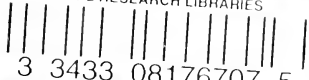
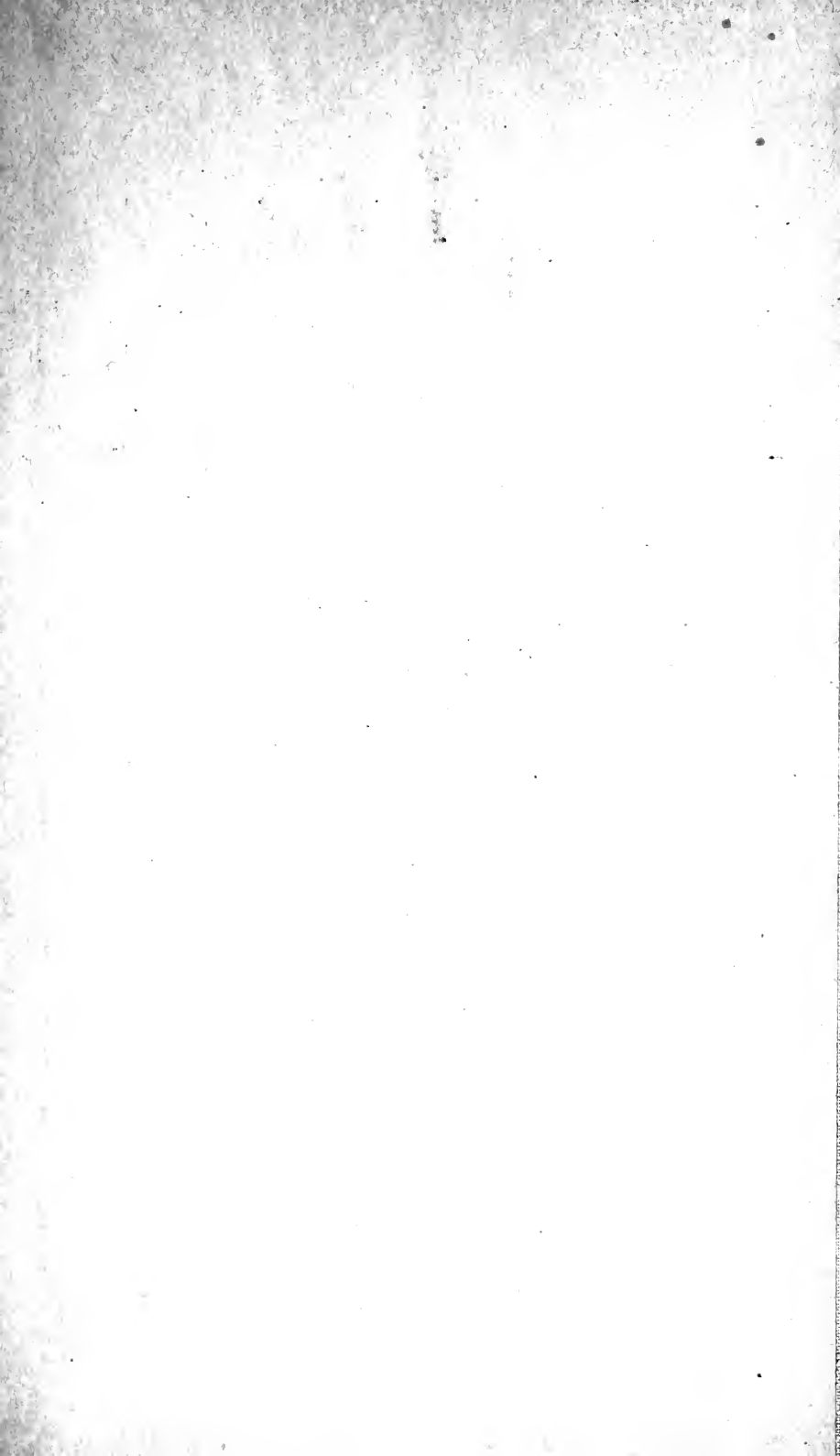


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CONSTITUTIONAL LEGISLATION  
IN THE UNITED STATES

ITS ORIGIN, AND APPLICATION TO THE RELATIVE  
POWERS OF CONGRESS, AND OF STATE  
LEGISLATURES

BY

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## P R E F A C E.

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THE accompanying work is an attempt to present in a concrete form the entire system of Federal and State legislation, as practised under a written Constitution in the United States. Its object is to expound those administrative powers which, in our dual form of representative government, are sovereign within their several spheres of action. In tracing them along their respective borderlines to points where they either concur in operation, or conflict in jurisdiction, it has been necessary to explore the channels of our constitutional jurisprudence in their affiliated relations with statutory law.

A written Constitution is a political grammar to whose rules administrative laws must conform, in order to give them judicial validity. Accordingly, the author's aim has been to exhibit the foundations of our political system ; to trace its development into a Federal government of balanced powers, and to search out the reasons which animate their exercise, as historically evolved and judicially interpreted. Under a political system framed as is ours, the most important legal forces are unquestionably those sovereign powers of Federal and State legislation which, in their governmental relations, bear to each other certain quasi-international aspects.

The government of forty-four independent States, dwelling in harmonious relations under a supervisory Federal sovereignty, would seem, therefore, to justify the treatment of Legislation as a department of jurisprudence meriting more textual consideration than it has yet received.

An hundred years of constitutional government and judicial interpretation of its limits has divested the subject of all theoretical aspects. It has passed from the sphere of experiment to that of an enduring fact, and will continue to be a living, practical problem to all students of democratic institutions. Acting upon this conviction, the present treatise has been prepared to meet the wants of those who, desiring to practise or interpret the canons of representative government in the United States, may seek to master the secrets of its architecture through a study of the labors of its founders, and to trace its genesis and development to a providential origin in the Spartan Commonwealths of our colonial period.

JOHN ORDRONAU.

NEW YORK, May, 1891.

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# CONSTITUTIONAL LEGISLATION.

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## CHAPTER I.

### SOURCES OF REPRESENTATIVE GOVERNMENT IN THE UNITED STATES.

THE Government of the United States occupies a peculiar and unparalleled position before the world. Born upon a continent which seems to have been providentially dedicated to the development of republican institutions, and resting upon the best foundations known to political architecture, the power which it exhibits, and the influence of its success upon the stability of older governments, have caused it to become at once the most interesting and the most inspiring member in the family of nations. In its short lifetime of a century it has already been subjected to the severest strains which a constitutional government can endure. Without adequate precedents to guide its action, it has passed through an infancy of legislation marked by few errors, and none of lasting consequence. In this brief period it has added to its burthens the annexation of large territories like Louisiana, Florida, Texas, California, and Alaska, and has carved out of them thirty-one sovereign States as a girdle to its original thirteen. Its rapid expansion and absorption of a continent; its equal adaptability to the wants of a population varying from five to sixty millions in a century, as shown by its

symmetrical growth in the various departments of legislation, jurisprudence, and international relations, have made it the wonder and study of statesmen and jurists. Finally, it has passed through the fiery furnace of a civil war whose gigantic proportions found no equal in the records of history, and has emerged with shoulders disburthened of the incubus of slavery, and a guerdon of the newly-cemented allegiance of all the people of all the States. It stands, therefore, unique in itself, a monument of the vitality and elasticity of the commonwealth principle, with every element of duration in its construction, and apparently free from those vicissitudes of longevity and decay which have everywhere assailed the political fabrics of nations.

Apart from the advantages of geographical position—of unlimited territory, and the fortunate inheritance of a national continuity in laws, language, and in domestic institutions derived from the mother country, much, if not all of this unparalleled progress, is due to our compensated system of legislation, which unites the broadest principles of home rule in the States—with the most definite and enumerated limitations of power in the Federal Government. We have established what the world had never before witnessed in the genesis of a Republic. Nor, but for the favoring circumstances of remoteness from the mother country, under which the English colonists were permitted to exercise themselves in self-government and to attain to a knowledge of its powers and its dangers, would they have been able to forge with such consummate skill a political union of independent parts, having over them a supervisory, yet not intermeddling government of the whole. We have a federation without a confederacy of States, and a national government, but with restricted domestic powers. This political paradox, which no previous

century could have produced, is the consummate result of race intuition, and of long preparation on the soil of English constitutional liberty.

No study of American administrative law can be complete which does not begin with an inquiry into the historical sources of representative government as they may be traced through the various stages of our judicial and political legislation. Certain cardinal facts meet us at every turn of the pages of this record. These facts constitute the foundation stones on which our political temple was built. Those who utilized them, whether as founders of constitutions or framers of laws, "built better than they knew," and with a wisdom in foresight which seemed born of inspiration. No human hands were ever so deftly guided before. And none appear to have realized more fully that in the structure of popular government the animating principle must be sought in the common law, as represented by the domestic life, the religious creed, and the political sentiment of the community whenever free to express itself.

In yielding to the combined power of these forces, legislation must be flexible, in order to obey that law of moral equivalents, which expresses the impossibility of guiding human affairs by a standard of mathematical precision. It follows, as a result, that the legal constitution of a country, representing a supreme effort of national polity, is never a spontaneous development, but always rests upon and is evolved from a social constitution which furnishes the mould into which it is ultimately cast. And since custom is the origin of law, legislation should be based upon the social standard of justice. That standard always reflects the customs and habits and opinions of the people, and contains the inner law which antedates the law. It is this

social constitution, therefore, which supplies the necessary organic life to the civil institutions that are built upon it; and thus reflects both the national conscience and the national will. What the people feel, and what they will, they sooner or later enact into positive laws. Such is the history of representative government the world over.

But government, being everywhere a tentative effort to meet present wants and to anticipate future necessities, is always so far experimental that the function of legislation, as a department of public duty, does not admit of classification among the accepted sciences. Its principles cannot be translated into definite formulæ, nor, in practice, made productive of assured results. Government, like human nature, deals constantly with independent variables. Its purpose is to adapt legal instruments to the wants of political society, and in doing this it finds itself constantly met and often thwarted by that personal equation which, whether belonging to the individual sole or the individual aggregate, represents the moral, physical, and social temper of the community. This temper is found to vary among races of men. A nameless yet potential factor of unknown origin, of indeterminate composition, and all-pervading influence, it stamps itself in indelible character upon the organization of communities as a law of universal conduct. A tendency of this kind forming a special race-instinct seems to have been everywhere a congenital factor in the genesis of human government. By lapse of time and repeated descent it has now become a political heritage, unconsciously transmitted from generation to generation.

Under such historical proofs as may easily be adduced, it is not difficult, therefore, to explain the political tendencies of a nation from its known and underlying race-

instincts; and the growth of any particular form of government is thus seen to depend very largely upon the congeniality of this form to the national character. For example the Oriental nations have always preferred monarchical and personal governments. It is probable that any attempt to graft democratic forms of political society upon them would meet with signal failure. This law of preference for absolute authority is similarly stamped upon the European nations, except where leavened by admixture with an Aryan stock. The pervading character of this admixture, by giving rise to a common political instinct of independence among the Western nations, has prepared them for every subsequent development in the freedom of government which they have accomplished. It is to the Aryan instinct of popular government beginning in household and tribe, that we owe the growth of those free States, in which the voice of the people is permitted to express itself in the framing of laws.<sup>1</sup>

From personal and despotic monarchy to constitutional monarchy is a great stride; yet it was finally accomplished by England, prepared by her race instincts and her political experience, through an act of Parliament and a dynastic revolution.

It is true that eighteen years of confusion and bloodshed were required to bring about this great conclusion; for, in theory, the British Constitution had not meanwhile been changed by statutes of a purely declaratory character, which introduced no new rights but simply repeated those of immemorial existence. If there was any alteration in principles of government it consisted in gradually transferring the substance of power to Parliament while allowing the sovereign to retain its shadow.

<sup>1</sup> "The Aryan Household," W. A. Hearn; Tacitus' "Germany," §§ 11, 12.

This seems to be the opinion of her wisest historians, and it is an opinion fully justified by events. Thus the real and practical constitution of England was unquestionably altered, although the theoretical constitution remained unchanged, through all that period of time involving the downfall of Charles, the Commonwealth of Cromwell, and the Restoration of the Stuart dynasty. No radical alteration of the constitution, by affixing metes and bounds to the domain of sovereignty, can be said to have occurred until the passage of the Act of Settlement placing William and Mary upon the throne. Then, and then only, were the boundaries of a constitutional sovereignty fixed by an impassable Rubicon.

That day witnessed the triumph of the permanent will of the people, expressed in its new constitution, over the capricious and despotic will of the sovereign heretofore speaking as the autocrat of the realm. It was the triumph of English Puritanism over a State Church which had used the secular arm of the law to enforce the doctrine of the divine right in kings and of passive obedience in subjects. The nation had fought for it, had suffered for it, had waited for it through civil war, domestic oppression, and religious persecution, during the long centuries which covered the reigns of the Plantagenets, the Tudors, and the Stuarts. At last it came, bringing with it a new order of the centuries and kindling that torch of Republican independence which has since been carried to the uttermost parts of the earth.

The Revolution of 1688, which made Parliament supreme over all by giving it the character of a convention of the people, established constitutional liberty forever among the English-speaking races. It completed the edifice of free government by compelling recognition of the doctrine of popular sovereignty. Thence-



forth no estate of the realm felt itself above the reach of the popular will. The king on his throne and the peer in the House of Lords saw the handwriting on the wall which announced the downfall of governments founded upon caste.

It was from this new order of things in the mother country that the American colonists drew their largest inspiration and hopes of free representative government. By removing to an unsettled and almost uninhabited country and carrying their charters with them, they placed themselves beyond the reach of judicial supervision at the hands of the home government, whose authority in this particular they ever afterwards disputed. Possessing also the advantage of local independence, and unfettered by the presence and oppression of a church establishment interwoven with the civil authority, there was nothing to complicate the enterprise of a government by the people for the people. The events of the succeeding century, in their variegated aspects of peace and war, wrought out as a stupendous conclusion a union of sovereign States based upon a constitution ratified by the entire people. Transcending in this respect anything similar ever before done in Greece, Rome, Holland, or England, the thirteen colonies thence became, like the banyan tree, a parent trunk from which fresh shoots have been constantly springing to form new stocks.

The legislation which, beginning with the Virginia and Plymouth colony laws, now emanates from the popular assemblies of so many sovereign States, is a monument to the wisdom of the fathers who laid the foundations of this organic unity and harmonious development in the Constitution of the United States. No statute however important, or however insignificant, but is bound to it by an invisible cord of loyalty and subor-

dination. No judicial decision from whatever court it may emanate, which touches the relations of the citizen to the State, but is compelled to find its reason and support in this great charter of our liberties. It is therefore the source and the origin of all law-making powers—the compass and the guide of forensic judgments—and the shield and protection of personal liberty under every law made in the land.

Although political institutions are the work of the human will, they have not sprung spontaneously into existence. Man being a social animal has always lived in some form of society, and government merely expresses the necessity of regulating human actions by the agency of rules based upon the varying requirements of human wants. It is needless to say that no government can be so perfectly constructed as never to need any changes in its administrative law. None, consequently, can endure without making alterations in its political codes. The system which suited its youth will not apply equally well to its mature age. Population, commerce, and the industrial arts are constantly changing and enlarging their relations to the State; and the new rights to which they give birth, or the old rights which they disturb, require fresh re-adjustments of the municipal law. All positive law is thus seen to be merely tentative with respect to the end for which it supplies the means. Hence there is a constant necessity for reviewing the past in legislation, before venturing upon an experiment which may unsettle results that experience has shown to be in the direction of the greatest good to the greatest number. This leads to a consideration at the outset of the sources of Representative government in their philosophical aspects, for it is here that we find the key to every form of democratic polity, however varied in institutional expression.

Whenever we examine the foundations of government in any country, we invariably find them resting upon either the traditions of *dogma*, or the doctrine of *convention*. In the case of dogma, sovereignty is supposed to rest upon a divine right to exercise power as a special franchise, bestowed upon either a person, a family, or tribe, and which creates at once a regal status in them and their descendants with, necessarily, an inferior status in those who are governed.<sup>1</sup> The title of sovereign, and the servile designation of subject, spring very logically out of such a relation, and the coronation oil of the ceremonial law constitutes the warrant of divine authority to rule.

Whether this titular right to govern was originally disclosed by an act of tribal conquest, or of personal prowess, matters little in the history of absolute monarchy when hereditary. The fact being accepted by any nation as a right of sovereignty in its ruler, the dogma of his title becomes thenceforth fixed and immutable.

The growth of this idea of kingship among the English-speaking races can readily be traced from the archaic days of the Saxon heptarchy, when kings were content to be known simply as a chieftain and first man among their people, down to the time when the plural pronoun "we" began to appear in royal charters, and the monarch assumed the territorial title of King of England, instead of the older title of King of the English.<sup>2</sup> The former title implied sovereign ownership of the entire country, the latter only leadership of its inhabitants. Along with this transition in titles arose the idea that crowns

<sup>1</sup> For the most exhaustive exposition of the patriarchal theory of government, consult the "Patriarcha" of Sir Robert Filmer, written in the reign of Charles 1st, and Bishop Overall's Convocation Book, written in the reign of James 1st. <sup>2</sup> Hallam's Lit. of Europe, 358.

<sup>2</sup> 1 Freeman's Norman Conquest, 82; Maine's Early Hist. of Inst. 73.

were personal property hereditary in certain families, and therefore, that election by the people was superfluous. The personal right to a crown being thus conceded, the reigning monarch, whoever he might be, was supposed to hold his title by a transmitted sovereignty which was indisputable.

Under the Tudors and Stuarts the word King became a word of conjuration. The idea which it conveyed was that of a being hedged about by a sacred mystery of authority placing him above the law. His person might be human, but his royal investiture surrounded him with a nimbus of divinity which shielded him from the errors common to our race. The established church paid him the homage of passive obedience as its temporal head—the law made him a corporation sole, and pointed to him as the fountain of honor—of justice—of equity, and in his corporate capacity declared him to be infallible, dispunishable, immortal. The King can do no wrong; the King cannot be sued; prescription runneth not against the King; the King never dies; such are the maxims with which English jurisprudence buttressed the throne.<sup>1</sup> It was only necessary to find a royal ancestor, in order to justify the right to some crown in any of his lineal descendants. History is full of examples of this kind in the claims to dynastic successions made by descendants of reigning families in Europe, on the appearance of any vacant throne. Every royal marriage, in fact, from time immemorial, has been but another effort to perpetuate in a peaceable way, a title to royalty of a questionable character. It is probable that the right of any dynasty in Europe at this day to its particular throne when closely scrutinized, will, with few exceptions, be found to rest either upon direct

<sup>1</sup> See this doctrine examined and exploded as to the U. S. Government, or any of its officers, in *Langford v. U. S.*, 101 U. S. 341.

usurpation, or upon a fiction of authority accidentally localized in a family.

These thrones are indeed held to be valid property, but under a statute of limitations which no one is bound to respect, as soon as he is strong enough to trample it under foot. Witness the seizure by Bonaparte of the thrones of Holland, Spain, Westphalia and Italy; witness the conquest of Silesia by Frederick; the partition of Poland; the restoration of the Bourbons in France, and the stupendous crime of Napoleon the Third. Such are the bloody finger-marks left on the pages of history by modern Kingship, which has never respected human rights when in pursuit of a throne.

On the other hand, when the foundations of government rest in convention or contract, there arises at once a recognition of confessed equality among men as the basis of sovereignty, and the only source whence authority and power can legitimately originate. Therefore is it that in seeking for a fundamental distinction between monarchical and republican governments, it will always be found in the difference of relations subsisting between the sovereign power and the citizen. So long as the central power emanates from the will of the citizen, the government is republican. So long as the central power is organized independently of the will of the citizen, and cannot be challenged by him in the exercise of its rights, the government is despotic. True civil liberty only exists where the citizen has the right to question any claim made against him by an appeal to a competent tribunal. The source of the particular claim does not affect his right to contest it, for even in the case of one made by the State, the jural relations arising of necessity in a republic between the citizen and the governing power, make him its peer in any issue raised between them.

There can be in fact no prerogative rights in a government based upon a constitution representing the sovereignty of the people sitting in convention. For prerogative is the power to act at one's discretion without the prescription of the laws. Under this definition a patriarchal form of government consists almost entirely of prerogative powers embodied in a ruler. But a government of laws instead of persons practically refutes all idea of prerogative, and refers sovereignty exclusively to the people. The subsequent delegation of sovereignty to various departments, known as the executive, legislative, and judiciary, further abridges the exercise of discretion in their administration, and prescribes to each, within the sphere of its appropriate agency, the limits of its authority. This constitutes in modern designation a government of limited powers. The federal and all our State governments are political bodies of this class, and each is organized under a rigid constitution. Whenever, therefore, examined in their practical operations the two salient features of such governments will always be found to consist of grants in the case of the federal government, and of limitations in the case of State governments. In the former case the people have ceded certain powers to the United States, retaining all others; in the latter case they have imposed limitations upon their own powers of making laws through their representatives. Wherever we look in the United States we find consequently no prerogative authority residing in any department of government. Each represents only so much delegated power, controlled by the sovereign will of the people.

While under rigid constitutions like our own it is seen that prerogative powers cannot exist, and need not, therefore, be guarded against, in England it has



been found necessary to recognize certain established rules in legislation as of binding obligation. These rules, known as *conventions* of the constitution,<sup>1</sup> are appealed to for determining either the limits of the exercise of the prerogative, or discretionary authority in the crown; or of the "privileges" or discretionary authority of Parliament: and although not solemnly enacted, nor even reduced to writing, are yet obeyed, because of their traditional legality, being now sanctified by prescription. This points distinctly to the fact that, in every form of government organized under a constitution, whether it be a flexible or a rigid one, there is always behind the legal sovereign a political sovereign of indisputable power. But whatever may be the origin of constitutional maxims or conventions in England, or however varied may be their source in royal concessions in judicial decrees or in parliamentary privileges, they do not rest as with us on the fundamental principle of popular sovereignty.

This difference is due to the well-recognized principle that in a representative democracy, the convention is the supreme law-making body, and which convention always exists, even though not constantly in session. It is the primary assembly of the people and the first expression of their organized sovereignty. It precedes the government in the order of its genesis, and ever remains superior to it.<sup>2</sup> Hence it is the only body capable of making or amending the organic law of the land

<sup>1</sup> Dicey, "Law of the Constitution," 351; Anson, *Do.*, 67-70, 319.

<sup>2</sup> Wherever, therefore, any number of men so unite into one society as to quit every one his executive power of the law of nature, and to resign it to the public, there, and there only is a political or civil society. . . . And this puts men out of a state of nature into that of a commonwealth, by setting up a judge on earth with authority to determine all the controversies and redress the injuries that may happen to any member of the commonwealth, which judge is the legislative or magistrate appointed by it. Locke on Civil Govt., Lib. 2, p. 89.

known as the constitution. In England there is no distinction between the convention and the government.<sup>1</sup> They are, for all practical purposes, merged into each other. As a result, the constitution has always remained feudal, and being based upon the theory of the three estates, viz., kings, lords, and commons—the people do not form an estate proper. The British constitution is thus seen to be in no sense a constitution made by the people. It is simply an act expressing the will of an omnipotent parliament. In the United States, government bears a different aspect, both in its origin and in its limitations. However the exercise of sovereignty may be distributed, all power whether State or federal, is the ultimate offspring of a convention. And every right of local authority wherever officially organized, is a concession in trust subject to withdrawal by the same power which bestowed it.

In such a nation, consequently, the status of political *subject* or his classification in any form is unknown because inapplicable, and the word *citizen* takes its place, with all the powers, privileges, and immunities which the law of the land accords to such a person. The designation of citizen, first applied to freemen living in cities, has always carried with it a character of political eminence not possessed indiscriminately by the inhabitants of a community. With us it means a qualified voter who may sit or be represented in a constitutional convention. Nevertheless, the theory which regards a constitutional convention as the basis of the organic

<sup>1</sup> In England the executive functions of government are exercised by the cabinet, which is a committee of the legislative body selected to act as an executive body. It consists of persons representing the views of the dominant party in the House of Commons, and as a committee possesses the singular power of dissolving the assembly which appointed it. In other words it is a creature with the power of destroying its creators. Bagehot on the English Const., p. 80.

law in a free State is always subject to the question of whether such a convention be a purely revolutionary body or not, since, as was witnessed in Rhode Island in 1841, and at the outbreak of our Civil War in 1861, a body of citizens may assume the functions of government outside the pale of institutional law, may constitute themselves a convention in name, and may arrogate to themselves the right of speaking for the people in their primary and sovereign capacity. By such means they may affect a fictitious omnipotence which refuses to submit its action to the test of a popular vote. This, in fact, was the history of the opening chapter in the Dorr Rebellion in Rhode Island, and later on in the greater political drama of Secession.<sup>1</sup>

As a derivative from this it follows that, in the United States, all legislative power exists in two forms, viz:—

1st. As political or sovereign power, the nation as a whole embodying the political sovereignty supreme and unlimited.

2d. As civil or delegated power, the legislature representing the legal sovereignty as bounded by constitutional limitations.

Political legislation, therefore, being among the powers of sovereignty, belongs exclusively to the people as a nation.

Civil legislation, being morally an act of agency performed by the delegates or representatives of the people, belongs to the legislature proper, and indirectly to the judiciary in the exercise of a supervisory power arising out of actual controversy. In the hierarchy of government the people frame the constitution, the constitution creates the legislature, and the legislature enacts the laws. The fountain of sovereignty is the people,

<sup>1</sup> Jameson, *Const. Conv.*, p. 8; *Luther v. Borden*, 7 Howard, 1.

and the various departments of government only ministerial agents to execute their will.

Under our various constitutions, whether federal or State, every inhabitant of the United States is either a denizen or a citizen. If made a denizen he is born by operation of law into civil life; if made a citizen he is born into a political life, and shares in the exercise of sovereignty. The passage from denizenship to a citizenship is an evolution from subjection to sovereignty; from mere obedience to the laws to allegiance to those laws, and to an equal share in the political privileges of the people, who are the makers of the laws. No citizen can owe allegiance to any particular State, but only to the United States as one people exercising sovereignty over all the States united. But he owes obedience to the laws of every State within whose borders he may be, as well as to those of the United States wherever he may be, for he carries the obligations of citizenship with him even into foreign countries. The maxim, *nemo potest exuere patriam*, finds full application here.<sup>1</sup> Allegiance, being much wider in the scope of its obligations, belongs to political and sovereign, rather than to civil or delegated jurisdiction. It is, therefore, always regarded as an individual and filial tie, and not as an official one. This is the foundation upon which many of the European governments have based their unwillingness to recognize the efficacy of our naturalization laws, in protecting their subjects when naturalized as citizens of the United States, from the operations of a military conscription on revisiting their native land. In several instances they have required special treaty provisions before admitting such protection to exist.<sup>2</sup>

<sup>1</sup> Talbot v. Jansen, 3 Dall. 133.

<sup>2</sup> U. S. Stat. at Large: "Public Treaties," title "Reciprocal Privileges of Citizens."

Inasmuch as all representative government must begin in some legislative act of the people, and as such act of primary and plenary sovereignty usually takes the form of a convention, the first question which naturally arises is that relating to the character of such an assembly. Was it a revolutionary or a constitutional convention? It is manifest that if a constitution already exists in any political society as an organic law the only constitutional convention which can legally alter, amend, or reconstruct this charter is one whose members have been elected under its provisions. Any other body of delegates sitting as a convention becomes *prima facie* revolutionary. Its acts, consequently, are a nullity. As a general proposition, therefore, it may be stated that a convention always assembles for one of three purposes, viz., either to unmake and overthrow established laws in an irregular way; to frame a new constitution, or to alter or repeal parts of an already existing one. In the former case it is a revolutionary body; in the latter it is a constitutional convention.<sup>1</sup>

But the possession of sovereignty by a community being a fact, and not always the result of law, a new constitution might become valid independent of the provisions of a former one. Thus, in the early days of the Republic, government in many of the colonies was wholly democratic. For instance, Hutchinson informs us that the Massachusetts colony, from 1640 to 1660, approached very near to an independent Commonwealth, and during this period completed a system of laws and government the plan of which they had before laid and begun to execute. In this they departed from their charter, and instead of making the laws of England the foundation of their code they preferred the laws of Moses.

<sup>1</sup> Luther v. Borden, 7 How. 1; Texas v. White, 7 Wall. 700.

Some justification for this supersedure of the laws of England may be found in the fact stated by John Adams that the settlement of New England by the English was not a national act at national expense, nor made on territory belonging to the people or crown of England; hence the colonists were at first considered more as allies than as subjects.<sup>1</sup>

Their charter, moreover, was a peculiar one and shows that there was no provision securing to the actual colonists, whether connected or not with the corporate body in England, any share in the local government. Whoever came there came as an expatriated settler, and had to submit himself to the laws of the land as there promulgated. The elective franchise was governed entirely by the will of the grantees, who made it depend upon church membership. It was in every sense a democratic despotism, for although they were forbidden to make any laws inconsistent with those of England, they nevertheless disregarded the charter in all respects in which they did not find it convenient to themselves.<sup>2</sup> Letchford, who was himself one of the few lawyers in the Massachusetts colony, tells us, in his sketch of its government, that in "the General Court were tried all actions and causes, civil, criminal, and ecclesiastical," and that the colonists claimed the combined powers of "Parliament, the King's Bench, the Common Pleas, Chancery, High Commission, and Star Chamber. They put to death, banished, fined, cut off ears, whipped, and imprisoned persons, and that without sufficient record."<sup>3</sup>

In this exercise of sovereign authority they repeated the action of the primary assemblies of the people among the Germans, who, according to Tacitus, tried capital

<sup>1</sup> Works, vol. 2, p. 2.

<sup>2</sup> 2 Story's Life, p. 177; 2 Hutch. Hist., p. 3.

<sup>3</sup> Plaine Dealing, p. 23; Mass. Hist. Coll., 3d Ser's, vol. 3; Washburn, Jud. Hist. Mass., 28.

cases and executed their own sentences.<sup>1</sup> The justification for such conduct can only be found in that executive power of the law of nature which exists in a community where authority is not yet organized into departments, because not yet delegated.

As an illustration of this may be cited the instance given by Baylies, in his *Memoir of Plymouth Colony*, of an inhabitant of Newport, in Rhode Island, who was tried for a capital offense before a *Town Meeting*, convicted, sentenced, and executed in pursuance of the judgment there pronounced.<sup>2</sup> And this case, however strange, was not even then without parallel; for England's leading historian informs us that Parliament, under the Commonwealth, occupied itself for ten days in trying the case of one James Naylor, a ranting Quaker and lunatic, whom they convicted of blasphemy and condemned to be pilloried, whipped, burned in the face, and to have his tongue bored through with a red-hot iron.<sup>3</sup> But Parliament had this defense, that it was a judicial body imitating its progenitor, the Saxon Witan, which was the Supreme Court of justice both in civil and criminal cases, while a Massachusetts town meeting was not. The authority which this latter assumed was entirely outside of the charter,<sup>4</sup> and indicated a primitive state of society in which the will of the people, however expressed, was the sovereign source of administrative law.

It is certain that the Pilgrims adopted no constitution other than the compact signed in the cabin of the *Mayflower*. This was to them a spiritual constitution revealing the interior principles of their political faith, and was intended to precede the civil laws of the colony

<sup>1</sup> De. Mor. Ger. XII.    <sup>2</sup> Vol. 1, p. 224.    <sup>3</sup> Hume, vol. 5, p. 523.

<sup>4</sup> The charter creating a *private* corporation only, and without any municipal rights, gave the colonists no authority to inflict penalties. This was the current opinion in England. Adams's *Emancipation of Massachusetts*, p. 83; *New England Jonas*, p. 5.

that were destined to be born under it ; for, previous to the year 1636, the Plymouth colony was only a voluntary association ruled by a majority rather than by fixed laws. Legislative and judicial functions were combined in the same body. Trials were had in the General Court before juries selected from the whole body of freemen. Finally, in the year 1635, it was found necessary to define the limits of power belonging to both magistrates and people.

In emerging, therefore, from these provincial forms of government it is unquestionably true, because doubtless unavoidable, that the functions of a constitutional convention in the American colonies were often exercised by purely revolutionary conventions, and this because in the overthrow of a former system of government the whole effect produced was, in its intention, revolutionary from the inception. The history of the contest over the charter of the Massachusetts Bay colony and other colonies shows that the seeds of republicanism were in the air, and long before any outward revolution had occurred the corporation of most of the New England colonies had converted itself into a Commonwealth. Political society being then disorganized and its framework entirely subverted, the people, whose delegates met in such conventions, simply exercised the inherent rights belonging to any community of colonists whose bonds of alliance with the mother country had been sundered. Accordingly, the exercise of these political rights in their highest application to human necessities found expression in the formation of an independent Commonwealth.

Nor were the American colonists wanting in precedents to justify them in the adoption of such a course. In the English revolutions of 1660 and 1688, we have notable instances of convention Parliaments illegally calling sovereigns to the throne, and subse-



quently converting themselves, through elections, into regular Parliaments, for the purpose of ratifying their own revolutionary acts. The so-called Parliaments which brought Charles II. and William III. to the throne, were wholly illegal in their origin. No writs had been issued by the sovereign, because both Charles and James had abandoned the throne and were in foreign parts; and the Prince of Orange had no inherent right to invite any Parliament to assemble, in advance of having been proclaimed Sovereign. In seeking for a reason whereby to justify such a course of procedure, it will be readily found in the fact that by the recall of Charles II. the nation showed its acquiescence in the dogma of the divine right of kings, with its consequent law of hereditary succession; while by the election of the Prince of Orange, as William III., Parliament assumed more the character of a popular convention, and laying aside divine right as a predominant title, proceeded to place a new dynasty upon the throne of Great Britain. The Declaration of Rights which William was made to subscribe before his election as king of England, was a plain announcement that Parliament had now assumed the prerogatives of sovereignty, and was empowered henceforth to make kings, as well as to unmake them. A new order of things had been inaugurated. The people now claimed a share in the selection of their rulers, and in the exercise of this new-born right they initiated the doctrine of government by consent of the governed. This overturned the traditions of centuries by making the monarch subordinate to the constitution.

“In England,” says Macaulay, “the Church had long taught the nation that hereditary monarchy alone among our institutions was divine and inviolable; that the right of the House of Commons to a share in the

legislative power was a right merely human, but that the right of the king to the obedience of his people was from above; that the Great Charter was a statute which might be repealed by those who had made it, but the rule which called the princes of the blood royal to the throne in order of succession, was of celestial origin, and that any act of Parliament inconsistent with that rule was a nullity.<sup>1</sup>

After reading this description of the relative position of king and subject in Great Britain, one cannot be surprised at the passage of the many statutes repressive of civil and religious liberty which disgraced the reigns of the Tudors and Stuarts. Unjust as is always the practice of persecution, it has not been found without some good fruits at times. The English Acts of supremacy and conformity seem to have been needed to prepare the way for that revolution in 1648, on which was built not alone the Commonwealth, but the more enduring principles of personal liberty as claimed by the Puritans, as well as the Independents. The liberties of Englishmen which were secured on the fields of Naseby and Worcester, did not perish at the Restoration. They found new defenders in every direction who compelled each succeeding monarch to acknowledge a larger authority in the people, and to promise a more sincere regard for their rights and privileges. Monarchy as a sacred status had already begun to wane. The sunshine of sovereignty which had heretofore shone upon those who had a birth-right claim to its quickening power, now began to reach the forgotten and unrepresented classes of society. The seeds of personal liberty were in the air, and the Reformation which began in the bosom of the Church, was already making itself felt in the polity of the State.

<sup>1</sup> Hist. Eng., chap. x.

We thus see why it is that dogma and convention, as essential foundations of government, are principles of antagonistic origin. Dogma pre-supposes status, or that an individual is born in a class having distinct institutional rights of a hereditary character, which every one is bound to acknowledge. It pre-supposes, therefore, that all communities are divisible into two distinct classes, meaning either preferred citizens variously ennobled in their social positions, or general masses of undistinguished and undistinguishable people, the majority of whom are without the pale of political citizenship. This is well exemplified in the case of Charles II., whose reign is made to date in English official records, from the death of his father, the whole intervening twelve years of the Commonwealth being thus treated as a nullity in legislation. The dogma of the divine right in him to rule, is thus made to contradict the chronology and evidence of history itself, in respect to the labors of those great republican statesmen who laid the corner-stone of the revolution of 1688, in the foundations of the Puritan Commonwealth.

On the other hand, convention, as a basis of government, pre-supposes contract, which implies legal capacity and political equality between the parties in interest. The modern idea of a valid contract is that of an obligation whose inviolability the law must protect regardless of the parties to it. Hence, the obligation of contracts clause in the Constitution of the United States is not limited to persons, but extends its mandate to States, cities, and private corporations as well, and it has been accordingly held in the Dartmouth College case to bind Legislatures in their action, under the doctrine that a charter of incorporation is a contract together with all its collateral stipulations.<sup>1</sup>

<sup>1</sup> Dart. Coll *v.* Woodward, 4 Wheat. 518.

Again dogma, like status, represents ancient civilization; a civilization in which all personal rights were esteemed privileges, or concessions from the sovereign or State. Convention on the other hand represents modern progress in government, as based upon personal equality in citizenship, which means the right to be governed according to the consent of the governed. This equality in citizenship rests upon individual liberty and is the offspring of Christianity alone. It nowhere antedates it in political history, nor even to-day does it exist among nations that have not accepted the Christian faith. Moreover, this personal equality before the law is the germinal principle of representative government however organized, and its jural expression is that of a contract between tenants in common of a political estate. Without the consent of the governed popular government ceases to be possible; without the consent of a majority of the governed popular government can neither be organized nor administered, and without the consent of the majority it cannot be dissolved. All departures from any of these canons of its constitution are usurpations of authority in the nature either of despotism or rebellion.

Now the British constitution, although at the foundation of our own, possesses no conventional or contractual character. The people, as a distinct and underlying source of authority, are not represented in it. Unlike our own, it is not a written, definitely expressed instrument, containing both powers and limitations. It is not a public charter which has undergone previous discussion by the people, and thus expresses an assent preceding its official promulgation.<sup>1</sup> From our stand-

<sup>1</sup> It has not been "methodically constructed." It has not been "digested into articles." It has not been "ratified by constituent assemblies." Such is the admission of England's greatest historian. (Macaulay, Hist. vol. 4, p. 222.)

point, it emanates from an inferior authority, and is merely a statute of traditional legality. In the United States, the constitution both creates and governs the executive, legislative, and judicial departments. In England, these departments make and alter the constitution. In England there is no ratification. Prescription by lapse of time, and immemorial usage, are the only foundations upon which it rests. The absence of this vitalizing element of popular sovereignty in the constitution, has long been felt by British statesmen. Every effort to reform the basis of parliamentary representation has tacitly confessed it. The final passage of the Reform Bill in 1832, was the crowning success which attended the labors of those who sought to graft American principles of government upon the constitution of Parliament. How corrupt that system of representation must have been in the days of pocket-boroughs and disfranchised towns is best told in the words of Lord John Russell, in introducing his great Reform measure. Speaking of the surprise which any stranger would naturally experience at the inconsistencies of representation in Great Britain, he says:—

“Such a person would be very much astonished if he were taken to a ruined mound and told that that mound sent two representatives to Parliament; if he were taken to a stone wall and told that three inches in it sent two representatives to Parliament; if he were taken to a park where no houses were to be seen, and told that that park sent two representatives to Parliament. But if he were told all this, and were astonished at hearing it, he would be still more astonished if he were to see large and opulent towns, full of enterprise and industry and intelligence, containing vast magazines of every species of manufactures, and were then

told that these towns sent no representatives to Parliament."<sup>1</sup>

Looking back at these triumphs of constitutional liberty in England, and perceiving that the march of progress still continues, it is gratifying to hear one of her most accomplished historians, Mr. Freeman, admit that with the progress of free institutions in America, and the power of their influence over other nations, the English Constitution in its recent changes is coming nearer and nearer in resemblance to that of the United States.

This is not to be wondered at, for historical evidence shows that feudal ideas of sovereignty have been rapidly dying out even in constitutional monarchies, where they are covered up and embalmed in a species of mummified and harmless respectability. But even there they are found to obstruct the march of contemporary progress. They have consequently become an anachronism everywhere, and as little suited to the motion of modern political society, as the stage-coach of the past is to the present needs of rapid transit.

Hence, the "Civil Body Politic," into which the Pilgrim Fathers organized themselves in the cabin of the *Mayflower*, seems to us like a prophetic intuition of the needs of the future. Some heavenly power must have opened their eyes upon that unborn century, when sixty millions of freemen should occupy the land from the shores of the Atlantic to those of the Pacific, and, though distributed through forty-four sovereign States,

<sup>1</sup> "In Midhurst there were 1076 inhabitants, and but one voter. The qualifying tenements had all been bought by Lord Carrington, who returned the members. The whole of Hytesbury in 1766, was burnt down, but the one voter of that borough went on returning two members to Parliament. Much the same result followed in Old Sarum and in Westburg, while in Appleby the members were really returned by two Peers."

Mr. Mellor, Q. C., in his paper "On Parliamentary Representation," in proceedings of New York State Bar Association for 1888, p. 69.

should yet find a common protection and perpetuity under a constitution capable of unifying them into one indivisible Republic. Identity of interests, identity of language and sovereignty of the people, all conspired to make this possible; to which were added such favoring unities of time, place, and circumstance as were never before granted to any nation on the globe.

The rapidity and continuity of development which accompanied these early efforts at organizing popular government, arose chiefly from the fact that these colonists came from one nation, and carried with them similar political instincts and institutions. With the exception of the Dutch in New York, the American colonists all came from England. They represented the perfected political tendencies of their own times, which already looked strongly towards Republicanism. They had the further advantage of being unembarrassed by a complicated system of civil administration which had made the secular arm of the law the oppressor of their religious liberties at home, and permitted the will of the sovereign to trample upon the conscience of the subject.

Accordingly, they brought with them, by a sort of hereditary necessity, a disposition to repeat the form of government of the mother country, but with all the enlargements of personal freedom which their altered circumstances afforded them. From having been monarchical Englishmen they soon developed into democratic Englishmen, and smarting under the restrictions, both ecclesiastical and political, which they had suffered at home, they gladly availed themselves of every opportunity to enlarge the sphere of their local independence by resting their right of action upon the liberties secured to them in their charter. In their estimation this charter was a contract of binding obligation upon the king, and created in them a new *status* while still his subjects.

It is not strange, therefore, that this doctrine of a civil body politic, as the underlying foundation of a free State, should have become the archetype of all future representative government on this Continent, and the political model upon which the sovereignty of the people can most successfully distribute its powers through coordinate departments of administration.

This radical change from *status* to *contract* in the genesis of government, as wrought out upon American soil, marks the accomplishment of a political reformation which, beginning in the mother country with the efforts of Pym and Hampden and Elliot and Sydney, took its first concrete form in the Petition of Right of Lord Coke, whence it continued to enlarge its political application, until it finally blossomed through Bills of rights and declaratory statutes abridging prerogative, into its consummate flower, the Constitution of the United States. The whole effort and tendency of modern government since the Reformation has been to eliminate the estate of the clergy from direct participation in secular affairs, and to divest political sovereignty of all pontifical character. If this can be considered as a result of the influences of Christianity it must also be placed among its triumphs. For it is more in accordance with the teachings of that Divine Master, who, while laying the foundation of all true political ethics, announced that His kingdom was not of this earth. The exercise of political power by the clergy was a hindrance to the spiritual purity and influence of the church. It degraded its mission by imparting to its life a meretricious and aggressive character. Whatever then has tended to free it from secular trammels has tended to restore its primitive apostolic independence, and in return it has shed inspiration upon the labors of those who have sought to establish governments of the people



on the basis of evangelical religion and universal humanity.

In modern times, therefore, the source of representative government may be traced to the denial of the divine right of kings to rule, or the original right of legislatures to enact laws according to their sovereign pleasure. The primary foundation of such a government is the sovereignty of the individual and the equality of all before the law. It is manifestly a reaction against the doctrine of patriarchal authority or absolutism, as exemplified in the hereditary monarchy, and in its various modifications under the feudal system. The effect of denying these dogmas, which has moulded the constitution of governments throughout the civilized world for ages, is to revert society in a large degree to a condition of assumed equality between all its members; to abolish ancient distinctions based upon prerogative rights, and to rest government, not in a parental authority lodged in an individual, a family, or a class, but wholly upon the voluntary consent of the governed.

From these postulates flows as a necessary corollary the doctrine that all civil rights in a representative government are franchises born of the people, through a voluntary compact between equals. As a fact, however, these franchises are actually possessed and enjoyed only by those whose qualifications reaching the standard legally established by the majority of the political society, entitle them to exercise the prescribed privileges attached to such grants of power.

This points to an inevitable conclusion in the genesis of government, which is, that the necessities of any political society, however constituted, require as a foundation for order and judicature, that authority and subjection should be personified in distinct and different classes. For it is evident that where all are equal,

authority has no foundation to rest upon, and no mandate can issue which any one is compelled to obey. But the difference which instantly presents itself in this respect between a popular and a monarchical government is in the fact that in a popular government authority is official and not personified. It is possessed and exercised by the citizen only during his term of office. He brings no personal authority with him on entering it, and carries none out on leaving. His authority is simply the authority of an agent, and is always revocable at the pleasure of his principal.

In a representative democracy, the distribution of power, however made, always and necessarily expresses the opinions and desires of the majority of voters. They alone organize the government, and they alone direct its daily administration. Whether representing the most or the least intelligence; whether governing with the most or the least wisdom; or for the best interests of the community or not, it is to them exclusively that belongs the right of making the laws and shaping the policy of the State. In large communities, it must be conceded that many of those who form a majority of the voters at any given election are ignorant, incompetent and little calculated to judge correctly of the effects of a line of policy to be inaugurated by their political action. Doubtless, there will also be found ignorant and incompetent voters among the defeated minority, so that the right to vote on either side of a political question not requiring for its exercise the capacity to vote with the highest intelligence, leaves the decision of the contest to the arbitrament of numbers alone. The majority are thus empowered to rule because it is the only basis upon which popular government can be safely administered, and by this method

the assent of the governed is always supposed to be represented in the administration of public affairs.

But however true this may be in theory, it must be admitted, nevertheless, that the opinion of the majority, to the exclusion of the wishes, and oftentimes against the protests of the minority, has always been the practical rule adopted for the guidance of the civil conduct of the State. "It is a matter of fact, therefore," says Judge Story,<sup>1</sup> "in the history of our own forms of government, that they have been formed without the consent, express or implied, of the whole people; and that, although firmly established, they owe their existence and authority to the simple will of the majority of the qualified voters. . . . There is not probably a single State in the Union whose constitution has not been adopted against the opinion and wishes of a large minority of the qualified voters; and it is notorious that some of them have been adopted by a small majority of votes. How then can we assert with truth that even in our free constitutions the government is founded in fact on the assent of the whole people, when many of them have not been permitted to express any opinion and many have expressed a decided dissent?"

In Athens, where power was undivided by reason of universal equality, democracy sank into absolutism. To avoid this tendency has been the aim of every true representative government, and the remedy has been found in that doctrine of personal subordination to law which Cicero himself pronounced as essential to the enjoyment of civil liberty; hence in the election of a judge, legislator, or an executive, the constituent voluntarily surrenders a portion of his civil rights and subjects himself temporarily to their authority, although in every sense the creator of that authority. Yet in be-

<sup>1</sup> Comm. on the Constitution, vol. 1, p. 328.

coming their temporary liege, the citizen conveys no freehold title to office in such persons, as against his sovereign right to dispossess them in accordance with the law of the land. Public office in a representative government can never be more than a trust created by the people for the benefit of the people. There can be no personal property or fee absolute in it. It is simply a trust of power to specific uses and, as such, is neither negotiable or assignable. Whence it follows that to pay a person for his aid and influence in procuring an office, and for not being a candidate himself, is an immoral contract, and void as being against public policy.<sup>1</sup> By Act of July 16, 1862,<sup>2</sup> it is made a misdemeanor for any member of Congress or government officer to accept any consideration for aiding any person to procure a contract, place, or office from the United States.

In such a political society as ours the actual government is entrusted with little if any implied authority to act.<sup>3</sup> All its powers are specific, enumerated, and conditional, all others being either reserved to the people or, as in a confederacy, to those organized political bodies known as States. Such a doctrine, recognizing as it does the autonomy of the people as well as of the States, has been incorporated in the 10th Article of the Constitution of the United States, wherein it is recited that "the powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively or to the people." But, in a political society, who, it may be asked, are the people? Are they synonymous with the inhabitants of its territory or, again, with its citizens? In

<sup>1</sup> *Trist v. Child*, 21 Wall. 449; *Gray v. Hook*, 4 Comst. 449.

<sup>2</sup> 12 Stat. at Large, 577.

<sup>3</sup> "The genius and spirit of our institutions are hostile to the exercise of implied powers." Per Johnson, J., in *Anderson v. Dunn*, 6 Wheaton, 204.

answering these questions it will be seen that some very nice discriminations arise out of the necessary subdivisions of political society and the varying definitions which have been given to the language which expresses them. In fact, one of the elementary difficulties which constantly confronts the student in tracing the philosophy of government is that springing from the variety of definitions attaching themselves to words. Unlike most arts and sciences, the elements of which have received similar definitions in all countries, legislation has always been embarrassed by a confusion of language born of local prejudice, habit, and religious belief. Such, in consequence, has been the difference in meaning given to the same word at different times and in different places that it has often been made to represent ideas at once dissimilar and incompatible. This has been more particularly the case with words expressing forms of government and the status of certain officers and classes of citizens. Even writers on political philosophy have differed in their use of terms and given them at times a meaning entirely local and circumscribed. Thus the words Democracy, Republic, Commonwealth, and State, have been tortured to represent empires as dissimilar as the Persian, the Greek, and the Roman. In Russia the Czar is still not only an absolute civil ruler, but Pontifex Maximus as well; and in England the monarch is, in contemplation of law, a corporation sole and also the spiritual head of the established Church. This combination of dissimilar functions in the same person gives rise to a duality of character not always reconcilable with the different duties that are imposed upon such a public officer. Nevertheless, an explanation of these seeming incongruities can always be found in the constitutional history of the nation itself, wherein we may trace the development of such paradoxes to the

influences of social and ecclesiastical dogmas that have preceded the creation of political institutions. In like manner, terms of a more general significance are sometimes bent and moulded to meet conditions supposed to be temporary, but which may become permanent, as in the use of the word "contraband" applied to escaped slaves during our civil war, because of the fact that they were "property" under the Constitution and could be confiscated under the laws of war. Other examples might be furnished if necessary.

Thus, simple as appears the word "people" when taken in its ordinary sense, yet when used in connection with representative government it is susceptible of subdivision into two great classes, viz., first territorial people, meaning inhabitants generally, of whatever age or sex; and organic people, meaning citizens qualified to vote. In the first-named class are also included aliens and denizens temporarily sojourning in the country, receiving the protection of its laws, and in turn owing them allegiance; while in the second class are included only those who have become qualified under municipal laws to exercise the right of suffrage. In *Dred Scott v. Sanford*<sup>1</sup> the doctrine was laid down generally that the words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. This is unquestionably true in an international sense, the flag of a country covering equally all its people, and giving them the character of citizens. Hence citizenship of the United States may exist separate and independent from citizenship of the several States as a primary status. But this form of citizenship is inchoate in the several States so far as it relates to domicile, taxation, voting, succession, and special privileges

<sup>1</sup> 19 How. 393.

enjoyed by citizens in their own States.<sup>1</sup> There are "people" in every State who are not "citizens" of the State, neither voting, being taxed, nor having a legal settlement therein.<sup>2</sup> It is also well known that there are no federal citizens for representative or intra-state purposes. The citizens of territories, although citizens of the United States, cannot vote for president or vice president or governor of their own territory, or justices of their highest court, nor are they eligible to the office of senator or representative in Congress. Nor can they sue the citizen of a State in the Courts of the United States.<sup>3</sup> Although forming part of the people of the United States, they do not yet enjoy the privileges of full citizenship. The fact is indisputable that, until the adoption of the Fourteenth Amendment, the Constitution contained no definition of the word "citizen." The Thirteenth Amendment had, indeed, abolished slavery, and the Civil Rights Bill, which formed part of the appropriate legislation under it, had given equal jural rights to all persons within the jurisdiction of the United States. But the word "citizen" still remained undefined, because no distinction had yet been drawn between the protective rights of citizens of the United States and those of the several States, as was afterwards done by the Slaughter House cases in exposition of the Fourteenth Amendment.<sup>4</sup> It will be seen consequently that the word "people" means "citizens" only when used in the Constitution, for that is a political compact formed exclusively by the qualified voters in the several

<sup>1</sup> *Paul v. Virginia*, 8 Wall. 168.

<sup>2</sup> *Elk v. Wilkins*, 112 U. S. 94.

<sup>3</sup> *Hepburn et al. v. Ellzey*, 2 Cranch, 445; *New Orleans v. Winter*, 1 Wheat. 91.

<sup>4</sup> 16 Wall. 74.

States, meaning its citizens alone, and not by the unqualified people or inhabitants thereof generally.<sup>1</sup>

The right to participate in the affairs of government not being an absolute birthright, but a concession made by society to an individual on his possessing certain prerequisite qualifications, it follows that, in all forms of representative government, persons under any civil disability are from that fact alone excluded from the political people. However arbitrary may have been some of these distinctions in the past, they form part of the history of human society in every age, and their gradual diminution, both in number as well as austerity, are the most significant marks of the influences of Christianity upon political ethics in enlarging personal rights. Indeed, the great contest of all contests which has occupied human society from the first foundation of civil government has been that between prerogative and privilege; between a ruling class already established and one asking to participate in its powers and privileges. The infancy of all monarchical governments is a period of patriarchal supremacy in which personal attributes in a few individuals constitute the foundation of authority. Their will originates a rule of action for the community and imposes a "settled, customary yoke" of legality upon all beneath them. Such is the cradle and nursery of prerogative—a fiction of sovereignty personified by a monarch living above the reach of legal criticism or accountability. This was the doctrine asserted by Charles the First in his attempted arrest of the chiefs of the opposition on the floor of the House of Commons, and was again repeated by James the Second in his imprisonment and prosecution of the seven Bishops.

<sup>1</sup> See also *Ex parte Knowles*, 5 Calif. 300; *Blair v. Ridgely*, 40 Missouri, 63; *Cooley Const. Lim.*, p. 29; also chap. 17.



In former times, therefore, wherever the people of a country were, by virtue of any law or constitution, permitted to govern themselves through representatives, the term liberty as a civil right has been understood to mean the right to do everything which the laws permitted. Such is Montesquieu's definition, and it is in strict accord with the principle of the civil law. The Municipia of the Roman empire, though apparently clothed with the attributes of local independence and self-government, could exercise no other rights than the laws of the empire permitted. They enjoyed civil but not political rights, could make regulations relating to worship, religious festivals and ceremonies, and even the administration of their own private property and revenues; but no judicial power was accorded them beyond what we should designate as police powers. Meanwhile all political rights and interests continued to be centralized at Rome.

Civil liberty, in the Roman law, always assumed the existence of a personal sovereignty, from which all privileges of action originally emanated; whereas, in a modern republic, political omnipotence vests exclusively in the people. Consequently, civil liberty with us is a negation of any general restraint, while in the civil law it is an affirmance of a general restraint. In the United States liberty means the right to do everything which the law of the land does not forbid; but, for purposes of convenience and justice alike, in all well-governed communities, the natural rights of citizens are held in abeyance and subject to conditional limitations as having lost some portion of their absolute character. This is but an affirmance of the doctrine that every individual, in order to live peacefully in society, must submit to some abridgment of his natural rights; for any acknowledgment of government, says Brownson, implies

that the citizen consents to submit his will to that of a governing will located in the administration of the State.<sup>1</sup>

All civilized nations recognize the fact that government is founded in the necessities of our moral nature, and that its methods of public administration must find expression in forms or rules of conduct prescribed and enforced, accepted and obeyed. "For instance," says Mr. Austin, "it is a general inference from the principle of utility that God commands obedience to established government. Without obedience to 'the powers that be' security is weakened and happiness, as a general rule, diminished. Disobedience even to a bad government is an evil."<sup>2</sup> The duties of command and obedience being thus shown to be reciprocal give rise to two classes of citizens, viz., those who govern and those who are governed. Whatever the length or the tenure of office these two classes cannot simultaneously be equal, but one must relatively to the other be, *virtute officii*, superior and magisterial. Paradoxical as it may seem, it is nevertheless the fact that the servant of the people when entrusted with office becomes, as the embodiment of the law represented by that office, the ruler of those who have politically created him.

In a representative democracy, therefore, government is only another form of agency, in which the will of the principal is assumed to be identical with the will of the agent who enacts laws for the community. Besides the mere fact of governing, a government must have the right to govern, for its exercise of such a right without authority constitutes usurpation. In a true democratic republic, the underlying object aimed at is that of maintaining the sovereignty of the organic people

<sup>1</sup> American Republic, title "Constitution of Government."

<sup>2</sup> Province of Jurisprudence, sec. 62.

without popular despotism, and personal liberty without anarchy. In developing this theory of government we have secured union without fusion of States, and State sovereignty without disintegration of the Union.

But since even in a republic the whole people cannot govern and be governed at the same time, and since also direct democracy, as distinguished from representative democracy, is impossible outside of small communities, power and right to govern must be delegated by the many to the few as a political stewardship. The people, as before remarked, convert their public servants into governors *pro hac vice*, and render themselves subject to their legislation. It would be pure sophistry then to argue that the people in a republic can never be the subjects of their own government, and under allegiance to its sovereignty, because they are the authors of it; when all will admit that the legislator is everywhere amenable to the laws of his own enactment. Hence rebellion can have no legal justification in a democratic form of government, being an attempt at political suicide committed by a felonious minority. The promulgation of a law of government is, in fact, an imperative declaration of authority, and when emanating from a competent source, binds all persons within the territorial limits of that authority. Whence it follows, as a logical necessity, that all men indiscriminately owe allegiance to the laws in every government, however despotic. This was the ground of defence taken by the seven Bishops whom James II. sent to the tower for refusing to violate an act of Parliament, by reading a proclamation of indulgence issued by the King, suspending the operation of certain penal statutes. Their counsel, among whom was the illustrious Somers, took the ground that in a constitutional monarchy the King had no power to suspend or dispense with the

laws or statutes of the realm. In this he was sustained by a verdict of acquittal. And history repeated itself one hundred and fifty years after, when, on the floor of the United States Senate, Daniel Webster charged President Jackson with a similar attempt to trample upon the Constitution by putting his will above the law of the land, and spoke of him as claiming the same preposterous pretensions of the Tudors and Stuarts.

The doctrine of the civil law, which had constantly affirmed that whatever is agreeable to the sovereign has the binding authority of law, was in the case of the seven Bishops completely overthrown by the verdict of a British jury, and the sovereignty of the written law placed upon a fixed and constitutional basis. The abdication of James, and the revolution of 1688 followed close upon this overthrow of the doctrine of the divine right of kings, with the correlative duty of passive obedience in subjects. Henceforth, the constitutional history of England exhibits a steady progress towards the abridgment of prerogative in a class, and the enlargement of privilege in the many. No sovereign since James has ever attempted to repeat the follies which disgrace his administration. The "liberties" of Englishmen as they were called, meaning the Great Charters, the Bill of Rights, the Habeas Corpus, all attributing personal rights to the English subject, but which the Stuarts had so continuously disregarded and trampled upon, became each a statute law for the British nation, and as such were incorporated in the Act of Settlement of William and Mary.

Aside, then, from despotic forms of government with which, practically, we have no concern, the sources of authority in a republic must be looked for in the people as the integral repository of all power. It is a fiction of law, that the whole people govern continually,

because of their original right to do so; but as a fact, in the application of this doctrine to the political necessities of a country, the *de jure* government of the many is absorbed by transfer through delegation, in the *de facto* government of the few. Mediately the people rule, but immediately it is their representatives who rule for, and over them. Therefore, as a corollary to this proposition, the *de facto* government of a country is the only one which can have any international recognition, since no other exists as such, even for domestic purposes. Thus a government *de facto* becomes one *de jure*, simply because it exists. This was the ground taken by the British and French governments in their circular note of June 17, 1861, conceding belligerent rights to the confederate States of America, as a *de facto* government. Although this measure provoked great indignation in the loyal States, it had an unquestioned foundation in international law to rest upon, and had even been practised by us in the recognition of the revolted South American republics, made through the revisions of our neutrality laws in 1818.<sup>1</sup>

Reverting again to the various meanings of the word people, as descriptive of particular classes, it will be discovered that the division into an organic and a political people is not a new feature in government. Nor is this classification the offspring of modern ideas in State polity. These ideas were well recognized in Rome, where the term "Populus Romanus," as officially used in the promulgation of laws, never signified all who were called Romans. On the contrary, the plebeians and the patricians were essentially a different class, with originally different political privileges. The plebs or plebeians, largely recruited from the inhabitants

<sup>1</sup> 1 Brightly, 732; Lawrence's Wheaton, p. 36; *McIlvaine v. Cox's Lessee*, 4 Cranch, 212; *The Santissima Trinidad*, 7 Wheat. 337.

of conquered towns, or coming as voluntary emigrants upon Roman territory, had no tribal connection, no place in the comitia, and no share in any of the departments of government. They were consequently outside the pale of the political privileges possessed by the patricians or political citizens. This exclusion was so sharply drawn and maintained by positive enactments, that it will be sufficient in illustration to recall the famous defence of Cicero of the poet Archias, who was prosecuted for assuming the rights of a Roman citizen while living in one of the provinces. Nor did these distinctions arise then any more than they do now, in modern governments, from the arbitrary exactions of caste or class. They belong rather to those inherent necessities of distinguishing between those who can, and those who cannot with safety be entrusted with a part in the affairs of government, at different stages of its development; and which facts, if overlooked, would convert legislatures into mere mob assemblies of the whole people happening to be at any given place at any particular time, and enacting laws without regard either to vested rights or constitutional limitations. This would constitute not a republic, but a direct democracy.

On the basis of a merely personal equality, such assemblies must necessarily consist of all citizens indiscriminately, and any systematic legislation would, in consequence, become impossible. Every intelligent mind recognizes the fact that there are things which human law, whether promulgated by kings or legislatures, cannot alter. They are related to the course of nature, and the moral government of the universe. Mankind adopt them everywhere, and independently of coercion or imitation, because they are found agreeable to natural reason, and present themselves

to the human mind in every age as self-evident truths connected with our social life, and approved by long experience. They are in the nature of primary or necessary beliefs, and their imperative controls the aspect under which reason views them. When this is once conceded, the question, as to the authentic interpretation of the problem, ceases to be a matter of argument, and passes at once into the domain of the convictions. Therefore it is that in the United States, the organic and not the territorial people are sovereign, because it is from the organic people that citizens can be made. The right to vote is a privilege regulated by municipal laws, and inhering exclusively in the States, who may concede it to their citizens or others, upon conditions not repugnant to the supreme law of the land. Nor does the mere exercise of this right constitute a party a citizen, since foreigners not naturalized may be allowed to vote under certain conditions.<sup>1</sup> In some States it is sufficient that a party has declared his intentions of becoming a citizen, to entitle him to vote. It will thus be perceived that suffrage with us occupies an inferior place to that which it held in Rome, or holds now in most European countries. The ancient mistress of the world did not bestow political rights upon all citizens equally. Only those who had the *jus suffragium* with the *jus honorum* had the complete citizenship; while those who had the *jus privatum*, which included the right of marriage and of commerce, were esteemed citizens, but of an inferior class. They could neither vote in a tribe nor enjoy any offices of magistracy. These barriers of political discrimination were not peculiar to Rome alone, nor confined to her day. Limited suffrage has existed in England since the earliest times, and is only

<sup>1</sup> Dred Scott v. Sanford, 19 How. 373; Cooley, Const. Lim. 599.

now making rapid progress towards enlargement. Such is the tenacity of life of old traditions and usages, when based upon distinctions of caste.

In tracing the genesis and growth of representative government upon this continent, it is easy to see that the founders of the republic had before them, as their guide and stimulus, the memory of those struggles for civil liberty which they had witnessed at home. They had been taught the duty of passive obedience, both to the prerogative rights of the king and the prerogative rights of the church. They had also been schooled in the doctrine that the only attitude which the subject could assume towards the government was the attitude of a suppliant. They knew that the people had no rights as against the crown, the church, or parliament, but that every franchise they enjoyed was a privilege revocable at the pleasure of some master. And as they saw little hope of any immediate or of any extensive reformation under the Stuarts, they came to this new land to organize "a civil body politic," which should recognize no other foundation, and no other source of power or authority, than the conventional will of the people. When, therefore, in obedience to this determination, they separated themselves from a monarchical form of government, by repudiating their allegiance to it in the Declaration of Independence, they sought above all things to establish a republic of equal States, which, resting upon the sovereignty of the people as one nation, should, at the same time, combine all the available principles of a constitutional government like that of England.

Whatever repugnance they may have felt towards its statute law as the fruitage of oppressive legislation, or towards its judiciary as the pliant tools of royal injustice, was never felt towards its common law. And here



a singular antagonism arose between the mother country and the colonists. The latter, as Englishmen, still claimed the right of appeal to the common law of England in matters of government, while the British ministry as resolutely denied that the common law had any personal extent outside of Great Britain. In consequence of which they maintained that the rights of the colonies were to be determined solely by a law having a like territorial extent in and for the particular colony, and that such a colonial law could originate solely in the will of the king and parliament legislating for the colony.

This doctrine was all the more remarkable, by as much as it virtually contradicted the language of every colonial charter, save that of Pennsylvania, in each of which it was declared that the colonists and their children should have all the rights of subjects born in England. It goes without saying that this was one of the great issues which hastened disruption and justified revolution.

Even after the revolution of 1688 two conflicting forms of government existed in the colonies; one founded upon the king's prerogative, the other upon the supremacy of Parliament. As late as 1702, the Chief Justice of New York announced that, in the plantations, the king governs by his prerogative, and their law is what the King pleases.<sup>1</sup> The possibility of a revolution was evidently not before the mind of the court declaring this dogma of sovereignty, the logical consequence of which was fatal to monarchy. For, if no other sovereignty existed in the colonies than the prerogative of the King, then when that prerogative was thrown overboard at the Revolution, sovereignty descended to the entire people of the colonies, and they

<sup>1</sup> Bancroft, vol. 2, p. 333.

became a nation as declared in the preamble of the Constitution of the United States.

Nevertheless, this veneration of the colonists for the common law did not perish even amid the conflict of arms. It not only survived, but received recognition in the tribunals of every jurisdiction, whether federal or State. It was reasserted in the constitutions of the original thirteen States; and among the earliest decisions of our federal courts are to be found frequent affirmances of the doctrine that the colonists brought with them the common law of England; that it was to be regarded as the underlying law of the land, and that, under the principle of national continuity, this body of customary law was to remain a rule of jural conduct so far as it was applicable to their new situation. Therefore, that English judicial decisions pronounced previous to our Declaration of Independence, and construing statutes then in force in the mother country, were to be received here as part of any such statutes as we had adopted.<sup>1</sup>

But although the colonists adopted the common law of the mother country as the foundation stone of their own jurisprudence, they took care to eliminate those prerogatives of class, with their traditional dignities of person, and those systems of fiefs and tenures with which feudal customs had both encumbered and fettered British independence and legislation. The first direction in which the principle of personal sovereignty exhibited itself was in the change made in tenures of land by rendering them allodial. Base fees, socage tenures, and other feudal incidents were assailed in the legislature of New York as early as 1786, and subsequently annihilated by the Revised Statutes.<sup>2</sup> Satisfied that no republic could be suc-

<sup>1</sup> *Terret v. Taylor*, 9 Cranch, 43; *Pawlet v. Clark*, 9 *Ibid.* 292, 333; *Van Ness v. Packard*, 2 Peters, 137; *Sedgwick on Constit. Law*, 2d ed. p. 67.

<sup>2</sup> 3 Kent, 657. *Laws of 1786*, chaps. 12 and 36.

cessfully founded upon a form of society established to perpetuate estates by entail and to uphold class privileges by hereditary succession, they began by enunciating, as their fundamental dogma, the sovereignty of the people, acting in convention and through representatives selected by themselves, to express their will in legislation. In this sense they established a government of the people, by the people, through the people, basing it upon personal liberty and a paramount title to the soil embraced within the territorial limits of the State. Fully aware also of the fatal vicissitudes attending most republics in the past, and anxious to give to each State a living interest in the perpetuity of the Union, they inserted in the Constitution a provision guaranteeing to each State a republican form of government, even against its own dissent, if ever expressed in the future. In this way they resolved that the Union should constitute a nation of States and live or die as a political unit. No State, and no number of States, can therefore disband it. Its establishment came directly from the political people expressing themselves in convention, and its dissolution can only be accomplished by them in a like solemn and legal manner.

But in using the term republic the fact must not be overlooked that it is a word of very variable significance. It has been equally applied to aristocratic governments, like that of Rome; to monarchical, as were those of Sparta and Poland, as well as to the Italian States, the United Netherlands, and the Helvetic Confederation. The word, when unqualified, expresses simply the whole estate of a community in rights, whether legal, moral, or political; but it neither describes nor defines the origin of those rights, and leaves to conjecture the form under which they are personified in government. In modern times, indeed, the term republic has by almost universal

consent come to mean a democracy; but inasmuch as practically no pure democracy can exist, since where all are equally governors there can be none governed, and since also government implies subordination, which in its turn includes the duty to obey as well as the right to ordain, so it follows, as a logical consequence, that by a democracy we are to understand a democratic republic, or a government of the people through and by means of their own selected representatives. "In order to constitute democracy," says Lord Brougham, "it is necessary that the people should be either formally or substantially possessed of the supreme power, not sharing it with any power independent of themselves, still less exercising authority subject to the control or revision of any other independent body."

Such, therefore, are the sources of authority in a democratic government, which, in all its forms, has still to limit the manifestation of this authority to the few; for although the majority rule *de jure* they cannot *de facto*, as was well seen in ancient Athens, where a full assembly of the people numbered between 5000 and 6000 citizens, among whom very little order prevailed and by whom, in consequence, very little useful business could be transacted.<sup>1</sup> Upon this point the philosophic Montesquieu correctly observes that "it is the fact of there being physical limits to a pure democracy which has rendered representation necessary."<sup>2</sup> The Athenian assembly was only a mob of equals trying to govern the

<sup>1</sup> When a city charter was granted to the town of Boston in 1822 the number of qualified voters had risen to 7000. At that time, whenever a town meeting was held on any exciting subject Faneuil Hall was so crowded that only those who obtained places near the moderator could hear what was going on. The control of such an assembly was consequently in the hands of any determined men who chose to push themselves to the front, while the majority were practically excluded from any participation in the proceedings. Quincy's *Municipal History of Boston*, p. 28.

<sup>2</sup> *Book 8, ch. 16, 17, 19, 20.*

republic without being able, at the outset, to govern themselves. The necessity of governing through representatives became, therefore, very soon manifest, and the Grecian leagues, which were an advance in forms of government upon the Athenian legislature, may be considered as the earliest attempts to engraft a federal character upon a purely democratic government. These leagues have always been considered among the best models of popular government which the civilization of that day has exhibited. With a wisdom rarely equalled, and never surpassed, their founders early recognized the expediency of balancing the federal against the purely democratic elements, so as to insure a permanent check upon the ever-shifting tendencies of a popular assembly. It was from these examples of popular government that the founders of our Republic drew their inspiration, and the frequent allusions to them in the pages of the *Federalist* and the writings of John Adams show the estimate in which they were held by our early statesmen.

It is a settled truth in the history of constitutional jurisprudence, that no constitution has ever endured which was written as a whole, instead of being evolved by slow and steady increments of growth from the organic and social tendencies of a people. Our own federal constitution has been enlarged by already fifteen amendments, the majority of which have introduced either new guarantees to civil rights, or new limitations upon the powers of government. The same has been the case with the States, in most of whose constitutions provisions are made for periodically revising them as a whole, without, at the same time, preventing occasional changes as circumstances may require.

It is this steady infusion of the domestic life, wisdom and moral qualities of a community first into its common

law, and next into its organic law which alone gives vitality to a written constitution, because it then embodies the ripe product of many years of continuous preparation. As evidence of this we can appeal to history. Experience everywhere shows that a high state of political intelligence and culture is essential to the permanency of a federal government. Therefore, such a state is only reached through slow and successive stages of political evolution. It marks a period of national manhood which requires time for its attainment. Republics are not made by merely promulgating a charter. They must be born from the spirit, from the intelligence, and from the moral culture of the nation. Without these concomitant elements, they cannot last. The shores of time are strewn with the wrecks of Roman, Grecian, and Italian republics; and if we would determine by a single example how truly a written constitution is evolved by a course of circumstances always moving a nation towards one pre-determined conclusion, it is only necessary to point to the difference between the United States, as the best outgrowth of the English Commonwealth, and France, the nursery of political convulsions always tending to, but only recently, reaching a permanent republicanism. The radical difference between these two countries in permanency of administration is strikingly illustrated in the following chronological chart:—

Since the inauguration of the republic of the United States in 1789, France has had fourteen varying forms of government, viz:—

1st. A constitutional monarchy under Louis XVI., in 1789.

2d. A convention, 1792-5, three years.

3d. A directory 1795-9, four years.

4th. A consulate for a term 1799-1804, five years.

5th. An emperor in Napoleon I. 1804-14, ten years.

6th. A constitutional king in Louis XVIII., 1814.

7th. An emperor in Napoleon I. restored, 1815.

8th. A constitutional king in Louis XVIII., 1815.

9th. A constitutional king in Charles X., 1824-30, six years.

10th. A king of the French in Louis Philippe, 1830-48, eighteen years.

11th. A provisional government, 1848.

12th. A president for four years, 1848.

13th. An emperor in Napoleon III., 1852-69, seventeen years.

14th. A republic, 1869.

In ninety-six years France has enjoyed only twenty-five years of republican government, and up to 1869 had never been able to endure one for more than four consecutive years.

Strange as it may seem, this instance of political instability is not wholly without precedent in modern times. For, during the most important period of English constitutional history, when the postponed rights of popular sovereignty were slowly asserting themselves against the obstacles of ancient creeds and hereditary institutions, during the formative period, in fact, of true representative government, the nation continued to alternate between the extremes of prerogative and the extremes of privilege—thus, “in the short space of seven years,” says Macaulay, the supreme power had been held by—

1st. The long Parliament.

2d. By a council of officers.

3d. By Barebones' Parliament.

4th. By a second council of officers.

5th. By a Protector according to the instrument of government.

6th. By a Protector according to the humble petition and advice.

7th. By the long Parliament again.

8th. By a third council of officers.

9th. By a long Parliament for the third time.

10th. By a convention, and

11th. By a king at the restoration.<sup>1</sup>

Returning to our own country, it may be said that in the United States there are but few lingering principles of feudal extraction still infecting our jurisprudence, and their number grows less with every revision of our laws, whether organic or statutory. Jurisprudence, therefore, is keeping pace with the genius of government. The time is close at hand also, when, except for the purposes of historical illustration, no American court will need to seek for the law within the law, by the light either of Gothic or of Roman civilization. This was the point originally aimed at by the founders of the republic, and it has been closely pursued in the legislation of every State since the Revolution. Disembarrassing themselves of even the few remnants of feudal obligation still clinging to the laws of England, they borrowed from that source only its latest and most liberal rubrics, such in fact as wrested from prerogative its strongest bulwarks, by conceding to the voice of the nation the power to be heard in courts and legislative assemblies. It is idle, therefore, from the American standpoint of legislation, to review the constitutional history of European representative governments, for outside that of England they have no connection with the facts of our own, established as it was by the conventional will of the people, expressing itself in a written and rigid constitution. With such a consecrated instrument as this, no citizen

<sup>1</sup> Essays: Sir William Temple.



need fear any encroachments upon his civil rights or personal liberty. Nor, when he recalls the four hundred years of political tribulations through which the English people passed from Magna Charta to the Bill of Rights, including among them the terrors of a civil war, can he fail to be grateful that the United States was introduced into the great family of nations, precisely at the most opportune moment for profiting by the political triumphs of English republicanism. Without the recognized value of those constitutional guarantees which the British people had wrested from the ancient prerogatives of the crown, our own form of government would have been not simply tentative, but essentially inchoate in the very foundations upon which alone a union of sovereign States can legally be perpetuated. It was from an earnest conviction of the necessity of forming a national government, based upon an act of political self-incorporation, that the citizens of the original thirteen States, soon after securing their independence, hastened to exchange their Articles of Confederation for the more positive instrument known as the Constitution of the United States. The reasons for such a course are fully explained in the *Federalist*, the contributors to which have very justly been regarded as the wisest expounders of the principles of federate government in any age or country.

It is only those governments that are founded upon laws and not upon persons that give any promise of perpetuity; it is only impersonal institutions represented by fixed laws and conventions that have within them the elements of indefinite duration. The English Constitution, down to the period of the Commonwealth, was a rope of sand which any sovereign could break at will. The idea of government was entirely merged in that of

prerogative. Accordingly, the change effected by the Revolution of 1688 was radical. "It broke," says Hallam, "a spell that had charmed the nation; it cut up by the roots all that theory of indefeasible right and of paramount prerogative which had put the crown in continual opposition to the people." Consequently, it transferred the power of the government from the hands of the king to that of Parliament forever. The British Constitution has been strengthened by every subsequent incorporation of the element of popular sovereignty into its provisions, as has successively happened under the Catholic Emancipation Bill, under the various reform bills, and under the late suffrage acts. The true founders of States are thus seen to be not the conquerors of the people who rule with the sword, but the tribunes of the people, who teach them how to govern themselves. It is the work of Hampden, Locke, Milton, and Sydney which has made constitutional liberty an established fact in England; and, in like manner, it is the work of Washington and Franklin, of Adams, Jefferson, and Hamilton, that has given us a constitutional Union which, having successfully withstood the shock of a great civil war and the perils of legislative reconstruction, bids fair to endure as the most stupendous monument of political sagacity ever reared by the genius of man.

## CHAPTER II.

ORGANIZATION AND DEVELOPMENT OF REPRESENTATIVE  
GOVERNMENT IN THE UNITED STATES.

THE growth of the principle of popular government in America is the logical consequence of certain definite causes which are fading from view in the changes incident to our rapid development. These causes no longer appear upon the surface of our daily life; they no longer affect our social relations—no longer regulate the enjoyment of our political rights nor limit the freedom of our civil or religious privileges. They have disappeared before the liberalizing and levelling tendencies of democratic ideas and form no part of the present scheme of political society in any portion of our country. To attempt a study of the present aspect of representative government in the United States, without a previous knowledge of the underlying causes which led up to its possibility, would prove as unsatisfactory in its results as it would be to begin the study of mankind in entire ignorance of such a period of time as that of childhood and infancy.

In our present inquiry we shall accordingly have to pass from that time when “governments chartered liberty” to the time when the people began to charter governments and delegate to them certain powers of sovereignty.

The growth of free institutions, like that of the human body, is a growth from within. They are more truly evolved than created, and are more in the nature of expansions of germinal ideas which have long been nursed

in the bosom of communities. Geographical limitations and political vicissitudes may temporarily retard the development and maturity of such ideas, but the seed will grow nevertheless, and in the fulness of time the fruit will be garnered by the children of the sowers in some future temple of constitutional liberty. Such has been the history of the genesis of free government in our own country, and it is to the manner of this growth, in its chronological development, that we must now address our attention.

The fundamental idea which animated the English colonists in their settlement of Virginia and New England was not that of a change in their form of government. Both Episcopalians in Virginia and Puritans and Separatists in New England clung to the political institutions of the mother country. Rev. Messrs. Cotton and Ward, who were appointed a committee to draft a body of laws for the Massachusetts colony, and who represented the popular sentiment of their day, were outspoken monarchists, and what the clergy taught the laity acted.<sup>1</sup> Hence they did not repudiate their allegiance to the British crown, nor even think of it, in their migration to this western wilderness. On the contrary, they still claimed to be loyal subjects of King James, and asked and accepted from his hands the protection and authority of a royal charter. But the character of these emigrants was radically dissimilar. This dissimilarity, added to economic reasons belonging to soil, agriculture, domestic and ecclesiastical institutions, operated in certain colonies to retard the growth, and to diminish the influence of those ideas of representative government which all colonists alike had brought from their native land. They had lived where "thousands of small communities enjoyed the privilege of self-gov-

<sup>1</sup> 2 Winthrop, 155.

ernment, taxing themselves through their representatives for local objects, meeting for discussion and business, and animated by local rivalries and ambitions." Such is Sir Erskine May's description of the parish governments of England.<sup>1</sup> Consequently in Virginia, as in England, the parish was the image and reflection of the State. Inasmuch also as in the parish the dominant principle was that of allegiance to an established church which inculcated the doctrine of passive obedience to the secular authority, the Virginia emigrants were only transplanted Englishmen, but without the democratic ideas which the Massachusetts colonists brought over with them. The difference in ideas of self-government between two communities, one of which adhered to a State church governed by a house of Bishops, and one of which adhered to a free church governed by a creed and a discipline of its own making, is a difference in fundamental ideas of government which admits of no compromise. All free, representative government must be based upon convention and contract, and not upon dogma or tradition. This was the political creed of the English colonists in America. Nevertheless, some restraining obstacle to its practice did undoubtedly exist, for although Virginia established a representative assembly as early as 1619, which was over a year before the landing of the Pilgrims at Plymouth, and adopted a written constitution in 1621, being, as Bancroft asserts, "the first State in the world composed of separate boroughs where the government was organized on the principle of universal suffrage;" and although Maryland was the first to exhibit the true spirit of toleration and religious freedom, still the cause of republican government did not make such rapid progress, nor exert such

<sup>1</sup> Const. Hist. vol. 2, p. 461; Creasy on the English Constitution, p. 275.

external influence as in New England,<sup>1</sup> where two most potent elements were at work leavening the domestic life of its infant communities with the germs of civil liberty. Those two most potent elements were the Congregational Church system and the system of town governments. In tracing, therefore, the growth of our present political system during its colonial days we must concede to the above-mentioned causes a power not elsewhere present in equal force—a power, in fact, whose larger operations and results will, in the light of historical evidence, justify us in assigning to it a dominant place.

The primary reason underlying the colonization of New England was unquestionably a religious one, although combined with a spirit of commercial adventure; in consequence of which local government among the colonists assumed from the very beginning an ecclesiastical complexion. These colonists in particular were disposed to follow the laws of Moses more than those of England, endeavoring in many ways to imitate the Hebrew Commonwealth. None but freemen were eligible to office, and none were qualified to take the freeman's oath save those who were twenty-one years of age, of sober and peaceable conversation, orthodox in the fundamentals of religion, and possessed of a ratable estate of the value of £20. It will thus be seen that the test of religious orthodoxy was made an indispensable prerequisite to the enjoyment of the rights of citizenship, and the basis of the Puritan Commonwealth became, accordingly, ecclesiastical.

Asserting that all forms of civil government were the ordinances of man, the Pilgrims regarded the State as only a secular organization, and desiring to

<sup>1</sup> Story on the Const., vol. 1, p. 26; Frothingham, Rise of the Republic of the U. S., p. 18.

impress upon it a complexion of sanctity, they made the church political in order to make the State religious. Doubtless their theory of a "civil body politic" was the outgrowth of republican ideas finding their roots in that instinctive principle of the Germanic races, which led them to adopt as a political creed the doctrine that, where laws were administered, there they should be made; that the will of the community could be legally expressed only through the individual action of its citizens, and that, without this precedent consent of the governed, no free government could exist.<sup>1</sup>

Throughout the entire period of our colonial existence, the fear of diocesan Episcopacy continued in New England as a stimulus to Congregational Church government. The conduct of the English hierarchy, in using the arm of the civil power for the purpose of prosecuting non-conformists, had left an ineradicable dread of the Episcopal priesthood upon the minds of the dissenting colonists. Nor was this to be wondered at, in the presence of such historical proofs as the legislation of the mother country afforded, that episcopacy was not so much sacerdotal as it was governmental. In a letter written by John Adams in 1815, he recalls the prevalence of this apprehension as a stimulus to the formation of popular government, in the following words: "Where is the man to be found at this day, when we see Methodistical Bishops, Bishops of the Church of England, Bishops, Archbishops, and Jesuits of the Church of Rome with indifference, who will believe that the apprehension of episcopacy contributed fifty years ago as much as any other cause to arouse the attention, not only of the inquiring mind, but of the common people and urge them to close thinking on the constitutional authority of Parliament over the

<sup>1</sup> Oliver, Puritan Comm., 99.

colonies. This nevertheless was a fact as certain as any in the history of North America. The objection was not merely to the office of bishop, though even that was dreaded, but to the authority of Parliament on which it must be founded."<sup>1</sup>

In this separation from the Church of England, the colonists were only carrying out the principles of their sect at home, and were aiming at the establishment of a Parliamentary church founded upon Presbyterian government, instead of a church founded upon an incorporated hierarchy, having the king for its supreme head. Accordingly, the citizen deriving his political qualifications from his church membership, would very naturally be inclined to mould and shape the political society of which he was a member, in conformity to the higher law of church government which had imparted to him his civil qualifications. The government of the church being essentially conventional and congregational, all members being qualified to sit and vote, it is easy to see whence sprung the rudiments of representative government in New England, and how its prosperity there hastened the dissemination of democratic ideas.

