV. — ACCUSATIONS OF CRIME.

*Grand Jury.* — Among the other provisions which by the fifth amendment are made for the protection of persons accused of crimes is this, — that “No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger.” A grand jury is a tribunal consisting of not less than twelve nor more than twenty-three men, taken from the body of the community, and sworn to inquire into and make presentment of offences committed within their jurisdiction, and twelve of whom at least must unite in any presentment. The security to accused persons consists in the popular character of the tribunal, in the fact

<sup>1</sup> See *Drehman v. Stifel*, 8 Wall. 595; *Hess v. Johnson*, 3 W. Va. 645.

<sup>2</sup> *Griffin v. Wilcox*, 21 Ind. 370; *Johnson v. Jones*, 44 Ill. 142. See *Milligan v. Hovey*, 3 Biss. 1.

<sup>3</sup> *Luther v. Borden*, 7 How. 1.



that they meet, receive, and sift the evidence independently of the prosecuting authorities, and in their own way, and are therefore not likely to be swayed or influenced by the passions, desires, or interests of those in authority, or of malignant prosecutors.

An infamous offence is one involving moral turpitude in the offender, or infamy in the punishment, or both. It is probable that in this amendment the punishment was in view as the badge of infamy rather than any element in the offence itself, and that provision for the punishment of minor offences otherwise than on indictment, even though they be degrading in their nature, would not be held unconstitutional, provided the punishment imposed was not greater than that usually permitted to be inflicted by magistrates proceeding in a summary way. But the punishment of the penitentiary must always be deemed infamous, and so must any punishment that involves the loss of civil or political privileges.

The exceptional cases mentioned in the amendment are such as come under the cognizance of military or martial law, and are punished by military tribunals.

#### SECTION V. — BAIL.

*The Constitution.* — The eighth amendment forbids requiring excessive bail. The bail here intended is that which is given by persons who are accused of crime, and awaiting trial or final judgment, or who are held for security to keep the peace.

Bail is usually allowed in all cases except those in which the offence charged is punished capitally or by life imprisonment, and even then it may be taken in the discretion of the court.<sup>1</sup> That reasonable bail shall be accepted is an admonition addressed to the judgment and

<sup>1</sup> *United States v. Hamilton*, 3 Dall. 17; *United States v. Jones*, 3 Wash. C. C. 224.

conscience of the court or magistrate empowered to fix the amount: it is impossible that a definite rule shall be established by law for particular cases. The principle, however, is this: that any bail is excessive which is greater than is needful to secure satisfactorily the attendance of the accused for trial or sentence, or the performance of such other obligation as may have been required of him.

SECTION VI. — INCIDENTS OF THE TRIAL AND PUNISHMENT.

*Venue.*—One of the most valuable protections which the common law gave to accused persons was found in the principle that the trial should take place within the county where the alleged offence was committed. This protected the accused against being dragged away from his home and his friends for trial in such distant and perhaps hostile locality as his prosecutors might select, and it gave him the benefit on his trial of a good reputation if he had maintained one among his neighbors, and also rendered more probable the attendance of his witnesses, who would usually be found in his vicinity. A further principle, to which the people were even more greatly attached, was that the trial should be by jury. Both these were provided for by the original Constitution, which declared that “the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.”<sup>1</sup> The sixth amendment made the right more specific, and corrected a defect as regards the venue: “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State

<sup>1</sup> Const., Art. III. § 2, cl. 3.

and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The important differences in these provisions are, that the earlier did not require the trial to take place in the district of the crime, when the State was divided into two districts, nor did it in terms make it necessary that the jury should be summoned from the vicinage, though doubtless that was to be understood. The amendment says nothing about crimes committed out of the limits of States, and has no application to them.<sup>1</sup>

*Speedy Trial.* — A speedy trial cannot be defined more accurately than this, that it is a trial brought on as speedily as the prosecution can reasonably be expected or required to be ready for it.<sup>2</sup> A public trial is not of necessity one to which the whole public is admitted, but it is one so far open to all as that the prisoner's friends, and others who may be inclined to watch the proceedings, in order to see if justice is intelligently and impartially administered, may have opportunity to do so. There may be and often is justifiable occasion to exclude from a trial those who are inclined to attend from idle or morbid curiosity only, and especially in cases involving loathsome or disgusting details.

*The Jury.* — By jury in the Constitution is meant a common-law jury. This is a tribunal of twelve persons, impartially selected for the purposes of the trial in accordance with rules of law previously established, and who are to sit together, hear and consider the evidence in the case, and render their verdict upon the facts as they find them. The jury cannot consist of less than twelve, and a trial by less than that number, even by consent, is a mis-trial.<sup>3</sup>

<sup>1</sup> United States v. Dawson, 15 How. 467.

<sup>2</sup> See Ex parte Stanley, 4 Nev. 113.

<sup>3</sup> Work v. State, 2 Ohio, N. S. 296; Cancemi v. People, 18 N. Y. 128; Brown v. State, 8 Blackf. (Ind.) 561.

To secure impartiality each party is allowed a certain number of peremptory challenges, and as many others as he can show cause for. The jury listen to the evidence in the presence and under the direction of the court, and they are advised by the court what the law is that should govern the case. Formerly it was supposed that the jury might be punished if they failed to follow in their verdict the instructions of the court upon the law; but it has long been settled that the jury may render their verdict freely, and without assigning reasons.<sup>1</sup> If the accused is convicted against the law, or against the evidence, the judge may correct the error by granting a new trial. The verdict of the jury must be unanimous; and therefore, if agreement becomes impossible, they must be discharged, and a new jury summoned.

*The Indictment.* — The sixth amendment entitles the accused “to be informed of the nature and cause of the accusation.” This information is to be conveyed by the indictment, and the accused must have a copy in ample time to enable him to be prepared for trial. To make the indictment sufficient for the purpose, it must contain such a recital of facts as will reasonably apprise the defendant what the case is which he must meet; and this cannot be dispensed with even by statute.<sup>2</sup> But the unnecessary formalities and technicalities of the old forms may be abolished, and no cause for complaint be given thereby.<sup>3</sup>

*The Evidence.* — The fifth amendment also declares that no person “shall be compelled in any criminal case to be a witness against himself.” This was a common-law principle, and it has been incorporated in the Constitution to prevent the possibility of a recurrence to the inquisitorial

<sup>1</sup> Penn’s Case, 6 State Trials, 951; Bushel’s Case, Vaughan’s Rep. 135.

<sup>2</sup> State v. O’Flaherty, 7 Nev. 153; State v. Corson, 59 Me. 137.

<sup>3</sup> State v. Learned, 47 Me. 426; People v. Mortimer, 46 Cal. 114.

proceedings which in arbitrary periods were sometimes had, and which are now admitted in some countries under systems of jurisprudence differing from our own. Under the laws of some States accused persons are permitted to give evidence on their own behalf; but if one elects not to do so, the fact is not allowed to be made use of to his prejudice, since, if it were, this would indirectly force him to be sworn.<sup>1</sup> By the sixth amendment the accused has the right to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor. No comment need be made on this last privilege: the other renders it necessary that the prosecution procure the presence of their witnesses in open court, where the jury may have opportunity to observe them, and where full liberty of cross-examination may be had.<sup>2</sup>

*Counsel.* — By the sixth amendment the accused has the privilege “to have the assistance of counsel for his defence.” This is a common-law privilege, much improved and extended in late years, and it is secured with all its accustomed incidents. The counsel must be at liberty to deal with the case freely, and to comment fearlessly upon the facts, and upon the conduct, purposes, and motives of prosecutors and witnesses, only keeping within the bounds of decorum. The law protects implicitly the confidence which the relation of counsel and client requires, and will not suffer the counsel, even in the courts of justice, to disclose the confidential communications that may have been made to him with a view to pending or anticipated litiga-

<sup>1</sup> *People v. Tyler*, 36 Cal. 522; *State v. Cameron*, 40 Vt. 555; *Bird v. State*, 50 Geo. 585.

<sup>2</sup> *Jackson v. Commonwealth*, 19 Grat. (Va.) 656; *State v. Thomas*, 64 N. C. 74. If, on the second trial of a cause, it is found that the accused has kept away a witness, his evidence given on the first trial may be proved by the prosecution. *Reynolds v. United States*, 98 U. S. Rep. 145.

tion.<sup>1</sup> As the jury in general are judges of the facts only, the argument of counsel upon the law should be addressed to the court;<sup>2</sup> but the jury may be addressed directly, upon both law and fact, in those cases where by statute or constitution they are made judges of both.<sup>3</sup>

*Punishments.* — By the eighth amendment excessive fines and cruel and unusual punishments are forbidden. What punishment is suited to a specified offence must in general be determined by the legislature, and the case must be very extraordinary in which its judgment could be brought in question. A punishment may be unlawful either, 1. because it is in excess of, or different from, that prescribed by law;<sup>4</sup> or, 2. because it is not warranted by the judgment of any competent court; and, possibly, 3. because, though apparently warranted by law, it is so manifestly out of all proportion to the offence as to shock the moral sense with its barbarity, or because it is a punishment long disused for its cruelty until it has become “unusual.” Nothing more definite can on this point be affirmed.<sup>5</sup>

*Twice in Jeopardy.* — The fifth amendment forbids that any person shall be subject, for the same offence, to be twice put in jeopardy of life or limb. This is an old phrase, which has come from times when sanguinary punishments

<sup>1</sup> *Whiting v. Barney*, 30 N. Y. 330. Compare *Dixon v. Parmelee*, 2 Vt. 185.

<sup>2</sup> *United States v. Morris*, 1 Curt. C. C. 23; *United States v. Riley*, 5 Blatch. 204.

<sup>3</sup> *Lynch v. State*, 9 Ind. 541. See *Commonwealth v. Porter*, 10 Met. (Mass.) 263.

<sup>4</sup> *Bourne v. The King*, 7 Ad. & El. 58; *Ex parte Lange*, 18 Wall. 163.

<sup>5</sup> A punishment may perhaps be deemed cruel and unusual if from its nature it would be intolerable to one class of people, but comparatively indifferent to others; as, for example, the punishment of depriving a native of China of his hair. *Ho Ah Kow v. Nunan*, 18 Am. Law Reg. 676.

were common ; but the meaning is, that no person shall be put on trial a second time for the same offence, after he has been tried and convicted, or acquitted. But some explanation is necessary, since in some cases one may be entitled to the benefits of an acquittal, though a verdict has never been returned.

A person is in jeopardy when he is put upon trial, before a court of competent jurisdiction, upon an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been impanelled and sworn to try him.<sup>1</sup> The accused then becomes entitled to a verdict that shall forever protect him against any future prosecution,<sup>2</sup> and a discharge of the jury without his consent is equivalent to an acquittal, except in the few cases in which a discharge without a verdict becomes a necessity.<sup>3</sup>

But one is not put in jeopardy by a prosecution in a court which has no jurisdiction of the case ;<sup>4</sup> or upon an indictment which is so defective that no judgment can be given upon it ;<sup>5</sup> and the jeopardy once attached is removed, if the jury are discharged by reason of the impossibility of agreement, or by consent, or if the case is stopped by the sickness or death of the judge, or a juror,<sup>6</sup> or if, after verdict of conviction, it is set aside on motion of the accused, or judgment upon it is reversed in an appellate court, or is arrested for fatal defects in the indictment ;<sup>7</sup> and in any of these and similar cases, the accused may be tried a second

<sup>1</sup> *McFadden v. Commonwealth*, 23 Penn. St. 12 ; *O'Brian v. Commonwealth*, 9 Bush, (Ky.) 333.

<sup>2</sup> *Barker v. People*, 3 Cow. (N. Y.) 686.

<sup>3</sup> *People v. Barrett*, 2 Caines, (N. Y.) 304 ; *Nolan v. State*, 55 Geo. 521.