With the early history of the Congregational Church system of New England, we are not at present concerned. It is sufficient to say that it played an important part in laying the foundations of our free government, through its pervading influence in both the establishment and the government of towns. And as in English representative government the town or parish has always been the political unit, so the town grew up in New England around the meeting-house and because of the presence of the meeting-house, precisely as in England, the parish grew up around

<sup>1</sup> Works, vol. x. p. 185.



the church. At common law there could be no parish without a church, because the presence of a church stimulated the growth of municipal institutions, and as a parish was synonymous with a town, so there could be no town in law unless it had a church, together with celebration of divine service and administration of the sacraments.<sup>1</sup> These are elementary principles in the growth and development of modern communities of Germanic origin. Writers upon government point to the fact that in a representative democracy the town or communal constitution forms the political unit of the Commonwealth, and they trace the foundations of both Switzerland and the United States to this free, communal constitution, the absence of which in France, says Bluntschli, shows that the French have no natural tendency to a republican form of government.<sup>2</sup>

This principle of making the Church the nucleus of the Commonwealth first arose under Constantine and accompanied the great reformation introduced by Christianity. Under its influences the parish took the place of the *municipium* even in the Roman empire, whose sovereigns deprived the municipal magistrates of part of their authority and gave it to the bishops.<sup>3</sup>

It is important, therefore, to cast a glance, however brief, at those town governments which were the real nurseries of our political institutions. They were the offspring of that Anglo-Saxon spirit of self-government which is ever prone to organize the machinery of a political society whenever a body of freemen can meet in a primary assembly. No matter by what name such assembly may be known, whether as a parish, a school district, or a town meeting, the essential spirit of the old Saxon *folk mote* manifests itself in resting all right of

<sup>1</sup> Wood's Inst., p. 3.

<sup>2</sup> The State, ch. 22-3.

<sup>3</sup> Guizot, Rep. Gov., 190.

action upon the sovereignty of the people. Necessarily in these small communities, where the inhabitants were of a like mind in their religious and political views, it was an easy step towards the maintenance of a Commonwealth government to subdivide the general territory into conveniently small sections, each one of which could maintain an autonomy of its own; hence the town became an incorporated republic, self-governing and self-sustaining and possessed of all the attributes of political independence. This was the case in all the New England colonies, their towns enjoying varying degrees of political authority. In most instances, they undertook to govern themselves in obedience to rules prescribed by the General Assembly of the colony under whose permission they were founded; but in some parts they were self-created by the voluntary action of the inhabitants in occupying a certain portion of territory and organizing themselves into townships. A noteworthy instance of this kind was that of the three Connecticut towns of Hartford, Wethersfield, and Windsor, who by a federative union are said to have formed the first American constitution of government based upon the sovereignty of the people. So far, indeed, was this spirit of town autonomy carried in Connecticut that, according to one of her historians, it was the town that created the State and continued the residuary legatee of all political power; so that in any question of doubt between the State and the town as to the exercise of any particular power, the town had always presumptively a *prima facie* right, while the State had to establish its own.<sup>1</sup> Several causes combined to organize these political societies. Those causes

<sup>1</sup> Connecticut, by Alexander Johnson, in *American Commonwealth Series*, page 61; also *The Building of a New England State*, by the same author, in *Johns Hopkins Publications*, first series; Joel Parker, in *Massachusetts Historical Society Transactions for 1866-7*; Prof. Channing, in *Johns Hopkins Publications*, second series.

were partly religious, partly domestic, and partly political. The presence of the meeting-house as a nucleus for the assembling of co-religionists served, first of all, to inaugurate the township by enlargement of the original hamlet; next, the necessity of corporate municipal powers for purposes of government accompanied and grew out of the subdivision of land into freeholds.

As a historic fact local self-government had long existed in England in the several counties and parishes, for the parish was really the foundation of the town. It enjoyed the right of levying taxes for the support of the Church; and public assemblies of all its householders, regardless of property qualifications, were frequently held for purposes relating to government. The vestry meeting was the local legislature for enacting by-laws touching all matters of public concern. Besides its functions as a self-governing body, the parish became the political unit of the county and national administrations. It was also used as a military district and the starting-point for the collection of taxes.<sup>1</sup> The township in itself represented the ancient Saxon tithing, with its assembly of freemen and its democratic polity. All these rights, privileges, and immunities of a British subject at home were brought by the early emigrants to America and established in the various plantations, parishes, and towns of the different colonies. To these was added the great privilege of holding lands exempt from feudal tenures.

These estates, constituting the freest manner of holding land then known to the English law, were created in accordance with the provisions of the charter of New England, known as the great patent, which gave to the grantees the power of holding lands in free and common socage, and not *in capite*. The right to

<sup>1</sup> Toulmin Smith, *The Parish*, p. 125.

control the alienation of lands belonged to the towns. There were only two classes of citizens at that time—the one known as proprietors, who were tenants in common of town lands, and other inhabitants who were not. This exercise of colonial authority in the granting of township lands was assumed by the General Court, which, according to the original charter of the Massachusetts colony, consisted not only of the appointed officials, but of the whole body of freemen.<sup>1</sup> Such estates were practically allodial, and the land, in its subdivisions, was usually granted to groups or bodies of persons. The meeting-house in New England, and the Church in Virginia, were the pivot around which everything revolved, and as Puritanism and Congregationalism were freer systems than Episcopacy, the dominant form of church government became practically the form of social and political government in all the towns. When settlements became separated for the support of the Gospel, they necessarily became so also for local and temporal purposes, and towns were set off according to the wants of the time and the locality. Moreover, both Pilgrims and Puritans being dissenters who had fled from the hierarchy at home, it was very natural that they should establish a church without a bishop, and govern themselves according to a creed whose polity, rules, and discipline were regulated by the votes of its members. This was congregational action, and its close resemblance to democratic government in temporal affairs needs not to be pointed out.

In the revision of the laws of the colony made at a General Court held in November, 1636, the town of Plymouth was empowered to exercise a distinctly local or municipal government, and it was further enacted that Scituate and Duxbury should become townships

<sup>1</sup> Howard, Local Const. Hist. of the U. S.

with like principles, but all subject to the public ordinances of the general government of the colony. Judge Parker is of opinion that this was the origin of the first three towns in Massachusetts. However this may be, the above review of the colonial records presents this example as a type of what took place in other parts of New England.

The framework of a political society based upon democratic government in church and town, having been strengthened and enlarged in obedience to the growing wants of the colony, became speedily the model for further applications of the doctrine of popular sovereignty. Up to the year 1635, the compact signed in the cabin of the Mayflower had been the only organic law of the community. This famous compact was in the words following, viz:—

“In the name of God, Amen. We whose names are underwritten, the loyal subjects of our dread sovereign Lord King James, by the grace of God, of Great Britain, France and Ireland King, defender of the faith, etc., having undertaken for the glory of God, and advancement of the Christian faith, and honor of our King and country, a voyage to plant the first Colony in the northern parts of Virginia, do by these presents solemnly and mutually, in the presence of God and of one another, covenant and combine ourselves together into a ‘civil body politic’ for our better ordering and preservation, and furtherance of the ends aforesaid; and by virtue hereof, to enact, constitute and frame such just and equal laws and ordinances, acts, constitutions and offices from time to time, as shall be thought most meet and convenient for the general good of the Colony unto which we promise all due subjection and obedience.”

Under this compact or agreement the colonists had

lived for over fourteen years, during all which time they had adopted no constitution, and recognized no principle but that of allegiance to the king and the controlling power of the majority of the people in the transaction of public affairs. Meanwhile the absence of any persons learned in the law seems to have permitted a very lax system of administration to grow up. For, although the laws of England were considered of binding authority until altered or repealed by colonial statutes, still, even as to the latter there appear to have been no lawyers to interpret them; and no magistrates whose knowledge carried any weight in their opinions. For want of better guides, they had to resort to the clergy as the only learned members of the community who could master the subtleties of interpretation, in relation to their colonial statutes. But even these counsellors were not always capable of applying them to the actual necessities of civil government, or of directing an orderly procedure under their provisions. So marked was this ignorance of positive law that many crimes were neither declared, nor defined, and when a criminal was apprehended they hardly knew what disposition to make of his case. Thus, after one John Billington, who committed the first murder in the Plymouth Colony, had been duly indicted, tried, and convicted the Court doubted its authority to inflict the punishment of death. In consequence of which, the advice of Gov. Winthrop, and the ablest men of the Massachusetts Colony was sought in order to solve this judicial puzzle.

But the necessities of justice and an orderly administration of government requiring that the body politic should be ruled by law, rather than by opinion, at a Court of Associates held on the 15th of November, 1635, the following declaration in the nature of a

second compact was agreed upon in the words following, viz:—

“We, the Associates of New Plymouth, coming hither as freeborn subjects of the State of England and endowed with all and singular the privileges belonging to such, being assembled, do ordain that no act, imposition, law, or ordinance be made or imposed upon us at the present or to come, but such as shall be made and imposed by consent of the body of the associates or their representatives legally assembled, which is according to the liberties of the State of England.”

This declaration, giving as it did precedence to the laws enacted by the whole body of Associates over all other laws, present or future, was a virtual renunciation of the authority of Parliament to legislate for the colony, and in consequence was the first exercise of the principle of home rule on this Continent. It was the seed from which, in the fulness of time, there was destined to spring a great Union of sovereign States.

In this bald sketch of the origin and inauguration of the principle of representative government in America may be seen the operation of those silent forces which began at the Reformation, and, despite obstacles and opposition of every kind, have in the lapse of centuries successfully undermined the idol of sovereignty as personified in a king. The leaven of republicanism which took its rise in Germany changed the entire face of political society in England as well as in Holland; but in the latter, more than in any other country, was laid the initial foundation of all subsequent republican governments. The position occupied by the Pilgrim Fathers in Holland was one well calculated to increase their reverence for a form of government into whose territory, as strangers, they had been not only freely admitted, but accorded rights denied them in their own coun-

try. At home they had been denied the right of expatriation—they found it in Holland. At home they had been denied the right of dissenting public worship—they found it in Holland. At home they had been socially ostracised—imprisoned as fanatics and disturbers of the peace and placed under the ban of offensive laws—in Holland they found themselves the equals of all other denizens, with peace and security about them. No wonder is it that they sought to plant upon the soil of New England the liberal ideas whose fruits they had first tasted among strangers!

In less than three years from the passage of this declaration of rights, the benefit of a union for the common defence presented itself to the minds of the various colonists of Plymouth, Massachusetts, Rhode Island, and Connecticut. Accordingly, commissioners from each colony met for that purpose at Boston in May, 1643. After numerous meetings and the exchange of opinions upon the subject, Articles of Confederation were agreed upon and signed by all the commissioners, and the first union of confederated colonies in America took place under the name of the United Colonies of New England.

John Quincy Adams, in his discourse upon the history and influence of this confederacy, says that “it was the exercise of sovereignty in its highest attributes, and although made without the sanction of their sovereign, was yet not against him.”<sup>1</sup>

By the sixth article of this Confederation, a congress of two commissioners from each of the contracting parties was provided for the managing of all affairs proper to and concerning the whole Confederation. It was required, however, that these commissioners should all be in church fellowship with each other; that if the eight

<sup>1</sup> May 19, 1843.



could not agree, then six might, when in unison, determine and settle the business then in question; or if six could not agree, then the subject matter of difference was to be sent to the four General Courts of Plymouth, Massachusetts, New Haven, and Rhode Island. The Congress was to meet annually, in alternate places, and oftener, if any emergency required it.

Having now analyzed these foundations of political society in New England, and traced them to their proper ecclesiastical and domestic sources, we arrive at the close of a period in the Colonial History of the United States, in which already the growth of the principle of popular representation had taken organic shape, and established a frame-work of precedent capable of development into a constitutional form of government of limitless extent. This period covers a most important series of events, each of which typifies the crystallization of a new germinal idea, and its passage into a practical form of action in the administration of public affairs. The development of these ideas was rapid and continuous, as the following synopsis will show. But it is, after all, to the first and underlying one of a civil body politic with freehold tenure of lands, that we owe every subsequent phase of political superstructure as an offshoot merely from this parent trunk.

These three great ideas or doctrines of popular government may be re-stated in their chronological order, as follows, viz:—

1st. The idea of a Christian Commonwealth, or civil body politic, is foreshadowed in the compact entered into on board the *Mayflower*, November 15, 1620.

2d. The idea of a representative body of legislators based upon equality of suffrage among freemen, as set forth in the Declaration of Rights among the body of *Plymouth Associates*, November 25, 1635.

3d. The idea of a Federal Union as set forth in the confederation known as the United Colonies of New England, May 24, 1643.

We now come to a second chapter in the history of institutional government, viz: the chapter of our Revolutionary struggle. Petitions and remonstrances having failed to secure the colonies in their ancient chartered rights, and the British ministry continuing to impose new burthens and restrictions upon the local independence of the people, by insisting that a different law governed the colonies from that of the mother country, the struggle for civil liberty and home rule was inaugurated in blood at Concord and Lexington. In the seven years' war which followed, there was afforded opportunity to the various colonies to test their capacity for self-government and participation in a confederation of newly-born States, that was seeking to live without financial credit, and which dared to confront the greatest commercial power of Europe. On the basis of ordinary probability their success could hardly have been predicated. And when it was finally achieved, it seemed more like the providential act of a Divine hand, preparing the centuries for the coming of the last age of the Cumæan Sibyl, than as the result of unaided human agency. The birth of the American Republic was everywhere regarded by statesmen and by jurists as the day-star of civil liberty to the world.

It is a noteworthy fact, that however accomplished, a successful revolution always carries with it a certain picturesque and romantic character which is flattering to national pride. Hence this stirring period is the one from which political writers are more commonly disposed to date the origin and growth of our present representative system, than from those humble colonial days when the doctrine of a church without a bishop,

and a State without a king, were being sown as seeds of local independence in the organization of town and church governments throughout New England. No thoughtful student of American political history can doubt, that these town governments are the political unit out of which has been developed every subsequent form of institutional administration in the United States. All the averments in the Declaration of Independence, says Judge Parker, had been over and over again asserted in town meetings, and they had done everything to fan the flame of independence. Without them the way to a successful organization of our colonial resources would never have been so speedily opened; armed resistance would have been feeble and ill-regulated, and the assembling of conventions of delegates representing the unity of local interests would not have occurred with that unanimity so essential to ultimate success. The entire control of affairs was vested in the town meeting, which combined legislative, judicial, and executive powers. Such an assembly was necessarily autocratic, and occupied itself with all the prudential affairs of the town, whether civil, religious, or domestic. Hence questions relating to taxation, minister's salaries, school support, and sumptuary laws affecting dress and personal conduct, all came within the purview of its official cognizance. In fact, it was through township organizations of a militia and commissariat system that the colonists were able to maintain a successful resistance, in advance of any action on the part of the Continental Congress. It was the "minute men" of Concord and Lexington who kindled the torch of the Revolution, and made it historically possible to build the monument on Bunker Hill. It is but justice, therefore, to admit the pervading influence which the early town governments exercised upon subsequent legislation during the

whole of our Revolutionary period, and to point to these small democratic republics as still the true nurseries of American independence.

In January, 1689, before the news of the landing of William of Orange in England had reached the New England colonists, they had already determined to rise in rebellion against the oppressive administration of Sir Edmund Andros, then Governor of Massachusetts. On the 18th of April, a public declaration was made by a party of citizens styling themselves "The Gentlemen, Merchants and Inhabitants of Boston and the country adjacent," detailing their grievances, and announcing their determination to seize upon the persons of those public officers who had been the authors of their misfortunes. The Governor and Crown officers were accordingly arrested and thrown into prison; the fortifications were seized and occupied by the colonial troops; and the British authority entirely overthrown. A Provisional Government was immediately formed under the name of "The Council for the Safety of the People and Conservation of the Peace." In this embarrassment of their public affairs, having neither a charter, nor a deputation of authority from the Sovereign, nor any election of the people to justify them in their course, the leaders of this movement decided to call a convention to consist of two delegates from each town in the jurisdiction, except Boston, which was to send four. The convention met on the 9th of May, 1689; but failing to accomplish anything by reason of the opposition of the magistrates, a second convention was called, to which fifty-four towns sent delegates. As a result, the Governor and Magistrates chosen at the last election under the old and now abrogated charter, were reinstated into office, and in concert with the convention

delegates, proceeded to form a general court or legislative assembly.<sup>1</sup>

This Convention, which in point of time forms the opening chapter of a new period in American political history, was the creature of necessity, and only provisionally supplanted an already existing government, until the old order of things could be reëstablished. But it was not so much in the nature of a revolution against the British crown, as of personal resistance to the evil administration of Sir Edmund Andros. Such was the condition of affairs when the announcement of the establishment of William III. on the throne of England, immediately restored order in the colony by reëstablishing the ancient forms of administration.

It is not necessary, however, to follow in a close and regulated manner, the trials to which the colonists were subjected by the various acts of Parliament relating to them, which tended more and more to discriminate against their rights, privileges, and immunities as subjects of Great Britain. This portion of our history is too well known to need repetition, and it will be sufficient, therefore, to confine ourselves alone to such particular events as gave shape and consistency to those ideas of representative government which were already asserting themselves, while awaiting the process of conversion into definite organization.

It is now generally conceded that open revolution in the American colonies was precipitated by the act of Parliament of 1774, which was intended to abrogate the charter of William and Mary of 1691, and to subvert the ancient forms of local government, by vesting the entire power of appointment and removal of local officers in the Crown. As this was regarded a violation of a solemn compact on the part of the mother country,

<sup>1</sup> 3 Palf. Hist. N. E., 587-9.

it accordingly united the colonies in one general outburst of indignant protestation.

This condition of affairs had long been foreseen by the people, whose leaders deeming revolution inevitable, had already begun to make preparations to meet it. On the 7th of July, 1773, Benjamin Franklin had addressed a letter from London to the Massachusetts Assembly, advocating the assembling of a general congress of the American colonies. With his usual bluntness and high moral courage, he remarked that such a step would bring the dispute to a crisis, and all knew very well that he was anxious that it should. But nothing was done that year by legislation to promote it.

In May, 1774, the House of Burgesses of Virginia led off in the work of organizing a Continental Congress. Its members formed an association for the purpose of advising the Committee on Correspondence of that colony, to confer with a similar committee of the other colonies, upon the expediency of holding a general Continental Congress. Whereupon a popular convention was held at Williamsburg on the 1st of August, 1774, which elected seven delegates to represent the people of Virginia in a general Congress, to be held in Philadelphia, in the succeeding month of September. Massachusetts immediately followed this example, and its Assembly, which met in June of this same year, appointed five delegates to attend the Congress about assembling in Philadelphia. All the remaining colonies speedily fell into line and sent delegates, some being appointed by the popular branch of their Legislatures, and some by conventions called for that purpose. The first Congress accordingly assembled in Philadelphia on the 5th of September, 1774, and sat until the 26th of October following.

This step virtually inaugurated that form of Federal

machinery which was afterwards to receive a more definite moulding at the hands of the framers of the Constitution.

One of the features of this movement, which has more particularly attracted the attention of historians, is the remarkable unanimity with which the various colonies united in the common cause of independence. Whether living under the provincial governments of New Hampshire, New Jersey, Virginia, the Carolinas, Georgia, or New York; the proprietary governments of Maryland, Pennsylvania, or Delaware; or the charter governments of Massachusetts, Rhode Island, and Connecticut, all differences melted away, all rivalries were forgotten, and the Puritan of New England, the Episcopalian of Virginia, and the Roman Catholic of Maryland, in respect to political things, all made common cause against the common enemy. The spirit of civil liberty was in the air, the time was ripe, the opportunity present, the will of the people undivided on the subject of the Union.

But the first Continental Congress did not establish nor even seek to establish a permanent form of government. It consisted of sixty-five delegates from the various colonies, assembled to compare and confer upon their mutual grievances, and to seek by a union of remonstrance to secure a general redress for all. It was felt that unanimity and universality of complaint would command an attention which had not been heretofore given to the petitions of individual colonies. Still no disavowal of allegiance to the British Crown was yet made, nor any idea of separation from its authority entertained. They all looked for redress through the action of Parliament instigated by a returning sense of justice to the colonies, and in this belief adopted a Declaration of Rights setting forth the wrongs which

had been inflicted upon them by Parliament since 1763. They also claimed all the constitutional rights, liberties, and immunities of free and natural-born subjects within the realm of England, the right to its common law, especially to trial by a jury of the vicinage, and, lastly, to the immunities and privileges granted and confirmed to them by royal charter, or secured by their several codes of provincial laws. In all this they claimed no more than had been claimed by their ancestors under the Stuarts, and like them, also, without disloyalty.

So strong and enduring was this allegiance to the British Crown, that it continued to flourish in the midst even of all the indicia of revolution. Despite conventions and congresses the people did not think of independence as necessarily flowing out of revolution. Jefferson, in his Notes on Virginia, says that as late as July, 1775, "a separation from Great Britain and establishment of republican government had never yet entered into any person's mind;"<sup>1</sup> and John Adams, in his *Nov-Anglus* of March 13, 1775, corroborates this most fully by denouncing the statement that the inhabitants panted for independence as a great slander on the province."

The next step in the development of our representative system was taken on the 15th November, 1777, when the thirteen colonies entered into articles of confederation and perpetual union, under the title of "The United States of America." This confederation lasted through not only the period of the Revolutionary War, but until the adoption of the Constitution on the 4th March, 1789.

Although the confederation of States was soon discovered to be inadequate to the political necessities of the Union as then organized, and without such restrain-

<sup>1</sup> Notes, p. 165.



ing power over the States as was essential to their cohesion, it still served its purpose as a revolutionary government, and was the best that could, under the circumstances, have been established at that time. But it accomplished more than this, for it became the historical basis of the present Constitution, and its office, says Mr. Curtis, "was to demonstrate to the American people the practicability of a more perfect Union."<sup>1</sup>

With the adoption of the Constitution closes the second chapter of our sketch of the growth of representative government in America.

Finally, the war for the Union, as it was conducted by the loyal States in 1861, and its converse, the war for secession, as conducted by the rebellious States, forms a third and concluding chapter in this history. This last one is of too recent occurrence to need more than a passing allusion. It served its great purpose however, not only in the destruction of slavery, but also in its perpetuation of the doctrine of primary sovereignty in the people of the United States as a nation claiming authority over all its territory, together with the consequent right of maintaining a homogeneous form of government in all the States of the Union. This practically destroyed the secession principle that ours was a league of States, and reaffirmed the original doctrine of the founders that the People formed the Union out of which sprang the States.

We have now traced the origin and growth of the principle of popular government from its origin in the cabin of the Mayflower down to those reconstruction Acts of 1865, which reestablished the political relations of the seceded States to the Federal Government. In this period of two hundred and forty years, the American people have undeviatingly held to the principle of

<sup>1</sup> 1 Curtis Const., 149.

popular sovereignty, whether exhibited in the nature or degree of authority exercised over individuals; whether in the location and distribution of power in the various departments of administration; whether in personal immunity from oppressive laws, or whether in the inviolability of civil rights secured to the citizens of their great Commonwealth.

With these facts before us as a historical basis, we can now more readily interpret the significance and connection of those principles of administrative law, which have accompanied the genesis and growth of our political society, and harmonized all parts into one organic whole. In other words, we shall the better be able to know why the essence of our Union is a national one, rather than a mere confederacy of States, voluntarily combining in the form of a political league.

#### PRINCIPLES OF REPRESENTATIVE GOVERNMENT.

In fashioning our form of government with reference to avoiding whatever seemed objectionable in the English Constitution after which it was modelled, the framers of our Federal charter took note of all that history afforded them of past experience. They were profound students of public municipal law as well as of political economy, and had traced the sources of popular government, in both ancient and modern republics, to their fountain head. They had noted the causes which insidiously undermined Athenian liberty, and converted the "mother of arts and eloquence" into a democratic absolutism. They had followed the reign of communism in Sparta, down to the day when personal liberty was swallowed up by a doctrine of allegiance which extinguished individuality, and made the State the owner of the citizen. They had followed the his-

tory of the mediæval republics in their vain efforts at establishing permanent forms of self-government. Lastly, they had seen the results of revolutionary movements in Holland and England, when undertaken by a people without the experience of democratic home institutions; and without the capacity to grapple with the complex problems flowing out of the exercise of popular sovereignty. The downfall of Charles I., the short-lived Commonwealth of Cromwell, the restoration of monarchy, the abdication of James, the revolution of 1688, and the establishment of a new dynasty in England, all this, alongside of enlarged Parliamentary privileges, convinced them that the utmost circumspection was necessary, in building the superstructure of popular government upon those foundations of civil liberty, which the early colonists had incorporated into both their religious and municipal administrations.

They saw at the outset, that federal governments, however much they may differ in external form, or in origin, must ultimately rest upon two fundamental principles, viz: sovereignty of the people, and equality before the law. That without such principles no cohesion would exist between different parts, and no laws could be enforced, because the very authority to make them could be impeached, and thus the machinery of political society would be speedily disrupted, by the conflicting forces to which it was subjected. They saw that in the midst of the largest external diversity, there must still be a centralizing unity to constitute what is properly designated as the genius of a government. Around this, as on an axis, the wheels of all authority must revolve; and this principle must be so far indivisible and unitary, as to be able to oppose even reforms, when they came from sources foreign to itself. Each citizen of the Republic must be made to feel that he had a share in its

creation and maintenance, and a personal estate in his right to participate in its government. The basic principle, therefore, upon which they rested the Constitution was that of a homogeneous nation forever localizing sovereignty in its people. And as such sovereignty can never be abdicated, it constituted in the form of our present Union, an indestructible political society.

Historical evidence has always pointed to the fact, that, in every attempt made by a nation to formulate its ideas of self-government into a code of practice, there had at some period been evolved something akin to a compact, charter or constitution upon which the superstructure of its political system was made to rest. But in all these instances the localization of sovereignty differed with respect to the source of its origin. At the date of the formation of our Colonial Confederation, but few writers in England had undertaken to discuss the doctrine of popular government. Aristotle still remained the dominant philosophic author of antiquity, and as such was referred to with approbation. Meanwhile the idea of civil liberty which grew out of the Revolutions of 1648 and 1688, had taken firm root, and the treatises of Hobbes and Filmer, who were the outspoken defenders of monarchy, had been fully met and answered in the light of the events of that day, by the writings of Locke and Sidney, the great advocates of republican government. John Adams, in his "Defence of the Constitutions of the Governments of the United States," published in London, in 1787, after making a profound and exhaustive study of all past republics, whether democratic, aristocratic, or monarchical, assigns to the form of our own, the merit of combining in just proportions the best elements of a mixed and self-balancing administration. The authors of the *Federalist*, who were, also, among the framers of the Constitu-

tion, have fully expounded in its pages the reasons which governed them in proposing the various provisions entering into our great charter. They were fully aware of the fact that there were two antagonizing opinions, even at that early day, dividing the minds of the people. The one regarded the States as sovereignties, whose autonomy could not be diminished by union in any form of confederation. They further held them to be independent political societies, organized on a basis of democracy, and already recognized as capable of entering into alliances with other States, as had been done by the Articles of Confederation. To extinguish this sovereignty, by merging it into the political unity of the entire United States, seemed to those who entertained these views little less than a destruction of the entire political fabric of a State, and its reduction to the condition of a conquered province.

We are told by Frothingham,<sup>1</sup> that, from the moment of the Declaration of Independence, everything had assumed a new appearance. New terms came into use. The Colonies had been suddenly transformed into States, and hence Congress habitually designated them as sovereign, free and independent States, and referred to them in the Union as sovereign bodies. But the doctrine of a perfect State sovereignty was not received even then as an admission of absolute autonomy. All perceived that such a condition must be more apparent than real, if the Union meant anything stable. It is true that the word Province or Colony had so suddenly been transformed into that of State, and the principle of legislating for States in their corporate or collective capacity had so fixed itself into the political customs of the day, that there grew up a habit of regarding them as originally sovereign, which it became difficult to overthrow.

<sup>1</sup> Rise of the Republic of the United States, p. 556.

Even Franklin says that "the Colonies originally were constituted distinct States."<sup>1</sup> In the case of local governments, covering only inferior jurisdictions, this sudden change from Colonies to States, was not seriously felt, for representation in them had been slowly developing itself in obedience to the laws of circumstance and necessity. In proportion, however, as the scale of power and the extent of functions increased, the difficulties were multiplied.

"But to adjust the power of a general government adequate to the ends of a nation composed of independent States, required the experience and deliberations of several years."<sup>2</sup> All were compelled to recognize the imperfections of the Confederation, and all had arrived, in the words of Hamilton, to the point of a reluctant confession of those defects, and an admission of the fact that we had reached almost the last stage of national humiliation. Still, the proposition of nationalizing the Federal government by the sacrifice of State sovereignty did not meet with an unanimous assent. Between the extreme views of Hamilton as a Federalist, and Madison as a Republican, there was a wide field in which to adjust balances and checks of power.

These divergent opinions, rallying as they did to their support the leading minds of the country, retarded the labors of the Convention engaged in framing the Constitution, and operated, even beyond that, to delay its ultimate ratification. It was not from any disloyalty to the spirit of republican government that this distrust of Federal sovereignty arose; but rather from a fear of surrendering any portion of those rights for the possession of which the colonists had suffered the long agonies of provincial subjection, the trials and sacrifices of a revolutionary war, and the disappointments of a confederate

<sup>1</sup> Works, vol. 7th, p. 476.

<sup>2</sup> Frothingham, 426.

government. In the enjoyment of their local sovereignties, they had tasted the freedom of territorial independence, and they dreaded parting with any portion of it. To them Union seemed extinction of Statehood.

From the earliest colonial days, there had been occasional disagreements between the provinces, sufficient to awaken local prejudices and to provoke mutual distrust. Disputes had arisen between Connecticut and Pennsylvania and between New York and New Hampshire, Massachusetts and Connecticut, in relation to the district of Vermont. And so bitter had this contest become that, in the words of Hamilton, even the States which brought forward claims in contradiction to those of New York seemed more solicitous to dismember that State than to establish their own pretensions.<sup>1</sup>

It became the one great object, therefore, of the framers of the Constitution to extinguish State rivalries by reconstructing the Union upon a basis of popular sovereignty, acting under the limitations of representative government. The idea of nationalizing the Federal government before distributing its powers; or the idea of permitting the exercise of sovereignty by the States, but in subordination to a supreme Federal jurisdiction created by the Constitution, was each in itself a novel one to many. These two ideas did not appear simultaneously. The first one, which contemplated nationalizing the general government, is the work of Franklin, who, as a member of the convention which sat in Albany in 1754, first proposed it to the colonies. This "Albany plan," as it has been called, contemplated establishing one general government over all the colonies, based upon the consent of the governed. It was to be limited to general purposes alone, and in consequence it left to the local governments the uninter-

<sup>1</sup> Federalist, No. 7.

rupted exercise of their separate functions. It also gave to the representatives of the people enlarged powers in legislation, together with that of appointing officers to execute the laws, and yet so as not to interfere with the execution of local laws by local officers.<sup>1</sup>

It thus sought to establish the principle of superior and inferior jurisdictions, acting concurrently towards one political end, and that, too, without clash or conflict. Such a form of government had never before been witnessed in its entirety.

While Franklin's plan was not then adopted because in advance of the opinions of the day, there can be no doubt of the fact that it took firm root in the minds of the people, and there awaited the arrival of those political developments which the revolutionary struggle was so soon to bring forth. When, therefore, the great clock of Time, which regulates the movements of nations as well as of individuals, brought the representatives of the people together in convention, the plan of Franklin became the basis upon which all subsequent superstructures were built.

The first postulate to deal with was that of the distribution of sovereignty by delegation of powers to departments of government. In colonial days, sovereignty had been distributed in undetermined proportions between Parliament and the several local governments. The political administration resembled, and was fashioned upon that of Great Britain, the supreme sovereignty residing in the central imperial government, and the colonies having no other rights of autonomy than were conceded in their charters. The mischief wrought by this state of political subjection was too deeply engraven upon the memory of the people to permit any analogous form of indefinite, and unascertain-

<sup>1</sup> Frothingham, 149.



able jurisdictions to be again submitted to. So long as the national character of the Federal sovereignty could be secured, they felt that the matter of distributing delegated authority could be left to the circumstances of time and locality. No general overturning of established governments, and no disturbance of vested rights or franchises were anticipated. The object sought by all was "to form a more perfect Union, establish justice, insure domestic tranquillity, promote the general welfare, and secure the blessings of liberty." This object was accomplished without a revolution, by the simple exercise of national power expressing itself through the consent of the people in each State. Yet the word State, immediately upon the adoption of the Constitution, became one of qualified meaning. It is true that it had never meant Nation; nor had any international qualities ever been attached to it. So that when the Union was formed, the ratification of the Constitution by the people in each of the States was a virtual compact between them and the remainder of the people in all the States, under which compact each State by such act of ratification, surrendered its former independence, and without change in its local government became immediately re-invested with a delegated sovereignty under the Constitution. Looking at it as a juridical as well as a political question, it may be said that there are no States outside of the Union, or that are not united States. Hence, while there is existing sovereignty in the States, it is in the States united, and not in the States severally.<sup>1</sup> This is the view taken by Mr. Hurd, who says that the question of the seat of sovereignty is an historical one, that of its nature and extent is ethical.<sup>2</sup> The possession of sovereignty is a fact, and not an effect of law. All written memorials or declarations of the

<sup>1</sup> Brownson, p. 221.

<sup>2</sup> 1 Freedom and Bondage, 397.

rightfulness of sovereignty must proceed from itself, and are historical evidence of its existence.<sup>1</sup>

Applying these fundamental propositions to the historical evidence now before us, it will be seen that there never was a time before the Declaration of Independence when any of the colonies either claimed, or could have exercised the power of original sovereignty. It is true that the colonial governments were more or less republican in their form, beginning with the towns, and extending to the General Assembly of the various provinces. But above and antedating this was the ever recognized sovereignty of the Crown whence their colonial charters had emanated, and to which these local administrations deferred as loyal subjects. Whatever rightful authority simulating sovereignty was exercised by political organizations holding either legislative, judicial, or executive power arose, therefore, from jurisdictional necessity alone, and was not a delegation of power from the whole body of the inhabitants. Such power, if vested in them, would have practically dissolved their allegiance to the British Crown, and they would have been clothed with all the attributes of sovereignty. The true legal status of the colonists of that day was clearly stated by Chief Justice Jay, the first chief justice of the Supreme Court, and himself one of the framers of the Constitution, in the case of *Chisholm v. Georgia*.<sup>2</sup> The following are his words:—

“All the country now possessed by the United States was, prior to the Revolution, a part of the dominions appertaining to the crown of Great Britain. Every acre of land in this country was then held immediately or by grants from that crown. All the people of this

<sup>1</sup> *Hard*, *Ibid.* 296.

<sup>2</sup> 2 *Dall.* 4, 70; see, also, *Penhallow v. Doane's Adm'r*, 3 *Ibid.* 91, and *Ware v. Hylton*, *Ibid.* 231.

country were then subjects of the king of Great Britain and owed allegiance to him, and all the civil authority then existing, or exercised here, flowed from the head of the British Empire. They were, in a strict sense, fellow-subjects, and in a variety of respects one people.

\* \* \* \* \*

“The Revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time providing for their more domestic concerns by State conventions, and other temporary arrangements. From the crown of Great Britain the sovereignty of their country passed to the people of it, and it was not then an uncommon opinion that the unappropriated lands which belonged to the crown passed, not to the people of the colony or State within whose limits they were situated, but to the whole people. On whatever principle this opinion rested, it did not give way to the other, and thirteen sovereignties were considered as emerged from the principles of the Revolution, combined with local convenience and considerations; the people, nevertheless, continued to consider themselves in a national point of view as one people, and they continued without interruption to manage their national concerns accordingly. Afterwards, in the hurry of the war and in the warmth of mutual confidence, they made a confederation of the States the basis of a general government. Experience disappointed the expectations they had formed from it, and then the people in their collective capacity established the present Constitution.”

“It is evident,” says Judge Cooley, in commenting upon this opinion, “that the States, though declared to be sovereign and independent, were never strictly so in their individual character; but that they were always, in respect to the higher powers of sovereignty, subject

to the control of a central power, and were never separately known as members of the family of nations. The Declaration of Independence made them sovereign and independent States by altogether abolishing the foreign jurisdiction, and substituting a national government of their own creation."<sup>1</sup>

We have now sufficiently examined this question of independent sovereignty as formerly claimed for the States. We have seen that it never had any juristic existence, and moreover was never claimed by them in the international sense, the only true test of political independence. And if this is once established in relation to the thirteen original States, how much less tenable must such a proposition be when sought to be applied to the thirty-one new States admitted since the formation of the Constitution. Whence did such States, for example, as Florida, or Louisiana, or Arkansas, or any of the other States formed out of the territory of the nation, and whose very soil was purchased by the money of the people of the United States, obtain their original sovereignty? Strange as it may seem now, it required something more than the arguments of the Senate chamber, or the decisions of Federal courts to lay this doctrine at rest. The arbitrament of civil war, and the pitiless logic of the battlefield, *ultima ratio regum*, were finally invoked in its behalf ere this dogma was surrendered. It perished amid the clash of arms, and the bitter throes of fratricidal strife, a stupendous monument of political folly and unreasoning ambition. In finally summing up the changes wrought in the political constitutions of the colonies from their first rudimentary efforts at self-government, we shall find the following characteristic facts as foundations upon which juristic rights have been established in

<sup>1</sup> Const. Limitations, 6.

behalf both of individuals and of the body politic. These rights have in their subsequent development kept pace with the widening relations of political society down to present times. They should be followed, therefore, as links in the chain of evidence through which to trace the descent of genetic principles in representative government.

*First.* That the word people, in these constitutions, designated only a portion of the inhabitants. That such portion having possessed themselves of certain qualifications sufficient to constitute them freemen and electors became, and in fact were, the only *political* people who exercised any voice in the government of the Colony. That while exercising these functions of electors, they united the dual character of British subjects with the local character of corporate members of a chartered Colony.

*Second.* That at this time, sovereignty, but only for jurisdictional purposes, was held and exercised by such local governments, subject nevertheless to withdrawal or modification at the will of Parliament. That whether the government was organized under a charter or a patent, or whether it was provincial or proprietary, the rule of subjection still obtained, qualified only as to condition born of differences in its form.

*Third.* That, at the Revolution an immediate change occurred in the location of sovereign power. But inasmuch as no Colony achieved her independence singly, and such independence was in fact the result of the contemporaneous assistance of the people of all the Colonies, so the new location of sovereignty was centered in those who proved themselves capable of assisting, and maintaining it against all the world, and of establishing a *de facto* government. This the people of the United States did, but no single Colony.

*Fourth.* That national and local powers were not simultaneously transferred, owing to the fact that it was first necessary that national power should be created, in order to organize a successful revolution. Since, had each Colony severally revolted, it might have been overpowered, and again reduced to subjection, and the result, whether applying to one or more Colonies, might have proved equally disastrous. It is evident that without a union of all the thirteen Colonies, the Revolution would never have proved successful. Therefore, the corporate existence of the people of the different States continued throughout this period of necessity, and until, under a new charter promulgated by the people in a constitutional convention, the proper and permanent relations of the inhabitants of the several States to the United States, could be finally prescribed and determined.

*Fifth.* The government thus established by the Constitution was a national one. It created a Federal sovereignty; and the United States have, in consequence, been recognized internationally by admission into the family of States. The dominion of this government as the possessor of sovereign power is over the entire territory of the United States, irrespective of its subdivision into particular States. The right of this possession will be found in the historical evidence showing the actual exercise of power throughout this territory, beginning with the Declaration of Independence, and continuing without question or dispute, at a time when the boundaries of some of these States, like Virginia, New York, and Massachusetts, were still undetermined, and many conflicting claims under charters and patents were still outstanding.

*Sixth.* The subsequent acquisition of territory by treaty or conquest duly legalized by public law, and the

formation of new States out of it through the action of Congress, as a constituent body for that purpose, organized new sovereignties in such States, but only for local purposes.

*Seventh.* As a corollary from the foregoing propositions it follows, that the power of the political or constituting people of the United States is unlimited and absolute in its nature, being independent of all law or consent of individuals, and no law is valid which does not derive its authority under either a Federal or State Constitution.

The next great step in the formation of our Federal polity was that of fixing the basis of representation. Here a double difficulty arose out of the necessity of giving representation to the States as States, independently of popular representation, in the most numerous branch of the National Legislature. It was at this point that the principle of popular sovereignty encountered its first necessary limitation. Experience had shown that a pure democracy could not carry on successfully the complex operations of government, even in the small republics of Greece and Italy. It was inevitable, therefore, that to so large a field as the thirteen new States no scheme of this kind would apply. The reasons for this difference in democratic capacity between large and small territories, deserves a passing notice, since it is still re-asserting itself in the superior difficulty of governing great cities, as contrasted with rural districts. It is not a question of numbers alone, but of conflict of interests aggravated by contiguity. Much as this was theoretically foreseen from the examples of antiquity and the Middle Ages, no imagination had yet dreamed of the overpowering influence which modern civilization, and the mechanic arts would exert in hastening the development of metropolitan

communities, and their subsequent independence under municipal charters. It is now recognized that popular sovereignty needs limitation, in proportion to the absence of territorial subdivisions into small freeholds, and that allegiance to the soil, through some form of permanent occupancy, is the first condition of citizenship. While this satisfies the condition of legal domicile, it does not yet secure that individual interest in the purity of government which comes from freehold ownership.

If we start with the proposition of the sovereignty of the people as the basic fact in representative government; and if we concede that it forms the primary right to govern, we shall immediately see in the practice of this right that it presents itself under two aspects, viz: that of a right at rest, and that of a right in motion. In the former case, or that of a right at rest, we simply enunciate the theory of a purely democratic government or government of numbers, a form of polity which in all times has been found self-obstructive and confusing. No government in consequence, in which all the people personally participated, has ever been able to sustain itself long. Aristotle took the ground that a democracy was the reaction arising from a state of preceding tyranny; and that it was not in itself a desirable form of government, because it was in fact a perversion of the principle of a Commonwealth. Guizot practically adopts the same views, and says that sovereignty of the people is no sooner proclaimed than it is compelled to abdicate its power, and to confess the impracticability of its aims. But representative government moves naturally and steadily onward and develops itself by its very existence.<sup>1</sup> The ideal type of a perfect government must necessarily be representative.<sup>2</sup>

<sup>1</sup> Rept. Govt. Lect., 7th.

<sup>2</sup> Mill, On Representative Government, ch. xv.



These opinions representing the wisdom of the past and the experience of modern times, practically reflect the views which in England had been steadily asserting themselves from the days of Hampden and Pym, and Elliott and Sidney, down to the days of their political successors in the young American colonies. Reform in parliamentary representation, as a correction of deformities, had been advocated by Cromwell; but what to him seemed deformities were, in the language of Macaulay, "Beauties to those who were zealous for the Church and Crown." These things were well known to the framers of our Constitution. They were close students of political history, and had added an important chapter to that of civil liberty. Moreover, they were the descendants of those, who, for over a century, had been engaged in the task of founding representative government on this Continent. None, consequently, could be more alive to the difficulties which beset an undertaking of this kind, in the presence of the various State and local governments then existing.

When, therefore, the second aspect of the question of the sovereignty of the people as a right in motion, to be practically applied to the needs of a Federal Union, came into the field of discussion, the necessity for curbing and directing it in the form of representative government gave rise to some of the most perplexing problems before the convention. No one could fail to perceive at the outset, that what should constitute the proper homogeneous basis of representation in a community of colonies possessing, and accustomed to such dissimilar and competing forms of local government as sprung out of charters, patents or proprietary grants, would be a most difficult question to settle. They knew it was not like a problem of mathematical science, to be solved by the application of a formula of definite and

unchangeable elements. They saw it was more properly a question of public reason, to be decided according to the ethical standard by which the individual reason of the community expressed itself through the exercise of power. Therefore, it must be a government not of the numerical majority, but of the majority qualified to act as electors in the selection of representatives; at the same time securing to the minority, through the right of public discussion, and by means of a free press and of frequent elections, the opportunity to become themselves in turn the majority. But for these self-imposed qualifications upon the sovereignty of the people, that sovereignty would terminate with, and be included in the numerical majority alone, and there would follow a despotism of numbers far more dangerous than that of an autocrat.<sup>1</sup>

It was mainly owing to these reasons that, after settling upon what seemed the most convenient number to begin with in a representative Legislature, they immediately provided for a decennial enumeration of the inhabitants in the form of a census, so as to raise the number of representatives to a ratio more proportionate to the increased number of citizens. The first House of Representatives consisted of sixty-five members, the present contains three hundred and twenty-five. The first census of the United States returned 3,929,000 inhabitants; the last census shows about 63,000,000. Mr. Madison, in "The Federalist," computed, on the basis of one representative to 30,000 inhabitants, that in fifty years the House of Representatives would contain four hundred members. This exaggerated number, after

<sup>1</sup> Prof. Bluntschli does not overlook this paradox in government, and mentions it as a peculiarity of representative democracy that it ascribes the right of sovereignty to the majority, but intrusts its exercise only to the minority. —(The State, ch. 22-3.)

a full century of constitutional life, has not yet been reached, nor is it likely to be for some time yet to come. But it has been shown by experience that the numbers of each constituency could be safely enlarged without violating the spirit of popular sovereignty, however much it appeared like an abridgment of it. If the same ratio of representation for the lower House, which was deemed necessary to insure its popular character by the framers of the Constitution, had been continued to the present time, the House of Representatives instead of containing 325 members would now contain 1950. Yet with this apparent abridgment of the democratic character of the House, no one deems that its representative power, as a popular assembly, has been diminished. On the contrary, it is felt that with the increase of the voting people which necessarily accompanies increase of population, the simple addition of numbers does not justify, nor, indeed, require the same ratio of representation that was first agreed upon as a minimum. The logic of events, in fact, proves that 156,158 inhabitants can be as well represented by one member of Congress to-day, as 30,000 were at the foundation of the government. This happy adjustment of so small a number of representatives to a population of 63,000,000 is the result of the altered character of our modern system of representative government. In all former governments by assembled estates the delegate of the people was a deputy or attorney-in-fact of his immediate constituency. He knew only them, and worked almost exclusively in their interests. At present, the delegate is a representative of the whole people when sitting in Congress, although elected by only a portion of them. He fills, accordingly, a larger sphere, and occupies in corresponding measure a higher place

in the public life of the nation. Government by deputies has thus been swallowed up in government by representatives.

In following out the principle of adjustment in representation, so as to balance the conflicting influences arising from our national and federal form of government, there immediately appeared a necessity for a second House in which all disparities between the several States could be reconciled on a basis of equality. This would secure equal representation in one branch of the Federal Legislature, as set opposite to proportionate representation in the other. Experience in other lands and in other times had demonstrated the fact that no Republic had long survived without the presence of a Senate. Apart from the wide dissimilarity between our compound Republic and those of antiquity, it was still admitted that there were in all popular governments points enough of resemblance to make a senatorial institution worthy of adoption here, as a means of checking the otherwise hasty and perhaps even turbulent action of a popular assembly. In the creation of a Senate, the federal character of our Union of equal States was thus established, and their mutual independence, for purposes of domestic government, became fixed as a constitutional basis both of representation and of reserved powers. In the Senate, accordingly, the united States have equal federal representation, because they stand there as members of a common political partnership. Their rights of sovereignty spring from the Union of which they are members, and outside of which they do not exist. And as sovereignty admits of no superior of its own kind, it follows that each State holds the same political power as against every other, that the others do against it.

But if the principle of local self-government, which appears so prominently in the organization of the House of Representatives, seems to give place to the principle of centralization, as seen in the constitution of the Senate, it is only because some intermediate body was needed of a more conservative character, and removed from the immediate influence of the popular will. With fewer numbers than the House, with longer tenure of office; elected by the Legislatures of the several States, and free from direct accountability to the people, such a chamber was felt to be a balance-wheel in the machinery of government, yet withal not capable of ever obtaining an ascendancy over the popular branch. For while the Senate is undoubtedly aristocratic in theory, it is not so in fact with us, being neither hereditary in character, nor based upon ownership of property, nor limited to any particular class of citizens. A further limitation upon the possible growth of its power and influence in the Federal Legislature was secured by withholding from it the right to originate revenue bills, a right which, in imitation of the British Constitution, is reserved alone to the popular branch. This prerogative right which, in England, had required two revolutions and the waste of much blood and treasure to establish, fell naturally, and without strain into the keeping of the House of Representatives, because of the cardinal maxim that taxation, like representation, should originate with the people. At the same time, the Senate was not deprived of all voice in the matter of revenue bills, since it may propose or concur with amendments as on other bills, and may even originate appropriation bills disposing of moneys already in the treasury. This power, by parity of reason, may be considered as belonging also to our State

Senates, wherever its exercise is not directly prohibited by constitutional limitations.<sup>1</sup>

In farther imitation of the power of Parliament another feature was introduced into the constitution of this chamber. This feature engrafted a new power upon its law-making function, for the purpose of exercising a coercive jurisdiction over public officers, whose misfeasance could not always be inquired into by the ordinary tribunals of justice. It consisted in the right bestowed upon the Senate to discharge judicial functions by sitting as a high Court of Impeachment. This commingling of judicial with legislative functions seems, at first glance, a departure from that scheme of government which rests upon a separation between the different departments of power. But the answer to this objection is easily found in the necessity of establishing some tribunal to try political offenders, which should itself be as far removed as possible from the reach of political influences. It is for the single purpose of impeachment that the Senate is clothed with judicial powers, and the crimes with which it deals are such as are not easily definable by law. Therefore it is that its jurisdiction can never clash with that of the judicial department, since, in the language of Mr. Curtis, "the purposes of an impeachment lie wholly beyond the penalties of the statute or the customary law."<sup>2</sup>

In whatever aspect, therefore, we view the Senate, whether as a purely legislative chamber, or one clothed with the additional powers of a judicial body, we shall be the better convinced of its usefulness as a check upon precipitate legislation, and a necessary supporter

<sup>1</sup> Vid. Report, 147, House of Representatives, Forty-sixth Congress, Third Session, vol. 1; also Opinions of the Justices of the Supreme Judicial Court, 126 Mass. Rep. Supplement; U. S. v. James, 13 Blatchf. 207.

<sup>2</sup> Hist. Const., 260-1.

of the executive department. John Adams spoke of it as the most important branch in the government for aiding and supporting the Executive, for securing the rights of the individual States; those of the government of the United States; and the liberties of the people.<sup>1</sup> Hamilton, in his scheme of government, with an evident distrust of the popular will, would have given it an aristocratic character far beyond anything that has ever been acquiesced in under our ideas of a democratic republic. His plan contemplated a Senate elected for life, and armed with the power to declare war as well as approve treaties.

### THE EXECUTIVE.

The next, and perhaps the most difficult of all the labors of the Convention was the organization of the executive department, as a necessary branch of the law-making power. This completed the machinery of Federal legislation. In establishing the chief magistracy, the framers of the Constitution sought to create a power which, though personified in a single individual, should yet require for its exercise, in most instances, the employment of subordinates acting under restrictions imposed by the laws of the land, and personally responsible for any acts of malfeasance. In supplying the Executive with appropriate agents for discharging the functions of his office, they placed them within the control of the law-making department both as to numbers and means of support. The power and jurisdiction of these agents is wholly derived from, as well as regulated by, Acts of Congress, outside of which they can plead no patent of authority from the Executive in bar of responsibility for violating them. It is evident that the authority with which the President is clothed gives him no means of independent action by which such autho-

<sup>1</sup> Works, vol. 6, p. 440.

rity can ever become dangerous. He is confined to certain prescribed channels, and the official machinery by which alone he can act through the various departments of the government, leave him but a small installment of executive power that is absolutely free from restrictions. The sale of public patronage, and perversion of the policy upon which he was elected, are the only two directions in which he is absolutely free. But even such action, too base to be conceived as possible in the chief magistrate of the United States, could not long escape the fetters which Congress and the indignation of the people would place upon it.

“The Executive,” says John Adams, “represents the majesty, persons, wills and power of the people in the administration of government and dispensing of laws, as the Legislature does in making, altering, and repealing them. The Executive represents the people for one purpose as much as the Legislature does for another; and the executive ought to be as distinct and independent of the Legislature, as the Legislature is of that.”<sup>1</sup> Under the Constitution, the independence of the Executive is shorn of much of its power, because, as has been already shown, its sphere of personal and independent action is defined and circumscribed like that of other departments. While there doubtless is an executive independence in the performance of executive duties, which courts will not attempt to control by mandamus, injunction or any other form of compulsory process,<sup>2</sup> that

<sup>1</sup> Works, vol. 6, p. 172.

<sup>2</sup> *Marbury v. Madison*, 1 Cranch, 137; *Gaines v. Thompson*, 7 Wall. 347; *The Secretary v. McGarrahan*, 9 Ibid. 298; *Mississippi v. Johnson*, 4 Ibid. 475; *Georgia v. Stanton*, 6 Ibid. 57. It is a noteworthy fact that on the trial of Aaron Burr, President Jefferson having refused to obey a subpoena *duces tecum*, and a motion having been made by Burr himself for the issuance of compulsory process, the court took no action thereon, although C. J. Marshall had previously decided that such a writ might issue to the President.—*Combs's Trial of Aaron Burr*.



independence rightly interpreted means constitutional, and not personal liberty of action. Thus his nominations may be rejected and his veto may be overruled. As commander-in-chief of the army and navy and of the militia of the several States, when called into the actual service of the United States, he has no private funds at his command with which to maintain them. He must await the pleasure of Congress in calling them out, and in making the necessary appropriations to support them when on foot. As to the standing army of the United States, Congress being empowered to "make rules for the government of the land and naval forces," could, at any moment, disband both. The Constitution has thus, by every possible means, secured the supremacy of the civil over the military power.

The President's relations to legislation are practically so subordinate, as not to be in any degree indispensable to it. For law-making purposes, his co-operation with Congress is permitted by requiring that "every bill which shall have passed the House of Representatives and the Senate, before it shall become a law, shall be presented to the President of the United States," who "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." The part played by him toward the Federal Legislature is, therefore, limited to the duty of endorsing or disapproving its measures. He can neither hasten nor permanently obstruct them, for it is made the duty of the House receiving his disapproval of a measure, not to accept it as a finality, but to proceed to reconsider it. And it is their re-approval of the measure by a two-thirds vote, conjoined to a similar action on the part of the other House, which constitutes the finality of

converting the measure into a law. It will be seen from this that the President has, properly speaking, no true legislative power, although he performs a legislative function as an adjunct to Congress. The language of the Constitution is unmistakable on this point. Article I., section 1, distinctly recites that "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." These are words both of limitation and of exclusion, leaving no doubt as to the intention of the framers of that instrument.

But his executive power, which constitutes his chief official estate, stands on a different basis, and its exercise is associated with the performance of duties that are of a non-legislative character. Those powers are mostly political. They relate to the foreign as well as domestic policy of the government, and do not fall legitimately within the scope of judicial examination. Courts cannot scrutinize their exercise by the Executive, although they may inquire into the action of subordinates through whom those powers have been made operative. Apart from these, there are powers which require some preceding action by Congress in order to furnish the subject-matters upon which they can be exercised; or there are powers again by which he is enabled, in discharge of his duty, to take care that the laws shall be faithfully executed. The detailed enumeration of these powers is, of course, impossible, as many of them grow out of circumstances varying with the legislation of Congress that requires his co-operation to execute the laws made by it for such occasions.<sup>1</sup> Thus in relation to his authority to suspend the writ of habeas corpus, it seems well settled that while Congress may bestow the authority, its exercise is limited to those dis-

<sup>1</sup> Pomeroy's Const. Law, §§ 635-8.

tricts alone in which martial law has been proclaimed by him as Commander-in-Chief. But in all other districts, neither President nor Congress has the power to suspend the issuing of the writ by a State court.<sup>1</sup> So too his powers as Commander-in-Chief are in contemplation of law only war powers, not to be exercised in times of peace; and the title was made one of official designation, rather than of technical application to the ordinary circumstances of government.

Of the various powers with which the President is invested, the most important, doubtless, is that of exercising a qualified negative upon the acts of the other branches of the Legislature. This power to veto bills is in his case a power to delay, though not necessarily to defeat a public measure, inasmuch as it may still be passed over his negative by a two-thirds vote. The nearest approach in resemblance to it is a similar power possessed by the sovereign in England; but the resemblance ceases the moment either power is set into operation. The veto of the British Sovereign is an act of perfect absolutism. It kills the measure at which it is aimed, and substitutes the will of the monarch for that of the nation. Tyranny can do no more. Hence, in the progress of constitutional liberty in England this power is no longer exercised. Were any sovereign to veto an act of Parliament at this day, it would constitute an assumption of power which the nation would hardly endure. So well is this understood that no Sovereign has attempted it since the reign of Queen Anne, who vetoed a Scottish Militia Bill in 1707. Nor is it any longer necessary, since, by judicious efforts and political sagacity in regulating the progress of any bill through Parliament, the government can always secure the defeat of an obnoxious measure.

<sup>1</sup> *Jones v. Seward*, 40 Barb. 563; *Griffin v. Wilcox*, 21 Indiana, 383.

In contradistinction to the present attitude of the veto power in England, that of our own President represents no absolute will upon the subject over which it is exercised. He has only a qualified or retarding power in respect to the measure proposed. His negative, therefore, expresses nothing more than the moral weight of his disapprobation as a constituent branch of the Legislature, and the effect of which is to demand that, before the measure shall pass, it must receive a two-thirds instead of a bare majority vote; consequently in estimating what his legal power really is in this respect, we find it represented by the difference between that majority which is necessary to pass a measure and the two-thirds vote which can pass the measure over, and in spite of his veto. It follows that the weight of his veto is thus capable of being expressed in precise numbers. A recent writer has accordingly computed that under the present census of the two houses of Congress, the President's veto is equal to forty-nine votes.<sup>1</sup> When that number is surpassed by even one vote, the power of his veto expires. Almost every administration has furnished some examples of this possibility, and particularly that of President Johnson, whose continuous disagreement with Congress led to the passage of many Acts over his negative, thus affording a striking instance of the impotence of the American veto, when unsupported by public opinion. It exhibits also, the difference between the English veto, which was originally one of the prerogatives of the crown to protect itself against encroachments by the people, and the American veto, whose special office it is to protect the constitutional rights of the people not against encroachments, but against abridgments. Jefferson's view of the purposes of the

<sup>1</sup> Now, 53; Comparative Const. Law, Crane & Moses, p. 215.

veto was that it represented a shield provided by the Constitution to protect, 1st, the rights of the Executive; 2d, those of the Judiciary and 3d, those of the States and State Legislatures.<sup>1</sup>

It is a remarkable and still more regrettable fact that while in England there has been a steady decline in the exercise of the veto power by the sovereign, in the United States the necessity or the disposition to employ it has steadily increased in late years. It cannot be that Congress is less qualified for the performance of its law-making functions, or less animated by a desire to discharge them within proper constitutional limits. There are doubtless reasons to be found in the rapid expansion of the country and in the novelty of the problems presented to legislation. Be this as it may, the fact remains that, under inharmonious views of the same subjects entertained by Presidents and Congress, vetoes have multiplied to such a degree as to have lost much of their terror, and all of their moral weight. They no longer shake the faith of the people in the honesty or capacity of their representatives, nor impart to the act of the President the character of a vermillion decree. They are now regarded merely as differences of opinion upon questions of public policy, which all admit must become more perplexing as they become more miscellaneous, and make calls upon powers of Congress, whose limits in these particular directions have not yet been judicially determined.<sup>2</sup>

During Washington's administration of eight years but two vetoes were recorded. Under Adams and Jefferson's, extending through a period of twelve years, none occurred. Under Madison's of eight years six are recorded. Under Monroe's of eight years one only

<sup>1</sup> Works, vol. 7, p. 560.

<sup>2</sup> "The Veto Power," E. C. Mason, Harv. Uny. Pubns.

occurred. Under John Quincy Adams's of four years none. Under Jackson's of eight years twelve were recorded. Under Van Buren's of four years none. Under Harrison and Tyler's of four years nine. Under Polk's of four years three. Under Pierce's of four years nine. Under Buchanan's of four years seven. Under Lincoln's of four years three. Under Lincoln and Johnson's of four years twenty-one. Under Grant's of eight years forty-three. Under Hayes's of four years twelve. Under Garfield and Arthur's of four years four. Under Cleveland's of four years three hundred and one, of which twenty-nine were sent in on one day.

Without entering upon a detailed examination into the powers of the President, it will suffice to summarize them in their nearer or more remote connection with legislation. First of all, he may require the opinion in writing of the principal officers in each of the executive departments, with reference to sending messages to Congress. This is the basis upon which he is allowed by custom to form a Cabinet, and to surround himself with constitutional advisers of his own selection.<sup>1</sup> Again, he may make appointments and removals;<sup>2</sup> and form treaties by and with the consent of the Senate;<sup>3</sup> may grant pardons and reprieves;<sup>4</sup> may record his veto against a bill in Congress; receive ambassadors and other public ministers, and it is made his duty to take

<sup>1</sup> U. S. v. Eliason, 16 Pet. 291; Little v. Barreme, 2 Cranch, 170; Wilcox v. Jackson, 13 Pet. 488; U. S. v. Freeman, 3 How. 556; Parke v. U. S., 1 Pet. 292. All heads of departments are constitutional advisers.

<sup>2</sup> U. S. v. Moore, 95 U. S. 760; U. S. v. Jermaine, 99 Ibid. 508; Collins v. U. S., 14 Ct. of Cl.; U. S. v. Hartwell, 6 Wall. 385; Keys v. U. S., 109 U. S. 336; *Ex parte Hennen*, 13 Pet. 230; Bentley's Dig., p. 353, § 60.

<sup>3</sup> Story on Const., § 1508; Doe v. Braden, 16 How. 635; Fellows v. Blacksmith, 19 Ibid. 366.

<sup>4</sup> U. S. v. Wilson, 7 Pet. 150; *Ex parte Wells*, 18 How. 307; Carlisle v. U. S., 16 Wall. 147; Osborn v. U. S., 91 U. S. 474; *In re Muller*, 7 Blatchf. 23; Armstrong Foundry Case, 6 Wall. 766.

care that the laws be faithfully executed. In the exercise of the functions of his office, his responsibility is only political and not personal.<sup>1</sup> He is not amenable, consequently, either to civil or criminal prosecutions. He may also fill vacancies occurring during the recess of the Senate. The exercise of this power has given rise to many conflicts of opinion as to the proper construction to be put upon it. Both Courts and Attorneys-General have differed in their interpretation; and we must resort to analogical reasoning and the authority of approved text-writers for a solution of its meaning. It is evident that a vacancy in an office implies the absence of an incumbent. But there is a marked difference between filling an old office become vacant, and filling for the first time a new one. Every newly-created office is necessarily vacant until an appointment to it is made. And as a vacancy cannot *happen* to that which was never otherwise than vacant, it follows that by the term a vacancy in the Constitution is meant a change in the *facultative* condition of an office arising from the absence of a preceding incumbent and occurring during a recess of the Senate. This would seem to be the opinion of Judge Cooley, who says that "a newly-created office which has never been filled, is not a case of vacancy within the meaning of this provision."<sup>2</sup> And Judge Story holds that "if the Senate are in session when offices are created by law, and nominations are not made to them by the President, he cannot appoint to such offices during the recess of the Senate because a vacancy does not happen during the recess of the Senate."<sup>3</sup> The inference seems conclusive,

<sup>1</sup> *Durand v. Hollins*, 4 Blatchf. 451. *Little v. Barreme*, 2 Cranch, 170.

<sup>2</sup> Cooley, *Prin. of Const. Law*, p. 104, n. 5.

<sup>3</sup> Story on Const. § 1559; *Federalist*, No. 67; *Dist.-Atty. Cases*, 7 Amer. L. R. N. S. 786; *In re Farrow*, 3 Fed. Rep. 112.

that the change implied by a vacancy must affect some preceding operative condition of the office, before it can justify the exercise of an act of executive power to re-establish its suspended functions.

But the President is not invested with any dispensing power; and his obligation to see the laws faithfully executed does not imply a power to forbid or suspend their operation.<sup>1</sup>

He has no authority to perform the duties of an officer of the Treasury or an accounting officer, although it is his duty to see that such officers perform their duties.<sup>2</sup>

Nor can he give protection to aliens that have suffered violence at the hands of citizens of the United States.<sup>3</sup>

Nor can he give assent on the part of the United States to any acts of a foreign power, except it be done by treaty or act of Congress.<sup>4</sup>

Nor can he render personal services to any claimant seeking for information from a foreign government.<sup>5</sup>

Nor can he admit any prisoner to bail; nor discharge him on his own recognizance.<sup>6</sup>

Neither the President nor Congress, nor the judiciary can disturb any of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend, in certain cases, the privilege of the writ of habeas corpus.<sup>7</sup>

Nor can the President release the sureties given on a bond, nor remit the forfeiture of a bail bond.<sup>8</sup>

<sup>1</sup> Kendall v. U. S., 12 Peters, 612.

<sup>2</sup> 11 Op. Atty.-Gen'l's, 109; 3 Ibid. 500; 1 Ibid., 597.

<sup>3</sup> 3 Ibid., 253.    <sup>4</sup> 6 Ibid., 209.    <sup>5</sup> 9 Ibid., 320.    <sup>6</sup> 1 Ibid., 213.

<sup>7</sup> *Ex parte Milligan*, 4 Wall. 2.

<sup>8</sup> 4 Op. Atty.-Gen'l's, 144; 7 Ibid., 62; Bentley's Digest, tit. "President."



Nor can he remit a forfeiture of a vessel incurred by violation of statutes and enforced by seizure and proceedings *in rem* and condemnation and sale.<sup>1</sup>

During our Civil War, many powers were claimed and exercised by the President under a stringency of circumstances for which no provision had been made in the Constitution. Secession being the outgrowth of the doctrine of States governed by *compact* and not by *law*, it became necessary, in the complications growing out of the war, whether in the form of military occupancy and blockade, legislative reconstruction, or judicial protection of persons and property in the seceded States, to find, by implication, in the executive department certain *war-powers* not hitherto contemplated and never before invoked. While the general results of their exercise doubtless contributed to the restoration of the Union, and the re-establishment of the Government of the United States over all its territory, these powers were so far anomalous in their assumption as to afford no justifiable precedents for the government of the Executive, in the ordinary circumstances of our Federal administration. A formal discussion of their scope and application has accordingly been omitted, because they present exceptions in the body of our constitutional legislation that are never again likely to be repeated.<sup>2</sup>

Not having undertaken to examine the constitutional jurisprudence of the United States beyond its relations to legislation, it is unnecessary to enter into any inquiry touching the organization or practical operations of the Judiciary department. The scope and purpose of our work do not demand it. Except in its power to impose restraints upon legislative encroachments, and to

<sup>1</sup> 11 Op. Atty-Gen'ls, 124.

<sup>2</sup> Whiting, "War Powers under the Constitution of the United States;" Bump's Constitutional Decisions p. 246.

maintain the inviolability of the Constitution by declaring certain statutes to be repugnant to its provisions, there is no occasion to do more than to record its judgments, with the reasons upon which they are founded. Our present concern is solely with legislation as one of the functions of the State and the chief object of its civil Constitution. In studying the growth of the principle of representative government we have found it essential, for a clearer understanding of its sources and preparatory stages, to present an analysis of the historical evidence through which its continuous development can be traced ; and having followed this, from early colonial days to the formation of the Constitution, we have brought together enough facts to show whence the legislative power derives its authority, and what are its necessary limitations.

As the sum and substance, therefore, of all these historical explorations, we are led to the conclusion that the generative principle of political constitutions exists in the domestic life of communities before its expression in a written organic law. That it is, consequently, more in the nature of a social development than a special creation of the popular will. That before it assumes the form of a conventional enactment, it is already a recognized part of the body of the common law of the State. That its enunciation is only a method of declaring its character to be now fixed and unalterable, until changed by a procedure as solemn as its original promulgation ; and that, finally, the true object of all written constitutions in a representative government should be to distribute sovereignty as a trust acting through impersonal institutions, so as to make it in the best sense a government of laws, and not of persons.

## CHAPTER III.

THE STATE AS A QUALIFIED SOVEREIGNTY WITHIN THE  
FEDERAL UNION.

## 1ST. ORIGIN OF THE STATE.

WRITERS upon political philosophy, in their various efforts to trace the origin of the State, have differed widely in respect to its underlying sources. Some have sought it in the idea of justice, some in the idea of protection, and some again in the idea of sovereignty as an inherent power in society, always working to organize itself in administration. With them, therefore, the State is only the administrative part of the nation, personified in its public officers for the purpose of government. Aristotle goes even behind these ideas, by asserting that "the State is a work of nature," that "man is naturally a political animal," and thus instinctively disposed to establish himself into an institutional form of society. He cannot live perfectly outside of it, and from the first dawn of social life has discovered the indispensable necessity of a civil or jural relation to his fellow-man. He thence proceeds to trace the growth and development of political society from the family to the village, and, lastly, to the City-State, for the Greeks knew no other form of State than that of their city governments. He is also careful to remind us that the State must not be too large. It must not exceed the capacity of its citizens for assimilation in customs, in interests, in laws. In his opinion it cannot become an Empire. It is evident that, in common with the pub-

licists of his day, he had no idea of such a condition as is implied in national development. A city of a few thousand inhabitants was his maximum idea of a State.<sup>1</sup>

Granting that many of these views of Aristotle are sustained by facts in the history of modern as well as ancient governments, it is still, nevertheless, true that no single idea, whether of justice, protection, or sovereignty is in itself sufficient to explain the origin of the State. This is made evident whenever we attempt to apply it in practice. For justice does not imply either equality or neutrality of advantage; nor does protection imply immunity against responsibility for wrong-doing; nor, again, does sovereignty imply the unqualified right to exercise every form of authority. There are limits, it is seen, to each one of these ideas when applied to practice. It is more logical, therefore, to say that the State exists as a social growth in order to enforce laws; because in order to enforce laws there must be sovereignty lodged somewhere; a sovereignty to command as well as to enforce; a sovereignty to do justice, which is to render unto each one his due, and a sovereignty to protect all who need protection under the laws. Therefore, whoever makes the organic law and declares the national will is the sovereign, whether that sovereign consists of one or many persons.

Before the existence of such a sovereignty, men are governed only by custom and usage. These do not yet take the form of laws until there is a power lodged somewhere to enforce them. And since the State supplies the locality of that power, it thence becomes both the source and the executioner of the laws.

The State being thus established to enforce the laws, those laws in turn must relate to personal rights, because the State is only the impersonal representative

<sup>1</sup> Polit. Lib., 1, ch. 2.

of the persons who constitute its population. Being founded upon the jural rights of its citizens, in a word, upon rights that may be enforced, the State is very justly described by some as a jural society, meaning thereby a society of jural relations between its members, with sovereignty organized in administration, and acting as a means through which to secure justice to all as an end. This end is doubtless protection to all the citizens—protection to life, property, health, and reputation. And since this end can never be so well attained as by the practice of justice towards all, a strong argument may be made in support of the doctrine that the administration of justice is natural to man, and that States are in fact organized because the jural rights of men in society require the aid of sovereignty to enforce them. Whether, therefore, these jural rights be natural or acquired matters little, since the State does not create rights, it only creates an instrument, or a means, as we have seen, to execute them through its appropriate tribunals.

Territorially considered, the State may consist either of one people, as in France, Spain, or Italy, or of many peoples as in Austria, Russia, or under the present empire of Great Britain. It differs radically, therefore, from a nation which is a natural unit, while the State is most generally an artificial unit; and the basis of this artificial union being the jural relations of its citizens, the State is consequently a jural institution with all the attributes appertaining thereto. This fact must be constantly borne in mind, as a key to the problem of the rights and duties which attach themselves to a political society thus organized. The immediate necessity of a system of administrative law, whereby to regulate the conduct of its citizens becomes at once apparent, and the exercise of police powers arises contemporaneously

with the creation of tribunals for enforcing merely private rights.

Because, therefore, the State is natural and necessary to the purposes of institutional government, it may be said to organize sovereignty as a primary act of its existence. This, in fact, is the *sine qua non* of its legality. It must be sovereign, otherwise it cannot be a State; for by becoming a State it is instantly invested with the *summa potestas*, or power of sovereign jurisdiction over all its citizens. This power it can never abdicate until conquered by a foreign enemy. Again, the sovereignty of every State may be considered under two distinct aspects.

1st. As to its *external* sovereignty as a member of the family of nations, whereby it is recognized as independent of all control from without.

2d. As to its *internal* or domestic sovereignty which gives it an original jurisdiction over all its citizens. And here we must remark by way of digression, that the States of the American Union as members of a Federal body, have no external sovereignty, that power residing in the Federal government alone. Nevertheless, they are sovereign, as between each other, within the Union; and they are also sovereign in respect not only to their own citizens, but in respect to those powers not delegated to the United States by the Constitution, nor prohibited by it to the States. In other words, the States united and several, constitute one State for international purposes; but the individual States are not such States as can form members of the family of nations.<sup>1</sup>

From those considerations upon the origin of the State as a foundation for government, we deduce the following conclusions, viz:—

<sup>1</sup> Martin v. Hunter, 1 Wheat. 304, 323, 352; 1 Hurd, Freedom and Bondage, 408; Cooley, Const. Lim., p. 6.

That the State, as an institution, is the natural outgrowth of human society; that it is evolved and not invented; that it represents a necessity in the life of every nation for some means to regulate the jural relations of its citizens; and that, consequently, it is an instrument for organizing justice between men, and enforcing the laws necessary to its administration.<sup>1</sup>

But the State as an organized form of government has varied in different ages with the conditions of civil society. The ancient and the mediæval State have each had certain characteristic features distinguishing them from each other, according to the predominance of the law of status, as based upon religion, landed property or military conquest; while the modern State is chiefly based upon personal independence in the citizen and sovereignty constitutionally limited.

Prof. Bluntschli, in his philosophical work upon the State as a political organization developed through the moral order of society, draws the following significant distinctions between the ancient and the modern State.

#### ANCIENT STATE.

*First.* In the Ancient State, there was no personal independence, the citizen was entirely absorbed in the State. Labor as an instrument of livelihood was confined to slaves. Custom ruled and status was everything.

*Second.* In the Ancient State, the Priesthood was political. Private law was not distinguishable from public law, and the citizen was not spiritually free.

*Third.* In the Ancient State, Sovereignty was absolute, and authority directly exercised by the people in primary assemblies.

#### MODERN STATE.

In the Modern State, Rights, rather than privileges are accorded to men. Hence personal freedom and law dominate custom, and contract takes the place of status.

In the Modern State the Priesthood is purely ecclesiastical. The State no longer dominates. Religion and private law is also recognized.

In the Modern State, Sovereignty is constitutionally limited. The State is representative since there is no direct democracy.

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<sup>1</sup> Lieber, Civil Liberty, 42.

## ANCIENT STATE.

*Fourth.* In the Ancient State, authority was combined in one officer, who discharged legislative, judicial, and executive functions.

*Fifth.* The mediæval conception of the State was still theological and dependent upon unity of creed, hence spiritual authority dominated political authority. The feudal system recognized deputies and not representatives.<sup>1</sup>

## MODERN STATE.

In the Modern State, government is divided and distributed through three departments.

The present conception of the State is, that of a human organization founded upon contract between free men who are equals; and religion does not constitute a legal status. Hence the nation rules as a nation, through representatives.

Passing from this synopsis of historical development to the present condition of things in the United States, we find that the idea of government with us has never been identified with the State as an independent institution, but always with the people as the primary source of sovereignty. Government with us, therefore, is a question of agency only. Our conception of it begins with the consent of the people, and not with that of a State already organized. The State, as a member of our Union, is a political corporate body; it can act only through agents, and can command only by laws.<sup>2</sup>

## WHAT CONSTITUTES A STATE WITHIN OUR FEDERAL UNION.

It is now generally conceded by writers upon government, that mankind have never existed without the society of their fellowmen, or in a pure state of nature. The doctrines of Hobbs, Locke, and Rousseau advancing these ideas are now exploded, being shown to be against both reason and experience. The theory of a social contract between men in a savage state, antedating all government, is contradicted by the facts of

<sup>1</sup> Bluntschli, *The State*, p. 50.

<sup>2</sup> *In re Ayers*, 123 U. S., 501.



history and the logic of circumstances. The idea of a consensual contract typified by a written constitution; or the idea of a general agency, as shown in a representative democracy, are the result of centuries of political training. But whether such perfected forms of government exist or not, society has always existed among men. Consequently men are born into society without regard to their consent or preferences. As to them, therefore, society is already formed and established, and they enter it precisely as travellers do a country whose institutions are in full operation. These truisms do not, however, contradict the fact that the origin and rise of particular societies may be various; and that an empire may have been founded by an originally insignificant number of persons. No better illustration of this fact can be pointed out than that of the Pilgrim Fathers, who, by their original compact laid the foundations of the American Union; and, subsequently, though still under their charter, "resolved" themselves into a Commonwealth.<sup>1</sup>

These men, however, were not in a state of nature. Far from it; they were subjects of a kingdom, claiming by right of occupancy the authority to execute its own laws upon them. They were, in a word, colonists seeking for the enjoyment of more religious and political freedom than could be obtained at home. Nevertheless, they still considered themselves subjects of the British crown. Having spent some years in Holland and breathed the free air of the young Republic, they had imbibed the sentiments and adopted the ideas of its illustrious founders. They needed no other incentive than this to awaken in them a desire for a popular form of government. But these wishes being at variance with the political creed of their native land, they could

<sup>1</sup> Oliver, Pur'n Comm. 52.

not hope to see them gratified there. The divine right of Kings, as claimed by the Stuarts and inculcated by the Church of England, and the personal independence of the citizens as longed for by them, were irreconcilable principles. The Crown would not yield, the subject could not endure, and there being no middle ground upon which to compromise, they accordingly emigrated to the western wilderness in search of a new home. We have sufficiently followed their acts in our preceding chapters, from the period of their arrival down to the formation of the Constitution of the United States, not to need any further review of the progress made by them in the organization of a new form of political society. Although their first attempt was to found a theocratic government modelled upon that of the Hebrew Commonwealth, they were soon compelled by the circumstances of the times, and more particularly by the exigences of their environment, to unite themselves to the other colonies in a confederate body of States.

Whatever appeal we may accordingly make to historical evidence, we are met by the invariable answer that every State is the political fruit of an antecedent society developing itself into forms of internal and external self-regulation. Of such an organization there can be no more comprehensive definition than that given by Grotius, who in this respect follows closely the language of Cicero. "A State," he says, "is the harmonious union of a body of freemen united for the purpose of enjoying common laws and interests."<sup>1</sup>

Cicero, in his treatise on the Republic, states in a brief sentence the essential conditions precedent to all government: "A Commonwealth," he says, "is a Constitution of the entire people, bound together by the obligation of the laws and the community of interests."<sup>2</sup>

<sup>1</sup> J. B. et P., lib. 1, cap. 1, sec. 14.

<sup>2</sup> Lib. 1, sec. 25.

It will be noticed that these definitions, written at distances of fifteen centuries apart, both include the similar idea of a "civil body politic," formed of freemen united by a community of interests, and protected by a system of laws of binding obligation upon all. Moreover, it so happens that the term "the State" does not appear in English political history until the days of the Commonwealth, when the Presbyterian doctrines relating to the secular character of civil government obtained prominence and gave direction to the current of public affairs, so that at the restoration of Charles II. and the resumption of monarchical principles of administration, men spoke of "the State," meaning the Commonwealth of Cromwell and Ireton and Milton, to distinguish it from the regal government of the Stuarts.<sup>1</sup> As yet, however, there was no appearance of the principle of the participation and consent of the governed in the framing of the laws of the State, as an indefeasible part of the contract of Union between the people themselves. That doctrine was not yet matured. According to Mr. Maine, mere vicinity as a basis for political relations, rather than kindred or religion, is a late offshoot of feudalism, and territorial sovereignty could not exist until men inhabiting the same country became fellow-citizens.<sup>2</sup>

It was reserved for our Declaration of Independence to enunciate for the first time to the world the true idea of an independent State, in that article of our political creed which recites that in order to protect the right to life, liberty, and the pursuit of happiness, governments are instituted among men, "deriving their just powers from the consent of the governed." It is the consent of the governed, therefore, when permitted to participate in the framing as well as in the administration of

<sup>1</sup> Lieber, *Civ. Lib.*, 42.

<sup>2</sup> *Ancient Law*, p. 106.

their own laws which constitutes a State with a republican form of government; and it is this form of government which the Constitution of the United States jealously guards and guarantees to the people of every State in the Union.

So important is this doctrine to the stability of the Union, and so necessary is it that it should be protected against the action of any revolutionary body of conspirators, organized in the form of a popular convention, that the Supreme Court of the United States, in *Texas v. White*,<sup>1</sup> held that Congress as the political department of the government was omnipotent to legislate upon this subject, and that its decision is binding on every other department of the government, and cannot be questioned in a judicial tribunal. This confirms the doctrine of the primary sovereignty of the people as represented in Congress. And thus the creed of the Plymouth colonists finds renewed acceptance in the highest tribunal in the land.

It is because of the recognition of these cardinal principles of representative government by the highest judicial authority, and the placing of the citizen before the State in the genesis of modern political society, that the American Commonwealth occupies so unique a position before the world as the last derivative of personal independence. Unlike any past States, it was never ecclesiastical, never feudal, and never absolutely sovereign. First existing as a colony, then arrogating to itself the sovereign power of entering into a confederation with sister colonies, whereby it assumed the attitude of an independent State, it subsequently converted itself into an integral part of the United States by a process of political transmutation heretofore unknown in the history of republican government. The sovereignty

<sup>1</sup> 7 Wall. 700.

which before their independence was vested in Great Britain, passed by that fact to the States united, and not to the States severally, a sovereignty which has ever since been assumed and exercised alone by the United States and never by the States; for sovereignty is only attributed to the domain of the nation, and the domain is in the United States.<sup>1</sup> It must always be borne in mind that the Declaration of Independence was made by the States jointly and unitedly, and not by them in their several and independent capacity. Nor was the Revolutionary War carried on by them severally, but by them unitedly. They were far more independent as revolted British colonies than they now are as States in the Union. This affords the best reason why the Articles of Confederation proved to be a rope of sand.

The development of the States out of colonies was the necessary result of applying English constitutional liberty to the formation of independent Commonwealths. The Continental Congress, urged on by the action of numerous provincial conventions, had finally adopted the resolution of May 10, 1776, recommending to the representative assemblies and conventions of the united colonies, where no government sufficient to the exigences of their affairs had been established, to adopt such government as should, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular, and of America in general. Necessarily the representatives of the people yielding to the tendencies of the times, and swimming with the tide of republicanism which was then overflowing the colonies, could and did organize no other form of government than that of a representative democracy or Commonwealth.

<sup>1</sup> Jay, C. J., in *Chisholm v. Georgia*, 2 Dallas, 320.

Herein we find the rudiments of the present American State, which sovereign territorially, is only quasi-sovereign as a member of a political union having a central federal government acting as a supervisory power for both domestic and international purposes. This it is which constitutes it a true *imperium in imperio*.

The secret of the success which attended this political incorporation from the first, may be traced to the fact that the colonists brought here the Parliamentary Constitution of England with its elastic common law; that they were free from the embarrassments of a State church or a landed aristocracy; and that, in the revolutionary disturbances agitating the mother country for so many years, they were left comparatively free to act in local affairs, so as to resemble allies, more than subjects. The strength arising from consolidation of interests, which they thus acquired during the earlier years of colonial existence, prepared them for the successful overthrow of British authority when the day of final arbitrament was reached.

There can be no doubt, however, that the States, as successors of the Colonies, were sovereignties until the ratification of the Constitution.<sup>1</sup> Throughout the entire Revolutionary War, and the period of the Confederation, they were constantly recognized as sovereign and independent Commonwealths. Not until, therefore, the final adoption of the Constitution, unifying the people of the United States as one nation, and proclaiming them to

<sup>1</sup> There being no national government in existence *de jure*, during the Revolution it was natural that the Colonies should be regarded as independent States. They acted as such; were treated as such; and invited by the Continental Congress to form independent constitutional governments as such. And it is difficult to see how it could have been otherwise in the genesis of a federal Republic out of revolutionary provinces each being a separate colony and the whole united in a voluntary league.—*Works of John Adams*, vol. 4, p. 217.

be the owners of its entire domain, did the States surrender their absolute sovereignty, or consent by a general merger of land and inhabitants into the body politic of the federal union, to become a component part of the nation of the United States. There being colonial States in existence until the adoption of the Constitution, its preamble does not speak of the people without reference to these States, but announces at the outset that "We the people of the United States do ordain," etc., showing plainly that the framers did not recognize themselves as a sovereign disparted people without States; nor at the same time did they consider any States, as States, outside of that Union which cemented them into united States. It is in the meaning of the word united as a distinctive adjective, and not as part of a proper name, that the true character of an American State is to be ascertained. For the word State with us does not mean a wholly independent and sovereign community of citizens, nor yet a political society dependent upon any other and in subordination to it; but it means a member of the American Union as organized under our Federal Constitution.