<sup>4</sup> *People v. Tyler*, 7 Mich. 161.

<sup>5</sup> *Gerard v. People*, 4 Ill. 363 ; *Kohlheimer v. State*, 39 Miss. 548.

<sup>6</sup> *Nugent v. State*, 4 Stew. & Port. (Ala.) 72 ; *Hector v. State*, 2 Mo. 166.

<sup>7</sup> *Casborus v. People*, 13 Johns. (N. Y.) 351.

time. But an acquittal, however erroneous, must be a bar, unless a remedy by writ of error is given to the State by statute, as has been done in some States.<sup>1</sup> If the accused is acquitted on some counts in an indictment and convicted on others, and the conviction is set aside, he can be put upon trial the second time on those counts only on which he was before convicted, and is forever discharged from the others.<sup>2</sup>

*Due Process of Law.* — The fifth amendment also provides, that no person shall be deprived of life, liberty, or property without due process of law. The meaning of this protection has been more fully considered in another place; at present, it is sufficient to say that, as a protection to life and liberty, it requires, before either can be taken away under legal proceedings, that there shall be a prosecution according to the forms of law, resulting in conviction after public trial, and opportunity to be heard, and followed by judgment applying the law which the convicted party violated.

*Contempts of Authority.* — It sometimes becomes essential, in the course of their discharge of public duties, that legislative bodies and courts should punish summarily those who disturb their proceedings, or who refuse or neglect to perform any duty required of them in respect thereto. Such conduct is called a contempt of authority, and the power to punish it is inherent in such bodies.<sup>3</sup> But as the tribunal that punishes will also be the tribunal whose just authority has been contemned, the power is one to be exercised very sparingly, and only when the necessity plainly appears. When inferior courts punish for contempts, their records must show that the party is convicted of conduct

<sup>1</sup> *State v. Tait*, 22 Iowa, 140.

<sup>2</sup> *Campbell v. State*, 9 Yerg. 333; *Barnett v. People*, 54 Ill. 325.

<sup>3</sup> *Anderson v. Dunn*, 6 Wheat. 204; *Robinson ex parte*, 19 Wall. 505.



which is in fact a contempt;<sup>1</sup> and the conviction will be void if the finding is wanting. A different rule applies in the courts of general jurisdiction.<sup>2</sup> In tribunals of all sorts and grades the party accused of contempt is entitled to a hearing.<sup>3</sup> Bodies having *quasi* judicial and legislative powers, like boards of supervisors and city councils, cannot punish for contempts.<sup>4</sup>

<sup>1</sup> *Bachelor v. Moore*, 42 Cal. 412; *Turner v. Commonwealth*, 2 Met. (Ky.) 616.

<sup>2</sup> *Bradley v. Fisher*, 13 Wall. 335.

<sup>3</sup> *Ex parte Bradley*, 7 Wall. 364.

<sup>4</sup> *Whitcomb's Case*, 120 Mass. 118.

## CHAPTER XVI.

## PROTECTION TO CONTRACTS AND PROPERTY.

## SECTION I. — LAWS IMPAIRING THE OBLIGATION OF CONTRACTS.

*The Constitution.* — Among the powers forbidden to the States by the Constitution is the power to pass any law impairing the obligation of contracts.<sup>1</sup> The prohibition passed almost without comment at the time, and in the careful and very full discussions of the Federalist it is barely alluded to twice; first, as a provision to prevent aggressions on the rights of those States whose citizens would be injured by such laws;<sup>2</sup> and, second, as being a “constitutional bulwark in favor of personal security and private rights” against laws which are “contrary to the first principles of the social compact, and to every principle of sound legislation.”<sup>3</sup> Apparently nothing was in view at the time except to prevent the repudiation of debts and private obligations, and the disgrace, disorders, and calamities that might be expected to follow. In the construction of this provision, however, it has become one of the most important, as well as one of the most comprehensive, in the Constitution; and it has been the subject of more frequent and more extended judicial discussion than any other. Only brief referencce can be made here to the principles which the decisions have settled.

<sup>1</sup> Const., Art. I. § 10.

<sup>2</sup> Federalist, No. 7, instancing the then recent laws of Rhode Island in their results on the neighboring States.

<sup>3</sup> Federalist, No. 44.

*What are Contracts?*—Contracts are either executory or executed. An executory contract is one whereby a party takes upon himself the obligation to do or abstain from doing some particular thing. An executed contract is one whereby an obligation assumed is performed, and the transaction perfected; as a deed of conveyance perfects a sale of lands. The Constitution makes no distinction between these two classes of contracts, and the latter as much as the former is within its protection. It is, therefore, not within the power of legislation, after a conveyance has been made, to annul it on any pretence; since this would not merely impair the obligation of the contract, but would destroy it entirely.<sup>1</sup>

*Obligation of the Contract.*—The obligation of a contract consists in its binding force on the party making it, which the law at the time recognizes and for which it gives a remedy. It involves, therefore, first, the promise or assurance of the party, and, second, the sanction of the law, whereby the promise or assurance becomes an effectual contract.<sup>2</sup> No promise or assurance can, therefore, constitute a contract, unless the law lends its sanction; and this in some cases it withholds. For example, if there is no consideration for an executory contract, this in law is a mere nude pact, and invalid; and so is any promise which is illegal, either in its consideration, or in the purpose to be accomplished by it.<sup>3</sup>

*What Contracts intended.*—The contracts intended by the Constitution are all those over which the State can have authority, and which, but for this provision, might be reached by state law. The contracts of the State itself

<sup>1</sup> Fletcher v. Peck, 6 Cranch, 87, 133.

<sup>2</sup> Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608; Ogden v. Saunders, 12 Wheat. 213, 259, 302, 318.

<sup>3</sup> Meacham v. Dow, 32 Vt. 721; Piatt v. People, 29 Ill. 54; Marshall v. Railroad Co., 16 How. 314.

are therefore included, as much as those of individuals; and a State is thus precluded from recalling its own grants, as had frequently been done on various pretexts in England.<sup>1</sup> Neither can a State modify, except by mutual consent, any provision of a pre-existing contract into which it may have entered.<sup>2</sup> For example, if a State, being the owner of the capital stock of a bank, provides by law that its bills shall be received in payment for all debts owing to the State, the provision is a promise to those who shall receive the bills, that they shall be thus accepted for state dues; and this promise the State cannot recall, to the prejudice of any who previously had become holders of the bills.<sup>3</sup> So if a State, or one of its municipalities, contracts a debt and issues obligations therefor, and these obligations come into the hands of foreign holders who are not subject to state taxation, a subsequent statute imposing a tax upon them, and directing that the amount thereof shall be deducted in making payment, is void as to the foreign holders, because withholding something to which they are entitled, and to that extent impairing the obligation of the contracts.<sup>4</sup>

*Statutes.* — A statute, public or private, is not a contract. It is an expression in due form of the will of the State, as to what shall be the law on the subject covered by it; and the State would be deprived of its sovereignty, and crippled in the exercise of its essential functions, if it were

<sup>1</sup> *Fletcher v. Peck*, 6 Cranch, 87; *Van Horne v. Dorrance*, 2 Dall. 304; *Huidekoper v. Douglas*, 3 Cranch, 1. The principle stated would of course not preclude a State from invoking judicial proceedings to set aside one of its grants on any grounds that would be sufficient if it were a grant by an individual.

<sup>2</sup> *New Jersey v. Wilson*, 7 Cranch, 164.

<sup>3</sup> *Woodruff v. Trapnall*, 10 How. 190; *Furman v. Nichols*, 8 Wall. 44; *Keith v. Clark*, 97 U. S. Rep. 454.

<sup>4</sup> *Murray v. Charleston*, 96 U. S. Rep. 432. And see *State Tax on Foreign Held Bonds*, 15 Wall. 300.

not at liberty to change its laws at discretion. But there are exceptions to this general rule: for a State may give to its contracts such form as it may choose to express its assent in; and this is sometimes the form of a statute. The grants of land by a State are frequently made by statute, and so are grants of special privileges. Bounties are sometimes offered in this way; and when the terms of the offer are accepted, a contract exists; but a bounty law may be repealed at any time as to anything that may accrue thereafter.<sup>1</sup>

*Offices.* — A public office is a public trust: the appointment or election to it is a delegation of the trust to the person appointed or elected for the time being. But it is not a contract, and neither the office nor its emoluments can be claimed as matter of right, as against subsequent legislation abolishing the one or reducing the other.<sup>2</sup> Nevertheless, if in either of these particulars the state constitution has made provisions, it is not competent by law to change them, for the manifest reason that the constitution in that case limits the legislative power in that regard. For example, the President's term of office is four years, and his compensation can neither be increased nor diminished during his term;<sup>3</sup> and in both these particulars the power of Congress over his office is excluded.

*Statutory Privileges.* — The grant of a statutory privilege is not a contract, but it resembles a license, and is always revocable, except that the party cannot be deprived of benefits already enjoyed under it. Under this head come exemptions from military and jury duty, exemptions of property from taxation or from sale on execution,<sup>4</sup> and

<sup>1</sup> *Welch v. Cook*, 97 U. S. Rep. 541.

<sup>2</sup> *Butler v. Pennsylvania*, 10 How. 402; *Head v. University*, 19 Wall. 526.

<sup>3</sup> Const., Art. II.

<sup>4</sup> *Christ Church v. Philadelphia*, 24 How. 300; *East Saginaw*

licenses to engage in any business the carrying on of which is not open to the general public.<sup>1</sup> And in general it may be said that any privilege which is obtained under the general law of the State may be taken away by a repeal or modification of the law.<sup>2</sup>

*Municipal Corporations.* — A grant of rights or privileges to a municipal body or corporation for public purposes is not a contract, but a law for the public good. Such bodies and corporations are created as necessary conveniences in government, and they must hold their powers and privileges subject to legislative modification and recall at all times. Therefore the grant to a town of the right to establish and maintain a ferry across a public river may be revoked,<sup>3</sup> the territorial limits of the town may be reduced, particular powers taken away or changed at discretion, and so on.<sup>4</sup> But a municipal corporation is entitled to protection in its property as a natural person is, whether it comes from the State or from any other source.<sup>5</sup>

*Essential Powers of Government.* — A State cannot by contract bargain away any of the essential powers of sovereignty, so as to deprive itself of the ability to employ them again and again, as the public exigencies shall seem to require. For example, it cannot by granting land for cemetery purposes preclude itself from forbidding the further use of the land for those purposes when, by reason of the increase of population in the vicinity, it has become, or

Salt, &c. Co. v. East Saginaw, 13 Wall. 373; Bull v. Conroe, 13 Wis. 233.

<sup>1</sup> Calder v. Kirby, 5 Gray, (Mass.) 597; Fell v. State, 42 Md. 71.

<sup>2</sup> Beers v. Arkansas, 20 How. 527.

<sup>3</sup> East Hartford v. Bridge Co., 10 How. 511.

<sup>4</sup> Barnes v. District of Columbia, 91 U. S. Rep. 540; Laramie Co. v. Albany Co., 92 U. S. Rep. 307.

<sup>5</sup> Town of Pawlet v. Clark, 9 Cranch, 292; Terrett v. Taylor, 9 Cranch, 43; State v. Haben, 22 Wis. 660; Grogan v. San Francisco, 16 Cal. 590; Dillon, Mun. Corp., § 39 et seq.

threatens to become, a nuisance ;<sup>1</sup> and it cannot by a railroad charter deprive itself of the power to establish reasonable regulations under which the railroad business shall be carried on.<sup>2</sup> So also the State cannot deprive itself of the right to appropriate private property to public uses under the eminent domain ; this being a necessary power in government,<sup>3</sup> or of the right to raise a revenue by an exercise of the power to tax.