This practically defines a State to be a portion of the territory of the nation upon which a body of citizens, desiring to establish local government, either by joining in the ratification of the Constitution, as in the case of the thirteen original States, or by permission given through an enabling Act of Congress, have been authorized to organize an independent Commonwealth, with no other limitations upon the powers of self-government than those prescribed by the Constitution.

Remembering, always, that our form of government was founded upon the basis of "a civil body politic," and has so continued unchanged through all the vicissitudes of a colonial revolution, a confederation of States,

and lastly a union of the people of the States, there has arisen a peculiar relation between the State as a State, and the citizen, such as was never before known. This peculiarity may be summarized for convenience's sake in the following propositions:—

1st. That the State with us is rather territorial than personal. It does not own the citizen, and cannot be said to absorb him. And it is well, also, as an elementary proposition, to bear in mind the fact that the State being a Commonwealth under a republican form of government, is necessarily impersonal, because always an abstraction. It means simply that recognized system of laws under which a community of freemen consents to live. This is sufficient to constitute a State. But the moment we attach the idea of personality to its sovereignty, we render it patriarchal, convert its citizens into subjects, and destroy the principle of equality among them. This modern theory differs radically from the ancient doctrine which still obtains under many monarchical governments, to the effect that all that an individual is, he is as a member of a State. Consequently, that he has no rights as against the State, because the State is everything and the individual nothing. This doctrine of State Socialism is a legacy transmitted by the civilians, for Rome never considered man as an individual, but only as a thing. Even Plato insists that men are to be considered not as men, but as elements of the State; a perfect subject differing from a slave only in this, that he has the State instead of an individual for his master.<sup>1</sup>

In Athens, everything could be demanded for the State from the citizen. Taxation was arbitrary, and bore upon particular individuals with the harshest injustice. The State was regarded as of paramount im-

<sup>1</sup> Draper, *Intl. Devt. of Europe*, 117, 198.



portance, and its demands above those of justice. This grew out of the Pagan ideas of political society, which, regarded government as an organization based upon the inequality of men; that because of differences among them in wealth and social position, a certain class in every community was born to rule, and all others outside of it were born to serve. According to this law of status, the disfranchised majority were by nature created to toil for the sole advantage of the ennobled minority. This dogma, in some form or other, became a petrified canon of government through all subsequent ages until supplanted by the doctrines of the Christian Church, which first taught the brotherhood of man, and the fatherhood of God.

The English sovereigns down to the period of the Revolution of 1648, undertook to apply the same principles in practice, and to levy subsidies in the form of assessments without consent of Parliament. They based their claims upon the monstrous assumption of the divine right of Kings to exercise an authority irresponsible in character, and illimitable in extent. And what is worse, they found subservient judges to sustain them in their extortions.<sup>1</sup>

With us allegiance is solely political, and consequently voluntary. It is individual and not official. The citizen may renounce it at any time. It belongs to political, or primary jurisdiction rather than to civil or derivative jurisdiction. Hence, allegiance is not within the province of any Legislature, and under the Constitution (Art. 1, s. 8) Congress alone is empowered to make uniform naturalization laws. So also with the doctrine of the parental authority of the State, which, being without personal affection, "leads," as has been said, "to unlimited authority without moral control."<sup>2</sup>

<sup>1</sup> R. v. Hampden, 3 St. Tr. 826.

<sup>2</sup> Lieber, Pol. Ethics, vol. 1, chap. 3.

This doctrine becomes both pagan and communistic in some of its extreme applications.

Under a democratic form of government the parental authority of the State cannot be said to exist as a prerogative right. Although needing to be exercised at times in the form of pardons, insolvent laws, patents, guardianship, and the establishment of charitable and reformatory institutions, it exists only for the purposes of civil administration and by fiction of law. Were this authority really implanted in the structure of the State, it would possess a patriarchal power over the citizen, and destroy the idea of agency embodied in the various departments of government organized under a constitution. All citizens would be subjects of the State, rather than subjects of the laws of the State made by their consent, and there would be no organic political people, but only territorial inhabitants as in monarchical States. An American State implies, therefore, the political manhood of its people and not their political infancy, with all the consequences of pupillage. It is a civil body politic which by self-incorporation has become converted into a constitutional Commonwealth.

2d. That the State with us is held, but not owned by its citizens, under an organic Act emanating from the people of the United States in Congress assembled, or as in the case of the original thirteen States, by fusing itself into the Union by adoption of the Constitution; and being, as a political body, purely territorial, the State can neither enlarge nor diminish its area without their consent first obtained. Nor can it divest itself of any of its attributes of sovereignty without their permission.<sup>1</sup> It is organized as a State only for the benefit and convenience of its citizens, but cannot exist as such before an Act of the national Legislature has made it a

<sup>1</sup> Cooley, Const. Lim., 82-4.

political sovereignty. Nor is it such an independent sovereign State that it can wage war on behalf of its citizens, or obtain any redress for them as a sovereign trustee of their rights in the courts of the United States.<sup>1</sup>

3d. That the State has no original power, but only such as is delegated to it by law. It is in itself solely an impersonal embodiment of the law, whether organic or statutory. Its people form its government, its public officers being only their public servants or agents to execute the jurisdictional functions of government. Therefore, and in contradistinction from monarchical forms of government, the people of our States are not a distinct class from their government, with different and conflicting interests. Government with us is only a form of agency, carried on through mutable public officers.

4th. That the State can only speak to its citizens through its laws, because its relations to them are only jural, and not personal. It cannot enforce a purely moral obligation, because it cannot affix a penalty to its violation.

There will ever be some wrongs, consequently, which the State cannot punish, for there will ever remain a distinction between the adjective right, meaning moral duty, and the substantive right, meaning a perfect claim to a legal action with its appropriate remedy. Were any Legislature to pass a code of compulsory morality, it is very certain that it could never be enforced. Morality must antedate law in the genesis of government, and in turn, while resting upon such foundations as justice and morality, law must not arbitrarily undertake to interfere with purely ethical problems. Only when they are associated with material injury to positive rights can it interpose its corrective arm.

<sup>1</sup> *N. H. v. Louisiana, etc.*, 108 U. S. 76.

5th. Nevertheless, the State, as the embodiment of an organic law for the better guardianship of the rights of its citizens through its administrative functions, needs to possess, and does possess certain jural rights of its own, and in order to exercise these functions it must be clothed with a quasi private personality in respect to the rules of procedure by which such rights may be enforced. Thus, it may own lands apart from its right of eminent domain; it may own buildings; it may borrow money and issue its obligations therefor; it may become a mortgagee; may carry on industrial enterprises in its prisons and reformatories; and may take under a will, or by escheat, in the absence of lawful heirs.

Previous to the secession of the Southern States in their attempt to disrupt the Union, the term State had not received any extended examination in American courts outside of its precise use in the Constitution of the United States. The reason for this was obvious, for our States had never existed, nor acted as sovereign States, outside of the Union. Up to the time of the Declaration of Independence they claimed to be British colonies, with the rights of British subjects, and it was the denial of their rights which led them to revolt. In a few cases, and mostly for jurisdictional purposes, the question of a State as a sovereign community had been judicially investigated. But the transition from the status of colonies to that of independent States was so gradual, and that, too, without much internal change in the form of domestic government, that the word "State" as used in common language, was felt to be sufficiently well understood not to need any special interpretation outside of the Constitution.

Thus in the case of the Cherokee Nation *v.* The State

of Georgia,<sup>1</sup> which arose upon a motion for an injunction to prevent the execution of certain Acts of the Legislature of the State of Georgia in the territory of the Cherokee Nation of Indians, they claiming to proceed in the Supreme Court of the United States as a foreign State against the State of Georgia, under the provisions of the Constitution of the United States, Chief Justice Marshall held that the Cherokee Nation was a State, only in the sense of being a self-governing community with whom a treaty had been made by us. But that it was not a foreign State admitted into the family of nations, nor anything more than a feudatory State under the protection of the United States. The motion was accordingly dismissed for want of jurisdiction. Mr. Justice Thompson dissented from these views, holding directly opposite ones, and in this opinion Judge Story concurred. It will be perceived, therefore, that on the question of what constitutes a State, two of the leading expounders of the Constitution, Marshall and Story, differed radically.

In the case of *Scott v. Jones*,<sup>2</sup> which was an ejection brought in the Circuit Court of Wayne County in the State of Michigan, by the Detroit Young Men's Society against the plaintiffs in error, to recover a certain lot of ground in the city of Detroit, claiming the same under an act of incorporation granted by the Legislature of the State of Michigan, in March, 1836, whereas, in fact, Michigan did not become a State until the 27th of January, 1837, it was held that a State, to be such, must first be a member of the Union; that a territorial and a State government can not co-exist, and that under the provisions of the Judiciary Act, the Supreme Court was without jurisdiction, Michigan not

<sup>1</sup> 5 Peters, 1, A. D. 1831.

<sup>2</sup> 5 Howard, 343, A. D. 1847.

being a State at the date of the granting of the act of incorporation under which the plaintiffs in error claimed title to the land in issue.

The earliest case in which an approximate attempt to define the word State was made in our courts irrespective of its precise meaning under the Constitution, was that of *Chisholm's Executor v. The State of Georgia*.<sup>1</sup> There it was said, that a State sometimes means an extent of country within certain limits, within which the authority of a neighboring country cannot be exercised; or it may mean the government *de facto* of any territory occupied by a political society; or again, it may mean a number of persons united by a community of interests and laws.

The legal meaning of the word State was again fully examined in *Hepburn v. Ellsey*,<sup>2</sup> where Chief Justice Marshall said, "The clauses show that the word State is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the Law of Nations." Hence, a citizen of a territory cannot sue a citizen of a State in the courts of the United States; nor can those courts acquire jurisdiction from the fact of other parties being joined, who are capable of suing. All the parties on each side must be subject to the jurisdiction, or the suit will be dismissed.<sup>3</sup>

These judicial determinations of the meaning of the word State, in respect to the application which might be given to it, both outside of as well as within the Constitution, accord fully with the ideas of the civilians as given by Puffendorff.

"A State," he says, "is a moral body conceived to

<sup>1</sup> 2 Dallas, 457.

<sup>2</sup> 2 Cranch, 445.

<sup>3</sup> *Corporation of New Orleans v. Winter*, 1 Wheaton, 91; 2 Bibb, 334; 1 Kent, 349, 385; *Foster et al. v. Neilson*, 2 Peters, 253.

act by one will. But inasmuch as it is made up of many natural persons, each of whom hath his particular will and inclination; and since these several wills cannot, by any natural union, be joined together, or tempered and disposed into a lasting harmony, therefore, that one will which we attribute to the State, must be produced by the agreement of all persons to submit their own private wills to the will of one man, or one assembly of men, on whom the government hath been conferred."<sup>1</sup> Therefore, and as corollary to this proposition, he maintains that "the government of a State ought rather to be committed to laws than to men. It is more expedient that the rules of Commonwealths should govern according to the standing prescriptions of the law, than according to their own private and unconfined pleasure."<sup>2</sup>

It will be perceived from the foregoing citations that, writing as a civilian and with the principles as well as the canons of the Roman *jus scriptum* before his mind, Puffendorf has in reality uttered the keynote of all modern constitutional legislation. In speaking of rules agreeing with the standing prescriptions of the law, what else can that language apply to, in our day, than to a supreme, organic law, known as the Constitution? This basis of all derivative laws being written, has every characteristic of permanency. It is in some senses, therefore, immutable, except by a conventional act of as solemn a kind as that by which it was originally promulgated.

The Emperor Justinian threatened with severe penalties those who should dare alter the text of the *jus scriptum*, reserving to himself, as the fountain of all sovereignty, the exclusive right of so doing. In this he was

<sup>1</sup> De Jur. Nat., etc., lib. 7, cap. 4, sec. 2.

<sup>2</sup> Ibid., lib. 7, cap. 6, sec. xi.

undoubtedly justified by the form of government over which he swayed his imperial sceptre. With us, the organic people are the source of all authority, from among whom are drawn the political people or voters, they in turn expressing their legal will through representatives duly chosen. It is the voice of these representatives which must, to all intents and purposes, be considered the will of the State, expressed through legislation. It stands, therefore, as the act of the whole political society, since, in the very nature of things, there is no other way in which it can so advantageously be promulgated.

## 2D. FORMATION OF STATES.

The formation, or organization of a State as a member of our Federal Union, from the day when town governments were first established in New England down to the last State admitted into the political body known as the United States, has been unlike anything of a similar kind ever before witnessed. This mode of organizing a government upon the single dogma of the sovereignty of the people stands, and will always stand, as the most conspicuous ethical foundation on which to build a political society. In tracing the origin of States as a chapter in the natural history of nations, we have seen that they arise from causes mostly outside of and above the mere will of the nation. They may be forced upon a people by conquest, or they may be a compromise between choice and environment, as in the case of feudatory States, or those living under a protectorate; or again, they may be independent States, but without power of growth. Instances of these various kinds may be found in the history of modern Europe, from the time of the dismemberment of the Roman Empire



to the present day. Those important periods in the development of international law, which have been selected by jurists as marking the inauguration of new and more enlightened principles in the intercourse of nations, and which are stamped with the authority of such famous treaties of peace, as those of Munster, Utrecht, Rysvick, Hubertsburg, Versailles, the Congress of Vienna, and the Treaty of Adrianople—those great periods have always been associated with either the partition and dismemberment, or the reorganization of States through the agency of powers outside of themselves. In many instances, these treaty conventions were called simply for the purpose of legalizing the spoliation of neighboring States, already accomplished and assented to by ambitious monarchs, anxious to maintain the balance of power in the hands of an irresistible partnership of which they were members, and at the expense of their weaker neighbors.

The difference between such States and ours is too self-evident to need comment under the explanation of their origin just given. The former are the creatures of force, bestowing upon their citizens such rights and privileges only as to the governing power are agreeable. Ours, on the contrary, are the expression of the sovereign will of the people organizing itself through a convention in a written Constitution. Properly speaking, there can be no true constitutional basis of government, where the people have not directly participated in framing or ratifying the organic law. All the constitutions of continental Europe have lacked this essential quality outside, perhaps, that of Switzerland. They were only nominally constitutions. In reality they were but concessions made to the people by the sovereign, and revocable at his pleasure. They served, temporarily, to allay irritation; to delay revolution, and

to extend the leasehold interests of some tottering dynasty. Such is the history of all constitutions which have lacked the element of a popular origin.

Returning to the organization of our own States, it will be found that there are four ways in which the present members of our Federal Union became sovereign States.

1st. By the action of provincial conventions in the original thirteen colonies, establishing temporary governments prior to the calling of a Continental Congress. This made them States, but for domestic purposes only.

2d. By the Declaration of Independence adopted by the Continental Congress, July 4, 1776, declaring themselves to be a Federal sovereignty of States for international, as well as domestic purposes.

3d. By the action of Congress, and such States as were parties in interest, permitting the subsequent erection of new States within the territorial limits of these existing States, as, for instance, Kentucky out of the territory of Virginia; Tennessee out of the territory of North Carolina; Vermont out of the territory of New York; Maine out of the territory of Massachusetts, and West Virginia out of the territory of Virginia.

4th. By the creation and admission of every subsequent State out of the territories, or public domain of the United States as a nation.

There has never been but one method for organizing a State government within the territory of the United States, and that method is by a Convention of the people assembled in their political capacity. For, while sovereignty resides in the great body of the people as a corporate unit comprising all the citizens of the State, this mass of voters is too unwieldy to discharge the functions of government directly. It must, in consequence, act through agents or delegates so selected as

to insure that the performance of the work shall represent the will of the entire people. The *locus in quo* of sovereignty, as a distinguishing fact between the territorial people and the electors of a State, was examined in a very early case in the Supreme Court of the United States, viz., that of *Penhallow v. Doane's Adm'rs*,<sup>1</sup> where the Court said that in our State governments "the sovereignty resides in the great body of the people, but it resides in them not as so many distinct individuals, but in their political capacity only." The legal interpretation of this doctrine plainly points to the electors, or voters only, as that body of the people in whom sovereignty is practically lodged. A popular convention, therefore, whether in the form of a spontaneous assembly, or a constitutional convention called under the authority of an already existing government, is the primary instrument for organizing our State governments. It is an assembly called to ascertain the will of the people in a new exigency. It does not necessarily make laws, but it determines the manner in which, and the persons by whom, laws may be made. The popular or spontaneous convention is, therefore, the predecessor of the constitutional convention, which latter is formed of delegates, elected in compliance with certain rules prescribed by a competent authority.

Although during our revolutionary period popular conventions were of necessity revolutionary, yet they were permitted to assume the functions of constitutional conventions, because political society was then in a condition of disorganization and transition, and it was indispensable to the formation of our federation that States, already existing as independent colonies, should appear to have qualified themselves for admission by spontaneously framing constitutions which would ena-

<sup>1</sup> 3 Dallas, 54.

ble them to discharge their duties to sister States. Judge Jameson, in his history of the Constitutional Convention, refers to the peculiar circumstances of that period as justifying the course then pursued, saying that "the statesmen of the Revolution, in their first essays at Constitution making, partly from ignorance and partly from the urgent needs of the time, allowed the functions of the Constitutional Convention, in some cases, to be exercised by its revolutionary prototype, the Revolutionary Convention assuming the duty with others of framing their first Constitution."<sup>1</sup>

In the case of *Luther v. Borden*,<sup>2</sup> which arose out of the Dorr Rebellion in Rhode Island, and involved the question of jurisdiction under the old Charter Government of that State, as against the new Constitution and government established by the People's Convention, a Revolutionary Assemblage held without any previous authority from the Legislature, Mr. Webster in his argument in behalf of the original State authorities, said: "It is true that at the Revolution, when all government was dissolved, the people got together and began an inceptive organization, the object of which was to bring together representatives of the people who should form a government; that this was the mode of proceeding in those States where their Legislatures were dissolved. . . . But where any Legislature existed this mode of procedure would be held irregular and invalid; for, 'another American principle growing out of this,' and just as important and well settled as is the truth that the people are the source of power is, that, when in the course of events it becomes necessary to ascertain the will of the people on a new exigency, or a new state of things, or of opinion, the legislative

<sup>1</sup> The Constit. Conv., sec. 14.

<sup>2</sup> 7 Howard, U. S., 44.

power provides for that ascertainment by an ordinary act of legislation.

“Has not that been our whole history? In what State has an assembly, calling itself the people, convened without law, without authority, without qualifications, without certain officers, with no oaths, securities or sanctions of any kind, met and made a Constitution and called it the Constitution of the State? There must be some authentic mode of ascertaining the will of the people, else all is anarchy.” Such is the language of one of the greatest expounders of the Constitution.

The decision of the Supreme Court upholding the charter government of Rhode Island was solely based upon the principle that the State courts had decided in favor of its validity, and that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the Constitution and laws of the State; but it did not pass upon the merits of the controversy, which involved no less a question than the right of the people of a State to change, alter, or abolish their government in such manner as they please, and this, as a right, not of force, but of sovereignty. It so happens that in the case of Rhode Island its charter, emanating from the British Crown, contained no provision relating to its own amendment. Originating in the personal will of the sovereign, it was a fixed instrument immutable, except at his pleasure. Such a charter became, therefore, under the Constitution of the United States, inconsistent with a republican form of government; and although it was acquiesced in for over fifty years, that fact did not alter its character as an anachronism in our form of State administrations. How best to change it, and re-cast the foundations of State authority upon a basis of popular sovereignty, became the moving cause to a conflict of

arms. An appeal to force rather than a submission to legislative authority was accordingly made, resting itself upon mistaken ideas of original and primary sovereignty in the people of a State already a member of the Union.

That question, it will be perceived, involved the right of revolution, which in turn involved insurrection and rebellion, both which constitute that "domestic violence" against which Congress is bound under the Constitution to guarantee the States; so that, practically, revolution can never be legally resorted to under the Constitution, that instrument securing to the people of the States the legal means for altering, amending, or abolishing, in a peaceable manner, any present Constitution, and substituting another in its stead. Moreover, the guarantee by the United States of a republican form of government to every State in the Union supplies the very means for preventing the necessity of a revolution in any of them, in order to alter its form of government. In other words, the United States is bound to protect them not only against foreign invasion, but also against political suicide. For nothing is plainer than that, under the forms of the compact expressed by the Constitution, we are an indestructible Union of indestructible States.

These questions were all fully examined and passed upon by the Supreme Court in *Texas v. White*,<sup>1</sup> which was on an original bill filed by the State of Texas to recover a portion of her public property, in the form of United States bonds issued to her in 1851, in arrangement of certain boundary claims, and which property had been alienated during the Rebellion by an usurping State government for the purpose of carrying on war against the United States. The decision restoring the property to the State was based upon the principle that when

<sup>1</sup> 7 Wall. 700.

Texas became one of the United States she entered into an indissoluble relation, and the union between her and the other States was as complete as perpetual, and as indissoluble as the union between the original States. There was no longer any place for re-consideration or revocation, except through revolution or through consent of the other States.

Apart from these established principles of Federal Union and State authority, may very properly be considered the effect of limitations established by the law-making department of a State upon the extent of authority vested in constitutional conventions when permitted to sit within the jurisdiction of such State governments. The doctrine of supreme conventional sovereignty is one of comparatively recent growth. For many years it made but little progress outside of the circle of States inclined to accept the theories of nullification as a dogma of State sovereignty. Although occasionally adverted to without, however, much acceptance or recognition in conventions in New York, Pennsylvania, Illinois, Kentucky, and Massachusetts, it never really bore fruit until 1861, in the action taken by the eleven seceding States.

It is hardly necessary at this time, and after the experience of our Civil War, to examine at length the exploded doctrine of conventional sovereignty, for which there could never be found any legal basis within the Constitution of the United States. The whole dogma of secession rested upon it, and with that dogma it perished.

For granting that in a state of anarchy, and when society is disorganized, a spontaneous convention may assemble to initiate the formation of some government, the limit of authority of such a body is still capable of ascertainment. But when a government *de jure* as well

as *de facto* already exists from which alone all measures to alter existing institutions can legally emanate, a constitutional convention is seen to be only an assemblage of delegates created by specific legislative enactment for the purpose of performing certain enumerated functions, and which functions being described, exclude by such words of limitation the right to perform any others.

This question was in fact fully examined and decided in 1833, in the opinion given by the justices of the Supreme Judicial Court of Massachusetts,<sup>1</sup> in which it was held that if the Legislature should submit to the people the expediency of calling a convention of delegates for the purpose of revising or altering the Constitution of the Commonwealth in any specific part thereof, and the people should, by the terms of their vote, decide to call a convention of delegates to consider the expediency of so altering the Constitution, the delegates would derive their whole authority and commission from such vote, and would have no right, under the same, to act upon and propose amendments in other parts of the Constitution not so specified. The Constitution then in force already provided a way for its amendment, and such provision by implication excluded all other modes of amending that instrument.<sup>2</sup>

In the case of the original thirteen States, no special enabling Act was required to be passed by Congress in respect to any of them. They became States by simple transition from provincial governments, because they were so *de facto*, and had been for some time in respect to administering their own affairs; therefore, in their subsequent Declaration of Independence, they merely re-asserted the fact with reference to localizing sovereignty,

<sup>1</sup> 6 Cushing, 573.

<sup>2</sup> Wells v. Bain, 75 Penn. St. 39; Trustees v. McIver, 72 N. C. 76.



and claiming membership as the United States of America in the family of nations.

The colonies previous to the Revolution were in all respects States independent of each other. They had Legislatures of their own by which laws were made for their internal government. These laws were not affected by their separation from the mother country. Their charters, emanating from the crown, answered for Constitutions. With but two exceptions, relating to Connecticut and Rhode Island, those charters had been annulled by subsequent revolutions and the people had substituted others of their own framing. At the Declaration of Independence, which finally dissolved all connection between England and the colonies, the thirteen original States were found to be governed by three systems of jurisprudence, viz:—

1st. By the common law of England, so far as they had tacitly adopted it as suited to their condition—a doctrine which is reaffirmed in many of their early State Constitutions.

2d. By the statutes of England amendatory of the common law, which they had adopted.

3d. By their Colonial statutes.

From the first and second of these sources is derived our American Common Law, as still applied in the courts of this country.

Since the adoption of the Federal Constitution in 1789, thirty-one new States have been erected out of the national territory and admitted into the Union. The majority of these admissions followed upon the action of Conventions, assembled for the purpose of framing a first Constitution under the authority of prior Enabling Acts. The necessity for passing these Enabling Acts and of giving validity to the assembling and labors of such conventions, merits special notice inas-

much as it tends to show the national character which has attached itself to the public domain since the establishment of the Constitution. According to the principles of primary sovereignty then localized in the people of the United States over all the territory of the nation, the right to establish a new State by the inhabitants of a Territory does not exist as an unqualified right. The care of the government of those Territories has, by the Constitution, been committed to the Congress of the United States; and Congress having provided a territorial form of administration, no other political body can change, or authorize to be changed the existing form of government. Any popular convention called to do so without prior authority bestowed by Congress, would be a purely revolutionary body and its action a nullity. Consequently, in order to be legitimate, a convention called to erect a State out of a Territory must be preceded by an Enabling Act of Congress, granting permission to such a body to assemble. In like manner, after its work has been accomplished, it must be submitted for ratification to the same sovereign authority before it can acquire validity. The usual manner of proceeding in such cases is for the inhabitants of the Territory desiring admission as a State to memorialize Congress on the subject. If the creation of such a State be deemed expedient, an Act is then passed expressly authorizing the assembling of a convention to pass upon the question of a State organization, and to frame an appropriate Constitution.

The fact to be kept in mind is, that, while a popular convention has always been at the foundation of every organization of a State government in the United States, such a convention since the adoption of the Constitution has lost its original jurisdiction to act, and is now only a derivative body, subject to the primary

authority of Congress to allow or disallow it. The question of the validity of conventions irregularly called to form State governments out of the territory of the United States, was fully examined by the Supreme Court in the case of *Scott v. Jones*,<sup>1</sup> heretofore cited, where the issue turned upon the character of the government of Michigan prior to January 27, 1837, with reference to its position before that court for jurisdictional purposes. It was shown in evidence that three separate conventions had been called to establish a State government prior to that time, none of which, however, had been authorized by Congress. That although these conventions were irregular, they resulted in the establishment of a quasi State government, upon which admission to the Union was sought. That Congress finally had consented to ratify the action of one of these bodies by accepting the State Constitution and organization thereunder, subject, however, to certain conditions relating to the acceptance of a boundary line fixed by the neighboring State of Ohio, which condition not being agreeable to the people of Michigan, was uncompleted until December, 1836, whereupon Congress withheld the act of admission until January 27, 1837.

Several States have obtained admission into the Union in an irregular way, by the spontaneous action of the people of the Territory assembling in convention, or under the direction of the Legislature or executive authority, and by afterwards adopting a State Constitution preceding the passage of an Enabling Act by Congress authorizing them to do so. But their subsequent admission may be said to have cured this irregularity in procedure. In some cases, however, it was claimed that no irregularity had in fact been committed, because the necessity of an Enabling Act by Congress had been dis-

<sup>1</sup> 5 Howard, U. S., 343.

pensed with by previous stipulations of the National Government, in acquiring the Territory from which such States were formed.<sup>1</sup>

Thus in the famous ordinance of 1789, creating the Northwest Territory and providing for its government, it was declared that the following articles "shall be considered Articles of Compact between the original States and the people and States in the said Territory and forever remain unalterable unless by common consent." The fifth article provided for the formation out of the said Territory of not less than three, nor more than five States, as soon as Virginia shall alter her Act of Cession and consent to the same.

Under these stipulations Michigan claimed the right of admission, also Indiana. In like manner under the provisions of the treaty with France relating to the purchase of the Louisiana Territory, in 1803, and which provided that "the inhabitants of the ceded Territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution," the people of the Territory of Arkansas without any preceding Enabling Act met in Convention and adopted a State Constitution on the 30th of January, 1836, after which they sent a memorial to Congress praying for admission. Congress passed an Act admitting the State on June 15, 1836, but annexing some conditions. The State then passed an ordinance accepting these conditions as a compact between itself and the other States, and took its place in the Union October 18, 1836.

The admission of both Arkansas and Michigan without a preceding Enabling Act, was one of the earliest instances of irregularity in procedure of this kind. It virtually nullified the claim of the exclusive and pri-

<sup>1</sup> Cooley, Const. Limit., 27.

mary right of Congress to authorize the formation of territorial governments, or to permit changes to be made in them. In view of the anomalous character of this demand for admission by States spontaneously organizing themselves and attempting to break into the Union, the occasion gave rise to much conflict of opinion upon the floor of Congress. The President was thereupon moved to obtain the opinion of the Attorney-General upon the subject, in order that the same might be laid before the Houses. This opinion, after carefully inquiring into the merits of the application for the admission of Arkansas founded upon the treaty with France, and the provisions of the Constitution relating to the introduction of new States into the Union, proceeds to lay down the following conclusion as the rule of guidance for Congress, viz:—

“That the people of any Territory may peaceably meet together in primary assemblies, or in Conventions chosen by such assemblies, for the purpose of petitioning Congress to abrogate the territorial government and to admit them into the Union as an independent State; and if they accompany their petition with a Constitution framed and agreed on by their primary assemblies, or by a convention of delegates chosen by such assemblies, there is no objection to their power to do so, nor to any measure which may be taken to collect the sense of the people in respect to it, provided such measures shall be prosecuted in a peaceable manner in subordination to the existing government, and in subserviency to the power of Congress to adopt, reject, or disregard them at pleasure.”<sup>1</sup>

The opinion given in the case of Arkansas has been

<sup>1</sup> Opinions Attorney-Generals, vol. 2, p. 726; Benton's Abridgment of Debates, vol. 13, 69-72.

adopted as a rule of action by Congress in every subsequent admission of a State without a preceding enabling Act, and may be said to have done away with the latter as an indispensable condition precedent.

Acting under this now accepted rule, other States, like Minnesota, California, and Oregon have been admitted in a similar way, under various stipulations entered into by the General Government relating to the original acquisition of their territory, so that this question of irregularity has been cured of much of its apparent wrongfulness.

The currents of authority formed by both text-writers and judicial decisions seem to unite in the opinion that, in the absence of any provisions in territorial constitutions looking to the further change into a State form of government, and authorizing a convention to assemble to frame a State Constitution (which is practically all that an enabling Act of Congress does), the power to originate proceedings for that purpose rests with the Legislature of the territory, as the department most nearly representing the sovereignty of the people. Although such action appears on its face somewhat revolutionary, since it practically amounts to establishing a new form of government within the territory of the nation without permission first obtained from its legislative authority, yet, under the light of the precedents already established, the action of such a convention, when peacefully held, would be considered only as a step by anticipation of its rights under an enabling Act, still leaving to Congress its original discretion to ratify or reject the State Constitution, and to grant or deny admission to the Union.

It will be perceived from the course of practice presented by the records of Congress, in relation to the admission of new States, that the people of the several

territories may, by virtue of an enabling Act, at any time proceed to form a State Constitution, though only in the manner prescribed by such Act. This manner refers more particularly to the persons who may vote for delegates to such convention, thus clothing some particular class with the right of suffrage irrespective of existing territorial laws. When these conditions have been complied with and a State Constitution has been framed, it is then for Congress to ascertain and satisfy itself that certain indispensable qualifications are possessed by such State, both as matters of policy as well as of constitutional law. The first of all qualifications to be determined is, Whether the Constitution framed will secure a republican form of government to the State. 2d. Whether its boundaries have been definitely fixed. 3d. Whether the population, as shown by the last census, is sufficient. 4th. Whether the proper qualifications for the exercise of the elective franchise have been established.

Should the people of any Territory, as before pointed out, meet spontaneously in convention, frame and adopt a Constitution, this would give them no right to admission now, since they could no longer appeal to the ordinance of 1787, or the treaty of purchase of Louisiana, as a compact of obligatory force upon Congress. Nevertheless, as the discretion of admitting or refusing admission vests in Congress, this latter may act as it shall please, and as it has often, in fact, done, by ratifying the Constitution of a State made without its previous permission, and thus admitting it into the Union.

This question of the admission of new States has of late years assumed more the complexion of a political problem, than one of constitutional law. The need of a few more electoral votes to maintain the balance of power in the hands of a political party has often operated

as a strong inducement to the admission of a new State; or again, the fear of losing this balance of power has operated to oppose and delay its admission. This is the necessary result of lodging the power of admission in the political department of the government alone. But as a question of this kind being one of fact and policy, more largely than one of law, could not come primarily within the jurisdiction of the judiciary, the Constitution has wisely confided its determination to that body which represents the Federal sovereignty of the entire people located in its national Legislature.<sup>1</sup>

#### RELATION OF THE STATES TO EACH OTHER.

Having successively examined the questions of—1st, The origin of a State; 2d. What constitutes a State, and, lastly, The method of their formation under the Constitution, it only remains for us to consider the relations of the States to each other. This is a question which the Supreme Court has pronounced to be one of “uncommon magnitude,” and with good reason, since upon its solution in a constitutional way alone depends the integrity of the Union. In order, therefore, the better to comprehend its import, it becomes necessary at the outset to inform ourselves of the underlying elements which enter into the purview of this inquiry.

The Declaration of Independence was the work of representatives of thirteen united States, acknowledging themselves still to be only united Colonies, but claiming that they were of right, and ought to be free and independent States, because absolved from all allegiance to the British Crown. The word State, as then employed, was meant to describe in the largest and most unrestricted sense, an organized Commonwealth existing

<sup>1</sup> *Luther v. Borden*, 7 Howard, U. S., 1.



under a system of written or positive laws. The autonomy of each one of these Colonies or States was fully recognized then, and acquiesced in during the entire period of the Revolutionary War. On the formation of the subsequent confederation by a solemn compact entered into between the States on the 15th day of November, 1777, after giving an appropriate name to the confederacy, as that of the United States of America, the 2d Article, or that which first deals with the subject-matter of the agreement, is one reciting 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.”

Again, by the 13th Article of the confederation, it was provided “that no alteration of said Articles should at any time thereafter be made, unless such alteration should be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.”

The two important points to consider in this connection are, 1st. That of State Sovereignty, which is kept prominently in view, with all the attributes appertaining thereto; and 2d. That which gave to these State governments the exclusive power of ratifying all amendments to the existing Federal Constitution.

The States were thus kept dominant in their political capacity and without any central authority to coerce them. These two facts in constitutional legislation virtually constituted the United States a union of sovereign independent States, and not, as the present Constitution subsequently made it, a union of the people of the United States.

During the existence of the Confederation we were not a nation, but only a congeries of political communi-

ties designated as States, a mere league, in fact. This was well known and understood in all its unfortunate consequences by the statesmen of that day, and it was tolerated only as a measure of expediency in the presence of a common danger.

Mr. Madison, in the introduction to his Record of Debates in the Constitutional Convention, says that "The radical infirmity of the Articles of Confederation was the dependence of Congress on the voluntary and simultaneous compliance with its requisitions by so many independent communities, each consulting more or less its particular interest and convenience, and distrusting the compliance of the others."

And Mr. Hamilton adds a significant suggestion of the perilous character of the existing government by exclaiming "that a nation without a national government is an awful spectacle." So deeply impressed were these facts upon the minds of the people of the States, that the Legislature of New York, as early as July, 1782, had solemnly *Resolved*, "That the situation of these States is, in a peculiar manner, critical; and affords the strongest reason to apprehend from a continuance of the present Constitution of the Continental government, a subversion of the public credit, and consequences highly dangerous to the safety and independence of these States."

On whatever side examined as a question of polity, this independence of the States under the claim of sovereignty, was seen to be a hindrance to the general well-being of the Union, and a menace to its perpetuity. The great aim of the Convention called to frame the Constitution was, therefore, to reorganize the government upon the basis of the people as the origin of all Federal sovereignty, rather than upon that of the States. This was to be done without necessarily dissolving State

governments, or in any way interfering with them, the object being to transform the federation of States into a federation of the people acting through various forms of representation.

The fallacy of assuming that absolute State sovereignty existed *ab initio*, because of the league formed between the individual colonies, needed no argument to refute it. For at the outset, none of the original thirteen States ever claimed separate independence of the mother country—none of these States ever undertook to enter by treaty into any alliance with a foreign nation, or claimed any international recognition whatever; and none undertook to wage war singly in behalf of its own independence. Each Colony felt its individual weakness and the identity of interest which linked its fate to that of every other. Therefore, they were united politically into one nation, because they could not stand dis-united and achieve an independence either local or national. It was necessary that there should be fusion as a condition precedent to nationality. “When,” says Chief Justice Marshall, “these allied sovereigns converted their league into a government; when they converted their Congress of ambassadors deputed to deliberate on their common concerns, and to recommend measures of general utility into a legislature empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.”<sup>1</sup> To have subsequently admitted State sovereignty as an unqualified indefeasible right, would have been tantamount to placing the State above the nation, or making the part greater than the whole. This is further illustrated in the case of the organization of later States

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 566.

out of Territories belonging to the nation, all which States are the creation of Congress and admitted under enabling Acts, or special treaty provisions as before shown. Inasmuch, therefore, as the original thirteen States never claimed this sovereignty outside of the articles of Confederation, and considering, also, that the effect of this tacit admission, under the operations of that confederation, had proved disastrous to the well-being of the Union, the Convention of 1787 addressed its efforts to the task of fusing the States into a nation, and then beginning political reconstruction on the basis of popular sovereignty.

It has never been claimed that the framers of the Constitution were prophets, or that they did their work under special inspiration. Nevertheless, it is a most noteworthy instance of pre-vision in them, that they foresaw in this dogma of State sovereignty the danger of secession, and anticipated its possible coming by *nationalizing* the territory and the Union of the States, so as to afford to this heresy no foothold under the Constitution. It did not seem to them, any more than it can to us, that, by simply converting a piece of the territory of the nation into a political society designated as a State, and allowing it to enjoy the privileges appertaining to such a community, the nation either surrendered its right of ownership and eminent domain over it, or consented to allow it to nullify national laws, or finally to secede from it by actual disruption. Yet, illogical and absurd as it may appear, this was, nevertheless, the ground upon which the secession movement of 1861 based its attempt.

But all this by a species of prophetic anticipation had been provided for by the framers of the Constitution, who began the preamble of the Great Charter with these words of unmistakeable significance: "We,

the people of the United States," not, "we, the people of the States United," "in order to form a more perfect Union," etc., "do ordain and establish this Constitution for the United States of America." Whether, therefore, we believe in a liberal or a strict construction of the Constitution, there is and can be as to these clauses no confusion of meaning. All writers upon the Constitution, all jurists, all political parties, all interpreters of the genius and sense of our form of government agree in one, that it is a government of the people, first, last, and always; who, in the interests of convenience, and for the promotion of matters of administration, are organized into political societies known as States: that these States are sovereign only as between each other, and as to their own citizens, but are not sovereign as to any relation which they occupy towards the Federal Government for the purposes of the common Union.

This Union of ours is for the benefit, not of the States as States, but of the people of the United States as citizens of these States. Hence the Federal Government is bound to protect the citizens of these various States, against any encroachment upon their constitutional rights at the hands of their own State governments. The State governments are thus seen to be, under the Constitution, inferior jurisdictions to that of the national government, but only in matters affecting the interests of the Union.<sup>1</sup>

In concluding this examination into the origin and constitution of States as members of our Federal Union, it may be well to give a passing glance at two of the leading decisions which the necessities of our political vicissitudes have called forth in relation to them.

In the case of *McIlvaine v. Cox's Lessee*,<sup>2</sup> which

<sup>1</sup> Slaughter-house Cases, 16 Wall. 36; *Brown v. Maryland*, 12 Ibid. 430.

<sup>2</sup> 4 Cranch (1808), 209.

arose upon the question whether one Daniel Coxe, who was born in the colony of New Jersey before the year 1775, and resided there until the year 1777, but who then joined the British army, and thereafter adhered to it, claiming to be a British subject, had a right to take lands by descent in the State of New Jersey, the Court held, that on the 4th October, 1776, the State of New Jersey was completely a sovereign and independent State, and had a right to compel the inhabitants of the State to become citizens thereof, and that consequently Coxe, under the laws of the State, was a citizen and competent to take an estate by descent.

It will be noticed that the sovereignty here adjudicated upon was *domestic sovereignty* over its own citizens, complying with its own laws.

But a far more important and vital point, relating not to the autonomy of a State so much as to its real existence, was decided in the case of *Scott v. Jones*,<sup>1</sup> heretofore cited. Dwelling upon the intent of the Judiciary Act of 1789, in respect to revisions of State decisions by a Federal tribunal, the Court said "two things must unite in order to justify it. There must be an Act of solemnity and importance, such as a statute, and that statute must be by a State, a member of the Union, and a public body owing obedience and conformity to its Constitution and laws. This seems to have been settled by this Court as to the meaning of the word State, where empowering one to bring an action. It must be a member of the Union. And it is not enough for it to be an organized political body within the limits of the Union."<sup>2</sup>

It will be perceived from the foregoing decision that particular stress is laid upon the fact, that, in order to

<sup>1</sup> 5 Howard (1847), 343.

<sup>2</sup> *Cherokee Nation v. Georgia*, 5 Peters, 18.

become a State, something more than the organization of a body of citizens into a distinct political society is necessary. This something more is the ratification by Congress of this action of the State, exemplified by its admission into the Union. That admission constitutes it a member of the Union, and therefore a State within the meaning of the Constitution. Under this view of our political union, there were no States preceding the adoption of the Articles of Confederation, but only provinces of a disintegrated empire. Speaking to this point, the Supreme Court, in *Penhallow v. Doane's Adm'r*,<sup>1</sup> said that "if the people of each province had chosen to resist separately, they undoubtedly had equal right to do so, as to join in general measures of resistance with the people of the other provinces, however unwise and destructive such a policy might and undoubtedly would have been. If they had pursued this separate system, and afterwards the people of each province had resolved that such province should be a free and independent State, the State from that moment would have become possessed of all the powers of sovereignty as completely as any one of the ancient kingdoms or republics of the world, which never yet had formed or thought of forming any sort of Federal Unions whatever."

Now all this might have happened if these provinces had fought each for itself a separate revolutionary war, and claimed international recognition as an independent State. But inasmuch as they never made any such individual assertion of liberty, but preferred to unite in a common league, they never, consequently, assumed to be absolute States until they entered into a union with each other as equals in a political partnership. They passed directly from provinces into States for the purposes of a union between themselves, which could be

permanent only when resting on a basis of equality and mutuality of advantages.

Again, the sovereignty of the United States, and that of a State are independent of each other within their respective spheres of action, although both exist and exercise their powers within the same territorial limits.<sup>1</sup> The State, consequently, is so far autonomic that its Constitution is not a contract within the meaning of that clause of the Constitution of the United States which prohibits the States from passing laws impairing the obligations of contracts. The State Constitution is the fundamental law adopted by the people for their government in a State of the United States; and as such may be construed and carried into effect by the courts of the State, without review by the Supreme Court, except in cases where what is done, is supposed to come in conflict with the Constitution of the United States.<sup>2</sup> This is necessary, in order to leave to the States the unfettered exercise of those police and other powers essential to the maintenance of their domestic institutions.

Thus in the civil rights cases decided in 1883,<sup>3</sup> it was held that the act of a mere individual in refusing accommodations at an inn, or in a railway carriage, was an ordinary civil injury properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears. Until, therefore, some State action was taken counteracting the operation of the 14th Amendment, and the corrective legislation provided by Congress to meet such cases, the court was without power to interfere. A distinction was also drawn between the primary and the corrective legislation of Congress, in respect to the protection of the rights of citizens of the various States, as showing that

<sup>1</sup> *In re Neagle*, 135 U. S., 60.

<sup>2</sup> *Church v. Kelsey*, 121 U. S., 282.

<sup>3</sup> 109 U. S., 3.



the Federal Legislature could not enact a municipal code for a State.

Sometimes, indeed, this doctrine of the domestic autonomy of States within our Union has been pushed to an extreme limit, as in the cases of *Worcester v. Georgia*,<sup>1</sup> and *Ableman v. Booth*,<sup>2</sup> where the States of Georgia and Wisconsin both refused to acknowledge the authority of the Supreme Court of the United States to adjudicate upon the domestic power of the States. The judgments of that court were, in consequence, never enforced. In like manner the imprisonment of foreign colored seamen in the ports of South Carolina, or of colored citizens of other States going there, was recognized to be an exercise of the domestic powers of the State with which the Federal government could not interfere, although bound by treaties, as in the case of British seamen in South Carolina, or Chinese residents in California.\* So, also, Massachusetts, in 1843,<sup>3</sup> and again in 1855,<sup>4</sup> enacted Personal Liberty Bills in open defiance of the Constitution and Acts of Congress relating to the rendition of fugitive slaves.

Therefore, as between the national government and the several States, the latter are not either foreign or independent States, but on the contrary are dependent and subordinate. All the rights of the States as independent colonies were surrendered under the Constitution to the United States. The States are not nations either as between themselves or towards foreign nations. They are sovereign within their spheres, but their sovereignty stops short of nationality. Their political status

<sup>1</sup> 6 Peters, 515.

<sup>2</sup> 21 Howard, 506.

<sup>3</sup> Laws, chap. 69.

<sup>4</sup> Laws, chap. 489. See *Prigg v. Penna.*, 16 Pet. 611.

\* Vid. *Baldwin v. Franks*, 120 U. S. 678, where it was held that there is no national law even under treaty stipulations to protect the subjects of China in their right to reside and do business in the United States. But the court was divided.

at home and abroad is that of States in the United States.<sup>1</sup> It is only for national purposes embraced by the Constitution, such as the establishment of post-roads and port-officers, the regulation of inter-state commerce, etc., that the States and the citizens thereof are one, united under the same sovereign authority. In all other respects the States are foreign to each other.<sup>2</sup>

There is but one conclusion from these premises, which is, that the States have never lost their distinct and individual territorial existence, nor their right of self-government. But here their autonomy expires and their sovereignty is exhausted. They cannot withdraw from the Union by any act of their own, either through an abrogation of their existing State governments, or a refusal on the part of their citizens to act as agents of the Federal government in administering Federal courts, post-offices, barracks, forts or navy yards. They are estopped by the fact that being once admitted as States, the Constitution looks to an indestructible union of indestructible States. There is no place, consequently, for reconsideration, nor opportunity for revocation of their admission into the Union, except through revolution; and which revolution, as we have elsewhere seen, it is the constitutional duty of the United States to suppress, since under the Constitution, the Union being self-protecting, is indissoluble and therefore perpetual.<sup>3</sup>

It follows as a corollary to these adjudicated principles of our political organization, that the several ordinances of secession, however passed, and however ratified, whether by a majority of the citizens of the seceded States, or by their Legislatures, when considered as transactions under the Constitution, were absolutely null and

<sup>1</sup> *New Hampshire v. Louisiana*, 108 U. S. 76.

<sup>2</sup> *Buckner v. Finley*, 2 Pet. 586; *Dickens v. Beal*, 10 Ibid. 572.

<sup>3</sup> *Texas v. White*, 7 Wall. 700.

void, having no legal basis to rest upon. Such States did not consequently cease to be States in the Union, nor their citizens to be citizens of the United States. This conclusion was forced upon the several courts before which arose questions belonging to the operation of the reconstruction Acts of Congress, because of the concurrent opinion that the government of the United States is not a mere compact between the several States from which any one may withdraw at pleasure, but that it emanates from the entire people as a nation, and always remains subject to their sovereign will.<sup>1</sup>

The existence of a state of insurrection and war did not, in respect to the States under the Constitution, as it did in respect to the colonies before the Constitution, loosen the bonds of society, or do away with civil government as derivative from the authority guarded by a colonial charter. Wherever, therefore, the acts of the several States, in their individual capacities, and those of their different departments of government, executive, judicial, and legislative, although occurring during the war, did not impair or tend to impair the supremacy of the national authority, or the just rights of citizens under the Constitution, those acts of domestic government are to be treated as valid and binding.<sup>2</sup>

But the central government of the Confederate States had no existence, except as organized insurrection. For wherever existing, it existed as an usurper on territory belonging to the people of the United States. It was a political trespasser in every sense, and its statutes, decrees, and authority could give no validity to any acts done in its service. At best, it was not even a *de facto* government in any such sense, that its acts were

<sup>1</sup> *White v. Cannon*, 6 Wall. 443; *Shortridge v. Macon*, 1 Abb. U. S. 58; *U. S. v. Cathcart*, 1 Bond, 556.

<sup>2</sup> *Horn v. Lockhart*, 17 Wall. 571.

entitled to judicial recognition anywhere as valid. It was simply the military representative of the insurrection, personified in various departments of temporary civil government.<sup>1</sup>

It has been a popular belief since the termination of our Civil War that the Southern States, by their attempt at secession, lost a large portion of their former rights under the Constitution; and it is common to say that such a thing as States rights no longer exists. This is an error. If by the term States Rights is meant the right to secede from the Union, then the answer is that such a right never existed under the Constitution, and the States, in consequence, never possessed it. The attempt at secession was a purely revolutionary act, aimed at the destruction of the Union. It was, therefore, precisely such an act, as no Constitution framed upon the basis of a national union of the people of the United States could provide any means for legalizing. In other words, the people, in their Constitution, have provided no means for committing political suicide.

With the exception only of the institution of slavery, the States in rebellion lost nothing of their former constitutional rights. Their political relations to the General Government and the loyal States were simply suspended during the war, but became speedily re-established on their unqualified submission to the Federal authority. The Thirteenth, Fourteenth, and Fifteenth Amendments were intended chiefly to benefit an emancipated race in its new status of citizenship. But States rights, for domestic purposes, have not been abrogated either by the war, or the new amendments. They remain in force as before. The civil rights cases, in the

<sup>1</sup> *Sprolt v. U. S.*, 20 Wall. 459; *Keppel v. Petersburg R. R. Co.*, Chase's Dec. 167; *Williams v. Bruffy*, 96 U. S. 176, 193; *Keith v. Clark*, 97 *Ibid.* 454.

109 U. S. 3, show that, in the opinion of the Supreme Court, these States, regardless of their former disloyalty, remain on the same constitutional footing as all others for purposes of local government. And finally that it is only when State authority exercises itself in a manner to infringe any provision in the Bill of Rights, that the Court can declare such acts to be unconstitutional.<sup>1</sup>

In conclusion, it may be said that the political status of the States within our Union is in every aspect a peculiar one. Nothing exactly like it has ever before been known in ancient or modern times. None of these States was ever a sovereign nation. Each was simply a dependency of the British Crown, existing under a charter, patent, or proprietary grant. At the Revolution, this political framework became dissolved into a national fusion of the people of the United Colonies, for the purpose of securing not local, but general independence of the British Crown. Lastly, at the formation of the Constitution, the several States were first organized as co-equal and independent members of a Federal Republic. Though separately born from the bosom of the nation, and chartered as a qualified sovereignty, they are still so inseparably united and interfused as to form but one homogeneous Commonwealth.

#### RATIFICATION OF THE CONSTITUTION BY THE ORIGINAL STATES, AND ADMISSION OF THE NEW ONES IN THEIR CHRONOLOGICAL ORDER.

The Constitution of the United States was adopted on the 17th of September, 1787, by the Convention appointed in pursuance of the resolution of the Congress of the Confederation of February 21, 1787. Its ratifi-

<sup>1</sup> *Strauder v. West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 *Ibid.* 339.

cation by the Conventions of the several States occurred in the following order:—

Delaware,	Dec. 7, 1787	South Carolina,	May 23, 1788
Pennsylvania,	Dec. 12, 1787	New Hampshire,	June 21, 1788
New Jersey,	Dec. 18, 1787	Virginia,	June 26, 1788
Georgia,	Jan. 2, 1788	New York,	July 26, 1788
Connecticut,	Jan. 9, 1788	North Carolina,	Nov. 21, 1789
Massachusetts,	Feb. 6, 1788	Rhode Island,	May 29, 1790
Maryland,	April 28, 1788		

These States, whether previously existing under Charter, Provincial or Proprietary governments, began establishing Constitutions of their own at the outbreak of the Revolution, and have subsequently amended or reformed them entirely, at the dates mentioned below.

DELAWARE, Royal Charter, 1701. Constitution, 1776, 1792, 1831.  
Amended 1855, 1875.

PENNSYLVANIA, 1776, 1790, 1838, 1873.

NEW JERSEY, 1776, 1844, 1875.

GEORGIA, 1777, 1789, 1798, 1865, 1868.

CONNECTICUT, Royal Charter of 1662; slightly altered and re-adopted in 1776, 1818. Amended in 1828, 1832, 1836, 1838, 1845, 1850, 1855, 1856, 1864, 1873, 1874, 1875.

MASSACHUSETTS, 1780. Amended in 1822, 1833, 1836, 1840, 1855, 1857, 1859, 1860, 1863.

MARYLAND, 1776, 1851, 1864, 1867. Amended, 1875.

SOUTH CAROLINA, 1776, 1778, 1790, 1865, 1868.

NEW HAMPSHIRE, 1776, 1784, 1792. Amended, 1852, 1877.

VIRGINIA, 1776, 1830, 1850, 1864, 1870. Amended, 1872, 1874, 1876.

NEW YORK, 1777, 1821, 1846. Amended, 1854, 1864, 1869, 1872, 1874.

NORTH CAROLINA, 1776, 1868, 1876.

RHODE ISLAND, Royal Charter of 1643, continued until 1842. Amended, 1854, 1864.<sup>1</sup>

The new States admitted under section 3 of Article IV. of the Constitution, and the dates and circumstances of their formation and admission have been as follows:—<sup>2</sup>

<sup>1</sup> Poor's Constitutions of the United States.

<sup>2</sup> Hickey, Constitution of the United States, p. 412.

**VERMONT**, which once formed part of New York, by Act of February 18, 1791, and which took effect March 4, 1791.

Constitution formed 1777, 1786, 1793.

Amended, 1828, 1836, 1850, 1870.

**KENTUCKY**, which once formed part of Virginia, by Act of February 4, 1791, which took effect June 1, 1792.

Constitution formed, 1792, 1799, 1850.

**TENNESSEE**. Formed from territory added to the United States by North Carolina, by Act of June 1, 1796, and which took effect at the same date.

Constitution formed, 1796.

Amended, 1834, 1870.

**OHIO**. Formed from territory ceded to the United States by Virginia, by Act of February 19, 1803, which took effect from date.

Constitutions formed, 1802, 1851.

**LOUISIANA**. Formed part of the territory purchased from France by treaty of April 30, 1803, by Act of April 8, 1812, which took effect from date.

Constitutions formed, 1812, 1845, 1852, 1864, 1868.

Amended, 1870, 1874.

**ARKANSAS**. Formed from the Louisiana Territory by Act of June 15, 1836, which took effect from date.

Constitutions formed, 1836, 1864.

Amended, 1868, 1874.

**MICHIGAN**. Formed part of the territory ceded to the United States by Virginia, by Act of June 15, 1836, which took effect from date.

Constitutions formed, 1835, 1850.

Amended, 1835, 1860, 1862, 1866, 1870, 1876.

**FLORIDA**. Formed from territory purchased from Spain by treaty of February 22, 1819, by Act of March 3, 1845, which took effect from date.

Constitutions formed, 1838, 1865, 1868.

Amended, 1870, 1875.

**IOWA**. By Act of March 3, 1845, which took effect from date.

Constitutions formed 1846, 1857.

Amended.

**TEXAS**. An independent Republic, annexed December 29, 1845, by Act of that date.

Constitutions formed—of Republic, 1836.

“ “ “ State, 1845, 1866, 1868, 1876.

**WISCONSIN**. By Act of May 29, 1848, which took effect from date.

Constitution formed, 1848. Amended, 1867, 1869, 1870, 1871, 1874.

**CALIFORNIA**. Formed from territory ceded to the United States by Mexico, by treaty of February 3, 1848, by Act of September 9, 1850.

Constitution formed, 1849.

Amended, 1862, 1871, 1876.

**INDIANA**. Formed part of territory ceded to the United States by Virginia, by Act of December 11, 1816, which took effect from date.

Constitution formed, 1816, 1851.

Amended, 1873.

- MISSISSIPPI.** Formed from territory ceded to the United States by Georgia and South Carolina, by Act of December 16, 1817, which took effect from date.  
 Constitution formed 1817, 1832, 1868.  
 Amended, 1875.
- ILLINOIS.** Formed from territory ceded to the United States by Virginia, by Act of December 3, 1818, which took effect from date.  
 Constitution formed, 1818, 1848, 1870.  
 Amended, 1851.
- ALABAMA.** Formed from territory ceded to the United States by Georgia and South Carolina, by Act of December 14, 1819, which took effect from date.  
 Constitution formed, 1819, 1865, 1867, 1875.  
 Amended, 1830, 1846, 1850.
- MAINE.** Formed from part of Massachusetts, by Act of March 3, 1820, which took effect March 15, 1820.  
 Constitution formed, 1820.  
 Amended, 1834, 1837, 1839, 1841, 1845, 1848, 1851, 1856, 1865, 1868, 1869, 1876.
- MISSOURI.** Formed from part of the Louisiana territory purchased from France, by Act of March 2, 1821, and which took effect August 10, 1821.  
 Constitution formed, 1820, 1865, 1875.  
 Amended, 1865.
- MINNESOTA.** Formed from part of the Louisiana territory, by Act of May 11, 1858, which took effect from date.  
 Constitution formed, 1857.  
 Amended, 1858, 1860, 1868, 1869, 1876.
- OREGON.** Formed from territory whose boundaries have been determined by the treaties with France, of April 30, 1803 (Louisiana Purchase), with Spain, of February 22, 1819, and with Great Britain of June 15, 1846, by Act of February 14, 1859.  
 Constitution formed, 1857.  
 Amended.
- KANSAS.** Formed from the Louisiana territory by Act of January 29, 1861, which took effect from date.  
 Constitution formed, 1857, 1858, 1859.  
 Amended, 1861, 1864, 1865, 1868, 1875, 1876.
- WEST VIRGINIA.** Formed from certain counties of Virginia, by Act of December 31, 1862, which took effect June 20, 1863.  
 Constitution formed, 1861, 1863, 1872.  
 Amended.
- NEVADA.** Formed from part of California, by Act of March 21, 1864, which took effect October 31, 1864.  
 Constitution formed, July 28, 1864.  
 Amended.



- NEBRASKA.** Formed from part of the Louisiana territory, by Act of February 9, 1867, and which took effect from date.  
 Constitution formed, 1866, 1867, 1875.
- COLORADO.** By Act of March 3, 1875, which took effect with Constitution on March 14, 1876.
- NORTH DAKOTA.** } Formed from territory of that name, by Act of Febru-  
**SOUTH DAKOTA.** } ary 22, 1889, which took effect with Constitution on  
 November 2, 1889.
- MONTANA.** Formed from territory of that name, by Act of February 22, 1889, which took effect with Constitution, November 2, 1889.
- WASHINGTON.** Formed from territory of that name, by Act of February 22, 1889, which took effect with Constitution, on November 2, 1889.
- IDAHO.** Formed from territory of that name.  
 Constitution ratified November 2, 1889. Admitted into the Union by Act of July 3, 1890.
- WYOMING.** Formed from territory of that name.  
 Constitution ratified November 2, 1889. Admitted into the Union by Act of July 10, 1890.<sup>1</sup>

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<sup>1</sup> No enabling Acts were passed in the cases of either Idaho or Wyoming. But having held Conventions at the same time as the Dakotas, Montana, and Washington, and availed themselves of this opportunity to frame a Constitution; having also ratified it on the same day as the above Territories, they asked and obtained Statehood from Congress by appropriate bills approved at the dates above recited.

## CHAPTER IV.

CONSTITUTIONAL GUARANTEES AS ELEMENTS OF CIVIL  
LIBERTY AND FEDERAL UNITY.

To foreigners studying the structure of our government by the light of the British Constitution, nothing appears more strange than the unity which pervades it in the midst of the most apparent diversity. They cannot understand this federal paradox. A harmonious Union in the midst of such a complexity of State interests is to them a political riddle.

Thus, we have a President of a Union of forty-four States, who does not communicate officially with the Governors of any of these States, as part of his necessary duty.

We have forty-four Governors of States who do not report to the President, or communicate officially with him, as part of their necessary duty.

We have a national legislature which makes laws for the government of the whole Union, and yet does not communicate officially or directly with the Legislatures of the several States, as part of its necessary duty; and contrariwise, we have forty-four Legislatures which do not communicate with, or report to Congress, as part of their necessary duty.

Lastly, we have a Supreme Court of the United States whose judgments operate throughout the Union as the supreme law of the land, and yet which does not communicate officially with any of the forty-four Appellate State Courts, nor they with it, as part of its, or their necessary duty. Only when questions arising out

of the Constitution or laws of the United States, or the public treaties, come within its jurisdiction, does it review their judgments, and pronounce upon their validity. But beyond that, it has no power even of review, and none of enforcing its own decrees against a sovereign State.<sup>1</sup>

To sum up the matter in a few words, we have a Federal executive with no direct supervisory power over the State Executives—a Federal Legislature with no direct supervisory power over State Legislatures, and a Federal Supreme Court with no direct supervisory power over the State courts. This is a paradox in representative government of unusual aspect and unparalleled proportions. So many States united, yet each, as a State, independent; a Federal government over all, yet never interfering with the domestic jurisdiction of any of its subordinate Commonwealths. History may be searched in vain for a similar example of a union of differential members, developing by political affiliation into one organic whole. We owe this happy result to the common source from which these various members have derived their origin. That one source has been omnipresent as an animating principle at every stage of their existence. It is found in the personal independence of the citizen, through which alone a permanent representative form of government can be developed. On this expanding creed we have built our political faith, and applying it to practice, have established a great Commonwealth system, which beginning with the humble township, runs through the sovereign State up to the imperial Federal government, enlarging its proportions as it goes, yet faithfully adhering to the germinal principle of popular sovereignty in the greatest, as in the very least of its parts.

<sup>1</sup> *Worcester v. Georgia*, 6 Peters, 515; *Ableman v. Booth*, 21 How. 506.

This de-centralization of government in a union of so many States, coupled with the indissoluble nature of that union springing from its national character, is the fruit of the ripest wisdom and political sagacity that ever presided over the organization of a civil body politic. In an age of constitution-making ours stands foremost, as an instrument containing such well-balanced powers of sovereignty, such inflexible guarantees of political and personal rights, and such limitations upon assumptions of arbitrary authority, as to secure harmony through all parts of a graded political system, based upon the single idea of personal independence. It is to these constitutional guarantees that we must ever look for stability and permanency in carrying on the operations of our government. It is through them alone that the welfare of conflicting interests between different sections can be stayed by the hand of federal legislation, or peacefully adjudicated by the appropriate tribunals. A study of their origin and growth will show that they are the last and best fruits of civil liberty organized into the form of a political code.

In all free representative governments, the bulwarks of civil liberty consist of public acts passed for the purpose of defining and regulating the exercise of the sovereign powers of the State. It is only in this way that the personal rights of the citizen can be secured against invasion by the supreme authority. These acts are guarantees of the good faith of the citizens towards each other, and towards the common sovereignty under which they are united. They consist of grants of power, together with limitations upon its exercise. Part of these rules of conduct being unwritten form the common law of the land, and are in the nature of conventions; and part consist of positive laws known as constitu-

tional provisions, which may be enforced in competent tribunals.

“Liberties,” says Guizot, “are nothing until they have become rights—positive rights formally recognized and consecrated. Rights even when recognized, are nothing so long as they are not entrenched within guarantees. And lastly, guarantees are nothing so long as they are not maintained by forces independent of them, in the limit of their rights. Convert liberties into rights—surround rights by guarantees—intrust the keeping of these guarantees to forces capable of maintaining them—such are the successive steps in the progress towards a free government.”<sup>1</sup>

Wherever written constitutions exist, such instruments are absolute and indefeasible against all derivative legislation, and against all revolution by any portion of the people less than was necessary to enact the original charter. Under the Constitution of the United States, there is, consequently, no power of secession vested in the States, or of dissolution of the Union by any portion of the people operating even through a legal convention. The Federal government in its origin is essentially national. The people form a political unit, inhabiting for the purposes of convenience and local government, those several areas of the national territory designated as States. This alone does not constitute a republic. In order to establish one, and to secure any State against domestic incapacity for self-government, or insurrection against the allegiance which it owes to the genius of our Federal Union, it is made the duty of the United States to maintain a republican form of government within its borders. The language of the Constitution on this point is precise and emphatic. “The United States shall guarantee to every State in

<sup>1</sup> Rep. Gov. Lect. 6.

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.<sup>1</sup>

In England, these constitutional guarantees have been either wrested from kings, as in the instance of Magna Charta and the Petition of Rights; or else, solemnly enacted by Parliament as remedies against existing evils threatening the stability of political society. The Habeas Corpus, the Bill of Rights, and Act of Settlement of William and Mary, are examples of the latter. The force of usage producing an effect akin to consent is strongly marked in the inviolable character given to these statutes. For, the distinguishing feature of the British Constitution being the absence of any popular vote in calling it forth, or ratifying it subsequently; and Parliament having the uncontrolled power of adding new provisions to this Constitution at its pleasure, it would seem to follow logically, that constitutional liberty in England is only another name for parliamentary liberty, a fact which locates sovereignty primarily in a legislative assembly, instead of in the people, whose representatives or delegates go to make up such an assembly. This form of enacting a constitution is but a repetition of what has been constantly occurring in monarchical governments, whenever a cabinet constitution has been made, rather than one by the people.

But however constitutions may be made, they are always intended to provide for daily emergencies in the life of a nation, which time alone could not relieve; and to supply bulwarks against encroachments of power, not always intentionally, yet insidiously increasing, by that habitual tendency of all departments of government to

<sup>1</sup> Art. 4, sec. 4.

enlarge their respective jurisdictions. The assumption of implied powers under liberal interpretations of the rule of official discretion, is among the ever present dangers of political administrations. Hence the necessity of institutional government, founded upon a written organic law which all must obey according to the language of its text.

Political history shows, that under all forms of government, not wholly despotic, the tendency of legislation always is towards the adoption of certain fundamental principles of public conduct, which shall regulate both the internal and external polity of the State. Experience everywhere teaches mankind that stability of government is essential to prosperity and permanency; and this stability can only be secured when by universal consent of the nation expressed through its laws, every citizen has his rights, clearly defined, and the State pledges itself to his protection through every department of its administration. In this way, the legislative, judicial, and executive branches become ministers to execute the will of the people in behalf of their common weal.

In order, therefore, as a postulate in government, that its sovereign powers may be properly divided; that persons may be designated to whom those powers are to be intrusted; and that, finally, the manner and means by which those powers are to be exercised may be duly provided, it is usual to frame an organic law termed a Constitution, under which the political society agrees in convention to exist.

“The understanding is general, if not universal,” says Judge Story, “that having been adopted by the majority of the people, the Constitution of the State binds the whole community *proprio vigore*, and is unalterable, unless by the consent of the majority of the people, or,

at least, of the qualified voters of the States in the manner prescribed by the Constitution, or otherwise provided by the majority.”

\* \* \* \* \*

“It is a rule as contradistinguished from a temporary or sudden order, permanent, uniform, and universal.

“It is not a compact or contract, but a solemn ordinance.

“A confederation is a mere treaty or league between independent States. The people ordain and establish a Constitution, not a confederation.”<sup>1</sup>

Such is the language used by one of the most classical expounders of our Constitution in respect to the origin, scope, and legal force of this instrument in its authority over the political construction of the Federal and State governments.

Noting that in every popular government there are always two co-existent constitutions, viz., one of the people and one of the government, we shall find in tracing their origin, historically, that the common law of a country is the true and original Constitution of its people, ante-dating in this respect the more formal Constitution of its government. Whenever we desire, therefore, to establish popular government upon the basis of a written or fixed Constitution, we must seek for its elements in the common law of the people who are to frame it. If its seeds are not to be found there, it can never be other than a foreign or imported rule of life imposed upon them. Of this we have numerous examples in the histories of European countries, where every fresh presentation of a written Constitution prepared in the privacy of a ministerial chamber, and in whose formation consequently the people have taken no part, has been followed by similarly disastrous results.

<sup>1</sup> Story on the Const., §§ 337, 339, 352.



Such a charter may have occasionally sustained itself for a few years—may have struggled through a few public events of minor consequence, but it has never been able to weather any heavy political storms; and the first great emergency which has taxed the national strength has invariably shivered it into pieces. Having no roots in the national life, it has perished for want of a proper soil to sustain it.

Of the many definitions which may be found for such an instrument in writers on law or government, none appears more terse and comprehensive than that of Judge Cooley, who styles it as that “body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.”<sup>1</sup> Every Constitution in its essence is a limitation upon the powers of government in the hands of agents. They alone have restrictions placed upon them. But the nation at large retains all the powers not so delegated, those powers being boundless in extent and incapable of definition.<sup>2</sup> In a monarchy, therefore, constitutional government cannot be said to exist until the king is rendered subordinate to the Constitution. The abolition of feudal distinctions and hereditary rights by successive enlargements of national liberty, is the greatest of triumphs achieved by modern political revolutions.

Thus it appears that national liberty is an essentially modern doctrine, the fruit of the combined influences of Christianity and civilization. It was unknown to the ancients, for ancient liberty dwelt in City-States only, and could not expand itself, because it required disregard of personal freedom, while modern civil liberty is founded upon it, and finds its best field of activity and strength in a national unity of free men.

<sup>1</sup> Const. Limit., p. 2.

<sup>2</sup> *Hamilton v. St. Louis Co.*, 15 Mo. 13.

The above facts all point to the conclusion that Constitutions were originally only concessions wrested from monarchs, in opposition to their asserted prerogative to rule by divine right. And as prerogative rights have no place in the framework of democratic societies, the incidents attached to such rights do not require any special discussion in governments like our own, whose whole authority is derived from the consent of the governed. In such as these, sovereignty inheres universally in citizenship, all classes, territorially considered, being equals in political significance. It is, therefore, in the free and independent man as a sovereign unit, that we find the original source of that popular sovereignty which, by numerical development, converts the entire society into a nation of political equals.

Hence, our Constitution is neither a grant, a concession, nor yet a charter, but a solemn ordinance or rule of political conduct adopted by the citizens in Convention assembled, designed and executed in order the better "to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, and promote the general welfare."

Before entering, however, upon a critical inquiry into the civil as well as political rights to which constitutions give birth, and before considering the derivative authority flowing from them, which, in the United States, both our State Legislatures and Congress exercise within their appropriate spheres of legislation, it will be well to trace the source whence has descended to us the idea of a legal rule of conduct, written, permanent, and inflexible, as distinguished from a temporary rule made and unmade at the pleasure of a governing power. This it is which marks the difference between a rigid Constitution like ours and a flexible or mutable Constitution like that of England. It serves further to

explain the difference between a Parliamentary government, which is without restraints, and a Constitutional government which is hedged about with limitations. Lastly, it illustrates the difference between our Federal Constitution and a State Constitution, the first of which is a grant of express and enumerated powers by the people to the Federal Government; the second of which is a grant, but without limitation of the residuary powers of the people of the particular State.<sup>1</sup>

#### SOURCES OF CONSTITUTIONAL GUARANTEES.

The ancient designation for all laws was that of *Assisæ* or *Constitutiones*—the latter plainly deriving its name from the Latin verb *constituo*. Thus in the Pandects, the civilians announce the three sources of all law to be as follows: “*Omne jus aut necessitas fecit, aut consensus constituit, aut formavit consuetudo.*” In the jurisprudence of Rome, the term Constitution was generic, and included the epistles, edicts, and decrees of the Emperor.<sup>2</sup> By the terms “*consensus constituit,*” we should now understand positive or written law, deriving its authority from convention. But with us, the term Constitution means more than this. It means an organic and fundamental law, sovereign in principles and immutable in character, except as provided for by itself. It is the creative source of all derivative law, and the ultimate standard by which the validity of such law is to be measured. Hence it represents the centre of gravity of all administrative law, considered merely as the application of original sovereignty to domestic purposes.

In English law, the word Constitution has, in modern

<sup>1</sup> Ward v. Maryland, 12 Wall. 418.

<sup>2</sup> Dig. lib. 50, *ad verb.*

times, been restricted to its more proper use as a term designating the fundamental rules governing the exercise of the sovereign power of the State. But constitutional law in the American sense of that term, and as indicating a distinct branch of administrative law, is practically unknown in English jurisprudence. It is not directly mentioned by Blackstone, and only incidentally appears in his discussion of the rights of the Crown and that of persons.

As an underlying reason for this is the fact, conceded by all jurists, that the British Constitution does not exhibit itself in such a substantive form as to make it distinguishable from the ordinary statutes of the realm. Speaking to this point, Prof. Dicey, of Oxford, in his recent work on the Law of the Constitution, says that the student "may search the statute book from beginning to end, but he will find no enactment which purports to contain the articles of the Constitution;" he will not find any test by which to discriminate laws which are constitutional or fundamental from ordinary enactments, and he will discover that the very term constitutional law, which is not even employed by Blackstone, is of comparatively modern origin. De Tocqueville makes a still more sweeping assertion, alleging that inasmuch as the English Constitution is only what Parliament chooses to make it; and furthermore, as Parliament is omnipotent to change its new work at will, it follows, that such a thing as the English Constitution cannot be said to exist.<sup>1</sup>

We find, accordingly, that the term constitutional law when applied to England carries with it no higher meaning than that of a system of rules governing the exercise of the sovereign power of the State. These rules, exclusively originating with Parliament, stand on

<sup>1</sup> Works, vol. 1, p. 166-7.

a similar footing as statutes. They were passed by it, as any ordinary act of legislation might be, but were never ratified by the people at a subsequent general election. Being mutable at the pleasure of the Legislature, they lack that permanency and stability which form the essential attributes of our own Constitution. Such expressions, therefore, as "subverting the Constitution," which appear so frequently throughout English history, and have been associated with so many political tragedies reported in the volumes of her State trials, have no place in our own public records. In fact, they do not apply in the same sense to our condition at all, simply because it is not in the power of any man, or any body of men to subvert the Constitution.

But inasmuch as, by a fiction of law, the British Constitution is held to exist for purposes of domestic government, English jurists have undertaken to explain its anomalous form, by assuming that the rules which it has established for the guidance of the various political departments, and for the protection of the subject, consist partly of laws and partly of conventions. Hence they treat of the law of the Constitution, meaning by that, laws which can be enforced by the various tribunals; and conventions of the Constitution, meaning thereby such habits and customs as are, from immemorial usage, regarded as creating an obligation to obey them by reason of their accepted legality. To the latter system they give the name of constitutional morality; a name which describes that most mutable of all codes of public conduct known as political morality. And since partisan judgment, religious bigotry, and time-honored prejudices must, at times, govern in the enactment of its rules, they are still compelled to admit that, under such a system of government, no distinction in fact exists between ordinary and constitutional law. The barbarous

disfranchisement and proscription of Roman Catholics in Great Britain for nearly three centuries, is a fearful indictment of constitutional as well as political morality.<sup>1</sup>

Parliament, then, as the law-making power of England is the centre of the political, judicial, and ecclesiastical authority of the nation. It stands like Jupiter in the ancient theogony, with nothing like it, and nothing even second to it.<sup>2</sup> Its sovereignty or omnipotence, as it is often expressed, knows no limits.<sup>3</sup> The queen herself occupies the throne by a parliamentary title. She is but a creature of the law, whose claim to reign depends upon the language of a statute. Moreover, the effect of its action binds no subsequent Parliament, whatever may be the terms used in the coronation of a sovereign. It can change any existing law, either by amendment or repeal; and what it can do in unmaking the work of its predecessors, posterity in turn may do with its own. Thus Parliament dethroned Charles I.; and established the Commonwealth of Cromwell; restored monarchy under Charles II.; declared the throne vacant under James II.; called William of Orange to be King of England, and established his dynasty by an Act of Settlement. And inasmuch as there is no written constitution superior to it, there is no co-existent power which can review or overrule its sovereign legislation. That legislation stands as the supreme law of the land without any restrictions or limitations upon it. Courts cannot annul it, nor can the sovereign hinder or vary its application. This unfettered freedom from interference at the hands of the royal executive is the great political triumph achieved by the revolutions of 1648 and 1688.

<sup>1</sup> Lieber's Pol. Eth., vol. i. p. 124 n.

<sup>2</sup> "Unde nil majus generatur ipso,

Nec viget quidquam simile aut secundum."—*Horat. Lib. 1, Ode xii.*

<sup>3</sup> Coke, 4 Inst., p. 36.

Under the Stuarts, a singular doctrine had been maintained, not only by the monarch, but by statesmen and certain lawyers anxious to be superserviceable to the Crown, to the effect that the King's prerogative included certain vested rights of wide and indefinite scope, which ante-dated the law of the land, and were in consequence superior to it; whence it followed, as a necessary corollary, that the Crown could at its pleasure suspend the operation of any statute. This, it will be remembered, was the ground taken by Charles and James respectively, the one in the case of Ship Money, the other in the case of the Seven Bishops. These traditions of prerogatives, however antiquated and patriarchal in character, were still slow in dying out. They were constantly used by political malcontents to feed the flame of insurrection, and to nurse false hopes in royal pretenders of the Stuart line. Finally, Parliament had to insist upon its own supremacy, by passing the statute known as the 6th of Queen Anne, making it high treason to deny the right of the sovereign to rule, except according to an Act of Parliament.<sup>1</sup>

It follows very naturally, from this conceded omnipotence of Parliament, that courts do not ever criticise its Acts in the manner, or from the constitutional standpoint, from which American courts inquire into the validity of any statute. Thus, in *Bradlaugh v. Gossett*, where the House of Commons prevented the plaintiff from taking the oath as a member of Parliament, which the statute required, before taking his seat, it was held that the House has the exclusive power of interpreting the statute, so far as regulation of its own proceedings within its own walls goes, and though that interpretation be erroneous, courts cannot interfere to revise it.<sup>2</sup>

<sup>1</sup> Stubbs, vol. 2, p. 239, 486, 513, 515.

<sup>2</sup> 12 Q. B. D., p. 280.

Public policy, as expressed in the will of the people, finds no corresponding place in English jurisprudence. The only popular will which English courts take cognizance of is that which they find expressed in an Act of Parliament, and in so doing they recognize the fact that while political sovereignty may and does reside in the people, *legal* sovereignty resides alone in Parliament. In answer to the objections which present themselves to locating so large a measure of sovereignty in a body amenable to no supervision, and therefore accountable only indirectly to the people, English jurists assert that the people, however remotely, do, in time, succeed in enforcing their will upon the national Legislature. In support of this statement, they point to changes in views of polity occurring through changes of Ministry as exhibited by Parliament, in obedience to the demands of political exigences, and its avoidance of Acts deemed expedient in the past, but which presumably it would not now undertake to repeat, because of the influence of a public opinion which had put itself upon record as opposed to such legislation. These things are pointed to as limitations of a moral character upon a body otherwise free from the trammels of a rigid Constitution, or of any legal restrictions upon its actions; and in order further to show that the restraining influence of public opinion becomes as binding from mere usage as are positive laws, thus constituting in practice those conventions of the Constitution to which we have heretofore adverted.

Another ever present difference between the English Parliament and an American Legislature is found in the circumstance that the former is a constitutional assembly, making and unmaking the organic law at its pleasure. All its enactments stand on a plane of common authority. What are known to us as constitutional laws in distinction from other laws are unknown



under any such designation. In fact they do not exist, consequently they are not classified as though of any higher authority, because, practically, the method of passing them differs in no particular from that adopted in the passage of the most ordinary statutes. The distinguishing feature accompanying any alteration, however slight, of our Constitution, is the participation of the entire people in the act.

Now, in Great Britain, until very recently, the classification of the population in respect to representation was such that below the three estates represented in Parliament there was a large working-class, which, although enjoying personal liberty, had yet no share in the political rights of the Parliamentary Constitution. These persons had no direct relations with the State, for they paid no dues to any higher authority than a landlord or master. It was he upon whom these burdens fell. Their status was that of feudal servants, whether predial or domestic. They were subjects, but without rights of plenary citizenship in the sense of our own Constitution. What the Parliamentary Constitution really conceded to the unrepresented members of society was the legal liberty of ascending into a higher class than their own, without at the same time opening any special doors of opportunity through an enlarged suffrage for so doing. Nor, until the passage of the Reform Bill in 1832, can the feudal basis of representation be said to have received its death-blow. Nevertheless, it must be conceded that even before the passage of this new Magna Charta, the English Constitution was vastly superior to that of any of the continental nations, because it contained seeds of republicanism planted by the statesmen of the Commonwealth period, which have been slowly blossoming ever since.<sup>1</sup>

<sup>1</sup> 2 Gneist, p. 113.

To sum up the matter in a few words, the three principles of parliamentary sovereignty, which constitute its distinguishing features, are:—

*First.* The power to make or alter any law.

*Second.* The absence of any legal distinction between laws with reference to their constitutional character.

*Third.* The non-existence of any judicial body having authority to overrule any Act of Parliament.

These facts stand at the foundation of that distinction between a *flexible* or unwritten and unratified Constitution, and a *rigid* or written one like our own.

It is the boast, nevertheless, of British jurists that while the various written constitutions, which have played so conspicuous a part in the political history of Continental nations, have crumbled into dust beneath the disturbing touch of revolutions, or even of less important events, that of England has grown stronger with age in the midst of the vicissitudes that have wrought out the enfranchisement of the masses. This may be explained by the fact that the British Constitution has been more of a spiritual than a civil Constitution, and has reflected the animating genius of the nation which has always tended towards personal independence. Hence its common law favored political freedom, as is illustrated by the history of its Magna Charta, which was not a new written Constitution, but only a re-affirmance of long-acknowledged rights belonging to the people, with additional limitations upon sovereign power. It is these limitations in particular which impart to it its great and dominating value.

From the above examination of the sources of constitutional authority in England we find the rule to be there, as here established, that before any written law can take effect as an organic law, it must be recognized to be the act of a sovereign power standing above all

positive law in that particular community. A Constitution, therefore, is a sovereign power, but only in a secondary sense, since it cannot establish itself, and presupposes an anterior sovereignty capable of creating it. While it may be assumed for juristic purposes to be the foundation of all legal rights, it is still only an instrument to execute the will of a superior sovereignty. It follows, consequently, that the inviolability of a Constitution is a bar to the action of inferior and derivative jurisdictions only; but can never operate to secure immutability as against its own founders. With them the right of amendment always remains. And we may cite, as an example, the frequent amendments to our own Federal Constitution, all which concur to establish the anterior and primordial sovereignty of the people of the United States. This sovereignty can never be abdicated through any grants or concessions, but ever remains as a present, inalienable right, vested in the entire body of citizens as a nation.

While we have felt it necessary to begin our inquiry into the sources of constitutional guarantees by briefly reviewing the history of English legislation, it must be apparent to all that we have constantly been confronted by the fact that neither constitutional guarantees to the people, nor limitations upon the power of Parliament are to be found in any of the Statutes of the Realm. On every occasion when the rights of any portion of the English people have been threatened with spoliation, or confiscation, and some act of concession has been wrested from the hands of prerogative, wherever located, the student of law will see nothing more binding than an Act of Parliament which any succeeding one might repeal.

Thus Parliament makes and unmakes its own Constitution, and places itself constantly above the Constitution

of the Empire itself. It makes the Constitution; it enacts the laws under it; and lastly, it gives authentic interpretation to those laws as the ultimate Appellate Court. It combines, therefore, the powers of a conventional, a legislative, and a judicial body. Each Parliament being equally sovereign, is at liberty to undo the work of its predecessor, and to unsettle the Constitution according as it may deem it expedient.

This uncertainty began with the Great Charter, and has attached itself with consistent uniformity to all subsequent Parliamentary enactments. They have represented only the popular sentiment of the day that gave them birth, and are liable at any moment to amendment or even repeal. Despite all that may be said, therefore, of the conventions of the Constitution as time-honored usages, and consecrated rules for parliamentary guidance, Sir Henry Maine, in his recent work on Popular Government, still mournfully confesses the instability of the English Constitution, by saying that "of all the infirmities it possesses, there is none more serious than the absence of any special precautions to be observed in passing laws which touch the very foundations of the political system."<sup>1</sup>

When a repealing statute can thus unsettle the provisions of a Constitution, it is evident that the latter lacks an essential foundation. As to this fact there is unanimity of opinion on the part of all analytical jurists. Practically, however, it is only on certain great and momentous occasions, that the attention of the British nation has been called to it. This serves to confirm the judgment of modern writers upon government, who maintain that in England there is no other form of civil liberty than parliamentary liberty, and that its abuse is unimpeachable before any other tribunal than that of public

<sup>1</sup> Pop. Gov., p. 246.

opinion. It is this public opinion, as we have elsewhere shown, which constitutes what English lawyers call the conventions of their constitution, and they look to it alone, rather than to any Act of Parliament, for the maintenance of the bulwarks of their civil liberty.

In striking contrast with all these dangers surrounding an unwritten constitution, appears the stability of our own, whose safety rests in the restrictions put upon its violation, by the authority granted the judiciary to treat as void any enactment which infringes either its spirit or its letter.

Since, therefore, public opinion in England has supplied all the necessary conventions of its Constitution which are tantamount to guarantees, and since, with the lapse of centuries, no disposition to abrogate these has yet appeared, it is but just to conclude that in respect to those fundamental acts like the Great Charter, the Habeas Corpus, and the Bill of Rights of William and Mary they have now become an immutable heritage never to be disturbed. They stand as historical monuments of the loyalty of the nation to its political martyrs, through whose sacrifices on the scaffold and in the dungeon they were finally secured.

It was on these great foundation stones of civil liberty that our own form of government was erected. From feeble and loosely organized political societies under the form of Charter, Provincial, and Proprietary governments, the American Colonies had evolved a temporary amelioration in their Articles of Confederation. This league they had found to be, in its broken and uncertain lines of jurisdiction, too weak to insure permanent stability. They accordingly adopted all the good results of the English Revolution of 1688 as the basis of their constitutional liberties, taking in as much also of the common law of the mother country as could be adapted

to republican uses. For, although there was entire political separation between the countries, English jurisprudence was still invoked as the guide of much of our earlier judicial administration. The precedents established by the courts of Westminster Hall, whether sitting at common law or in equity, became recognized standards for the government of our own practice. Our older reports, in fact, abound in decisions that rest upon both principles and rules of trans-Atlantic origin.

It becomes indispensable, therefore, to a right understanding of the sources whence the framers of the Constitution drew their inspiration, that we should examine some of those historical Acts or petitions of Parliament, to which time, and repeated confirmations, have imparted a sacred character before English courts, as well as the English nation; and which, taken together, practically stand under the consecrating hand of usage, as guarantees of constitutional liberty, never to be violated, nor even questioned. These Acts are Magna Charta, the Petition of Right, the Habeas Corpus, and the Act of Settlement.

#### MAGNA CHARTA.

It is common to speak of the great Charter of John as though it introduced an entirely new system of constitutional guarantees in England, and that before this time the unwritten common law was the ultimate standard by which civil rights could be measured and adjudicated. This is an error. Magna Charta was only a reaffirmance in a more formal shape of the ancient liberties of Englishmen, made at a time when the Crown possessed legislative powers of an irresponsible character, and enlarged them at its own pleasure. Royal usurpations of power, although not then a new thing,

at times drove the oppressed nation to an open opposition. All classes, being in turn its victims, found it to their interest to make at least a show of resistance, whenever there was an opportunity to extort a royal surrender of prerogative. On whatever occasions it might happen, the ground on which this resistance was made, whether by princes, barons, or serfs, was invariably the same. It consisted in claiming the ancient liberties of subjects, according to the existing law of the land. Hence, the demand of the Barons from John was that the laws of England be not changed, meaning thereby that they be not tampered with at the pleasure of royalty.

Algernon Sidney, in his discourses on Government, when treating of the great charter of England, says that "Magna Charta was not made to restrain the absolute authority, for no such thing was in being, or pretended (the folly of such visions seeming to have been reserved to complete the misfortunes and ignominy of our age), but it was to assert the native and original liberties of our nation by the confession of the king then being, that neither he nor his successors should any way encroach upon them."<sup>1</sup>

Sidney was a republican of the republicans, and firmly believed in the original sovereignty of the people, for, he goes on to say, that "Magna Charta could give nothing to the people, who in themselves had all. It only reduced into a small volume the rights they were resolved to maintain."

It is remarkable, too, as an historical fact, that the doctrine of popular sovereignty seems to have long been in the air both of France as well as of England, and was always waiting for opportune occasions in which to exhibit itself. Thus, for example, in the reign of Philip

<sup>1</sup> Ch. 3, sec. 27.

le Bel, in 1285, many provinces obtained charters from the king like Magna Charta, and in one Norman Charter in particular, trial by jury, and the law of the land, was guaranteed. The French barons also stipulated that no money should be raised by the king without the consent of the three estates, of which right there is no declaratory statute in England before the 25th Edward I., ch. 4.<sup>1</sup>

The vicissitudes through which Magna Charta has passed, afford a curious illustration of the difficulties under which the most beneficent public measure may labor, on its way to a legal confirmation of its popularity. Both Magna Charta proper, and the Forest Charter, were renewed as many as thirty-five times during the reign of the Plantagenets, extending down to Henry VI. Even this monarch, although he confirmed them no less than six times, was so regardless of good faith, and did so often violate their obligations, that Parliament at last compelled him to make oath that he would observe them strictly. In perfecting this great Charter, every restraint upon the prerogatives of the crown was resisted to the utmost possible degree, each confirmation being a royal concession, with as little diminution of royal power as possible. Thus, the clause forbidding the crown to levy any aid without consent of Parliament was struck out in Henry the Third's time.<sup>2</sup>

The first formal adoption of these charters by solemn Act of Parliament occurred in the 25th Edward I., A. D. 1297, when the great charter of 9th Henry III. was duly confirmed. The English statutes at large begin with this Act of Parliament, as the initiatory step in their constitutional legislation; and though history has sanctified the concessions of John to his barons as the

<sup>1</sup> Barrington's Obs. on the Statutes, 26; Boulainvilliers, vol. 3, p. 56.

<sup>2</sup> Brougham, Polit. Phil., vol. 3, pp. 225-9.



great charter of English liberties, the fact still remains that the statute 25th Edward I. did not confirm it by direct recital, but adopted, instead, that of 9th Henry III., which contained similar guarantees. This statute, with the exception of several omissions of subordinate matters, was in truth a comprehensive reaffirmance of the great charter of Runnymede.

### THE PETITION OF RIGHT.

The next constitutional bulwark in English history, and one which was called forth by the despotic action of the famous Star-chamber, is the Petition of Right, drawn up in behalf of Parliament by Lord Coke, and presented to Charles I. on the 2d of June, 1628. This petition, which recites the grievances under which the people of England labored, embodies many of the same usurpations of prerogative that were subsequently charged in our Declaration of Independence against George III.<sup>1</sup> It will be noticed that the very title of the Act is a concession to royal prerogative, and an admission of personal sovereignty in the monarch overpeering every other jurisdiction in the realm, Parliament itself included. The King's reply to this petition was vague and evasive, consisting of little else beside repeating the stereotyped formula of "willing that right be done according to the laws and customs of the realms, and that the statutes be put in due execution." It is needless to say that this did not satisfy the Houses of Parliament, whereupon a second petition was presented to him on the 7th June, praying for a more full and satisfactory answer. The second reply was even worse than the first, and conveyed a covert suggestion that they could not hurt his prerogative. Nor was it

<sup>1</sup> Hallam, *Const. Hist.* 223; Hume, 3, 69-4, 498-5, 37, 74, 134.

long before the habitual bad faith of the king again displayed itself in various ways, finally culminating in the imprisonment of Eliot, Hollis, and Selden. This, with other similar acts, led to that rupture between king and Parliament that inaugurated the Revolution of 1640.

The Petition of Right, embodying as it did the fundamental liberties of Englishmen, became thenceforth the standing articles of political faith of the nation. The changes were rung upon them from year to year on every possible occasion. Whenever a popular right was thwarted by an encroachment of sovereignty—or a privilege conceded in the nature of a monopoly—or a law suspended by an act of royal dispensation, a cry against absolutism had gone up in the past, but all in vain. At last a day of judgment had come even to the king on his throne, for the gauntlet of defiance had been thrown down by Parliament, never again to be taken up, and the pretensions of prerogative appearing more than ever preposterous and untenable were rapidly yielding to the encroachments of constitutional authority.

The king ceased to be feared, the moment it was solemnly adjudged by Parliament that his ancient rights and privileges could be questioned under the Constitution. It was found that the sceptre of the autocrat and the shield of prerogative could both be wrested from his grasp. The royal office being no longer regarded as sacred, the glamour of rank, the pretensions of dynasty, and the bulwark of a throne afforded him no protection against impeachment. And thus it came to pass that this Petition, which in precatory words of humble submission had besought the aid of Charles to redress the grievances which he had himself inflicted upon his subjects, became in an enlarged sense the second great charter of the liberties of England.

## HABEAS CORPUS.

The next great constitutional guarantee of personal liberty to the citizen against unjust or oppressive arrests and imprisonment, is the famous Habeas Corpus Act passed in the reign of Charles II.<sup>1</sup> In reality, however, this act introduced no new principle into English jurisprudence, since, to quote Mr. Hallam, "From the earliest records of the English law no freeman could be detained in prison except upon a criminal charge, or conviction, or for a civil debt. In the former case, it was always in his power to demand of the Court of King's Bench a writ of habeas corpus *ad subjiciendum*, directed to the person detaining him in custody, by which he was enjoined to bring up the body of the prisoner with the warrant of commitment, that the court might judge of its sufficiency, and remand the party, admit him to bail or discharge him, according to the nature of the charge. This writ issued as matter of right, and could not be refused by the court. It was not to bestow an immunity from arbitrary imprisonment, which was already abundantly provided for in Magna Charta, that the statute of Charles II. was enacted; but to cut off the abuses by which the government's lust of power, and the servile subtlety of crown lawyers had impaired so fundamental a privilege."<sup>2</sup>

The true reason, however, for the passage of this Act was the notorious fact that the judges, in a spirit of craven concession to the Crown, as the source of political power and favoritism, had constantly leaned towards the doctrine that any warrant of arrest containing the words *per speciale mandatum Regis* (by the king's special command) was an authority superior to

<sup>1</sup> 31st Charles II., chap. 2d.

<sup>2</sup> Const. Hist., p. 500; De Lolme on Const., 239.

the law, and, therefore, not to be questioned. In consequence of this dogma of royal absolutism, courts had generally remanded parties brought before them upon habeas corpus, without any hearing, whenever, as in the case of political offenders, as well as notorious wrongdoers, the warrant had issued upon complaint of the Crown. Since Elizabeth's day, and even earlier, courts had made common cause with the sovereign in harassing political dissenters, who could easily be charged with misdemeanors, and under such pretexts be imprisoned under the King's warrant. It was in this way that the special commands of the sovereign, or the authority of the Privy Council in the reign of the Tudors and Stuarts, were permitted to override the law, and to carry with them a flavor of infallibility, which the political judges of that day did not dare lightly to question. It was a return to the fundamental precept of the civilians, that the will of the sovereign has the binding authority of law.

Emboldened by success and strengthened by judicial confirmation, the custom grew into a precedent, although the judges, when closely pressed to state the sources of this authority, could find no higher foundation for it than the maxim that the king can do no wrong. Lord Chief Justice Hyde, when questioned in the House of Lords upon this subject, returned the following answer: "If we have erred *erravimus cum patribus* and they can show no precedent but that our predecessors have done, as we have done, sometimes bailing, sometimes remitting, sometimes discharging. Yet we do never bail any committed by the king or his council, till his pleasure be first known; and thus did the Lord Chief Justice Coke in Raynard's case."<sup>1</sup> However much Coke

<sup>1</sup> Campbell's Lives of the Chief Justices of England, vol. i. p. 336, n.

may have erred in this case, he certainly repaired his error, and was afterwards among the most bitter denouncers of the iniquity of arbitrary arrests, exclaiming, "What is this but to declare upon record that any subject committed by such absolute command may be detained in prison forever?"<sup>1</sup> Such unanswerable arguments as these, coupled with the passage of resolutions by the Commons, reciting that "no freeman ought to be committed or detained in prison or otherwise retained by command of the King or the Privy Council, or any other, unless some cause of the commitment, detainer, or restraint be expressed, for which by law he ought to be committed, detained or restrained," gave strength to the opponents of despotism. The nation became aroused by such evidences of judicial servility, and the advocates of the right to inquire into the legality of any arrest, under a writ of habeas corpus, remained firmly intrenched behind the impregnable bulwarks of Magna Charta.

This contest between the prerogative of the sovereign and the personal liberty of the subject, after extending through several reigns, finally ended in a triumphant affirmance of the principles of the Great Charter.

The case of Jenks<sup>2</sup> was the occasion for bringing to a crisis a controversy which could not much longer be delayed, and in 1679 the final blow was given to arbitrary imprisonment in England. The adoption of this bulwark of personal liberty into our Constitution is a sufficient proof of the estimate in which it was held by its framers, who, though absolved from the fear of kings and servile judges, still deemed it prudent to place the freedom of the citizen beyond the reach of every form of arbitrary arrest.<sup>3</sup> And going still further it was ren-

<sup>1</sup> 2 Parl. Hist., 292.

<sup>2</sup> 7 St. Tr. 1676.

<sup>3</sup> 3 Blackstone Comm., 135; Broom's Comm's on Common Law, p. 245 (4th ed.); Hallam's Const. Hist., ch. 1 and 8.

dered sacred by the declaration that it should be maintained in constant operation, except in times of great public emergency.<sup>1</sup>

#### LEADING CASES IN ENGLISH CONSTITUTIONAL LAW.

Having now examined those bulwarks of constitutional liberty in England on which rest the civil rights of her citizens, and which mark her political enfranchisement, we cannot have failed to discover in them the sources whence our own have been derived. Descended from the same stock, and inheriting the same traditions of respect and desire for a government of law rather than of persons, we have enlarged both the meaning and the scope of political society in America by introducing into it as a fundamental element, the personal independence of the citizen. While public events in England had been moving in that direction since 1648, the Feudal character of her Constitution represented in its monarchical and aristocratic elements, prevented any rapid development of democratic principles. Nor was any forward step taken in that direction until the passage of the Reform and Catholic Emancipation Bills, which sensibly altered the basis of her representative system in the House of Commons. Meanwhile it was possible to trace in the organic growth of her jurisprudence a declining fear and reverence for prerogative. A bolder assertion of the independence of the judiciary, and a keener appreciation of the rights of the individual man, were in conflict with caste privileges or a political hierarchy. It is most fitting, therefore, to supplement the political development of her constitutional liberties

<sup>1</sup> Const. U. S., Art. 1, § 92; Cooley's Const. Limit., pp. 342-3; Hurd on Habeas Corpus; Rev. Stat. U. S. ch. 13.

by a synopsis of the judicial auxiliaries which helped to root them in her soil.

### POWERS OF THE CROWN.

Case of the Seven Bishops (4 Jas. 2, 1688).<sup>1</sup> This case arose upon an attempt made by the Crown to suspend certain penal statutes by royal proclamation. The Seven Bishops were petitioners, who besought the king to relieve them from the duty of reading this proclamation in their churches, because it asserted a prerogative formerly declared illegal by Parliament. They were committed to the Tower and prosecuted for sedition, but were acquitted.

Thomas *v.* Sorrel, 25 Car. 2, 1674,<sup>2</sup> and Godden *v.* Hailes, 2 Jas. 2, 1686,<sup>3</sup> were both cases of usurpation of dispensing powers on the part of the Crown.

Bates's Case, 4 Jas. 1, 1606,<sup>4</sup> was a case where the king had imposed a customs duty without authority of Parliament.

Case of Proclamations, 8 Jas. 1, 1610,<sup>5</sup> arose upon an attempt on the part of the Crown to exercise legislative functions. Coke says very plainly that "the king hath no prerogative but that which the law of the land allows him."

Hampden's Case (ship money), 13 Car. 1, 1637.<sup>6</sup> This celebrated case, which did more perhaps than anything else to precipitate the Revolution of 1648, was but another instance of those flagrant abuses of prerogative for which the Stuart dynasty is distinguished. It arose upon an issue of writs for the collection of money in virtue of the royal prerogative, although in violation of

<sup>1</sup> 12 How. St. Trials, 183.

<sup>2</sup> Vaughan, 330.

<sup>3</sup> 2 Shower, 475, 11 How. St. Tr., 1165.

<sup>4</sup> 2 St. Tr. 371.

<sup>5</sup> 2 St. Tr. 723; 12 Coke, 74.

<sup>6</sup> *Ibid.* 825.

many existing statutes from Magna Charta down, and particularly because done without the previous consent of Parliament. Hampden refused to pay the tax on the ground of its illegal assessment, in consequence of which he was sent to prison. The case, owing to its great importance, was tried before all the judges of England, and despite the accumulation of statutes supporting the contention of the defendant, the Court of Exchequer, four judges only dissenting, decided in favor of the Crown.<sup>1</sup>

It will be noticed upon investigation, that, in all the above cases, except that of the Seven Bishops (where the judges were evenly divided), the decision was for the Crown, a commentary upon the political subserviency of the courts, which needs no other remark than the statement of the fact.

Calvin's Case, 6, Jas. 1, 1608,<sup>2</sup> decided that the Crown is entitled to allegiance as the supreme executive power, by all born within its jurisdiction.

Campbell v. Hall, 15 George 3, 1774,<sup>3</sup> decided that when the Crown has once delegated the power of legislation to a local assembly it cannot afterwards levy taxes there.

In the Banker's Case, 2 W. & M. 12 Wm. 3, 1690-1700,<sup>4</sup> it was held that subjects loaning moneys to the Crown, the king might in return alienate the revenues fixed in him and his successors, and that the proper remedy was Petition of Right to the Exchequer, *per contra*.

In Canterbury v. The Attorney General, 5 & 6 Vict., 1842,<sup>5</sup> it was held that a petition of right does not lie

<sup>1</sup> Hume, vol. 5, p. 88; Hallam's Const. Hist., ch. 8th; Lives of the C. J., vol. 2, 56.

<sup>2</sup> 7 St. Tr. 559.

<sup>3</sup> 20 Ibid. 239.

<sup>4</sup> 14 Ibid. 1.

<sup>5</sup> 1 Phillips, S. T. 106.



to recover compensation from the Crown for damage arising from negligence on the part of the servants of the Crown, nor, can it be maintained, to recover unliquidated damages for trespass.<sup>1</sup>

### POWERS OF PARLIAMENT.

In *Barnardiston v. Sloan*, 26 Car. 2, 1674,<sup>2</sup> it was decided that the House of Commons has the right to determine all matters touching the election of its own members. Re-affirmed in *Bradlaugh v. Gossett*.<sup>3</sup>

*Ashby v. White*, 2 Anne, 1704,<sup>4</sup> arose from an attempt of the House of Commons to punish persons, as for a contempt of its authority, who brought actions in common law courts to test the validity of elections.

*Stockdale v. Hansard*, 2 Vict., 1839,<sup>5</sup> decided that the House of Commons cannot, by ordering a report to be printed, legalize libellous matter.

In *Burdett v. Abbott*, 51 Geo. 3, 1811,<sup>6</sup> and in *Sheriff's of Middlesex Case*, 3 Vict., 1840,<sup>7</sup> it was held that either House may commit for contempt, and in the latter case that no court will inquire into the grounds of such commitment.

In *Bonham's Case*, 7 Jas. 1, 1609,<sup>8</sup> which arose upon the fining and imprisonment of the plaintiff by the censors of the College of Physicians, under color of a patent of Henry VIII., and the Statutes of 14 H. 8 and 1 M. for practising physic without their allowance, Lord Coke decided against the statute because it gave both judicial and ministerial functions to the College. His

<sup>1</sup> *Tobin v. The Queen*, 16 C. B. N. S. 368 (111 Eng. C. L.).

<sup>2</sup> 6 St. Tr. 1063.

<sup>3</sup> 12 Q. B. D. 280 (36 Eng. C. L.).

<sup>4</sup> 2 Ld. Raymond, 938, 14 St. Tr. 695; Sm. L. C., 9th Am. ed., 464.

<sup>5</sup> 9 Ad. & Ell., 1.

<sup>6</sup> 14 East, 1.

<sup>7</sup> 11 Ad. & Ell., 273 (39 Eng. C. L.).

<sup>8</sup> 8 Coke, 375.

language is worth remembering: "And it appears in our books that, in many cases the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void, for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

#### POWERS OF THE JUDICIARY.

In *Bushell's Case*, 22 Car. 2, 1670,<sup>1</sup> it was held that no jury is liable to be fined or otherwise punished for its finding.

So, too, judges are not liable for any judicial acts done, nor for any words spoken by them in their judicial capacity.<sup>2</sup>

This principle of judicial immunity has been fully recognized and endorsed by American Courts. It rests in the necessity of securing to the judiciary that independence of action which can only exist when judges are freed from the apprehension of vexatious suits at the hands of disappointed litigants, smarting under the irritation of an adverse decision. Nevertheless, a distinction as to their liability has been made between acts done by them in mere excess of their jurisdiction, and acts done by them in the clear absence of all jurisdiction over the subject-matter. In the latter case the act is not only void, but the judge committing it would be liable as any other wrong-doer, for the immunity

<sup>1</sup> Vaughan, 135; 6 St. Tr. 999.

<sup>2</sup> *Floyd v. Barker*, 12 Coke, 22; *Kemp v. Neville*, 10 C. B. N. S. 523 (100 Eng. C. L.); *Fray v. Blackburn*, 3 Best & Smith, 576 (113 Eng. C. L.); *Scott v. Stansfield*, L. R. 3 Exch. 220; *Calder v. Halket*, 3 Moore, P. C. C. 28.

attaches not to the officer but to the jurisdiction, and expires at its limits.<sup>1</sup>

Small as the above number of cases may be, when contrasted with the many thousand constitutional decisions with which our reports abound, they still represent, in their essential features, the tap roots of civil liberty in Great Britain. Most of these decisions antedate the Revolution of 1688, and already exhibit the dawn of that better day which heralded the coming in of limitations upon arbitrary power. Others follow in the spirit of that national resistance to absolutism, which has never abated since the downfall of the Stuarts, and still continues as a cardinal article of political faith among Englishmen.

It is creditable to the genius of such a government that having taken from the Sovereign the power of the Sword, of the Exchequer, and of the Veto, and enlarged the sovereignty of the people through representation in Parliament, it has been able, under a mixed constitution, to so maintain the balance between its different departments as to afford few, and infrequent occasions for calling upon the judiciary to readjust their jurisdictional limits.<sup>2</sup>

<sup>1</sup> *Bradley v. Fisher*, 13 Wall. 335; *Randall v. Brigham*, 7 *Ibid.* 523; *Yates v. Lansing*, 5 Johnson, 291; *Lange v. Benedict*, 73 N. Y. 12; *Pratt v. Gardner*, 2 Cush. 68; *Ackerly v. Parkinson*, 3 Maule & Sel. 411.

<sup>2</sup> *Thomas's Leading Cases in Constitutional Law*, London, 1876.

## CHAPTER V.

CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES  
IN ITS RELATIONS TO LEGISLATION.

It is generally conceded that the framers of our Constitution based it upon those portions of that of England which seemed to offer the best guarantees of the rights of the people. The acknowledged supremacy of the convention Parliament which called William and Mary to the throne at the Revolution of 1688, and the reaffirmance of the fundamental principles of the British Constitution, in the Bill of Rights which this monarch was required to subscribe, virtually rendered that Parliament a *constituent* assembly of the people of Great Britain. It was from such sources, therefore, as Magna Charta, the Petition of Right, and the Bill of Rights, that the founders of our Federal Commonwealth drew their models as well as their inspiration. Their sole object was to found a representative government on the basis of the sovereignty of the people. In the construction of the fabric of such a Republic they could recognize no rights of caste or prerogative; could have no estates to protect, and no feudal incidents to perpetuate. They sought to distribute the exercise of the powers of sovereignty in such a way as to make the Commonwealth a Federal unity of equal component departments, each supreme within its sphere, yet all amenable to the greater power of the people. This they obtained by weaving into the Constitution limitations upon power, and guarantees of protection to States

and individuals, such as no political fabric of ancient or modern times had ever contained.

A few of those guarantees, as we have already seen, had been wrested from kings of England under different reigns, and with varying vicissitudes of success. Progress had not always been continuous. It required two political revolutions to cement these new democratic principles into the fabric of an old feudal Constitution. Nevertheless, it was done, despite the retrogression which had occurred during the period of the Restoration. When, therefore, our own Constitution was in process of construction the members of the convention, who had tested the benefits and knew the still greater possibilities of popular government in the colonies, were not slow in availing themselves of the results of the labors of their forefathers in enlarging the framework of representative government.

With the experiences of the Revolutionary War before them, and the more trying apprenticeship of the Confederation to point out the dangers incident to a voluntary league of States, they entered upon their task with qualifications of a personal and political character of the very highest order of excellence. Wherever the British Constitution could safely be followed they did so, but always with the qualifications necessary to meet the circumstances of our altered condition. While commending it as a whole, they did not find it adapted to the genius of republican institutions. Its foundation was too essentially feudal, and its superstruction partook of the same character. That Constitution, however much it had been altered since 1688, still gave predominance to monarchical and aristocratic principles. The framers of our own determined to base theirs upon democratic principles, having their origin in the personal sov-

ereignty of the citizen. This they made the alpha and omega of our political system.

Speaking of these changes in public sentiment which prepared the way for the political complexion that was to be given to the Constitution, Mr. Webster, in his argument in *Luther v. Borden*, said: "From the Declaration of Independence, the governments of what had been colonies before were adapted to their new condition. They no longer owed allegiance to crowned heads. No tie bound them to England. The whole system became entirely popular, and all legislative and constitutional provisions had regard to this new, peculiar American character which they had assumed. Where the form of government was already well enough they let it alone. Where reform was necessary they reformed it. What was valuable they retained; what was essential they added; and no more."<sup>1</sup>

We are now prepared to enter upon an examination of the constitutional jurisprudence of the United States so far, and so far only, as it affects the functions of legislation. Those functions as an outcome of the peculiar framework of our government are distinctly prescribed by the Federal Constitution, and the several State constitutions made in harmony therewith. These latter consist, as well as the former, of enumerated powers defining the extent to which the people have consented to allow their lawmaking organ to exercise its authority, and beyond which they have placed, in the supervisory power given to the judiciary, obstacles to any successful attempt at legislative usurpation. Under these canons of authority Acts of Congress are as amenable to judicial interrogation as are those of State Legislatures.

A noteworthy distinction between the Constitution of

<sup>1</sup> 7 How., 1; Works, vol. 6, p. 220.

the United States and that of England, which deserves mention here, is the absence of any Bill of Rights in the former. At the accession of William and Mary to the throne of Great Britain, it was felt to be necessary to pass an initiatory statute declaring the true rights of British subjects. To this the designation of Bill of Rights has been generally affixed. It was an open confession of the insecurity of the British Constitution at that time. But there is no similar Bill of Rights attached to our Constitution, because the whole instrument in fact constitutes such a declaration of principles, particularly when read in connection with the Declaration of Independence.

Alexander Hamilton, in the eighty-fourth number of the "Federalist," after showing that Bills of Rights were in their origin stipulations between kings and their subjects, and abridgments of prerogative in favor of privilege, says: "It is evident, therefore, that according to their primitive signification they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing, and as they retain everything they have no need of particular reservations. The truth is that the Constitution is itself, in every rational sense and to every useful purpose, a Bill of Rights." Notwithstanding the reasons assigned by Hamilton, several of the States opposed the ratification of the Constitution, until assurances were given that guarantees, in the nature of bills of rights, would be introduced in the form of amendments, which was subsequently done at the very first session of Congress.

Accordingly, if we examine the first nine Articles of the Constitution, we shall find that they prescribe limits to the powers of the executive, legislative, and judicial

departments. The second, third, fourth, fifth, sixth, and seventh paragraphs of the ninth section of Article I. impose specific restrictions upon suspending the writ of habeas corpus; the passage of bills of attainder or *ex post facto* laws; the levying of capitation, or other direct taxes; exacting export duties between the States, or giving preference by any regulation of commerce or revenue to the ports of one State over those of another; upon raising money except by appropriations made by law, and lastly, upon the granting of titles of nobility by Congress.

In like manner the third paragraph of the second section of Article III., establishing the right of trial by jury in all criminal cases, and in the locality where the crime was committed; and the whole of the third section of this same Article defining treason, and regulating the degree of proof necessary to establish it, may all be said to represent bills of rights as to these enumerated guarantees. No buttress or bulwark of constitutional protection was overlooked. No powers were given without attaching to them corresponding restrictions. The edifice, as a whole, was reared upon a foundation of privileges granted to the Federal Government, with rights and prerogatives still undiminished in the people of the United States.

What, therefore, is known as a Bill of Rights in the English Constitution, is represented in our own by those limitations or restraints which are imposed upon every department of the General Government, and lastly upon the States themselves. These provisions or restraints are expressed in negative language, and are intended to guard the rights of the citizen against the encroachments of power. They constitute a guarantee that such power shall not be allowed to pass beyond these limits, without encountering a tribunal competent to check its



exercise. In every State Constitution these safeguards are repeated, either in the body proper of the instrument, or in distinct bills of rights appearing as a preamble.

Taken as a whole, the constitutional guarantees which surround the American citizen pervade every branch of government, being inwoven into the executive, legislative, and judicial administrations of the entire country. Every public body and every public officer is subject to their operation, the moment a step is taken outside the boundaries of a prescribed jurisdiction. Diversities of construction in respect to the intent and purport of these limitations will doubtless continue to arise, as the inevitable consequence of the right of independent action possessed by the different judicatures throughout the Union. But it may be safely asserted that no great bulwark of civil liberty, nor any principle essential to its preservation, can be successfully tampered with, and much less undermined, while the Federal Constitution remains, as a rule, of obligatory conduct upon all.

It must always be borne in mind that when the founders of the Republic began shaping its political machinery, they had in view the dangers through which popular government had passed in England, not alone under the Tudors and Stuarts, but even in their own day. The British Constitution on which they modelled ours was that which existed between 1760 and 1787. It was a Constitution still infected with feudal traditions and class distinctions inimical to popular rights. It is true that the successful accomplishment of the Revolution of 1688, which forever silenced the assumptions of kingly prerogative, had, indeed, remodelled the Constitution, but the bitter memories of the military despotism which had accompanied the Commonwealth

of Cromwell had also left behind it some very impressive lessons in republican government, and taught our forefathers the expediency of defining by exact limits the boundaries of each separate department of their own. Keeping these things in view they labored as though in the presence of a constant danger, and attached to every grant of power a check upon its abuse.

The term Constitution as it is understood in the jurisprudence of the United States, may mean one of two distinct facts dependent upon the standpoint from which we view it. Thus in the case of the Federal Constitution, it is a grant of prescribed and enumerated powers by the people of the several States to the General Government, for the purpose of organizing its machinery and securing its perpetuity. On the other hand a State Constitution has no implied limitations put by the people of a State upon the exercise of their own territorial sovereignty. If such limitations are desired they must be expressed. But, it is always a limitation upon the powers of the legislative department whether in a State, or in the Federal administration, because it is the department which initiates the legal action of the State, and by positive enactments regulates the civil rights of the citizen, together with the methods of enforcing them. To other departments of government, the Constitution is a grant of enumerated powers. By this apportionment of delegated sovereignty, a system of checks and balances is maintained between the legislative, executive, and judicial branches.<sup>1</sup>

The historical parallels which we have just traced between the constitutional jurisprudence of England and our own, show us the reason for dividing all constitu-

<sup>1</sup> *Field v. The People*, 3 Ill. 79.

tions into two classes irrespective of their source of origin—

1st. Into those which have grown by small additions at different times, and are designated by analytical jurists as cumulative constitutions, and

2d. Into such as have been enacted or created as the completed work of a convention sitting specifically for that purpose. To the former class belong the constitutions of Rome and England, both which required centuries to produce them; and to the latter, those of some monarchies and republics alike—our own included.

It will be remembered that in England, until the confirmation of Magna Charta by various Acts of Parliament, the Great Charter was in no sense a legalized part of the Constitution. Parliament had always represented what is known in the United States as the Conventional Will of the People. Nor was its legal omnipotence regarded as an usurpation of power, having always been acquiesced in by the people; and it is not too much to say that, for all practical purposes of government, they have allowed it to discharge the functions of both a National Convention and a National Legislature, and in addition, have clothed the House of Lords with the judicial power of interpreting its own enactments.

The application of these principles of constitutional liberty under the interpretation given to them by courts, has built up in the United States a special branch of jurisprudence known as constitutional law. This new branch has grown out of the occasional conflicts of power and jurisdiction between different departments of a tripartite government. The boundaries of these departments not being capable of exact ascertainment, there will, in the complexity of public interests, necessarily arise occasions when the supposed limits of their

authority being reached, an act is nevertheless required to be performed by them, for whose justification neither precedent nor adjudication can be supplied. In such emergencies, the wheels of government would be blocked were not some implied powers attached to those specifically granted, as necessary adjuncts to their complete execution. Should error occur, either in assuming an unwarranted jurisdiction, or in discharging duties belonging to a different department, it becomes a proper subject for judicial inquiry to define these boundaries in that particular instance. In such cases, the function of the court is to seek the law within the Constitution from which a rule of conduct may in future be deduced.

But these questions, seemingly contentious, do not indicate either hostility or rivalry between departments. Although such acts may wear the appearance of usurpations dangerous to the stability of governments, they are not so in fact, nor do they ever increase to any serious extent, because of the inevitable litigation to which they sooner or later give rise, and the consequent appeal to the judiciary as an official arbitrator, whose power is invoked to re-adjust the limits of legal authority between the contending jurisdictions. As no prescription runs in such cases, the experience of a century of government shows that these vibrations of the balance never last long, nor leave behind them permanently incurable results. The wrong inflicted by the error of one department is redressed by another, when it cannot be by the wrongdoer itself. These results constitute the guarantees of life, health, and property to our citizens, and of stability, independence, and commercial prosperity to the States.

It follows from this that in the United States, every constitution implies something more than a mere written instrument, under which systems of municipal law have been permitted to grow up. In its origin it is both a

sovereign ordinance and a guarantee against successful infractions of its provisions. It is a check upon the power of the States whenever illegally exercised; it is a check upon the powers of Congress or the Executive; it is a check upon the judiciary at large, and finally it is a check upon every legislative body in the land, and upon every petty magistrate wherever sitting to exercise his functions.

It has also an additional element of strength over a simple legislative act in the fact of its ratification by the people. It is not simply an enactment, but an enactment subsequently confirmed in the most solemn manner. It is the highest expression, and the most potential declaration of the sovereign will of the people that can be made in the form of a written law. We need to recall but one single fact in order to show the immense stability of our Federal Constitution against all attempts at unwarranted amendments. Thus it requires the ratifying vote of the Legislatures of three-fourths of the States to pass an amendment. There are now forty-four States, of which thirty-three must concur to do this. Each State Legislature consists of two chambers, so that sixty-six legislative bodies must assent to any proposed amendment, before it can form part of the Constitution. Is there any nation on the globe whose organic law is hedged about and buttressed by such mountains of popular assent as these sixty-six legislative Houses represent? An interval of sixty years occurred between the passage of the 12th and 13th Amendments, showing that although in that period of time the population had increased from five to thirty-five millions, and nineteen States had been admitted into the Union, the Constitution was still equal to all the demands made upon it by the enlarged and conflicting interests of the Republic.

A cursory examination of the Federal Constitution, as a supervisory rule of conduct, will show the general scope and extent of its powers, however enumerated, and the limits beyond which neither Congress nor State Legislatures can act.

The encyclical proclamation of its supreme legal sovereignty is contained in section second of Article VI. which declares that "this Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." It follows that precedence in supremacy must be given to the Constitution and laws of the United States over every public act, whether conventional, legislative, or judicial, which can be performed by the people of any State, or any officers appointed by them. Neither State Constitutions, nor Acts of their Legislatures, nor decisions of their courts, are of binding authority, if in conflict with any provision of the Federal Constitution. Even the laws of the United States, themselves, are only valid when made in pursuance of the Constitution; and any enactment, whether Federal or State, which is repugnant to it, is void, being in violation of this fundamental law.<sup>1</sup> Next only to it in importance are the laws made by Congress. Measured by their jurisdictional extent, and the varied local interests to which they apply in their relations to persons, property, or the public domain, these constitute

<sup>1</sup> *Marbury v. Madison*, 1 Cranch, 137; *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. The State of Maryland*, 12 Ibid. 419; *Hayburn's Case*, 2 Dall. 407; *Van Horn's Lessee v. Dorrance*, 2 Ibid. 308; *Dodge v. Woolsey*, 18 How. 347.

the highest expression of derivative sovereignty in the land. They speak the Federal will of the nation as a supreme command to all its citizens, and impose rules and obligations of conduct upon every department of government.

Under Article X. of the Amendments, it is further declared 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."

This plainly indicates that the powers of sovereignty, without being strictly divisible, are yet distributed and localized in varying degrees, according to their original or derivative character. They are always original in the people, and simply delegated to the General Government. They are derivative in both the Federal and the State constitutions, but with a conceded and necessary grant of supremacy given to the former instrument as our parent charter. The Federal Government, being the sovereign head of our political hierarchy, is independent within its limits of all interference on the part of the State governments. And in respect to the objects committed to them, they are equally independent within their limits, both of it and of each other.<sup>1</sup>

These various forms of federative sovereignty, distributing and localizing powers under a written Constitution, may be classified as follows:—

*First.* Powers which are granted exclusively to the United States; or which, being in their nature prerogative and indivisible, cannot be shared by the States without encroachment upon the sovereignty of the United States. (Such, for example, as refer to naturalization, commerce, whether foreign or inter-state,

<sup>1</sup> *McCulloch v. The State*, 4 Wheat. 316; *Stearns v. U. S.*, 2 Paine, 300; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 *Ibid.* 264.

wageing war, and making treaties of peace and alliance, emitting coin, and regulating the currency and the postal service, bankruptcy, etc.)

*Second.* Powers which belong exclusively to the States. (For example, election of Representatives, laws relating to citizenship and suffrage, marriage and divorce, wills, internal police, etc.)

*Third.* Powers which may be exercised concurrently or independently by both. (For example, punishment of crimes and extradition of criminals, bankruptcy and insolvent laws, taxation, etc.)

*Fourth.* Powers which may be exercised by the States, but only by the consent, express or implied, of Congress. (For example, regulations of domestic commerce, naturalization, taxation of national banks, etc.)

Reverting to the various classes of powers, and examining their operations in detail, we shall see, that, *First*, and in relation to the first-mentioned class, it is evident that a power belongs exclusively to the Federal Government, whenever,

There is an express prohibition against its exercise by a State;<sup>1</sup> or,

Where an authority is granted to the United States, to which a similar authority in the States would be absolutely and totally contradictory and repugnant;<sup>2</sup> or,

Whenever Congress has already exercised a power given to it by the Constitution over a particular subject.<sup>3</sup>

Nevertheless, wherever the power of Congress has only been partially exercised over a subject of which Congress might have assumed exclusive power, there the State may provide by legislation for such cases as the laws of the United States do not cover. The prin-

<sup>1</sup> *Houston v. Moore*, 5 Wheat. 1.

<sup>2</sup> *Holmes v. Jenneson*, 14 Pet. 540, 574.

<sup>3</sup> *Prigg v. Comm.*, 16 Pet. 539; *Jack v. Martin*, 12 Wend. 311; *People v. Brooks*, 4 Denio, 469.



ciple upon which this rule is founded is, that the sovereignty of the State is never excluded, except by the entire control of the subject-matter by Congress.<sup>1</sup> Until this occurs there is a residuum of power in the State still latent, and which may be exercised as part of its administrative sovereignty. All powers, by whomsoever exercised, being thus derived from the Constitution, Congress can neither prevent the exercise of any power exclusively belonging to the States, nor re-convey a power to them of which they have been divested by the Constitution.<sup>2</sup> The regulation of commerce for example, requiring in some instances uniform rules, and in others rules varying with locality, the power to command uniformity would belong exclusively to Congress; the power to regulate diversity may be concurrently exercised by the States.<sup>3</sup>

*Second.* In relation to the second class of powers, bearing in mind the fact that the Constitution is a grant of enumerated powers, it follows that all those not therein delegated to the United States, nor prohibited to the States, are reserved to the latter respectively. This constitutes their residuum of political sovereignty within the Union. Hence, they have an exclusive authority over all subjects relating to health, education, pilotage, inspection laws, exclusion of foreign paupers, lunatics, and criminals, and whatever else belongs to their internal police, and form proper subjects for municipal legislation.<sup>4</sup> And since the passage of the Fourteenth Amendment, the right to sell intoxicating liquors has been held not to be one of the privileges and immunities of citi-

<sup>1</sup> *Houston v. Moore*, 5 Wheat. 1; *Moore v. People*, 14 How. 13.

<sup>2</sup> *Cooley v. Philadelphia*, 12 Ibid. 299.

<sup>3</sup> *Passenger Cases*, 7 How. 402

<sup>4</sup> *License Cases*, 5 How. 504; *Mayor v. Mila*, 11 Pet. 102; *Fitch v. Livingston*, 4 Sandf. 492; *Moore v. People*, 14 How. 13.

zens of the United States, which by that amendment the States were forbidden to abridge. In consequence of which, prohibitory legislation in respect to the sale of these liquors has been sustained, provided such legislative enactments did not operate so rigidly on property in existence, at the time of their passage, as to amount to an actual confiscation. "No one," says Mr. Justice Bradley in *Bartemeyer v. Iowa*, "ever doubted that a Legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. When such rights stand in the way of the public good, they can be removed by awarding compensation to the owner."<sup>1</sup>

*Third.* In relation to the third class of powers, the principle is well settled that where mere grants of power to Congress are made, and no prohibitions in regard to the same are imposed upon the States, they may exercise such powers concurrently with Congress. No implied prohibition arises except in the case of those powers, whose nature, as before stated, is such as to require that they should for the public good be exercised exclusively by Congress. But even where the authority of the States is presumptively taken away, they may still act upon the subject-matter until Congress exercises its power, and supersedes them by direct legislation.<sup>2</sup> The point to be kept in view is the avoidance of a conflict between two jurisdictions occupying the relations of superior and subordinate. The exercise of these powers, therefore, must not be incompatible with the end in view, and in any case of doubt the

<sup>1</sup> *Bartemeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25.

<sup>2</sup> *Sturges v. Crowninshield*, 4 Wheat. 122; *Holmes v. Jennison*, 14 Pet. 540; *Houston v. Moore*, 5 Wheat. 1; *Cooley v. Philadelphia*, 12 How. 299; *Freeman v. Robinson*, 7 Ind. 321.

law of Congress must take precedence of that of the State.<sup>1</sup>

In respect to those subjects, which embrace concurrent powers of legislation, the Supreme Court has laid down the principle that this concurrent power of State legislation does not extend to every possible case in which its exercise has not been prohibited; but that whenever "the terms in which a power is granted to Congress, or the nature of the power requires that it should be exercised exclusively by Congress, the subject is as completely taken from State Legislatures as if they had been expressly forbidden to act on it."<sup>2</sup> Nevertheless, a State may, by its own supplementary legislation, aid in carrying out the object of an Act of Congress.<sup>3</sup>

*Fourth.* In relation to the fourth class of powers, there are many subjects connected with the regulation of commerce where the statutes of the several States are to be regarded as constitutionally made, until Congress by its own act supersedes them. The erection of bridges over navigable streams, inspection, health, and pilotage laws; and others, embracing a great variety of subjects, often give rise to permissive action on the part of States which the Federal courts will not necessarily enjoin. Although Congress may interpose when necessary, still, until it does, the power to regulate commerce may be exercised by the States.<sup>4</sup>

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *Norris v. Boston*, 45 Mass. 282.

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

<sup>3</sup> *Robinson v. Flanders*, 29 Ind. 10; *Norris v. Boston*, 45 Mass. 287.

<sup>4</sup> *Gilman v. Philadelphia*, 3 Wall. 713; *Ex parte McNeil*, 13 *Ibid.* 236; *Cooley v. Board of Wardens of Philadelphia*, 12 How. 312.

## RESTRAINTS UPON THE NATIONAL GOVERNMENT CONTAINED IN THE ORIGINAL CONSTITUTION.

It is well known that the adoption or ratification of the Constitution by the several States was by no means unanimous. On the contrary, very serious objections were made to its provisions in many quarters, all which tended to delay its acceptance and threaten its defeat in the form presented. Many of these objections having been considered and answered in the "Federalist," it becomes unnecessary to review them here. They all seemed to rest upon the complaint that the powers of the national government needed specific restrictions, in order to balance the grants bestowed upon it by the Constitution. The underlying reasons for the bestowal of these powers may be easily traced in the history of the Articles of Confederation, and are virtually announced in the preamble to the Constitution itself. The object of that instrument, as there recited, was to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and to secure the blessings of liberty."

Under the Articles of Confederation, as is well known, the States were sovereign and independent, and the Union a league of unstable elements. This was universally felt and acknowledged. "The great radical vice, in the construction of the existing Confederation," says one of the authors of the "Federalist," "is in the principle of legislation for States or governments in their corporate or collective capacities, and as contradistinguished from the individuals of whom they consist. . . . The consequence of this is, that, though in theory their resolutions concerning those objects are laws constitutionally binding on the members of the Union, yet in practice

they are mere recommendations which the States observe or disregard at their option."<sup>1</sup>

The evidence of this was found in the fact, that there was no central authority clothed with power to enforce compliance with any general laws established to regulate and harmonize intercourse; to suppress encroachments upon public rights; or to prevent discriminations by communities consulting their particular interests. In the presence of these imminent dangers to unity, prosperity, and peace, the Constitution in its domestic aspects was evidently framed to prevent the independence of the States from exercising an aggressive action towards each other, to re-establish a national credit, and to preserve the sanctity of contractual relations. The three paramount objects secured by it, in the creation of a central and governing Federal power, were the regulation of commerce between the States; the establishment of a public credit based upon a currency of gold and silver; and the protection afforded to the obligation of contracts.

In comparing, therefore, different parts of the Constitution together, it will be seen that there are restraints of a similar character imposed reciprocally upon the action of both State and national governments. Some are express in terms, and some are general. Those upon the national government which are express in terms are unquestionably limitations upon it alone. Those which are general, act directly upon it also, but only negatively upon the powers of the States. This concurrence of limitations leaves open the door for variety of local interpretation, in respect to State action, at the hands of State tribunals. In questions arising solely under State laws and not involving the Constitution of the United States, State courts will always continue to be the final

<sup>1</sup> "Federalist," No. xv.

arbiters, and their decisions will furnish rules for the guidance of Federal courts. On the other hand, in all questions that are of Federal cognizance the appellate jurisdiction of the Supreme Court will extend itself over State tribunals in review of their judgments, since, in the language of Hamilton, "the national and State systems are to be regarded as one whole."<sup>1</sup>

Without these essential bulwarks of national equity, the guarantee to the citizens of each State of all the privileges and immunities of citizens in the several States, would have proved a hollow mockery and a paltering promise, soon to be detected and exposed.

In proportion, however, as the powers of the Federal government required enlargement, it became necessary to balance them with restrictions, in order to avoid a centralization of authority to which it was felt that the States would never consent. As increase of power at the centre, virtually meant a corresponding abridgment of it in the States, the grants of enumerated powers to Congress in Section 8, Article I., was immediately followed by the prohibitions contained in Section IX, viz:—

"1. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation not exceeding ten dollars for each person."

This clause, which originally referred more particularly to the importation of slaves into the United States, ceased to be operative long before the adoption of the 13th Amendment. It has been held, therefore, to have no application now to the State governments.<sup>2</sup> In so

<sup>1</sup> Federalist, No. 82; *Gut v. State*, 9 Wall. 55.

<sup>2</sup> *Butler v. Hopper*, 1 Wash. C. C. 499; *Brightly's Dig.* vol. 1, p. 835; *Scott v. Sandford*, 19 How. 397; 1 Kent Comm., sect. 9; *Story's Const.*, § 1331.

far, however, as it applies to foreign emigrants landing in the United States, Congress possesses the power to prohibit or allow their admission on such conditions as it may choose to impose. This power is logically connected with the power to regulate commerce with foreign nations. Hence passengers or emigrants can never be properly subject to State laws, until they have become mingled with the population of a State. Until then, they are under the exclusive control of Congress.<sup>1</sup> In virtue of this power the Act of February 26, 1885,<sup>2</sup> was passed "to prohibit the importation and immigration of foreigners and aliens under contract or agreement to perform labor in the United States." And similar Acts were passed against Chinese laborers.<sup>3</sup>

"2. The privilege of the writ of Habeas Corpus shall not be suspended, unless where, in cases of rebellion or invasion, the public safety may require it."

This provision being a guarantee of personal liberty applies to the States as well as to the general government. It constitutes one of those fundamental rights of citizenship which is included in the category of "privileges and immunities." Except under the conditions enumerated, it cannot be suspended by either Congress or the States, without denying that equal protection of the laws guaranteed by the Constitution.

Apart from this, the writ of Habeas Corpus being esteemed at common law a writ of right, every person is entitled to its benefits.<sup>4</sup> State courts, however, after being judicially informed that a party is imprisoned by the authority of the United States, cannot interfere so

<sup>1</sup> Passenger Cases, 7 How. 283; S. C. 45 Mass. 282.

<sup>2</sup> Stat. at Large, vol. 23, p. 32; vol. 24, p. 414.

<sup>3</sup> Stat. at Large, vol. 23, p. 115.

<sup>4</sup> 2 Kent Comm., Lect. 24; *Yates v. Lansing*, 5 Johns. 282; Story's Const., § 1339; *U. S. v. Hamilton*, 3 Dall. 17; *Ex parte Dorr*, 3 How. 103; *In re Neagle*, 135 U. S. 1. *In re Kemmler*, 136 U. S. 436.

as to compel the production of such person before them. Their authority in this respect is abridged by the paramount jurisdiction of the United States which cannot be questioned by them.<sup>1</sup> The right to this writ is among the most jealously guarded of our civil privileges. In many States it is made a misdemeanor for any judge to refuse to grant such a writ when legally applied for, it being well settled that in so doing he acts only ministerially and not judicially, the duty being absolute and without discretion.<sup>2</sup>

The suspension of the writ of Habeas Corpus does not authorize by itself arbitrary or illegal arrests. Legal proceedings are not thereby suspended—compliance with forms of law must still be exercised by tribunals issuing process, intended to operate as a restraint upon personal liberty. The effect of the suspension is simply to bar an interlocutory proceeding midway of arrest and trial.<sup>3</sup>

Moreover, the suspension of the writ, being an act involving legislative power, cannot be performed by the President.<sup>4</sup> Congress alone is authorized to do it, being the exclusive judge of the public necessity requiring it to be done. But this action of the Federal Legislature does not suspend the issuance of the writ by a State court, except in districts where through the presence of hostilities, the civil courts are for the time being displaced, and martial law has been proclaimed.<sup>5</sup> Whence it follows that the proclamation of martial law in any locality, whether by State or Federal authority, operates as a

<sup>1</sup> *Ableman v. Booth*, 21 How. 506; *Gormley's Case*, 12 Opin. of Atty.-Gen'ls, 267.

<sup>2</sup> *Nash v. People*, 36 N. Y. 607.

<sup>3</sup> *Ex parte Milligan*, 4 Wall. 2; *Ex parte Vallandigham*, 1 *Ibid.* 243; 2 *Brightly*, 96.

<sup>4</sup> *Ex parte Merryman*, Taney, 246; *Griffin v. Wilcox*, 21 Ind. 370; *In re Kemp*, 16 Wis. 359; *In re Oliver*, 17 *Ibid.* 381.

<sup>5</sup> *Griffin v. Wilcox*, 21 Ind. 370; *Ex parte Milligan*, 4 Wall. 2; *Kneeder v. Lane*, 45 Penn. 238.



virtual suspension of the writ, by ouster of the civil jurisdiction.<sup>1</sup> In such cases, the authority given to an officer to make arbitrary arrests may provide for his exemption from any penalty for so doing.<sup>2</sup>

It speaks well for the stability of republican institutions, that, in the judicial history of the United States, the writ has never been suspended but once by the General Government. The occasion for doing so arose out of the necessities of the Civil War, and its suspension was authorized by the Act of March 3, 1863.<sup>3</sup>

“3. No bill of attainder or *ex post facto* law shall be passed.”

A Bill of Attainder is a legislative act in the nature of an indictment, which inflicts punishment for an alleged crime, but without a judicial trial. As originally employed in England, it was directed not only against individuals who were capitally condemned, but sometimes against a whole class of untried persons. Nor did it limit itself alone to punishing the individual named, but worked corruption of blood in his offspring, who thus lost their heirship in his property, the latter being forfeited to the Crown. It was the favorite method adopted by Parliament for destroying political adversaries, in subserviency to the demands of despotic monarchs, and continued in force, as a legal accompaniment of convictions for felony, down to the year 1870, when it was abolished by the Forfeiture for Felony Abolition Act, known as 33 and 34 Vict. c. 23, § 1.

If the punishment was less than death it was termed a Bill of pains and penalties.<sup>4</sup> Before the adoption of the

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

<sup>2</sup> McCall *v.* McDowell, 1 Deady, 233.

<sup>3</sup> Stat. at Large, vol. 13, p. 755.

<sup>4</sup> Story on the Const., § 1344; Cooley, Const. Limit., 259; Gaines *v.* Buford, 1 Dana, 510; Macaulay's Hist., ch. 12; Martin *v.* Snowden, 18 Gratt. 100.

Constitution, State laws banishing persons and confiscating property were held to be valid. In consequence of which, such attainder could not be impeached collaterally, in an action to recover back lands by an attainted person.<sup>1</sup> This form of pains and penalties, therefore, is the only form known to the jurisprudence of the United States, within the meaning of the Constitution, although included in the larger phrase of attainder. The cases which in our country have brought the subject before courts, have not been numerous, but they have served to show that there is property, not only in land and money, but in vocations, and in rights that are vested, under whatever form they may exist. A statute, therefore, which deprives a party of the privilege of enforcing a contract, or of pursuing a certain vocation without having taken a previous expurgatory oath; or in any way inflicts punishment for past conduct without a judicial trial, is a bill of pains and penalties. The constitutional prohibition is based upon the principle that what cannot be done directly, cannot be done indirectly.<sup>2</sup>

#### AS TO EX POST FACTO LAWS.

The prohibition against *ex post facto* laws on the part of the general Government, is also included among the restraints imposed upon the States, and applies not only to criminal cases, which is its general intent, but also to cases for the recovery of penalties and forfeitures.

Retrospective statutes have always been considered a

<sup>1</sup> *Cooper v. Telfair*, 4 Dall. 14; *Hylton v. Brown*, 1 Wash. 344-354.

<sup>2</sup> *Cummings v. Missouri*, 4 Wall. 277; *Ex parte Garland*, 4 Ibid. 377; *Shepherd v. The People*, 25 N. Y. 406; *Drehman v. Stille*, 8 Wall. 597. For early cases bearing upon the law of attainder, see *Sleight v. Kane*, 2 Johns. Cas. 236; *Jackson v. Sands*, Ibid. 267; *Jackson v. Gratz & Catlin*, 2 Johns. Rep. 260. New York passed an Act of Attainder, Oct. 22, 1779. (*Laws*, ch. 25.)

violation of the ethical principle that every law prescribes a rule for the future and not for the past. Being a command to do or abstain from doing a certain act; or if permitted to be done, then, from doing it in any other than a particular way, a statute looks to a future condition of things for its application. *Nona constitutio futuris, formam debet imponere, non prateritis.* This is a maxim which belongs to the elementary principles of jurisprudence. The single exception is that of remedial statutes which do not impair contracts or disturb vested rights, and which are passed either to cure defects, or to enforce existing obligations, as a duty owing to the public.<sup>1</sup> But an *ex post facto* law in the United States is not regarded as a remedial statute, but as one violative of existing obligations due either to individuals or to the State. And under the Constitution it has acquired a definite meaning, and an application limiting it to criminal procedure alone.

An *ex post facto* law is one which renders an act punishable that was not so when committed; or which changes the rules of evidence for the purpose of securing an easier conviction, or which increases the degree of punishment, while at the same time applying such amendments of the law to an existing state of things rather than to a future one. It is a retrospective statute, designed to apply, however, only to penal and criminal laws, which inflict forfeitures of property or personal punishment; but not to civil proceedings affecting private rights. The protection of these does not come within the purview of the constitutional inhibition. Therefore, in respect to crimes of any sort when committed, the States cannot, under the form of creating a qualification or attaching a condition, inflict a punish-

<sup>1</sup> 1 Kent's Comm., 455; Wood v. Oakley, 11 Paige, 403; Johnson v. Burrell, 2 Hill, 238; Dash v. Van Kleeck, 7 Johns. 479.

ment for a past act which was not punishable when committed. And deprivation or suspension of civil rights for past conduct constitutes punishment for such conduct.<sup>1</sup>

An *ex post facto* law is thus seen to be in its practical effects, tantamount to a bill of pains and penalties. For it either stamps an act as criminal which was not so when committed, or it alters the rules of evidence rendering conviction more easy, or it increases the former penalty subsequent to the commission of a crime. The union of these two prohibitions in the same clause, explains the intention of the framers of the Constitution. It was meant to check all vindictive legislation as addressed to the punishment of public wrongs, whether political or social. In view of the opportunities for retaliatory legislation which accompanied the reconstruction period following our Civil war, the wisdom that erected this bulwark against the tide of political vindictiveness cannot be too greatly admired. But for this, the proscriptions of Sylla and Marius might have been repeated in some of our States.

“4. No capitation or other direct tax shall be laid, unless in proportion to the census, or enumeration heretofore directed to be taken.”<sup>2</sup>

<sup>1</sup> *Calder v. Bull*, 3 Dall. 390; *Fletcher v. Peck*, 6 Cranch, 87; *Falconer v. Campbell*, 2 McLean, 212; *Carpenter v. Pennsylvania*, 17 How. 463; *Watson v. Mercer*, 8 Peters, 110; *U. S. v. Hughes*, 12 Blatchf. 553; *Gut v. Minnesota*, 9 Wall. 38; *Comm. v. Phillips*, 11 Pick. 28; *Comm. v. Lewis*, 6 Binney, 271; *King v. Missouri*, 107 U. S. 221; *Hopt v. Utah*, 110 U. S. 574; *Hartung v. People*, 22 N. Y. 95; *Shepherd v. People*, 25 N. Y. 406; *Comm. v. Wyman*, 12 Cush. 237; *Ratzky v. People*, 29 N. Y. 124; *King v. Missouri*, 107 U. S. 221.

<sup>2</sup> The first capitation or poll tax in England was imposed under the reign of Edward III., A. D. 1377. It was followed by another in 1379, and again in 1380, which latter was deemed so odious that the Commons of almost every county rose in arms against it. This tax exacted for the benefit of the Crown, a sum of not less than twelve pence nor more than twenty shillings from every person above the age of fifteen. *Stubbs's Const. Hist. of England*,

“5. No tax or duty shall be laid on articles exported from any State.

“6. No preference shall be given by any regulation of commerce or revenue to the ports of one State, over those of another; nor shall vessels bound to or from one State be obliged to enter, clear or pay duties in another.”

Congress having been given the power “to lay and collect taxes, duties, imports, and excises,” the above three provisions are limitations upon the exercise of this authority:—

1st. By distinguishing between direct and indirect taxes, as to their mode of assessment.

2d. By establishing a permanent freedom of trade between the States; and

3d. By prohibiting any discrimination in favor of particular States, through revenue laws establishing a preference between their ports and those of the others.

These provisions should be read together, because they are at the foundation of our system of national taxation.

The two rules prescribed for the government of Congress in laying taxes, are those of apportionment for direct taxes and uniformity for indirect. In the first class are to be found capitation or poll taxes, and taxes on land; in the second, duties, imports, and excises.

The provision relating to capitation taxes was made in favor of the Southern States, and for the protection of slave property. While they possessed a large number of persons of this class, they also had extensive tracts of

vol. 2, p. 476, 492; *Lives of Lord Chancellors*, vol. 3, p. 265. The various direct taxes laid by Congress were as follows: Act of July 14, 1798; Act of August 2, 1813; Act of January 19, 1815; Act of February 27, 1815, which applied to the District of Columbia; Act of March 5, 1816; Act of August 5, 1861.

sparsely settled and unproductive lands. At the same time, an opposite condition both as to land-territory and population existed in a majority of the other States. Were Congress permitted to tax slaves and land in all parts of the country at an uniform rate, the Southern Slave States must have been placed at a great disadvantage. Hence, and to guard against this inequality of circumstances, there was introduced into the Constitution the further provision that "representatives and direct taxes shall be apportioned among the States according to their respective numbers." This changed the basis of direct taxation from a strictly monetary standard which could not, equitably, be made uniform throughout the country, to one resting upon population, as the measure of representation. But for this, Congress might have taxed slaves arbitrarily and at its pleasure, as so much property, and land uniformly throughout the Union regardless of differences in productiveness. It is not strange, therefore, that, in *Hylton v. U. S.*,<sup>1</sup> the court said that "the rule of apportionment is radically wrong, and cannot be supported by any solid reasoning. It ought not, therefore, to be extended by construction. Apportionment is an operation on States and involves valuations and assessments which are arbitrary and should not be resorted to but in case of necessity."

Direct taxes being now well settled in their meaning, a tax on carriages left for the use of the owner is not a capitation tax.<sup>2</sup> Nor a tax on the business of an insurance company;<sup>3</sup> nor a tax on a bank's circulation;<sup>4</sup> nor a tax on income;<sup>5</sup> nor a succession tax.<sup>6</sup> The fore-

<sup>1</sup> 3 Dall. 171; *Springer v. U. S.*, 8 Wall. 586; *Loughborough v. Blake*, 5 Wheat. 517.

<sup>2</sup> 3 Dall. 171.

<sup>3</sup> *Pacific Ins. Co. v. Soule*, 7 Wall. 433.

<sup>4</sup> *Veazie Bank v. Fenno*, 8 Ibid. 533.

<sup>5</sup> *Smedberry v. Bentley*, 21 Int. Rev. R. 38; *Clark v. Sickel*, 14 Ibid. 6.

<sup>6</sup> *Scholey v. Rew*, 23 Wall. 331.

going are not, properly speaking, direct taxes within the meaning of the Constitution, but excise taxes or duties.

The same restriction is placed upon Congress, which is placed upon the States, in relation to the non-taxation of exports. Not only does the Constitution protect the freedom of inter-state commerce, but also that with foreign countries, when carried on through the instrumentality of American bottoms. The extra-territoriality of the vessel makes it part of the soil of its own country, for every ship must have a home and a national registration.

But Congress, in its dealings with *foreign* vessels, is bound by no such restriction. It has the general power of prohibiting the import or export trade in foreign vessels to, or from our ports, or of granting them the privilege of bringing in, or carrying out cargoes on any conditions which it may see fit to establish. Its power to impose a duty, therefore, upon foreign vessels, in order to determine the amount of such taxation, and the basis of its apportionment, cannot be questioned, even though in so doing preference should be given to certain nations over others.<sup>1</sup>

As between the States themselves, it has been held not to apply to a State tax upon an article brought into one State from another.<sup>2</sup> Nor is a State tax upon capital invested in ships a preference of the ports of one State over those of another, since such capital being the property of its citizens may be taxed at their domicil.<sup>3</sup> So a State may tax capital invested in an article purchased in other States for direct exportation, although

<sup>1</sup> *Aguirre v. Maxwell*, 3 Blatchf. 140.

<sup>2</sup> *State v. Charleston*, 10 Rich. 240.

<sup>3</sup> *State v. Charleston*, 4 *Ibid.* 286.

the article is never brought within the jurisdiction of the taxing State.<sup>1</sup>

In the regulation of commerce, or revenue, no preference must be given to the ports of one State over those of another. This provision does not, however, exclude the power of choosing between particular ports, with reference to making them ports of entry. Congress, in order to exercise this power beneficially, must give a preference to certain ports in one State over those of another, based upon population, commerce, and geographical necessities. Ports of entry being intended for the collection of imports or duties upon foreign commodities, inland States do not need them. The preference given in such cases, to a seaboard or boundary State, is not the kind of discriminating preference which the Constitution forbids, otherwise every port in every State might claim the simultaneous right of being made a port of entry. Speaking to this point the Supreme Court, in the *Wheeling Bridge Case*, said: "There are many Acts of Congress passed in the exercise of this power to regulate commerce, provide for a special advantage to the port or ports of one State, and which very advantage may incidentally operate to the prejudice of the ports in a neighboring State, which have never been supposed to conflict with this limitation upon its power. The improvement of rivers and harbors, the erection of lighthouses, and other facilities of commerce, may be referred to as examples."<sup>2</sup>

In whatever light the powers given to Congress to regulate commerce may be considered, it will appear that the chief object of the Constitution was to remedy the defects in the Articles of Confederation by secur-

<sup>1</sup> *People ex rel. Haneman v. Tax Commissioners*, 17 N. Y. Supr. 255.

<sup>2</sup> *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421.



ing commercial equality within the United States. In order to accomplish this, it was necessary to place the regulation of commerce under one authority, and next to prohibit the States from destroying this equality by any legislation prescribing the conditions upon which vessels bound from one State, shall enter the ports of another. It was this apprehension which, in the convention, occasioned the insertion of the provision that "No State shall lay any duty on tonnage without the consent of Congress."<sup>1</sup> The last provision, relating to *duties and clearances*, is the logical outcome of the foregoing, being intended to prevent a harassing repetition of taxes upon vessels by compelling them to enter, clear, or pay duties in any State, other than that to or from which they should be proceeding.<sup>2</sup> But a State law requiring the payment of pilotage fees is not an infringement of the provision, being in the nature not of duties, but of charges for services rendered to vessels.<sup>3</sup> It is only a compensation under an implied contract created by statute. Necessarily, any State law relating to pilotage is immediately abrogated by a subsequent Act of Congress which conflicts with it.<sup>4</sup>

"7. No money shall be drawn from the Treasury, but in consequence of appropriations made by law; and a regular statement and account of the receipt and expenditures of all public money shall be published from time to time."

The Treasury of the United States is the receptacle for its revenues. From whatever source collected, this is their ultimate destination. It is from this fund that the government draws the means for meeting its current

<sup>1</sup> Passenger Cases, 7 How. 383; 3 Madison Papers, 1585-6.

<sup>2</sup> U. S. v. The William, 2 Am. L. J. 255.

<sup>3</sup> Cooley v. Board of Wardens, 12 How. 314; *Ex parte McKee*, 13 Wall. 236.

<sup>4</sup> The Panama, Deady 27.

expenses and obligations. All money drawn from the Treasury is consequently drawn as an *appropriation* of it to some specified object. This can only be lawfully done by an Act of Congress authorizing such a disposition. And as the government cannot be sued by its creditors, except by its own permission, a Court of Claims was organized by the Act of February 24, 1855, for the purpose of enabling such persons to establish by legal proof, in a forum of justice, the merits of their claims. This is the extent to which the claim can be judicially enforced. But the final power to allow or disallow the judgment of this Court still remains with Congress; which body may withhold the appropriation necessary to satisfy it. A public creditor, therefore, must resort to an application to Congress for payment of his debt, since there is no legal process by which he can enforce it; nor can he even have a lien on the public property in his possession or custody.<sup>1</sup>

Public moneys in the hands of heads of Department are still constructively in the Treasury. Their possession of such funds amounts only to the custody of an agent, who must obey the spirit of the constitutional provision in their expenditure, by strictly adhering to the line of their appropriation.<sup>2</sup> Even emergency or secret service funds must, by a reasonable interpretation of their uses, be restricted to the exceptional occasions contemplated in their designation.

“8. No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of Congress, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign State.”

It is difficult to understand how the provision relating

<sup>1</sup> U. S. v. Barney, 3 Hall's L. J. 130.

<sup>2</sup> 3 Opin. Att'y-Gen. 13.

to titles of nobility could have found a place in the Constitution of a Republic based upon the sovereignty of the people. Without even this inhibition, the equality of all citizens in their "privileges and immunities" would have rendered it impossible, without a violation of the Constitution, to give to any citizens *titular* preferences over the remainder. At the same time, there is no prohibition against a citizen of the United States, not in the public service, accepting a title of nobility from a foreign government. Any one is at liberty to do so without forfeiting his citizenship, although it is an open question whether by such acceptance the person does not do homage, and owe allegiance as its correlative, to the sovereignty bestowing this political franchise upon him. A title of nobility always emanates from some monarch, and whoever accepts one becomes his *liege*-subject. It constitutes not so much a gift as a status.<sup>1</sup>

#### ADDITIONAL RESTRAINTS UPON THE NATIONAL GOVERNMENT CONTAINED IN THE AMENDMENTS TO THE CONSTITUTION.<sup>2</sup>

As already pointed out in the opening paragraphs of this chapter, the adoption of the Constitution by the

<sup>1</sup> Titles of nobility arose originally out of the right of eminent domain in the sovereign, to bestow conquered lands upon meritorious servants. The title was associated with the local holding, and the rank of the owner in the military hierarchy was transmitted to the domain itself. Thus, under the feudal system were established kingdoms, duchies, marquises, counties, baronies, etc. The manorial patents in New York constituted the land granted, "a lordship and manor," and gave their patentees power to hold courts "lecte and baron." These patents were protected under the confirmatory Colonial Act of 1691, and subsequently reaffirmed by the New York Court of Appeals in 1853, in *People v. Van Rensselaer*, 9 N. Y. 291. On the subject of "Nobility," see Thierry's *Norman Conquest*, book 2d, p. 237.

<sup>2</sup> The ten first amendments to the Constitution were proposed at the first session of the first Congress of the United States on September 25, 1789,

States was slow and halting. Only three ratified it in 1787, and not until May, 1790, did the last of the thirteen give in its adherence. The objections to it advanced, were not satisfied by the few restraints upon the General Government contained in section 9 of Article I. These complaints were accordingly repeated with more emphasis and urgency, until they assumed the condition of a *sine qua non* to ratification. There was no division upon the point of still further restraining the Federal power, by limitations of a definite character. Amendments were accordingly proposed, as the only safeguard to the right of the States and of the people. A new Runnymede and a new Magna Charta seemed to be confronting each other, where the national government was the monarch, and the States and the people the barons and lieges.

It was feared lest too much power had been taken from the States, and too much of it centralized in the General Government. From having been free and independent sovereignties, with voluntary power un-abridged under the Articles of Confederation, the States saw themselves, under the Constitution, menaced with a consolidated Federal government. Their object in these proposed amendments was, therefore, to make the Constitution one of rigid and enumerated powers, and to exclude from the General Government all idea of reserved or implied powers as inherent in its sove-

and were finally ratified by the constitutional number of States on the 15th of December, 1791. The eleventh amendment, relating to the judicial power of the United States, was proposed on March 5, 1794, and declared to have been ratified on the 8th of January, 1798. The twelfth amendment, relating to the duties of the Electoral College, was proposed on the 12th of December, 1803, and declared to have been ratified on the 25th September, 1804. The first ten amendments were intended to operate not on the States, but on the national government. *Spies v. Illinois*, 123 U. S. 131; *People ex rel. Kemmler v. Durston*, 136 U. S. 436.

reignty. Their aim was to bar every way to the claims of prerogative. This the States, with great unanimity, sought to do, by incorporating, into the amendments proposed, as many of the provisions of the Bill of Rights of 1688 as were adapted to our form of government. Many of the State conventions consequently made it a condition of their ratification that such amendments should be proposed; and the "Constitution was accepted and put in force," says Judge Story, "in anticipation of and in reliance upon the adoption of these amendments, and by them the instrument was completed."<sup>1</sup>

Accordingly, at the first session of Congress these amendments were introduced, and proper supplementary articles being added, a true Bill of Rights was secured to the people, which was submitted to the States for their ratification. By these means, many of the grievances complained of in the Declaration of Independence as violations of the rights of personal liberty, were provided against, and rendered impossible of repetition at the hands of the national government. No opportunity for doubt as to their intention was given. A bulwark of constitutional limitation everywhere surrounds congressional legislation. The language of these amendments is imperative in the highest degree. It leaves no room for any forced or strained construction. It defines distinctly, and categorically, the limits beyond which the powers of the national government shall not extend. These restraints form an additional Bill of Rights to the Constitution proper, and exhibit the extreme solicitude with which the founders of the republic regarded the powers with which they were endowing a supervisory Federal sovereignty.

<sup>1</sup> 1 Story on the Const., § 305, n., §§ 303, 304; *Jackson v. Wood*, 2 Cow. 820; *Curtis on the Const.*, vol. 2, s. 532.

“ART. 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.”

### RELIGIOUS FREEDOM.

The union of Church and State in the British Parliament, with which the founders of the Constitution had to contend throughout the Revolutionary struggle, led them to look upon an Established Church as an engine of possible oppression, to be guarded against by the most emphatic prohibition. They had discovered, as had their forefathers, that such a church was apt to be more governmental than sacerdotal, and having experienced the results of its hostility towards them as revolted colonists, they availed themselves of the earliest opportunity to graft by way of amendment upon the Constitution, the doctrine of a national religious freedom involving toleration to all. Mr. Madison is said to have been the author of this amendment. Under its terms religious freedom is guaranteed throughout the United States against any interference on the part of Congress. For the Constitution, itself, makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State Constitutions and laws.<sup>1</sup> “The whole power over the subject of religion is left,” says Judge Story, “exclusively to the State governments, to be acted upon according to their own sense of justice and the State Constitutions.”<sup>2</sup> “But it was never in-

<sup>1</sup> *Permoli v. First Municipality*, 3 How. 589.

<sup>2</sup> *Vidal v. Girard's Ex'rs*, 2 How. 198; Mr. Webster's Argument in the Girard Will Case. Works, vol. 6, p. 175.

tended or supposed," says Mr. Justice Field in *Davis v. Beason*, "that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order, and morals of society."<sup>1</sup>

Inasmuch, however, as no definition of religion is given in the Constitution, it becomes proper to ascertain by analogy what is to be considered as religion in the general opinion of the nation. The Christian religion being the predominant religious belief of the people, Christianity has come to be regarded as part of the common law of the land. It is true that it embraces many creeds, but all have a common foundation in their acceptance of the Bible, as a moral teacher and spiritual guide. The religion of the Bible is, therefore, the standard code of orthodoxy by which the national conscience seeks to guide itself. It is the alpha and omega of our moral law, and the interior power which directs the operations of our judicial system. Underlying the whole civil administration of the government, whether State or national, and in whatever form it enters into its positive laws, it is always understood as being an undenominational rule of conduct equally applicable to all, because embodying those essentials of religious faith, which are broad enough to include believers in both the Old, as well as the New Testament

It is upon this belief in Christianity as part of our common law, that are based those penal statutes which are addressed to the punishment of blasphemy, profane swearing, and perjury, and Sabbath-breaking.<sup>2</sup> These are incorporations of its precepts and principles into the positive law of the State. Moreover, also,

<sup>1</sup> 133 U. S. 333; see note appended to this decision; *Reynolds v. U. S.*, 98 U. S. 145.

<sup>2</sup> *Andrew v. N. Y. Bible and Prayer-Book Society*, 4 Sandf. (N.Y.) 182.

while religious freedom is protected to the fullest extent, and all may worship according to such forms as are most agreeable to them, yet that worship must be based upon morality and conformity to the law of the land. Hence polygamy, although believed in and practised as a religious right by the sect known as Mormons, is not such a religion as our laws can recognize or protect, aside even from the fact that it is an infraction of a positive enactment forbidding its practice.<sup>1</sup>

In all the States of our Union religious freedom forms part of their Bill of Rights. The Decalogue is also the basis of every criminal code. Under these circumstances, the States have so far incorporated Christianity and its doctrines of morality into their municipal law, as to have made it the animating principle of much of their legislation. Under the conditions of our jurisprudence, no form of worship can claim constitutional protection as a religion, which inculcates immorality, or tramples upon the positive law of the land. To legislate against such practices as polygamy is not to abridge religious freedom, any more than it would be to forbid human sacrifices, or the burning of widows upon their husbands' funeral pyres. It is only obeying that higher law of justice and mercy, which requires from society protection of the weak and helpless against wrong, committed under the assumed garb of religion.

#### FREEDOM OF SPEECH AND OF THE PRESS.

Once, only, in the history of our legislation, has Congress attempted to abridge the liberty of speech and of the press, by passing the famous, or rather infamous act

<sup>1</sup> Reynolds v. U. S., 98 U. S. 145; Murphy v. Ramsay, 114 Ibid. 15, 45; Davis v. Beason, 133 Ibid. 333.



of July 14th, 1798, known as the Sedition Law.<sup>1</sup> This act was fortunately self-limited, expiring on the 3d of March, 1801. Its constitutionality was popularly questioned from the very first; and beyond all doubt, it was an attack upon those sources of public opinion which find their only channels of utterance through tongue and pen. To muzzle these, was to stifle the national spirit in its efforts at expression. It was looked upon as an odious measure, born of partisan rancor, and a feeble imitation of parliamentary despotism.<sup>2</sup>

In all free nations, the right to criticise the acts of the government by speech or through the press, is admitted to be essential to the maintenance of the sovereignty of the people. If government in the United States be only a question of agency, then the principal, that is the people, must have the right freely to criticise the public acts of the agent, his public servant. Such a thing, consequently, as a libel upon the acts of the government can hardly be committed in this country. For while the private character of the citizen, whether in office or out, is equally protected against defamation, his public character when in office is what he voluntarily offers to criticism, as the guarantee of his good faith and qualification

<sup>1</sup> 1 Stat. at Large, p. 596.

<sup>2</sup> It is a well established fact in the Parliamentary history of England that, during the reign of Anne, the House of Commons exercised a censorship over the press. Many entirely harmless publications were voted libels, and their authors prosecuted. Such was the case with Steele and Defoe, Dyer and Fleetwood. It mattered little what the nature of the publication was, since a political vote could, at the caprice of a majority, judicially contort it into a libel. It will surprise no one, therefore, that such a body was opposed to Parliamentary reporting, an opposition which lingered down to the reign of George III., and so firmly entrenched was this legislative despotism in the traditions of the House that, in the famous Aylesbury election case, it defied the courts, and threatened punishment to all those who carried election questions into law courts.

Vid. Parliamentary Hist., vol. 6; Lecky, Hist. of England in the 18th Cent., vol. 1, p. 458.

in discharging his trust. If we were permitted therefore to praise only, and never to criticise the public acts of our government, we should be simply its slaves or serfs. This is not in accordance with the theory of popular sovereignty, nor to be tolerated in a nation of freemen. Speaking to this point, says Judge Cooley, "Repression of full and free discussion is dangerous in any government resting upon the will of the people. The people cannot fail to feel that they are deprived of rights, and will be certain to become discontented, when their discussion of public measures is sought to be circumscribed by the judgment of others upon their temperance or fairness."<sup>1</sup>

Consequently, as every State in the Union has guaranteed freedom of speech and of the press in its Constitution, there arises little occasion to discuss a topic upon which there has always been such an unanimity of opinion, among American citizens. But liberty of speech and of the press, in criticising the public acts of public men, and liberty of speech and of the press in criticising the private acts of men, are essentially different privileges. While men may freely speak, and express their thoughts in print, they cannot take refuge behind this privilege, in order to protect themselves against legal responsibility for defaming private character. If they convert the liberty of speech, or of the press, into a license to abuse and destroy private character, they must stand precisely as any other wrongdoers, before the law. No constitutional bulwark can be invoked in their behalf, any more than in that of any trespasser upon private rights. Liberty of speech and of the press gives no license to defame or oppress one's neighbor. Every one who employs it, must do so subject to legal accountability for its abuse.

That liberty of speech and of the press, which both Federal and State Constitutions protect, either against invasion by direct suppression, or subsequent accountability at law, is—

1. Liberty of speech of legislators in public assemblies, and while engaged in discussing public matters, or in writing reports, or in the exercise of the functions of their office. This is an official privilege.<sup>1</sup>

2. Liberty of speech of counsel in judicial proceedings, and while confining himself to matters that are strictly pertinent to the issue. This, also, is an official privilege.<sup>2</sup>

Necessarily a party guilty of committing a disorder in debate, or in a court, by the use of violent or intemperate language, may be silenced like any other disturber of the peace. But Congress has no power to punish individuals for disturbing assemblies of peaceable citizens. That is a police power belonging to the States alone.<sup>3</sup>

3. Liberty of the press in publishing naked and impartial statements of judicial proceedings, involving a trial and not a mere *ex parte* examination; and when the nature of the case does not render it improper that the same should be published, or constitute such publication an offence at law.<sup>4</sup>

4. Liberty of the press in the publication of news. This is a field occupying such wide relations to the public, that it would be impossible to examine it here in all its details. We can, therefore, only formulate the general principles by which courts have been guided in affixing limits to the exercise of this right.

<sup>1</sup> Coffin *v.* Coffin, 4 Mass. 1; Cushing's Law of Legis. Assemb., § 602.

<sup>2</sup> Hoar *v.* Wood, 3 Met. 194; McMillan *v.* Birch, 1 Binney, 178.

<sup>3</sup> U. S. *v.* Cruikshank, 92 U. S. 542.

<sup>4</sup> Stanley *v.* Webb, 4 Sandf. 21; Huff *v.* Bennett, 4 Ibid. 120; Mathews *v.* Beach, 5 Ibid. 256; Cincinnati Gaz. *v.* Timberlake, 10 Ohio St. 548; King *v.* Koot, 4 Wend. 138; Hotchkiss *v.* Oliphant, 2 Hill, 513.

It may be stated as a general principle universally recognized in England as well as in the United States, that the conductors of the public press enjoy no especial rights, privileges, or immunities born of their peculiar relations to the public. They have no rights, consequently, but such as are common to all citizens. Like any other members of the community they have the right to utter and publish the truth, but no right to publish falsehoods to the injury of others' business or private character. Whether the matter be original or copied merely without comment, publishers of newspapers are held to the same responsibility as any other persons who utter or print defamatory matter. The press, as a profession, is not privileged to libel any one with impunity any more than other persons, and malice on its part is always inferred, where the communications are false.<sup>1</sup> This is a necessary protection to the public against an engine, whose otherwise resistless power forms the mightiest lever for controlling human opinion ever invented by the genius of man.

#### THE RIGHT TO ASSEMBLE PEACEABLY AND TO PETITION.

The right of freemen peaceably to assemble and to petition the government for a redress of grievances, does not seem ever to have needed protection in our country. The town meeting and the various political assemblages, varying in size from a village caucus to a county and State Convention, have always been held without let or hindrance, on the part of the civil authorities, in all the free States. During the existence of slavery it would have been, of course, impossible for those held in bond-

<sup>1</sup> *Sanford v. Bennett*, 24 N. Y. 20; *Dole v. Lyon*, 10 Johns. 447; *Mopes v. Weks*, 4 Wend. 659; *Andres v. Wells*, 7 Johns. 260; *Conn. v. Nichols*, 10 Mete. 259.

age to have held such a meeting in the Southern States, and even if they did, their petition for a redress of grievances could have brought no result, since Congress having no power to interfere with slavery in the States, could not legislate to secure to slaves the right of peaceably assembling. Being the creatures of local law, their status was inexorably governed by its provisions, however much they might conflict with the Constitution of the United States. As in England, the protection to personal liberty afforded by Magna Charta covered only a *liber homo*,<sup>1</sup> while thousands of villeins were excluded from its benefits, so the Constitution of the United States could protect no slave in a slave State. Its ægis covered only freemen. Even their right to petition in behalf of slaves was often questioned upon the floor of Congress.<sup>2</sup> Fortunately now this bone of contention having been removed, the Constitution, with its amendments, can be made to reach all citizens alike without regard to race, color, or previous condition of servitude.

“ART. II. A well-regulated militia being necessary to the security of a free State, the right of the people to bear arms shall not be infringed.”

The right to bear arms has always been the distinctive privilege of freemen. Aside from any necessity of self-protection to the person, it represents among all nations power coupled with the exercise of a certain jurisdiction. From time immemorial the sword has been the sceptre of military sovereignty. From this arose the profession of arms, as a distinctive calling in every age. Exposed as our early colonists were to the attacks

<sup>1</sup> Nullus *liber homo* capiatur vel imprisonatur aut dissaisetur, etc., etc., cap. 29.

<sup>2</sup> Benton's Thirty Years' View, vol. 1, ch. 35; vol. 2, ch. 32, 33, 36, 37.

of savages, the possession of arms became an indispensable adjunct to the agricultural implements employed in the cultivation of the soil. Men went armed into the fields, and went armed to church. There was always public danger. This was recognized by the laws of the Plymouth Colony, which required that "each person for himself have piece, powder, and shot—viz., a sufficient musket or other serviceable piece for war, with bandeleroes, swords, and other appurtenances for himself, and each man-servant he kept able to bear arms." And another ordinance required that men should go armed to church.<sup>1</sup> Whence it followed that the "embattled farmers" of the Revolution naturally enough became the minute men of Concord and Lexington, and the founders of our national system of militia.<sup>2</sup>

Therefore, it was not necessary that the right to bear arms should be granted in the Constitution, for it had always existed. It is not in consequence dependent upon that instrument, and is only mentioned therein as a restriction upon the power of the national government against any attempt to infringe it. In other words, it is a right secured and not created.<sup>3</sup> But this prohibition is not upon the States, whose citizens are left free in respect to the extent of their enjoyment or limitation of the right. The word "arms" being used in its military sense alone, and as part of the equipment of a citizen in the public service, the provision does not prevent a State from enacting laws regulating the manner in which arms may be carried. Thus, the carrying of *concealed* weapons may be absolutely prohibited without

<sup>1</sup> Plymouth Colony Laws (Boston, 1836), pp. 45-176, 192.