It is nevertheless held that the State may, for a consideration, impose upon itself the obligation not to tax certain subjects, otherwise taxable, for some definite period, or even indefinitely ; it being presumed in that case that the consideration received by the State is equivalent to that which might have been derived from the exercise of the customary power to tax.<sup>4</sup> Nor is it essential that the consideration shall be a direct pecuniary return, or one that can be shown by evidence to be an equivalent ; it is sufficient that the State has apparently found it for its interest to assume the obligation, and that some one else has acted in reliance upon it. In the leading case the State made a grant of lands, agreeing not to tax them in the hands of the grantees ; and this agreement was held to be an irrevocable exemption.<sup>5</sup> In other cases the State, in granting a charter of incorporation, has stipulated that the taxation of the corporation shall only be at a certain rate, or on a certain basis ; and this also is irrevocable.<sup>6</sup> But an ex-

<sup>1</sup> *Brick Presbyterian Church v. New York*, 5 Cow. 538. See *Fertilizing Co. v. Hyde Park*, 97 U. S. Rep. 659.

<sup>2</sup> *Thorpe v. Railroad Co.*, 27 Vt. 140 ; *Railroad Co. v. Jacksonville*, 67 Ill. 37.

<sup>3</sup> *Cooley*, Const. Lim., 4th ed., 343.

<sup>4</sup> *New Jersey v. Wilson*, 7 Cranch, 164 ; *Pacific R. R. Co. v. Maguire*, 20 Wall. 36 ; *University v. People*, 99 U. S. Rep. 309.

<sup>5</sup> *New Jersey v. Wilson*, 7 Cranch, 164.

<sup>6</sup> *Piqua Bank v. Knoop*, 16 How. 369 ; *Railroad Co. v. Reid*, 13 Wall. 264.

emption from taxation can never be granted as against a provision in the state constitution which requires all property to be uniformly taxed.<sup>1</sup> And as the power to tax is vital, and it is of the highest importance that it should always remain unrestricted and in full force, the presumption against any intention to hamper or restrict it must be strong in every case, and can only be overcome by the employment of very clear terms to indicate that intent.<sup>2</sup> And in any case an exemption from taxation, obviously made as a mere favor, may be terminated at the will of the State at any time.<sup>3</sup>

*Exclusive Privileges.*—It is settled by the authorities that the State may grant exclusive privileges for many purposes; as, for example, to build a toll-bridge at a certain point, to construct a toll-road between certain places, to establish a certain ferry, and the like; and these grants, when made to individuals or private corporations, are contracts, and bind the State. But, as in the case of exemptions from taxation, the intent of the State to restrict or hamper its power for the future is not to be lightly assumed, and it should appear with reasonable certainty in the legislation, and the grant will be strictly construed as against the grantees. This is reasonable, not only when the subject is regarded from the standpoint of state interest, but also because exclusive privileges are to some extent invidious and very justly obnoxious, and it is not reasonable to suppose that the State would grant them, except when some important public purpose or some necessary public convenience cannot be accomplished or provided without making the grant exclusive. Therefore, when the owners

<sup>1</sup> *Railroad Companies v. Gaines*, 97 U. S. Rep. 697.

<sup>2</sup> *Christ Church v. Philadelphia*, 24 How. 300; *Gilman v. Sheboygan*, 2 Black, 510.

<sup>3</sup> *East Saginaw Salt, &c. Co. v. East Saginaw*, 13 Wall. 373; *Home Ins. Co. v. City Council*, 93 U. S. Rep. 116; *Welch v. Cook*, 97 U. S. Rep. 641.



of a franchise under state grant contest the rights of the State to make a second grant which would compete with it, every doubt must be resolved in favor of their claim before it can be sustained, and every resolution which springs from doubt is against the claim.<sup>1</sup> Moreover the grant will never be extended by construction beyond the plain terms in which it is made. A familiar instance is where the owners of a ferry franchise, or of a franchise to take toll for passing over a bridge, contest the right of the State to grant a second franchise, the enjoyment of which would diminish their own profits. As against them, the presumption is that the State retained the right to license as many crossings as should be found needful or desirable.<sup>2</sup>

But even the agreement of the State, that the grant shall be exclusive, cannot prevent the making of another, subject to the obligation to provide compensation; under the principles governing the law of eminent domain. An exclusive privilege only gives to the franchise additional value as property; and all property is subject to be taken and appropriated to public uses on making payment therefor. Therefore, notwithstanding the existence of an exclusive grant to construct a railroad between two named places, or a bridge over a river at a certain locality, the State has, and must have, the power to make conflicting grants when the public needs seem to require them; and the progress of the State could or might be embarrassed or stayed by improvident or dishonest state concessions if this were otherwise.<sup>3</sup> The new grant in such case does not

<sup>1</sup> *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 Penn. St. 9, 22. See the discussions in *Fertilizing Co. v. Hyde Park*, 97 U. S. Rep. 659.

<sup>2</sup> *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Turnpike Co. v. State*, 3 Wall. 210.

<sup>3</sup> *West River Bridge Co. v. Dix*, 6 How. 507; *Eastern R. R. Co. v. Boston, &c. R. R. Co.*, 111 Mass. 125; *Alabama, &c. R. R. Co. v. Kenny*, 39 Ala. 307.

impair the obligation of the other, but the obligation is recognized in giving compensation for the exclusive privilege.

*Charter Contracts.* — In the Dartmouth College Case, in which the legislature undertook to remodel the charter of an educational institution, in most important particulars, without the consent of the corporators, it was decided that the charter was a contract, which the State was supposed to grant in consideration of expected benefits to accrue to the general public, and whereby the State in legal contemplation promised that the corporators should enjoy the privileges and franchises granted. The conclusion was that the amendatory act was invalid, as impairing the obligation of the contract.<sup>1</sup> The same doctrine has been reasserted and reaffirmed in many cases since.<sup>2</sup> Of course, a total repeal of the charter would be a still plainer case.

Where, however, by the charter the legislature reserves the right to alter, amend, or repeal it, it is plain that no such consequence can follow, because then an alteration, amendment, or repeal is in accordance with the contract, and not hostile to it. So if by the constitution of the State, or by its general laws in force when the charter was granted, it is provided that all charters shall be subject to legislative control and alteration, this provision in legal effect becomes a part of the charter, and therefore a part of the contract.<sup>3</sup>

*Police Regulations: General Principle.* — All property and all rights within the jurisdiction of a State are subject to the regulations and restraints of its police power, ex-

<sup>1</sup> Dartmouth College v. Woodward, 4 Wheat. 518.

<sup>2</sup> The Binghamton Bridge Case, 3 Wall. 51; Farrington v. Tennessee, 95 U. S. Rep. 679.

<sup>3</sup> Murray v. Charleston, 96 U. S. Rep. 432, 448; Railroad Co. v. Georgia, 98 U. S. Rep. 359; Railroad Companies v. Gaines, 97 U. S. Rep. 697.

cept so far as they are removed therefrom by the express provisions or implications of the federal Constitution.<sup>1</sup> The police power may be defined in general terms as that power which inheres in the legislature to make, ordain, and establish all manner of reasonable regulations and laws whereby to preserve the peace and order of society and the safety of its members, and to prescribe the mode and manner in which every one may so use and enjoy that which is his own as not to preclude a corresponding use and enjoyment of their own by others.<sup>2</sup>

*Interference with Federal Powers.* — In a preceding chapter cases have been mentioned in which attempts by the States to exercise this power have been held invalid, because they interfered with the proper exercise by Congress of its power in the regulation of commerce.<sup>3</sup> More often state regulations have been questioned on the ground that, under the pretence of regulation, they took away rights which were promised and assured by contract, and thereby impaired the obligation of the contract.

*Regulation of Charter Contracts.* — It is not questioned that all contract rights are subject to state regulation, as all property is. Therefore, though a railroad company has a charter not subject to amendment or repeal by the legislature, the company, nevertheless, in the conduct of business under it, must conform to such rules and regulations as the State may establish for the safety and protection of those being carried by or having transactions with it. Therefore the company may be required to fence its track as a proper precaution, as well against the trains being thrown from the track, as against the destruction or loss

<sup>1</sup> *United States v. De Witt*, 9 Wall. 41; *United States v. Reese*, 92 U. S. Rep. 214.

<sup>2</sup> *License Cases*, 5 How. 504; *License Tax Cases*, 5 Wall. 462; *Munn v. Illinois*, 94 U. S. Rep. 113, 124.

<sup>3</sup> *Ante*, pp. 69–77.

of cattle,<sup>1</sup> and to fix periodically its charges and keep them posted for the information of the public.<sup>2</sup> The following are also reasonable regulations: requiring all trains to check their speed at exposed places;<sup>3</sup> to carry impartially for all persons;<sup>4</sup> to permit other roads to cross the railroad track, and to share with them the expense of the crossing;<sup>5</sup> to ring a bell or sound a whistle at crossings, or to station a flagman at such, or any other dangerous places;<sup>6</sup> to respond in damages in case the death of any person shall be caused by the company's wrongful act, neglect, or default;<sup>7</sup> and so on. On the other hand, if the regulation assumes to take from the company some substantial right which its charter confers, it will be void. Instances are, the taking away a right to exact toll, which had been clearly given;<sup>8</sup> imposing upon the company new liabilities for something it was expressly permitted to do;<sup>9</sup> and so on.<sup>10</sup> The limit to the exercise of the police power over charter contracts is substantially this: the regulations must have reference to the comfort, safety, or welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not, under the pretence of regulation, take from the corporation any

<sup>1</sup> *Thorpe v. Railroad Co.*, 27 Vt. 140.

<sup>2</sup> *Railroad Co. v. Fuller*, 17 Wall. 560.

<sup>3</sup> *Chicago, &c. R. R. Co. v. Haggerty*, 67 Ill. 113; *Haas v. Railroad Co.*, 41 Wis. 44; *Pennsylvania R. R. Co. v. Lewis*, 79 Penn. St. 33.

<sup>4</sup> *Chicago, &c. R. R. Co. v. People*, 67 Ill. 11.

<sup>5</sup> *Fitchburg, &c. R. R. Co. v. Grand Junction R. R. Co.*, 1 Allen, (Mass.) 552.

<sup>6</sup> *Toledo, &c. R. R. Co. v. Jacksonville*, 67 Ill. 37.<sup>1</sup>

<sup>7</sup> *Steamboat Co. v. Barclay*, 30 Ala. 120; *Boston, &c. R. R. Co. v. State*, 32 N. H. 215.

<sup>8</sup> *Pingrey v. Washburn*, 1 Aik. (Vt.) 264.

<sup>9</sup> *People v. Plank Road Co.*, 9 Mich. 285; *Bailey v. Railroad Co.*, 4 Harr. (Del.) 389.

<sup>10</sup> See *Washington Bridge Co. v. State*, 18 Conn. 53; *Philadelphia, &c. R. R. Co. v. Bowers*, 4 Hous. (Del.) 506.

of the essential rights and privileges which the charter confers. In short, they must be regulations in fact, and not amendments of the charter in abridgment of the corporate franchises.<sup>1</sup> But where the charter reserves to the legislature the power to alter, amend, or repeal it, or where it is granted under a state constitution which expressly saves to the legislature that right, any change whatever in the contract by legislative power is no impairment of the contract.<sup>2</sup> A legislature having such a power may therefore fix the charges of railroad companies at discretion.<sup>3</sup>

*Implied Contracts.* — Implied contracts, as well as those made in express terms, are within the protection of the Constitution. Under this head may be classed judgments and decrees, and all statutory liens and rights of redemption when they spring from or originate in contracts, and are in accordance with the law when the contract was made.<sup>4</sup>

*State Control of Remedies.* — What is said further on respecting the control of remedies by the State is applicable as well to contracts as to other rights. But the State must always give some remedy, and it must be substantially the equivalent of that which was provided by law when the contract was made. The withdrawal of the remedy for a time by stay laws is an impairment of the obligation of contracts.<sup>5</sup> So is any law which, under the pretence of changing the remedy, undertakes to compel the party to accept something different in the place of that for which

<sup>1</sup> Cooley, Const. Lim., 4th ed., 719, and cases cited. See *Beer Company v. Massachusetts*, 97 U. S. Rep. 25.

<sup>2</sup> See the right of amendment with its limitations considered in *Sinking Fund Cases*, 99 U. S. Rep. 700.

<sup>3</sup> *Chicago, &c. R. R. v. Iowa*, 94 U. S. Rep. 155.

<sup>4</sup> *Gunn v. Barry*, 15 Wall. 610.

<sup>5</sup> Cooley, Const. Lim., 4th ed., 457, and cases cited.

he contracted ; as, for example, land at an appraisal in the place of money.<sup>1</sup> So is any law which gives a preference in payment of one creditor over another, which the law when their contracts were made did not give, even though the preferred creditor is the State itself.<sup>2</sup> So is any law which takes away from the creditor any substantial right which the contract assured to him ; for example, the right to the possession of mortgaged lands until the mortgage debt is paid.<sup>3</sup> So is any law which so far increases the exemptions from executions issued on judgments as seriously to impair the value of the remedy, and reduce the probabilities of collection.<sup>4</sup> Even the power to tax may sometimes become an important element in the obligation of a contract. Thus, if a city contracts debts at a time when it has by law ample power to levy taxes for their payment, the creditor has a right to rely upon this power as the means by the employment of which his debt shall be satisfied, and the State cannot afterwards withdraw the power, or so restrict it as to render payment by means thereof impossible, and an act for that purpose would be inoperative as to existing debts.<sup>5</sup>

Reasonable limitation laws a State may always pass, and make them applicable to existing contracts.<sup>6</sup> So the State may make and enforce insolvent laws when there is no national bankrupt law in existence, and under these may discharge debtors from further liability on their con-

<sup>1</sup> *McCracken v. Hayward*, 2 How. 608.

<sup>2</sup> *Barings v. Dabney*, 19 Wall. 1.

<sup>3</sup> *Mundy v. Monroe*, 1 Mich. 68.

<sup>4</sup> *Edwards v. Kearzey*, 96 U. S. Rep. 595.

<sup>5</sup> *Von Hoffman v. Quincy*, 4 Wall. 535 ; *Galena v. Amy*, 5 Wall. 705. This principle will apply when the corporate charter which existed when the debt was created has been taken away, and a new one substituted. *Broughton v. Pensacola*, 93 U. S. Rep. 266.

<sup>6</sup> *Bell v. Morrison*, 1 Pet. 351 ; *Terry v. Anderson*, 95 U. S. Rep. 628.

tracts on such terms and conditions as shall be reasonable. But such laws can only be applied to contracts subsequently made within the State, and between residents thereof.<sup>1</sup>

*Contracts of Guaranty.* — Contracts of suretyship or of secondary liability are as much within the protection of the Constitution as are the principal contracts which they secure, or on which they depend. Therefore, where the law makes stockholders in a corporation liable for the corporate debts, the liability, so far as existing debts are concerned, is one which cannot be taken away or reduced by a change in the law.<sup>2</sup> But penalties imposed by statute may be released by statute at any time before they are actually recovered.<sup>3</sup>

*Objectionable Considerations.* — The fact that a contract had its origin in a consideration now recognized as immoral and insufficient is immaterial, provided it was sufficient under the law at the time. Therefore, contracts for the purchase price of slaves were enforced after emancipation, notwithstanding the State by its constitution had provided that they should not be; the States having no more power to impair the obligation of a contract by constitutional provision than by any other law.<sup>4</sup>

*Adding to Contracts.* — It is as incompetent to import new terms into a contract as it is to take away or detract from the force of those already there. But this point will receive some attention hereafter.

*Is Congress restrained?* — That Congress should not have

<sup>1</sup> *Ogden v. Saunders*, 12 Wheat. 273; *Baldwin v. Hale*, 1 Wall. 223.

<sup>2</sup> *Ochiltree v. Railroad Co.*, 21 Wall. 249.

<sup>3</sup> *Confiscation Cases*, 7 Wall. 454; *United States v. Tynen*, 11 Wall. 88.

<sup>4</sup> *White v. Hart*, 13 Wall. 646. See *Delmar v. Insurance Co.*, 14 Wall. 661; *Marsh v. Burroughs*, 1 Woods, 463; *Swain v. Seaman*, 9 Wall. 254.

been prohibited from impairing the obligation of contracts, as the States were, may well excite some surprise. It was certainly never intended that Congress under any circumstances should exercise that tyrannical power, and it probably never occurred to any one as possible that it would ever attempt to do so. Should it, however, attempt it, in the case of private contracts, the act may well be held not to be legitimate legislation, and therefore incompetent and void.<sup>1</sup> But in respect to contracts by the government itself, so long as they remain executory, if it shall choose not to perform them, there can be no redress. A government cannot be compelled to pay its debts against its will by any process short of war or of forcible reprisal. And Congress may indirectly impair the obligation of private contracts, through its power to debase the currency and to establish and change the law of tender, as it did to some extent in the act making treasury-notes a lawful tender in payment of pre-existing debts. For such wrongs only the political remedies can be available.

*Miscellaneous Cases.* — Some police regulations have been contested, as amounting to a virtual destruction of property; for example, those prohibiting the sale of spirituous or malt liquors as a beverage, and those establishing limits in cities within which buildings of wood shall not be constructed or repaired. But there is no doubt that the legislature in its discretion may establish such regulations.<sup>2</sup>

## SECTION II. — PROTECTION TO PROPERTY.

*The Constitution.* — The fifth amendment to the Constitution provides that no person shall be deprived of property

<sup>1</sup> See opinion in *Gunn v. Barry*, 15 Wall. 610.

<sup>2</sup> *License Cases*, 5 How. 504; *Commonwealth v. Intoxicating Liquors*, 115 Mass. 153; *Insurance Co. v. Brown*, 11 Mich. 265. See *Transportation Co. v. Chicago*, 99 U. S. Rep. 635.



without due process of law. This provision is a restraint upon the federal powers only. The fourteenth amendment supplements this by providing that no State shall deprive any person of property without due process of law.

*What is Property?* — That is property which is recognized as such by the law, and nothing else is or can be. “Property and law are born and must die together. Before the laws, there was no property; take away the laws, all property ceases.”<sup>1</sup> In America the law which determines what is property is for the most part the common or customary law, though to this some additions are made by statute. Whatever a man produces by the labor of his hand or his brain, whatever he obtains in exchange for something of his own, and whatever is given to him, the law will protect him in the use, enjoyment, and disposition of. The wild beast is the property of him who captures and subdues it, provided he keeps it subjected to his dominion; game belongs to him who slays it; and so on. The natural increase of domestic animals is the property of the owner of the mother, and the natural productions of the soil, as well as the crops produced by the labor of man, belong to him who owns the soil.

When an article either intrinsically or by the use to which it is put becomes prejudicial, the law may withdraw from it the attribute of property, and then any one may be at liberty to destroy it. When anything becomes a nuisance, the party incommoded may destroy it if the nuisance cannot otherwise be abated; and if the public are incommoded, the right to abate is general. Sometimes things are declared nuisances by law because of their injurious influence upon the morals of the community; as for example, lottery tickets when kept for sale, the implements by means of which games of chance are played, when kept for gambling, and intoxicating liquors when

<sup>1</sup> Bentham, Principles of the Civil Code, ch. 8.

offered for sale in violation of law. But when the wrong consists solely in the use to which an article, not a nuisance in itself, is put, the owner's property in it cannot be taken away until it has been judicially determined that a breach of the law has been committed. A private citizen cannot determine for himself that a property right in some other person has been forfeited by disobedience of law.<sup>1</sup>

*Who restrained.* — The prohibitions of the Constitution apply to all departments of government, and to all private citizens. The executive must of course always show authority of law for his action: and when this is out of his power, what he does cannot be by due process of law. All ministerial officers must show warrant for everything they assume to do in apparent disturbance of the rights of others. The judiciary, from the highest courts to the lowest, must exercise its authority within the limits permitted by law, or it will act without jurisdiction, and therefore without due process.

The validity of judicial action is tested by the one question, Was it done with jurisdiction? Jurisdiction is commonly said to be, first, of the subject-matter, and, second, of the persons concerned. The former divides itself into territorial and subjective. Every court has its territorial jurisdiction assigned to it by law, and its process is inoperative outside the prescribed limits. And within those limits the court may take cognizance of such causes of action as may be committed to it by law, and by the acts of parties having a right to bring suit. For example, the Circuit Court of the United States for the District of Delaware has a territorial jurisdiction within that State only; but to ascertain what may be the subject-matter of a suit in that court, it is necessary to consult the Constitution and the laws of the United States, and sometimes also the common law. The Constitution prescribes to what cases the

<sup>1</sup> *Fisher v. McGirr*, 1 Gray, (Mass.) 1.

jurisdiction *may be* extended ; the laws of Congress extend it to all these cases, or to less than all, as shall be deemed wise ; but these laws are made with those common-law principles in view which determine what causes of action are local, and what are transitory. Thus, the Constitution permits a citizen of another State to sue a citizen of Delaware in the United States courts ; the law of Congress authorizes the suit to be brought in the United States Circuit Court only when the amount or value in controversy exceeds five hundred dollars. But if the matter in dispute was the recovery of possession of land in another State, it could not be brought in Delaware, because such an action is local, and must be brought where the land is ; while if it was the recovery of the amount of a promissory note, it would be immaterial where the right of action arose, as such an action is always transitory ; by which is meant, that it may be brought wherever service can be obtained, if the local law permits.

Consent can never confer jurisdiction of the subject-matter of suits.<sup>1</sup> Courts are created, and their jurisdiction limited and defined, on considerations of general public policy, and parties cannot be suffered of their own discretion to modify and enlarge these limits. Therefore, where a court by law has no authority to take cognizance of a particular subject-matter in controversy, if it shall proceed to do so either party to the controversy may repudiate its action at any stage of the proceedings, and refuse to be bound by them ; and his previous consent to them, however formal, can never be an impediment to his rejecting them.<sup>2</sup> This is the conclusive reason why di-

<sup>1</sup> *Mordecai v. Lindsay*, 19 How. 199 ; *Montgomery v. Anderson*, 21 How. 386 ; *Coffin v. Tracy*, 3 Caines, (N. Y.) 128 ; *Preston v. Boston*, 12 Pick. (Mass.) 7 ; *Green v. Collins*, 6 Ired. (N. C.) 139.

<sup>2</sup> *Bostwick v. Perkins*, 4 Geo. 47 ; *Ginn v. Rogers*, 9 Ill. 131 ; *White v. Buchanan*, 6 Cold. (Tenn.) 32.

voices obtained collusively by citizens of one State in the tribunals of another, are wholly inoperative and null; for no court of one State can take cognizance of the domestic relations of another with a view to their dissolution.<sup>1</sup>

Jurisdiction of the persons of litigants is acquired by courts in the following ways: — 1. Of the plaintiff, by his voluntary institution of suit; and, 2. Of the defendant, by his being served with legal process at the commencement of suit, or by his voluntary appearance in suit without process, or after irregular service of process. This jurisdiction may always be given to courts by consent of the party, provided the subject-matter of the controversy is within their jurisdiction.

Some cases are said to proceed *in rem*, because the process which begins them is served upon the thing which is the subject of controversy, instead of upon parties, and the pleadings and other proceedings take notice of the thing in litigation, and not of those interested in it. The law or the practice of the court may require notice to be given in some form to the parties concerned before final judgment, but the jurisdiction is obtained by the original seizure or service.