<sup>2</sup> J. Adams, "Letter to Abbé Mably," Works, vol. 5, p. 495.

<sup>3</sup> U. S. v. Cruikshank, 92 U. S. 542; State v. Hewson, 5 Ired. 350; Fife v. State, 31 Ark. 455.

the infringement of any constitutional right, while a statute forbidding the bearing of arms openly would be such an infringement. In order to prevent breaches of the peace, by either one person going armed in public, or by military associations of persons desiring to incite riots and disorderly conduct, a State may, as part of its police regulations, require that such assemblages shall obtain a license from the municipal authority of the place before parading with arms; or that a private citizen shall obtain a license in order to be permitted to carry a concealed weapon.<sup>1</sup>

The militia of a State represent that reserved power in its political sovereignty, which authorizes it to resort to force in order, if necessary, to execute its laws. Whenever, therefore, the civil authority is obstructed in its administration by any force which it cannot successfully overthrow, it is made the duty of the Executive of the State to employ the militia for the purpose of restoring its legal supremacy. If even then it cannot succeed, by reason of the supervention of domestic insurrection, it may call upon the President to render the needed assistance by calling out the militia of other States, under Title 59 of the Revised Statutes, § 5297, which recite that "in case of an insurrection in any State against the government thereof, it shall be lawful for the President, on application of the Legislature of such State, or of the Executive, when the Legislature cannot be convened, to call forth such members of the militia of any other State or States, which may be applied for, as he deems sufficient to suppress such insurrection, or on like application to employ for the same

<sup>1</sup> *Nunn v. State*, 1 Geo. 243; *State v. Chandler*, 5 La. Ann. 489; *State v. Smith*, 11 Ibid. 633; *State v. Jumell*, 13 Ibid. 399; *Andrews v. State*, 3 Heisk. 165; *Presser v. Illinois*, 116 U. S. 252.

purposes such part of the land or naval forces of the United States as he deems necessary.”<sup>1</sup>

“ART. 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.”

This provision has become so entirely obsolete in respect to any probable contingency of our civil life, that its presence in the Constitution serves only as a reminder of one of the oppressive measures from which the colonists suffered at the hands of the British Crown. It has been introduced into the constitutions of most of the older States because of its association with the Declaration of Independence, and the formation of those constitutions at a time when the waves of revolutionary agitation not having yet subsided, men still entertained apprehensions of boding evil, without exactly knowing where to look for it. Even a Commonwealth government bore in their minds an aspect of latent insecurity, which could only be quieted by putting the military in subordination to the civil authority in time of peace.<sup>2</sup>

“ART. 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.”

This clause has been held to apply only to the power of the United States in its regulation of searches and seizures, but not to affect proceedings undertaken under the authority of a State.<sup>3</sup> Even in the case of the Gen-

<sup>1</sup> Stat. at Large, vol. 4, p. 424; 15th Benton's Debates of Congress, 130.

<sup>2</sup> Story, Const., §§ 1899, 1900; Rawle, Const., 126.

<sup>3</sup> *Smith v. The State*, 18 How. 71; *Ex parte Burford*, 3 Cranch, 448; *Ex parte Field*, 5 Blatchf. 63.



eral Government, it has no reference to civil proceedings for the recovery of debts of which a search-warrant forms no part. And the name *warrant* of distress does not from that fact alone bring it within the constitutional prohibition.<sup>1</sup>

In alleged breaches of the revenue laws great latitude has often been allowed to ministerial officers in their searches for books and papers, and the regulations of Congress on the subject, however arbitrary, have been sustained.<sup>2</sup> Most of our State constitutions repeat this prohibition against "*unreasonable searches*," and thus render it unnecessary to examine the question of the effects which would result to the rights of the people from an omission of it. There are special cases where, from the facility of the concealment of the perpetrator of a crime, or where the subject-matter constituting its *corpus delicti* being capable of easy removal or destruction, it becomes necessary that its discovery should be speedily made, in order to secure corroborative evidence, after *prima facie* proof that a crime has been actually committed. Illustrations of this may be found in the necessity of seizing liquors, poisons, counterfeit money, and the tools and implements for its manufacture; forged papers; obscene pictures; gambling apparatus; concealed weapons, etc., all which seizures may be permitted under statutory provisions without contravening the constitutional immunity against unreasonable searches. But in the case of the seizure of one's private papers, in order to be used as incriminating evidence against him, the same rule does not apply, and he would be protected under that clause of the fifth amendment to the Constitution, which declares that no person "shall be compelled in any criminal case

<sup>1</sup> *Murray v. Hoboken Co.*, 18 How. 72.

<sup>2</sup> *Cooley's Const. Lim.*, p. 304; *Henderson's Distilled Spirits*, 14 Wall. 44.

to be a witness against himself." In like manner, where a statute authorizes allegations to be taken *pro confesso* against a party, merely because he refuses to produce his private papers and books in Court, the above prohibition will protect him. Both amendments, it will be perceived, relate to the personal security of the citizen.<sup>1</sup>

#### TELEGRAPHIC COMMUNICATIONS.

The question whether telegraphic messages, not being sealed, are in the nature of private correspondence, and to be protected, like letters in the mail, against compulsory production in the hands of a telegraph company, has given rise to many contradictory opinions as to their proper legal status under the fourth amendment to the Constitution.

The introduction of the telegraph as an instrument for the rapid transmission of communications, has made it the successful rival of the post-office in every part of the country. From the very nature, however, of the agent which transmits the message, no mechanical instruments in the form of letters, seals, mailbags, or locks can be employed as vehicles of secret transportation, as is the case with the mails. Of necessity, the operator at both ends of the line must read the message, and of necessity also, in order to protect itself against charges of negligence in transmission, the telegraph company may keep the message among its files, where it is at all times accessible to its officers. In the ordinary sense, therefore, in which the term private correspondence is employed, it can never be justly applied to a telegram which, however private may be the subject of its contents, is voluntarily disclosed to an operator

<sup>1</sup> *Boyd v. U. S.*, 116 U. S. 616; *Comm. v. Dana*, 2 Met. (Mass.) 329.

and stranger occupying no confidential relations to the sender, the latter well knowing that the necessities of transmission may require several repetitions of his message by fresh operators along the line until it reaches its destination. Meanwhile, and in mid-career, it is liable to be read by any one who chooses to tap the line, and this, too, without any imputable negligence to the company transmitting the message.

The full knowledge of these incurable liabilities to disclosure is confessed by the public, in the daily employment by many persons of cyphers for their correspondence. It is safe to assert that, at the present day, no prudent merchant having large commercial transactions to carry on by the aid of the telegraph, ever fails to protect himself by the use of a cypher, amid the rivalries of competition engendered by the fluctuations of the world's money-markets. And we know that governments, in communicating with their agents in foreign parts, use no other method. What the sealed letter and the mailbag insure of secrecy in communication, the cypher seeks, and to a large degree serves to accomplish in respect to the telegram. And this security is further aided by those statutes which, in many States, prohibit the wilful and unlawful disclosure by telegraphic agents of the contents of any messages.<sup>1</sup> These statutory inhibitions seem to provide all the protection which the nature of the telegraphic message will permit, for if we admit that cypher telegrams, undecipherable by an operator, may assume the character of a sealed letter as between the sender and receiver, and be even privileged communica-

<sup>1</sup> The States that have any prohibitory legislation relating to the disclosure, or feloniously obtaining knowledge of the contents of telegraphic messages, are Arkansas, California, Colorado, Dakota, Florida, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Michigan, Minnesota, Nebraska, Nevada, North Carolina, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, and Wisconsin.

tions, they are still not mail-matter protected by an Act of Congress, and whose inviolability, therefore, continues in the hands of the telegraph company.

This has been substantially the view taken by our courts when called to pass upon the question. The cases, indeed, have not been many, but the decisions have been harmonious, wherever the claim of inviolability has been made.<sup>1</sup>

In view, however, of the ethical aspects which a question of this character, partly domestic, as well as economic, may be made to assume, text-writers of accredited authority have differed in opinion, not upon what is, but what ought to be the law governing the status of the telegram before courts. Judge Cooley has taken the ground that "the proper view to take of this subject seems to be to consider it in the light of the rules which govern private correspondence by mail."<sup>2</sup> And again he says: "We must maintain the opinion, notwithstanding the decision (alluding to *State v. Litchfield*), that the public are not entitled to a man's private correspondence whether obtainable by seizing it in the mails, or by compelling the operator of the telegraph to testify to it, or by requiring his servants to take from his desks his private letters and journals and bring them into Court on subpoena *duces tecum*."<sup>3</sup>

These reasons, while excellent from an ethical standpoint and as measuring the extent of protection which the law should give to the private correspondence of the citizen, do not, however, render it any more possible to do so than has been already done by cyphers and statutes. Nature having ordained the laws and the

<sup>1</sup> *State v. Litchfield*, 58 Me. 267; *Ex parte Brown*, 72 Mo. 83; *Henisler v. Freedman*, 2 Pars. Sel. Cases (Pa.), 274; *U. S. v. Babcock*, 3 Dill. 566; *Wood v. Miller*, 55 Iowa, 168.

<sup>2</sup> *American Law Register*, vol. xviii., p. 69.

<sup>3</sup> *Const. Limitations*, p. 307, n.

agencies through which telegraphic messages can alone be transmitted, when delivered to a public telegraph company, and the public understanding this fully, it is evident that these are limitations to secrecy, which can only be cured through the absorption by the General Government of the telegraphic system of the country, and converting it by appropriate legislation into a branch of the postal service.

Mr. Hitchcock,<sup>1</sup> of St. Louis, who has treated the subject in a masterly manner, does not evidently find in the ethical aspects of the question any sufficient grounds on which to pronounce a dissenting opinion upon the judgment of the Courts in the cases considered. After an exhaustive examination of the entire field of discussion, he states the law as it is under existing forms of prohibitory State legislation. In this he is followed by Mr. Gray,<sup>2</sup> in his work upon "Communication by Telegraph."

The present legal status of the telegram as judicially determined by the cases cited, is substantially as follows:—

1st. Telegraphic messages, however confidential, are not privileged communications in the hands of third parties, who may be compelled to produce them or testify to their contents in the absence of the telegram.

2d. That where the statutory prohibition is only against the *wilful and unlawful* disclosure of messages, they may still be brought into Court by compulsory process, under subpœna *duces tecum*.

3d. That even where the statutory prohibition is unqualified, there is always an exception implied in favor of legal process, since obedience to a subpœna is obligatory upon all.

<sup>1</sup> Southern Law Review, vol. 5, N. S. 473.

<sup>2</sup> Communications by Telegraph, Boston, 1885, ch. x., p. 206.

4th. That the same rule which governs search warrants in general, should govern in the case of telegraphic messages. But in view of the peculiar character of such writings, the particular message needs to be stated and specified only with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may know what is wanted of him, and have the papers on the trial, so that they can be used if the Court shall then determine that they are competent and relevant evidence.<sup>1</sup>

5th. But either party to a message may waive its privilege in the hands of a telegraph company.

“ART. 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 subjected 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.”

#### CAPITAL AND INFAMOUS CRIMES.

The division of all crimes into the three classes of “treason,” “felony,” and “misdemeanor,” restricts the definition of a “capital or otherwise infamous crime” to the two first-named classes. They are “high crimes” as distinguished from misdemeanors. The above constitu-

<sup>1</sup> U. S. *v.* Babcock, 3 Dill. 566. For further information upon the subject, see Barnes's Case, Congressional Record, vol. 5, pt. 1, Forty-fourth Congress, second session; May's Const. Hist., ch. xi.; Brown's Const. Law, 615; Todd's Parliamentary Government, vol. 1, p. 272.

tional provision is a limitation solely upon the powers of the General Government. The States are not bound by it. By infamous crime is to be understood one which subjects a person to the infamy of capital punishment, or of imprisonment for life, or a term of years in a State prison, together with incapacity to testify in a court of justice. The States thus having the exclusive regulation of procedure for the punishment of crimes, the words "due process of law" in the Constitution, do not necessarily require an indictment by a grand jury in a prosecution by a State for a felony, therefore a party may be tried on information for an alleged offence, without a previous indictment by a grand jury,<sup>1</sup> and this even under the operation of the Fourteenth Amendment.

In respect to crimes that are neither capital nor infamous, Congress is non-restricted in its power to provide that they may be tried either by indictment or information.<sup>2</sup>

#### LAND AND NAVAL FORCES.

Congress, having exclusive authority to make rules for the government of both land and naval forces, and of the militia when in actual service in time of war or public danger, may provide for the trial and punishment of offences committed in either branch of the public service by courts martial, without indictment or the intervention of a jury. It has consequently power to prescribe the manner of charging the accused and of conducting the trial, together with the punishment

<sup>1</sup> *Hurtado v. California*, 110 U. S. 516; *Munn v. Illinois*, 94 *Ibid.* 113; *Walker v. Savinet*, 92 *Ibid.* 90; *Missouri v. Lewis*, 101 *Ibid.* 22, 31; *Ex parte Wilson*, 114 *Ibid.* 417; *Jane v. Comm.*, 3 *Metc. (Ky.)* 18; *State v. Keyes*, 8 *Vt.* 57; *Mackin v. U. S.*, 117 U. S. 348; *Ex parte Bain*, 121 *Ibid.* 1.

<sup>2</sup> *U. S. v. Maxwell*, 3 *Dillon*, 275.

which may be inflicted. Even after a party's connection with the public service has ceased, Congress may still authorize his trial by court martial for an offence committed by him while formerly in such service, because it is a case "arising in the land or naval forces."<sup>1</sup> It is the forum of the crime which determines the jurisdiction over it. Therefore, with the sentences of courts martial which have been convened regularly and have proceeded legally, and by which punishments are directed that are not forbidden by law, civil courts have nothing to do, nor are they in any way alterable by them.<sup>2</sup> The jurisdiction of courts martial can only be questioned when it has been wrongfully exercised in attempts to try and punish persons who are not the proper subjects of military discipline.<sup>3</sup>

#### TWICE PUT IN JEOPARDY.

This provision has been held to be binding upon the States, as well as upon the general government, not only because it is general in its nature and unrestricted in language, but also because it rests upon a fundamental principle of the common law. The term jeopardy of limb, however, has no significance in the United States, where mutilation, or loss of any member, was not inflicted by the laws of any of the States at the adoption of the Constitution. It means that a party shall not be twice exposed to the risk of a conviction of felony, the punishment of which, anciently, consisted of dismemberment. As he cannot be twice exposed except upon trial, the clause prohibits a second trial of an acquitted person for the same offence. But to render the plea of

<sup>1</sup> *In re Bogart*, 2 Sawyer, 396.

<sup>2</sup> *Dynes v. Hoover*, 20 How. 82.

<sup>3</sup> *Barrett v. Hopkins*, 2 McCrary, 129.



a former acquittal valid, it must be a legal acquittal by judgment, upon a trial for substantially the same offence. Anything short of this, whether by disagreement of a jury, or the withdrawal of a juror, will not suffice.<sup>1</sup>

#### NOT COMPELLED TO BE A WITNESS AGAINST ONESELF.

As no person who is called upon to answer a criminal charge is generally inclined to furnish affirmative evidence of his own guilt, the above protection is not only a rebuke to those times when torture could be legally resorted to, in order to extort self-incriminating proof from the accused, but also a bar to the right of any court to punish for contempt a person occupying this position, who refuses to give testimony against himself. It was the history of English jurisprudence, with its many instances of cruel and unjustifiable methods of extorting confession, and the continuing practice in the criminal tribunals of Continental Europe of subjecting an accused person to a course of harassing interrogatories, which inspired the framers of the Constitution to introduce the above clause. No accused person, therefore, can be compelled on trial to answer any questions which in his opinion are self-convicting. Even if he offers himself as a witness in his own behalf, under any statute, that would not authorize the infliction of a penalty to compel him to disclose more than he chooses.

It must be borne in mind that the position of a criminal when on trial, is a peculiar one. All presumptions are in favor of his innocence. Consequently, when he testifies for himself, it is evident that he is not present

<sup>1</sup> *People v. Goodwin*, 18 Wend. 187; *U. S. v. Coolidge*, 2 Gallis. 364; *Comm. v. Bowden*, 9 Mass. 494; *U. S. v. Riley*, 5 Blatchf. 204; *Ex parte Lange*, 18 Wall. 163; *U. S. v. Townmaker*, Hempst. 299; *U. S. v. Perez*, 9 Wheat. 579; *Moore v. People*, 14 How. 13.

as an ordinary witness, but stands as an accused party protected by the Constitution in his permitted concealment of any matters which affect his criminal responsibility.<sup>1</sup> It is true that he may be cross-examined upon all facts which are relevant to the issue, and which the court has decided to be the subject of proper questions, and if he refuses to answer, such refusal may be commented upon by the prosecution and considered by the jury. This is the only penalty incurred by him. But he cannot, nevertheless, be compelled to answer such questions or punished if he does not. The constitutional protection covers him as often as he chooses to invoke it. So too a confederate testifying on the trial of a co-offender, may refuse to answer questions tending to show his own complicity in the crime, for where there is no legal provision protecting the witness against the reading of his previous testimony on his own trial, he cannot be compelled to answer.<sup>2</sup>

NOR DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT  
DUE PROCESS OF LAW.

The phrase due process of law, or "law of the land,"<sup>3</sup> the latter having come down from Magna Charta, was in its original significance intended to describe that regular form of judicial proceeding which is permanently established for the government of communities, in contradistinction from those summary measures which in

<sup>1</sup> *Cooley Const. Lim.* 317 (n); *State v. Ober*, 52 N. H. 459; *People v. Thomas*, 9 Mich. 321; *People v. Hackley*, 24 N. Y. 82; *People v. Mondon*, 103 N. Y. 211; *Comm. v. Mullen*, 97 Mass. 545; *Comm. v. Morgan*, 107 *Ibid.* 199; *Boyd v. U. S.*, 116 U. S. 616.

<sup>2</sup> *People v. Mather*, 4 Wend. 229.

<sup>3</sup> *Mayo v. Wilson*, 1 N. H. 55; *Porter v. Taylor*, 4 Hill, 140; *Story on Const.*, § 1789; *Hurtado v. California*, 110 U. S. 516; *Walker v. Savinet*, 92 U. S. 90; *Stuart v. Palmer*, 74 N. Y. 101.

England had been permitted to disgrace the administration of justice, down even to the time when our Constitution was framed. Under a parliamentary government, and a flexible constitution altered and shaped to suit the varying moods of political majorities, it had been made possible to enact laws of a most despotic character, and destructive of both personal liberty and of property rights. Acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures had all been witnessed as emanations from the law-making power. As such, their obligatory character made them the law of the land, irreversible by any of its tribunals.

The memory of these Acts, from some of which they had themselves suffered, led the framers of the Constitution to introduce into that instrument this insuperable barrier against arbitrary judicial proceedings. And since every enactment is not necessarily the "law of the land," particularly when it may chance to be a special statute addressed to the rights of an individual or a locality, the phrase "due process of law" has a general meaning covering with impartial equality all the civil rights of all the citizens. Under "due process of law," therefore, a citizen cannot be deprived of his right to life, liberty or property, except after a trial conducted according to a system of judicial procedure established for the protection of the entire community in the enjoyment of these same rights, and applicable to the same class of cases as the one in question. The phrase does not always mean trial by jury, nor trial by any particular tribunal, or number of judges, but it means trial had, proof adduced, and judgment rendered under, and according to a general system of law which the community has established for the protection of the civil rights of all its

members.<sup>1</sup> This provision is repeated in the Constitutions of all the States.<sup>2</sup>

PRIVATE PROPERTY NOT TO BE TAKEN FOR PUBLIC  
USE WITHOUT JUST COMPENSATION.

Under the right of eminent domain as an attribute of sovereignty, there is no form of property required for public use which the State may not seize and appropriate.<sup>3</sup> The only restriction upon the exercise of this right is that the property cannot be taken without just compensation to its owner. This clause does not apply, however, to the power of taxation, which in a certain sense may be construed as a taking of private property for public use. But even were this to be so regarded, there is still a compensation returned in the benefits of peace, protection to property, and security to life, resulting from good government. This is what the government returns to the citizen, as a just compensation for the private property taken from him in the form of a tax. And its right is not to be questioned, when exercised through legislative power, in raising money for public uses. This sovereign power to be exercised solely in behalf of the public, of necessity excludes any right of levying a tax for private objects and purposes.<sup>4</sup>

The taking of private property for public use is governed by the law only of public necessity. This law being in each case governed by the circumstances of the

<sup>1</sup> *Murray v. Hoboken Land Co.* 18 How. 272; *U. S. v. Taylor*, 3 McLean, 539; *Westerwelt v. Gregg*, 12 N. Y. 209; *Pennoyer v. Neff*, 95 U. S. 714; *Wynehamer v. People*, 13 N. Y. 432.

<sup>2</sup> *Poor's State Constitutions, passim*; *Sedgwick Const. and Stat. Law*, 474; *Cooley Const. Lim.* 351.

<sup>3</sup> *Vattel*, ch. xx., § 244; *Domat, Civil Law*, lib. 1, tit. 3, § 13; *Varick v. Smith*, 5 Paige, 159; *Ervine's Appeal*, 16 Penn. 256.

<sup>4</sup> *Allen v. Jay*, 60 Me. 124.

occasion, no particular degree of public necessity is required in order to justify its exercise.<sup>1</sup> If, in the opinion of the legislative power, or of any person or body whom it may designate, a benefit to the public will accrue from taking private property, it may be done, but only under the restrictions imposed by the Constitution.<sup>2</sup> The emergency may be sudden as in time of war, or impending public danger; or the case may admit of delay and extended inquiry, but in either condition, whenever the necessity is shown to exist, private rights must give way to the public good.<sup>3</sup> Necessarily, whether the property be sacrificed, as in cases of checking conflagration, or whether it is merely converted to a different use, as in the construction of a highway, bridge, public park, etc., the taking of such property creates an obligation on the part of the government to re-imburse the owners to its full market value. And where the suddenness of the emergency does not admit of condemnation by formal procedure, the party making the seizure may always justify in an action of trespass, by showing the antecedent existence of such a public necessity. *Salus populi suprema lex* becomes the rule governing the situation.

As incident to the right of eminent domain, the United States have the power to appropriate lands or other property within the States for public use; otherwise, the unwillingness of property-holders to sell, or the action of a State prohibiting such sale to the Federal Government, might seriously embarrass it in the discharge of its functions. And since this power exists, and is complete in itself, it can neither be enlarged nor dimin-

<sup>1</sup> *Newcomb v. Smith*, 1 Chand. 71; *Swan v. Williams*, 2 Mich. 427.

<sup>2</sup> *Ex parte Barnard*, 4 Cranch C. C. 294; *Avery v. Fox*, 1 Abb. C. C. 246; *Balto. & Ohio R. R. v. Van Ness*, 4 Cranch C. C. 593; *Dickey v. Turnpike Co.*, 7 Dana, 113.

<sup>3</sup> *U. S. v. Russell*, 13 Wall. 628; *Mitchell v. Harmony*, 13 How. 134.

ished by a State, nor can the latter prescribe the manner in which it must be exercised. The right, therefore, is operative with, or without the consent of the State.<sup>1</sup>

The more usual way has been for the State, on the necessity arising for transferring the title to and jurisdiction over such lands or buildings to the General Government, to pass an Act of expropriation, and then to condemn the property, under a proceeding in one of its own courts. But this is not indispensable, nor does it interfere with the right of Congress to pass an Act authorizing the purchase and condemnation of private property within the States, and thus proceeding to acquire title without the agency of the State itself. On strictly constitutional principles, this would seem to be the more correct way, since the right of any sovereignty to take private property for its own use, cannot impart the right to take it for the use of another. The right is the offspring of a political necessity, limited to the particular sovereignty which is to be benefited. It cannot be assumed to exist in order to be exercised for the benefit of another.<sup>2</sup>

“ART. 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.”

This and the preceding amendment, both relating to

<sup>1</sup> *Kohl v. U. S.*, 91 U. S. 367.

<sup>2</sup> *Trombley v. Humphrey*, 23 Mich. 471.

criminal prosecutions, were not designed as limits upon the State governments in reference to their own citizens, but exclusively as restrictions upon the Federal power.<sup>1</sup> A strict interpretation of its language shows that it applies only to the case of offences committed within the limits of a State, because if committed outside of those limits, the crime would not be a local offence, but might be tried at any place which Congress might designate.<sup>2</sup> The trial, therefore, must be had in some district established by law *before* the commission of the offence; the district cannot be established subsequently for the purpose of such trial.<sup>3</sup> The purpose of the amendment was to definitely localize the forum of every crime committed by a person, not in the land or naval forces, so as not to leave the rights of the accused to be settled by the caprice or hostility of Congress.<sup>4</sup> As to the right of trial by jury, this is a right appertaining to all citizens, except those connected with the Army or Navy, or with the militia, when in actual service in time of war or public danger. Wherever the Courts are open, citizens, with these exceptions, when charged with crimes are guaranteed the right of trial by jury, and cannot be tried by military commission, nor can a party be tried in one State<sup>5</sup> for an act committed in another. The crime and its punishment are attached to the jurisdiction within which it was committed.<sup>6</sup>

The indictment, representing as it should the entire accusation, must set forth with clearness and precision the specific offence with which the accused stands charged.<sup>7</sup> It must be unambiguous in language, and

<sup>1</sup> *Twitchell v. Comm.*, 7 Wall. 331.

<sup>2</sup> Const., Art. 3, § 2; *U. S. v. Dawson*, 15 How. 467.

<sup>3</sup> *U. S. v. Maxon*, 5 Blatchf. 360.

<sup>4</sup> *U. S. v. Dawson*, 15 How. 473.      <sup>5</sup> *Ex parte Milligan*, 4 Wall. 2.

<sup>6</sup> *People v. Merrill*, 2 Parker Co. Cas. 590.

<sup>7</sup> *U. S. v. Cruikshank*, 92 U. S. 542.

contain distinct averments of material facts. The party indicted is entitled to be confronted with the accusing witnesses, and to have compulsory process to secure the attendance of his own. Also, to be assisted by counsel of his own selection, or if not already provided, it is the duty of the Court to assign to some attorney the performance of this task.<sup>1</sup>

The above guarantees of a fair trial to an accused person, which are daily put in practice in every State of the Union, have become so much a matter of course in our criminal procedure, as to have made us forget that at the time of the adoption of the Constitution, and under the common law of England which became the common law of many of the States, an accused person was not entitled to the assistance of counsel upon his trial. Nor was this privilege accorded by statute until the passage of 6 and 7 Wm. 4th, cap. 114, in 1836.<sup>2</sup>

“ART. 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.”

The first clause of the above provision has been continuously decided to apply to trials in Courts of the

<sup>1</sup> The question whether a party can claim to have been erroneously convicted, by being deprived of the equal protection of the laws, because defended by counsel not of his own choice, but assigned him by the court, and which counsel it appears had never been admitted to practice at the bar, and was not at the time of the trial an attorney of the court, is now pending before the Supreme Court of the United States in the case of the Japanese murderer, Shebuyo Jugiro, under sentence of death in New York.

<sup>2</sup> Statutes at Large, vol. 76, p. 653. Not until the passage of 7th Wm. 3d, cap. 3, in 1695, were persons accused of high treason in England, allowed the assistance of counsel, or a view of the indictment. Even then, the statute forbade that the names of the accusing witnesses should be furnished to the defendant.—*Statutes at Large*, Vol. 3, p. 593.



United States alone, and not to State Courts. It refers to trials by a common law jury of twelve acting unanimously in finding a verdict. Inasmuch however as it is not the trial itself, but "the right of trial by jury" which shall be preserved, the benefit of it may be relinquished by any party, who may elect to avail himself of some other means for enforcing a legal right.

Preliminary inquiries, that do not dispose by regular trial of the merits of a controversy, so as to form a final judgment, are not included in this provision. It refers to suits at common law alone, and does not include suits in admiralty. Therefore, trial by jury may be denied in any proceeding which is not a common law proceeding—and passing from Federal jurisdictions to those of States, it is conceded that the latter may, if they choose, provide in their own Constitutions for the trial of all offences against the State, as well as for the trial of civil cases without the intervention of a jury.<sup>1</sup>

The second clause is a wholly independent one, and to be read apart. It is a restriction upon the power of the Federal Courts to re-examine any facts tried by a jury in a State Court, in any other manner than according to the rules of the common law. "The reasons, therefore," says Mr. Justice Nelson,<sup>2</sup> "for the application of this clause of the Seventh Amendment to cases coming up for review from the State Courts, were as strong as in cases from the inferior Federal Courts, and the history of the amendment will show that it was the apprehension and alarm in respect to the appellate jurisdiction of this

<sup>1</sup> *Barron v. Baltimore*, 7 Peters 247; *Livingston v. Moore*, *Ibid.* 551; *Ex parte Martin*, 2 Paine 348; *Fox v. Ohio*, 5 How. 434; *Edwards v. Elliott*, 21 Wall 557; *Cooley Const. Limit.*, p. 19, 410; *Pearson v. Yewdall*, 95 U. S. 294; *Miller v. McQuerry*, 5 McLean, 469; *Smith v. Maryland*, 18 *Ibid.* 76; *Waring v. Clark*, 5 *Ibid.* 441.

<sup>2</sup> *Justices v. Murray*, 9 Wall. 274; *Patrie v. Murray*, 43 Barb. 331

Court, over cases tried by a jury in the State Courts, that led mainly to its adoption.”

According to the rules of the common law, the only mode which can be resorted to, for the purpose of re-examining facts tried by a jury, is the granting of a new trial by the Court where the issue was tried, or to which the record was returnable, or the award *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings.<sup>1</sup> In questions arising under State laws, and not involving any infringement of the provisions of the Constitution of the United States, the appellate State Courts will always continue to be the final arbiters. Their jurisdiction is complete and cannot be questioned. “Writs of error to State Courts have never,” says Chief Justice Chase, “been allowed as of right. It has always been the practice to submit the record of State Courts to a Judge of this Court, whose duty has been to ascertain upon examination whether any question cognizable here upon appeal, was made and decided in the proper Court of the State, and whether the case upon the face of the record will justify the allowance of the writ.”<sup>2</sup> As a consequence, in all questions that are of Federal cognizance, the appellate jurisdiction of the Supreme Court will extend to State tribunals, in review of their judgments, since, in the language of the Federalist,<sup>3</sup> the National and State systems are to be regarded as one whole.

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

This provision, with the exception of the substitution of the word “*shall*” for “*ought*,” is a verbatim repro-

<sup>1</sup> *Parsons v. Bedford*, 3 Pet. 433; *Wetherbee v. Johnson*, 14 Mass. 412.

<sup>2</sup> *Twitchell v. Comm.*, 7 Wall. 324.

<sup>3</sup> Federalist, No. 82.

duction of a clause in the English Bill of Rights of 1688.<sup>1</sup> It was intended to operate as a restraint solely upon the government of the United States, and not upon that of the States.<sup>2</sup> Even in England, the statute was a restraint only upon the Crown and the Judiciary, but was not understood as in any way abridging the right of Parliament to prescribe, under its conceded omnipotence, any punishment for crime which it might deem proper. In view of the cruelties which had been practised upon political offenders under the Tudors and Stuarts, its insertion as a guarantee in the Bill of Rights is not to be wondered at. The pages of England's State Trials, during these two reigns, are blistered with recitals of outrages upon decency and humanity committed under forms of law, by orders from the Crown, the Bench, and even by Ecclesiastical authority.<sup>3</sup> And the popular reaction found vent, at the installation of a constitutional dynasty, in the promulgation of the above clause, which furnished a model for our own Constitution builders.

Its introduction into the Constitution of the United States is remarkable, therefore, for the distrust which

<sup>1</sup> 1st Wm. III., cap. 2.

<sup>2</sup> 2 Sharswood's Blacks. Comm., p. 440; De Lolme on the Const., p. 251, n.; *Spies v. Illinois*, 123 U. S. 166; *Wilkerson v. Utah*, 99 U. S. 130.

<sup>3</sup> Prynne when convicted in the Star-chamber of a political libel was adjudged to stand in the pillory, lose his ears, pay a fine of £5000, and to be perpetually imprisoned. To which the Chief Justice Finch moved, by way of amendment, that "he should likewise be stigmatized in the cheeks with the two letters S. and L. (seditious libeller), to which all the Lords agreed." 3 State Trials, 725; *Lives of Lord Chancellors*, vol. 3, p. 243.

Dr. Alexander Leighton, a Scotch divine, convicted of "*slandering pre-lacy*," was ordered to be imprisoned during life; fined £10,600; and after being degraded from Holy Orders, set in the pillory in Westminster, there whipped, again set in the pillory, have one of his ears cut off, have his nose slit, be branded in the face with a double S.; again set in the pillory in Cheapside, there whipped; again set in the pillory and have his other ear cut off. 3 State Trials, 380; *Lives of Lord Chancellors*, vol. 3, p. 208.

it proclaims of a Federal code of criminal procedure, and the admonition which it conveys to the judicial as well as legislative departments of the national government. Referring to the origin of this provision, Chancellor Sandford, in pronouncing the judgment of the Court of Errors of New York, in *Barker v. The People*,<sup>1</sup> said: "The danger apprehended was by the parts from the new government of the whole, and not by any State from its own government. Each State was then at liberty, as it is now, to provide by its own Constitution that cruel and unusual punishments shall not be inflicted by its own government. Accordingly, several States in their constitutions, established since the adoption of this amendment to the Constitution of the Union, have provided that cruel and unusual punishment shall not be inflicted. Other State constitutions are silent upon the subject of punishments, either cruel or unusual. It is most evident that the States which have imposed these restraints upon their own governments, conceived that they were at liberty to do so or not; and that in their conception, the Constitution of the Union contained no such restraints upon State governments in the punishment of crimes against States. This provision concerning punishments is, therefore, as a part of the Constitution of the Union a restriction upon the government of the Union, and as a part of any State Constitution, it is a restriction upon the government of the State which has established it."

The action of those States prohibiting in their own constitutions cruel and unusual punishments would seem to dispose effectually of the question as to the extent of the operation of this restriction. If it be a limitation expressed in general terms, it can apply only to its own proper subject, viz., the national government,

<sup>1</sup> 3 Cowen, 703; *James v. Comm.*, 12 Serg. & R. 220.

and not until repeated in State constitutions would it be a restraint upon their action. "The people of the United States," says C. J. Marshall, in *Barron v. The Mayor of Baltimore*, "framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred upon this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally and necessarily applicable to the government created by the instrument."<sup>1</sup>

In a recent case in New York, arising under the new law changing the method of capital punishment from hanging to death by electricity, and where the contention was that this constituted "*cruel and unusual punishment*," the Court of Appeals said: "We entertain no doubt in regard to the power of the Legislature to change the manner of inflicting the penalty of death. The general power of the Legislature over crimes, and its power to define and punish the crime of murder, is not and cannot be disputed. The amendment prescribed no new punishment for this offence. The punishment now, as before, is death. The only change made is in the mode of carrying out the sentence. The infliction of the death penalty in any manner must necessarily be accompanied with what might be considered in this age some degree of cruelty, and it is resorted to only because it is considered necessary for the protection of society. In behalf of the relator, this legislation is assailed in no other way, than by attempting to show, that the new mode of carrying out a death sentence subjects the person convicted to the possible risk of torture and unnecessary pain. This argument

<sup>1</sup> 7 Pet. 243; *Pervear v. Comm.*, 5 Wall. 480; Story on the Const., § 1904.

would apply with equal force to any untried method of execution, and when carried to its logical results would prohibit the enforcement of the death penalty at all. Every Act of the Legislature must be presumed to be in harmony with the fundamental law until the contrary is clearly made to appear.”<sup>1</sup>

Upon an historical review of the entire subject of punishments as inflicted by judicial sentence, it will be found that at the time of the adoption of the Constitution, there was still remaining in England, a disposition to affix to certain crimes and offences penalties symbolical of the varying degrees of moral depravity which they represented to the mind and conscience of Parliament. Thus, offences illustrating simply meanness of disposition, as an instigating motive, were punished by public *whipping, putting in the pillory or in the stocks*; others of a graver character and evincing malignity of temper, or incurable vagrancy, by *burning in the hand or branding, or slitting of the nostrils*; others again by *cropping the ears*; while the highest penalties were reserved for treason, and might consist of *drawing, hanging, quartering, cutting off the hand, pressing to death, disembowelling, and decapitation*.

It was to these manifestly exceptional and revolting forms of punishment, particularly those involving needless public scorn and ignominy, or brutal mutilations of persons or members, that reference was had in this provision of the Constitution. They were all “*cruel*” in the best sense of that term, because they purposely prolonged the pain or mental agony of their subjects, while exposing them publicly to the jeers and even to the assaults of the rabble. Out of the sufferings of the condemned, they made a Roman holiday for the entertainment of

<sup>1</sup> People *ex rel.* Kemmler *v.* Durston, N. Y. State Reporter for April, 1890, p. 206; s. c. 136 U. S. 436.

the crowd. This was a perversion of the moral purposes of judicial punishment well calculated to destroy its impressiveness and efficiency.<sup>1</sup>

In respect to methods of inflicting capital punishment, the civilized world has passed through many stages of brutal experiment. Wherever revenge has been the instigating motive, the form of punishment has always revealed a studied design to couple torture with it. The gradual elimination of that motive has been accompanied by a corresponding diminution in the forms of judicial execution, as well as in the number of stages and instruments employed to accomplish it. Slowly, yet steadily, the spirit of humanity has reformed the criminal law of most countries, by changing public opinion in regard to the true object of the death penalty, and the most proper form of inflicting it. The result of this emergence from the darker days of the past as expressed in modern public opinion, when even not promulgated in written codes, is that—

1st. Punishment, of whatever kind, should not be cruel in itself, nor inflicted by instruments calculated to prolong suffering.

2d. That when the death penalty is to be inflicted, it should not be by any agency of an uncertain character, and which necessitates for its successful action a remote combination of circumstances circuitously affecting the functions of organic life, by secret and invisible means. Such for example as the action of poisons, electricity, forcible deprivation of sleep, inhalation of deadly gases, starvation, or slow bleeding unto death.

<sup>1</sup> Stephen's Hist. of Criminal Law in England, vol. 3, *passim*; Pike's Hist. of Criminal Law, vol. 2, *passim*; Lecky's Hist. of England in the 18th Century, vol. 1, p. 506. During the trials of witchcraft at Salem, the punishment of *pressing* (*peine forte et dure*) was applied to one Giles Cory who refused to plead. Washburn Jud. Hist. of Mass. 142.

3d. That such punishment should be inflicted by some agency which man can produce, direct, and control. It must be an agency which not only will produce death swiftly and surely, but which produces it by external violence addressed to the body, suddenly obliterating consciousness, and visible in all its effects to the jury present at the execution.

The founders of the Republic were Englishmen, and the old-time penalties so horrible of their kind, and some of which they had themselves just escaped as rebels, were reminders of an era of political enslavement and judicial tyranny, which they were determined should never be repeated by any national government of their own. Hence they affixed these prohibitions as an insurmountable barrier against either legislative or judicial oppression.

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

“ART. 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.”

These two articles, as well by legal as by political affinity, form the terms of a syllogism whose conclusion is expressed in the common predicate of the sovereignty of the People. They are best treated together, because they emerge from the same doctrine, in respect to the source of political powers—to their location—and to the extent to which they are reserved in the various spheres of their application.

As the people of the United States are the original source of all authority exercised by the national government, and as that government is one of *enumerated*



powers, and without restriction in its right to exercise those that are expressly given, it was neither necessary nor proper to define the powers retained by the States, and still less those retained by the people.

In relation to any fundamental *rights*, whether latent or expressed, inhering in the people, it is evident that their non-enumeration in the Constitution cannot primarily affect their existence; and the provision against their denial or disparagement is in the nature of an affirmance of their retention by them. All such rights form part of their prerogative power, as a political society whose sovereignty is indivisible, notwithstanding that its exercise has been delegated to various departments of government. The Constitution, therefore, only enumerates certain of these rights, because it would be impracticable to define the nature or the limits of the others, in advance of a case arising under which their substantial character could be questioned.

Apart, then, from the political omnipotence of the people as a whole, the States and their citizens, for all national purposes embraced by the Constitution, are one. They exist under the same Federal sovereignty, and are governed by the same laws. In all other respects the States are foreign to, and independent of each other. Although their constitutions and forms of government must be republican, there may be, and necessarily is permitted great diversity in their laws and institutions.<sup>1</sup>

Before the passage of the Thirteenth Amendment, every State had the undoubted right to determine the domestic *status* of its inhabitants. Slavery then existed in many of them. It had its rights under both State and Federal constitutions, being created by the one and recognized by the other. Nevertheless, the republican

<sup>1</sup> *Backner v. Finley*, 2 Pet. 590; *Augusta v. Earle*, 13 Ibid. 520; *Dodge v. Wolsey*, 18 How. 350.

form of government of the States, permitting it, was not called in question on that account. However incongruous, or inconsistent it might appear, it was maintained by the States, protected by Acts of Congress and judicial decisions, and acquiesced in as a status of settled legality. In the same Republic there existed a status of freedom and a status of bondage, both equally rooted in the Constitution. The Civil War expunged the latter and made freedom national. Since the abolition of slavery there is but one legal status for all the citizens of the United States. It is the status of freedom and political equality before the law. No State can now abridge it, or deny to its citizens the equal protection of its laws.

As to suffrage, if it were a natural right, it might find protection under Article IX. above, but it is only a State right, in the nature of a franchise conferrable by the State, and which Congress cannot control. Each State may, therefore, regulate its practice in this respect, as to it may seem best, subject only to the Fifteenth Amendment abolishing all discriminations against it, based upon race, color, or previous condition of servitude. It will be seen that the amendment does not forbid the States from denying the right to vote, except upon the above enumerated grounds. In all other cases, it is left optional with them to affix any conditions to its enjoyment which they may see fit. This they have always done with regard to age, sex, crime, and alienage.

Before a power can be exercised by the national government, it must have been granted to it in general terms, or given by necessary implication. Properly speaking, the national government can have no prerogative powers in itself, and therefore no prerogative rights. All its powers have been delegated to it as the agent of the people, organized to act within a certain

sphere of paramount authority.<sup>1</sup> It is supreme within that sphere, but not beyond it, and in addition, is clothed with such reserved powers only as by necessary implication form part of the attributes of its sovereignty.

From this it will be seen that the powers of the Federal Government are limited only in their number, but not in their nature.<sup>2</sup> Congress within its appropriate sphere of action enjoys the same powers as any other Legislature. Its jurisdiction and authority is precisely that which the Constitution has prescribed, and neither can be enlarged by any implication not derived from the provisions of that instrument.<sup>3</sup> As a correlative to this, the withholding of a power from the national government by omission to name it in the Constitution is a tacit limitation upon its exercise. And if not in terms prohibited to the States, nor incompatible with their relations to the Federal authority, is reserved to them respectively or to the people.<sup>4</sup>

But the powers conferred upon the national government by the Constitution, ample as they are, do not include the authority to provide every form of remedy which individual necessities may require. And though wrongs may be committed by State governments, the power to correct them cannot always be found in the Constitution. Each constituency must look to its own legislature, consisting of its own representatives, for the desired redress. "However absolute," says C. J. Marshall, "the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burthens, and that portion must be determined by the Legislature. This vital power may be

<sup>1</sup> *Van Husan v. Kanonde*, 13 Mich. 303; *Martin v. Hunter*, 1 Wheat. 304.

<sup>2</sup> *Kneedler v. Lane*, 45 Penn. 238.

<sup>3</sup> *Comm. v. Dennison*, 24 How. 66.

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

abused, but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments."<sup>1</sup> Therefore, where no express contract is violated, or no act performed which is in conflict with that instrument, no Federal question is raised which will authorize the interference of the Courts of the United States.

### RESTRAINTS UPON THE STATES.<sup>2</sup>

State constitutions being the organic law under which their local governments are to be administered, great latitude is allowed their citizens in framing them. The only limitation put upon the exercise of this political right is, that they shall not be violative of the Constitution of the United States. Within these boundaries, the people of every State are permitted to distribute sovereignty through their various departments of administration, in any manner which to them may seem best. When this has been done, and the State admitted into the Union, they may proceed to amend their organic law with like freedom, as often as they shall deem necessary. The Constitution has, nevertheless, placed restraints upon the exercise of State sovereignty in the following provisions contained in section 10 of Article I:—

“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 impair-

<sup>1</sup> *Providence Bank v. Billings*, 4 Pet. 514; *Missouri Pacific Railroad v. Humes*, 115 U. S. 512.

<sup>2</sup> As some of these subjects have already been considered under the heads of the similar restraints imposed upon the General Government they do not need any fresh discussion here. The same principles apply to both.

ing the obligation of contracts ; or grant any title of nobility.”

*As to any Treaty, Alliance or Confederation.*

These clauses substantially repeat the provisions contained in the sixth of the Articles of Confederation. They forbid any alliances between the States themselves, for any purposes whatsoever. This is the scope of their domestic intent. As to their external or international application, no State can manifestly have official dealings with any foreign power, nor can it, while exercising the sovereign right of excluding from its territory foreign paupers, lunatics or criminals, undertake to extradite any at the request of a foreign government, since this would be to “*treat*” with it in violation of the Constitution. The power of foreign extradition being part of the foreign intercourse of the country, is exclusively vested in the Federal government, and included in the treaty-making power.<sup>1</sup>

*As to Granting Letters of Marque and Reprisal.*

No State, even in Colonial times, has ever granted letters of marque. The Continental Congress, upon the passage of the English Embargo Act, and as incident to the power of declaring war, authorized the fitting out of privateers by Resolution of March 23, 1776.<sup>2</sup> Under this resolution some privateers were fitted out at various ports in Massachusetts ; also at New York and Philadelphia. Meanwhile vessels in our regular navy had been built by some of the States themselves.<sup>3</sup>

<sup>1</sup> *Holmes v. Jennison*, 14 Pet. 540, 570.

<sup>2</sup> *Vid. Jour. of Congress*, vol. 2, p. 107.

<sup>3</sup> *J. Adams' Works*, vol. 7, 224.

*As to Coining Money.*

This power, like the preceding one, being national, never existed in the States, even under the Confederation. The prohibition upon the States, therefore, while unnecessary in the presence of the power granted to Congress, was intended to prevent a State from incorporating banking institutions, and authorizing them to coin money, instead of doing so itself, by way of evading this clause of the Constitution. It has, accordingly, been held that such an authority granted to an individual or corporation, is as much a violation of the Constitution, as if the State had, through its own officers, coined money. The principle obtains here as elsewhere that what cannot be done directly, cannot be done indirectly.<sup>1</sup>

*No State shall "emit Bills of Credit."*

The financial discredit, which existed in all the States at the adoption of the Constitution, was the result of the paper currency with which they had sought to sustain themselves during the Revolutionary War. Under the designation of Bills of Credit, they were "an attempt to supply the want of the precious metals, by a paper medium intended to circulate between individuals, and between government and individuals for the ordinary purposes of society."<sup>2</sup> "They were," says Mr. Webster,<sup>3</sup> "a paper currency issued in various forms by the State governments during the Revolution and under the Confederation. They pledged the credit of the State and were intended to circulate from hand to hand." This scheme was not a new one, the various Colonies having

<sup>1</sup> *Briscoe v. Bank of Kentucky*, 11 Pet. 257.

<sup>2</sup> *Craig v. Missouri*, 4 Pet. 431, per Marshall, C. J.

<sup>3</sup> *Speech on the Currency*, Works, vol. 4, p. 337.

constantly resorted to it to raise money during the French and Indian wars.<sup>1</sup>

These bills were of the same nature as bank bills, and intended to circulate in the same manner. Being subject to great fluctuations in value, they tended to foster speculation, with all its ruinous consequences. In this they were aided by the various legislative provisions under which they were issued. Some drew interest, others not; some had funds arising from taxation pledged for their redemption; and some again had lands; and some again were issued without any pledge. At times also, they were made a legal tender, at others not; in some instances a refusal to receive them operated as a discharge of the debt, or again as a postponement, and in one State the party refusing to receive them was liable to a heavy penalty.<sup>2</sup> Whether permitted to circulate at such a value as the caprices of the money-market chose to fix, or whether forced into circulation by legislative command as legal tender, in either case they drove gold and silver out, as a circulating medium, and threw commerce and the public credit into a state of general confusion. It was the knowledge of these facts still surviving at the formation of the Constitution, and the urgent necessity of rehabilitating credit and confidence in the various States, which imposed upon its framers the duty of inserting this prohibitory clause:—

“To constitute a bill of credit within the Constitution,” says McLean, J., “it must be issued by a State on the faith of the State, and be designed to circulate as money. It must be a paper which circulates on the credit of the State; and is so received and used in the

<sup>1</sup> Massachusetts issued them as early as 1690. Vid. Hutchinson, vol. 1, p. 402; Laws of Connecticut, 1709; Laws of Rhode Island, 1710; Laws of Massachusetts, 1702; Laws of Pennsylvania, 1709.

<sup>2</sup> *Trevett v. Weeden*, 2 *Arnold's Rhode Island*, ch. 24.

ordinary business of life. The individual, or committee who issue the bill must have the power to bind the State, they must act as agents, and of course do not incur any personal responsibility, nor impart as individuals any credit to the paper."<sup>1</sup>

These definitions do not, it will be seen, include the idea of a *loan*, made to a State on the faith of its credit, accompanied by an acknowledgment of its indebtedness. Certificates of loans issued by a State are not bills of credit, although in the form of bonds they have now become negotiable securities, passing from hand to hand, and with which debts *may* be paid. Still, not being issued nor intended to circulate as money, they are not emitted as bills of credit within the express meaning of the Constitution.

Recent decisions have gone to the extent of holding that although a State may supply the whole capital of the bank, may be its only stockholder, select the directory, and receive the profits, if any be realized, and may make the bills receivable for debts and taxes, still the bills of the bank cannot be called bills of credit issued by the State, not being made payable by the State, but by the bank only.<sup>2</sup> Nor are coupon bonds issued by counties for money lawfully borrowed by them, within the constitutional prohibition.<sup>3</sup>

*No State shall make anything but Gold and Silver Coin a Tender in Payment of Debts.*

While a State may incorporate a Bank, and authorize it to issue its own notes, it cannot, as we have seen,

<sup>1</sup> *Briscoe v. Bank of Kentucky*, 11 Pet. 318.

<sup>2</sup> 2 *Daniel's Neg. Ins.*, p. 619; *Antoni v. Wright*, 22 Gratt. 833; *Wise v. Rogers*, 24 *Ibid.* 169; *Darrington v. Branch Bank*, 13 How. 12; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Woodruff v. Trapnall*, 10 How. 190.

<sup>3</sup> *McCoy v. Washington County*, 3 Wall, Jr., 389.



extend this power so far as to enable it to coin money. The only money known to the Constitution as legal tender is gold and silver coin. Consequently, bank notes, which are in the nature of bills of credit, or paper promises to pay, are not legal tender in payment of debts. Not being legally "*money*" they cannot have that character imparted to them by legislation. Even if the charter of a bank should attempt to make the notes of the bank a legal tender, such a provision would be repugnant to the Constitution.<sup>1</sup> In like manner, a statute requiring county scrip to be received for taxes due the county is invalid;<sup>2</sup> or the tender of the scrip of a corporation, in payment for damages assessed in favor of an individual whose property is taken for its benefit, is equally void.<sup>3</sup> In either case there is an attempt to substitute something other than lawful currency, as a tender for the payment of a debt. It is evident, from the current of decisions, that a State has no power over the currency farther than the right to establish banks, to regulate or prohibit the circulation within its territory of foreign notes, and to determine in what form of money the public dues shall be paid.<sup>4</sup>

#### *Laws Impairing the Obligation of Contracts.*

This clause of the Constitution, which has attained an importance far beyond the conception of its framers, may be said now to occupy the most prominent place in the history of the judicial interpretation of that instrument. Drafted at a time when our commerce was in its infancy; when public credit was depreciated to the lowest ebb; and confidence in monetary transactions

<sup>1</sup> *Briscoe v. Bank of Kentucky*, 11 Pet. 257.

<sup>2</sup> *Gaines v. Rives*, 8 Ark. 220.

<sup>3</sup> *State v. Beackmo*, 8 Blackf. 246.

<sup>4</sup> *Woodruff v. Trapnall*, 10 How. 208.

almost destroyed, it was manifestly introduced as a barrier against the tide of repudiation which threatened to overwhelm both public and private obligations. The extensive, and still extending judicial discussions to which it has given rise, the variable constructions put upon its meaning, and the numerous qualifications which it has received under the adjudications determining the range and limits of its legal application, have made it the subject of as much conflicting exposition as are some portions of the Statute of Frauds.

Without undertaking, therefore, to sketch any history of its authorship, or to trace its origin beyond the day of its adoption as a constitutional guaranty, we owe it to the memory of its distinguished framers to interpret it in the light of the events which gave it birth. Among the many contemporaneous expounders of the underlying meaning of this clause, Mr. Madison seems to have furnished the most reasonable solution in saying that, "In the internal administration of the States, a violation of contracts had become familiar, in the form of depreciated paper made a legal tender; of property substituted for money; of instalment laws; of the occlusions of the courts of justice, although evident that all such interferences affected the rights of other States relatively creditors, as well as citizens, creditors within the State."<sup>1</sup>

Mr. Webster, in his argument for the defendant in error, in *Ogden v. Saunders*,<sup>2</sup> took the same ground as Mr. Madison, by asserting that the main scope of this provision of the Constitution was general and political; that commerce, credit, and confidence were the principal things which did not exist under the old Confederation, and which it was a main object of the present Constitu-

<sup>1</sup> Shirley, Dartmouth Coll. Cases, p. 217.

<sup>2</sup> 12 Wheat. 213; Works, vol. 6, p. 34.

tion to create and establish. He denied that the obligation of a contract had its origin in municipal law, but, on the contrary, insisted that it rested upon universal law, citing the great civilians in support of his contention.

It seems evident, from the opinions of these two great expounders of the Constitution, that the obligation of contracts clause was originally meant to apply in an equitable sense, *ex bono et aequo*, to civil cases founded upon contracts, in analogy with the clause relating to *ex post facto* laws, which apply to criminal cases alone, and the juxtaposition of these two clauses would seem further to warrant this conclusion.<sup>1</sup> But change of time has radically modified these views. The rapid expansion of population over the territory of the nation; the stupendous development of commerce and the mechanic arts in connection with the birth of new States, new cities, new occupations, in a word of new circumstances, have all tended to furnish our present legislation with novel and perplexing subjects. Under such rapid transformations of political, and economic relations between the General Government and the States and their citizens, considerations of justice have supplied Courts with reasons for qualifying former interpretations of the Constitution, so as to keep pace with the varying necessities of the times. The rules and analogies of former decisions have had to be revised as well as scrutinized, and their import weighed in the balance of to-day, in obedience to the maxim that "the wisdom of the law is wiser than any man's wisdom."

Moreover, in the Constitution itself, the obligation of contracts clause was restricted to the States alone. It does not apply to the United States; consequently, Congress may pass laws impairing the obligation of contracts, which shall be the supreme law of the land, and as such

<sup>1</sup> *Kring v. Missouri*, 107 U. S. 227.

binding upon the States. Illustrations of such legislation may be found in the Legal Tender and Bankruptcy Acts cases.<sup>1</sup>

At present, therefore, the binding force of this clause as an equitable provision for the protection of creditors, has been sensibly weakened by recent decisions relating to the indebtedness of States. Thus, in *Louisiana v. Jumel*,<sup>2</sup> C. J. Waite said substantially that the State, by her "Debt Ordinance" of 1879, stopping the levy of a tax promised to be raised to pay the interest falling due on certain bonds issued by her in 1874, as well as the principal and interest maturing thereafter, had violated her contract with such bond-holders, and *if she could be sued*, might perhaps be made to set aside her wrongful appropriation of the money already collected. But as there was no existing statute at the time the bonds were issued, or since, or any judicial decision authorizing a suit against the State in her own courts, and she could not be sued in the courts of the United States by a citizen of another State, she could not be controlled in the disposition of moneys in her treasury, they being her own property, held by her officers as servants and not in trust for the benefit of her creditors. Justices Field and Harlan dissented, the former saying, "Of course the new Constitution in these provisions is a repudiation of the engagements of the Act of 1874, and of the Constitutional amendment of that year, and is a direct violation of the inhibition of the Federal Constitution, against the impairment of the obligation of contracts.

"Is this inhibition against the repudiation by the State of her engagements of any efficacy? The majority of the Court answer, No. I answer, adhering to the doctrines taught by a long line of illustrious judges pre-

<sup>1</sup> *Evans v. Eaton*, Pet. C. C. 322; *Hepburn v. Griswold*, 8 Wall. 637.

<sup>2</sup> *Louisiana v. Jumel*, 107 U. S. 711.

ceding me, 'Yes, it is,' and though now denied, I feel confident that at no distant day its power will be re-asserted and maintained.

"If a State can successively repudiate her solemn obligations; can obtain the surrender of a large portion of the demands of her creditors upon pledges for the more prompt payment of the remainder, and then set aside as worthless the pledges given, with no possibility of redress to the creditors, either by enforcement of the pledges, or by a return of the surrendered demands, what confidence can be reposed anywhere?" Mr. Justice Harlan's opening sentence, in endorsing his colleague's opinion upon the illegality of repudiation, will sufficiently express his views upon the effects of this decision. "Having a deep conviction that the opinion of the Court is in conflict with the spirit and tenor of our former decisions;<sup>1</sup> subversive of long-established doctrines, and dangerous to the national supremacy as defined and limited by the Constitution, I deem it my duty to dissent from it."

If, as the majority opinion decides, the parties to the suit are alone responsible, through their pleadings, for asking from the Court a remedy not within its power to grant, then the decision cannot be truly said to conflict with any past adjudications, that have brought this clause of the Constitution squarely within the jurisdictional powers of the same tribunal. The opinion simply decides a question of procedure, without, at the same time, impeaching the principle of law upon which the substantive contention is made to rest. Subsequently, in the Vir-

<sup>1</sup> Sinking Fund Cases, 99 U. S. 700-767; *Wolff v. New Orleans*, 103 U. S. 358-365; *Louisiana v. New Orleans*, 102 U. S. 203; *Green v. Biddle*, 8 Wheat. 1; *New Jersey v. Wilson*, 7 Cranch 164; *Providence Bank v. Billings*, 4 Pet. 514; *Woodruff v. Trapnall*, 10 How. 190; *Osborn v. Bank of the U. S.*, 9 Wheat. 738; *U. S. v. Lee*, 106 U. S. 196.

ginia Coupon cases,<sup>1</sup> the Court reasserted and maintained the inviolability of the constitutional guaranty, wherever the question came directly within the purview of its inquiry. It is safe, therefore, to say that outside of questions of pleading affecting the remedy sought for, whether in respect to its method, or the extent of its operations, the authorities are in harmony upon the essential principles governing the prohibition. No distinction either is recognized between legislative acts which are violative of the Constitution of the United States, and similar provisions introduced into State constitutions. Both are equally invalid, whether relating to executory or executed contracts, and neither can be pleaded in justification of wrongs committed under them.<sup>2</sup>

While a State is not an independent sovereignty as between itself and the National Government, it is yet sufficiently so, to enable it to disallow the claims of its creditors. By refusing to permit itself to be sued, it may successfully repudiate the obligation of its contracts, whether made with its own citizens, or those of other States or countries. Even though this conduct be in violation of the supreme law of the land, it may still escape the penalty of wrong-doing, because there is no tribunal whose judgment includes the power of compelling it to so adjust its political administration as to make provision, through the levy of a tax, for the payment of its own obligations. The question of repudiation resides with the political department of the State, over which the judiciary can exercise no authority. The *post-bellum* history of the Southern States unfortunately

<sup>1</sup> 114 U. S. 269.

<sup>2</sup> Louisiana v. Jumel, 107 U. S. 711; New Orleans v. Clark, 95 Ibid. 644.

affords many illustrations of the abuse of this power of State immunity.<sup>1</sup>

The various interpretations put upon this clause by different courts has tended to so widen its application, as to justify a somewhat extended examination of those legislative enactments, which have been adjudged to be violations of the constitutional prohibition. Thus, a statute impairing the obligation of a contract is an Act changing the laws governing a contract at the time of its formation. Such an Act may be addressed either to its formal validity, as an agreement between assenting minds; to its mode of construction, as a rule of substantive obligation governing their conduct, or to the method of its discharge or enforcement. A contract being a prospective obligation to do, or abstain from doing, some particular act, is founded upon the presumption of the stability of the law under which it is entered into. Any subsequent unsettling of this rule, by diminishing the duty, or impairing the right of either party, is an operative obstacle to the equitable execution of the contract, and consequently impairs the discharge of its obligation.

The constitutional inhibition against such legislative interference covers, not only the obligation of the contract, which is the law that binds the parties to perform their agreement, but all collateral stipulations connected therewith.<sup>2</sup> It embraces, however, only contracts which relate to property or some object of value, and such as confer rights which may be asserted in a court of justice. And in respect to these, its extent is unlimited,

<sup>1</sup> Cyclopædia of Political Information, by Lalor, Art. "Repudiation." *N. Hampshire v. Louisiana*, 108 U. S. 76; *U. S. v. N. Carolina*, 136 *Ibid.* 211.

<sup>2</sup> *Green v. Biddle*, 8 Wheat. 92; *Bronson v. Kinzie*, 1 How. 319; *Ogden v. Sanders*, 12 Wheat. 231; *Von Hoffman v. City of Quincy*, 4 Wall. 550; *Sturges v. Crowninshield*, 4 Wheat. 122; Story on the Const., §§ 1374-400.

for it includes all contracts, whether executed or executory, between private individuals, or between a State and private individuals, or corporations, or between the States themselves. Even where that which was property, at the time of the making of the contract, has subsequently been prohibited by the Constitution to be so, the obligation of the contract cannot be impaired by legislation.<sup>1</sup>

But an appointment to a salaried office is not a contract within the meaning of the Constitution. Says Daniel, J., in *Butler et al. v. Pennsylvania*: "The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither the one, nor the other of these arrangements, can constitute any obligation to continue such agents, or to re-appoint them, after the measures which brought them into being shall have been found useless; shall have been fulfilled, or shall have been abrogated, as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted during the continuance of a particular agency may, undoubtedly, be claimed both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconciled with neither common justice nor common sense."<sup>2</sup>

<sup>1</sup> *White v. Hart*, 13 Wall. 646, where it was held (in 1871) that a note given in Georgia in 1860, of which the consideration was a slave, slavery being at the time lawful by the law of the place, was valid, although by the Constitution of Georgia, adopted in 1868, no Court was authorized to enforce the payment of any debt, the consideration of which was a slave or the hire thereof. Chase, C. J., dissented, on the ground that the case was covered by the Thirteenth and Fourteenth Amendments abolishing slavery.

<sup>2</sup> 10 How. 416.



Homestead and exemption laws, though retroactive in their operations, do not come within the constitutional prohibition against impairing the obligation of contracts. Says Taney, C. J.: "The State may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles necessary in household furniture shall, like wearing apparel, not be liable to execution on judgments."<sup>1</sup>

Such laws are illustrations of the parental authority of the State, exercised in behalf of unfortunate citizens, whose wage-earning power and capacity for self-support depend upon the daily use of the implements of their trade. The question involved in their exemption from harassing litigation, and domestic ruin, is one of policy and humanity, not of law. It stands on a higher plane of ethics than bankruptcy or insolvent acts, which deal with the distribution of assets, while homestead and exemption laws deal with the foundation stones of family existence.

A charter being in the nature of a contract, its inviolability is placed under the same protection as are private agreements.<sup>2</sup> But measures relating to local government, such as municipal charters, are of necessity excepted from the operations of this guaranty. Hence no political rights acquired under such charters, and no constitutions or statutes are included among contracts. They are simply the agencies of government for executing its purposes. On this account, they are amenable to whatever changes the good of the community, may, from time to time, demand. The legislative department

<sup>1</sup> *Bronson v. Kinzie*, 1 How. 311.

<sup>2</sup> But this inviolability does not extend to those subjects which affect the public health. *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *Powell v. Penna.*, 127 *Ibid.* 678; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 *Ibid.* 650.

which has created them, can likewise alter or annul them, as to it may seem best. In this respect it is supreme and unrestrained in the exercise of its power. The principle of law governing the status of corporations in respect to the contractual character of their charters, was fully expounded by C. J. Marshall, in *Dartmouth College v. Woodward*, and the difference between municipal and private corporations clearly defined. "If," says he, "the Act of incorporation be a grant of political power; if it create a civil institution to be employed in the administration of government, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitations of its powers imposed by the Constitution of the United States."

#### STATE INSOLVENT LAWS IN THEIR RELATION TO THE OBLIGATION OF CONTRACTS.

At the adoption of the Constitution insolvent laws existed in all the States. They had always been necessary, but never more so than at that time. And, as a logical consequence of the depression of business, and of the accumulation of private debts which accompanied the Revolutionary War, they had been resorted to as a means of relief by merchants and others, who found in them an opportunity of escaping the worst penalties attendant upon financial misfortunes. The discharge of debtors from imprisonment, and the passage of statutes of limitation, barred effectually not only the remedy of creditors, but also their means of coercion. There had been a tendency to over-favor the debtor, by too easily discharging him from his contract without performance, and releasing him without payment, from not only a present, but even from

any future obligation to discharge his debt. The facility with which a party could thus, by operation of law, be released from the obligation of his contract without the consent of the party entitled to its performance, was destructive of good faith and credit in mercantile transactions. It put a premium upon successful chicanery, by making the law itself the instrument of its artful contrivances.<sup>1</sup>

The evidence of these facts was plainly in the minds of the framers of the Constitution, when they introduced into it the clause prohibiting the States from passing any laws impairing the obligations of contracts. In giving, therefore, to Congress the exclusive power of establishing *uniform* laws on the subject of bankruptcies, it recognized the impossibility of securing this result through State legislation, and while the power of the States over the regulation of insolvency was not taken away, it was always intended to be suspended by the enactment of a general bankrupt law. In the intervals of such Congressional legislation, the permanent insolvent laws of the States are in force, and operation, upon the remedies which the law gives to the creditor against the estate of his debtor, where both are citizens of the same State.<sup>2</sup> Both living within the same jurisdiction may be brought voluntarily, or involuntarily, under the

<sup>1</sup> Adverting to this fact, Mr. Justice Livingston, in *Adams v. Story*, 1 Paine C. C. 79-109, said, "During a long and arduous struggle for independence much individual misery and distress were unavoidably produced. Various expedients were accordingly resorted to, and the practice of interfering between creditor and debtor became so very extensive, and so inconsiderate, as in many instances to place the former entirely at the mercy of the latter, and that, too, under laws which were apparently introduced with no other view than that of affording to the debtor a temporary relief from the pressure occasioned by the then situation of the country."

<sup>2</sup> *Reed v. Taylor*, 32 Iowa, 209; *Scully v. Kirkpatrick*, 79 Penn. 324; *Hawkins v. Learned*, 54 N. H. 333; *Thayer v. Hillman*, 91 U. S. 496; *Beck v. Parker*, 65 Penn. 262; *Cook v. Rogers*, 31 Mich. 391; *Berthelon v. Betts*, 4 Hill, 577.

authority of the Courts administering such insolvent laws. Legal notice may be given them; they may be cited and compelled to appear or suffer the penalties of a legal default.

But within even the limits of their power over insolvency, the States cannot annul the validity of a contract by impairing its obligation. In the leading case on this subject of the obligation of contracts, C. J. Marshall said, "What is the obligation of a contract, and what will impair it? Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid and entirely discharges it."<sup>1</sup>

Inasmuch as State insolvent laws may apply to all contracts within the State, between citizens of the State, it is evident that a bankrupt or insolvent law which discharges both the person of the debtor, and his future acquisitions of property, after a trial had of the several rights of parties, is not a law impairing the obligation of contracts, so far as respects debts contracted subsequent to the passage of the law, and in those cases where the contract was made between citizens of the State under whose laws the discharge was obtained, and in whose Courts the discharge may be pleaded.<sup>2</sup>

On the other hand State insolvent laws do not apply to contracts made within a State, between a citizen of that State and a citizen of another State, where the latter has not voluntarily become a party to insolvency proceedings under them. But when the foreign creditor has appeared to prove his debt against the insolvent's estate, he has submitted himself to the jurisdiction of

<sup>1</sup> *Sturges v. Crowninshield*, 4 Wheat. 414; *Hicks v. Hotchkiss*, 7 Johns. Ch. 297.

<sup>2</sup> *Ogden v. Saunders*, 12 Wheat. 213; *Boyle v. Zacharie*, 6 Pet. 348; 2 Story on Const. § 1390; Story Confl. Laws, § 341.

that State, and must abide the judgment of its Courts like one of its citizens.<sup>1</sup> Therefore, certificates of discharge, however granted under a State law, cannot be pleaded in bar of an action brought by a citizen of another State in the Courts of the United States, or of any other State than that where the discharge was obtained, unless it appear that the plaintiff proved his debt against the insolvent's estate, or in some manner became a party to the proceedings.<sup>2</sup>

Any statute which would bar the claim of a foreign creditor who had not voluntarily become a party to the insolvency proceedings, would impair the obligation of his contract and be a nullity. It is manifest also that the insolvent laws of a State can have no extra-territorial operation. Consequently, the tribunals administering them, have no jurisdiction over citizens of another State, who do not voluntarily submit themselves to their authority. Legal notice cannot be given them—neither is there any obligation on their part to appear—and compulsory proceedings not being permissible, there can be no legal default entered.<sup>3</sup>

Lastly, State insolvent laws do not apply to contracts not made within the State; nor to contracts existing before the passage of such laws.<sup>4</sup> Legislation cannot consequently be addressed to either class of contracts. As all the States now have permanent insolvent laws dating back many years, the principles regulating their operation are among the best settled of our rules of constitutional jurisprudence.

<sup>1</sup> *Clay v. Smith*, 3 Pet. 411; *Suydam v. Broadnax*, 14 Pet. 75; *Springer v. Foster et al.*, 2 Story, 387.

<sup>2</sup> *Gilman v. Lockwood*, 4 Wall. 411.

<sup>3</sup> *Baldwin v. Hale*, 1 Wall. 223.

<sup>4</sup> *Cook v. Moffat et al.*, 5 How. 308.

## THIRD. AS TO INTER-STATE COMMERCE.

“No tax or duty shall be laid on articles exported from any State.”—(*Art. I, § 9. 5.*)

“No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress.”—(*Art. I, § 10. 2.*)

“No State shall, without 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.”—(*Art. I, § 10. 3.*)

The above three articles are restrictions upon State sovereignty internationally considered; as also restraints upon any Legislation designed to interfere with the freedom of inter-state commerce. They are, therefore, constitutional guarantees against State barriers which might otherwise be erected for purposes of discrimination.<sup>1</sup> Their object is to neutralize the effects of local jealousies and rivalries between States, by broadening the opportunities for inter-communication between their citizens. It was felt from the very first, that inter-state commerce would always need some external guardianship for its equitable maintenance. The progress of events has confirmed the wisdom of the framers of the Constitution in this respect, by calling for specific legis-

<sup>1</sup> *Henderson v. Mayor of N. Y.*, 92 U. S. 259; *R. R. Co. v. VanHusen*, 95 *Ibid.* 465; *Walling v. Michigan*, 116 *Ibid.* 446.

lation in the Inter-State Commerce Act of February 4, 1887, and its amendments of March 2, 1889.

In order to protect the wide field of domestic traffic, it was necessary to lodge the power of regulating commerce in the General Government. For however numerous may be the States, and however situated in respect to local advantages of seaboard or inland intercourse; or whatever may be the relative superiority in the growth of products, or the development of industries, it is evident that for purposes of free commerce there can be but one country, with free circulation of products, and without trammels of local discrimination. The preamble to the Constitution recites that one of its objects is "to promote the general welfare," and among the chief of its instrumentalities none will deny that commerce occupies a foremost position. To promote this, every citizen must be permitted to enter any State freely, and to bring with him his property.<sup>1</sup> In doing so, his political privileges as a voter, may be temporarily modified under State laws governing change of domicil, but his jural rights as a citizen accompany him everywhere. These constitute his "privileges and immunities" as a citizen of the United States.

Under this aspect of the relations of the States to the General Government in matters of commerce, Congress has the power to regulate it for all, and over all. As elsewhere shown, this power is plenary and without restraint within its appropriate sphere. And where not specifically limited, it may find authority for its exercise as a means to an end, in the overshadowing right of eminent domain; since whatever is necessary to execute the power is included within the grant.<sup>2</sup>

<sup>1</sup> *Robbins v. Shelby County Tax*, 9 Dist. 120 U. S. 487.

<sup>2</sup> *Kohl v. U. S.*, 91 U. S. 367; *Decker v. Balt. & N. Y. R. R. Co.*, 30 Fed. Rep. 723.

The difference, however, between domestic State commerce and inter-state commerce is radical. Under the powers reserved to the States, they alone can regulate their own internal commerce. The products of their own soil and of their own industries are under their exclusive control. And where products from other States have become mingled with the property of their own citizens, so as to be indistinguishable from theirs, the distinctive character of the imported article having become changed by obliteration of its original form, the State may then subject its sale to such regulations as it may deem fit. But this interference on the part of the State must not precede the first sale of the article *as imported*, since this condition must be executed before the article can be said to have become incorporated with the general property of the community. It is always entitled, therefore, to the privilege of being sold by the importer, or consignee, in the form in which it was imported, that is to say in the original, unbroken package. Without the right to sell, the right to import would be a nullity. Whence it follows that, in the regulation of our domestic commerce every State is an open market to every citizen. This is the principle established by the decisions of the Supreme Court from the days of C. J. Marshall down, and should be considered as definitely settled.<sup>1</sup> It applies alike to all merchantable articles, whether imported from foreign countries or sister States, because in either case subjects of commercial regulation, and as such their right of transportation and circulation throughout the country is under the exclusive control of Congress.<sup>2</sup> Hence a burden imposed upon

<sup>1</sup> *Brown v. Maryland*, 12 Wheat. 419; *Hylton v. U. S.*, 3 Dall. 171; *Leisy v. Hardin*, 135 U. S. 100.

<sup>2</sup> *Bowman v. Chicago & N. W. R. R. Co.*, 125 U. S. 465.



inter-state commerce, is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting it.<sup>1</sup>

The taxation of a traffic, whether carried on by peddlers or other persons, and which is partly State and partly inter-state in its results as measured by earnings, gives rise at times to great difficulty in determining the jurisdiction to which it belongs, and by which it may be lawfully regulated. In the sphere of taxation, the right of a State to tax property or occupations having a moveable and inter-state character has been uniformly interpreted as only a qualified one, and that, while to tax a transaction of commerce extending beyond its boundaries would in fact be a regulation of commerce forbidden by the Constitution, it can and may tax the agency by which that transaction is accomplished; but only where that agency represents the property of non-resident traders within the State,<sup>2</sup> and is wholly outside of and distinct from the instruments necessary for carrying on such commerce.<sup>3</sup> As, for instance, the distinction between taxing locomotives as property, and taxing their use as instruments of inter-state commerce.<sup>4</sup> Doubtless, also, the difference must be borne in mind between persons as citizens trading between States, and foreign corporations coming into another State. In the latter case, a corporation not being a citizen under the Constitution can claim no privileges or immunities, and may be taxed a license fee for having an office within the State,<sup>5</sup> except always where the corporation is in

<sup>1</sup> *State of Minnesota v. Barber*, 136 U. S. 313.

<sup>2</sup> *Duer v. Small*, 4 Blatchf. 263.

<sup>3</sup> *Pembina Mining Co. v. Penna.* 125 U. S. 181.

<sup>4</sup> *Minot v. Phil., etc.*, R. R. 18 Wall. 206.

<sup>5</sup> *Paul v. Virginia*, 8 Wall. 168.

the employ of the General Government, or its business is strictly commerce, inter-state, or foreign.<sup>1</sup>

This question of taxation, as applied to inter-state commerce, is full of perplexing conditions that are constantly demanding the utmost ingenuity of courts, in order to harmonize the decisions under them. Unfortunately these efforts have not always proved successful, and we are in consequence confronted with judicial determinations which, while settling the particular issue, still leave behind them great uncertainty as to the extent of their practical application in analogous cases. But in any event, the solution of the problem consists in determining the limits to which a State may carry its taxing power, where Congress has not interfered with reference to the same subject, or where the act is not a violation of the constitutional guarantee of equal privileges and immunities to the citizens of the United States, wherever trading within the Union. And the point lies in the difference between taxing a transaction of commerce, and taxing an agency through which it is remotely accomplished. While the right of a State to do the former may be questioned, its right to do the latter, under the foregoing limitations, can not.<sup>2</sup>

Thus steamboats plying between different ports on a navigable river may, under a statute, be taxed as personal property by the city where their owners have their principal office and which constitutes their home port, although the same vessels have been licensed as coasters under the laws of the United States and all fees and charges due thereon have been paid.<sup>3</sup> Vessels being property, are subject to that power of taxation

<sup>1</sup> *Pensacola Tel. Co. v. West'n Un. Tel. Co.*, 96 U. S. 1; *Norfolk and West'n R. R. v. Penna.*, 136 *Ibid.* 114; *McCall v. California*, 136 *Ibid.* 104.

<sup>2</sup> *Sherlock v. Alling*, 93 U. S. 99.

<sup>3</sup> *Transportation Co. v. Wheeling*, 99 U. S. 273.

which may be exercised at the same time by the State and the United States, upon the same objects of private property. In the one case the State taxes for its own support, in the other Congress exercises the constitutional right of laying an excise tax upon the coasting trade, in return for a license to carry it on.<sup>1</sup> But in the case of the State, the tax must be upon the owner and at his domicile, and not upon the vessel as an instrument of commerce.

Nevertheless a distinction must be noted between merchantable articles of an innocuous character, and those possessing certain dangerous qualities which are inseparable from transportation or use. Articles whose circulation or use is a menace to life, health, property, or morals, while entitled to the right of importation into States, are not thereby entitled to free and unqualified circulation and sale. It is plain that over such merchantable articles as gunpowder, nitro-glycerine, and dynamite, poisons, illuminating oils, lottery tickets and obscene literature, the State, by virtue of its police power, may exercise a regulative supervision from the moment of their entrance into its territory. This is a measure of protection which it owes to its citizens, and which imposes a corresponding duty of vigilance on its own part. While it cannot prohibit their importation,

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *McCulloch v. Maryland*, 4 Ibid. 316.

An examination of the following cases presenting both aspects of this variable problem, will be found useful in determining the lawful boundaries of State taxation in respect to traffics and earnings partly of inter-state character.

*Against the right to tax such traffic*:—*State Freight Tax*, 15 Wall. 232; *Philadelphia & Southern Mail St. v. State*, 122 U. S. 326; *Wabash R. R. Case*, 118 Ibid. 557; *Gloucester Ferry Co. v. State*, 114 Ibid. 196; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Robbins v. Shelby Co.*, 120 U. S. 489; *Welton v. Missouri*, 91 Ibid. 275; *State Tonnage Cases*, 12 Wall. 204.

*For the right to tax*:—*Railway Gross Receipt Cases*, 15 Wall. 284; *Cooley v. Philadelphia*, 12 How. 299; *Machine Co. v. Gage*, 100 U. S. 676; *Munn v. Illinois*, 94 Ibid. 113; *Reik v. Railway Co.*, 94 Ibid. 164.

it can regulate both their sale and use. The importer of such articles cannot claim the right of unqualified sale even in the original packages, because by universal consent these things have come to be regarded as dangerous everywhere and at all times. In other words they are a standing menace to the welfare of the community. This superior right of the police power of a State to interfere with even the transportation, sale or use of a notoriously dangerous article such as nitro-glycerine, is conceded by Congress in the permission granted in section 4280 of the Revised Statutes, relating to interstate commerce by means of railways. All fulminating substances being chiefly dangerous *in transportation*, it was fitting that Congress should authorize a State to control absolutely both the *transportation* through, or any commerce in the article within its own boundaries.

By parity of reason addressed to the protection of the public health, States may exercise their police powers to the extent of prohibiting both persons and animals, when laboring under contagious diseases, from entering their territory. They may pass any sanitary laws deemed necessary for this purpose, and enforce them by appropriate regulations. It is upon this reserved right of self-protection, that quarantines are permitted to interfere with the freedom of commerce and of human intercourse. But this power is not without its limitations, and its exercise must be restricted to directly impending dangers to health, and not to those which are only contingent and remote. Hence, while diseased persons or diseased animals, and those presumably so from contact with infected bodies or localities, may be prevented from entering a State, any general law of exclusion measured by months, or operating in such a way as to become a barrier to commerce or travel, would be a regulation of commerce forbidden by the Constitu-

tion. Such a statute being more than a quarantine regulation transcends the legitimate powers of a State.<sup>1</sup>

As to alcoholic products which are not absolutely dangerous substances either in transportation or use, their importation cannot be prohibited except by consent of Congress.<sup>2</sup> They are merchantable articles the world over—produced at home as well as abroad, and their employment in commerce and the arts covers a very wide range of useful possibilities. When dispensed as intoxicants, merely, they pass from the field of commercial regulation into the domain of criminal instrumentalities, and it is at that point that the jurisdiction of the State may intercept them as incentives to wrong-doing, and either regulate, or prohibit their manufacture or sale.<sup>3</sup>

In relation to tonnage, which is a tax or duty proportioned to the size of the vessel, the prohibition covers every form that imposes a tax or duty upon the privilege of arriving at, or departing from a port in the United States.<sup>4</sup> Nor does the particular State citizenship of the owner of the vessel affect the question, since that would constitute discrimination.<sup>5</sup> Nor even for the purpose of guarding the public health, can a State raise a revenue to defray the expenses of its quarantine system, by imposing a duty on tonnage.<sup>6</sup> But a charge for wharfage, which is a mere rent for property, and not an assertion of sovereignty, is not within the prohibition,

<sup>1</sup> *Railroad Co. v. Husen*, 95 U. S. 465; *Chy Lung v. Freeman*, 92 *Ibid.* 275; *People v. Marx*, 99 *Ibid.* 378.

<sup>2</sup> *Walling v. Michigan*, 116 U. S. 446; *Leisy v. Hardin*, 135 U. S. 100.

<sup>3</sup> For the relative powers of control of Congress and the States over inland domestic commerce see "Congressional Legislation."

<sup>4</sup> *Inman Steamship Co. v. Tinker*, 94 U. S. 238; *Cannon v. New Orleans*, 20 Wall. 577; *Guy v. Baltimore*, 100 U. S. 434.

<sup>5</sup> *State tonnage Tax Cases*, 12 Wall. 204.

<sup>6</sup> *Peete v. Morgan*, 19 Wall. 581; *Gibbons v. Ogden*, 9 Wheat. 203.

being neither a tax nor a duty.<sup>1</sup> In like manner, fees paid to a harbor-master for assigning a vessel to a berth, and tolls paid for transportation on a railroad, are not a tax on commerce.<sup>2</sup> The principle of interpretation governing this clause of the Constitution appears, in the light of the accompanying decisions, to be this, namely, that whenever a beneficial service has been rendered the vessel or shipper, a charge in the nature of a compensation therefor is not properly speaking a tax. Even a State law, imposing a penalty in the form of half-pilotage fees on vessels refusing to employ a pilot has been upheld as valid.<sup>3</sup>

#### ADDITIONAL RESTRAINTS UPON THE STATES IMPOSED BY CONSTITUTIONAL AMENDMENTS ADOPTED SINCE THE CIVIL WAR.<sup>4</sup>

It has been seen, in the treatment of the subject of the "privileges and immunities of citizens of the United States in the several States," that American slaves could not claim the protection of this provision of the Constitution. They were not only politically disfranchised, but regarded merely as chattels personal. Having no other status before the Constitution, than that of persons numerically entering into the basis of representa-

<sup>1</sup> *Cannon v. New Orleans*, 20 Wall. 577; *Municipality v. Pease*, 2 La. Ann. 538.

<sup>2</sup> *Steamship Co. v. Port Wardens*, 6 Wall. 31.

<sup>3</sup> *Cooley v. Philadelphia*, 12 How. 229. Likewise a State may charge tolls for benefits to navigation made by its own improvements of streams, *Huse v. Glover*, 119 U. S. 543.

<sup>4</sup> The Thirteenth Amendment to the Constitution of the United States was proposed by Congress February 1, 1865, and declared to have been ratified on the 18th of December, 1865. The Fourteenth Amendment was proposed on the 16th of June, 1866, and declared to have been ratified on the 28th July, 1868. The Fifteenth Amendment was proposed on the 27th of February, 1869, and declared to have been ratified on the 20th of March, 1870. U. S. Rev. Stat., 28, 31, 32.

tion of those States in which slavery existed, they presented the political paradox of being neither citizens nor aliens. Their sudden emancipation by the actual results of the Civil War, and the Proclamation of President Lincoln, both which acts might have been questioned as to their legality in after times, rendered it necessary to place this result in the Constitution, by a definite amendment. Hence followed the Thirteenth Article of the Amendments distinctly abolishing slavery everywhere within the United States.

But the action of several of the Legislatures of the alleged reconstructed States, showing a disposition to discriminate against the colored race, on the basis of caste distinctions, by imposing disabilities and burthens upon them, and otherwise curtailing their newly acquired civil rights, Congress accordingly proposed the Fourteenth Article of the Amendments to the people, and at the same time made it a *sine qua non* to the restoration of the seceded States to their normal relations to the government, that they should first ratify this article by a formal vote of their Legislatures. It was soon discovered, however, that these two Articles did not quite meet the necessities of the colored race in the former slave States, nor afford them that political enfranchisement, without which their liberty would have been but an empty and useless name.<sup>1</sup>

The Fifteenth Amendment was thereupon proposed, and in due time ratified, as the cap-stone of constitutional citizenship throughout the United States. Taken together, these three amendments place the colored race upon precisely the same political foundation as all other

<sup>1</sup> For a history of the proceedings of the Joint Committee of both Houses of Congress which proposed these amendments, see Argument of Roscoe Conkling before the Supreme Court, in *County of San Mateo v. Southern Pacific R. R.* (Pamphlet Report), Washington, 1883.

citizens of the United States, and although it is only in the Fifteenth Article that the race is expressly alluded to in terms denoting color and previous slavery, it is well understood, and settled, that each of the preceding Articles is equally intended to remedy the grievances and disabilities under which it suffered in the past.<sup>1</sup>

“ART. XIII., § 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.

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

“ART. XIV., § 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.”

§ 2. This section, relating to representation, will be found treated under the head of Congressional Legislation.

§ 3. This section, relating to the disfranchisement of secessionists, owing to the different amnesty acts passed at various times by Congress, has left practically so few persons still laboring under political disability as to have taken from the Amendment all its public importance.

“§ 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 suppress-

<sup>1</sup> Slaughter-House Case, 16 Wall. 67.



ing 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.

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

“ART. XV., § 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

“§ 2. The Congress shall have power to enforce this article by appropriate legislation.”

The prohibition under the Fourteenth Amendment 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 its laws, is a re-affirmance of the second section of Article Fourth, reciting that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States; and also of the entire Fifth Article of the First Amendment to the Constitution. The Fourteenth Amendment imposes upon the States the same restriction which the Fifth had imposed upon the General Government.<sup>1</sup> But as most of the States had already embodied these guarantees in their Constitutions, the Fourteenth Amendment really introduced no new protection to the white race, in respect to the enjoyment of their “political privileges or immunities.” The only substantive addition to the Fifth Amendment made by the Fourteenth, is in the words “nor deny to

<sup>1</sup> *Davison v. New Orleans*, 96 U. S. 97; *Kelly v. Pittsburgh*, 104 *Ibid.* 78. *State v. Pennoyer*, Sup. Ct. of N. H., *Albany L. J.*, vol. 41, p. 102.

any person the equal protection of the laws." This taken in connection with the provision relating to "due process of law," would seem to indicate its meaning to be, that whatever may be the form of that due process of law, whether judicial, ministerial, or administrative, it must not discriminate injuriously against any person, to the abridgment of his equal rights with other citizens of the same State before the law.

"We must not forget," says Mr. Justice Bradley, in the Civil Rights Cases,<sup>1</sup> "that the province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery, the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property without due process of law, and from denying to any the equal protection of the laws. The Amendments are different, and the powers of Congress under them are different.

. . . . Under the Thirteenth Amendment, the legislation so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals whether sanctioned by State legislation or not; under the Fourteenth, as we have already shown, it must necessarily be and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings."

The appropriate legislation which Congress was empowered to undertake, in order the more fully to carry out the purposes of these Amendments, is exemplified in the Civil Rights Acts of April 9, 1866, and March 1, 1875.<sup>2</sup>

As these Amendments did not to any sensible degree affect the white race, who were already sufficiently

<sup>1</sup> Civil Rights Cases, 109 U. S. 23.

<sup>2</sup> 14 Stat. at Large, p. 27; 18 Ibid. 335.

protected in their jural rights, so they did not add to the privileges or immunities of any citizen as they existed at the time they were adopted. Thus neither the Constitution nor the Fourteenth Amendment made all citizens voters.<sup>1</sup>

#### CITIZENSHIP DEFINED AND DIFFERENTIATED.

Under the first section of the Fourteenth Amendment, which was adopted nearly eighty years after the formation of our government, a definition of the word citizen was, for the first time, inserted in the Constitution, so that it is now made to include "all persons born or naturalized in the United States and subject to the jurisdiction thereof." Such persons are thereby rendered, not only citizens of the United States, but of the State wherein they reside. The distinction thus created between citizens of a State and citizens of the United States was fully considered in the Slaughter-House Case<sup>2</sup> and in *U. S. v. Cruikshank*.<sup>3</sup> In the former case the Court said: "Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union."

In the second case which we have cited, the Court was even more explicit in drawing these distinctions, and said: "There is in our political system a government of each of the several States, and a government of the United States. Each is distinct from the others, and has citizens of its own who owe it allegiance, and

<sup>1</sup> *Minor v. Happersett*, 21 Wall. 162; *U. S. v. Anthony*, 11 Blatchf. 200.

<sup>2</sup> 16 Wall. 74.

<sup>3</sup> 2 Otto, 542.

whose rights within its jurisdiction it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other."

What particular rights now constitute those "privileges and immunities of citizens of the United States," which, under the Fourteenth Amendment, they possess, but which the citizens of the several States do not possess, is difficult to determine. In the Slaughter-House Case there was, unfortunately, a division of opinion, the Court stating that it would hold itself excused from defining the privileges and immunities of citizens of the United States, which no State can abridge, until some case involving those privileges made it necessary to do so. On the other hand, Mr. Justice Field, in his dissenting opinion, said that, "If, under the Fourth Article of the Constitution, equality of privileges and immunities is secured between citizens of different States, under the Fourteenth Amendment the same equality is secured between citizens of the United States." And Mr. Justice Bradley, also dissenting, said: "The citizenship of the United States is the primary citizenship in this country, and that *State* citizenship is secondary and derivative, depending upon citizenship of the United States, and the citizen's place of residence. The States have not now, if they ever had, any powers to restrict their citizenship to any classes of persons."

Therefore, a citizen of a State is primarily a citizen of the United States who is domiciled in a State, and can, by conforming to its local laws, qualify himself to become an elector. But a citizen of a Territory is a citizen of the United States only. His privileges and immunities are identical with those of every other citizen occupying the same political status. It will be seen

from this distinction in rights, as well as terms, that political privileges and immunities (none other being embraced in the Constitution) are exclusively the creation of local sovereignty. They need not be everywhere equal. A State may enlarge or restrict them at pleasure within the permitted constitutional limits; but inasmuch as it cannot discriminate against the citizens of other States on the basis of State alienage, neither can it against the citizens of the United States generally. Such persons may claim in any State the same privileges and immunities as belong to its citizens, who have qualified themselves for their possession by conforming to its own local laws. But persons who are citizens of the United States only, are only inchoate citizens for political purposes. They need State citizenship to elevate them to the full privileges of electors of President and Vice-President of the United States.

The term "*person*" in this section of the amendment has, for the purposes of protection to property, been extended in its meaning so as to include even private corporations, to whom (although not citizens) yet equally with citizens, it has been held to be forbidden to deny the equal protection of the laws.<sup>1</sup> This agrees substantially with the definition of a corporation, as an "artificial being or person," given by C. J. Marshall, in *Dartmouth College v. Woodward*.<sup>2</sup>

These distinctions between persons and citizens, when applied to property rights as set opposite to political rights, do not invalidate any of those fundamental

<sup>1</sup> *San Mateo v. Southern Pacific R. R.*, 13 Fed. Rep. 722; *Missouri v. Lewis*, 101 U. S. 22; *Neal v. Delaware*, 103 Ibid. 370; *Strander v. West Va.*, 100 Ibid. 303; *Virginia v. Rives*, Ibid. 315; *Ex parte Virginia*, Ibid. 339; *Hurtado v. California*, 110 Ibid. 516; *Santa Clara v. Southern Pacific R. R.*, 118 Ibid. 394; *Philadelphia Fire Association v. New York*, 119 Ibid. 110.

<sup>2</sup> 4 Wheat. 518.

privileges and immunities, which have at all times been enjoyed by the citizens of the several States from the very formation of the Union. With the exception of the right to exercise those special privileges in the nature of local franchises, which may have been conferred by the laws of any State upon its citizens, and which are confined to the limits of its sovereignty,<sup>1</sup> a citizen of the United States may go and come at will in any State or Territory, and claim therein equality of citizenship and the equal protection of its laws.

The result of the passage of the Thirteenth, and Fourteenth Amendments, has been to repair the omissions of protection to the civil rights of the new citizens of the United States, recently emancipated from the status of slavery. Previously to this, judicial notice had to be taken of the fact that there were two general classes of citizens of the United States, namely, free citizens and slaves. The former could add to their primary citizenship that of State citizenship, the latter could not. The former could claim, and were entitled to enjoy "all privileges and immunities of citizens in the several States" under Article IV. of the Constitution; while the latter being designated therein only as "persons held to service or labor," could not. Now that slavery has ceased to exist, there are none but freemen in the land, and as to these, the privileges of citizenship have never been made to depend upon the possession of any particular political, or even of all civil rights. There have always been citizens who are not in contemplation of law *sui juris*. And there have always been citizens who are politically disfranchised, as a measure of public policy. Such is the case with women, minors, criminals, and lunatics.

The restrictions placed by the Fourteenth Amendment

<sup>1</sup> Ward v. Maryland, 12 Wall. 418.

upon State action, in abridging the privileges and immunities of citizens of the United States, are addressed to the correction of State legislation only, and to acts done under and by virtue of State authority. Individual acts, whether committed by a few persons—by private corporations, or by unlawful assemblages in communities, cannot be strained into the similitude even of State action, which they are not. Individual invasions of individual rights being in the nature of private delicts, are punishable in the Courts of the State in which the wrong was committed. The individual injured must seek his remedy there. So long as the State does not bar his way to legal redress through legislative action, either by closing its courts—disfranchising witnesses—or discriminating against him on account of “race, color, or previous condition of servitude,” he must stand precisely as any other citizen, who commits himself to the law of the land and the judgment of his peers. There are doubtless cases where a fair trial cannot be had without a change of venue, but that venue cannot be carried beyond the jurisdiction of the State and into the Federal Courts, until the State itself has, in its political capacity and through its legislative enactments, assailed the privileges and immunities of a citizen of the United States.<sup>1</sup>

The Fourteenth Amendment not extending to territorial or municipal arrangements within a State or portions of a State, does not secure to all persons the benefit of the same laws and the same remedies. “Great diversities,” says Mr. Justice Bradley in *Missouri v. Lewis*, “in these respects, may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its

<sup>1</sup> Civil Rights Cases, 109 U. S. 17.

own mode of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States, without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."<sup>1</sup>

A new chapter was added to our constitutional history by the judicial aspects of the Civil War. It had been said, because firmly believed, that certain things could not be done under the Constitution. It was looked upon as an adamant wall through which none could break; it was regarded as a sacred compact consecrated by the most solemn political vows, and which all citizens pledged themselves to observe, as rubrics of civil conduct. But the first month of the secession movement dissipated these ideas. The resignation of all Federal officers in the seceded States—whether civil, military, or naval; the closure of post-offices and United States courts, with its consequent effects upon commerce and the administration of justice, together with the simultaneous passage of Ordinances of Secession, were dangers not contemplated, and not provided for in the Constitution. It was felt that if this charter of our civil liberties was not wrecked, it was, to say the least, badly strained, by this disorganization of the practical relations of the States to the General Government. Statesmen saw that the perils of the situation did not end with the war, but continued with more perplexing questions to solve, in the problem of reconstruction. The Constitution, it was evident, needed strengthening, in order to meet the new conditions that were forced upon the government. Amendments were called for to nationalize the territory of the United States—to impose fresh restraints upon the States—to secure citizenship

<sup>1</sup> 101 U. S. 22.



and the equal protection of the law to all persons within their jurisdiction, and to empower Congress to enforce these amendments by appropriate legislation.

While it may be said, perhaps, that the three last amendments introduced no new guarantees into the Constitution that did not already surround the white citizens of the various States, and put no restraints upon the power of the States which did not already exist, nevertheless, these amendments, following close upon a civil war that had successfully defied for four years the constitutional powers of the General Government, did unquestionably serve to emphasize those guarantees of civil liberty in more precise language than ever before, and to show that not the arbitrament of arms, so much as the will of the nation, pronounced them to be a new confession of political faith, to be forever practised towards all citizens alike. They declared more fully the citizenship of the United States to be the paramount political status; gave a larger scope to the meaning of the term than had been heretofore recognized either politically or judicially; and without defining what constituted the privileges and immunities to which all citizens had been entitled under the fifth Article of the first amendments, they forbade the States to make or enforce any law abridging their enjoyment. And, as if this provision were not yet sufficiently buttressed and armor-plated, they repeated the substantive idea contained in the above article relating to "due process of law" by forbidding any State to deny the equal protection of the law to any person within its jurisdiction. Lastly, they established a rule of description for a particular class of voters falling within its terms, who should not be excluded from enjoying the right of suffrage on account of their "race, color, or previous condition of servitude;" thus pointing them out as an emancipated

race suddenly endowed with the highest privileges of citizenship by an act of political transmutation.

STATE LEGISLATION THAT IS LAWFUL OVER NAVIGABLE  
WATERS.

The range of State legislation for purposes of internal improvement is so wide, that it can only be measured by the wants of its citizens, with respect to the future as well as to the present. Such measures are necessarily included also within those police powers which embrace whatever relates to the safety, well-being and prosperity of the community. Among the many instrumentalities for promoting growth and prosperity, commerce is universally acknowledged to occupy the first place; and in order to impart as much freedom as possible to it, great latitude has always been allowed to the States in regulating their own commerce, notwithstanding that clause of the Constitution which bestowed a similar power upon Congress. The power granted to the latter was, manifestly, intended to secure the absolute freedom of *inter-state* commerce by preventing the erection of barriers between States; as also, to prevent monopolies and other obstructions to channels of commerce which needed to be kept free to all. It is in the nature of a supervisory power, administering justice in the interests of the commercial rights of all.

For the purpose of making internal improvements States may, therefore, legislate with respect to navigable waters, in the form of granting charters to *bridge* or *ferry* companies, provided always that such grants do not conflict with the powers which Congress has already exercised over the same subject.<sup>1</sup> Certain streams also

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *Thames Bk. v. Lovell*, 18 Conn. 500; *State Freight Tax*, 15 Wall. 232; *Kellogg v. Union Co.*, 12 Conn. 7;

being wholly within the borders of a State, and not forming part of its tide-waters, are not amenable to the control of Congress. Over such, State legislation has exclusive authority.<sup>1</sup> More latitude is also allowed to the granting of a franchise for a ferry, than to a bridge, because the former cannot create an obstruction; although on narrow streams a wire or rope-ferry might prove so. In either case, the State is simply exercising its right of establishing a public way. Neither is the concurrent action of two States necessary to the grant of a ferry franchise on a river that divides them.<sup>2</sup>

A State may also collect tolls like any proprietor, on railroads or canals of its own building; or authorize any other owners of the same to do so. Or, in a charter, may introduce a stipulation that the company shall pay to the State a bonus, or portion of its earnings.<sup>3</sup> Such a stipulation is different, in principle, from the imposition of a tax on the movement or transportation of goods or persons from one State to another. The latter of which is an interference with and a regulation of commerce between the States, and beyond the power of the State to impose. "The general right to control and regulate the public use of navigable waters," says Judge Cooley, "is unquestionably in the State; but there are certain restrictions upon this right growing out of the power of Congress over commerce. Congress is empowered to regulate commerce with foreign nations and among the several States, and wherever a river forms a highway upon which commerce is conducted with foreign nations

*Silliman v. Troy & W. Troy Br. Co.*, 11 Blatch. 274; *The Passaic Bridges*, 3 Wall. 782; *Silliman v. Hudson River Br. Co.*, 2 *Ibid.* 463; *Gilman v. Philadelphia*, 3 *Ibid.* 713; *State v. Wheeling Br. Co.*, 18 How. 421.

<sup>1</sup> *Veazie v. Moor*, 14 How. 568.

<sup>2</sup> *Conway v. Taylor's Ex.*, 1 Black, 603

<sup>3</sup> *R. R. v. Maryland*, 21 Wall. 456.

or between States, it must fall under the control of Congress, under this power over commerce."<sup>1</sup>

Under these tests of concurrent jurisdiction, it follows that State legislation is always subordinated to the right of Congress to remove obstructions, and to keep the stream open as a highway. Hence it may interpose with directions as to the place and manner of construction of a bridge, but, subsequent to its erection, it cannot render its further use unlawful by legislation, without making proper compensation, provided such bridge was erected in the absence of conflicting legislation on the part of Congress.<sup>2</sup> As to *dams* and locks over navigable streams, a State may authorize their erection, whenever they do not seriously interfere with navigation; or when Congress has exercised no legislative authority over them by the passage of any laws regulating their use."<sup>3</sup>

#### STATE TAXATION.

So broad is the field over which State taxation may be exercised in respect to persons, property, business, or occupations within its limits; and so intricate are the problems to which it often gives rise in the presence of the powers and duty of the Federal Government to regulate both domestic and foreign commerce, that it becomes extremely difficult to trace the line which separates these two jurisdictions, and to define the exact point where the paramount authority of Congress terminates, and that of the States begins. This concurrence of authority between two powers, acting each in a sovereign capacity within its own sphere, is the result

<sup>1</sup> Constitutional Limitations, 591.

<sup>2</sup> *Dover v. Portsmouth Bridge*, 17 N. H. 200; *Gilman v. Philadelphia*, 3 Wall. 713.

<sup>3</sup> *Parker v. Mill Dam Co.*, 20 Me. 353; *Woodman v. Kilbourne Manuf. Co.*, 1 Abb. C. C. 158; *Wilson v. Marsh Co.*, 2 Pet. 245.

of the unwillingness of the people of the various States, at the formation of the Constitution, to surrender their autonomy in matters of a purely local and self-regarding character.

Hence, among the reserved rights belonging to the States, and never granted to the United States, was that of regulating their own internal commerce. "It is equally clear," says C. J. Taney, "that the power of Congress over this subject does not extend further than the regulation of commerce with foreign nations, and among the several States; and that beyond these limits the States have never surrendered their power over trade and commerce, and may still exercise it, free from any controlling power on the part of the General Government. Every State, therefore, may regulate its own internal traffic, according to its own judgment, and upon its own views of the interest and well-being of its citizens."<sup>1</sup> This doctrine C. J. Chase re-affirms by saying, that "over this commerce and trade Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States."<sup>2</sup> If the commerce of a State were limited to its own territory, and carried on by its own citizens, and if the exercise of the State's power in this respect were confined alone to the enactment of laws governing its municipal regulations, or dealing with its own internal commerce, or the franchise, property, or business of its own citizens, the determination of questions arising thereupon would, in cases of doubt, be greatly simplified. But when we are confronted with the fact that each State is a free and open market to the citizens of every other State, to travel or trade in, it will at once be seen that there often are competing interests

<sup>1</sup> License Cases, 5 How. 574.

<sup>2</sup> License Tax Cases, 5 Wall. 470.

between its citizens and those of other States, which justify certain forms of legislative self-protection.

It will not be questioned that every State needs to raise revenues for the purposes of internal government, and must have the power to raise it by the imposition of suitable taxes. Of the means and manner of doing this, it must, as the sovereign authority, be the exclusive judge. Acting within the limitations of its own Constitution, it is free to create any system of taxation which the will of its citizens may demand.

But while thus exercising undoubted powers over the persons and property of those citizens, it must see to it that municipal regulations, designed for their good, do not extend the scope of their practical application to such a degree, as to bring them into conflict with the more general powers which the people of the United States have conferred upon the Federal Government. State legislation, in whatever direction exercised, must not assume to regulate or control subjects committed by the Constitution to the higher authority of Congress. Nevertheless, this power, like the police power, being indispensable to the existence of a State government, is not impaired by any clause of the Federal Constitution, except so far, and in such respects, as that instrument expressly prohibits it.<sup>1</sup> For, in any event, the constitutionality or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid.<sup>2</sup>

Since, then, these limits exist, it becomes necessary to ascertain their boundaries, in order that legislation may be maintained within its proper constitutional channels.

<sup>1</sup> *Crandall v. State of Nevada*, 6 Wall. 35.

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

TAXATION THAT IS NOT IN CONFLICT WITH THE POWERS  
OF CONGRESS.

We have seen that a State has the power to undertake or to sanction the improvement of navigable waters, whether wholly within its own borders, or having only riparian rights over it as part of its general police powers; and for this purpose may enact laws, as well as grant franchises relating to bridges, dams, ferries, and any other uses of such waters. These Acts fall into the category of municipal regulations applicable to highways over water-courses. A State may do with its own property precisely what a private owner may. Its dominion over it is absolute with reference to use, occupancy, or alienation. It may, therefore, exercise the double powers of civil proprietorship and of political sovereignty. In doing this it may simultaneously collect a toll or a rent, and impose a tax or a penalty. Inasmuch, also, as it possesses the exclusive right to escheats and forfeitures, it retains a general reversionary interest in all its lands, whether granted by it or not, except cessions made to the United States; and in all property that may have been condemned under statutory forfeiture.

As a sovereignty, it may tax the gross receipts of a corporation doing business upon its territory, either according to the extent of its business, or the use made of its franchise. As a proprietor, it may collect tolls on canals or from railroads.<sup>1</sup> And it may even impose a higher tax upon a foreign, than upon a domestic corporation (whether organized under the laws of a State of the Union or a foreign government) for the privilege of con-

<sup>1</sup> State Tax on R. R. Gross Receipts, 15 Wall. 284; Delaware R. R. Tax, 18 Ibid. 206.

ducting its business within its borders.<sup>1</sup> It may tax an express company engaged in transporting goods between States, and for this purpose may require it to take out a license.<sup>2</sup> Again, a State having a right to tax its own citizens for the prosecution of any particular business or profession, may tax the business of a money or exchange broker, notwithstanding foreign bills of exchange are instruments of commerce, because these do not essentially differ, as representatives of value in the money market, from the products of agriculture and manufactures over which the taxing power of the State extends, until they are separated from the general mass of property by becoming exports.<sup>3</sup> It may tax, therefore, the agents of foreign insurance companies doing business within the State, because the issuing of a policy of insurance is not a transaction of commerce, but a mere personal contract between parties even though domiciled in different States. The transaction by itself has no political or inter-state character.<sup>4</sup>

#### VESSELS AND STEAMBOATS.

As to vessels, although instruments of commerce, they are yet but one form of property, whether navigated by sail or steam, and whether employed wholly within the State or in commerce between the States, and like any other property may be taxed when owned by a citizen of the State. A tax may also be laid by a State upon the capital or stock invested in vessels by its citizens.<sup>5</sup>

<sup>1</sup> *Liverpool Ins. Co. v. Mass.*, 10 Wall. 566; *Cooper Manuf. Co. v. Ferguson*, 113 U. S. 727.

<sup>2</sup> *Walcott v. People*, 17 Mich. 68; *Southern Exp. v. Hood*, 15 Rich. 66; *Southern Exp. v. Mayor*, 49 Ala. 404; *Osborne v. Mobile*, 16 Wall. 479.

<sup>3</sup> *Nathan v. Louisiana*, 8 How. 73; *Ex parte Martin*, 7 Nev. 140.

<sup>4</sup> *People v. Thurber*, 13 Ill. 554; *Paul v. Virginia*, 8 Wall. 168.

<sup>5</sup> *Howell v. State*, 3 Gill, 14; *State v. Charleston*, 4 Rich. 286; *People v. Commissioners*, 48 Barb. 157; *Perry v. Torrance*, 8 Ohio, 521.



Property imported into a State for the purposes of sale, has given rise to many perplexing questions relating to the power of regulating the same, by requiring parties to obtain licenses before selling. The word "import" as judicially defined does not refer to articles transported from one State to another, but to articles imported from foreign countries.<sup>1</sup> Therefore in a Kentucky case, it was held that a State having no port of entry at which foreign goods could be admitted, was not so situated as to be chargeable with laying a tax upon imports, and that taxing whatever property was found within its limits was only an exercise of its police powers, and not an attempt to regulate commerce.<sup>2</sup>

The subject of the taxing power of the States as exercised over their internal commerce, was thoroughly examined in the case of *Brown v. Maryland*,<sup>3</sup> and the principle was there settled, that an article authorized by a law of Congress to be imported continues to be a part of the foreign commerce of the country, while it remains in the hands of the importer for sale, in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carries with it the right to sell the imported article in the form and shape in which it was imported; and that no State, either by direct assessment, or by requiring a license from the importer before he is permitted to sell, can impose any burden upon him, or the property imported, beyond what the law of Congress has itself imposed. But that when

<sup>1</sup> *Woodruff v. Parhan*, 8 Wall. 123.

<sup>2</sup> *Beall v. State*, 4 Blackf. 107.

<sup>3</sup> 12 Wheat. 419. The decision in *Brown v. Maryland* has always been received as the leading exposition of the jurisdictional limits of Congress, over movable property transported among the States. It has become a beacon-light in our constitutional jurisprudence destined never to be quenched, and forty-five volumes of the Supreme Court Reports, in each of which it has been re-affirmed in some one of its manifold aspects, bear witness to the undiminished confidence reposed in the soundness of its conclusions.

the original package is broken up for use, or for retail by the importer, and also when the commodity has passed from his hands into the hands of a purchaser, it ceases to be an import, or a part of foreign commerce, and becomes subject to the laws of the State and may be taxed for State purposes and the sale regulated by the State like any other property. The protective power of Congress over it continues, until the commodity has ceased to be the subject of discriminating legislation as a foreign import.<sup>1</sup>

A State may impose a tax upon capital invested in products on shipboard in the course of exportation to foreign countries, or in transit from one State to another for purposes of such exportation, for this is a tax upon the personal property of the citizen, and not upon the exports;<sup>2</sup> in like manner it may lay tax upon the capital of merchants without regard to the articles in which they happen to deal.<sup>3</sup> Hence the conveyance of goods from State to State, by way of interchange, will not exempt them from taxation or the operation of laws regulating their sale.<sup>4</sup> For it is the capital invested, and not the goods, which is taxed, since these are not properly subject to taxation upon merely entering the State, but only when they have changed their condition and become part of the taxable property of the State, within the meaning of its assessment laws.<sup>5</sup>

Again, while a State may impose taxes in the way of licenses upon all pursuits and occupations within its limits, it cannot lawfully do so where the license tax required for its pursuit is in effect a tax upon the goods

<sup>1</sup> License Cases, 5 How. 504; *Welton v. State*, 91 U. S. 275.

<sup>2</sup> *People v. Tax Com.*, 104 U. S. 466; S. C. 17 Hun, 255.

<sup>3</sup> License Cases, 5 How. 504; *Raguet v. Wade*, 4 Ohio, 107; *Smith v. People*, 1 Parker Cr. Cas. 583.

<sup>4</sup> *State v. Pinekney*, 10 Rich. 474.

<sup>5</sup> *State v. Kennedy*, 19 La. Ann. 397.

themselves, as, for instance, where a State law imposes a tax upon the sale of goods, which are not of the growth, product or manufacture of the State. Were such legislation permitted, it would operate as an absolute exclusion of certain goods between the States, which, though favorable to the interests of one State, would be injurious to the interests of others. This discrimination against the products of sister States would constitute a tariff upon inter-state commerce.<sup>1</sup>

### CORPORATIONS.

Corporations not being citizens, within that clause of the Constitution which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," can be made the subjects of any form of discriminating taxation which a State may choose to impose. Thus it may lay a tax upon a corporation as an entity existing under its laws, as well as upon its capital stock, or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation however arbitrary or capricious, are mere matters of legislation.<sup>2</sup> The exercise of the authority which every State possesses to tax its corporations and all their property, real and personal, and their franchises, and to graduate the tax upon such corporations according to their business or income, or the value of their property, where this is not done by discriminating against rights held in other States, and when the tax is not on imports, exports or tonnage, or transportation to other States is not in conflict with the constitutional power of Congress.<sup>3</sup>

<sup>1</sup> *Welton v. State*, 91 U. S. 275.

<sup>2</sup> *Minot v. P. W. & B. R. R. Co.*, 18 Wall. 206.

<sup>3</sup> *State Tax on R. R. Gross Receipts*, 15 *Ibid.* 284.

Moreover corporations being creations of local law enjoying the special privileges appertaining to a franchise, have no implied powers, but only such as are specifically granted. Outside of their own birth-place they have no absolute right of recognition. Other States may admit or reject them as they please, or restrict their operations in any manner however vexatious or arbitrary. Consequently, their contracts cannot be enforced within the limits of other States, without the previous assent of those States, who may also annex to it such conditions as they see fit.<sup>1</sup>

In correspondence also, with this sovereign authority of States to tax the property of corporations, they may exempt particular parcels, or the property of particular persons or corporations from taxation, either for a specified period or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected. In all these various forms of taxation or exemption, they are simply exercising their unquestioned powers of sovereignty. The hinge upon which this right of discrimination turns is the special privilege conferred upon corporations, or citizens in the form of a franchise. Any peculiar privilege conferred by a State upon a citizen removes that citizen from the operations of the Constitutional guaranty above cited, and applies universally to all classes of persons whether natural or artificial. The person or corporation enjoying this concession occupies an extra-political status, and is no longer on the plane of ordinary citizenship in such States. Some new right has been added, but of a local character only. Hence the disabilities of alienage in other States include public officers, receivers, executors and administrators, guardians, trustees and committees. Such persons can legally claim no extra territorial recog-

<sup>1</sup> *Paul v. Virginia*, 8 Wall. 168.

nition of their powers by sister States, but must first await their voluntary assent.

Whenever legislation does not discriminate against the residence of citizens, so as to work practical harm to their "privileges and immunities;" or against the place of production of domestic goods, so as to amount to a prohibitory exclusion of them from an open market, a State may exercise its right of sovereignty over all property owned by its citizens, or found within its borders;<sup>1</sup> or upon any business or occupation carried on upon its soil. Thus imposing a tax upon a non-resident trader by requiring a license to be taken out by him, was held not to be a regulation of commerce, because while residents of the State were taxed on their property, he could not be, and the license was properly a tax on his business and not on his alienage.<sup>2</sup> So a State may impose a tax upon the business of a telegraph company,<sup>3</sup> or upon the sale of liquor introduced from another State, when a similar amount is collected as a tax within that other State.<sup>4</sup> Again, a State may impose a penalty on the sale of articles not the product of the United States;<sup>5</sup> or impose a tax on the sale of articles manufactured in the State.<sup>6</sup>

### INSPECTION LAWS.

Inspection laws belong to the police powers of a State. They are designed to ascertain whether any particular articles of merchandise are fit for commerce; or

<sup>1</sup> *Speer v. Comm.*, 23 Gratt. 635.

<sup>2</sup> *Sears v. Commissioners*, 36 Ind. 267; *Commissioners v. Ober*, 67 Mass. 493.

<sup>3</sup> *West. Un. Tel. v. Richmond*, 26 Gratt. 1; *Ibid. v. Mayer*, 28 Ohio St. R. 539.

<sup>4</sup> *Hinson v. Lott*, 8 Wall. 148.

<sup>5</sup> *Beall v. State*, 4 Blackf. 107.

<sup>6</sup> *Downham v. Alexandria*, 10 Wall. 173.

for human consumption; or what measures are necessary for the protection of the public health, by the inspection either of domestic provisions, drugs, poisons, illuminating oils, spirituous liquors, and fulminating substances, as also the quarantining of men and animals, etc. etc.

A State has such plenary powers in these various directions, that it becomes superfluous to attempt any enumeration of cases in which those powers have been upheld when questioned. A few leading ones will suffice. Thus, a State may require that horses and cattle be landed at a designated spot provided by it, and may charge the owners for accommodations furnished there. Or, it may require all the cattle slaughtered in a certain district to be brought to the stockyards of a corporation created by it for that purpose.<sup>1</sup> Or, again, it may impose a penalty upon those who sell a particular article brought from another State, and allow a fee to the inspecting officers.<sup>2</sup>

#### TAXATION THAT IS IN CONFLICT WITH THE POWERS OF CONGRESS.

It is well settled, as elsewhere shown, that a State may tax the capital of its citizens whether at rest or in motion; may tax a particular business or occupation by whomsoever carried on within its borders, and even impose a penalty upon the sale of particular goods. What then may it *not* tax?

A State may not tax, even for hospital purposes the officers and crew of a vessel licensed by the United States, because Congress having exercised this power,

<sup>1</sup> State v. Pagan, 22 La. Ann. 545; Slaughter-house Case, 16 Wall. 36.

<sup>2</sup> State v. Fosdick, 21 La. Ann. 256; Bd. of Hay Comm. v. Pleasants, 23 Ibid. 349.

the State cannot tax the occupation of a mariner employed in the foreign or coasting trade. Nor tax a vessel temporarily entering its ports for purposes of commerce, if the home port is in another State. Nor compel it to pay a fee to a portwarden, whether he render or not any service to it.<sup>1</sup>

It may not tax passengers coming into the ports of the State, because this is a regulation of commerce,<sup>2</sup> although it may exclude them if paupers, vagrants, lunatics, or criminals, since this is an exercise of its police power.<sup>3</sup>

But it may not tax an alien after he has landed, for the mere privilege of residing in the State, except on the same basis as other residents. His property or his occupation may be taxed, but not his alienage.<sup>4</sup>

It may not tax freight taken up within the State and carried out of it, or taken up outside the State and delivered within it, or any form of freight other than that taken up and delivered within the State, because the transportation of freight as the subject of commerce is a constituent part of commerce itself, and the tax is imposed, not upon the commerce, but upon the freight carried and because carried.<sup>5</sup>

† It may not tax persons for the privilege of passing through it. Consequently a special tax on railroad and stage companies, or any other common carrier, for every

<sup>1</sup> *People v. Brooks*, 4 Denio, 469; *Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Steamship Co. v. Port Wardens*, 6 Ibid. 31; *Moran v. N. Orleans*, 112 U. S. 69; *Sprague v. Thompson*, 118 Ibid. 90.

<sup>2</sup> *Passenger Cases*, 7 How. 283; *Henderson v. Mayor*, 92 U. S. 59; *People v. Downer*, 7 Cal. 169; *State v. Constitution*, 42 Cal. 578.

<sup>3</sup> *Mayor v. Miln*, 11 Pet. 102; *Ex parte Ah Fong*, 3 Sawyer, 144.

<sup>4</sup> *Lin Sing v. Washburn*, 20 Cal. 534.

<sup>5</sup> *State Freight Tax*, 15 Wall. 232; *State v. Del. L. & W. R. R. Co.*, 30 N. J. 473; *Wabash R. R. Co. v. Illinois*, 118 U. S. 557; *Fargo v. Michigan*, 121 Ibid. 230.

passenger carried out of the State by them is a tax on the passenger for the privilege of transit, and not a tax upon the business of such companies.<sup>1</sup> Nor does it matter in what terms such tax is imposed, whether directly upon the passenger, to be collected by the carrier, or *vice versa*.

It may not impose a tax upon coal or other products of the State transported to markets outside of its limits, since this would be tantamount to an export duty.<sup>2</sup> Nor, if the tax is imposed upon all such freight in gross, is its invalidity cured by the fact that portions of that freight are intended for internal transportation alone, since the Act having for object the taxation of inter-state commerce is *ab initio* void. It cannot be validated by the embodiment of otherwise lawful provisions.

So, also, imposing a tax upon lumber floating down a river, in the course of transportation to another State, is a regulation of commerce and void.<sup>3</sup>

Any Act of Congress which authorizes the importation of an article authorizes its sale, that sale being an ingredient of commerce. And any tax or charge levied by a State upon the introduction of an article and its incorporation with the property of the State, is an interference with the power given to Congress to regulate commerce.<sup>4</sup> Nor can a State tax the commerce of the United States, in order to defray the expense of executing its police regulations.<sup>5</sup>

<sup>1</sup> *Crandall v. Nevada*, 6 Wall. 35; *State v. P. W. & B. R. R. Co.*, 4 Houst. 158; *People v. Raymond*, 34 Cal. 492; *Pickard v. Pullman Southern Car Co.* and *Tennessee v. Ibid.* 117 U. S. 34, 57.

<sup>2</sup> *State v. Cumb'n & Penna. R. R. Co.*, 40 Md. 22.

<sup>3</sup> *Carson Riv. L. v. Patterson*, 33 Cal. 334.

<sup>4</sup> *Brown v. State*, 12 Wheat. 419.

<sup>5</sup> *Passenger Cases*, 7 How. 283.



## GUARANTIES TO THE STATES AND THEIR CITIZENS.

In considering the attitude occupied by the States towards the General Government, it is necessary to bear in mind that, although the basis of that government is national and all sovereignty resides in and originates with the people of the United States, there were in existence at the formation of the Constitution thirteen independent colonies, or States, whose people, without destruction of their political autonomy, consented to merge so much of their sovereignty into that of the people of the United States as was necessary, in order to establish a supreme Federal government over all, but of defined and enumerated powers. This left the States and the General Government each supreme within the sphere of its own appropriate jurisdiction. The only qualification to this exercise of local sovereignty, on the part of the States, is in the matter of the ownership of their soil, the title to which is inalienably fixed in the people of the United States.

This fact being admitted, it is immaterial to our purpose to determine how short was the interval between the surrender of the independence of any one colony, and its immediate resumption of the powers of a State within the Union. Historically viewed, "the States severally continue the colonial organization, and united they hold the sovereignty that was originally in the mother-country."<sup>1</sup> Such is the language of Brownson, and it unfolds the same doctrine of the transference of sovereignty, by national continuity, as was laid down by C. J. Jay, in *Chisholm v. Georgia*.<sup>2</sup>

In like manner the powers of the Continental Congress from the first meeting in September, 1774, to the

<sup>1</sup> American Republic, p. 222.

<sup>2</sup> 2 Dall. 419.

ratification of the Articles of Confederation on the 1st of March, 1781, were revolutionary powers, and were derived from the people they represented, such powers being expressly given through the medium of State conventions or legislatures. The Colonial system expired with the Revolution, and that of the Confederation took its place, bringing with it a radical change in the hegemony of the States, which was not settled until the formation of the Constitution.<sup>1</sup> It was by this process of political transmutation that the States became by distinct appellation, and territorial separation, so many qualified sovereignties within the Union possessed of separate and distinct rights from those of the people, or the General Government. Whatever powers were bestowed upon them by their own constitutions were made subject to express limitations, so as to maintain them in direct harmony and subordination to the Federal Constitution.

Nevertheless, the express powers granted in the Constitution to the Federal government, and the limitations affixed to their exercise, have reference to it alone. These limitations, in consequence, do not apply to the several States. The autonomy of the States, with corresponding powers for domestic and local government, has been preserved as far as practicable. Therefore, the restrictions upon the powers of State governments are purely negative, requiring them simply not to infringe upon express provisions in the Constitution addressed to them; and not to violate those implied in that instrument, or in the grants of power to the General Government. So long then, as the several States assimilate their Constitutions to that of the United States, so as to harmonize the general guarantees given to the citizens, together with those secured to the Nation at large,

<sup>1</sup> *Ware v. Hylton*, 3 Dall. 199.

they may make any provisions in their organic laws which may be agreeable to their own citizens.<sup>1</sup>

Inasmuch, however, as a too liberal and strained construction had been put upon this doctrine of State sovereignty, particularly in respect to the colored population of the Southern States, even after the destruction of slavery, the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted as additional constitutional guarantees in their behalf, and Congress was empowered to enforce this article by appropriate legislation. By these three Amendments, certain omissions in the Constitution were repaired, and that instrument was made the dominant model for the determination of the civil rights of all persons by State governments, except in those matters exclusively belonging to the exercise of their police powers.<sup>2</sup>

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.—(*Art. IV.*, § 4.)

This is the first and most important guarantee made by the General Government, in its corporate capacity, to the States. The preamble to the Constitution having declared it to be the will of the people of the *United States* to form a more perfect Union, that instrument proceeded in all its parts to establish a Democratic Republic, whose government, whether Federal or State,

<sup>1</sup> *Barron v. Mayor of Baltimore*, 7 Pet. 243; *Murphy v. The People*, 2 Cowen 815; *Barker v. The People*, 3 *Ibid.* 686.

<sup>2</sup> *Slaughter House Case*, 16 Wall. 36; *U. S. v. Cruikshank*, 2 Otto, 542; *Civil Rights Cases*, 109 U. S. 3.

should be everywhere administered by representatives of the people. The original thirteen States having formed this Union by the ratification of the Constitution, required no enabling Act of Congress to authorize them to frame a State Constitution of their own. As a historical fact, they had already been invited to do so by the Continental Congress at the outbreak of the Revolution, in order to locally assist their independence of the authority of the British Crown, and for this purpose, had established a republican form of government in each of the colonies.<sup>1</sup>

The introduction of this clause in the Constitution was therefore in logical consistency with that scheme of future government which they were then constructing. Having formed a more perfect Union of republican States than existed under the Articles of Confederation, it was necessary to its perpetuity, that the republican character of local government should be forever maintained, as a *sine qua non* of State autonomy. No broken link could be permitted in such a chain of political hegemony.

<sup>1</sup> Many of these States framed Constitutions of so republican a character as not to need any extensive revisions in order to harmonize them with the Federal Constitution.

New Jersey adopted a Constitution,	July	2,	1776.
Delaware	“	“	Sept. 20, 1776.
Maryland	“	“	Nov. 8, 1776.
Pennsylvania	“	“	Sept. 28, 1776.
North Carolina	“	“	Oct. 18, 1776.
Georgia	“	“	Feb. 5, 1777.
New York	“	“	April 20, 1777.
South Carolina	“	“	March 26, 1776.
Virginia (Bill of Rights)	“	“	May 6, 1776,
New Hampshire adopted a	“	“	Jan. 5, 1776.
Connecticut	“	“	1776.

Rhode Island and Connecticut did not, at the period of the Revolution, like the other States, adopt a new Constitution, but continued the form of government established by the Charter of Charles II., each making only such alterations as were indispensable to its new political condition.

Since the adoption of the Constitution, the question of deciding what constitutes a republican form of government has always devolved upon Congress. The question is a political one and not to be answered in a judicial tribunal. In the case of *Luther v. Borden*,<sup>1</sup> Chief Justice Taney said, "It rests with Congress to decide what government is the established one in a State. For, as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State, before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character is recognized by the proper constitutional authority."

This guarantee of a republican form of government does not, however, designate any particular government as republican, nor is the exact form to be guaranteed especially mentioned. "The guarantee," says C. J. Waite in *Minor v. Happersett*,<sup>2</sup> "necessarily implies a duty on the part of the State themselves to provide such a government. All the States had governments when the Constitution was adopted. In all, the people participated to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is therefore to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form within the meaning of that term as employed in the Constitution."

The practical interpretation of this decision is, that, a

<sup>1</sup> 7 How. 42; *Powell v. Boon*, 43 Ala. 469.

<sup>2</sup> 21 How. 175.

republican form of government in a State means a political society which acknowledges its subordination to the Federal Constitution, and administers its government through representatives of the people elected in the manner specially provided by its own Constitution. Within this broad margin of definition, it will be readily inferred that a republican form of government does not imply the necessity of either universal or unqualified suffrage, or the absence of property qualifications. Some restrictions upon voting are quite compatible with the exercise of popular government. It is only when these restrictions discriminate against persons in a manner prejudicial to their civil rights, and political interests, that they infringe upon their privileges and immunities as citizens.<sup>1</sup>

Under this view of the guarantee of the United States to each State, Congress as the political department of the government, has the power to legislate for the purpose of re-establishing the broken relations of a rebellious State with the Union. And in establishing a new government within such a State, it may require that its Constitution shall contain any measure which Congress has the power to enact and enforce.<sup>2</sup> This necessity of interference, and of imposing conditions, arose out of the fact that constitutional government having been entirely destroyed, and legal State authority ceasing to exist by the promulgation of the Ordinance of Secession, the duty devolved upon Congress (after the restoration of the authority of the United States over these dismembered portions of the Union) of re-establishing State

<sup>1</sup> *State v. Woodruff*, 2 Day 504; *Opinions of Justices of S. J. Court*, 18 Pick. 575; *U. S. v. Anthony*, 11 Blatchf. 200; *U. S. v. Cruikshank*, 92 U. S. 542; *Minor v. Happersett*, 21 Wall. 162.

<sup>2</sup> *Shorter v. Cobb*, 39 Geo. 285; *Hardeman v. Downer*, Ib. 425.

governments, republican in form, under the control of and with the approval of the national government.<sup>1</sup>

Consequently the President's Proclamation of June 17, 1860, declaring that the Rebellion had in its revolutionary progress deprived the people of those States of all civil government, appointing meanwhile a provisional Governor, and ordering the election and assemblage of a convention to form a new Constitution and State government, was strictly in accordance with this article of the Constitution. These States did not cease to be members of the Union because of the Ordinance of Secession, nor did their citizens cease to be citizens of the United States.<sup>2</sup> In other words neither the States nor their citizens acquired a foreign character, during the period of insurrection. While their relations to the general government were suspended and changed, they were still not annulled.<sup>3</sup> And the reconstruction Acts passed by Congress were in the nature of necessary revivals of State governments, republican in form, by removal of the causes which had interrupted their continuance.<sup>4</sup> These Acts became, therefore, the self-evident exponents of the indissolubility of the United States, under the cohesive power of this constitutional guarantee.<sup>5</sup>

The duty of the States to maintain a republican form of government within their own limits, implies the duty of resorting to all necessary means for suppressing

<sup>1</sup> *White v. Hart*, 13 Wall. 646.

But these new New State Constitutions, although approved by Congress are not to be construed as Acts of Congress, being the voluntary act of the State performed without the coercion of the political department of the Government.

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

<sup>3</sup> *White v. Hart*, 13 Wall. 646.

<sup>4</sup> *Blair v. Ridgely*, 41 Mo. 63.

<sup>5</sup> In the several Reconstruction Acts, the language employed fully sustains this view, where it declares that the State in question "*Shall be entitled and admitted to representation in Congress as a State of the Union, when, etc.*" Vid. Acts of June 25, 1868, 15 Stat. at Large 73; Act of March 2, 1869, 14 *Ibid.* 429; Act of March 23, 1867, 15 *Ibid.* 4.

domestic rebellion. The term "lawful" imposes no restriction upon the States, in respect to the employment of means found within themselves for this purpose. If the civil authority be not sufficient they may invoke the military power. They could not call upon a neighboring State, however, to aid them in executing their laws, any more than upon a foreign power. But in suppressing an armed opposition, they may resort to the rights and usages of war, in the same manner as any established government, and the exercise of such authority cannot be questioned by the Courts. Should the power of the State however prove inadequate to the re-establishment of its civil authority, then and then alone, can the general government intervene, either upon the application of the Executive, or the Legislature, or, as in the case of the seceded States, upon *prima facie* evidence of the overthrow of lawful State government within the terms of the Constitution.

But no State can lawfully maintain a permanent military government from the mere apprehension of future domestic insurrection. The reason for exercising at any time a military authority, must be a present and pressing one. It is not sufficient that the necessity *may* arise, or is even near at hand; because, until the civil authority has exhausted all its powers, the military being its subordinate, cannot assume the reins of government. It may, indeed, aid the civil authority in discharging its functions, but it cannot supplant it until the latter is first dethroned. The military power as a dominant instrument of State sovereignty can only be exhibited during such an actual crisis. And even then the writ of *habeas corpus* could not be suspended.<sup>1</sup>

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

Vid. Act of February 28, 1795 (1 Stat. at Large, 424), authorizing the President to call upon the militia of other States to suppress domestic insurrection in any particular one. Also, Act of July 13, 1861 (12 Ibid. 257).



“ART. IV. § 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.

“§ 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.”

Judicial records form part of the municipal history of a State. They afford documentary evidence of changes in the civil rights of its citizens and others who have placed themselves within its jurisdiction. Owing to diversities of procedure employed in the various States, and which may be invoked by non-residents in order to enforce similar rights and to obtain similar remedies, Congress, by Act of May 26, 1790,<sup>1</sup> and the supplementary Act of March 27, 1804,<sup>2</sup> prescribed the mode of authenticating Legislative Acts and judicial records, so as to secure uniformity throughout the country.

Under the above guarantee afforded by these two clauses of the Constitution, that the laws of each State, by a species of necessary comity, shall protect the citizens of other States in enforcing through its appropriate tribunals any judgment against one of its citizens, or any lien upon property within its jurisdiction, every citizen is entitled to the privileges of the civil machinery of every State, on a similar footing with its own citizens. Subject therefore, to the qualification that the judicial proceedings are always open to inquiry, as to the jurisdiction of the Court which entertained them, and as to proper notice to the defendant, the judgment of a State Court, not reversed by a Superior Court having juris-

<sup>1</sup> 1 Stat. at Large, 122.

<sup>2</sup> 2 Ibid. 298; U. S. Revised Statutes § 905.

diction, nor set aside by a direct proceeding in equity, is conclusive in the Courts of all other States where the subject matter in controversy is the same.<sup>1</sup> Wherever the jurisdiction has attached, the proceedings are validated; the parties have had their day in court, the judgment is conclusive for all purposes and is not open to any inquiry upon its merits.<sup>2</sup> The Act of Congress not only provides for the admission of such records as evidence, but by their proper authentication, declares their effect, so that, if a judgment is conclusive in the State in which it is pronounced it is equally conclusive everywhere.<sup>3</sup>

The object of the constitutional provision was to strengthen the bonds between citizens of the various States, by facilitating the means for collecting debts. This it did by preventing the necessity for the repetition of a legal controversy upon the merits of a claim, after a valid judgment had been rendered upon it, in a competent State Court, but the execution of which, against either persons or property, required to be enforced through the tribunals of another State.

As to its effects upon wills when admitted to probate, it seems doubtful whether the decree does more than furnish conclusive evidence of the validity of the will, as affording title to things within the jurisdiction of the Probate Court, but not beyond. For being a decree *in rem* it is confined to things within the particular State. The "full faith and credit" to which it is

<sup>1</sup> *Christmas v. Russell*, 5 Wall. 290; *Mills v. Duryee*, 7 Cranch, 483; *Hanley v. Donohue*, 116 U. S. 1; *Renaud v. Abbott*, 116 Ibid. 277; *People v. Dawell*, 25 Mich. 247; *Green v. Sarmiento*, 3 Wash. C. C. 17.

<sup>2</sup> *Hampden v. McConnel*, 3 Wheat. 332; *Nations v. Johnson*, 24 How. 203; *D'Arcy v. Ketcham*, 11 Ibid. 165; *Bissell v. Briggs*, 9 Mass. 462; *Green v. Van Buskirk*, 7 Wall. 139; *Maxwell v. Stewart*, 22 Ibid. 77; *Ins. Co. v. Harris*, 99 U. S. 331.

<sup>3</sup> Story on Const. § 1313.

entitled, decides nothing in another State as to titles to things situated there.<sup>1</sup>

The objects accomplished by it were, therefore:—

1st. To place all the public acts, records, and judicial proceedings of each State on an equal footing before the law in every other State.

2d. To provide one general law for authenticating such acts, records, and judicial proceedings, so as to give them validity before every tribunal in the land.

3d. To declare what the effect of such authentication should be upon the Court, or officer, to whom the record was addressed. This provided the necessary means for giving to all valid judgments the conclusiveness of judgments upon the merits, whenever it is sought to carry them into judgments by suits in the tribunals of other States.

The difference between such a judgment and a foreign judgment, which it would otherwise resemble, is due, therefore, to the above clause of the Constitution and the Act of May 26, 1790; for while the foreign judgment would be only *prima facie* evidence of a debt to sustain a new action of debt upon it, that judgment is now made conclusive on the merits; and to it full faith and credit shall be given, when authenticated in the manner prescribed by Congress.

Necessarily, also, while the authenticated judgment is made a debt of record not examinable upon its merits, it does not carry with it, in another State, the right to an immediate execution against either the property or the person. To give it that force and efficiency, it must first be made a judgment there, and can be executed subsequently only in conformity with the laws of that particular State.<sup>2</sup>

<sup>1</sup> *Bowen v. Johnson*, 5 R. I. 112; *Olney v. Angell*, 5 *Ibid.* 198.

<sup>2</sup> *McElmoyle v. Cohen*, 13 Pet. 312; *Gibbons v. Livingston*, 6 N. J. 236;

The clause can only give validity to a judgment duly rendered by a competent Court against those who appeared to defend, or were duly notified to appear. It cannot validate a void decree, or cure defects relating to jurisdiction or want of notice to defendants.<sup>1</sup>

Inasmuch, however, as this "full faith and credit" relates only to the substantive merits of a judgment, States may, in the exercise of their sovereignty, limit the time for enforcing remedies upon judgments recovered in other States. And as rules of prescription remain within the power of every State, it may fix a less or larger time for the enforcement of such claims, or altogether bar such suits, if not brought within the statutory time. A plea of the Statute of Limitations is a plea to the remedy, and consequently the *lex fori* must prevail.<sup>2</sup>

For obvious reasons this provision attaches only to judgments in *civil* actions, and criminal prosecutions remain unaffected by it. The Constitution leaves to each State the exclusive power of defining and punishing crimes committed against its sovereignty. Subject only to the restraints imposed upon it as a member of the Union, each may regulate its criminal procedure independently of all others.<sup>3</sup> Even in the extradition of fugitives from justice, the Executive of a State is free to act as he may see fit, since Congress cannot coerce a State officer to perform any duty by Act of Congress, nor can such an officer be compelled through the judiciary, or any other department of the national government to surrender a party upon the demand of

Gibbons *v.* Ogden, *Ibid.* 285; Cole *v.* Cunningham, 133 U. S. 107; Hanley *v.* Donohue, 116 *Ibid.* 1; Renaud *v.* Abbott, *Ibid.* 277.

<sup>1</sup> Ogden *v.* Saunders, 12 Wheat. 213; Aldrich *v.* Kenney, 4 Conn. 380; Brengle *v.* McClelland, 7 Gill & J. 434; Vanuxem *v.* Hazlehursts, 4 N. J. 192; Duvall *v.* Fearson, 18 Md. 502.

<sup>2</sup> McElmoyle *v.* Cohen, 13 Pet. 312; Bacon *v.* Howard, 20 How. 22.

<sup>3</sup> Comm. *v.* Green, 17 Mass. 514.

the Executive of another State.<sup>1</sup> The governing principle there is solely that of comity.

#### AS TO PRIVILEGES AND IMMUNITIES OF CITIZENS.

In all forms of political society the possession and enjoyment of civil rights depend upon status. The principle is fundamental and independent of the character of the government. Even in Commonwealth governments typifying contractual relations between citizens, the existence of status is not only tolerated, but found to be indispensable to the successful administration of public affairs. The United States are no exception to this principle of municipal organization. And although every citizen may feel himself to be a monarch in plain clothes, the peer and equal of every other, he is still confined to the pale of his status, and must submit to the limitations which it imposes.<sup>2</sup> Popular sovereignty may be fundamental in a government, but it is not practicable in its administration. There will always be some citizens who, from minority, sex, crime, or other legal incapacity are not politically enfranchised.

As elsewhere shown, there are, in our political hierarchy, two generic classes of citizens of the United States, viz., organic citizens, meaning inhabitants generally, but who cannot vote, and political citizens or electors. The political status of each class being different, there is in consequence a diversity in the privileges and immunities enjoyed by them. Each elector

<sup>1</sup> *Comm. v. Dennison*, 24 How. 66.

<sup>2</sup> In England the King is the fountain of all privileges, which are thereby deemed to be so many *concessions* or *exemptions* granted to individuals or societies. Privilege in the subject is thus seen to be the offspring of prerogative in the sovereign. In a constitutional Republic, where the only sovereign is the law, *privileges* represent the legal capacity of an individual based upon his status. *Black's Comm.*, Bk. 3, p. 289.

by changing his domicile may enlarge or abridge some particular political privilege.

Thus an elector, who moves his domicil from some State into a Territory or the District of Columbia, loses his right to vote for President and Vice-President; while, on the other hand, a citizen of that Territory or District who fixes his domicil in some State acquires that right. Likewise in inter-state removals, electors disfranchise themselves politically in one locality, to enfranchise themselves in another, according to the laws of that jurisdiction. In commercial relations between the States, the citizens of each carry no extra territorial privileges or franchises with them. Beyond the right of free trade and protection against unlawful discrimination based upon their alienage, they have no exemption from the operation of the laws of the State they have entered. So long as they remain non-residents, they are only commercial citizens trading under the protection of the laws of the United States. What then, it may be asked, are the "privileges and immunities of citizens in the several States" as contemplated by the Constitution? What is the meaning of these terms? Whence their origin, and what do they particularly describe?

The terms privileges and immunities may be said to represent certain advantages in the possession of civil rights, and certain exemptions from the rigors of the common law, which, in their results, place their possessors in a favored position before the law of the land. And as those terms have descended to us from English sources, it may be well to remember that from the days of Magna Charta down to its last re-affirmance in the Bill of Rights of 1688, the Englishman always claimed the "*rights and liberties*" of a freeman as distinguished from the thralldom of the churl or villein. With us,

therefore, privileges and immunities are synonymous with rights and liberties, and mean all those fundamental rights which every freeman can claim as a member of our political society, because guaranteed to him by the law of the land.

At the adoption of the Constitution there were slaves in many States, who not being citizens, could claim neither privileges nor immunities. By the common law of those States they had no civil rights; their status forbade it; they did not own themselves. They could form no legal marriage or other contract, hold no property—could make no wills—bequeath no estate, nor claim their freedom. The articles of confederation had distinctly stated that the “free inhabitants” of each of the States should be entitled to all privileges and immunities of free citizens in the several States. Viewed in the light of these historical facts it is evident, that, under the Constitution, the terms “privileges and immunities” have always applied to freemen alone, and described those generic civil rights which are at the foundation of every free commonwealth government. They form the attributes of personal liberty in the citizen, and correspond to so many limitations upon the sovereignty of the State. They are fundamental and inalienable, because the citizen cannot be deprived of them except by due process of law.

In an early case, that of *Corfield v. Coryell*,<sup>1</sup> Washington, J., gave a definition to these terms which has been very generally adopted and reaffirmed by the Supreme Court. This definition includes, first and in general, “protection by the government; the enjoyment of life and liberty, with the right to acquire and possess

<sup>1</sup> 4 Wash. C. C. 380; *Comm. v. Milton*, 12 B. Mon. 212; *Campbell v. Morris*, 3 H. & McH. 535.

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 Court then proceeds to enumerate some of the more prominent of these as follows, viz:—

1. 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.

2. To claim the benefit of the writ of habeas corpus.

3. To institute and maintain actions of every kind in the courts of the State.

4. To take, hold, and dispose of property, either real or personal.

5. An exemption from higher taxes or impositions than are paid by the citizens of the other States.

6. The elective franchise as regulated and established by the laws or Constitution of the State in which it is to be exercised."

While the Supreme Court has refused to give any general definition of "privileges and immunities," confining itself to cases as they arise, there are enough of these, together with decisions of State tribunals, to show the direction in which courts have almost universally leaned in their interpretation of these terms.

The trend of these authorities is towards—

*First.* Freedom of action in the citizen to pass from State to State for any lawful purpose without let or hindrance. But in so doing he acquires no political rights as a sojourner either as to voting or holding office.<sup>1</sup>

*Second.* Freedom to trade, and to bring his goods into any State in the original packages if imported; and if not, then such goods may be taxed or a license

<sup>1</sup> *Crandall v. State*, 6 Wall. 35; *State v. Phil.*, Wil. & B. R. R., 4 Houst. 158; *People v. Brooks*, 4 Denio, 469; *Passenger Cases*, 7 How. 283; *Ex parte Archy*, 9 Cal. 147; *Willard v. People*, 5 Ill. 461.



required to be taken out by him, provided the law bears equally upon the citizens of that particular State.<sup>1</sup>

*Third.* Freedom of action on the part of the State to make any laws for the government of its own citizens that are not repugnant to the Constitution of the United States, or the laws made in pursuance thereof.<sup>2</sup>

*Fourth.* That all citizens of the United States temporarily residing in any State other than that in which they have their domicile, shall not be deemed or treated as aliens and foreigners, but shall stand on an equal footing with the citizens thereof, and be entitled to the equal protection of its laws.<sup>3</sup>

*Fifth.* That notwithstanding the above privileges and immunities, a citizen entering any other State than his own enters only as a citizen of the United States, and not as a citizen of the State in which he may happen to have his domicile. He carries with him only his civil, and not his political rights. In leaving his own State he leaves behind him all franchises and privileges of a local nature born of that jurisdiction. Whoever voluntarily enters any State subjects himself to its laws, and can acquire no peculiar privileges, except upon the same conditions as its own citizens.<sup>4</sup>

<sup>1</sup> State Tax on Railway Gross Receipts, 15 Wall. 284; *Welton v. State*, 91 U. S. 275; *State v. Robinson*, 49 Me. 285; *State v. Kennedy*, 19 La. Ann. 397; License Cases, 5 How. 504; *State v. Pinckney*, 10 Rich. 474; *Ward v. Maryland*, 12 Wall. 418; *Sears v. Commissioners*, 36 Ind. 267; *Seymour v. State*, 51 Alab. 52.

<sup>2</sup> *Del. R. R. Tax*, 18 Wall. 206; *Southern Exp. v. Hood*, 15 Rich. 66; *Nathan v. Louisiana*, 8 How. 73; *People v. Thurber*, 13 Ill. 554; *Liverpool Ins. Co. v. Mass.* 10 Wall. 566; *Osborne v. Mobile*, 16 *Ibid.* 479; *Hinson v. Lott*, 8 *Ibid.* 148.

<sup>3</sup> *State v. Medbury*, 3 R. I. 138; *Conner v. Elliott*, 18 How. 591; *Paul v. Virginia*, 8 Wall. 168; *Lemmon v. People*, 20 N. Y. 562; *Comm. v. Griffin*, 3 B. Mon. 208; *Ward v. Maryland*, 12 Wall. 418; *Morgan v. Neville*, 74 Penn. 52; *McFarland v. Butler*, 8 Minn. 116; *Davis v. Peirse*, 7 *Ibid.* 13.

<sup>4</sup> *Lemmon v. People*, 26 Barb. 270; *Conner v. Elliott*, 18 How. 591; *Reynolds v. Geary*, 26 Conn. 179; *Comm. v. Milton*, 12 B. Mon. 212; *Austin v. State*, 10 Mo. 591; *Minor v. Happersett*, 21 Wall. 162.

*Sixth.* That while a State may not impose a discriminating tax or other burthen upon non-resident traders, or citizens of other States, it may prescribe the mode of commencing and conducting suits or other judicial proceedings in its own courts, and provide extraordinary remedies for its own citizens. Hence, it may require a plaintiff who is a non-resident to furnish security for costs, or a non-resident executor or testamentary trustee to give bonds, unless the will contain an express provision relieving him from the obligation of giving security.<sup>1</sup>

*Seventh.* That while corporations are deemed persons, although artificial ones, and are entitled to the equal protection of the laws, they are not citizens even of the State which creates them. Not being clothed with the attributes of natural persons, and possessing only such rights as the Legislature has granted, they are not entitled to all the privileges and immunities of corporations in the several States. A franchise being the creature of local law has no extra-territorial validity. Each State is exclusively sovereign in its dealings with them.<sup>2</sup>

*Eighth.* This clause is a guarantee to citizens against the operation of other State laws than those of their own domicil, consequently it has no application to a citizen of the State whose laws are complained of.<sup>3</sup>

<sup>1</sup> *Campbell v. Morris*, 3 H. & McH. 535; *Haney v. Marshall*, 9 Ind. 194; *Baker v. Wise*, 16 Gratt. 139; *Burlock v. Taylor*, 33 Mass. 335; *Kincaid v. Francis*, *Cooke*, 49; *McGregor v. Francis*, 1 *Keyes*, 133.

<sup>2</sup> *Paul v. Virginia*, 8 Wall. 168; *Bank v. Earle*, 13 Pet. 519; *Tatem v. Wright*, 23 N. J. 429; *Warren Manuf. Co. v. Etna Ins. Co.*, 2 *Paine*, 501; *Phoenix Ins. v. Comm.*, 5 *Bush*, 68; *F. & M. Ins. Co. v. Hurrah*, 47 Ind. 236; *Atty.-Gen. v. Bay State Mining Co.*, 99 Mass. 148; *Slaughter v. Comm.*, 13 Gratt. 767; *Firemen's Association v. Lounsbury*, 21 Ill. 511; *State v. Lathrop*, 10 La. Ann. 398; *People v. Imlay*, 20 Barb. 68.

<sup>3</sup> *Bradwell v. State*, 16 Wall. 130.

## CHAPTER VI.

THE LEGISLATURE IN ITS RELATIONS TO ADMINISTRATIVE  
LAW.

THE distinctions between Legislative, Executive, and Judicial duties in the functions of government, have been apparent to all observers, from the first days of municipal organization. But it is only when viewed from an ethical stand-point that the inconsistency and danger of combining them in the same person, or in the same body, become manifest. Under patriarchal forms of society, the functions of Legislator, Judge, and Governor are necessarily united in the same person. Oftentimes, also, they descend in the order of succession to the family, and transmit an authority to rule which becomes prescriptive by lapse of time and undisputed exercise. All royal dynasties were originally private families which converted themselves into corporations, for the purpose of obtaining perpetual succession in their descendants. Whether known as Carlovingians or Plantagenets, Tudors or Bourbons or Stuarts, they all aimed at one common purpose, which was, to establish patriarchal authority in themselves, and to transmit personal sovereignty through descent. The possession of such unlimited power is always a temptation to its abuse, as history everywhere shows; and the doctrine of the divine right of Kings to rule, by an accumulation of all powers, legislative, executive, and judicial in their own hands, was simply an invention to cover royal iniquity with a mantle of sacredness, which none could

remove, under penalty of committing sacrilege. This doctrine may be justly pronounced the very definition of tyranny.

“There can be no liberty,” says Montesquieu, “where the legislative and executive powers are united in the same person, or body of magistrates.” This fundamental truth in the foundation of popular government was recognized by the builders of the Republic, and carefully incorporated into the framework of our Federal Commonwealth. It marks every stage in the evolution of the Constitution as shown in the deliberations of the Convention that framed it. Nor were they content to leave that Constitution to patriotism and public opinion alone for its protection. But forecasting the possible rivalries of sovereign States, and the encroachments of competing departments whose boundaries occasionally overlapped each other, they established between them the most unique tribunal of arbitration in the world, in the form of the Supreme Court. That august tribunal, clothed with an authority above the reach of legislative or executive control, is made the sovereign source of law in our land, and endowed not only with the legal faculty of administering public justice, but with the higher power of summoning States to its Bar, of deciding controversies between them, and of determining the validity or invalidity of every Legislative Act performed in the land. It is made the special guardian of the Constitution which created it, and as such all the statutory powers of the government of the United States are subject to its judicial scrutiny.

Under a tripartite division of the powers of government, it becomes the duty of the Legislature to enact laws—of the Judiciary to construe them, and of the Executive to enforce them. Therefore in the United States, the law-making power neither interprets nor

enforces its own acts, these duties devolving upon the Judiciary and the Executive. This separation of the departments of government by interposing constitutional barriers, is the highest expression of political sagacity when applied to the establishment of popular government. It disarms the Executive of all tyrannical power—it deprives the Legislature of the capacity of encroachment upon the territory of other departments by subjecting its labors to judicial supervision—and lastly it insures the independence of the Judiciary, by making it free in its salary and tenure from the trammels of political servitude to any other departments.

The necessity, no less than the expediency of this subdivision of power was early recognized in England, in those efforts tending towards the rise of the people, which beginning as early as the thirteenth century in certain national assemblies termed Parliaments, finally culminated in the establishment of the Commonwealth. No one can fail to trace, in the successive privileges gained by the English people since the “good” Parliaments of 1340 and 1376, the steady ascendancy of popular rights over royal prerogative. This progress in political enfranchisement has steadily continued, until it has become the foundation for that ultimate equipoise in representative government which springs alone from acknowledging the sovereignty of the people, in each branch of its tripartite administration.

Tracing the growth of legislative bodies from those primary assemblies of the people whose omnipotence we have elsewhere adverted to, it follows as a logical inference, that the legislative power has always been regarded by writers upon Government as the supreme authority in the State. And of necessity it must be so in a representative democracy—

1st, Because it represents the direct will of the people

exercising their executive power of self-government in a public assembly, and

2d, Because it is the organ through which that will is promulgated in the form of written law.

In the early colonial days of New England the functions of a Legislature combined duties of a judicial character with those of a law-making body.<sup>1</sup> These provincial assemblies were not restrained by a written constitution, but acted under the unlimited authority conferred by charters, as construed by the colonists themselves. Previous to the year 1636, says Judge Washburn, the entire judicial work of the Massachusetts colony was done by the General Court or Legislature. After that it was ordered that the Governor and rest of the magistrates should hold four great quarter Courts. This was the inauguration of the system of executive Courts, which latter had both a civil and criminal jurisdiction, together with a right of appeal to the general Court sitting twice a year.<sup>2</sup>

But this express theoretic view of Legislative power, which in England has led to the doctrine that an Act of Parliament cannot be questioned or its authority controlled in any court of justice, must, in the United States, be considered as meaning always power exercised within the Constitution, and in accordance with the principles of our social compact. Hence no omnipotence attaches itself to the power of an American Legislature, even where the Constitution has imposed no explicit restraint, because, in the exercise of that power it may have violated some fundamental maxim of a free government.<sup>3</sup>

<sup>1</sup> Connecticut, by Alex. Johnston, in *Am. Commonw. Series*, p. 57.

<sup>2</sup> Washburn, *Judicial Hist. of Mass.* 32; *Emancipation of Massachusetts* by B. Adams, "General Court."

<sup>3</sup> *Wilkinson v. Leland*, 2 Peters, 627; *Sedgwick on Const. and Stat. Law*, p. 132.

In all representative governments deriving their political descent from England, the sovereignty of the Commonwealth has accordingly been distributed among three co-equal branches, viz: The Executive, the Legislative, and the Judicial. This division of powers is the creature of modern times, and was unknown to the ancients. It appears also from the slowness with which this separation was accomplished in England, that it was the result of continuous struggles against the traditional rights of prerogative, whether existing in a King or in a constituent Assembly; and it kept pace with the rise of power in the people, as the authoritative foundation of representative government.<sup>1</sup> A free government, it is seen, must therefore be a complicated one, since that implies a balance of all its powers among themselves; while it is only in a despotism that a single will can combine and exercise both the law-making and the law-executing power. In the latter case the government is not one of laws, but of men, not one of general consent among the governed, but of personal will in the sovereign alone.<sup>2</sup>

In this modern and tripartite division of the powers of government, each branch is assumed to derive its authority primarily from the people, and to exercise it only as permitted by the Constitution. But however this authority may be prescribed in words, or however it may be carried into effect, an entire equality among these several departments is a practical impossibility. The preponderance of power will always and inevitably tend to centre itself in that branch where the popular will is most immediately represented; that is to say, in the Legislature. Mr. Mill in his work on Representa-

<sup>1</sup> Palgrave's English Commonwealth, vol. 1, p. 127.

<sup>2</sup> This is exemplified in the rule of the Civil Law declaring that "*Quod Principi placuit legis habet vigorem.*" Institutes lib. 1. 4. 1.

tive Government, when touching upon this subject says very truly, that "A perfectly balanced Constitution is, in the nature of things impossible, because, in the practical application of the powers of Government, some one branch must inevitably preponderate or take the lead *quoad hoc*. If each, being equal, could thwart the operations of the other, Government would soon be at a dead-lock, since acting in defence of its own powers it would never lend its aid to the others. It is only public sentiment or morality which prevents aggressions by one branch of Government upon another."<sup>1</sup>

It will be perceived from this, that the predominant manner in which any particular department asserts its authority in the affairs of the General Government becomes a test of the public intelligence and morality of the nation. Thus, where everything bends to the will of the executive alone, the Government expresses want of general intelligence in the citizens, coupled with weakness of public morals, this is tyranny; again, where everything bends to the will of the Legislature, it expresses an uncultivated idea of the true character of representative political majorities, as qualified law-makers; this is a pure democracy. And lastly, where the judicial branch is permitted to give tone to the operations of the Government by interpreting the limits within which the Executive and Legislative branches may constitutionally tread, it then becomes a true Government of laws, and not alone of men.

The development of the British Constitution, from the days of Magna Charta and the establishment of annual Parliaments, has been mainly, therefore, in the direction of a more definite separation of the three essential departments of government. This separation is even yet far from complete; but since the Revolution

<sup>1</sup> P. 82 *et seq.*



of 1688, it is felt to be, for all practical purposes, sufficient to insure the nation against all possible dangers from royal usurpation. Prerogative has passed from the King to the Commons and can never be recalled.

The tripartite division which consequently grew out of these modern doctrines of free government, was not only adopted by the founders of our own, but greatly improved upon in the absoluteness with which this division was secured. By the Constitution of the United States, and that of every State in the Union, the executive, legislative, and judiciary departments are assured an inviolable jurisdiction over their own territory. In fact, the pendulum of reform has swung so far in the direction of popular sovereignty, that it is from usurpations of legislative power, more than from any other source of public authority, that we now have cause for apprehension. It is true, that the balance-wheel of the judiciary constantly exercises its influence in curbing any disposition to assume unconstitutional powers. A barrier is thus erected against the enforcement of unjust laws. But the judiciary is, nevertheless, the weakest of all the departments, and could not execute its own mandates without aid from sources outside of itself. Hence, if those mandates are disobeyed, it has no inherent power to enforce them. Where, then, lies the strength of such a government? It lies in the mutual support given by these various departments to each other, within the constitutional limits prescribing their sphere of action.

From the first day of the organization of our government, it has been felt that whatever might be the relative strength of any department to defend itself against encroachments; or whatever ascendancy a political party might have over either the legislative or executive branches, every safeguard must be placed around the

judiciary to preserve its independence. This department has been looked upon as essentially the bulwark of our civil liberties. The winds of political dissension may blow, and the waves of party contention may beat upon Congress or the President, so as to direct, if not control, their official action, but on our judiciary they can produce neither shock nor impression. It is placed constitutionally outside of the sphere of political movements and emergencies. It stands unique, impartial, inviolable. In this consists its strength; and its strength in turn maintains the legal equilibrium of our forty-four States.

The course pursued by our judiciary has always accorded with these ideas of constitutional independence. It has always repelled encroachments upon itself, and stayed the course of ill-advised legislation. As early as 1793, the Circuit Court of the United States felt itself called upon to vindicate the independence of the judiciary in *Hayburn's case*,<sup>1</sup> which arose upon a mandamus prayed for by the Attorney-General under the Act of Congress of March 23, 1792, imposing certain duties concerning revolutionary pensions upon circuit courts, and making their decisions revisable by the Secretary of War and Congress. Chief Justice Jay, pronouncing the opinion of the Court, held that "neither the legislative, nor the executive branches, can constitutionally assign to the judicial any duties but such as are properly judicial, and to be performed in a judicial manner. That the duties assigned by this Act were not of that description, and consequently imposed no obligation upon the Court to execute them." The prayer of the petitioner was accordingly denied, and

<sup>1</sup> 2 Dallas, 409

the Act of Congress subsequently purged of its unconstitutionality by an appropriate amendment.

The independence of the judiciary was again assailed in 1870, in New York, by an attempt on the part of the Assembly to punish Judge Potter of the Supreme Court for a breach of the privilege of that House, committed in issuing an attachment against one of its members, who had been guilty of a criminal contempt by disregarding a subpoena issued by the Court of Oyer and Terminer, a criminal branch of the Supreme Court, and whose process, legally speaking, was not "*civil process.*" Judge Potter vindicated fully the right of the judiciary to issue such attachment, being in the nature of criminal process against a contumacious witness, and the case against him was discharged. But in discharging the case, the Assembly did not withdraw from the position it had taken in charging the Judge with breach of privilege. It simply exonerated him from any intentional wrong-doing. No student of the Constitution can fail to see that Judge Potter was right, and the Assembly of New York wrong.<sup>1</sup>

The necessity for maintaining the independence of the judiciary, as representing a government of laws and not of persons, needs no exposition before the eyes of a citizen of the United States. It is self-evident that the preservation of this government, if one of laws, must depend chiefly upon that department whose duty it is to interpret these laws, and to direct their administration. The moment we deviate a step from this, we revert either to personal absolutism or democratic anarchy. Besides which, the instinctive desire for justice implanted in mankind, has very naturally led them to turn to the judiciary as the least corruptible of the depart-

<sup>1</sup> Potter's Dwaris on Statutes, pp. 708, 792, Appendix; Sedgwick's Const. and Stat. Law, p. 120.

ments of government, and to confide to its keeping the most sacred interests of society.

These postulates in the genesis of representative government show that, in order to inaugurate government, we must have—

*First.* A Constitution, or fundamental law, which deals with all things, but only in a general way and when at rest. This law expresses the permanent will of the nation.

*Second.* An administrative law which deals with all these things when in motion, and therefore expresses the occasional will of the nation.

*Third.* That in order to shape the adjective law of procedure to the substantive law of the Constitution, we must have assemblies of representatives empowered to enact laws, of binding obligation upon all to whom they are addressed.

Representative assemblies as an instrument of government have, accordingly, been found necessary in all forms of democratic society. The cause of this obviously rests in the inability on the part of the citizens of any community to discharge, simultaneously, the duties of *governors* and *subjects* of the State. A delegation of special powers to an enumerated body of persons, to legislate for the whole body politic, becomes a speedy necessity in the development of every free community; and it is painful to recall how much time, and how many costly experiments have been required to determine the proper limits within which a supreme legislative power could be delegated to a representative body.

Ancient societies never mastered the true principles of a free representative Assembly. The ancient city-state was a Federal democracy, but without any system of representation. It marked the highest conception of popular government of which the masses were capable.

Hence, even in Athens, where the legislative Assembly consisted of a multitude numbered by thousands, nothing higher than a resolution could be passed. On the other hand, the decrees of the Senate were liable to be overthrown by the whole body of the people sitting in the General Assembly.<sup>1</sup> "The structure and history of the Athenian democracy," says Chancellor Kent, "has much to warn and very little to console the friends of freedom. From the incurable defect, among others, of assembling the people to make laws in masses and not by representation, and from the want of a due and well-defined separation of the powers of government into distinct departments, that celebrated Republic became violent and profligate in its career and ended in despotism and slavery."<sup>2</sup>

When a law was to be enacted, the proposition had first to be submitted to a *legislative committee*, before whom, also, a board of advocates appeared to contest the expediency of the new measure. The founder of the Athenian Constitution, Solon, saw the necessity of limiting the powers of the popular Assembly by creating a supreme board emanating from itself, which, by reason of the intelligence, experience, and familiarity with legal principles possessed by its members, should impart a more judicial character to their deliberations.<sup>3</sup> Something akin to this will be found engrafted upon the constitutions of most of the ancient leagues or confederacies.

In the history of Roman legislation we find the same exaction of a higher authority than a mere popular Assembly for the passage of a law. Hence, its definition in the Institutes, which affirms that "a law is an

<sup>1</sup> Brougham's Political Philosophy, 89.

<sup>2</sup> 1 Kent, Lec. XI., p. 232, n.

<sup>3</sup> Thirwall's Greece, vol. 2, p. 46, and vol. 8, p. 91.

enactment established by the Roman people upon the rogation of a senatorial magistrate or a consul."<sup>1</sup> It seems doubtful, therefore, whether with strict reference to the power which formed the acknowledged source of law in Rome, a *senatus consultum*, was in itself a true law. Even *plebiscita* have been similarly criticised, and if we admit, as we must, that the only two proper modes of enacting laws there were through the *comitia curiata* and the *comitia centuriata*, both which were scarcely more than large town meetings, the above criticisms will not appear to be without some foundation.

Neither a Senate alone, nor yet a popular Assembly, seems to have been considered, in even the most rudimentary republics of antiquity, a competent legislative body. Every political society has, sooner or later, been compelled to see that for the purpose of securing the utmost perfection in legislation, it is best that the labors of one deliberative Assembly should be reviewed by another. The danger which constantly menaces the law-maker is that of precipitancy, coupled with inadequate preparation. A deliberate revision of his work by a second chamber seems the only practical method for detecting its errors. It is unnecessary, however, to enter into any historical disquisition upon this intuitive appreciation of mankind, of the safety of dividing the law-making Assembly into two branches. It is sufficient to point to its universality as the best proof of its recognized necessity and wisdom.

Coming down to later times, we find that in the Middle Ages, congresses of feudal lords often assembled to determine questions relating to local polity. But these bodies were generally powerless to execute their decrees, without the consent of the parties upon whom such

<sup>1</sup> Lex est quod Populus Romanus senatorio magistratu interrogante, veluti consule, constituebat. Instit. Lib. 1, tit. 2, sec. 4.

laws operated. This was the condition of local governments, both in France and in England, until the beginning of the thirteenth century.<sup>1</sup> With the then existing supremacy of the Church, as an almost co-ordinate branch of civil authority, ecclesiastical councils were also often held, which, besides disposing of questions relating to dogma or discipline, undertook to interfere in secular matters, even to the extent of prescribing material penalties, and thus of entering into the domain of municipal government. Concurrent history would seem to point to the States General of France (an Assembly constituted of representatives from the three orders of the nation, and convoked by Philip the Fair in 1302) as the first legislative body of modern Europe, which approximates in any degree to present ideas of a representative parliamentary Legislature.

In England the congresses of barons were in no sense representative assemblies. They related only to the rights and privileges of the nobility, while the commonalty were no better secured in their individual rights than under any form of feudal despotism. Even the famous provision in Magna Charta, relating to the protection of personal liberty and the guarantee of trial by jury, if legally construed according to the words of discrimination which it contains, practically excluded the most helpless class of persons from its benefits. "*No freeman,*" such is its language, "shall be taken or imprisoned or disseised of his freehold or liberties, etc., but by lawful judgment of his peers, or by the law of the land." Now, at that time there were thousands of serfs in England living like cattle in prædial servitude. Had they no rights which Magna Charta should have protected? Were they not within the pale of the common law of the land? It seems not.

<sup>1</sup> Hallam, M. A., pp. 99-102.

It is generally conceded that until the beginning of the fourteenth century the English Parliament was not divided into two Houses, and so numerous are the conflicting accounts given us of the beginning of this custom, that it seems impossible to affix, with certainty, any particular date to its occurrence. Indeed, the time of the first union of county and borough members as one *elective* body, contradistinguished from another Assembly *individually* summoned in their quality of peers and barons, is differently stated by such historians as Carte and Hallam, the former placing it in the 17th Edward III. (1344), the latter in the 1st Edward III. (1327). Bearing in mind the fact that the Parliaments consisted only of the great lords or barons, and the knights of the shire, as representatives of counties, all alike being of the rank of tenants *in capite* of the Crown, it will be seen that no place was yet made for the burgesses or representatives of boroughs. The union of county and borough members arose, but much later, and as a necessity for acknowledging the local power which they represented. That this power had long existed, is evident through many acts originally associated with the presumed prerogative character of the great barons, when assembled in council. Thus, there seems to be little doubt that the barons who wrested the Great Charter from John, had in their turn to make very liberal concessions to their own vassals, a fact which plainly indicates that feudal oppressions were gradually surrendering to the advance of more liberal ideas in government. Many signs existed to show that democratic ideas were already in the air.

“At the Conquest,” says Lord Brougham, “and for nearly two centuries later, there were no representatives even of the counties. The greater Peers or Barons sat in one chamber with the lesser Barons, or free tenants,



holding their lands like the greater, directly, or *in capite* of the Crown. In the Thirteenth Century, the counties began to send Knights as representatives of the lesser freeholders, whose personal attendance was thus excused, and it was only towards the latter part of the century that the burgesses or inhabitants of towns were represented, and that they, with the Knights representing Counties, formed a body apart from the Peers and sat in a chamber of their own."<sup>1</sup>

In like manner Mr. Guizot, writing upon this confused point in the development of representative government says, that "originally the separation was between the representatives of the Counties and those of the Boroughs. The former, under feudal traditions, consisting of titled personages, such as Knights of the Shire, were associated with the great Barons. And even after the union of the two classes of representatives in one House, there is evidence that in the case of special taxes and customs, the discussion and the vote was limited alone to the representatives of towns and boroughs.<sup>2</sup> When the Assembly sat in the same town or at Westminster they occupied the same chamber. The Knights and great Barons sitting at the upper, and the Burgesses at the lower end."