*Irregularities in Judicial Action.* — When a court has acquired jurisdiction, it may nevertheless exercise it irregularly. An irregularity consists in the failure to observe that particular course of proceeding which, conformably to the practice of the court, ought to have been observed in the case. It is a general rule, that, while a want of jurisdiction renders the proceedings of a court void, an irregularity only subjects them to be avoided on a direct proceeding instituted for the purpose. The proper proceeding is either, — 1. An application to the court in which the irregularity occurred, to set aside all action based upon

<sup>1</sup> Cheever v. Wilson, 9 Wall. 108; Hoffman v. Hoffman, 46 N. Y. 30; People v. Dawell, 25 Mich. 247; Leith v. Leith, 39 N. H. 20.

or affected by it; or, 2. The removal of the case to some appellate court or jurisdiction for the correction of the error as right and justice may require. But an irregular step cannot be taken advantage of in a collateral proceeding, but must be taken to be valid, while a want of jurisdiction may always be inquired into, and the enforcement of a judgment obtained without jurisdiction can never be due process of law.

*Divesting Rights by Legislation.* — The legislature makes the laws, but cannot pass judgments or decrees, or make a law that is such in substance.<sup>1</sup> It must “govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.”<sup>2</sup> Nevertheless the general laws of the State may make different regulations for different kinds of business, and prescribe different rules for the different classes of people who compose the State. The rules of civil capacity and criminal responsibility are justly and properly made for different classes of people; for minors and adults, for males and females, for the sound in mind and the insane, for those engaged in hazardous employments and those who are not, and so on. If an employment is one which concerns the general public, and requires for its proper usefulness that it should have the unhesitating confidence of the public, — as in the cases of bankers and carriers of passengers, — it may be proper that special and even severe regulations be established to prevent the confidence being abused, and to insure that the public reliance shall be justified. To compel the observance of these under penalties is neither unjust nor unconstitutional.

<sup>1</sup> *Tyson v. School Directors*, 51 Penn. St. 9; *Gaines v. Buford*, 1 Dana, (Ky.) 481.

<sup>2</sup> Locke on Civil Government, § 142; *Griffin v. Cunningham*, 20 Grat. (Va.) 31.

*Vested Rights.* — The test of unlawful interference with property is that vested rights are abridged or taken away. Rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of a present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.

*Rights in Expectancy.* — The man who to-day erects buildings and puts in them machinery for the manufacture of some important article of common consumption, on the importation of which the law imposes a tariff duty which is practically prohibitory, may expect that this will continue in force, and that he will in consequence reap large profits from his manufactory. But he has no vested right in the general laws of his country which entitles him to insist that any one of them shall remain unchanged for his benefit;<sup>1</sup> and if the duty shall be removed, and his property rendered worthless in consequence, he is nevertheless deprived of no right. All statutory privileges depend upon this principle, and they may be taken away by changes in the general laws at any time. The privilege of exemption from arrest, exemption from taxation, exemption of property from forced sale on execution, and exemption from jury duty, are all within the principle. Even an exemp-

<sup>1</sup> "A person has no property, no vested interest, in any rule of the common law. . . . Rights of property, which have been created by the common law, cannot be taken away without due process; but the law itself as a rule of conduct may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations." — *Munn v. Illinois*, 94 U. S. Rep. 113, 134.

tion from military duty, granted by the law after full performance of duty for some previously fixed period, may be withdrawn when the exigencies of the State appear to require it.<sup>1</sup>

So the rules of descent may be changed in the legislative discretion, though thereby the expectations of living persons under the previous laws are disappointed. The living have no heirs, and the laws which provide who shall be their heirs in the event of their death are only expressive of present views of what is best, and may be changed as these views change; and no vested rights can be impaired, since no rights under these laws can vest while the owner of the estate is living. The expectation is not property; it cannot be sold or mortgaged; it is not subject to debts; and it is not in any manner taken notice of by the law until the moment of the owner's death, when the statute of descents as it then exists comes in, and for reasons of general public policy passes the estate to persons standing in certain degrees of relationship to the deceased, in preference to all others. It is not until that moment that there is any vested right in the person who becomes heir.<sup>2</sup>

So qualities annexed to estates, and to affect their enjoyment in the future, may be changed when the interests of the owners are not rendered less beneficial. Estates tail may be changed into estates in fee simple, estates in joint tenancy into estates in common.<sup>3</sup> So the expectant right of the husband to an estate by the courtesy in his wife's lands may be taken away by general legislation at any time before it has become initiate by the birth of living issue of the marriage, and the expectant right of the wife to dower

<sup>1</sup> *Commonwealth v. Bird*, 12 Mass. 443; *Swindle v. Brooks*, 34 Geo. 67; *Murphy v. People*, 37 Ill. 447; *State v. Wright*, 53 Me. 328.

<sup>2</sup> *Cooley*, Const. Lim., 4th ed., 446.

<sup>3</sup> *Holbrook v. Finney*, 4 Mass. 465; *Burghardt v. Turner*, 12 Pick. (Mass.) 534.

in her husband's lands at any time before it has passed from the condition of expectancy and become perfected by the husband's death.<sup>1</sup> The marriage gives no vested right in either of these cases.

*Trust Interests.* — Where one holds property for another, the vested right which the law regards is not that of the trustee, but of the beneficiary. It is a perfectly legitimate exercise of legislative power to convert equitable estates into legal, thereby wholly divesting the trustee of his legal ownership. The Statute of Uses<sup>2</sup> had this for its main purpose, and its general features have been re-enacted in many States of the Union, and recognized by judicial decision in others. Trusts arising by construction of law to prevent frauds are subject to a like legislative control, but with this limitation: that, as the legislature cannot adjudge that a fraud has been committed, the supposed trustee, if he claims the property, must have a right to a judicial hearing upon his claim before he can be dispossessed. And as between those who claim adversely as beneficiaries the legislature can never decide, but they must be left to litigate their conflicting claims in the courts.<sup>3</sup>

*Curative Laws.* — One method in which beneficial interests are protected by legislation is by a retrospective correction of errors and defects in conveyances. A leading case on the subject was one in which a statute was passed to validate certain leases of land which under previous judicial decisions had been declared inoperative. By the express terms of the statute it was made applicable to pending suits in which contracts of leasing might come in question. It was sustained as undoubtedly valid, though it was contested as a law impairing the obligation

<sup>1</sup> *Lucas v. Sawyer*, 17 Iowa, 517; *Noel v. Ewing*, 9 Ind. 37; *Pratt v. Tefft*, 14 Mich. 191; *Westervelt v. Gregg*, 12 N. Y. 202.

<sup>2</sup> Stat. 27 Hen. VIII. c. 10.

<sup>3</sup> *Cash, Appellant*, 6 Mich. 193; *Lane v. Dorman*, 4 Ill. 238.



of contracts.<sup>1</sup> Manifestly, it had no such effect as was pretended; it rather imported into the contract an obligation which the parties had attempted, but failed, to incorporate in it. And this is the principle on which all such laws may be sustained; they merely give legal validity to what the parties have attempted to accomplish; converting their invalid agreements into the valid conveyances which they undertook to make. Presumptively, therefore, these laws further the intent the parties had in view.

It may happen that the grantor in the invalid conveyance, when he finds the title has not been transferred, may desire to take advantage of the invalidity, and may insist that he has a vested right which the legislature cannot take away. But obviously he has in such a case no equitable right. In equity he is considered as holding for the benefit of the party to whom he undertook to convey; and, as has been well said, "Courts do not regard rights as vested contrary to the justice and equity of the case."<sup>2</sup>

This principle has been applied to the conveyances of married women, and they have been validated retrospectively, though they were so entirely void in their origin that they did not constitute even a contract, or raise an equity which could be taken notice of judicially.<sup>3</sup> The woman has no right to complain if the law which prescribed forms for her protection shall interfere when justice demands it, to preclude her taking advantage of an imperfection in her own act.<sup>4</sup>

<sup>1</sup> *Satterlee v. Mathewson*, 16 S. & R. (Penn.) 169; S. C. in error, 2 Pet. 380.

<sup>2</sup> *State v. Newark*, 27 N. J. 185, 197; *Foster v. Essex Bank*, 16 Mass. 245; *Brown v. New York*, 63 N. Y. 239; *Chestnut v. Shane's Lessee*, 16 Ohio, 599.

<sup>3</sup> *Watson v. Mercer*, 8 Pet. 88; *Underwood v. Lilly*, 10 S. & R. (Penn.) 97; *Deutzal v. Waldie*, 30 Cal. 138.

<sup>4</sup> *Goshorn v. Purcell*, 11 Ohio, N. S. 641.

If, however, the grantor in the invalid conveyance shall subsequently convey in due form of law to a *bona fide* purchaser, the previous deed cannot afterwards be corrected to his prejudice. The reason is, that he has equities equal to those of the first purchaser, and, having connected the legal title with these, his right, according to well-settled rules of the courts of equity, has become unassailable.<sup>1</sup> And if the defective conveyance was one which for any other reason was inoperative; as where the grantor assumed to convey by it contrary to conditions or qualifications which, for the benefit of others, were imposed upon his title, or in fraud of the rights of others whose representative or agent he was, it is not in the power of the legislature to validate it retrospectively, since validating it would divest equities instead of perfecting them.<sup>2</sup> An invalid will, or trust in a will, can never be helped after the testator's death, for the obvious reason that titles vest under it immediately.<sup>3</sup>

The defects in conveyances and contracts which render them inoperative arise from two causes: — 1. Defect in legal capacity in the party making them; 2. Failure to observe some legal formality in their execution. The former may arise from nonage, coverture, or guardianship, or it may be a defect of intelligent will. The disabilities which are imposed by the law itself may be removed or modified by a change in the law. The same is true of legal formalities: the statute establishes what are deemed important, and the statute may dispense with them. And the general rule is this: it is competent for the legislature to give retrospect-

<sup>1</sup> *Brinton v. Seevers*, 12 Iowa, 389; *Le Bois v. Bramel*, 4 How. 449; *Sherwood v. Fleming*, 25 Texas, 408 (Supplement).

<sup>2</sup> *Shonk v. Brown*, 61 Penn. St. 320.

<sup>3</sup> *Hilliard v. Miller*, 10 Penn. St. 326; *Greenough v. Greenough*, 11 Penn. St. 489; *Alter's Appeal*, 67 Penn. St. 341; *State v. Warren*, 28 Md. 338.

ively the capacity it might have given in advance, and to dispense retrospectively with any formality it might have dispensed with in advance.<sup>1</sup> But it can never, either prospectively or retrospectively, dispense with the act of assent, and therefore cannot validate the deed of an insane person.<sup>2</sup>

The power to correct applies to all classes of contracts. A marriage defective in formalities of execution may be validated retrospectively;<sup>3</sup> so may notes and bills issued by a corporation on which the power has not been conferred by its charter;<sup>4</sup> so may negotiable paper which is wholly or in part void for usury.<sup>5</sup> It is not an uncommon exercise of legislative power to validate the imperfect contracts of municipal corporations, whether the defect consists in a want of original power in the corporation to do what was attempted, or in neglect of proper formalities in entering into them.<sup>6</sup>

*Curing Defects in Judicial Proceedings.* — It is a well-settled principle that the legislature can never, by retrospective proceedings, cure a defect of jurisdiction in the proceedings of courts. The reason is manifest. Such proceedings being utterly void, they would acquire vitality as judicial acts, if at all, by the legislative act exclusively, and the curative act must therefore be in its nature a

<sup>1</sup> *Single v. Supervisors of Marathon*, 38 Wis. 363.

<sup>2</sup> *Routson v. Wolf*, 35 Mo. 174.

<sup>3</sup> *Goshen v. Stonington*, 4 Conn. 209.

<sup>4</sup> *Lewis v. McElvain*, 16 Ohio, 347; *Trustees v. McGaughy*, 2 Ohio, N. S. 152.

<sup>5</sup> *Savings Bank v. Allen*, 28 Conn. 97; *Thompson v. Morgan*, 6 Minn. 292; *Parmelee v. Lawrence*, 48 Ill. 331; *Woodruff v. Scruggs*, 27 Ark. 26.