But, how little legislation was then understood, as meaning Acts of delegated authority executed for the advantage of the State as a whole, is thus set forth by him:—

"No idea then existed of truly general interests and a national representation. The *particular* interests which were of sufficient importance to take part in the government, intervened in it solely on their own account, and treated separately of their own affairs."<sup>3</sup>

<sup>1</sup> Polit. Phil. vol. 3, p. 194.

<sup>2</sup> On Represent. Gov., p. 420-421.

<sup>3</sup> Ibid. p. 421.

Nevertheless, the steady growth of towns and the rights of personal independence acquired by their freeholders, as citizens carrying on commercial relations of both a domestic and foreign character, imparted to this class of burghers a political status midway of that of the aristocracy, and the county freeholders. The artisan class being producers and manufacturers, in contradistinction from the two foregoing classes of simple consumers, the fruits of their industry, under the multiple forms of wealth, soon gave them the possession of a power capable of controlling the financial stability of the State. Although their names are not found inscribed in Domesday Book, nor on the roll of Battle Abbey, they still exercised in times of public emergency a greater influence than many an Earl with half a score of quarterings in his family escutcheon. It was among this class that modern commercial law took its rise. It is to their enterprise, their industry, and their spirit of adventure, whether on land or sea, that European nations owe their wealth and social progress. It is to the merchants and artisans of that day in England and on the Continent, that we owe our first ideas of bills of exchange and notes; of many forms of bailment, and of laws of shipping and marine insurance.

The primary object of these early Parliaments was to impose taxes and redress grievances. In other words to establish and maintain some salutary checks upon royal prerogative, which always tended towards tyranny. Politics in that day consisted mainly in money dealings between the sovereign and the nation, in which royal prerogative always gave him the advantage. This battle between King and Parliament was renewed under every dynasty, and it was only in the reign of Edward III. that Parliament first succeeded in establishing

three very important principles relating to the privileges and authority of representative assemblies, viz:

*First.* The illegality of raising any public money without their consent.

*Second.* The necessity that the King and both Houses should concur in making or altering any law.

*Third.* The right of the Commons to inquire into public mal-administration, and to impeach offenders.

The separation of the House of Lords from that of Commons was recognized as a necessity, from the very inception of a national Legislature in England; and the cardinal principles above unfolded were the result of continuous struggles on the part of Parliament to resist, in behalf of the people at large, the traditional and hitherto unquestioned prerogatives of a King and Privy Council. These fruits of a growing respect for the rights of a class of citizens heretofore ignored, are represented in those so-called *privileges* of Parliament, which still show that they were originally treated as royal *concessions*, rather than as *inherent, popular* rights. In the famous Petition of Rights, presented by Sir Edward Coke to Charles I., in 1628, on behalf of Parliament, relief from manifold impositions was prayed for as among the rights and liberties of English subjects, according to the laws and statutes of the realm; and the King was humbly besought to grant these things as manifestations of his royal will and pleasure.<sup>1</sup>

The House of Lords, in addition to its ordinary legislative powers, as a co-ordinate branch of the national Legislature, enjoys also a certain power of judicature in the following cases, viz:—

1st. In the trial of peers.

2d. In claims of peerage and offices of honor.

<sup>1</sup> Hume, vol. 5, p. 42; Rushw., vol. 1, p. 590; Parl. Hist., vol. 8, p. 116; Whitlocke, p. 10.

3d. It also has jurisdiction over cases brought on writs of error from the courts of law, and to hear appeals from courts of equity on petition. But appeals in ecclesiastical, maritime, or prize cases, and colonial appeals both at law and in equity are determined by the Privy Council.<sup>1</sup>

It can also administer oaths to witnesses summoned before it, whether they are to be examined by the House, by a committee of the whole House, or by a select committee. This is a prerogative which the House of Commons had formerly never claimed much less exercised, except during the Commonwealth.<sup>2</sup> The reason for this discrimination between the powers of the two Houses, in a matter so essential to the discovery of truth as the administering of an oath to witnesses, has never been explained. It will probably be found to rest upon an act of original usurpation born of some obsolete fiction of law. Various attempts at securing by subterfuge for the House of Commons a like privilege have been at times made; such, for instance, as directing some of its own members, who happened to be justices of the peace for Middlesex and Westminster, to withdraw and examine witnesses under oath, but in so doing they plainly exceeded their own powers and jurisdiction, the witnesses not being legally *coram judice*.

So, too, when judges of common law courts were called in for the same purpose, or the Commons sought to obtain examinations under oath at the bar of the House of Lords, or before joint committees of both Houses, these methods were found to be irregular and illegal, and in the last-named instances the Lords refused to sanction them. These various attempts on the part of the Commons to assume, or delegate a power which they had not even claimed to exercise themselves, continued until the year

<sup>1</sup> May, *Law of Par.*, p. 51.

<sup>2</sup> Hatsell, vol. 2, p. 138; May, 313.

1871, when an Act was passed (34 and 35 Vict., c. 83) empowering the House and its committees to administer oaths, subject to all penalties for perjury.<sup>1</sup>

One of the earliest and most important results secured by the House of Commons, in its manifold struggles against the prerogatives of the House of Lords, was that of obtaining for itself the right to be the exclusive judge of the returns, elections, and qualifications of its own members. It would appear that after having permitted this right to be exercised by the King and Council, the House of Lords and the Lord Chancellor, the Commons, in 1624, finally declared by resolution that this privilege belonged to it as "its ancient, natural, and undoubted privilege," and so it has ever since been regarded. This rightful claim did not escape the notice of the framers of the Constitution who embodied it as a power bestowed upon both Houses of Congress.<sup>2</sup>

The necessity for thus subdividing a national Legislature into two distinct houses, has approved itself to the framers of all representative governments, as a just balancing of the powers of law-making between a purely democratic Assembly springing directly from the people, and a co-ordinate body of a more stable character, elected by delegates of the people, and generally enjoying a longer and more independent tenure of office. "Each," says Mr. Mill, "must represent some power in the State. Each is a check upon the other, and in every law passed makes the responsibility rest upon both Houses. Neither, then, can be said to dictate the law upon its despotic power."<sup>3</sup>

Passing now to the domestic government of our

<sup>1</sup> May, Parl. Pr., 428.

<sup>2</sup> Art. I., § 5; Cushing, Leg. Assemb., p. 55.

<sup>3</sup> On Represent. Govt., p. 249.

several States, in respect more particularly to the legislative and executive departments, their separate powers and duties present themselves to us in the following order of relation, viz:—

#### THE LEGISLATIVE DEPARTMENT.

As a general rule, State Constitutions do not undertake to define the powers either of the legislative or the judicial department. This is in marked contrast with that spirit of jealous supervision which prescribes with precision the character and functions of the Executive. In respect to the two former departments, there is a conceded latitude of powers which seems to represent the entire sovereignty of the people, except as limited by themselves. Hence, an American Legislature usually possesses the whole legislative power of the people, except as limited by the Constitution; and in like manner in a judicial sense the authority of our courts is absolute and unqualified, except as limited by the same organic law. The two circles of limitation within which those departments must operate are, therefore, the interior one of the State Constitution and the exterior one of the Federal Constitution. These Constitutions furnish the only restraints upon the powers of the legislative department, and it is within their provisions that are to be found the essential guides to the exercise of its law-making functions.

Under a government like our own, whose laws are made in conformity with a Federal Constitution termed *rigid*, and of which in turn State Constitutions are largely derivative, it may be well to consider what that term implies, and how far it limits the freedom of legislation in respect to powers not enumerated in its provisions. As has been elsewhere shown, every popu-

lar constitution is an evolution from the domestic life, social manners, political ideas, and religious beliefs of a nation. These elements, however important as historical factors in the preparation of a people for chartering government on the basis of their unrestricted sovereignty, cannot, nevertheless, all be expressed in terms of equal proportion and weight in the code of their organic law. They would encumber legislation with details and obstacles, by combining essentials with non-essentials; they would fetter the action of State sovereignty with conflicting limitations; lastly, they would bind the administration of justice to a measured standard of rights and remedies, incapable of adjusting itself to the varying necessities of a progressive society.

In this connection, also, it is necessary to bear in mind that an important and characteristic difference exists, between the Federal and the State Constitutions. The former represents a grant merely of powers, enumerated and surrendered by the people, to the National Government. The latter represents only the limitations which the people of a State have imposed upon their political departments, in their distribution of administrative powers. Whatever powers are not granted to the general government are withheld; whatever powers are not prohibited to the States are retained by them; and whatever powers are not prohibited to Legislatures either by their own State Constitutions or that of the United States, may be exercised by them.

It is for these reasons that, in tracing the genesis and structure of the Constitution of the United States through all its historical antecedents, we are compelled to admire it as much for what it has omitted, as for what it has ordained. Outside of, and beyond the rigid lines of its chiselled formulas, it has left a vast field of undefined powers, of whose extent, the term "reserved,"

conveys but a faint intimation. This wide area includes all those necessities of the domestic and political life of the nation, which make constant additions to its common law, and find ultimate expression in legislative enactments. It is here we confront the fact that the political constitution, though inelastic in itself, is supplemented by a greater domestic and social constitution which surrounds it like an atmosphere, making it possible for legislation to expand, and to create new rights, as well as to regulate existing ones. Administrative law needs elastic limits, in order to adapt itself to the varying circumstances of the times. Nor is the effect of the possession of these undefined powers in the States and the people, less beneficial to jurisprudence, which finds in these same sources the foundations of local sovereignty; which shapes the administration of justice in conformity to their spirit and intent; and under principles combining equity with public policy, seeks to harmonize the administration law of the States and of the Nation, with the higher law of the Constitution.

In looking, therefore, at the few restraints imposed by it upon the States, in the light of the compensating freedom of action contained in their reserved powers, one cannot fail to see the extreme care manifested to maintain their autonomy against any possible interference on the part of Congress, in matters over which the people have not surrendered jurisdiction to the United States. It was intended that they should exercise every function of local sovereignty compatible with their relations to each other, and to the general government. And their Legislatures were left free to act, under their own State Constitutions, as befitted the law-making department of an independent commonwealth. Any thing less than this power of local sovereignty,



would have reduced them to the condition of municipal bodies, subject to the arbitrary will of Congress. In the language of Mr. Justice Nelson, "any government whose means, employed in conducting its operations, are made subject to the control of another and distinct government, can exist only at the mercy of that government."<sup>1</sup>

Anterior to the formation of any of our State Constitutions, it may be doubted whether there existed any definite restraints upon the power of the Legislatures of those States, such bodies still possessing all the primary sovereignty of the people, except as limited by Magna Charta and subsequent Bills of Rights. Consequently, the idea evolved by a written constitution was that of recognizing the necessity of affixing some visible restrictions upon representative sovereignty, as delegated to a Legislative Assembly.<sup>2</sup>

Inasmuch, however, as each constituted department of government must be clothed with such powers as are indispensable to the exercise of its authority and the maintenance of its efficiency, it follows that there are certain powers which may be said to be inherent in the nature of a Legislative Assembly, and do not need to be specially delegated to it. The right to exist includes, as well, the right to the exercise of all that is necessary to protect that existence. Such necessary powers, therefore, are held to be included in the provisions of the organic law establishing a legislative department, and the manner of their execution is left to each House itself, which thereupon proceeds to enact its own rules. Those rules, constituting the written law of such a body, are of binding obligation upon its members until they are revoked or abrogated in due form. The following is a summary

<sup>1</sup> *Collector v. Day*, 11 Wall. 124.

<sup>2</sup> *Wilkinson v. Leland*, 2 Peters, 627.

of the essential powers and privileges of an American Legislature:—

*First.* The power to decide upon the election and qualification of its members.<sup>1</sup>

*Second.* The power to choose and remove its own officers, and to make and enforce rules for the transaction of business.<sup>2</sup>

*Third.* The power to compel the attendance and service of its members; to maintain order; to punish for contempt, and to suppress personal violence.

*Fourth.* To protect and preserve its dignity and honor, by the reprimand of, or expulsion of an unworthy or incompetent member.<sup>3</sup>

*Fifth.* To protect itself and its members from libelous and slanderous attacks, and against bribery and corruption.<sup>4</sup>

*Sixth.* The privilege to be free from all interference on the part of other departments of government, while engaged in any matter depending before it. Nor can its motives be inquired into, in relation to the passage of any statute.<sup>5</sup>

*Seventh.* The power to issue process and to administer oaths, and to compel the attendance of witnesses, and the production of papers whenever necessary to obtain information in aid of legislation. And for this purpose, it

<sup>1</sup> Const., Art. I., § 5; Story on Const., § 833.

<sup>2</sup> 1 Kent's Comm. 238; Tucker's Blacks. Appendix, N. 200, Barclay's Digest; Cushing L. & Pr. of Leg. Assemb., pt. 2, ch. 2.

<sup>3</sup> Blount's Case, 1 Story Const., § 838; Smith's Case, 1 Am. L. Jour. 459; Sergeant's Const., L. ch. 28, p. 285; Benton's Abridg. Deb., vol 2, p. 658.

<sup>4</sup> Duane's Case, Journal of U. S. Senate, vol. 3, 37; Jour. of Sen., 29th Cong. 1st Sess. 191; Cong. Globe, vol. 15. 457, 458, 525; Whitney, etc., Randall's Case, Jour. H. of Reprs. vol. 2, 389; Anderson's Case, Ibid., 15th Cong. 1st Sess. 117.

<sup>5</sup> People v. Shepard, 36 N. Y. 285; People *ex rel.* Wood v. Draper, 15 N. Y. 545; *Ex parte* Newman, 9 Cal. 502; Harpending v. Haight, 39 Ibid. 189.

may appoint committees to pursue such inquiry during the recess of the Legislature. But such committees cannot punish for contempt beyond the session of the Legislature, and their power is in abeyance during its recess. "A Legislative Assembly," says Mr. Cushing, "being authorized, in the exercise of its constitutional functions, both administrative and legislative, to institute inquiries into all grievances of the citizen which are remediable by legislative enactment; and into all abuses of power by persons in office, with a view either to their removal by address, or to their punishment by impeachment, it has a power to investigate all such subjects, by the examination of witnesses, or otherwise, in the same manner, as is practised by grand juries, and as a consequence of this authority the Assembly itself, its officers and servants and all persons connected with every such investigation, enjoy a perfect immunity for everything fairly said, done or published in the course of such inquiry."<sup>1</sup>

In the exercise of this power, which has at times led legislative committees, or even the House itself, to encroach upon the domain of the Judiciary, there has been frequent occasion to discover how easily, and to all appearances how unintentionally, a law-making body assumes the complexion and action of a judicial forum, when sitting outside of its own chamber, or performing unaccustomed duties. The power to issue process and to administer oaths being in its nature judicial, it becomes extremely difficult in its exercise to pause at the proper legal limits of legislative authority. Moreover a legislative committee, being a political body representing more or less of the spirit of party affiliation, is not sufficiently impartial to exercise even quasi-judicial duties without some color of prejudice. Though there should

<sup>1</sup> On Legislative Assemblies, § 641.

happen to be lawyers upon it, they are still, like any other members, under bonds to defend the interests of the party which has elected them.

Consequently, such a committee should be attended by counsel to represent them in the examination of witnesses; and if any party examined desires similar assistance, he should be allowed to have it, although the proceeding is not technically a trial. The novelty of the position in which such a witness is placed, and the leading character of the questions often asked and of which he may have had no previous intimation, entitle him to this aid. Moreover, it helps to purge the proceeding of its otherwise inquisitorial character. Nothing is more foreign to the genius of our form of government, than inquisitorial examinations conducted by political bodies, armed with semi-judicial power. Their invariable tendency is to seek, not so much for information, as for incrimination, by combining the functions of a grand and petit jury, organized to convict upon indictments found by themselves. A few noteworthy cases have afforded occasion for testing the extent to which this power may legally be carried, and a synopsis of them is herewith given, as affording useful illustrations of the pitfalls which lie in the way of such legislative inquests.

The first reported case in our Federal Reports was that of *Anderson v. Dunn*,<sup>1</sup> which came before the Supreme Court of the United States in 1821, on a writ of error to the Circuit Court of the District of Columbia. It arose upon an action for assault and false imprisonment, brought by the plaintiff against the defendant as Sergeant-at-Arms of the House of Representatives, and to which the defendant pleaded the general issue and a special plea of justification. The plaintiff demurred generally to the special plea, which was adjudged good,

<sup>1</sup> *Anderson v. Dunn*, 6 Wheaton, 204.

and the demurrer overruled. Whereupon, judgment upon such demurrer was entered for the defendant, and a writ of error brought by the plaintiff. It appears that the House had summoned the plaintiff to its bar by arrest of his person; had held him in custody from day to day while pursuing its inquiry; had heard him in his defence, adjudged him to be guilty of the high contempt charged, and after a reprimand had discharged him from custody. Upon the record of these facts, all bearing upon the question of the right of the House to imprison for contempt, the Supreme Court *held* it to be a good defence to an action of false imprisonment against the Sergeant-at-Arms, that he had arrested and held in custody the plaintiff under an order of the House for a breach of its privileges, and the judgment of the Court below was affirmed. This decision remained in force, and unquestioned as to the latitude of interpretation which it gave to the powers of a Legislative body, until reversed in 1880 by *Kilbourn v. Thompson*.<sup>1</sup>

In this case, the House of Representatives was seeking to investigate the affairs of a private business partnership called the "real estate pool" of the District of Columbia, in order to ascertain what interests Jay Cooke & Co., who were debtors of the United States and whose affairs were in litigation in a bankruptcy Court, had in it. Kilbourn was a member of this pool, and refused to answer as witness certain questions put to him, or to produce certain books demanded of him; whereupon he was, by order of the House, imprisoned for forty-five days in the common jail of the District of Columbia. He brought suit to recover damages against the Sergeant-at-Arms who executed the order, and the members of the Committee who caused him to be brought

<sup>1</sup> *Kilbourn v. Thompson*, 103 U. S. 168.

before the House, when he was adjudged to be in contempt of its authority.

Upon these facts it was held substantially that although the House can punish its own members for disorderly conduct, or for failure to attend its sessions, and can decide cases of contested elections and determine the qualifications of its members; and exercise the sole power of imprisonment of officers of the Government, and may, where the examination of witnesses is necessary to the performance of these duties, fine or imprison a contumacious witness, still, there is not found in the Constitution of the United States any general power vested in either House to punish for contempt. Also that,

“Neither House of Congress is constituted a part of any Court of general jurisdiction, nor has it any history to which the exercise of such power can be traced. Its power must be sought alone in some express grant in the Constitution, or be found necessary to carry into effect such powers as are there granted. The Court without affirming that such a power can arise in any case other than those specified, decides that it can exist in no case where the House attempting to exercise it, invokes its aid in a matter to which its authority does not extend, such as an inquiry into the private affairs of the citizen.”

The same question had occupied the attention of the Supreme Judicial Court of Massachusetts in 1859 in the case of *Burnham v. Morrissey*, which arose out of a refusal on the part of the plaintiff, who was a State Liquor Agent, to answer certain questions addressed to him as a witness, and to produce certain books required of him by a committee of the House of Representatives of the Massachusetts Legislature. Having thereupon been arrested and committed by order of the House to

the county jail, he brought suit against the Sergeant-at-Arms for assault and false imprisonment. The Court sustained the action of the House, but in the course of its judgment made use of the following qualifying language, viz:—

“The House of Representatives is not the final judge of its own powers and privileges, in cases in which the rights and liberties of the subject are concerned; but the legality of its action may be examined and determined by this Court. That House is not the Legislature, but only a part of it, and is, therefore, subject in its action to the laws in common with all other bodies, officers, and tribunals within the Commonwealth. Living under a written Constitution no branch or department of the Government is supreme.”<sup>1</sup>

In 1884 another case involving the same question arose in New York and which resulted in a radical conflict of opinion between the general term of the Supreme Court,<sup>2</sup> and the Court of Appeals.

It appears that the State Senate passed a resolution, reciting that grave charges of fraud and irregularities had been made from time to time by the Press and the Union League Club of the City of New York, against one Thompson, the Commissioner of Public Works, etc., etc., whereupon it directed its standing committee on the affairs of cities, to investigate the department of Public Works of the said city, with the additional power to “send for persons and papers.” One McDonald, who was examined before the committee as a witness, (he not being an officer of the department) refused to answer certain questions put to him relating to the manner in which he kept his books, and carried on his

<sup>1</sup> 14 Gray, 226.

<sup>2</sup> McDonald v. Keeler, 32 Hun, 563; 99 N. Y. 463; Emory's Case, 107 Mass. 172; People v. Kelly, 24 N. Y. 74.

business, and as to the sources from which, and the persons from whom, he procured material sold by him to the city. McDonald was attended by counsel, and under his advice, besides refusing to answer questions, left the presence of the committee and declined to be further examined. For such conduct he was adjudged by the Senate to be in contempt, and was sentenced to imprisonment in the common jail of Albany County, there to remain "until the final adjournment of the present Legislature, unless sooner discharged by order of the Senate."

The Justice sitting at the then Oyer and Terminer, before whom an application for his discharge by Habeas Corpus was made, having denied the same, an appeal was thereupon taken to the general term of the Supreme Court for that department. There, judgment of the Court below was reversed and the appellant ordered to be discharged. The following are the grounds upon which this reversal was placed:—

1st. That the questions put to the witness were immaterial, and that he was not bound to answer them.

2d. That, except, when engaged in the judicial functions authorized by the Constitution, neither branch of the Legislature has any power to punish as for contempt for a refusal to answer a question.

3d. That, in investigating the department of Public Works in the City of New York, the Senate was not exercising any of the judicial functions conferred upon it by the Constitution, and could not punish a witness as for contempt, in refusing to answer questions put to him by its Committee.

4th. That the witness had the right to have the advice of counsel, in an orderly manner, and that when this was refused, he was justified in withdrawing.

5th. That even if it be granted that there are cases in



which the Senate might imprison a witness for a refusal to answer (as for instance in the trial of charges against judicial officers), yet the Senate is not the sole judge of the proper exercise of its powers, and its decision thereon is subject to review and examination by the Courts.

A further appeal was taken from this decision to the Court of Appeals, which in its turn reversed the judgment rendered at the General Term, and held substantially as follows, viz., that—

1st. Notwithstanding the division of powers between the co-ordinate branches of the State government and the vesting of the judicial powers in the courts, certain powers, in their nature judicial, belong to the Legislature, and a statute (referring to the Penal Code and Revised Statutes) is not necessarily void which involves action on the part of either House in its nature judicial.

2d. Where the statute relates to the proceedings of the legislative body itself, and is necessary and appropriate to enable it to perform its constitutional functions, it is not such an invasion of the province of the judiciary, as to bring it within any implied prohibition on the Constitution.

The power of obtaining information, for the purpose of framing laws to meet supposed or apprehended evil, is necessary and belongs to the Legislature, and statutory provisions, such as are contained in the Revised Statutes,<sup>1</sup> authorizing legislative committees to take testimony and summon witnesses, are within the limits of legislative powers; as is also a statute authorizing either House to enforce its process by imprisonment of a recusant witness.

3d. It seems this power may only be exercised, where the investigation which the committee was conducting

<sup>1</sup> R. S. 158, § 1 *et seq.*

was a legislative proceeding, which the House was authorized to institute.

4th. It seems also that an investigation instituted for the mere purpose of investigation, or for political purposes, not connected with any intended legislation, or other matter upon which the House can act, is not a legislative proceeding.

5th. Where, however, public institutions belonging to the State, or public officers are ordered to be investigated, it is to be presumed that it is with a view of some legislative action in regard to them.

6th. A witness summoned before a legislative committee has no constitutional or legal right to be attended by, or to the aid of counsel on his examination.<sup>1</sup>

The above recited cases show how strong is the temptation to transcend the proper limits of a public inquiry when conducted by political bodies; and how natural is the disposition to enter into the domain of private life and personal affairs, whenever legislative committees are given the power to send for persons and papers, indiscriminately, at their own discretion. It is too often the case that, for the purpose of gratifying personal animosities, or of casting reflection upon an opposite administration, excuses are invented to justify the examination of immaterial witnesses by a forced construction put upon the value of their testimony. This opens the door to an indefinite search after evidence, and converts the proceeding into a fishing excursion to discover facts incriminating persons. This examination may begin with inquiries involving the manner, or method, in which political duties have been discharged by public officers, and be continued until it enters the domain of their private affairs and domestic life. And what it may fail to extort from them, it may supplement

<sup>1</sup> 99 N. Y. 463.

by information similarly obtained from other witnesses, who likewise stand unprotected against irrelevant, immaterial or impertinent questions. Such an exercise as that of judicial functions, would practically establish a tribunal of inquisition into the private life of any citizen, at the will of a legislative committee, armed with the omnipotence of a subpoena.

It is hardly necessary to say that this is not one of the legitimate purposes of legislation. If reforms of the law, or of its administration, are at any time called for, there is always enough of public information abroad upon the subject, to be easily gathered by a legislative body, without resorting to inquisitorial searches into the private affairs of citizens. Under a written Constitution, personal rights of privacy being placed outside the domain of legislation, will always be protected in their inviolability on a proper appeal to the courts.

The trend of the decisions upon these points may be briefly summarized as follows, viz:—

1st. That a Legislature is not authorized to inquire into any matters over which it can exercise no legislative power, consequently, that an investigation for the mere purpose of investigation, or for political purposes, not connected with any intended legislation, or any other matters upon which such an Assembly can act, is not a legislative proceeding within the purview of its constitutional powers.

2d. That the powers exercised by either House of Parliament in England are not conclusive precedents by which to guide the conduct of American Legislatures, nor are they always adapted to the political character of the latter. Because Parliament does not sit as a representative body with legislative functions only, but has always formed in itself the highest Court of the realm,

and either House in consequence partakes of the nature of a judicial body.

3d. That a legislative body may punish for contempt only such witnesses as refuse to reply to questions directly pertinent to the subject-matter of the inquiry, and which shall not call for self-incriminating answers. Because, as said by Denio, J., in *People v. Hackley*,<sup>1</sup> "there is great force in the argument that constitutional provisions, devised against governmental oppressions, and especially against such as may be exercised under pretence of *judicial power*, ought to be construed with the utmost liberality, and to be extended so as to accomplish the full object which the author apparently had in view, so far as it can be done consistently with any fair interpretation of the language employed."

Moreover, the powers of legislative bodies or grand juries are not superior to those of courts, and the same rules, which under a written Constitution limit the powers of the latter, should limit the powers of the former.

4th. That neither branch of a legislative body is the final judge of its own powers and privileges, where the private rights and liberty of the citizen are at stake; but that the legality of such action may be inquired into and examined by courts of competent jurisdiction.

5th. That the genius and spirit of our institutions, being hostile to the exercise of implied powers by departments of government organized under a rigid Constitution, the authority of a legislative body to punish other persons than its own members for contempt, must be sought for in the occasional necessity of obtaining information for the purposes of legislation from private

<sup>1</sup> 24 N. Y. 82; *Frink v. Ryckman*, 2 Blatchf. 301; *People v. Mather*, 4 Wend. 229; *People v. McDonald*, 99 N. Y. 464; *Cooley*, Const. Lim. 134.

sources; and that while in such cases an inherent discretionary power follows, as to the choice of the method by which such information shall be constitutionally obtained, that discretionary power is subject to examination and review by the proper tribunals.

6th. That where the power of punishing for contempt exists, the imprisonment of a contumacious witness must cease with the adjournment.<sup>1</sup>

### ASSUMPTION OF JUDICIAL POWERS.

#### *Statutes which a Legislature may not Lawfully Enact.*

Encroachments by one department of government upon the powers of another, being necessarily unconstitutional, acts of this kind when committed are invalid from the start. Proceedings undertaken under color of such authority are not conclusive, but may always be reviewed by the Courts, and nullified according to the demands of public interests. Therefore, any assumption of judicial powers by a Legislature, particularly in relation to matters falling strictly within the jurisdiction of Courts, and where adequate provision already exists for dealing with such cases, is an act *ultra vires*, and in its essence unconstitutional. Nevertheless there are, undoubtedly, directions in which, and occasions over which, a Legislature may exercise powers in their nature judicial. But in such cases it will be found that there is either inadequacy of authority in Courts, or inadequacy of means for carrying such authority into effect. Such Legislative Acts in reality are only quasi judicial, being

<sup>1</sup> For a history of these "powers and privileges" of legislative assemblies, many of which have descended to us from the practice of English Parliaments, see "The Commonwealth of England," by Sir Thos. Smith, lib. 2, ch. 23; Stubbs, Const. History, vol. 3, p. 405, Tit. Parliamentary Antiquities; Hallam, vol. iv.

in their nature remedial and suppletory. And they are permitted, because founded in those principles of public policy, which endeavoring to accommodate themselves to the complexity of social facts, and to meet the demands of political communities, are necessarily reflected in the structure of all administrative law.

These limitations upon legislative powers will be best exemplified by the citation of a few leading cases representing certain classes of subjects, and embracing general principles now forming part of the settled law of the land.

*In Relation to Suits at Law Pending or Past.*

The Legislature may not pass an Act reversing the ruling of a Court in a past case, by opening its judgment or controlling its decision in a pending one.

Nor by authorizing a person to maintain a suit barred by the statute of limitations; nor granting special exemptions from the operation of general laws.<sup>1</sup> And the same rule of law applies to Congress.<sup>2</sup> Nor can a Legislature commute the punishment of a criminal offence after sentence.<sup>3</sup> Nor put a construction upon the meaning of a statute, and control Courts in their interpretation of its provisions, so as to affect pending suits or vested rights.<sup>4</sup> But a Legislature may authorize a particular case to be re-opened, provided the Court is satisfied on the facts shown that the ends of justice will be promoted

<sup>1</sup> Holden v. James, 11 Mass. 396; Denny v. Mattoon, 2 Allen, 361; Atkinson v. Dunlop, 50 Me. 111; Simonds v. Dunlop, 103 Mass. 572; White v. White, 105 Ibid. 325; Sparhawk v. White, 116 Ibid. 315; Bagg's Appeal, 43 Penn. St. 512; Burch v. Newbury, 10 N. Y. 374; Dash v. Van Kleek, 7 Johns. R. 477; Calder v. Bull, 2 Dall. 386.

<sup>2</sup> U. S. v. Klein, 13 Wall. 128.

<sup>3</sup> Opinions of Justices of Sup. Jud. Court, 14 Mass. 472; State v. Holloway, 42 Penn. St. 446.

<sup>4</sup> People v. Supervisors, 16 N. Y. 424; Reiser v. Wm. Tell Assoc., 39 Penn. St. 137; Trask v. Green, 9 Mich. 358, 366.

thereby.<sup>1</sup> Such a statute is remedial and limited in its operation.

On the other hand a Legislature may grant divorces (except when prohibited by State Constitutions), for reasons physical, moral, and intellectual, which would render the continuance of the marriage relation intolerable to the other party and productive of no possible benefit to society.<sup>2</sup>

So it may "empower" a Court to do an Act in contravention of the general laws of the State, because such empowering is not imperative, for if it were, it would be unconstitutional.<sup>3</sup>

A State Legislature may not, without authority granted it by the Constitution, confer upon any Courts or officers, any part of the judicial power of the State, when the Constitution has already vested the entire judicial power in certain specified Courts or officers.<sup>4</sup> This is no more than saying that the Legislature cannot alter, amend, or repeal any portion of the Constitution. Therefore, it has no power to abridge, or limit the jurisdiction of any Constitutional Courts, either with or without the consent of these tribunals.<sup>5</sup> But in the exercise of the police powers of the State, a Legislature may establish Criminal Courts, in addition to those specified in the Constitution, and give them concurrent jurisdiction with existing Criminal Courts. In this way it may part the judicial powers of the State, so as to adapt them to its growth and change of circumstances.<sup>6</sup>

It is, however, in the field of remedial legislation that we find the largest assumptions of quasi-judicial power.

<sup>1</sup> *Calvert v. Williams*, 10 Md. 478.

<sup>2</sup> *Maynard v. Hill*, 125 U. S. 190.

<sup>3</sup> *Ex parte Picquet*, 5 Pick. 65.

<sup>4</sup> *Chandler v. Nash*, 5 Mich. 410.

<sup>5</sup> *De Hart v. Hatch*, 3 Hun, 375.

<sup>6</sup> *Comm. ex rel. Atty.-Gen'l v. Hipple*, 69 Penn. St. 9.

This must necessarily be so, considering the varied nature of the subjects intended to be reached by curative statutes. In matters of public concern giving rise to contingencies which cannot always be anticipated by legislation, there will be a necessity at times for the enactment of statutes that bear the form of judicial decrees. And in view of the public demand for, and the popularity of these measures, Courts when passing upon such Acts, have felt themselves compelled to acquiesce in them as measures of public policy belonging to the political side of legislation, and not therefore to be regarded as distinct encroachments upon the functions of the Judiciary. Such occasions furnish the best evidence for their own justification. It is easily seen that the line of demarcation between the two departments must become at times exceedingly faint and shadowy, in the presence of that supreme necessity known as public policy. And while the Judiciary can never enact laws under any form of contingency, having no inherent prerogative powers, the case is different with a Legislative Assembly, which, retaining all the sovereignty of the people not limited by the Constitution, may always supply a *casus omissus*, in respect to individual rights as well as to public needs, and thus provide a judicial remedy to meet a judicial want.

It will be perceived that those Acts of a quasi-judicial character which a Legislature may lawfully pass, are such as are intended to cure irregularities and defects not affecting the essence of a proceeding. They are remedies belonging to the justice of procedure, rather than to that of substance, the latter of which dealing with the merits of a controversy, falls exclusively within the jurisdiction of Courts. These Acts of supplementary legislation address themselves to inchoate proceedings having the color of validity, yet lacking some element



necessary to give them strict legality. In this condition they would be voidable unless re-animated by a Legislative decree. Had they been originally void, they could not have been resuscitated in this way, since no Act void in itself can be cured by Legislative action.<sup>1</sup>

Mr. Sedgwick<sup>2</sup> accordingly makes the following classification of objectionable laws:

1st. That a law must receive its final sanction and enactment from the Legislature, and that the trust of the popular representatives can neither be returned to the people, nor delegated to any other power.

2d. That a statute which dispenses in favor of some particular individual with the general rules governing similar cases, does not come within the rightful attributes of legislative power, and is not to be regarded as a law.

3d. That a statute which seeks to affect or influence the determination of any private contested right, is for the same reasons equally vicious and void.

4th. That a statute, which, without some controlling public necessity and for public objects, seeks to affect or interfere with vested rights of private property, is equally beyond the true limits of the legislative power.

#### PRIVILEGES OF MEMBERS.

5th. Under the Constitution of the United States, and of the States generally, members of legislative bodies are exempt from arrest on, or service of, *civil* process during their session.<sup>3</sup> And it is also added, in going to and returning from their respective houses, in all cases except treason, felony, and breach of the peace.<sup>4</sup>

<sup>1</sup> White Mts. R. R. Co. v. White Mts. R. R. Co. of N. H., 50 N. H. 50.

<sup>2</sup> Const. and Stat. Law, p. 151.

<sup>3</sup> Coxe v. McClenachan, 3 Dall. 478; Nones v. Edsall, 1 Wall. Jr. 189.

<sup>4</sup> Cushing's Legisl. Assemb., §§ 566-584.

These are privileges growing out of the necessity of securing the business of legislative assemblies against interruptions, arising from the compulsory absence of their members. Such exemptions are coeval with the establishment of Parliaments in England, and have been transmitted, and adopted by us, as an essential part of our parliamentary law.<sup>1</sup> But the privilege does not extend to the exemption of a member from the service, or the obligation of a subpoena in a criminal case.<sup>2</sup> Nor, in duration, does it cover anything more than the actual session, and the time consumed in going and returning.<sup>3</sup>

#### JOURNALS.

A journal is kept by each House of which courts may take judicial cognizance.

The rule in England has always been, that where the journals of either House have the character of records, they are received in the same manner and to the same extent as any other judicial records.<sup>4</sup> But where they do not possess this essential feature, they stand only as evidence of the proceedings, and not of the facts affirmed or implied in them. This distinction has not been recognized so formally in the United States, because of the fact, that in most of the States the Constitution requires each branch of the Legislature to keep, and publish a journal of its proceedings. Consequently, whenever printed in the manner required by law, and promulgated from the proper department, there would seem to be nothing wanting to give them the character

<sup>1</sup> 3 Reeve's Hist. of the English Law, 464; Const. U. S., Art. I., § 6.

<sup>2</sup> U. S. v. Cooper, 4 Dall. 341.

<sup>3</sup> Lewis v. Elmendorf, 2 Johns. Cas. 222; Hoppin v. Jenckes, 8 R. I. 453.

<sup>4</sup> Rex v. Gordon, 2 Douglass, 593; Jones v. Randall, Cowper, 17.

of authenticated public records. As to the degree of evidence which they afford, the settled doctrine seems to be that the mere publication does not make that evidence which intrinsically is not so, although it gives the highest character of authenticity to such documents.<sup>1</sup>

### LOBBY AGENTS.

As no contract for services rendered in influencing legislation or obtaining public office can be enforced, being against public policy,<sup>2</sup> it becomes unnecessary to inquire into the history, or to detail the functions of the lobby, as representative of that external pressure and importunity which is so often brought to bear upon legislation, in order to secure the passage of certain measures. The term "lobbying" has unfortunately acquired so ill a repute as to blind us to the fact that, like every act by which we seek to persuade or influence others, its character should be judged solely by the motives which inspire it. Good citizens may lobby for the passage of good measures, with entire propriety and benefit to legislation, and, on the other hand, dishonest ones may lobby for evil measures in which they have a pecuniary interest. An impartial judgment upon these facts must concede, that since legislators often need to be enlightened upon subjects propounded for their action, those who seek to instruct them by information may vary in their motives and intentions, and either prove honest guides to knowledge, or, going beyond the

<sup>1</sup> *Watkins v. Holman*, 16 Pet. 25; *Post v. Supervisors*, 105 U. S. 667; *Root v. King*, 7 Cowen. 613.

<sup>2</sup> *Harris v. Roof's Executors*, 10 Barb. 489; *Marshall v. Balt. & Ohio R. R.*, 16 How. (U. S.) 314; *Chippenger v. Hopbaugh*, 5 Watts & S. 315; *Mills v. Mills*, 40 N. Y. (1 Hand) 543; *Tool Co. v. Norris*, 2 Wall. 45.

region of statement, may seek to control their judgment, and to influence their votes by insinuating arts of a corrupting nature. What the law condemns, therefore, is not public, open, avowed lobbying, but secret lobbying as an employment, and under a contract stipulating for a pecuniary or other consideration.<sup>1</sup>

It follows from these general principles, embodying the powers and duties of legislatures and of their members, that either House of a legislative body may set on foot any inquiry relating to its organization, the conduct or qualification of its members, its proceedings, rights, privileges, or any matter upon which it is competent to legislate.

But questions affecting the moral, religious, or economic interests of society are often beyond the true sphere of legislative action. And in like manner the Legislature can exercise no control over the terms of a contract.<sup>2</sup>

In the United States, two forms of constitutional legislation exist concurrently, viz: that practised by State governments, and that practised by the national government. Each of the former constitutes a true *imperium in imperio*, being sovereign as to sister States, and co-equal in the political congregation which forms the Federal Commonwealth. These States are sovereign communities, although subordinated by constitutional position to the Federal Government, being simply a body of political communities organized under the Constitution by the people of the United States, acting through their representatives in Congress. Their political autonomy in consequence is not primary, but secondary and derivative. They were called into being by the

<sup>1</sup> See Article LOBBY, in Cyclop. of Polit. Sci., by A. R. Spofford, Librarian of Congress.

<sup>2</sup> Powers v. Shepard, 1 Abbott, Pr. N. S. 129.

nation on whose territory they were organized. Under this aspect of their legal status (which is the one assigned them by the founders of the Republic and the Supreme Court of the United States), it will be seen that they are qualified sovereignties existing only within the Union, but have no recognized political standing outside of it. Viewed from an international standpoint, they are merely provinces of the United States, incorporated into the general body of the Union as one nation, and whose Federal Government represents them in its external or foreign relations.

These principles, when applied to the practical administration of government, whether for the furtherance of State or Federal purposes, necessarily restrict the powers and scope of legislation to the enactment of laws consistent with the authority promulgating them. One common rule governs both sovereignties in the exercise of their separate powers. That rule is the requirement of conformity with the grant of power, or the limitations affixed to its exercise. "The sovereignty of the United States," says C. J. Tilghman, in *Comm. v. Young*,<sup>1</sup> "is derivative, that of the individual States inherent, but the exercise of both is limited, being restricted to the exercise of powers applicable only to particular subjects, neither being sovereign to every purpose and in every aspect, but only so when acting within the prescribed limits of its authority."

State Legislatures, therefore, have a twofold duty to perform, first, as to conforming their enactments to the Constitution of the United States, and, next, to that of their own State. The former, being the paramount law, overpeers by its supremacy all State Constitutions. Yet within this proviso, the latter are, for all practical purposes, the sovereign chart by which legislation must

<sup>1</sup> Brightly, 302.

be guided. Under the powers reserved to the States and the people, there is a wide territory of unrestricted legislative authority. It is here that resides that inherent sovereignty never parted with at the formation of the Constitution. The restraints upon the General Government contained in the first ten amendments to that instrument, bear witness to the determination of the people of the original States to retain for themselves, and their successors, all the inherent powers of sovereignty not granted to the Federal authority.

Nor was it deemed less necessary to affix specific restraints upon the action of States, in order to avoid conflicts of jurisdiction with Congress; to prevent discriminations against other States in relation to commerce and taxation; to validate judicial records; to nationalize citizenship, and thus to secure its privileges and immunities to all citizens in the several States, by securing to them the equal protection of the laws. The introduction of such restraints upon the action of Federal and State governments, each being supreme within its sphere, would appear like a paradox in the synthesis of government, were it not that the sovereignty of the people from which they both emanate is never surrendered, and that it is only the power to exercise it which is delegated to these various branches known as the legislative, executive, and judiciary departments.

The national government, through the agency of Congress, legislates municipally whenever it legislates for the whole country, and it is restricted in so doing by the terms of the grant and the limitations of the power under which it acts. But when it legislates internationally, it is not thus strictly bound, being empowered to act as any other sovereign authority having both the *jus et summa potestas*.

The State legislates for local purposes alone. It can

lawfully do so only under the constitutional restraints imposed upon it as a member of the Union, and by virtue of the inherent sovereignty residing in its citizens, and expressing its will through an organic law. No State was ever admitted without a written Constitution and none could exist, because, under the canons of popular sovereignty, such an instrument is in the nature of a Bill of Rights, and must be the foundation upon which is built that republican form of government which the United States shall guarantee to every State in the Union.

In order to be valid, the laws passed by State Legislatures must possess these attributes.

1st. They must not be repugnant to the Constitution of the United States.

2d. They must not be in conflict with existing Acts of Congress. And whenever the nature of a power is such as to require that it should be exercised exclusively by Congress, the subject is completely withdrawn from the field of State legislation. Nor can these bodies add, by way of complement, to the legislation of Congress any other regulations as auxiliary provisions.<sup>1</sup>

3d. They must not be in conflict with public treaties now in force.

4th. They must not be repugnant to the Constitution of the State itself.

Under these various applications of sovereign power by National and State Governments, we have three distinct yet inter-dependent classes of legislation, viz:

*First.* Congressional Legislation for the government of our foreign relations, which is international.

*Second.* Congressional Legislation of a domestic character which is Federal and Municipal.

<sup>1</sup> *Prigg v. Comm.*, 16 Pet. 539; *People v. Brooks*, 4 Denio, 469; *Henry v. Lowell*, 16 Barb. 268; *Jack v. Martin*, 12 Wend. 311; *Thornton's Case*, 11 Ill. 32.

*Third.* State Legislation, which is Local and Municipal.

An examination of the various charters, patents and grants issued to the English Colonists in America, show that they were given very extensive powers of self-government. This appears to have arisen partly from geographical necessity and the consequent difficulty of easy communication with the mother country; partly from the absence of any pre-existing settlements here; and partly also from the fact, that the lands granted by these charters were to be held by the Colonists in free and common socage, and not *in capite* or Knight's service. The entire community, at the outset, consisting of the grantees and those selected by them as partners in the undertaking, were given such ownership of the soil as might constitute them an independent municipal society owing allegiance to England.

These charters gave them powers of legislation of the most comprehensive character. They might hold General Courts or Assemblies, with authority to make all reasonable orders, laws, statutes, ordinances, directions, forms and ceremonies of government, and magistracy, fit and necessary for the government of the Colony; might impose fines, mulcts, imprisonments, or other lawful corrections; and had the additional authority to pardon, govern and rule all subjects who might come there, according to such laws as the Council might make; and in defect thereof, in cases of necessity, and according to the discretion of such Governors and Officers as they might elect, were empowered to act as well in cases capital and criminal, as in civil cases both marine and otherwise. The only limitation put upon them, was that of making no laws contrary to those of England.

It will be seen from this general review of the powers



granted, that these Colonists were furnished an opportunity to establish free representative government, on a basis of local independence seldom possessed by any subjects of an European Monarch. In order, further, that nothing might be wanting in the foundation of this free political society, they were created a body politic as well as corporate, thus bestowing upon them perpetuity, together with local autonomy. Discovering subsequently how far reaching were the political concessions made to the Colonists, it is no wonder that the British Crown sought at a later day to recall these charters or to abrogate them. Several of the Colonies were obliged to contend against writs of *quo warranto* instituted for the purpose of annulling their charters.<sup>1</sup> During this time also, agents of the Crown were seizing upon local offices formerly filled by popular election, and measures were successively brought forward in Parliament looking to a revision of local governments by overriding their charters, and depriving them of their former rights of legislation. The evident object of all this was to check the growth of popular power. The names of Sir Edmund Andross and the Duke of

<sup>1</sup> This was the favorite method adopted in England for stamping out the germs of civil liberty which the Commonwealth had bequeathed to posterity. James II. made an attack upon the charters of corporate boroughs because they were the stronghold of the popular party. The Crown lawyers in 1683 filed an information against the corporation of London alleging certain misdemeanors, and the political Judges of the King's Bench, gave judgment in favor of the Crown.

In like manner and actuated by the same spirit, writs of *quo warranto* and *scire facias*, were issued in 1683, for the purpose of annulling the charter of the Massachusetts Bay Colony. A decision favorable to the Crown was rendered on the 18th of June, 1684. Similar writs were issued in 1687 against the charter of Rhode Island and Connecticut and with similar results. Redress, however, soon came, for among the extra-territorial benefits of the Revolution of 1688, was the restoration of these charters to the Colonies. Creasy on the British Const. p. 275; 2 Chand. Com. Deb. 316.

York are infamous in our Colonial history, for dishonorable connection with attempts of this kind.

Besides those grants of power to legislate made to the early Colonists, their charters were constituted letters patent, in the nature of warrants of royal authority for putting their enactments into execution.

As a consequence of this latitude of authority in legislation, the early Colonial Legislatures, by whatever title designated, were democratic assemblies combining legislative with judicial functions. Illustrations of the exercise of these dual functions may be found in the judicial history of all the New England Colonies.

Important criminal cases were tried before a general political assembly, and disposed of by fines or penalties in the same way as before any regular Court. In some Charters also, permission was given to the council and magistrates appointed by them to declare Martial Law in cases of insurrection or rebellion. These Charters, in the eyes of the Colonial Statesmen, had become a constitution, conveying to their governments all the attributes of local sovereignty. They were regarded as compacts favorable to liberty. Nor was it straining any canon of construction to assert, as in the case of certain proprietary grants to individuals, that royal rights were thereby entirely surrendered. It was from this fact, perhaps more than any other, that they drew a justification for considering each colony an independent commonwealth; and it followed, by a similar process of reasoning, that the General Court of Massachusetts Bay, consisting of the Governor, Deputy Governor, and Assistants with the freemen, resolved itself in 1634 into a supreme legislative assembly with an Executive, a Senate, and a House of Representatives. Meanwhile, and throughout the entire circle of Colonies, legislative assemblies had been similarly forming.

To Virginia is due the honor of having established the first legislative assembly in North America. Her House of Burgesses was organized on July 30, 1619, or eighteen months before the landing of the Pilgrims at Plymouth. The next Colony to found an assembly was Massachusetts, on the 14th May, 1634. Connecticut followed in January, 1639, and Maryland in February of the same year. Rhode Island in May, 1647, North Carolina in 1667, East New Jersey in May, 1668, West New Jersey in November, 1681, South Carolina in 1674, New Hampshire in March, 1680, Pennsylvania in 1682, Delaware in 1682, New York in 1683, although the first Assembly whose acts are officially recognized is that of 1691; Georgia in 1784.

All these Colonies, as before said, treated their Charters as constitutions emanating from the British Crown, and they considered their provisions tantamount to guarantees, that the rights existing under them would not be interfered with, until some serious reasons arose to justify it. This doctrine of the inviolability of Charters was transferred to, and incorporated in the various Constitutions subsequently formed by these States, so that the idea of Constitutional Government, meaning government within the restrictions placed upon the powers of each department, was established here from the earliest Colonial times. The idea it is true, was of British origin, but its expansion and practical application on a plane of unrestricted enjoyment was the fruitage of American Statesmanship.

#### THE STATE EXECUTIVE.

The next branch of the administrative department of a State is the Governor, who, besides his civil magistracy, is the commander-in-chief of its militia. While in his purely administrative capacity he is designated

as the Executive, he is *virtute officii* a component part of the Legislature, may exercise a qualified negative upon their action through his veto; and may, during its recess, convene it in extra session, if, in his judgment, the public necessity requires it. This reserved power inheres in his office as the State's chief magistrate and highest official officer.

The Governor of an American State is, in relation to its law-making power, both a branch of the legislative department and the executor of the laws. He has two sets of powers, viz: *Constitutional powers, and statutory powers.* As a co-ordinate branch of the Legislature, his approval of bills is necessary in order to give them legal completeness, although this is not always indispensable, since the Constitution generally authorizes the enactment of laws over his veto. With this exception, he is made an integral part of the legislative department. But all grants of prescribed powers, in any branch of State government, being regulated by its Constitution, it follows that reference must be had to this instrument for a precise enunciation of the powers, duties, and limitations affixed to any department. The veto power of the Governor, whether deserving to be regarded or not as a constitutional guarantee, operates at least as a salutary check upon the Legislature, and to that extent protects the citizen against crude, dishonest, or unconstitutional laws. Its best effect is undoubtedly moral, since practically it may be overridden. It serves at least to admonish the Legislature, and to give public opinion an opportunity to rally in support of, or against the condemned measure.

Aside from purely legislative powers, the Governor, in many of our States, exercises judicial functions, as for instance, in the administration of oaths, and the trial of sundry officers, like county judges, sheriffs, district-

attorneys, etc., upon charges of malfeasance preferred against them. In such cases, he unites in his own person the functions of both executive and judicial departments. He may, in furtherance of these functions, inflict the appropriate penalty upon the convicted offender. But his powers as a chief magistrate in signing warrants of extradition, and in appointing terms of Courts, belong rather to his ministerial functions. These powers in their scope and extent vary in different States, but in all of them the Executive unites in his person, at times, the powers of both these departments of government. This is much to be regretted, because, under the freest of democratic republics, it thus appears, that there is no means of escaping from such a political paradox as a judicial executive. The King still sits within the gate.

#### EXTRADITION OF CRIMINALS.

It is made the constitutional duty of the various State Executives to aid in the extradition of fugitives from justice found within the limits of their jurisdiction, upon the demand of the executive authority of the State from which such persons may have fled. "No State," says Beasley, C. J., "can refuse to surrender such criminals, because the right to require such surrender is part of the sovereignty of the nation. But under present legal conditions the general government cannot enforce the performance of this constitutional obligation."<sup>1</sup> And Taney, C. J., in like manner held that "it gives the right to the executive authority of the State to demand the fugitive from the executive authority of the State in which he is found; that the right given to demand implies that it is an absolute right, and it follows that there must be a correlative

<sup>1</sup> Matter of Peter Voorhees, 32 N. J. 141.

obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled," and "without the right to exercise either executive or judicial discretion."<sup>1</sup>

While these opinions from the highest judicial sources are unimpeachable in their construction of the constitutional obligations of States towards each other, the fact nevertheless remains that no present authority exists to compel a State Executive to the performance of this ministerial duty. A question of extradition is a *casus foederis* affecting the external relations of a State, and as such is purely a political question; and its determination must be left to the sense of justice, and mutual interest in suppressing crime, of each particular State. The refusal of an Executive to extradite a criminal fugitive from another State as a ministerial act, on demand of the proper authorities of that State, however much it may violate, not only principles of comity, but even constitutional obligations, affords no ground for the application of a judicial remedy. It is an exercise of State sovereignty by its political department, which cannot be questioned in any Court. Congress, doubtless, has the power to create certain national officers in each State, and to invest them with the authority to cause the arrest, and rendition of fugitives from justice, on the requisition of the Executive of the State from which they have fled.<sup>2</sup> But until it does so, a question of extradition will always practically remain one of comity between the States.

It is everywhere the duty of the Governor to see that no bills are signed by him which are either unconstitutional, or against public policy, or in opposition to the decision of the highest appellate tribunal of the State,

<sup>1</sup> *Kentucky v. Dennison*, 24 How. (U. S.) 66; *Clark's Case*, 9 Wend. 220; *Comm'th v. Green*, 17 Mass. 547.

<sup>2</sup> *Sims's Case*, 61 Mass. 258; *Booth's Case*, 3 Wis. 35.

expounding the civil or legislative rights of which such laws involve the exercise. It is for this supervisory purpose that the veto power is placed in his hands.

Again, it is the duty of the Governor to see that the laws are enforced by all proper and legal methods. Usually, there is no occasion for his direct intervention, since the various administrative officers carry on the government through the operation of their separate departments. But, whenever the civil authority is so obstructed as to be rendered impotent, he may call upon the military power to aid in the execution of the laws. It is for this purpose that he is created commander-in-chief of the military forces of the State.

In some States, the Executive is empowered to remove certain public officers summarily for misconduct, and to appoint others, with or without the concurrence of the highest branch of the Legislature; also to appoint special terms of courts and to select the judges who shall preside thereat. He is further empowered to call extra sessions of the Legislature, and during its recess may fill any vacancies occurring in public offices, or until the recurrence of the time for electing a new incumbent. Lastly, in many States the Governor is authorized to grant reprieves and also pardons, whether conditional or absolute. And he is not even required to advise with any judicial officer before exercising such authority, but may act upon his own judgment.

Among the above enumerated powers the last one in particular merits our attention. And it is, because it bestows upon the Executive department authority to grant absolute pardons, and thus to nullify the action of courts. In most States this power was originally vested in the Legislature. The change, which for convenience's sake now centralizes it in the Governor, has been very generally adopted and acquiesced in through-

out the United States. Nevertheless, it is a return to a patriarchal form of administration, and a re-affirmance of parental sovereignty personified in a magistrate. Consequently it is a paradox in a democratic Republic, whose government takes the form of a civil corporation. And inasmuch as its exercise rests upon the irresponsible will of an individual, a pardon may often frustrate justice, by being the product of political influence operating upon a partisan judgment.

Where there exists a body of councillors to act as an advisory board with the Governor, or where a distinct Court of Pardons has been created, all the objectionable features attaching themselves to the one-man pardoning power are removed. Responsibility becomes divided, as in the case of a jury, and each member of this absolving tribunal feels an unfettered liberty of action, arising from the impersonal weight which his individual opinion bears in the aggregate judgment of the whole. Moreover, if justice to a criminal requires that he should be convicted only by "due process of law," justice to the community requires that that conviction should not be nullified by any less solemn proceeding. Even for purposes of pardoning, we should not constitute an appellate court with only one judge.

Now, there is no doctrine more dangerous in a Republic, because more subversive of its fundamental character, than that of the parental power of the State. It is the one dogma of sovereignty beyond all others which the Plymouth Colonists repudiated, when they organized themselves into a "*civil body politic*." While, therefore, it has been found impracticable to eliminate it from our form of administration, it has always been kept out of sight as much as possible, and concealed under some misleading title, either of public charities, legislative commissions, or other quasi-judicial bodies relating to the police powers of the State. It is painfully



manifest, however, that this doctrine is slowly and insidiously invading our legislation, and changing much of the original character of our political society from that of a Commonwealth to that of a municipal State. Indeed, in the whole of the forty-four States of our Union, it is only Massachusetts, Virginia, West Virginia, and Pennsylvania that still retain the official designation of a Commonwealth. This is a painful fact to contemplate, amid the progress made by republican ideas of government on this continent. It is a retrogression in democratic principles, beginning with their representative name. We cannot afford to allow this to go on indefinitely, without imperilling the unity of our system of government. A patriarchal political society is incompatible with the exercise of popular sovereignty. The two ideas mutually exclude each other. Ours is either a Commonwealth system or nothing. For, under a democratic form of government, the State is only a secular institution, representing the conventional will of the people as expressed through an organic law. The State with us is territorial rather than personal. In the soil of such an institution, consequently, parental authority can never legitimately take root.

But whatever may be the legal status of the Governor of a State, in respect to the exercise of legislative or judicial functions, his official power is always subordinated to that of the other departments of government.

In a representative democracy, it is the legislative Houses that are justly regarded as the highest power exercising functions of authority in the State, and for the following reasons:—

1st. That this power is the immediate representative of the popular will, acting constitutionally in a deliberative Assembly.

2d. That it is the law-making organ of the State, and

can supplement defects in existing laws; can give provisional remedies under emergencies; propose amendments to the Constitution; fix the compensation of all public officers, and vote appropriations as well as raise revenues. And lastly, because holding the public purse, it can provide for the public defence.

It may be said to act, therefore, as a committee of public safety for the benefit of the common weal, and in obedience to the provisions of the organic law. In England, Parliament in addition to its legislative powers, exercises certain judicial functions through the House of Lords, when acting as an appellate tribunal; and which functions are unknown to any American Legislatures. The only judicial functions belonging to such bodies in the United States, are such as spring from the exercise of discipline over their own members; or in cases of impeachment of public officers where the Senate sits as a Court; but nothing beyond this. And in New York it has been held by the highest tribunal that "aside from the special limitations of the Constitution, the Legislature cannot exercise powers which are in their nature essentially judicial or executive."<sup>1</sup> This opinion is cited with approbation by one of our most eminent writers upon constitutional jurisprudence, who says that "we are only at liberty to liken the power of the State Legislature to that of the Parliament, when it confines its action to the exercise of legislative functions; and such authority as is in its nature either executive or judicial, is beyond its constitutional powers, with the few exceptions to which we have already referred."<sup>2</sup>

The reason for these restrictions is founded in the fact that popular assemblies, reflecting as they do very largely, the political sentiments of party, are not apt to be guided

<sup>1</sup> *Wynehamer v. People*, 13 N. Y. 391.

<sup>2</sup> *Cooley Const. Lim.*, p. 90.

by sentiments of impartiality; but on the contrary tend to arrogate to themselves, by implication, powers of indefinite character; and being the immediate representatives of the people, are prone to assume that whatever they perform has the sanction of the people and of the law to justify it. Hence all writers upon popular government agree in opinion that of its three departments the Legislative is the one which most tends to usurpation of power, and consequently the one upon which it is most necessary to impose restraints.<sup>1</sup>

These legislative Houses form, together with the Courts and municipalities, the only sovereign law making bodies of the State. In respect to their number, it will be sufficient to say that experience in all representative governments has shown the advantage of having two chambers rather than one. One chamber has never been found sufficient, and more than two has been found disadvantageous to harmonious legislation. In fact the more chambers there are beyond two, the more difficult it would be to reconcile them to the passage of any important public measure. In the Middle Ages three, and even four Houses have at times acted as a legislative body, but the modern system of national representation was then unknown, the delegate acting only in the capacity of a local deputy.<sup>2</sup>

It is not necessary, a second time, to enter upon an extended inquiry into the origin and growth of this bicameral system, which is now so universally adopted. The history of every representative government shows that it is the result of ages of experiment in various and modified forms, and that the present one was finally adopted as the best solution of the problem. And so important is the separation of these chambers deemed,

<sup>1</sup> Federalist, No. 51, Webster's Works, vol. 3, p. 29.

<sup>2</sup> Lieber C. L. 189.

that it has been expressly provided for in the Constitution of each of the States. Wherever it exists with us, the idea of popular sovereignty pervades both chambers alike, and the Senate, therefore, does not represent either pedigree or property, any more than does the Assembly. Nor do the powers of an American Legislature rest upon custom or tradition only, aided by occasional statutory provisions, as is the case with the English Parliament; nor again are they convened, prorogued or dissolved at the sole pleasure of the Executive, as in England. On the contrary, such assemblies in the United States are founded in, and in great part regulated and controlled by the fundamental organic law.

Under the shadow of these well-settled principles, it is manifest that the law-making power of our Legislative Assemblies is solely derived from the Constitution. But inasmuch as this instrument, in respect to the people of a State, is a grant of powers limited only by the restraints expressed therein, it follows that the powers of a Legislature is general and unlimited as to all subjects of legislation, except as above described; and in any question of doubt, as to whether a given subject falls within the Constitutional powers of a Legislature, the answer must be sought for in the direction of the prohibitions in terms, or by necessary implication affixed to it, rather than of powers specifically conferred. This constitutes the difference between a strict and a liberal construction of a Constitution. If the power under discussion be not withheld directly, or by necessary implication, then it may be considered as granted. The Legislature in fact, possesses all the legislative power of the people except so far as limited by the Constitution. In the case of Congress this rule is reversed, because all legislative powers possessed by it being a grant of specific power, it has none except those which are expressly or

by necessary implication conferred upon it. Therefore, whatever power is not thus conferred, is withheld.

In case of any doubt relating to the powers of a State Legislature, as affected by the Constitution of the United States, the rule of interpretation is, to determine whether a given power would exist in a State Legislature, outside of the Federal Constitution, and if so, whether such power is abrogated by the latter instrument.<sup>1</sup>

But inasmuch as the practice of liberal construction of its own powers by an irresponsible body, tends always to an enlargement of those powers, the extent to which such bodies frequently construe their powers to act, varies with the course of public events. The doctrine of legislative inquests, and legislative contempts has, in recent times outgrown all former conceptions of their Constitutional boundaries, so that it is now extremely difficult to trace these boundaries, and to fix any limit to them. Apart from positive laws enacted in solemn form, legislative bodies often exercise their powers through committees, or commissioners, by whom judicial functions are assumed, of a very questionable authority. Beginning with the undoubted right of governing their own members by suitable rules and discipline, there has steadily grown up a tendency to enlarge this jurisdiction in directions, and to an extent plainly transcending its Constitutional limits. The case of *Kilbourn v. Thompson* (before cited), is one in which the Supreme Court had occasion to review this subject in full, in relation to the external powers of the House of Representatives, and its opinion is a re-assertion of the duty devolving upon each department of government not to encroach upon the territory of another, or to assume a jurisdiction not conferred upon it.

<sup>1</sup> Cushing L. A. 717-19; *Bank of Chicago v. Brown*, 26 N. Y. 467; *Leggett v. Hunter*, 19 N. Y. 445.

“While the experience of almost a century,” says Mr. Justice Miller, “has in general shown a wide and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed, not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is entrusted, to overstep the just boundaries of their own departments, and enter upon the domain of one of the others, or to assume powers not entrusted to either of them.”<sup>1</sup>

The principles so sagaciously enunciated in the above opinion, apply with equal force to every legislative body in the country. Were they permitted to enlarge the boundaries of their jurisdiction at will, and thus to undermine the foundations of the other departments, our government would soon lose its representative form, and degenerate into a tyranny of majorities. The dominant political party would constitute the only government; its chief object would be to legislate not so much for the benefit of the Commonwealth, as for the perpetuation of party supremacy, and under the supposed claims of expediency, and public policy, legislative authority would be stretched to almost indefinite limits. The doctrine of privilege has always been a menace to personal liberty, as was seen in the case of John Wilkes in England, Judge Potter and Hallett Kilbourn in the United States. And the successful resistance which they made to the exercise of arbitrary power will ever stand among the great triumphs of civil liberty.

Another limit to the exercise of legislative authority

<sup>1</sup> 103 U. S. 191.

in the United States exists in the fact that the moral, religious and economic interests of society are placed beyond the sphere of legislative action, in consequence of which no control can be exercised by it over rights of moral obligation, over the economic interests of individuals or the terms of a contract. We have neither a State Church,<sup>1</sup> a State System of Medicine,<sup>2</sup> nor a State Code of Commerce.<sup>3</sup> The decisions which sustain these dogmas of free government cover the ground occupied by codes of religious tenets, medical ethics, and sumptuary laws in general.

Both Legislative Houses are, as a matter of right, empowered to make rules and regulations for the government of their own members and proceedings. This is a self-evident necessity, and carries with it by implication also the power to enforce them through appropriate penalties. Some of these powers expire with the session, cancelling at the same time any penalties that may have been inflicted. Under the rules made by such assemblies, they are permitted to determine the qualification of their own members, to decide questions of contested elections, to elect officers, to determine the place and times of their sittings, and to regulate proceedings so as to promote harmony between each House and the Executive in the general duties of legislation. The exercise of these powers, in a prescribed way, gives rise of necessity to a Code of Legislative procedure, within which the functions of both Houses are required to be carried on. But the formalities incident to enacting laws are usually provided for in the Revised Statutes of a State, the authentication of such laws being made by the Secretary of State, who certifies, as to the day

<sup>1</sup> *Watson and Jones*, 13 Wall. 728.

<sup>2</sup> *Corsi v. Maretzek*, 4 E. D. Smith, 1.

<sup>3</sup> *Powers v. Shepard*, 1 Abb. Pr. N. S. 129.

and the manner of their passage. When a law therefore bears upon its face the requisite authentication, it is presumed to have been passed in the proper Constitutional way.<sup>1</sup>

It results from these principles of representative government, that, while we have adopted, with proper reverence for their value, those great measures for the promotion of civil liberty which had their origin in Parliament, the people of the States have never consented to any abridgment of their right, in Convention, to prescribe rules and regulations for the exercise of portions of their sovereign power, by the various departments of State government. This inviolable right of self-government expressing itself through the functions assigned to each of these departments, constitutes the autonomy of the State. It is for the people to ordain, for the Legislature to enact, for the Executive to enforce, and for the Judiciary to interpret the laws made in pursuance of their legislative will.

The powers of State Legislatures, as assemblies of the people exercising inherent rights, are consequently, much larger and less well defined than those of Congress. The powers of the latter are all derivative, and spring from enumerated grants, the powers of the former are of a more general character and to be measured chiefly by the limitations which are put upon them. "When a question arises," says Mr. Cushing, "whether a given subject is within the Constitutional power of a State Legislature, the inquiry should be, not whether it is conferred specifically, but whether it is withheld in terms, or by necessary implication. If it cannot be said affirmatively that the power is withheld, then it exists, under the general

<sup>1</sup> *Falconer v. Campbell*, 2 McLean R. 195; *White v. How*, 3 McLean, 111.



grant. If the inquiry leads merely to a doubt of the power, the doubt is in favor of its being granted."<sup>1</sup> These reserved powers of the people as exercised by a Legislature, constitute that residuum of sovereignty which exists outside of every Constitution. It is the power by which it may be amended or reformed, being the same power by which it was instituted.

<sup>1</sup> Cushing Law of Legisl. Assemblies, § 717.

## CHAPTER VII.

## JUDICIAL LEGISLATION, INCLUDING IMPEACHMENT.

ALL legislation by representative assemblies forms part of the jurisprudence of a country. It constitutes what may be called political law, to distinguish it from forensic law. The Legislature is a department with prescribed law-making powers, but which, however well exercised, cannot deal with all the possible contingencies of human existence. Some things must be left unprovided for in every statute, and the degree to which injurious consequences may follow, in respect to individual rights and remedies, renders the assistance of Courts frequently necessary to determine the manner and the extent of injury thus arising, and the remedy, if any, which can be applied.

Moreover the legislative department, although the law-making branch, does not embrace the entire government of a State. Even when the Executive is added to it as a constituent member, the Government is not yet complete. Another power, supervisory of both the foregoing, still exists, before which the legality of all public Acts may be tested. This interior power, silent and inconspicuous until its jurisdiction is appropriately moved, is known as the Judiciary. It holds the scales of justice not alone between citizen and citizen in their individual contentions, but between each citizen and every source whence a legal command may issue, imposing a duty upon him. The validity of every law is subject to interpretation at its hands—the authority of

every official Act may be questioned in its forum. And while its condemnation of any statute, ordinance, by-law, or official Act of any public department, stamps it with invalidity, its own decrees can only be reviewed by itself in its highest appellate tribunal. The judiciary department is justly regarded as the bulwark of our civil liberties; the guardian of the Constitution; the regulator of the limits of administrative law; the altar of Equity; the defender of public morality, and the final protector of life, health, property, reputation, citizenship and equality before the law.

In all cases arising from conflicts of jurisdiction; in all cases where the civil rights of the citizen are invaded by oppressive legislation; in all cases where his life, health, property, or reputation are imperilled, it is for the Judicial Department not only to declare what the law is, where doubtful, but also to accommodate the law to the altered state of political society, and to stay its operations when found to be in conflict with the organic law. "The judicial power of every well-constituted government, must be co-extensive with the Legislative, and must be capable of deciding every judicial question which grows out of the Constitution and laws." Such is the language of C. J. Marshall in *Cohens v. Virginia*.<sup>1</sup>

This it cannot do spontaneously, as a moral censor over legislative acts, but must wait either until its jurisdiction is moved by an actual case pending before it, or an opinion is sought under some provision of the Constitution requiring it to respond to a call of this character.<sup>2</sup> In the former case its action is strictly judicial, in the latter

<sup>1</sup> 6 Wheat. 264. Legislators, through laws, administer average justice, while the judge administers specific justice. <sup>2</sup> Lieber. Pol. Ethics, 304.

<sup>2</sup> The Constitutions of several of the States authorize the Executive and Legislative Departments to require from the Judges of the Supreme Court opinions upon important questions of law.

it is political and suppletory to that of some other department. Again, in the former case it is empowered to enforce its judgments, in the latter case its opinions are not regarded as judgments, and are without binding force or obligation. Strictly construed they are neither law, nor the evidence of law. And it is curious to observe in connection with this subject, that, what with us is known and daily applied in practice as "*Judicial power*" is a power neither given, nor defined by the Constitution. This power, being founded in the common law, is inherent and incidental to the exercise of the functions of all classes of Courts. Experience has also shown that it is indispensable to their existence. Whatever statutes, therefore, have been passed in relation to it, have created no new powers, but only regulated and limited such as already existed.<sup>1</sup>

In the United States, Courts have no prerogative power. They are not endowed with any attributes of sovereignty. They are simply ministerial tribunals to execute the written law. While they cannot assume authority to enact systems of laws, nor to establish rules applicable to any foreign or unrelated subjects, they are constantly building up a concrete system of unwritten law, by adjudicating upon each case which arises before them.<sup>2</sup> These cases become subsequently classified according to the principles on which they rest, whether as to the foundation of the right sought to be enforced, or the remedy sought to be obtained. What was first unwritten law, becomes by lapse of time and force of precedent positive law. It is easily seen that the common law of any country finds its origin chiefly in judi-

<sup>1</sup> *King of Spain v. Oliver*, 2 Wash. C. C. R. 429.

<sup>2</sup> "Now, though the science of legislation (or of positive law as it ought to be) is not the science of jurisprudence (or of positive law as it is) still, the sciences are connected by numerous and indissoluble ties." Austin *Prov. of Jur.*, § 14.

cial legislation, decisions of courts ante-dating statutory provisions, and thus giving recognition to jural relations never before established. The development of positive rights, from the arbitrary rules of custom, forms therefore part of the normal evolution of law.

We may trace, for instance, in the customary relations of lord and tenant the underlying reason of such statutes as those of Westminster, *De Donis Conditionalibus*, and of Marlbridge, *Quia emptores*. Such statutes show that the beginnings of the common law were founded in local necessity, and that precedents once established become the stepping-stones to a system of written law, which thenceforth nationalizes the particular right that has been judicially declared. In this way it came to pass, that the first man who won his case prepared the way for similar victory to all his fellow-citizens when similarly circumstanced.

In the colonial times of New England, Executive Courts, a name applied to Courts of Justice, to distinguish them from the Legislature, which was designated as the General Court (this latter being also in some colonies the final Court of Appeal), exercised a police jurisdiction bordering upon legislation, for they made orders relating to the repair and construction of fences, the government of the town-watch and the viewing of boats. They were also empowered to lay out highways, license taverns, provide for the support of the ministry, and admit persons as freemen of the colony. Even town laws were subject to the approval of the County Court.<sup>1</sup>

Much of that body of the civil law known as the

<sup>1</sup> Washburn Judicial Hist. of Mass. 32; Mass. Colonial Rec., 4 pt. 1. 314; Palfrey Hist. of New England, vol. 1, 334; Mass. Acts and Resolves, 1. 66 (1692); Lodge's Short History, 415-17.

*Corpus Juris Civilis*, consists, in fact, of the work of the *jurisprudentes*, whose interpretations and constructions of the law proper, became, by a species of organic development, the accepted rules for its application. In like manner the edicts of Praetors were consolidated in the time of Adrian, and finally adopted into the body of the law, in the Legislation of Justinian. The classical jurists introduced the principle of analogical reasoning, on the basis of consistency in the law, and their aim was to trace its spirit continuously from the nature of legal relations in general, down to the end or objects contemplated by the particular statute. In this way they sought to expound the letter of the statute (*Mens Legis*) by its spirit (*Ratio Legis*). But as this could not always be done with logical certainty and precision, they were driven to the necessity of inventing fictions, in order to supply a hypothetical basis for their organic harmony. To this system of construing the law, and the power of the Judges under it, they gave the name of *equitas*, a system which has been repeated in the English Judicature Act of 1873, by incorporating the doctrines of its modern Chancellors into the law of England.<sup>1</sup>

It is upon this principle of analogical reasoning, as the basis of consistency in law, that our courts, whenever called upon to determine the constitutional extent of the legislative power in respect to a particular statute, have had to compare the written Constitution with certain anterior juridical rights of persons, already expressed

<sup>1</sup> Holland, *Jurispr.* 63. Mr. Austin in his chapter upon Praetorian Equity remarks that "It is to be regretted that the legislative power of the Judges is not exercised directly and avowedly with us as it was in Rome, that judge-made law is not made in the form of statute law; but in that of judiciary law; and that our Courts do not, like the Praetors, express and publish their law in the form of general rules, and thus legislate openly instead of covertly." Austin's *Jurispr.*, § 881.

either in positive judgments, or accepted as unwritten conventions incorporated in that Constitution. These conventions and common-law judgments constitute the historical evidence of the law within the law, being the nucleus from which by organic development the Constitution itself has been evolved. By the light of these analogies the fundamental law, however originally expressed, stands revealed as the necessary parent of the Constitution. So evident is this that even in England these conventions are admitted to be integral portions of the Constitution, limiting as well as defining the powers of sovereignty, and because of their fundamental character, not requiring to be solemnly enacted as an organic law.<sup>1</sup>

The necessity of interpreting and construing statutes being inseparable from the administration of justice, a system of legal hermeneutics has grown out of it, which in every doubtful case devolves upon courts the duty of searching for light outside of the written law. This system forms part of our jurisprudence under the doctrine of equitable interpretation,<sup>2</sup> and as such has served to widen the scope of judicial criticism and authority in its supervisory relations to legislation. For "there are," says De Tocqueville, "few laws which can long escape judicial scrutiny, since there are few which do not assail some personal interests, and which lawyers cannot, or do not, as a duty summon to the bar of justice. Hence, from the moment a court refuses to recognize the validity of any statute in a judicial proceeding, that statute loses a portion of its moral weight. Those whose rights it has infringed are thereby notified that

<sup>1</sup> Opinions of the Justices of the Sup. Jud. Court, 126 Mass. 594.

<sup>2</sup> This doctrine has even been applied to penal statutes, although in contravention of the general rule that they are to be strictly interpreted. *Van Valkenburgh v. Torrey*, 7 Cow. (N. Y.) 252.

there is a way of escaping the duty of obeying it, other litigations follow, and it eventually becomes impotent. Two results thereupon follow, either the people amend the Constitution, or the Legislature repeals the law."<sup>1</sup>

That statutes under the necessities of public policy, or the remedial principles of equity, may be construed against their letter, and frequently are, is now an accepted canon of interpretation, and "the proposition that in construing a statute the judges have a right to decide in some cases, even in direct contravention of its language has been repeatedly asserted and practised upon by the highest authority."<sup>2</sup> From the foregoing facts it will be seen, that the two sources of law in England and the United States have always been legislation and litigation. The substantive principles of the law, so far as they have been settled by judicial decisions, have gradually been enacted into statutes, and, on the other hand, statutes whose language has been misleading, or which have been in derogation of established principles, or constitutional provisions, have been construed with reference either to carrying out the intention of the Legislature; or where this could not legally be accomplished, have been declared invalid.

In this revision of the work of the Legislature, through an apparent contradiction of the language of an enactment, the judicial power seeks to find the equity of the statute by interpreting its intent according to its spirit, rather than according to its letter. To this process of interpretation, which sometimes enlarges and sometimes abridges the application of a statute, or even nullifies it entirely, the term judicial legislation has been applied. In such cases, the judgment of a

<sup>1</sup> Democracy in America, chap. 6.

<sup>2</sup> Sedgwick on Stat. & Const. Law, 255; *People v. Utica Ins. Co.*, 15 Johns. 380-1; Maxwell on Interpretation of Statutes, by Endlich.



court becomes in a certain sense creative of a precedent or new law, which it has fashioned out of an existing law; whereupon, by this judgment, until reversed, the case itself on which it is founded is evidence of law for the time being. A series of such precedents becomes, in the course of years, a system of rules of binding obligation, as has been seen in the growth of modern commercial law.

The history of English jurisprudence abounds in examples of the influences of judicial legislation, not only in mitigating the rigors of statutory law, but even in nullifying its effects. Thus, in *Taltarum's Case*, the Statute de Donis, which had been passed in the interest of the nobility for the purpose of creating perpetuities in real estates, was entirely overthrown by the judges.<sup>1</sup> In like manner, we owe to the courts the introduction of the doctrine of trusts, and the defeat of the Statute of Uses declaring that the legal estate should be annexed to the use. So with those rules known as Presumptions, which favor freedom, innocence, sanity, diligence, and competency.<sup>2</sup> And in the same way all court rules, and general orders may be regarded as so many acts of judicial legislation.

This action on the part of courts plainly shows that, if to a certain extent they make the law for the particular issue before them, they make it by exposition only of their conclusions whenever occasions arise furnishing them with actual cases. In doing this they formulate no new law, but confine themselves to that which already exists, seeking to apply by analogy its principles to the actualities of each fresh litigation. In this respect they follow precedents, but only such as are of established legality. The necessity, also, for the exer-

<sup>1</sup> 4 Kent, 13; and 10 Rep. 38.

<sup>2</sup> *City of London v. Wood*, 12 Mod. 687; 1 Bay's (S. C.) Rep. 252.

cise of an administrative jurisdiction by them, is further increased through the creation by statute of quasi-judicial boards of officers, such as tax assessors, highway, school, and excise commissioners, and other similar bodies, whose functions authorize them to act ministerially upon the rights of persons or property, according to a judicial discretion attaching itself to their office.

It is from the peculiar nature of the functions discharged by such bodies, that the duty has devolved upon courts of exercising some supervisory authority over boards of officers possessing their wide and expansive powers. Indeed, but for this they would be wholly irresponsible to any directory power for any abuse of their own. Controlling as they do, either the sources of financial support of communities, or the expenditure of their revenues, they are liable to err at times in the exercise of an arbitrary discretion, which needs to be checked. Experience having everywhere established this fact it is now well settled that the right of courts, whether intermediate or appellate, to review the acts of such bodies, under the common-law writ of *certiorari*, may be considered as a rule of general practice throughout the United States. For, independently of statute, it is the only method by which the citizen can obtain redress against either illegal taxation, or other forms of encroachment upon his civil rights.<sup>1</sup>

It is through the discharge of such necessary duties as these, that Judicial tribunals form part of the law-making power of the State. Their decisions, therefore, constitute practical, though unwritten laws, and being the result of more deliberation and technical knowledge than are the acts of a Legislature, such judgments are always acquiesced in by the people. They furnish con-

<sup>1</sup> *People v. Assessors, etc.*, 39 N. Y. 81; and see chap. 269, Laws of New York of 1880.

crete examples of general principles, and stand substantially on the same footing as legislative enactments. The history of jurisprudence from the days of Justinian to the present time, affords constant illustrations of this "power of the keys" of judicature. No more striking instance can be mentioned than that of Lord Mansfield, who through his many and unimpeachable decisions, exercised almost legislative powers in the foundation of English Commercial Law. And looking at the extent of their influence upon the development of a system of mercantile law in both England and her numerous Colonies, he may be said to have worked out more practical results within the same period of time than did Parliament in itself. In like manner, the decisions of Marshall, and Jay in our own country have furnished interpretations of the Constitution which stand on an equal footing with that instrument itself, before Courts and Legislatures.

As a consequence of these effects of judicial action, born of litigation, the so-called leading cases have virtually legislated themselves into the position of positive enactments upon the various topics to which they relate; and the Courts in which those cases arose, did in some degree exercise a species of legislative power by anticipation, since much of statute law is everywhere found to be only codified case-law. It is needless to say that there is nothing of either novelty or usurpation of authority in such judicial action, but only an effort to apply inflexible rules to personal transactions which are perpetually varying. This is the chief mission of the science of law, which seeks to govern the conduct of men by ethical rules founded upon natural justice. The making of such rules by a Legislature, and the interpretation of these same rules by a Court, tends to bring the office of the Judge very near to that of the law-maker. The two offices in fact are so mutually related in the administra-

tion of government, that they can never be entirely separated.

In whatever direction, therefore, we trace the organic development of any system of jurisprudence, we are led to one conclusion inevitably, which is, that the true evolution of law always takes place most naturally through the process of litigation; that some fact creating a jural right is always the first parent of a principle of law, which, being accepted as a precedent, becomes by frequent confirmation converted into a general rule. That system of jurisprudence from which we have so largely derived our own, points constantly to the fact that wherever we seek to trace the genesis of a principle of jural action in England, or the United States, it is in the soil of the case-law system that the common law finds the best sustenance for its roots. A decided case often affords a judicial corner-stone on which to rest a statute. Sometimes it does even more, by mapping out, through discussion and interpretation, the limits within which a rule of civil conduct may be established. No one can doubt for instance, that the decisions of the Supreme Court of the United States have exerted a direct influence upon all subsequent legislation throughout the country, whether in conventions of the people, or in State Legislatures. These decisions, being the supreme law of the land, carry with them the emphasis of a command to be applied to all analogical cases wherever possible. Their whole tendency under the Constitution is to nationalize the jural relations of the States and their citizens.

The inevitable blending of the functions of the legislative and judicial departments in the practical adjudication of civil rights and remedies, shows the extreme difficulty, if not impossibility, of strictly defining the boundary between legislation and judicial interpretation. It has often been attempted, but never success-

fully. The frequent instances in which judge-made law has intruded itself into legislation from time immemorial, is not the result of misapprehension on the part of Courts of the proper limits of their jurisdiction, but arises from the varying circumstances and relations entering into the *res gestae* of litigation. The more complicated these become, the more interests there are at stake, and the newer the questions which offer themselves for solution, the more necessary will it be for Courts to modify the application of principles of law, so as to meet the demands of existing facts. This explains the origin of the maxim "*Ex facto oritur jus.*"

Judicial interpretation stands, therefore, in the place of a qualifying power walking abreast of legislation, to point out how the statute may extend its operation in a given case; or again to nullify the statute if found to be in conflict with the organic law. It represents the three aspects of authentic, customary and doctrinal interpretation, because emanating from a co-equal department of government. Those interpretations constitute the law of the land until reversed by a tribunal of competent jurisdiction. In this aspect of its powers, judicial legislation may be either directory or corrective.<sup>1</sup>

Consequently, the interpretation or discovery of the meaning and intent of laws, and the construction or application of such meaning to practical questions affecting civil rights, constitute the proper domain of the judicial department in every government. While the Legislature can only determine and declare what the law shall be, it is the exclusive province of courts to decide what it is, or has been.<sup>2</sup> The maxim *jus dicere, non dare* applies specially to courts, and its con-

<sup>1</sup> *Marbury v. Madison*, 1 Cranch, 137; *Scott v. Sandford*, 19 How. 393; *Ex parte Garland*, 4 Wall. 334; *Civil Rights Cases*, 109 U. S. 3.