<sup>6</sup> *Booth v. Woodbury*, 32 Conn. 118; *Crowell v. Hopkinton*, 45 N. H. 9; *Ahl v. Gleim*, 52 Penn. St. 432; *State v. Demorest*, 32 N. J. 528; *Coffman v. Keightley*, 24 Ind. 509; *Mills v. Charlton*, 29 Wis. 400. See *Mattingly v. District of Columbia*, 97 U. S. Rep. 687.

judgment.<sup>1</sup> But mere irregularities in judicial proceedings may always be cured retrospectively. A leading case was where a sale in a partition case was ineffectual, because the purchase was made by several, and the deed was made to one only. But it appeared that the deed was so made by mutual agreement of all, for convenience in making subsequent sales and conveyances, and a healing statute was consequently in furtherance of justice, and unobjectionable.<sup>2</sup> So execution sales have been validated where the defect consisted in an over-charge of officer's fees on the execution,<sup>3</sup> and sales by executors and guardians where various irregularities existed not affecting the substantial interests of the parties concerned.<sup>4</sup> Indeed, it is not uncommon to provide by general law that certain specified defects and irregularities occurring in such sales shall not affect them; and the right to enact such a law is undoubted.<sup>5</sup>

*Administrative Proceedings.* — The same principle applies in all administrative proceedings. For example, irregular proceedings in taxation may be made good retrospectively,<sup>6</sup> but subject to this limitation, that there must originally have been in the officers jurisdiction to impose the levy; and they must have made it in accordance with the general principles which underlie the power to tax.<sup>7</sup> An

<sup>1</sup> *McDaniel v. Correll*, 19 Ill. 226; *Denny v. Mattoon*, 2 Allen, 361; *State v. Doherty*, 60 Maine, 504.

<sup>2</sup> *Kearney v. Taylor*, 15 How. 494. See *Boyce v. Sinclair*, 3 Bush (Ky.) 261.

<sup>3</sup> *Beach v. Walker*, 6 Conn. 190.

<sup>4</sup> *Davis v. State Bank*, 7 Ind. 316; *Lucas v. Tucker*, 17 Ind. 41.

<sup>5</sup> *Toll v. Wright*, 37 Mich. 93. This whole matter of Retroactive Laws is fully and carefully examined in Mr. Wade's treatise on that subject, which was received too late to be made use of in this work.

<sup>6</sup> *Butler v. Toledo*, 5 Ohio, N. S. 225; *Iowa, &c. Co. v. Soper*, 39 Iowa, 112; *Astor v. New York*, 62 N. Y. 580.

<sup>7</sup> *People v. Lynch*, 51 Cal. 15.

instance of the failure to observe these principles would be a levy without an apportionment among the subjects taxed ; an arbitrary levy being no tax at all. And a tax sale effected by fraud is incapable of confirmation.<sup>1</sup> Defects in execution or mortgage sales, or in the execution of any statutory power, may be cured under the same rules.<sup>2</sup> And so may irregularities in the proceedings of public and private corporations.<sup>3</sup>

*Rights of Action.* — It is not competent by legislation to bring into existence and establish against a party a demand which previously he was neither legally nor equitably bound to recognize and satisfy.<sup>4</sup> On the other hand, it is not competent for the legislature to deprive a party of a right of action accruing to him under the rules of the common law, or in accordance with its principles. Therefore the right to redress for illegal arrests cannot be taken away ;<sup>5</sup> neither can the right to recover back taxes illegally exacted,<sup>6</sup> nor the right to have a void tax sale set aside.<sup>7</sup> Nor can conditions to the exercise of the right be imposed, which are of a nature to render it practically of no value.<sup>8</sup> But an action for a forfeiture, given by and depending on statute, will be gone if, before recovery, the statute is repealed without expressly saving it.<sup>9</sup>

<sup>1</sup> Conway v. Cable, 37 Ill. 82.

<sup>2</sup> Allen v. Archer, 49 Me. 346 ; Commonwealth v. Marshall, 69 Penn. St. 328.

<sup>3</sup> Thompson v. Lee County, 3 Wall. 327 ; Mitchell v. Deeds, 49 Ill. 416 ; State v. Guttenburg, 38 N. J. 419.

<sup>4</sup> Medford v. Learned, 16 Mass. 215 ; Albertson v. Landon, 42 Conn. 209 ; People v. Supervisors, 43 N. Y. 130 ; Ohio, &c. R. R. Co. v. Lackey, 78 Ill. 55.

<sup>5</sup> Johnson v. Jones, 44 Ill. 142 ; Griffin v. Wilcox, 21 Ind. 370.

<sup>6</sup> Hubbard v. Brainerd, 35 Conn. 563.

<sup>7</sup> Wilson v. McKenna, 52 Ill. 43.

<sup>8</sup> McFarland v. Butler, 8 Minn. 116 ; Wilson v. McKenna, 52 Ill. 43.

<sup>9</sup> Ante, p. 313 ; Miller v. White, 50 N. Y. 139 ; Breitung v. Lindauer, 37 Mich. 217.

A statute of limitation takes away no right of property. Such a statute prescribes a reasonable time within which a party claiming legal rights which another withholds shall commence legal proceedings for their enforcement, and it withdraws the privilege of suing if the time is suffered to elapse without action.<sup>1</sup> This is a proper and reasonable regulation of a right; not a denial of it.<sup>2</sup> And when the time limited by the statute has been suffered to elapse without suit, so that the right of action is gone, it is not competent to revive it by retrospective legislation, since this would be equivalent to creating a new demand.<sup>3</sup> But all limitation acts must allow to claimants a reasonable opportunity to assert their rights in court, and one entirely and manifestly unreasonable in the time it gives is void.<sup>4</sup>

It is a rule of construction, that a statute of limitation does not apply to suits instituted by the State itself, unless it is so provided in express terms.<sup>5</sup> And state statutes cannot limit suits by the United States.<sup>6</sup>

*Remedies.* — The power to provide remedies for all civil wrongs, and to change them when found ineffectual, or when others shall promise to be more effectual, is and must be continuous. The citizen has no vested right to any particular remedy, and the State may therefore take away at

<sup>1</sup> *Bell v. Morrison*, 1 Pet. 351.

<sup>2</sup> *Bell v. Morrison*, 1 Pet. 351; *State v. Jones*, 21 Md. 432; *Pitman v. Bump*, 5 Oreg. 17.

<sup>3</sup> *Brent v. Chapman*, 5 Cranch, 358; *Lockhart v. Horn*, 1 Woods, 628; *Reformed Church v. Schoolcraft*, 65 N. Y. 134; *Atkinson v. Dunlap*, 50 Me. 111; *Yancy v. Yancy*, 5 Heisk. 353; *Thompson v. Reid*, 41 Iowa, 48; *Rockport v. Walden*, 54 N. H. 167; *Hicks v. Steigleman*, 49 Miss. 377; *Horbach v. Miller*, 4 Neb. 31; *Bradford v. Shine*, 13 Fla. 393.

<sup>4</sup> *Pereles v. Watertown*, 6 Biss. 79; *Hart v. Bostwick*, 14 Fla. 162; *Berry v. Ramsdell*, 4 Met. (Ky.) 292; *Ludwig v. Steward*, 32 Mich. 27.

<sup>5</sup> *Gibson v. Chouteau*, 13 Wall. 92.

<sup>6</sup> *United States v. Hoar*, 2 Mason, 311.

discretion those it provides, and substitute others which shall apply to wrongs already committed as well as to those which may be committed thereafter.<sup>1</sup> The exceptions to this general statement are, that the remedy given must be one which recognizes and gives effect to the obligation of the contract when the wrong grows out of non-performance of contract,<sup>2</sup> and it must in any case be a remedy calculated to give redress, and not merely colorable.<sup>3</sup> But no right in property is violated, and no wrong done, when a new or additional remedy is given for a right or equity previously in existence, and not sufficiently provided for before. This often becomes important to the accomplishment of effectual justice.<sup>4</sup>

An alteration in the rules of evidence is often one of the most serious modifications of remedies; but the power in the legislature to make it is undoubted, and the changes may be made to apply in the investigation of causes of action previously accruing.<sup>5</sup> So the burden of proof may be changed from one party to the other by legislation; as has often been done by statutes which make a deed given on the sale of lands for taxes *prima facie* evidence of a complete title in the grantee, whereas before such statutes the grantee would be compelled to make out his *prima facie* case by showing that the proceedings anterior to and upon the sale were regular.<sup>6</sup> The statutes making defective rec-

<sup>1</sup> Railroad Co. v. Hecht, 95 U. S. Rep. 168; Tennessee v. Sneed, 96 U. S. Rep. 69.

<sup>2</sup> McCracken v. Hayward, 2 How. 608; Gantley's Lessee v. Ewing, 3 How. 707; Bronson v. Kenzie, 1 How. 311.

<sup>3</sup> Oatman v. Bond, 15 Wis. 20; Walker v. Whitehead, 16 Wall. 314.

<sup>4</sup> Hope v. Johnson, 2 Yerg. (Tenn.) 123; Danville v. Pace, 25 Grat. (Va.) 1; Bartlett v. Lang, 2 Ala. (N. S.) 401.

<sup>5</sup> Ogden v. Saunders, 12 Wheat. 213, 249; Webb v. Den, 17 How. 577; Rich v. Flanders, 39 N. H. 304; Gibbs v. Gale, 7 Md. 76.

<sup>6</sup> Sprague v. Pitt, McCahon, (Kan.) 212; Callanan v. Hurley, 93 U. S. Rep. 387; Hand v. Ballou, 12 N. Y. 541.

ords of conveyances evidence, notwithstanding the defects, is a further illustration of legislative power in this regard.<sup>1</sup> Such laws presumptively wrong no one. They provide such method of investigating the truth as seems likely to be most effectual and just for the particular cases mentioned, and they preclude no one from establishing his rights. A statute which should undertake to establish conclusive rules of evidence, whereby a party might be excluded from any opportunity to show the facts, on the affirmative presentation of his adversary's case, would be nothing short of a statute of confiscation, and manifestly in violation of constitutional right.<sup>2</sup> In saying this we except all those cases to which the principle of estoppel may be justly applied; that principle being that a party shall be precluded from showing a state of facts differing from that which by his own conduct or assurances he has induced another to believe in and act upon, when the effect would be to deceive and defraud the party so acting. This is a valuable and just principle recognized by the common law and in equity.

*Betterment Laws.* — Those laws which charge a man's land with a lien in favor of one who, while holding it adversely in good faith, has expended his money in improvements upon it, seem at first view to be laws creating demands for the improvement of one's lands against his will; but as they only recognize an equity to the payment for benefits which he must appropriate when he recovers his land, they are not unjust and not unconstitutional.<sup>3</sup> All such laws give the owner the option to pay for the improvements and take the land, or to abandon the land to the occupant, and recover its value without the improve-

<sup>1</sup> *Webb v. Den*, 17 How. 577.

<sup>2</sup> *Wright v. Cradlebaugh*, 3 Nev. 341; *Groesbeck v. Seeley*, 13 Mich. 329; *East Kingston v. Towle*, 48 N. H. 57.

<sup>3</sup> *Whitney v. Richardson*, 31 Vt. 300; *Ross v. Irving*, 14 Ill. 171.



ments; which is as much as in justice he can claim. It would not be competent to make him personally liable for the improvements.<sup>1</sup>

*Sales for Taxes.* — Taxes may always be levied through administrative proceedings, the assessors exercising *quasi* judicial authority in so doing. This is due process of law for such cases.<sup>2</sup> The collection of taxes may be enforced by suits, by sale of property, or by forfeiture for non-payment or for attempts to evade the law. Where the tax is a personal or property tax, it is most commonly collected by means of a seizure and sale of property. The general rule is, that in proceedings for this purpose the officers must follow the law with some strictness, and comply with all those provisions which are enacted for the protection of the person taxed.<sup>3</sup> For the collection of imposts and excise taxes the United States has always made provision under which forfeitures may be imposed for evasions of the law. The forfeitures sometimes extend, not merely to the property or thing in respect to which the tax is imposed, but to the building or ship which has been made the instrument of accomplishing the fraud upon the revenue. Forfeitures are judicially declared, and, as they accrue at the time when the illegal act was committed, it is held that the judgment relates back to that time, and will cut off the right of a subsequent *bona fide* purchaser.<sup>4</sup>

### SECTION III. — THE EMINENT DOMAIN.

*The Constitution.* — In the fifth amendment to the Constitution the fact is recognized that in some cases the ne-

<sup>1</sup> Childs *v.* Shower, 18 Iowa, 261; McCoy *v.* Grandy, 3 Ohio, N. S. 463.

<sup>2</sup> Cruikshanks *v.* Charleston, 1 McCord, (N. C.) 360; Weimer *v.* Bunbury, 30 Mich. 201, 212.

<sup>3</sup> Stead *v.* Course, 4 Cranch, 403; Williams *v.* Peyton, 4 Wheat. 77.

<sup>4</sup> Henderson's Distilled Spirits, 14 Wall. 44. See United States *v.* The Reindeer, 2 Cliff. 57.

cessities of the government must override the rights of private ownership, and compel the surrender of specific private property to the public use. To prevent oppression in such cases, it is provided that private property shall not be taken for public use without just compensation. This is a declaration of the underlying principle of the law of eminent domain.

*Definition.* — The eminent domain may be defined as the lawful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand. The most important of these public rights consist in the use of the public highways, by land or by water, and to participate in the public fisheries. Highways and other public conveniences, however, must be provided by the State in the exercise of the eminent domain; and as the legal controversies respecting its principles usually arise in connection with appropriations for these purposes, the right itself is often spoken of and treated as if it were restricted to such cases.

*State and Nation.* — As between the United States and the several States, the regulation and protection of private rights, privileges, and immunities belongs primarily to the States, and the States are expected to make provision for the conveniences and necessities of public travel, and for the other wants of the general public, or of the State itself, which are commonly supplied under this right. The eminent domain, therefore, pertains in general to the States, not to the United States. Nevertheless, for all national purposes it is in the United States, and the government may exercise the power of appropriation as an attribute of the national sovereignty.<sup>1</sup> In the Territories the general

<sup>1</sup> *Kohl v. United States*, 91 U. S. Rep. 367.

right belongs to the United States, but it is within the ordinary compass of territorial legislative power to exercise it for local purposes. When the Territory is admitted into the Union as a State, the right passes with all its incidents to the new sovereignty.<sup>1</sup> Among these incidents is the right to the sea-shore below the line of private ownership.<sup>2</sup>

*Legislation essential.* — But although the right is inherent in sovereignty, it lies dormant until legislation is had, defining the occasions, methods, conditions, and agencies under and by means of which it may be exercised. And as an exercise of the right in the appropriation of private estates against the will of the owners is a severe instance of governmental convenience displacing private ownership, the rule is general that the legislation which permits it must be strictly construed and strictly followed, and that every precedent form or ceremony which by law is made a condition to a completed appropriation, must be had or observed before the right of the government will be perfected, and the right of the citizen appropriated.<sup>3</sup>

*Distinguished from Taxation.* — Taxation takes property from the citizen for the public use, but it does so under general rules of apportionment and uniformity, so that each citizen is supposed to contribute only his fair share to the expenses of government, and to be compensated for doing so in the benefits which the government brings him. What is taken under the right of eminent domain, on the other hand, is something exceptional, — some particular parcel or item of property of which the government has special need. The case, therefore, is not one in which there can be any apportionment of the burden as between

<sup>1</sup> *Weber v. Harbor Commissioners*, 18 Wall. 57.

<sup>2</sup> *Pollard's Lessee v. Hagan*, 3 How. 212.

<sup>3</sup> *Nichols v. Bridgeport*, 23 Conn. 189; *Burt v. Brigham*, 117 Mass.

the citizen whose property is taken, and the body of the community, and compensation to him of a pecuniary nature must therefore be made. Equalization in any other mode is not possible.

*The Purposes.* — The purposes for which the right of appropriation may be exercised must be determined by the needs of the government, and be declared by law. The United States, in the exercise of the powers conferred upon it by the Constitution, may construct fortresses, light-houses, piers, docks, military roads, public buildings, &c., and for these or any other constitutional purpose may have need of land or material which the owner refuses to sell, or for which he demands an extortionate compensation. Any such purpose is within the reason of the right, and may be supplied by means of its exercise. The State provides for the ordinary highways, and for other state and municipal purposes, under a similar necessity, and under the same right. The limitation in either case must be this: that the purpose must be public, and must be one which falls within the proper sphere of the government undertaking to make provision for it. The United States must judge of its own needs, and make provision for them, and the State must in like manner judge of and provide for its own: neither can exercise this right for the benefit of the other.<sup>1</sup>

But though the appropriation must be made for some public use, it is not indispensably necessary that it be made to the State or the nation itself. When the need provided for is municipal, as where it is for a city street or park or public building, the land will be taken to the corporate body having need of it, not to the State, and the corporate body may be permitted to be the actor in making the appropriation, and be clothed with the power of the State for the purpose. In some cases even a private

<sup>1</sup> Kohl v. United States, 91 U. S. Rep. 367.

corporation, when it has been created by law to supply some public convenience, may be endowed with the power of appropriation for the purpose, and is regarded as a public agent in exercising it. A familiar instance is that of a railroad company empowered by legislation to appropriate a right of way to its own use.<sup>1</sup>

The line of distinction between the purposes that are to be deemed public and those which cannot be, is not very accurately drawn by the authorities. It is certain that no government can under any circumstances divest one citizen of his estate for the benefit of another, — the public interest being in no way involved, — and this whether compensation is made or not.<sup>2</sup> The case of a private road is one of this sort, and it can only be allowed where the people by their constitution have assented to it.<sup>3</sup> Nor in any case is the fact that the public will be incidentally benefited by the appropriation sufficient to supply the power, when the taking is purely for a private purpose.

There are some cases, however, in which the improvement of private estates, where it cannot be accomplished without the appropriation of an easement for the purpose over the lands of others, has been deemed so far a matter of public interest as to bring the case within the principle of the law of eminent domain. Thus, it is held in some States that lands may be appropriated by flooding, to enable the owners of mill sites to improve them for manufacturing purposes,<sup>4</sup> and in Pennsylvania it seems that a private road may be laid out over the lands of an unwilling

<sup>1</sup> *Beekman v. Saratoga, &c. R. R. Co.*, 3 Paige, (N. Y.) 45, 73; *Secomb v. Railroad Co.*, 23 Wall. 108.

<sup>2</sup> *Tyler v. Beacher*, 44 Vt. 648; *Bloodgood v. Mohawk, &c. R. R. Co.*, 18 Wend. (N. Y.) 9.

<sup>3</sup> *Taylor v. Porter*, 4 Hill, (N. Y.) 140; *Clark v. White*, 2 Swan, (Tenn.) 540; *Consolidated Cannel Co. v. Cent. Pac. R. R. Co.*, 51 Cal. 269.

<sup>4</sup> *Mills, Em. Dom.*, §§ 287, 288; *Cooley, Const. Lim.*, 4th ed., 666-669.

owner, to enable one who has a coal mine to obtain access to and develop it.<sup>1</sup> It may be said of these cases, that the easement taken enables dormant wealth, in the development of which the whole public is concerned, to be brought into use and added to the general wealth of the State; and the same may be said where large swamps or other low lands owned by individuals are drained and made available by means of ditches cut across the lands of others, under the right of eminent domain.<sup>2</sup> But these are extreme cases, and stand upon disputed ground. Lands may always be appropriated, however, for the drainage of others with a view to the benefit of the public health.<sup>3</sup>

*Adjudging the Necessity.* — The State may not only determine upon the necessity of some appropriation for its needs, but it may also decide for itself whether it is needful to take any particular estate or parcel of property for the purpose. It is not of right that the property owner shall be heard upon this question, since, if it were, the public purpose might be defeated by an adjudication against the necessity. This is so improbable, however, that it is not uncommon to provide by law that the necessity shall be passed upon by a jury or by commissioners. When a corporation is permitted to make an appropriation, it may also be empowered to judge of the necessity, where other provision is not made by the constitution.

*What may be taken.* — The property which the Constitution protects is anything of value which the law recognizes as such, and in respect to which the owner is entitled to a remedy against any one who may disturb him in its enjoyment. It is immaterial whether the property be tangible or intangible, — whether the interest in it be permanent or

<sup>1</sup> *Harvey v. Thomas*, 10 Watts, (Penn.) 63.

<sup>2</sup> *Matter of Drainage of Lands*, 35 N. J. 497; *Talbot v. Hudson*, 16 Gray, (Mass.) 417.

<sup>3</sup> *Reeves v. Treasurer, &c.*, 8 Ohio, N. S. 333.

merely temporary. A franchise is the subject of appropriation equally with land, and the interest of the owners in it is also equally protected.<sup>1</sup> So the complete and exclusive possession of his estate is assured to every owner as much as is the fee itself, and he may defend himself against any trespass upon it, or any encroachment not made under the constitutional conditions. Therefore a telegraph company cannot set its poles along the line and upon the right of way of a railroad, until it shall first have obtained permission, or made lawful appropriation of the land for the purpose.<sup>2</sup> So there is an appropriation of property where its value is taken, either wholly or in part, by something done or set on foot at a distance; as where, by means of a dam across a water-course, one's land is flooded with drift-wood, or sediment,<sup>3</sup> or where, by the occupation of the street in front of his lot, he is cut off from his means of access to it;<sup>4</sup> or where, after the State has granted an exclusive privilege, it grants another which competes with it,<sup>5</sup> and the like.

*Incidental Injuries.* — It is a general rule, however, that the mere fact that one suffers incidental loss in consequence of the undertaking and construction of a public work, where nothing to which he has a legal right is actually appropriated, can never give him a claim to compensation. The following are illustrations. A second toll-bridge constructed under legislative authority near the first may destroy its value; but unless the owner of the first had an exclusive franchise, he has no legal ground of complaint. So a railroad may render a turnpike valueless, but

<sup>1</sup> Richmond, &c. R. R. Co. v. Louisa, &c. R. R. Co., 13 How. 71.

<sup>2</sup> Atlantic, &c. Tel. Co. v. Chicago, &c. R. R. Co., 6 Biss. 158.

<sup>3</sup> Pumpelly v. Green Bay Co., 13 Wall. 166.

<sup>4</sup> Lackland v. Railroad Co., 31 Mo. 180.

<sup>5</sup> Central Bridge Corp. v. Lowell, 4 Gray, (Mass.) 474; Commonwealth v. Penn. Canal Co., 66 Penn. St. 41.

when the turnpike itself is not taken, no property is taken; there is merely a new competition in business to the injury of the party least competent to transact it profitably.<sup>1</sup> So a dam constructed under legislative authority may have its value destroyed by the subsequent construction of a canal under like authority; but where the last grant is not inconsistent with the first, so that no contract is violated, it is equally true that no property is appropriated.<sup>2</sup> Loss to some one is almost a necessary incident of any exercise of governmental authority: a tax law cannot be changed, a street opened or graded, a county-seat changed, a new town set off from an old, or anything else of public importance done, without injurious consequences falling upon some one. But the loss is *damnum absque injuria*, as it is also in the instances above recited.<sup>3</sup>

*The Interest appropriated.* — When land is taken for a public use the fee is not in general appropriated, but an easement only is taken, and the easement consists in the right to make use of the land for the particular purpose, and for no other. When under such circumstances the use ceases, the owner is restored to his former estate. If in the mean time it becomes important to make use of the land for any other public use than that to which it was devoted by the first appropriation, and this is done, the original owner becomes entitled to a new assessment of compensation. The reasons for this are, first, that the new use may affect the right of reverter; but, second and principally, it introduces new elements, which might have affected in an important manner the compensation originally awarded had they then been present. It will be seen as we proceed that every inquisition of damages is

<sup>1</sup> Kenneth's Petition, 24 N. H. 139; Lafayette P. R. Co. v. New Albany, &c. R. R. Co., 13 Ind. 90.

<sup>2</sup> Susquehanna Canal Co. v. Wright, 9 W. & S. (Penn.) 9.

<sup>3</sup> See Transportation Co. v. Chicago, 99 U. S. Rep. 635.



made with the use in view to which the land is to be devoted: one use may bring with it important compensations in benefits, while another may be specially injurious far beyond the value of the land taken, and a new use may entirely reverse these conditions. For example, if a common highway is opened through agricultural lands, it will more often be beneficial to the premises than hurtful, and the award of damages to the owner will often be merely nominal. But if the highway is then converted into a canal, the injury is likely to be of a character to render the former assessment wholly inadequate. The general rule therefore is, that, when an appropriation of land is made for one purpose, the owner retains such an interest therein as entitles him, when the same land is taken for a new use, to a new estimate of his injury in view of the new conditions which the new use introduces, and of their effect upon his estate generally. And this right does not depend upon the question whether the fee was at first taken, or only an easement. The rule, however, can only apply where the first appropriation was of a part only of the parcel of land; for if all was taken, the change in the use cannot concern the former owner.

*New Uses.* — It is not a new use if a common highway is taken for a plank road or a turnpike; the public being at liberty to avail themselves of its advantages in the same way as before, and the tolls exacted being only a substitute for the tax which must before have been levied for repairs.<sup>1</sup> But when a highway or toll-road is taken for the purposes of a railway, the use is so different, and the probable influence upon the value of adjoining estates so different also, that it is justly held that a further property of the owner is appropriated when the change is made.<sup>2</sup> At least, he has a right to an inquisi-

<sup>1</sup> *Murray v. County Commissioners*, 12 Met. (Mass.) 455.

<sup>2</sup> *Imlay v. Union Branch R. R. Co.*, 26 Conn. 249; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526.

tion, to determine whether or not he suffers further injury. The case would be still plainer, if possible, were the highway taken for a canal. But the case of a city street afterwards appropriated to the purposes of a horse railway is different. When land is taken for a city street, it is taken for all the purposes to which city streets are usually devoted: for sewers, and the laying of water, gas, and steam pipes, as well as for passage of men and teams, and for all such improved methods of passage and carriage as may come into use, and as may not be inconsistent with the enjoyment of the way for other customary uses. A horse railway is such an improved method, and it is permitted for the reason that it tends to relieve the street, instead of further burdening it.<sup>1</sup> Similar to this, in some respects, is the case of a rafting and booming company on a natural water-course in the lumbering regions, whose operations under authority of law may constitute a virtual monopoly of the stream; but they are allowed, because they facilitate this peculiar navigation instead of hindering it, subject, nevertheless, to responsibility to the owners of the banks, should they cause them to be flooded or otherwise injured,<sup>2</sup> and to any persons lawfully using the stream whom they might needlessly or unreasonably obstruct or inconvenience.

The rules respecting a second assessment are applicable to cases where the land was originally dedicated to a public purpose, as well as to those of a compulsory taking.

*Assessment of Compensation.* — It is not an uncommon provision of law, that, when land is to be taken for the public use, an attempt shall first be made to agree with the owner upon compensation, and when this fails the compensation may be assessed by some statutory tribunal. It

<sup>1</sup> *Elliott v. Fair Haven, &c. R. R. Co.*, 32 Conn. 579; *People v. Kerr*, 27 N. Y. 188.

<sup>2</sup> *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308.

is not competent for the State to decide for itself what compensation shall be made, for the manifest reason that the question is one in respect to which the State and the property owner occupy antagonistic positions; and for the State to decide it would be to make itself judge in its own cause, in violation of an inflexible principle of constitutional right.<sup>1</sup> The duty of the State is to provide an impartial tribunal, which can judge of the injury that will be sustained, and before which the land-owner shall be at liberty to appear and present his proofs in the customary modes.<sup>2</sup>

The rule by which compensation shall be measured is not the same in all cases, but is largely affected by the circumstances. If what is taken is the whole of what the owner may have lying together, it is clear that he is entitled to its value, judged by such standards as the markets and the opinions of witnesses can afford, and that this, except in extraordinary cases, must be the full measure of his injury. This rule will apply in all cases where the whole of any article or thing of value is taken, and not a part only, to the injury of what remains. But when less than the whole is taken, the question of just compensation becomes a question of damages merely; and in determining these the benefit to what is left may be offset against the damages, and the question to be determined will be to what extent the owner's interest in that a part of which is to be taken will be diminished thereby. If the taking is of some right in an easement, or exclusive franchise, or other intangible right, the question will also be one of damages merely. But in any case mere incidental injuries or benefits, like those suffered and received by the com-

<sup>1</sup> Co. Lit., § 212; *Dimes v. Proprietors, &c.*, 3 House L. Cas. 759; *Rich v. Chicago*, 59 Ill. 286.

<sup>2</sup> *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 571; *Powers's Appeal*, 29 Mich. 504.

munity at large, — such as the greater facility in travel when the taking is for a railway, or the greater danger of fright to teams when making use of the highway, — are to be excluded altogether from the computation.<sup>1</sup> It may possibly happen that an assessment on these principles will award to the owner nothing, but he nevertheless in contemplation of law receives it in the benefits which overbalance his losses.<sup>2</sup>

*Payment.* — It is sometimes expressly provided by law, that payment shall precede appropriation. But where that is not the case, it is still believed to be essential in all cases where the appropriation is made for, and payment to be made by, a private corporation, such as a railroad or toll-road company.<sup>3</sup> But where the State takes the property for its own use,<sup>4</sup> or for the use of one of its own municipalities,<sup>5</sup> this is not essential. The reason is, that the property owner is supposed to be fully protected, in the faith and the means of the State or municipality, so that eventual payment is certain.

The party may waive his right to payment in any case, either expressly or by failing to claim it within such period of limitation as may be established by law.<sup>6</sup>

<sup>1</sup> Somerville, &c. R. R. Co. *ads.* Doughty, 22 N. J. 495; Greenville, &c. R. R. Co. *v.* Partlow, 5 Rich. (S. C.) 428.

<sup>2</sup> White *v.* County Commissioners, 2 Cush. 361.

<sup>3</sup> Powers *v.* Bears, 12 Wis. 220.

<sup>4</sup> Orr *v.* Quimby, 54 N. H. 590; White *v.* Nashville, &c. R. R. Co., 7 Heisk. (Tenn.) 518.

<sup>5</sup> Commissioners *v.* Bowie, 34 Ala. 461; Talbot *v.* Hudson, 16 Gray, (Mass.) 417.

<sup>6</sup> Matter of Albany St., 11 Wend. (N. Y.) 140; Callison *v.* Hedrick, 15 Grat. (Va.) 244.

## CHAPTER XVII.

## MUNICIPAL CORPORATIONS.

*Their Functions.* — The place of municipal corporations in the structure of American governments has been incidentally referred to in the preceding pages, and little further mention is important here. It is axiomatic that the management of purely local affairs belongs to the people concerned, not only because of being their own affairs, but because they will best understand, and be most competent to manage them. The continued and permanent existence of local government is, therefore, assumed in all the state constitutions, and is matter of constitutional right, even when not in terms expressly provided for. It would not be competent to dispense with it by statute.<sup>1</sup>

*Their Creation.* — Nevertheless there is no constitutional form or model of local government, or standard or measure of local powers; and these need to be different according to the circumstances. A city of a million of inhabitants, with boulevards, parks, water-works, docks, and other public property, may need an elaborate structure of government with extensive powers, while a very simple form and few powers may answer the purposes of a country hamlet. To determine the local needs in this regard, legislation is requisite; and the State, therefore, will create local governments, confer upon them such powers as in its wisdom may seem expedient, and prescribe such safeguards and limitations to their exercise as shall be deemed needful or prudent. The powers thus conferred the State may increase at discretion, so long as they are limited to govern-

<sup>1</sup> *People v. Hurlbut*, 24 Mich. 44; *People v. Lynch*, 51 Cal. 15.

mental matters of purely local concern, but the State may also diminish them at discretion, and may at any time abolish any particular local government and substitute another in its place. In other words, while the local community is entitled to local government, it cannot claim, as against the State, any particular charter or form of local government.<sup>1</sup>

The creation of municipal governments within the States belongs exclusively to the States. Congress may create them in the District of Columbia and the Territories. Within the Territories, however, it is customary to leave the authority with the territorial legislature.

*Duplicate Nature of Municipalities.*—Municipal corporations are sometimes spoken of as having a duplicate nature, and they certainly possess and exercise two classes of powers; the one of which pertains to them in what may be called their private capacity, and does not differ in nature from the powers exercised by other corporations, while the other pertains to their public capacity, and is purely governmental. In the one capacity the municipal corporation may acquire property for its own purposes and the benefit of its people; and it has a constitutional right to be protected in this, as any individual or private corporation has.<sup>2</sup> It may also make contracts within the limits of the powers the State has conferred, and it is entitled to exercise its own proper judgment and discretion in making such contracts, and cannot be forced by the State to contract debts against its will.<sup>3</sup> But in its public capacity

<sup>1</sup> Dartmouth College v. Woodward, 4 Wheat. 518; Barnes v. District of Columbia, 91 U. S. Rep. 540; Laramie Co. v. Albany Co., 92 U. S. Rep. 307.

<sup>2</sup> Terrett v. Taylor, 9 Cranch, 43; Pawlet v. Clark, 9 Cranch, 292; State v. Haben, 22 Wis. 660.

<sup>3</sup> Hasbrouck v. Milwaukee, 13 Wis. 37; Pope v. Phifer, 3 Heisk. (Tenn.) 682; Howell v. Bristol, 8 Bush, (Ky.) 493; Washington Avenue, 69 Penn. St. 352.

the municipal corporation is merely an agent in government, and the State will employ it as seems best, and mould and control its powers with a view to the utmost usefulness. To a large extent state duties are apportioned for performance between the local governments, and they are required to perform them within their limits, and to levy taxes for the purpose if necessary. Illustrations of state duties thus apportioned are those of maintaining local courts, and the local police force, and of making and keeping in repair the highways.<sup>1</sup> If the localities fail in these particulars, the State may coerce them; but it is inconsistent with local institutions, as they have always existed in this country, that the local community should be coerced by the State in matters of purely local convenience, or that the State should appoint officers to take charge of local affairs.

. *Legislative Powers.* — Within their proper sphere the municipalities have legislative powers, and may make by-laws and ordinances which have the force of local law. These powers they exercise under the same rules which govern state legislative authority. They cannot delegate them to individuals for exercise; they must employ them in conformity to the charter of local government; they are subject to all the restrictions which the federal Constitution imposes on the States, — such as that *ex post facto* laws and laws impairing the obligation of contracts shall not be passed; and they must restrain their action within the municipal limits. The State itself cannot so far enlarge municipal powers as to enable the local officers to burden their people with taxes for objects not of local interest.<sup>2</sup>

<sup>1</sup> See *People v. Draper*, 15 N. Y. 532; *Baltimore v. State*, 15 Md. 476; *In re Pennsylvania Hall*, 5 Penn. St. 204; *People v. Detroit*, 28 Mich. 228.

<sup>2</sup> *Wells v. Weston*, 22 Mo. 385; *Livingston County v. Weider*, 64 Ill. 427; *Mills v. Charlton*, 29 Wis. 413.





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