<sup>2</sup> *Dash v. Van Kleeck*, 7 Johns. 498.

verse to Legislatures. Since, therefore, in the subdivision of the powers of government, it becomes necessary to apportion to each department its appropriate sphere of duty, it follows, inevitably, that upon the judiciary must devolve not only the task of settling legal controversies, but also of deciding upon the constitutional validity of acts emanating sometimes from one department, and sometimes from another. A judicial check has thus been established upon possible encroachments by either the Executive or the Legislature, which function of government, although not specifically designated in the Constitution as forming part of the powers of the judiciary, has yet been conceded to it, because of the universal opinion that it properly falls within its sphere, and could not as safely, if at all, be lodged elsewhere. "There is nothing," says Mr. Sedgwick, "more curious in our history than the fact, that without any provision either of Constitution or of law giving this power to the courts of justice, they have, since the earliest days of our Republic, steadily and vigorously applied it."<sup>1</sup> Nor is this a modern doctrine born of republican institutions alone, for even as against the omnipotence of Parliament, Coke boldly took the ground that "when an Act of Parliament is against common right and reason, or repugnant or impossible to be performed, the common law controls it, and adjudges such Act to be void."<sup>2</sup>

#### RELATIONS OF THE JUDICIARY TO THE LEGISLATURE.

The question of the authority of courts to declare an Act of the Legislature void, because repugnant to

<sup>1</sup> Sedgwick, *Stat. & Const. Law*, p. 182; *Marbury v. Madison*, 1 Cranch, 137; 1 Kent, 448.

<sup>2</sup> *Bonham's Case*, 8 Rep. 118; *Cooley, Const. Lim.*, 44.

the Constitution, is one of an unique character; and wholly American in its origin. It could not possibly arise in England, where the conceded omnipotence of Parliament leaves no opportunity for courts to entertain problems of this kind. All tribunals there being subordinate to the High Court of Parliament, the duty of acquiescing in its enactments and enforcing them, according to the necessities of the occasion, becomes a matter of strict obligation with them. Even the famous dictum of Coke, in *Bonham's Case*, is not to be understood as meaning that such acts would be reviewed and revised in the light of a written organic law, but that, theoretically, if such acts were found to be in violation of reason, the duty would devolve upon courts to declare them not to apply to the particular case at issue. Despite this ethical doctrine as a guide to judicial action, modern authorities all re-affirm the absolute power of Parliament as an indisputable prerogative, and that its acts, being above the law, cannot be questioned or controlled in any court of justice.

In the United States, where a rigid Constitution has created distinct departments of government, it has been deemed necessary from the very outset to endeavor to maintain the territorial limits of each, by protecting it against encroachments from any other. On whom primarily devolves the duty of declaring when an act of this kind has been committed, is not expressed in the Constitution; yet by tacit consent, and in respect more particularly to acts of the Legislature affecting the rights of citizens and giving rise to contentious litigation, it has come to be recognized, that the duty of interpreting the Constitution can most safely be intrusted to the judiciary department alone. The habit of looking to it as the only final tribunal of arbitration wherein to adjudicate upon differences between fellow-citizens, or

between them and the State, has slowly but surely confirmed the position of the judiciary as the proper and determining exponent of the Constitution, and they may be said to hold that exalted trust by an unwritten law, which has now become as solemn in its obligations of civil obedience as any positive enactment.

“It has accordingly become,” says Chancellor Kent, “a settled principle in the legal polity of this country, that it belongs to the judicial power, as a matter of right and duty, to declare every Act of the Legislature made in violation of the Constitution, or any provision of it, null and void.”<sup>1</sup>

If it be charged that the exercise of this power virtually constitutes our courts the masters of the Constitution, with capacity to nullify its provisions and thus to override the will of the people, the answer may be found in the fact that the Constitution nowhere imposes the duty upon either department of government of obeying the rulings of another, but leaves each free to act within the sphere of its own appropriate functions. Consequently, the decisions of even our highest courts are accepted as a finality only in relation to the particular cases with which they happen to deal, and their judgments do not impose compulsory limitations upon the action of any other department.<sup>2</sup>

These relations of the Judiciary to the Constitution and consequently to the Legislative department, have in the past given occasion to some remarkable contro-

<sup>1</sup> Comm., vol. 1, 450.

<sup>2</sup> Bancroft's Hist. of the Const., vol. 2, pp. 198-202; Inaugural of President Lincoln referring to *Dred Scott v. Sandford*, 19 How. 393; *Haybourn's Case*, 2 Dall. 409; *Hylton v. U. S.*, 3 Ibid. 171; *Marbury v. Madison*, 1 Cranch, 137; *U. S. v. Peters*, 5 Ibid. 115; *Fletcher v. Peck*, 6 Ibid. 87; 19th Am. Law Review, 175; *Cooley, Const. Lim.*, 160, n.; 1 Kent Comm., 450.



versies between the two, in all of which, however, it is creditable to the spirit of legality which pervades the American character to perceive, that reason has ultimately triumphed over political partisanship, and paid tribute to the unshaken confidence reposed in the judiciary, by conceding to it the right of interpreting and declaring the law.

In 1786 the Legislature of Rhode Island passed an Act making paper money a legal tender for debts, at specie par value. This Act meeting with little favor and many obstacles, a second or coercive law was passed providing that all who sought to depreciate or discourage the passing of paper bills, should, for the first offence, forfeit the amount of the debt tendered and pay the sum of £100, and be rendered incapable of being elected to any office of honor, trust or profit within the State. The second Act failing in its purpose, a third law was passed providing that persons who refused to receive such bills as equal to coin, should be liable to complaint and arrest. The offender must appear within three days before a special Court to stand trial without a jury. If convicted, the penalty must be paid, or the party go to jail. The judgment to be final and without appeal, and no delay or injunction should in any case be granted.

This arbitrary and tyrannical law was soon brought to a judicial test of its validity, by the case of *Trevett v. Wheedon*, which arose out of a refusal by the defendant to accept paper money, as the consideration of a sale of goods made by him to the plaintiff. The Judges of the Superior Court who held upon Appeal that the Act was void, because unconstitutional, were thereupon impeached, and although not removed from office, the Legislature refused to re-elect them, and their places

were filled by persons in sympathy with these obnoxious laws.<sup>1</sup>

A similar case occurred in Ohio in 1808, where the Judges of the Supreme Court were impeached, for deciding that a statute passed in 1805 was repugnant to the Constitution of the United States and that of the State of Ohio, and therefore void. The trial resulted in an acquittal.<sup>2</sup>

But these apparently strained relations between different departments of government, must not be construed into actual conflicts of an irreconcilable character. They are not so in any sense, nor are they the creatures of an arbitrary exercise of power. On the contrary, they are the offspring of our peculiar form of government, and belong to the polity of its administration as a necessary result of its tripartite sub-division. Confusion and anarchy on the one side, or a dead-lock inactivity on the other, would attend upon any permitted encroachments between these departments, were no rectifying power at hand to re-adjust their jurisdictional limits. The necessity of such a power has always existed and been recognized from the very foundation of our government. And this, because it was seen to be impossible from the very outset to define with accuracy the precise sphere of each department, or to draw such rigid boundary lines around it as to mark its limits with unerring certainty.

This self-evident fact was well understood by the framers of the Constitution, who saw, in advance, the difficulties that must be encountered in applying its provisions as a rule of administrative conduct to the ever varying necessities of government. And fully

<sup>1</sup> Arnold's Hist. of R. I., vol. 2, chap 24; Cooley Const. Limm., p. 160, n.; J. Winslow in Proceedings N. Y. State Bar Association for 1888.

<sup>2</sup> Western Law Monthly, vol. 5, p. 3. Sketch of Hon. Calvin Pease.

comprehending this political problem the Supreme Court, in *Cooper v. Telfair*,<sup>1</sup> which was decided as far back as 1800, said that "the general principles contained in the Constitution are not to be regarded as rules to fetter and control, but as matter merely declaratory and directory, for even in the Constitution itself we may trace repeated departures from the theoretical doctrine, that the Legislative, Executive and Judicial powers should be kept separate and distinct.

This idea of the contiguity of departments may serve to account for the fact that in the Constitution of Massachusetts of 1780, Art. 2, Ch. 3; in that of New Hampshire of 1792, part 2, Sec. 74; in that of Maine of 1820, Art. 6, Ch. 3; and in that of Rhode Island of 1842, Art. 10, Sec. 3, it is recited substantially, that each branch of the Legislature as well as the Executive, shall have authority to require the opinions of the Justices of the Supreme Court upon important questions of law, and upon solemn occasions.

This clause has been construed to mean, that the question must be one which the body making the inquiry has occasion to consider, in the exercise of the Legislative, or Executive powers entrusted to it; but not upon a question which may arise in the course of Judicial administration, and which cannot be affected either by Legislative or Executive action.<sup>2</sup>

Therefore, whenever any competent Court adjudges an Act of the Legislature to be unconstitutional, such Act immediately loses its moral sanction, and expires in the presence of some antecedent law with which it has come into conflict. In like manner the construction given to the statute of a State by the highest judicial tribunal of such State, is regarded as part of the statute,

<sup>1</sup> 4 Dallas, 14.

<sup>2</sup> Answer of the Justices of the Supreme Judicial Court, 122 Mass. 600.

and is as binding upon Courts as the original text.<sup>1</sup> This necessity of surrendering the rectification of civil rights and remedies to Courts, as equitable administrators of the will of the Legislature, has been recognized and practised in England from the earliest times. "Instead of the Legislature framing new provisions as occasion has required," says Mr. Dwarris, "it has been left to able judges to invade its province, and to arrogate to themselves the lofty privilege of correcting abuses and introducing improvements. It certainly is a remarkable fact that the jurisdiction, or method of proceeding, in all our Superior Courts will be discovered on inquiry to be founded on usurpation and sustained by fiction."<sup>2</sup>

The above, it is needless to remark, was written before the recent Judicature Acts in Great Britain had given, by Parliamentary sanction, the various necessary powers, whether original or concurrent, to the Courts at Westminster, and elsewhere, to hear and determine under prescribed rules of practice, the manifold issues tried before them. These Acts have thus affirmatively recognized a jurisdiction heretofore resting upon fiction and tradition alone.

Under every form of constitutional government the judiciary of a State constitutes in fact the only safe bulwark of civil liberty. So generally is this conceded that decisions pronounced by the highest Appellate Court become, as to the principles of constitutional law upon which they pass, conclusive and binding upon all its citizens. They are a finality which legislation scarcely ever attempts to disturb, since the maxim *stare decisis* would require every subsequent court to respect them

<sup>1</sup> *Shelby v. Guy*, 11 Wheat. 351; *Leffingwell v. Warren*, 2 Black. 599; *Beals v. Hale*, 4 How. (U. S.) 51; *Green v. Neal*, 6 Pet. 292; *Webster v. Cooper*, 14 How. (U. S.) 496; *Christy v. Pidgeon*, 4 Wall. 203.

<sup>2</sup> *Dwarris on Statutes*, 708, 792.

as *res judicata*. And until some change in the Constitution had altered the grounds upon which they rested, no judicial power in the State would unsettle them.

These are pregnant reasons why in framing new statutes, it is of the first importance to study the judicial history of the subject to which they relate, as unfolded in the decisions of Appellate Courts, before undertaking to introduce remedial provisions of a nature which may be in direct contravention to the organic law of the land, or to principles of the common law, long since adjudicated and settled. One great and omnipresent danger appertaining to hasty and loose legislation, is that of repetitious statutes unsettling the foundations of civil rights, and constantly requiring fresh interpretations of the intent of the Legislature at the hands of the Judiciary, to the great cost of litigants. As a result there follows the loading down of law reports with cases which would not have been likely to arise, but for this disturbance of settled principles.

Among the first things to remember is, that to whatever degree political ethics may enter into the science of the State; or however much we may recognize the latter as a moral person owing duties to all the civic virtues, it is very certain that most of these are incapable of being expressed as rules of obligatory conduct either in judicial decisions or in terms of legal enactments. The area of legislation is so wide and all embracing; it includes so much of past history and present wants, and it finds itself confronted to such an extent by obstructing facts like commercial rules, domestic customs, local circumstances, and religious beliefs that, aside from the merely technical limitations placed upon it by constitutional provisions and vested rights, the duty of making laws has, in its practical exercise to yield to much which, on its face seems undeserving of recognition. Thus the

doctrines of public policy and expediency, servile as they appear to the eye of the moralist, are yet safeguards against hasty and revolutionary legislation. These doctrines have an acknowledged place in political law as they even have in Judicature, representing undoubtedly the sagacity of experience in dealing with any particular community. To take in the full scope of the duty of the legislator, and to diminish as much as possible the necessity of Judicial Legislation we must accordingly turn for guidance to the utterances of text-writers and philosophers, as well as of jurists.

Mr. Sedgwick advances the following as his conclusions upon the limits to which Judicial Legislation should be permitted to extend:—

*First.* That the Legislature is to confine itself to the function of making laws.

*Second.* That it is the right and duty of the Judiciary to repress and confine the Legislative body within the true limits of the law-making power. But they have no right whatever to set aside, arrest, or nullify a law passed in relation to a subject within the scope of the Legislative authority, on the ground that it conflicts with their notions of natural right, abstract justice or sound morality.<sup>1</sup> Nor is Judicial interposition permitted to interfere with the operation of a statute, unless express words of a written Constitution give that authority.<sup>2</sup>

If a Legislative Act be made in contravention of the Constitution, it is manifestly no law; and as it is the duty of Courts to administer that only which is law, there can be no choice allowed then in the matter of declaring such a statute to be invalid. They cannot be bound by it, since it is a violation of the paramount law, which

<sup>1</sup> Const. and Stat. Law, p. 159; *Georgia v. Stanton*, 6 Wall. 50; *Riggs v. Palmer*, N. Y. State Reporter, Oct. 1889, p. 198.

<sup>2</sup> *Cochran v. Van Surlay*, 20 Wend. 381.

being the supreme law of the land weighs with equal force upon all Courts alike. Says C. J. Marshall, "If both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the Courts are to regard the Constitution, and the Constitution is superior to any ordinary Act of the Legislature, the Constitution and not such ordinary Act must govern the case to which they both apply. Those then, who controvert the principle that the Constitution is to be considered in Court as a paramount law, are reduced to the necessity of maintaining that Courts must close their eyes on the Constitution, and see only the law."<sup>1</sup>

In the record of our Federal legislation of one hundred years, only a few instances have occurred in which the duty has devolved upon the Supreme Court of declaring that Congress had passed acts in violation of the Constitution.<sup>2</sup> Perhaps strict historical accuracy would

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

<sup>2</sup> The first Act of Congress which was decided to be unconstitutional was that of March 23, 1792 (1 Stat. at Large, 243), requiring Circuit Courts of the United States to examine into the claims of the officers, soldiers, and seamen of the Revolution to the pensions granted to invalids by that Act, and to determine the amount of pay that would be equivalent to the disability, and to certify their opinion to the Secretary of War. And it authorized the Secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the Court, and to report the case to Congress at its next session. The question never came before the Supreme Court *in banc*, but the concurrent opinions of C. J. Jay and Justices Cushing of the Supreme Court; of Duane District Judge of the New York Circuit; of Justices Wilson and Blair of the Supreme Court; of Peters District Judge of the Pennsylvania Circuit; of Justice Iredell of the Supreme Court; and Sitgreaves District Judge of the North Carolina Circuit, were all to the effect that the act required of them was not a judicial one, because subject to the revision of the Secretary of War and Congress.

justify us in adding another instance, in the case of *Hepburn v. Griswold*,<sup>1</sup> which we have elsewhere examined. But as this case was subsequently re-opened for argument, and the Court retraced its steps in the second and final judgment, we are bound by the record as made therein.

The first instance is to be found in the case of *Marbury v. Madison*, above cited, where it was held that the authority given to the Supreme Court by the Act establishing the judicial system of the United States to issue writs of mandamus to public officers was not warranted by the Constitution. That to enable the Court to perform such an act, it must be shown that it is an exercise of appellate jurisdiction, revising and correcting proceedings in a cause already instituted. And that while, therefore, a mandamus could be issued to a Court, yet to issue such a writ to an officer for the delivery of a paper, would, in effect, be the same as to sustain an original action for that paper, under not an appellate, but an *original* jurisdiction not conferred by the Constitution.

The second instance is that arising out of the case of *Dred Scott v. Sandford*,<sup>2</sup> in which it was decided that the Act of Congress of March 6, 1820,<sup>3</sup> historically known as the Missouri Compromise, and which provided that, in all that territory ceded by France to the United States under the name of Louisiana, slavery and involuntary servitude, otherwise than in punishment of crimes whereof the party shall have been duly convicted, shall be, and is hereby forever prohibited, was unconstitutional, in that it prohibited a citizen of the

These opinions having been communicated to the President and Congress, the Act was repealed at the next session. See *Hayburn's Case*, 2 Dall. 409, n.; *U. S. v. Ferreira*, 13 How. 40.

<sup>1</sup> 8 Wall. 603.

<sup>2</sup> 19 How. 393.

<sup>3</sup> 3 Stat. at Large, 545.



United States from taking with him his slaves, being his private property, into this territory. Moreover, that the power granted to Congress by the Constitution to make all needful rules for the government of the territory, and other property of the United States, applied only to territory originally surrendered by Great Britain to the old Confederation of the States, and not to any new and subsequently acquired territory.

The third instance is that arising in *Ex parte Garland*,<sup>1</sup> in which it was held that the Act of Congress of January 24, 1865,<sup>2</sup> excluding from the practice of the law, in the Federal courts, any person who had voluntarily taken part in the late rebellion against the authority of the United States, was unconstitutional, in that it operated as a legislative decree excluding such persons from the right to practise in the Federal courts, and was to that extent a bill of pains and penalties, within the meaning and intent of that clause of the Constitution, prohibiting the passage of any bills of attainder or *ex post facto* law.

Another instance arose in the so-called Civil Rights Cases,<sup>3</sup> on the question of what was the "appropriate legislation," addressed to the States, by which Congress was authorized to enforce the Fourteenth Amendment. The amendment being prohibitory upon the States only, it was held that its enforcement was, in its method, restricted to such a form of corrective legislation as might be necessary, or proper, for counteracting and redressing the effect of State laws. In consequence of which the Court decided that the first and second sections of the Act were unconstitutional, because they legislated upon subjects which were already within the domain of State legislation, and included in its police powers; and furthermore, that Congress was not authorized to create a

<sup>1</sup> 4 Wall. 333.

<sup>2</sup> 13 Stat. at Large, 424.

<sup>3</sup> 109 U. S. 3.

code of municipal law for the regulation of private rights. It was admitted that the public conscience of the State might be warped through the misconduct of its citizens, but that in itself would not authorize the passage of any laws interfering with the internal regulations of the affairs of a State, in advance of hostility shown by its own laws.

A remarkable case is that arising out of the operation of Section 5th of the Act of June 22, 1874,<sup>1</sup> entitled an Act to amend the customs, revenue laws, etc.; which section authorizes a Court of the United States in revenue cases, on motion of the government attorney, to require the defendant or claimant, to produce in Court his private books, invoices and papers, or else the allegations of the attorney to be taken as confessed. The original Act, of which the above section is an amendment, was passed in 1863, amid the financial perils of a civil war. No similar statute had ever been enacted in the history of our government, and its only excuse is to be found in the fact that it was one of those war-measures passed at a time when, under the pressure of existing calamities, Congress felt itself called upon to save the National Treasury at any hazard, even to the Constitution.

The 5th section above cited was intended to supersede the 2d section of the Act of March 2, 1867, which in turn superseded the 7th section of the Act of March 3, 1863, entitled "An Act to prevent and punish Frauds upon the Revenues, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes." These objects, when taken in connection with the events of the day, will explain the tendency to a legislation which, instead of being merely

<sup>1</sup> 18 Statutes at Large, 187; 14 Ibid. 547; 12 Ibid. 737; U. S. Revised Statutes, §§ 3091-2-3.

corrective, became oppressive in application, and repugnant to the Fourth and Fifth Amendments of the Constitution.

Accordingly, in *Boyd v. United States*,<sup>1</sup> which arose upon an information filed by the District Attorney of the United States for the Southern District of New York, against thirty-five cases of plate glass seized by the Collector as forfeited to the United States pursuant to Section 12th of the Act of 1874, and under and by virtue of an order of the Court made under Section 5th of the same Act, the Supreme Court *held*, that this last section was unconstitutional and void as applied to suits for penalties, or to establish a forfeiture of the party's goods, because repugnant to the Fourth and Fifth Amendments to the Constitution. And the Court, in construing the statute, said that it does not require actual entry upon premises, and search for and seizure of papers, to constitute an unreasonable search and seizure within the meaning of the Constitution; a compulsory production of a party's private books and papers, to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the Amendment. And further, that it is equivalent to a compulsory production of papers, to make the non-production of them a confession of the allegations which it is pretended they will prove.

Protection to the exercise of the right of suffrage by Federal legislation furnished another occasion for impeaching the validity of an Act of Congress in the case of *U. S. v. Reese*,<sup>2</sup> which arose upon the construction of the third and fourth sections of the Acts of May 31, 1870,<sup>3</sup> relating to the power of Congress to legislate upon the subject of voting at State elections, as "appropriate legislation" under the 15th Amendment.

<sup>1</sup> 116 U. S. 616.

<sup>2</sup> 92 *Ibid.* 214.

<sup>3</sup> 16 Stat. at Large, 140.

These sections, being broad enough to cover wrongful acts without, as well as within the constitutional jurisdiction, and not admitting of limitation by judicial construction, were held to be invalid, because not confined in their operation to unlawful discriminations "on account of race, color, or previous condition of servitude," as specified in the Amendment.

In the same category of legislation stands the case of *U. S. v. Harris*,<sup>1</sup> which was one relating to the application of section 5519 of Tit. lxx., R. S., embracing "Crimes against the Elective Franchise and Civil Rights of Citizens." There, certain persons were indicted in the State of Tennessee, for conspiring to deprive citizens of their rights to the due and equal protection of the laws. The statute is a penal one and addressed not to wrongs inflicted by the laws of a State, but to wrongs committed by private persons upon other persons within some State or Territory. Accordingly, it was held, reaffirming the decision in *U. S. v. Reese*, that so long as a State has been guilty of no violation of the provisions of these Amendments, they impose no duty and confer no power upon Congress to act. That the above provisions do not apply to the acts of private persons towards each other, and that even as to State officers, Congress can only legislate for their punishment when administering some law violative of these Amendments.

It is fortunate therefore, that there is a department of government whose sleepless eye and watchful care is quick to detect, and resolute to correct, these legislative errors. A case is no sooner brought to its cognizance, than the first question raised is one involving the existence of a law to meet it, and a jurisdiction competent

<sup>1</sup> 106 U. S. 629; reaffirmed in 120 *Ibid.* 678.

to adjudicate the controversy. If the law be wanting, there is no occasion to consider the jurisdiction, or if the former be lacking in its essential agreement with the paramount law of the land, its illegitimacy will be judicially declared. It is in this silent, yet effective way that the Judiciary have become the palladium of our civil liberties. And whether a supervisory authority over legislation has been granted, or not, by specific words of endowment, the Constitutional power to pronounce a decree of nullity against the labors of a co-ordinate department of government, has, from the earliest days of the Republic, been accorded to Courts as a fitting accompaniment to the administration of Justice. There was a logical necessity for that since the duty of declaring the law as applicable to any given case could not, under the Constitution, be properly discharged, without having annexed to it the power to determine whether that law was loyal in itself, or whether, though written and promulgated, it still possessed no facultative life.

See also *Baldwin v. Franks*, 120 U. S. 678, where it was held that this same section was unconstitutional, as a provision for the punishment of a conspiracy within a State to deprive an alien of rights guaranteed to him therein by a treaty with the United States.

## CHAPTER VIII.

## IMPEACHMENT.

THE union of judicial and legislative functions in the same Assembly is unknown under our Constitutions, except in the solitary instance of the impeachment of public officers. Unless, perhaps, the trial of election cases, or the disciplining of its own members, may be said to involve the discharge of judicial functions on the part of a legislative House. With these exceptions, impeachment is the only occasion on which a Legislature may legally exercise the functions of a Court, and proceed to try an individual by due process of law. As elsewhere shown, the British Parliament has always combined the functions of both a Legislature and a Court, in this respect following the customs of the Anglo-Saxon National Assembly which, among other duties, performed those of a judicial tribunal, meting out justice between man and man. A similar combination of functions occurred in the early town meetings and assemblies of this country.

In the colonial days of New England, the Legislature, then designated as the General Court, was the Court of last resort. It claimed this prerogative, and was jealous to exercise it on all convenient occasions. Moreover, in reviewing the action of the executive courts, it was bound by no precedents, but was a law unto itself, and being a purely political body, its ideas of justice and equity were as elastic as the varying opinions of its members. Governor Hutchinson, of Massachusetts, saw

the iniquity of such a course, and addressed both Houses upon the subject in 1772, in a remonstrance against its continuance.<sup>1</sup>

Necessarily, the assumption of such an authority admitted of no limits to its application, and it is not surprising to find that appeals taken by colonial suitors to the Privy Council in England, were treated and punished as contempts of Court by colonial assemblies.<sup>2</sup> This was in a day when ignorant politicians, appointed by the British Crown, occupied the Bench in the various colonies. To contemn the judicial capacity of such persons was as natural as it afterwards became to challenge their opinions, and the assumptions of judicature, by colonial Legislatures, were only the logical result of extending the powers of the primary assemblies of the people, so as to cover all the necessities of their municipal organization.

This omnipotence of primary assemblies and Legislatures was an affirmance of the natural rights of society over all its members, in whatever aspect of civil relation those members might be made the subject of public inquiry. The idea of a primary Assembly in which original sovereignty was localized, justified the exercise of any and all powers, whether legislative, judicial, or executive. For, wherever society is either in a rudimentary state, or incompletely organized in respect to departments of government, the exercise of such combinations of functions by the same Assembly may naturally be expected to exist. Such centralization of powers is suited to two opposite conditions only of political society, viz., to a patriarchal state, or to a small compact and democratic City-State like those of Greece. But as soon as it became necessary to establish a *repre-*

<sup>1</sup> Mass. State Papers, 1765-75, pp. 314.

<sup>2</sup> B. Adams, Eman. of Mass., p. 299-301.

*sentative* form of Assembly, the expediency of separating legislative from judicial functions became apparent, as a security to personal liberty. The difference, therefore, between a primary Assembly, which is a quasi-sovereign body, and a representative Assembly, which is only a derivative body originating in an organic law, explains the necessity of the limitations affixed to the several departments of government. If it is necessary that there should be three departments, it follows, as a corollary, that it is necessary for those departments to be independent of each other. Such is the theory exemplified by our American constitutions.

But, as experience had shown to be the case in England, there were details of administration belonging to these departments, which, being in the nature of forms of procedure for their government, needed to be met by special provisions. In the regulation of the tenure of office it was found, that provision had to be made for removals, as well as for appointments. Whether offices were held for a prescribed term, or during good behavior, it was seen that the peculiar status of public officers, as trustees and agents of the State empowered to perform certain executive, judicial or ministerial duties *virtute officii*, required the exercise over them of a common law jurisdiction partaking of both a political and judicial character. In the absence of any purely common law crimes against the Federal or State authority, such a tribunal was designed to operate as a sovereign inquest into the conduct of public men.<sup>1</sup> No government could long exist without the means of calling its servants summarily to account for breaches of official trust. It being necessary at times to depose a public officer for malfeasance in the discharge of his duties, some means had to be provided for moving a

<sup>1</sup> Story on the Const. § 689; 4 Elliott's Debates, 262.



prosecution against him, and for creating a tribunal competent to hear and determine in a judicial forum the issue raised by his impeachment. The only occasion, therefore, in which this rule of the separation of legislative and judicial functions is permitted to be relaxed is in the case, as above stated, of trials of impeachment.

There, the offender being a public servant, and the offence consisting in a breach of the trust reposed in him by the people, it seems eminently fitting that he should be tried by that department of the government which represents most directly the popular will. The legislative Houses being the best embodiment of this sovereign authority, they have accordingly, under our various constitutions, been empowered to inaugurate such proceedings in the lower branch, and to try the offender before the higher branch, sitting as a high Court of Impeachment. Whether the impeachment be tried before the Senate of the United States, or before a State Senate, the proceedings in either case are governed by similar rules of procedure, and an inquiry into the sources whence this method of trying public officers has arisen, will show that it has been arrived at through many political vicissitudes in the history of English jurisprudence, casting sinister reflections upon the purity of some of her ancient courts, notably the Star-Chamber, the Court of the Lord High Steward and even Parliament itself.

The State Trials of England are disfigured by repeated instances of judicial corruption, where the victim was sacrificed to the cupidity or cowardice of the Court, at the bidding of the sovereign. From the day when Sir Thomas More and Raleigh perished under unlawful convictions, to the day when Russell, and Sidney, and Alice Lisle suffered for crimes which it was proved they had never committed, the word impeachment, in

England, was often synonymous with death. The execution was generally determined upon before the trial, and this latter was only the convenient cloak for covering the iniquity of the sacrifice with the thin disguise of a legal procedure.

Under the light of these examples of political tyranny, the separation of the three departments of Government in the Constitution of the United States is easily explained. The founders of the Republic had the Constitutional history of England before their eyes. They saw the inevitable dangers to which civil liberty was exposed from a centralized prerogative in government, and they accordingly determined that, although the opportunity for similar political iniquities might never arise here, they would still provide that the very instruments to suggest it, in the form of a corrupt Judiciary, a venal Legislature, or a tyrannical Executive, should never be found combined on American soil.

It is a well recognized principle of government, that the same power which creates a public office may abolish it, and that, consequently, the same power which has created a public officer may not only regulate the tenure of his office, but also provide means for his removal in case of malfeasance therein. Every office is a personal trust conferred by the public upon an individual, and not capable of being deputed, unless the Constitution and laws shall so expressly provide. It is a delegated authority, and under the maxim *delegatus non potest delegare*, the officer is such a personal agent, that he cannot legally make his office the subject of any contract with another person, either to obtain it, to share its profits, or to depute its authority.<sup>1</sup>

<sup>1</sup> 1 Story's Eq. Jurisp., sec. 295; Dunlap's Paley on Agency, page 175; Gray v. Hook, 4 Comst. 455; Tappan v. Brown, 9 Wend. 177; People v. Bedell, 2 Hill, 196, 200, 434; Conner v. The Mayor, etc., of New York, 1 Selden, 284, 285.

At common law, any wrong done to the State was always punishable by indictment. But there has from the earliest times been a disposition to discriminate between *personal* and *official* wrongs; between crimes committed by a private individual against another, but not extending beyond that individual; and to wrongs done to the whole nation through a breach of its trust, committed by a public servant acting in his official capacity. In the first case, or that of an injury done by one private citizen to another, an indictment lies, because of the duty of the State to redress the wrongs of its citizens, and to avenge its own violated dignity. In the second case, or that of a public servant, an indictment will also lie, but in addition to this an impeachment may be brought against the offender, to dispossess him of his office, and to further punish him in such way as may accord with the laws of the land. The two proceedings, by indictment and by impeachment, may therefore be concurrently enforced against the same individual at the same time.<sup>1</sup> It seems to be conceded also, that in the case of the House of Lords, it may entertain a presentment for any crime, whether consisting of a felony or a misdemeanor; whether it be committed by a peer or a commoner, and that it may attach ordinary punishments to its convictions.<sup>2</sup>

Impeachments seem to have been coeval with the earliest days of Parliament, the first case having been heard by the Commons in 1376, in the reign of Edward III. Before that time, the House of Lords had tried both peers and commons, but without complaint by the latter. It had assumed in this respect the combined

<sup>1</sup> Stafford's Trial, 7 How. S. T. 1297; Impeachment of Wm. W. Belknap, Secretary of Navy, Washington, 1876.

<sup>2</sup> 2 Broom and Hadley, p. 550; Hallam, p. 205; Trial by Impeachment by Theodore W. Dwight, 15 Am. Law Register, p. 257.

functions of a Grand and Petit Jury, and tried indictments of its own finding. In fact, an impeachment was originally held to be in the nature of an indictment, and the proceeding itself was only a particular method of trying a criminal offence. And as the party impeached could only be convicted of a crime known to the law, the trial had to be conducted in accordance with the rules of evidence practised in the ordinary Courts.<sup>1</sup>

This method of procedure continued to be resorted to during the next four reigns. But none occurred under either Edward IV., Henry IV., Henry VIII., Edward VI., Mary or Elizabeth's reign.<sup>2</sup> During this period prosecutions in the Star Chamber and in the Court of the Lord High Steward, or the High Commission Court took the place of proceedings by impeachment. In the reign of James I., they were again revived and pushed with a vigor which is best illustrated by the following statistics:—

Between 1620 and 1688 there were, of impeachments,	40
In William III., Anne, and George I.'s reign,	15
In George II.'s reign,	1
In George III.'s reign,	{ Warren Hastings, 1788, } { Lord Melville, 1806, }

No case of impeachment has come before Parliament for eighty years, Lord Melville's having been the last. This form of proceeding has become therefore so nearly obsolete in England, that probably no man is living there, who ever participated, even as a spectator, at such a trial. In the United States, we have already had in the first century of our existence, impeachments of one President, Andrew Johnson in 1868; of one Justice of the Supreme Court of the United States, Samuel Chase in 1804; of one Secretary of War, Wm.

<sup>1</sup> 15 How. State Tr. 68; 15 Ibid. 795; 6 Ibid. 354.

<sup>2</sup> Hallam, p. 205; May Par. Hist., p. 53.

W. Belknap in 1876; of one District Judge of the United States, John Pickering in 1803; of one Senator of the United States, William Blount in 1797; and in New York of three Judges, George G. Barnard and Albert Cardozo of the Supreme Court, and John H. McCunn of the Superior Court, all in 1872.

It seems to be conceded that no impeachment will lie except for some breach of the common or statute law, the distinctive feature being, that the offence must represent such a crime as would render the person liable to indictment in any county of the State.<sup>1</sup> And as a notable instance of the application of this principle, may be cited the case of the Earl of Orrery in 1669, who, though a peer of the realm, was not tried by impeachment, because his offence was not considered treason, and his case was accordingly remanded to a court of law.<sup>2</sup>

The object of this limitation was to afford no reasons for impeachment upon political grounds alone, as was so frequently done in England, under the doctrine of constructive treason. Thus the Duke of Richmond was impeached in 1641 upon the most frivolous charges, among which was that of moving an adjournment in the House of Lords.<sup>3</sup> And Chief Justice Scroggs was impeached, because, as it was recited in the articles against him, "he, the said Sir W. Scroggs, on the contrary, by his frequent and notorious excesses and debaucheries, and his profane and atheistical discourses, doth daily affront Almighty God, dishonor his Majesty, give countenance and encouragement to all manner of

<sup>1</sup> T. W. Dwight, *op. cit.*, p. 264; 12 How. State Tr. 1213; 6 *Ibid.* 346.

<sup>2</sup> 6 How. State Tr. 917; *Vid.* also case of Inigo Jones for pulling down a church, 4 Hatsell's *Prec.* 132.

<sup>3</sup> 4 How. State Tr., 120.

vice and wickedness, and bring the highest scandal on the public justice of the kingdom."<sup>1</sup>

But, on the other hand, neither an indictment, nor an impeachment are a bar to each other, since, as we have before shown, both proceedings may be carried on concurrently, or if a party is indicted first, he may be impeached afterwards, or vice versa. These doctrines were evidently acquiesced in by the framers of the Constitution when, in affixing penalties to persons convicted upon impeachment, they inserted the clause which recites that "the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment, according to law."<sup>2</sup> It is still, however, a mooted question, so far as the general government is concerned, whether there are any crimes against the United States which are purely common law crimes. Mr. Wharton, in his criminal law, takes the ground, though only to dissent from it, that the United States has no common law criminal jurisdiction. But says that, if the common law, as a source of jurisdiction, does not control Federal Courts, it may still apply to them as a rule for the exercise of jurisdiction previously given.<sup>3</sup>

The point seems well taken in both statements, inasmuch as it simply eliminates the common law as a source of jurisdiction, to substitute it as a rule in applying a jurisdiction not precisely defined. Prof. Dwight coincides in this opinion, saying that "impeachments like indictments can only be instituted for crimes against the statutory law of the United States."<sup>4</sup>

<sup>1</sup> 13 Lord's Jour. 737.

<sup>2</sup> Art. 1, §§ 3, 57.

<sup>3</sup> Am. Cr. L. sec. 166-69.

<sup>4</sup> Op. cit. p. 269; 1 Wash. C. C. 84; U. S. v. Maurice, 2 Brock. 96; U. S. v. N. Bedford Bridge, 1 Woodb. & Minot, 401; U. S. v. Lancaster, 2 McLean, 431.

These doctrines properly limit the grounds for an impeachment to acts done in violation either of laws of Congress, or to the commission of such crimes as are mentioned in the Constitution. The difference between England and the United States in this particular must never be overlooked, since the Constitution defines no other crime against the government of the United States save that of treason,<sup>1</sup> and leaves the other ones of bribery, or other high crimes and misdemeanors, to be ascertained by recurrence to rules of the common law.<sup>2</sup>

As it thus appears that impeachment is nothing but a *method of procedure* adopted by legislative bodies for the trial of certain crimes, concurrently with the common law courts, it will more readily be understood why in modern times, it has gradually become restricted to such high crimes and misdemeanors only, as are chiefly of an official or political character, and which no other authority but the Supreme Legislative power can so well prosecute for the benefit of pure government.<sup>3</sup>

*Persons Liable to Impeachment.*—Impeachment in the United States being a matter of Constitutional provision (repeated in the Constitutions of all the States), is held to apply not only to the chief executive magistrate, but to other civil officers. In relation to the last named however, it has never been extended to any not belonging to one of the three constitutional departments. Officers created by statute, although as impeachable as any others, are not usually removed in that way. In most States the Governor is empowered to remove certain civil officers for satisfactory reasons duly established. But this applies only to inferior ones, and this method is so vastly superior in every sense to that by impeachment,

<sup>1</sup> Art. 3, sec. 3, 1.

<sup>2</sup> 1 Story's Const., sec. 799.

<sup>3</sup> Cushing on Legis. Assemblies, sec. 2539.

that no comment is necessary to explain the reasons for its adoption.

*Arrest.*—In England, arrest of the person follows his impeachment, although a distinction in this respect is made between peers and commoners.<sup>1</sup> A commoner may be arrested upon any charge, while a peer can only be placed in custody under a charge of treason, or other capital offence.

Again, the Commons may arrest at the outset, and in their discretion hold the party to bail; and when the prisoner in turn is brought within the custody of the House of Lords, they may exercise a similar discretion in regard to admitting him to bail.<sup>2</sup>

*Suspension.*—In the United States, arrest of the person is not deemed necessary, nor is his presence indispensable at the trial of an impeachment, the reason of this being that as no punishment of the body is to be enforced by such a Court, the presence of the defendant, or his absence, can affect in no degree the results of its judgment. That judgment with us is limited to removal from office, and disqualification for ever again holding any within the same sovereignty. But the question is still a moot one, whether pending the trial of an impeachment the party can be suspended from office. Prof. Dwight,<sup>3</sup> who has examined very carefully the authorities upon this subject, through the practice in England and the language of our Federal Constitution, is emphatically of opinion that there can be no suspension from office previous to conviction.

And considering the fact that an impeachment presupposes an indictable offence or crime, in which case the law always presumes innocence rather than guilt,

<sup>1</sup> 15 How. St. Tr. 806; Ibid. 1170; 14 Ibid. 240.

<sup>2</sup> 4 Hats. Prec. 256; Ibid. 128; 4 How. St. Tr. 56, 82.

<sup>3</sup> Op. cit., pp. 271-4.



there would seem to be no ground, *ex hypothesi*, upon which suspension from office of one not yet convicted could be made to rest. It is a departure from all established rules of judicature that a party shall be punished for a crime of which he is not yet convicted. Nor does it mitigate the injustice of such a course to say that suspension is not removal, when the fact remains that suspension constitutes such an abrogation of the confidence of the appointing power, as to thereby destroy the only source whence the appointee can derive either his right to office, or his powers to act in it. In the case of Lord Bacon, who, upon impeachment, confessed his crime, the House of Lords found great difficulty in pronouncing sentence upon him while he retained the Great Seal, since, it being the Lord Chancellor's duty to preside on the woolsack and render sentence, he would have been called upon to sentence himself. In order to avoid this legal paradox, the King accordingly induced Bacon to resign his office.<sup>1</sup>

Following the rule of English precedents as far as they can be applied to American practice, it seems conclusive that there is nothing in our Constitution which gives the right of suspension pending an impeachment. Indeed, it has been maintained by a high authority that the power of suspension was studiously excluded.<sup>2</sup> The most that could ever be said in favor of such an authority in England was, that offices held at the pleasure of the King might be vacated at any time at his command, under the stimulus of an "address" from Parliament requesting it. Yet, it is said that no case can be found where the Lords ever consented to unite with the Commons, in addressing the King to remove or suspend a judicial, or other officer, during the progress of an im-

<sup>1</sup> 2 Campb., Lord Ch., 408.

<sup>2</sup> 2 Madison Papers, 1154; 3 Ibid. 1572-3.

peachment. If any request of that kind ever emanated from them, it came only at the close of the trial, as in Lord Bacon's case before cited. All these precedents show that the power to impeach does not include the power to suspend. In the United States, any officer holding office at the pleasure of an appointing power, may be removed arbitrarily by the person possessing such power of appointment. In case of persons appointed to office for a stated period, they cannot be removed without cause, and trial first had. But impeachment, as employed in modern times, does not apply to either of these classes of officers.

#### PROCEDURE UPON IMPEACHMENT.

In all States of the Union, the power of impeachment is vested in the lower or popular branch of the Legislature, which constitutes, by analogy with the source of all indictments, a grand inquest of the State. It is, therefore, in this body that the initiative must be taken. The upper house, or Senate, is the Court before which the impeachment is to be tried, but it cannot take cognizance of malversation in office, except through information preferred by the lower branch; and in this respect it bears the same relation to this latter that a petit jury does to a grand jury.

Accordingly, whenever it is known, or there is reason for believing that a public officer has been guilty of malversation, any member of the lower house may introduce a resolution directly accusing the party, or asking for the appointment of a committee to consider and report upon the charges preferred against him. If the committee be appointed, and if they report adversely to the party, recommending the prosecution of the impeachment under the original accusation, a committee

is thereupon appointed to impeach the party at the bar of the Senate, to announce to that body that articles will be exhibited in due time against the accused and made good before them, and to demand that the Senate take order for the appearance of the party to answer to the impeachment.

The Senate having signified its willingness to take such order, the lower house proceeds by committee to prepare articles of impeachment, which, upon its approval of them, are then presented to the Senate, and a committee of Managers appointed by the House to conduct the impeachment. Upon receipt of these articles, the Senate issues its process summoning the accused to appear before it at a certain day, and to answer the articles.

These articles need not be technically precise as in an indictment. It is sufficient if their averments contain such certainty of allegation, as will enable the party to answer them upon an issue joined; and if successful, to employ such acquittal as a bar to any future proceedings against him.

The Senate being duly convened as a Court of Impeachment on the return day of the summons, the accused is called upon to appear and make answer to the articles preferred. As before said, the defendant need not appear in person, since his appearance will in either event be recorded, and the trial will proceed. He is entitled to counsel, but should he appear neither in person nor by counsel, the Senate may proceed *ex parte*, his default having first been recorded.

If he appears, he is entitled to a copy of the articles, and to a reasonable time in which to answer them. And if he answers the allegations, he may do so either in part, or as a whole, pleading generally or specially. Or again, he may plead to the jurisdiction of the Court,

as was done in Blount's Case in 1789.<sup>1</sup> Or again, as in General Belknap's Case in 1876,<sup>2</sup> who resigned his office of Secretary of War, immediately preceding his impeachment, and with a manifest purpose to evade its penalties. The plea was overruled in Belknap's Case, although it was sustained in the case of Blount, so that the English doctrine that all persons are liable to impeachment, whether *in* or *out* of office, has received fresh affirmation by our latest Court of Impeachment.

In contradistinction from the verdict of juries, the judgment, in cases of impeachment, does not require unanimity on the part of the Court.

The Constitution of the United States, and those of most of the States, require a two-thirds vote of the members present in order to secure a conviction, and the sentence is specially restricted to removal from, and disqualification for holding any further office, although the party convicted is still liable to indictment and punishment according to the law of the land.

An impeachment once instituted is not concluded by the adjournment or dissolution of the Legislature in which it is pending, for the government never expires, however often its legislators may be changed, and it is the people, acting through its Legislature, which supplies the Court in which an impeachment is tried. In Warren Hastings's Case the trial extended over a period of seven years, and through the sessions of several Parliaments. Under this rule of practice, every succeeding Legislature may resume the trial of an impeachment left unfinished by its predecessor.<sup>3</sup>

In the United States, no pardon can be granted by the President to persons convicted upon impeachment.

<sup>1</sup> Blount's Case, Annals of Congress, 5th Cong., vol. 2, p. 2248.

<sup>2</sup> Trial of W. W. Belknap, late Secretary of War, Washington, 1876.

<sup>3</sup> Cushing, Legis. Assemb., sec. 2561

This is borrowed from the practice of England, where, since the Act of Settlement of William and Mary, no pardon under the Great Seal is pleadable to an impeachment of the Commons. And this was the ground taken by the Senate of the United States on the impeachment of Secretary Belknap, whose resignation had been accepted by President Grant in anticipation of the impeachment proceedings.<sup>1</sup> But whether Congress or a State Legislature could, after similar proceedings, re-enfranchise a citizen, is a matter that has never been passed upon. Judging from analogy, the question would seem to be susceptible of an affirmative answer. The same power which imposes a penalty may remit it; impeachment being only a method of procedure like an indictment, there is no valid reason why its results should be treated differently, provided the public good is not thereby prejudiced.

The unvarying weakness of every impeachment is the necessarily political character of the Court before which it must be tried. The circumstances which give rise to it, are part of the history of an administration that is to be assailed in a judicial forum. The heat of the prosecution and the fervor of the defence awaken the acrimony of both sides. And should the conviction threaten to carry its stain beyond the character of the accused and to attain his party, every art and subterfuge may be expected to be practised, in order to maintain its hold upon power. In the presence of such facts, it is impossible to divest the public mind of a certain distrust of any tribunal where faction is permitted to wield so large an influence. And it will always be the case, therefore, that the judgments of common-law courts, were it possible to resort to them, would carry more weight

<sup>1</sup> Story on the Constitution, vol. 2, sec. 805-9.

with the public, in deciding questions of malversation in office, than can ever be attained by the determinations of a tribunal purely political in its constitution, and requiring not even legal knowledge in its members. It is well remarked by Sergeant Maynard that "the trial and condemnation of one man at common law will work more upon people than ten impeachments."<sup>1</sup>

The reason is obvious. There is everywhere a traditional distrust of political tribunals. It is felt that they are constituted in the interests of an object which is not exclusively that of justice. They have generally been used as an instrument of tyranny and oppression, and all ages have contributed illustrations of their disloyalty to the rights of man. From the tribunal which condemned Socrates in pagan Athens, to those which convicted Moore and Russell in Christian England, no difference has been found to exist in the spirit which animated their decisions. They had but one purpose in all those cases, and that was to destroy the victim they had selected, under the pretext of a trial at law. His conviction was determined before his arraignment. Consequently, the character of such courts has always been tainted with suspicion. Nor has that character been redeemed by the external forms of procedure which they borrow, since even those forms are proved to have been too often but a cloak to conceal, or a varnish to give an appearance of justification to their corrupt action.

<sup>1</sup> 12 How. St. Tr., 1212.

## CHAPTER IX.

## CONGRESSIONAL LEGISLATION.

WE owe to the Continental Congress the successful management of the Revolutionary War. When it passed into the Congress of the Confederation, it was called upon to deal with questions of a different and more perplexing character relating to the public domain, to taxation and revenue, to the public credit, and to foreign and inter-state relations. In other words to questions of both a national and inter-national character. The discovery of the inherent weakness of the Confederation under its written articles; the looseness of texture of the League of States which it represented; and the impossibility of building a National Government upon it, with powers of sovereignty commensurate to the necessities of a Federal supremacy, gave early warning of its incapacity to surmount the perils which were daily increasing about it. The Legislative department, which is ordinarily in every representative government the strongest power in the State, was here the weakest.

Under the Confederation, Congress was only a name, and could only recommend. It had no power to coerce, because it had no power to command, or authority to compel obedience. A year had hardly elapsed since the treaty of peace with the mother country, when it was compelled to declare its inability to maintain the public credit, to enforce obedience to its commands or to carry out its treaty-making power. "The radical infirmity of the articles of Confederation," says Mr.

Madison in the introduction to his Record of Debates in the Constitutional Convention, "was the dependence of Congress on the voluntary and simultaneous compliance with its requisitions by so many independent communities, each consulting more or less its particular interest and convenience, and distrusting the compliance of the others."

Without entering into historical details which are accessible to all, or burthening our pages with illustrations of the many occasions on which appeared the glaring impotence of a nation without a National Government, it will suffice to say that this manifest incompetency of a Confederation without a controlling legislative body, became the standing complaint of the day. All public measures encountered its paralyzing influences; all industries suffered, and the public credit after being strained to the utmost, and floated upon every form of irredeemable currency in the various States, finally sunk to so low an ebb as to threaten universal bankruptcy.

It is necessary to retrace these facts, if only in skeleton outline, in order the better to understand why the framers of the Constitution, who had felt the inconveniences of living under the Confederation, and some of whom had been members of both Revolutionary Congresses, were moved to give in that instrument, to our present Federal Legislature, powers unknown to any of its predecessors. They were men of experience in public affairs, whose statesmanship embraced the broadest conceptions of republican government, as based upon the sovereignty of the people. They drew their inspiration and their knowledge from both ancient and modern sources; and while as Englishmen they found in Parliament a convenient model, and in the British Constitution an underlying guide, they avoided everything in each which



clashed with the principles of personal liberty and equality in the citizen. Hence they eliminated the judicial element from the structure of Congress; they excluded every idea of estate or caste from either branch; they placed restraints upon its powers by amendments in the nature of a Bill of Rights, and at the same time they bestowed upon it all the necessary powers, and all the included means, for carrying out the least as well as the greatest purposes of a Federal Assembly.

In the broad field of legislation represented by the States of the American Union, Congress, as the Federal Legislature, takes precedence of all. The Constitution having prescribed that it shall consist of a Senate and House of Representatives—how its members shall be elected and of what qualifications they must be possessed; how representatives and taxes shall be apportioned among the States; that a Speaker shall be chosen by the House of Representatives; that the Senate shall consist of two Senators from each State to serve for six years, and each Senator having but one vote; also of what qualifications a Senator must be possessed; that the Vice President of the United States shall be its presiding officer and have only a casting vote; that it shall have the sole power to try all impeachments; and how such trial before it shall be conducted, and what the effect of its judgments shall be in such cases—the Constitution having thus mapped out the method of organization of a National Legislature, no special comments are called for, upon this preparatory stage of legislation.

All necessary powers for this purpose being thus vested in Congress, and its Acts, when made in pursuance of the Constitution being declared to be the supreme law of the land, the points of importance to the exercise of its legislative functions are—

1st. That it shall assemble at least once in every year.

2d. That each House shall be the judge of the qualifications of its own members, and that a majority of each House when present shall constitute a quorum.

3d. That each House shall keep a Journal, and may establish rules for the government of its own proceedings.

4th. That neither House during the session of Congress, shall, without the consent of the other, adjourn for more than three days.

5th. That all Bills for raising revenue shall originate in the House of Representatives, but the Senate may propose, or concur with amendments as on other Bills.<sup>1</sup> That every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States. If he approve he shall sign it, but if not, he shall return it with his objections to that House in which it shall have originated, who shall enter the objections at large on their Journal and proceed to reconsider it. If, after such reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by Yeas and Nays, and the names of the persons voting for, and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the

<sup>1</sup> As to the right of the Senate to *originate* an Appropriation Bill, see Report 147 House of Reps., 46th Cong., 3d Sess., vol. 1; also opinions of Justices of S. J. Court, 126 Mass. *supplement*.

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 re-passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a Bill.” (Art. 1, Sect. 4. 2.; Sect. 5, 1. 2. 3. 4.; Sect. 7, 1.)

Such is the constitutional outline of the general powers and duties of Congress as a basis for legislative procedure. They have been found large enough to embrace all the contingencies of a century of practice, without even the suggestion of a needed amendment. And the rules for the government of both Houses supply the legal machinery required for the orderly transaction of their daily business. Congressional legislation, when examined in its detailed application to the wants of the nation, will be found to exhibit three phases of jurisdictional power, viz:—

- 1st. Original, or primary and direct.
- 2d. Concurrent or divided with the States.
- 3d. Suppletory, or corrective.

#### ORIGINAL OR PRIMARY POWERS OF CONGRESS.

“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.”

The leading doctrine animating Congressional legislation and everywhere pervading its practice is that laid down in *Gibbons v. Ogden*,<sup>1</sup> viz., that "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects." It follows that the authority to lay and collect taxes, duties, and imposts gives to Congress a plenary power over all *persons* and *things* for purposes of taxation, except exports. The word *taxes* is used in a twofold sense in the Constitution, viz., in the more extended sense, as applicable to *persons* as well as *things*, and again, it is restricted in its meaning to the particular objects to which, by usage, the terms apply. Thus, Congress may tax persons who come into the United States; and it may tax imported articles, particular trades, or special franchises, under the designations of duties, imposts, and excises. The only limitations upon this power are, that direct taxes, including capitation taxes, shall be apportioned; that duties, imposts, and excises shall be uniform, and that no duties shall be imposed upon exports. The national treasury being the only beneficiary for whose benefit Congress can impose a tax, therefore, it has no power to authorize a trade or business within a State, in order to tax it, as for instance the sale of liquors, or of lottery tickets. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject. And the granting of a license to carry on an occupation forbidden by the laws of a State, only implies that the licensee shall be subject to no penalties under the Federal statutes if he pays it.<sup>2</sup>

Nor can it lay a tax for the benefit of a State; or impose one upon the salary of a judicial officer of a

<sup>1</sup> 9 Wheat. 196.

<sup>2</sup> Passenger Cases, 7 How. 421; License Tax Cases, 5 Wall. 462.

State. In other words, it cannot tax the agencies of government in a State.<sup>1</sup> But it may levy duties and imposts which are nearly synonymous terms, though applicable only to imported merchandise; while excise is an inland imposition bearing sometimes upon the consumption of an article, or upon its retail sale; sometimes upon the manufacturer or again upon the vendor.<sup>2</sup> Having also provided a national currency for the whole country, Congress may restrain by suitable legislation the circulation of any notes not issued under its own authority, and for this purpose may impose a tax upon the notes of a State bank.<sup>3</sup>

#### POWERS OVER THE CURRENCY.

1st. "To borrow money on the credit of the United States."

The power to borrow money being necessary to meet the exigencies of government, carries with it by implication the authority to emit bills of credit, or any form of evidence of debt which Congress may elect. These issues in the form of paper currency, treasury certificates, or bonds, are but so many pledges of the credit of the nation. The issue of treasury notes is an exchange of credit for money, and such issues need not provide for the repayment of the loan at a day fixed, nor even with interest.<sup>4</sup>

While the power to borrow money on the credit of the nation is unquestioned, the authority to make certificates of its indebtedness a legal tender in payment of private debts is nowhere to be found in the Consti-

<sup>1</sup> *Collector v. Day*, 11 Wall. 113; *U. S. v. R. R. Co.*, 17 *Ibid.* 322; *Freedman v. Sigel*, 10 *Blatchf.* 327.

<sup>2</sup> *Pacific Ins. Co. v. Soule*, 7 Wall. 445; *U. S. v. Singer*, 15 *Ibid.* 112.

<sup>3</sup> *Veazie Bank v. Fenno*, 8 Wall. 533.

<sup>4</sup> *Metropolitan Bk. v. Van Wyck*, 27 N. Y. 400.

tution. In *Hepburn v. Griswold*, decided at December term, 1869, the Supreme Court held, that there was in the Constitution no express grant of legislative power to make any description of credit currency a legal tender in payment of debts. And that moreover the clause in the Acts of 1862 and 1863 which makes United States notes a legal tender in payment of all debts, public and private, is, so far as it applies to debts contracted before the passage of those Acts, wholly unwarranted by the Constitution.<sup>1</sup>

This decision, which rested upon a close and rigid interpretation of the Constitution, although rendered by a divided Court, would have commanded the approbation of the whole country, but for the serious results to its business interests which it seemed likely to produce. Pending an opinion by the highest tribunal in the land upon the constitutionality of these Acts of Congress, the mercantile relations of the Nation had been shaping themselves upon the theory of their validity. Seven years had elapsed since their enactment, during which time the business of the country could not stand still, in order to await the guidance of a judicial decree. The existence of a civil war had quickened and developed the industries of the nation in all the loyal States. Millions of money were embarked in outstanding contracts, and in obligations but partially extinguished. How were these obligations to be rated in the fluctuations of a paper currency; or, when extinguished, how were the equities between debtor and creditor to be balanced, outside of a general bankrupt law?

Public necessity, the mother of public policy, demanded some relief for the pressure then resting upon the business interests of the country, and the contro-

<sup>1</sup> 8 Wall. 604.

versy over the validity of these Legal Tender Acts was again re-opened, in order to give the Court an opportunity to retrace its steps. *Hepburn v. Griswold* had been decided by a bench of eight Judges. C. J. Chase pronounced the opinion of the Court, Justices Miller, Swayne and Davis dissenting. The retirement of Mr. Justice Grier before the announcement and entry of the opinion, and the subsequent enlargement of the Court, together with the appointment of two new Justices, Bradley and Strong, furnished the occasion for a re-argument of the question at issue. This was accordingly done in the cases of *Knox v. Lee* and *Parker v. Davis*, decided at December term, 1870, where the Court reversed its former decision, holding that the Legal Tender Acts of Congress were constitutional when applied to contracts, whether made *before*, or after their passage.

Under this later decision Congress may therefore authorize the emission of Bills of Credit, may make them receivable in payment of debts due to the United States; may make them adaptable to all the transactions of commerce; provide for their redemption; make them a currency uniform in value and description, and if necessary, may even enhance the value of these national promises, by making them a legal tender for the payment of private as well as public debts both past and present. The right of exercising so wide and all-embracing an authority over the currency, was held to be in the nature of a resulting power, to be called into action only upon extraordinary and pressing occasions, and not to be exerted any longer than the circumstances of the case demanded; and it was said to be an incident of sovereignty, the exercise of which is confided to the Legislative department of the government.<sup>1</sup>

<sup>1</sup> *Legal Tender Cases*, 12 Wall. 457; *Veazie Bk. v. Fenno*, 8 Wall. 533; *Reynolds v. Bank*, 18 Ind. 467; *Hague v. Powers*, 39 Barb. 427; *Thayer v. Hedges*, 23 Ind. 141; *Shollenberger v. Brinton*, 52 Penn. 9.

2d. To regulate commerce with foreign nations, and among the several States and with the Indian tribes.”

This power occupies the first place in the international functions of every government, and is indispensable to the maintenance of commercial relations between separate nations. The United States, as a nation, may accordingly exercise all rights appertaining thereto in its intercourse with foreign powers. These rights include not only marine regulations affecting ships and seamen; custom-regulations affecting importations of goods of all sorts and the payment of duties thereon; but also the passage of laws regulating the admission of foreigners, or prohibiting them from landing in the country. The right to exclude foreigners on police, or other grounds, is the inherent right of every government and is so recognized in international law. It is constantly exercised without question in the case of paupers, criminals, lunatics and persons afflicted with contagious diseases.

But it may be exercised in the case of other persons as well, because it is a question belonging to the domain of public policy, of which each nation is the sovereign judge. Nor is it necessary that nations should be at war to justify its exercise, since it is an attribute of sovereignty, inherent and inalienable. They can suspend or enforce its operation at will. For, although it is not in accordance with the spirit of our age to put obstacles in the way of free intercourse among nations, still, even a commercial treaty between them does not, without specific provisions, carry with it the right of unlimited emigration to, and occupancy of each other's territory. And certainly if a nation can refuse to receive an accredited minister, because a person *non grata* to its government, it can by parity of reason exclude any number or class of persons. The question



being one of a political character, it belongs to the Legislative department to dispose of it as a problem of municipal law. This is the view taken by the Supreme Court,<sup>1</sup> in its interpretation of the Act of October 1, 1888,<sup>2</sup> excluding Chinese laborers from the United States.

The regulation of commerce presents a different and more difficult problem, however, in its domestic aspects. Every year brings new questions, with fresh intricacies, into the field of legislative and judicial action. They are all addressed to the constitutional relations of the States to each other, and to the national government. The direct and original powers of the latter have long since been adjudicated and their limits fixed. We are now entering upon an era taxing us with the necessity of searching for "reserved" powers, by which to meet the multifarious wants of importunate legislation, both Congressional and State. The framers of the Constitution saw, even in the infancy of the country, that in such a Union, where each State represents for local purposes of government an independent sovereignty, it was necessary to provide for the unrestricted navigation of rivers lying between States; of commerce upon the great lakes and coastwise, and for the protection of citizens, wherever and however engaged in domestic commerce, against any discrimination in the enjoyment of their legal rights in other States. In the intercourse also of the Government with the Indian tribes (who have always been treated as quasi-foreign nations), it was requisite to remove them from the operation of State laws, by placing them under the exclusive control of Congress. These external relations, whether with foreign nations or Indian tribes, involving mainly politi-

<sup>1</sup> Chinese Exclusion Case, 130 U. S. 581.

<sup>2</sup> 25 Stat. at Large, 504.

cal questions, have generally been managed in such a way as to furnish but few occasions on which to bring them under the eye of judicial interrogation.

A far more fruitful field of legislation, and one whose scope seems almost incalculable in its dimensions and results, is that of *inter-state commerce*. The novel questions to which it is daily giving rise are the fruitage of that rapid growth and expansion of industrial resources, which no previous country ever witnessed, and with which consequently no previous legislation was ever called to deal. Tribunals, whose functions lie between those of executive courts and Legislatures, seem to be required, in order to regulate these new fields of commercial activity. And the tentative measures by which Congress has sought to meet these problems, through the agency of a special commission, will be watched with the most earnest solicitude. That such a tribunal was called for by the necessities of the hour none can question. It should not be allowed to fail in its appointed mission for want either of sufficient power to act, or a jurisdiction wide enough to embrace all its purposes.

#### INTER-STATE COMMERCE.

The framers of the Constitution had witnessed the results flowing from the mutual jealousy of States. They had seen a State by an act of solemn legislation refuse to comply with a requisition of Congress; had seen States having seaports tax the citizens of other States trading through them; had seen them tax imports from sister States, and had seen, also, how unequally the navigation laws operated, by treating as aliens the citizens of other States.<sup>1</sup> Even as late as

<sup>1</sup> Frothingham, Rise of the Republic of the United States, p. 587.

1791, John Adams wrote that the rivalry between the State governments and the national government was growing daily more active and ardent.<sup>1</sup> All these facts, threatening worse consequences in the future, afforded reasons enough for placing the regulation of commerce exclusively in the control of Congress. How prophetic seems this action, in the light of present competing interests, and conflicting claims on legislation, is best shown by the volume of litigation to which inter-state commerce has given rise.

In contrast with the simple commerce of that day stands the many-armed, many-eyed despot of our own. In that day there were no railroads with consolidated charters overlapping the boundaries of several States, and burthened with leases subject to the varying operations of local statutes. "Long hauls" and "short hauls" had not arisen to establish tariffs of discrimination on freights, dependent upon local influences more or less political in character. The common carrier had not enlisted steam, caloric or electricity in his service, as an instrument for transportation; the agriculturist did not till the soil by machinery, nor the manufacturer combine his capital with that of others in the form of commercial trusts.

The synthetic products of chemical ingenuity had not yet appeared, to dispute the supremacy of the market with nature's manufactures. Oleomargarine, butterine, saccharine were unknown; the artificial fruit flavors, and the whole dissolute army of ethers and coal-tar products, ready agents for sophisticating, commercial, and alimentary substances, were still slumbering in the womb of unexplored matter. The police powers of the States were not then invoked, because they were not needed,

<sup>1</sup> Works, vol. 9, p. 573; Vid. also "View of the Political System of the United States." Madison's Writings, vol. 1, p. 320.

to build legislative barriers against the introduction of these substances, noxious to man and to trade. The regulation of commerce by Congress, and its domestic regulation by the States, was simple and seldom conflicting. Now, all is changed as by the stroke of a magician's wand; and with the increase of necessitated prohibitory statutes in the States, recognized as a moral protection to commerce as well as to society, there is a growing demand upon Congress for consent to be given the States, to legislate prohibitively against articles whose sale public opinion has stamped with a constitutional veto.

The chief object of bestowing this power upon the national Legislature was to establish a perfect equality among the States as to their commercial rights, and to prevent such unjust and invidious distinctions as local jealousies, or local and partial interests might be disposed to introduce and maintain. It was necessary that this power should be complete in itself. It embodies the authority to regulate commerce generally, in all its various branches, and it may be exercised on land, as well as on water, without any other limitations than are prescribed in the Constitution.<sup>1</sup> "Where the subject-matter," says C. J. Fuller, "requires a uniform system as between the States the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the States. Whenever the law of the State amounts essentially to a regulation of commerce with foreign nations, or among the States, as it does when it inhibits directly or indirectly the receipt of an imported commodity, or its dis-

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *N. Y. v. Milne*, 11 Pet. 102; *License Cases*, 5 How. (U. S.) 504; *Veazie v. Moor*, 74 *Ibid.* 574; *Brown v. State*, 12 Wheat. 419; *Groves v. Slaughter*, 15 Pet. 449; *U. S. v. Coombs*, 12 Pet. 72.

position before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which in this particular has been exclusively vested in the general government, and is, therefore, void."<sup>1</sup>

The commercial clause of the Constitution was introduced to check the unbridled sovereignty of the States, which, under the Articles of Confederation permitted them to discriminate against each other's products by obstructive legislation. Under the impulses of local jealousy, and the inevitable rivalry springing from competing industries, the inter-state commerce of the country would have been seriously hindered, and in many instances entirely crippled, had the framers of the Constitution not wrested it from the hands of local interference, and placed it under the immediate guardianship of Congress. The object aimed at was to secure the most absolute freedom of domestic traffic between the citizens of different States, by placing them on the most approximate equality compatible with the rights of local taxation, and the exercise of the police powers of the State. They were guaranteed both liberty of intercourse and protection of property against inquisitorial sovereignty, wherever they chose to go.

The possibilities and the effects of hostile legislation had been fully tested in too many ways to leave the subject open to any further doubt, and the wisdom which accomplished these results can only be estimated by a comparison of what would have been our present condition, if every product raised or article manufactured; if every stage-coach, railway carriage or steamboat; if every telegraph or telephone line, upon passing from one State into another, could, at the pleasure of the latter, be made the subject of discrimination and capri-

<sup>1</sup> *Leisy v. Hardin*, 133 U. S. 100.

cious taxation, in respect either to its freight, passengers or transmitted messages. Such an embargo as that upon commerce would have imperilled the stability of the Union at every stage of its existence.

*What Commerce Comprehends.*

Commerce being a generic term, comprehends all forms of intercourse having for its object traffic in lawful commodities; or the transportation of freight or passengers. It includes vessels, and their officers and crews; land carriages, and railways and telegraphs, together with all the instruments by which it may be carried on. Its regulation embraces therefore,—

1st. Navigation.<sup>1</sup>

2d. Trade.<sup>2</sup>

3d. Transportation of passengers.<sup>3</sup>

4th. Communications by telegraph.<sup>4</sup>

5th. Commerce by corporations as well as individuals.<sup>5</sup>

6th. Prescribing rules for the shipping of seamen or navigation of vessels, in foreign as well as domestic waters.<sup>6</sup>

<sup>1</sup> Clinton Bridge Case, 10 Wall. 454; *Cooley v. Port Wardens*, 12 How. 299; *Stnbt. Co. v. Livingston*, 3 Cow. 713; *People v. Brooks*, 4 Denio, 469; *Brig Wilson v. U. S.*, 1 Brock. 423; *The Daniel Ball*, 10 Wall. 557.

<sup>2</sup> *U. S. v. Bailey*, 1 McLean, 234; *Welton v. State*, 91 U. S. 275; *State Freight Tax*, 15 Wall. 232; *State v. Del., Lack. & W. R. R. Co.*, 30 N. J. 473.

<sup>3</sup> *Lin Sing v. Washburn*, 20 Cal. 534; *Passenger Cases*, 7 How. 283; *Murphy v. North'n Transp. Co.*, 15 Ohio St. 553; *People v. Raymond*, 34 Cal. 492.

<sup>4</sup> *West. Un. Tel. Co. v. At. & Pac. Tel. Co.*, 5 Nev. 102; *Penn. Tel. Co. v. West. Un. Tel. Co.*, 2 Woods, 643.

<sup>5</sup> *Paul v. Virginia*, 8 Wall. 168; *Liverpool Insurance Co. v. Mass.*, 10 Wall. 573.

<sup>6</sup> *The Barque Chusan*, 2 Story, 455; *Ex parte Wm. Pool*, 2 Va. Cases, 276; *White's Bk. v. Smith*, 7 Wall. 646; *Blanchard v. The Martha Washington*, 1 Cliff. 463; *Mitchell v. Steelman*, 8 Cal. 363.

7th. Regulating the admission of subjects of other powers into our country, and prohibiting the migration or importation of any particular class of persons into the States of the Union, whether such persons be slaves or free.<sup>1</sup>

8th. Punishing counterfeiting within, or, bringing into the United States, with intent to pass, any false, forged or counterfeited foreign coin or securities.<sup>2</sup>

Laws relating to pilots and pilotage in the various aspects which they assume, whether as to personal qualifications; modes and times and places of service; responsibilities and compensation, although regulations of navigation, and consequently of commerce, are not absolutely inhibited to the States. The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule throughout the country, and upon others different rules in different localities. In the former case, the power is exclusive in Congress; but not so in the latter.<sup>3</sup> Hence a mere grant of such a power to Congress does not imply a prohibition on the States to exercise the same power, until such time as its exercise by Congress becomes incompatible with its exercise by the States. In the former case the States may always legislate in the absence of Congressional regulations.<sup>4</sup> They may also inflict a penalty incurred for a past violation of their own pilot laws, after that law has been superseded by an Act of Congress.<sup>5</sup>

<sup>1</sup> *Chy Lung v. Freeman*, 92 U. S. 275; *People v. Downer*, 7 Cal. 169; *U. S. v. Gould*, 8 Am. L. Reg. 525; *U. S. v. Haun*, 8 Ibid. 663.

<sup>2</sup> *U. S. v. Marigold*, 9 How. 560; *U. S. v. Arjona*, 120 U. S. 479.

<sup>3</sup> *Cooley v. Port Wardens*, 12 How. 299; *County of Mobile v. Kimball*, 102 U. S. 691.

<sup>4</sup> *Sturges v. Crowninshield*, 4 Wheat. 193; *Moore v. Houston*, 5 Wheat. 1; *Wilson v. Blackbird Creek Co.*, 2 Pet. 251.

<sup>5</sup> *Sturges v. Spofford*, 45 N. Y. 446.

The commerce which Congress has the power to regulate, is such as may be carried on by vessels duly licensed under the laws of the United States. Even then, however, this license does not exempt the vessel from the operations of the laws of that particular State.<sup>1</sup> Because, if the State had the power to make the law, the case is conclusive in its favor.

Commerce between the States, in its ordinary acceptation, includes both internal as well as external traffic, since that would be no commerce which expired at the boundaries of a State. The right of inter-state traffic must of necessity include the right of bringing goods *into* a State. "If this power," says C. J. Marshall, in *Brown v. Maryland*,<sup>2</sup> "reaches the interior of a State, and may then be exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. Congress has a right not only to authorize importation, but to authorize the importer to sell. It may be proper to add that we suppose the principles laid down in this case apply equally to importations from a sister State." So long then as the articles imported (from whatever source they may come, whether from abroad or from sister States) remain in the original form in which they were brought into the State, they are subject to the power exclusively vested in Congress, and are not within the jurisdiction of the police power of the State, unless placed there by congressional action. Inter-state commerce cannot be taxed at all by a State, even though the same amount of tax should be laid on domestic

<sup>1</sup> *Smith v. State*, 18 How. 71; *The Bright Star*, Wool. 266.

<sup>2</sup> 12 Wheat. 419; *Stmbt. Co. v. Livingston*, 3 Cow. 713; *Moor v. Veazie*, 31 Me. 360; *Gilman v. Phila.*, 3 Wall. 713.



commerce, or that which is carried on solely within the State.<sup>1</sup>

This police power over merchantable articles remains subject to the superior power of Congress to regulate commerce within, as well as up to, the boundaries of a State. It may thus either expressly restrict the transportation of commodities between the States, or grant them permission to do so. The decisions of the Supreme Court all move in the direction of affirming that, whatever properly belongs to commerce in a national sense, is within the jurisdiction of the United States, and whatever does not so belong to commerce, is within the police power of the States.<sup>2</sup> The failure of Congress to exercise that power in any case, is an expression of its will that the subject shall be left free from restrictions or impositions upon it by the several States. But when an article imported into a State changes its form and becomes mingled with the property of the State, the subsequent right of sale, and the conditions governing the same, are within its police power.<sup>3</sup>

There are, however, branches of trade over which of necessity Congress must have exclusive power. This is particularly so with the "coasting trade," by which term something external to the State is always understood. The phrase is technical both in navigation and at law. It means commercial intercourse carried on in vessels between different districts in different States, or in the same State, but always on the seacoast, or on some navigable river. It implies a voyage from one port to another upon navigable waters, even though these waters

<sup>1</sup> *Henderson v. Mayor of New York*, 92 U. S. 259; *R. R. Co. v. Husen*, 95 *Ibid.* 465; *Walling v. Michigan*, 116 *Ibid.* 446; *Robbins v. Shelby Taxing Dist.*, 120 *Ibid.* 489.

<sup>2</sup> *Bowman v. Chicago & N. W. R. R. Co.*, 125 U. S. 465.

<sup>3</sup> *Brown v. Maryland*, 12 *Wheat.* 419.

penetrate the territory of a State.<sup>1</sup> For, it is the navigable waters that determine the external boundaries of commercial intercourse between the States, for the purposes of the "coasting trade."<sup>2</sup>

As common carriers, railroads are as much instruments of inter-state commerce as are ships, and they, too, may fall under the power of Congress by voluntarily becoming part of a line of inter-state communication, in which case this power may be exercised in prescribing all needful and proper regulations for the conduct of its traffic, in both passengers and freight.<sup>3</sup> But the agencies by which the domestic trade of a State is carried on do not fall within the powers of Congress. Hence canals, although containing in a certain sense navigable waters, are only artificial highways within a State, and do not constitute any of the navigable waters of the United States within the meaning of the Acts of Congress; and the same is the case with bridges, turnpikes, and disconnected railroads. The regulation of these is reserved to the States as one of the attributes of sovereignty with which Congress cannot interfere.<sup>4</sup>

The States, therefore, retain their right of legislating upon all subjects of internal police, even to the regulation of commerce, that are wholly within their boundaries; and Congress cannot provide for a license and inspection

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *Stmbt. Co. v. Livingston*, 3 Cow. 713; *The Daniel Ball*, 10 Wall. 557; *Moor v. Veazie*, 31 Me. 360; *Henderson v. Mayor*, 92 U. S. 259.

<sup>2</sup> By navigable waters are understood natural streams capable of being used in their ordinary condition as highways for commerce with other States, or foreign countries. They need not be continuous channels in themselves, but may be only links in a general highway for commerce between States or foreign nations. *The Daniel Ball*, 10 Wall. 557; *The Montello*, 11 Wall. 415; 20 *Ibid.* 439.

<sup>3</sup> *The Clinton Bridge Case*, 10 Wall. 454; *Wheeling Bridge Case*, 18 How. 421-460.

<sup>4</sup> *The Passaic Bridges*, 3 Wall. 782; *Withers v. Buckley*, 20 How. 84; *Veazie v. Moore*, 14 *Ibid.* 568; *U. S. v. Dewitt*, 9 Wall. 41.

of a vessel that navigates merely between ports in the same State, because it has no jurisdiction over the navigable waters of a State, except as a highway for intercourse with other States or foreign countries.<sup>1</sup> Its jurisdiction over such a highway is not territorial, but Federal and supervisory. Because, the shores of navigable waters were not granted by the Constitution to the United States, but remained in the possession of the States respectively owning them. And each State owns the beds of all tide-waters within its jurisdiction, unless they have been granted away.<sup>2</sup> Hence, the sites of government lighthouses and forts upon the coast and navigable waters were all originally the property of the States. The title was in them, and they have been ceded to the General Government under the forms of law governing such conveyances of property.

It results from this examination into the powers of Congress over commerce, that the power to “*regulate*” granted in the Constitution was intended, in its application to domestic affairs, to prevent *inter-state* discrimination against—

1st. The “*coasting trade*,” by vexatious tonnage duties; also to prevent discrimination by railroads in their rates, charges, and facilities for receiving, delivering, storing, or handling of property, in favor of one connecting line or against another.

2d. To prevent discrimination against the importation of particular articles, or the carrying on of particular

<sup>1</sup> *Jolly v. Drawbridge Co.*, 6 McLean, 237; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Sinott v. Davenport*, 22 How. 227; *Barnaby v. State*, 21 Ind. 450; *U. S. v. The Seneca*, 10 Am. L. Reg. 281; *The Thomas Swan*, 6 Ben. 42; *Haldeman v. Beckwith*, 4 McLean, 286.

<sup>2</sup> *Fuller v. Spear*, 14 Me. 417; *Smith v. State*, 18 How. 71; *McCready v. Comm.*, 94 U. S. 391; *Pollard v. Hagan*, 3 How. 212; *Seabury v. Field*, 1 McArth. 1; *Mumford v. Wardwell*, 6 Wall. 423; *Weber v. Harbor Comm'rs*, 18 *Ibid.* 57; *Withers v. Buckley*, 20 How. 84.

occupations, by citizens of the United States in other States than those in which they reside. But Congress may prohibit the importation of foreign laborers into the United States under contract.

3d. To prevent the imposition of a tax upon the transit of passengers through a State.

The following summary will be found to represent the judicial aspects of the relative powers of Congress and the States over domestic inland commerce:—

1st. That the powers of Congress over every form of inter-state commerce are plenary and without restraint; they extend over the transportation of passengers as well as freight, and are unlimited except as specially surrendered to the States.<sup>1</sup>

2d. That Congress may lawfully confer upon a private corporation the capacity to occupy navigable waters within a State, and appropriate the soil under them for the purposes of inter-state commerce, without the consent of the State.<sup>2</sup>

3d. That whether the waters are wholly within the boundaries of a State, or merely between the States is immaterial, provided they are navigable; and they are so in legal contemplation whenever they form by themselves, or by uniting with others, a continuous highway for commerce with other States or countries.<sup>3</sup> This power over navigable waters includes the power of deciding what are impediments to commerce; the power

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1; *Brown v. Maryland*, 12 Ibid. 419; *Sinnott v. Davenport*, 22 How. 227; *Gilman v. Phil.*, 3 Wall. 713; *Welton v. Missouri*, 91 U. S. 275; *Hall v. DeCuir*, 95 Ibid. 485; *Wabash R. R. v. Illinois*, 118 Ibid. 557; *Phil'a & South. S. S. Co. v. Penn.*, 122 Ibid. 326.

<sup>2</sup> *Decker v. Balt. & N. Y. R. R. Co.*, 30 Fed. Rep. 723; *Miller v. Mayor of N. Y.*, 109 U. S. 385.

<sup>3</sup> *The Daniel Ball*, 10 Wall. 557; *Escanaba Co. v. Chicago*, 107 U. S. 682.

of building light-houses or jetties in the bed of a stream, —the power of closing one channel and of requiring navigators to use others; because, for the purposes of controlling inter-state and foreign commerce, the United States have succeeded to the powers and rights of the several States.<sup>1</sup>

4th. That while Congress cannot lawfully authorize the appropriation of private property within a State for the purposes of a bridge, it can authorize the Government of the United States to exercise for its own purposes the right of eminent domain within a State.<sup>2</sup>

5th. That the powers of Congress, as the regulator of inter-state commerce do not extend beyond validating the first sales of imported articles in the original packages; or the admission of suitable persons as emigrants.<sup>3</sup>

6th. That property brought into a State and mingled with that of the community, is subject to the laws regulating its sale and use. It can claim no exemption from State burthens that are equally shared by its citizens.<sup>4</sup>

7th. That inter-state commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the State.<sup>5</sup> And corporations whose business in

<sup>1</sup> *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 250; *Penn. v. Wheeling Br. Co.*, 18 How. 421; *Gilman v. Phil.*, 3 Wall. 728; *Mobile v. Kimball*, 102 U. S. 691; *Pound v. Turk*, 105 *Ibid.* 459; *S. Carolina v. Georgia*, 93 *Ibid.* 4.

<sup>2</sup> *Kohl v. U. S.*, 91 U. S. 367; *Penn. v. Wheeling Br. Co.*, 18 How. 421; *Trombley v. Humphrey*, 23 Mich. 471; *Dickey v. Turnpike Co.*, 7 Dana. 113.

<sup>3</sup> *Leisy v. Hardin*, 135 U. S. 100; *License Cases*, 5 How. 574.

<sup>4</sup> *Brown v. State*, 12 Wheat. 419; *Coe v. Errol*, 116 U. S. 517.

<sup>5</sup> *Robbins v. Shelby Co. Tax Dist.*, 120 U. S. 489; *Hall v. De Cuir*, 95 *Ibid.* 485; *Guy v. Baltimore*, 100 *Ibid.* 434; *Corsen v. Maryland*, 120 *Ibid.* 502.

another State is connected with the sale, use, or manufacture of an invention described in a *patent*, cannot be taxed as a foreign corporation.<sup>1</sup>

8th. That States cannot prohibit the importation by common carriers of any class of passengers or articles of commerce unless by consent of Congress. Nor can they prevent the housing incidentally of such products *in transitu* upon their soil. And while so housed in bulk, they cannot invalidate a sale of the same made to one of their own citizens, without permission of Congress; because this would be a laying of imposts or duties upon imports. Nevertheless their police powers are not thereby suspended over articles dangerous to life or property.<sup>2</sup>

9th. That States possess the exclusive control of all highways, railroads, bridges, canals, wharves, dams and ferries, that are wholly within their limits, as part of the regulation of their own internal commerce.<sup>3</sup> They may also exercise such powers of police and such supervision of the public health as may be necessary for the general good. And for this purpose may prohibit the manufacture or sale of any article of domestic origin within their territory, or the manufacture of any article for transportation outside of their boundaries.<sup>4</sup>

10th. That while the power of executing its own inspection laws belongs to every State, it cannot be used

<sup>1</sup> Grover & Baker Sew'g Mac. Co. v. Butler, 53 Ind. 454; Walter A. Wood Mow'g Ma. Co. v. Caldwell, 54 Ind. 270.

<sup>2</sup> Bowman v. Chicago & N. W. R. R. Co., 125 U. S. 465; R. R. Co. v. Husen, 95 Ibid. 465; Henderson v. Mayor of N. Y., 92 Ibid. 259; Chy Lung v. Freeman, Ibid. 275; Munn v. Illinois, 94 Ibid. 114.

<sup>3</sup> Gilman v. Philadelphia, 3 Wall. 713; Silliman v. Hudson R. Br. Co., 4 Blatchf. 74 and 2 Wall. 403; Pollard's Lessee v. Hagan, 3 How. 230; Escanaba Co v. Chicago, 107 U. S. 678.

<sup>4</sup> Mayer v. Miln, 11 Pet. 102; License Cases, 5 How. 504; Passenger Cases, 7 Ibid. 283; Mugler v. Kansas, 123 U. S. 623; Patterson v. Kentucky, 97 Ibid. 501; Kidd v. Pearson, 128 Ibid. 1.

for purposes of discrimination against the citizens of other States. There can be no domestic tariff established between the States under the guise either of an Impost, Duty, or Tax.<sup>1</sup>

11th. That wherever Congress does not pass any law to regulate inter-state commerce, or to allow the States to do so, it indicates its will that such commerce shall be free and untrammelled.<sup>2</sup>

### COMMERCE WITH INDIAN TRIBES.

The relations of the general government to the Indian tribes dwelling in the United States have always been of a peculiar and anomalous character. While regarded as wards of the nation, entitled to be supported out of its Treasury and protected in their rights of property, they have at the same time been considered, in a quasi-international sense, as foreign nations occupying a portion of our soil by prescriptive right, and with whom treaties of purchase and cession could be made. As the original owners of the soil, absorbed by the pitiless stream of civilization into the body of the nation, whether in States or Territories, sentiment and prejudice rather than logic, or even justice, seem at times to have guided the policy of the United States in dealing with them. In our Constitutional history they are treated as an unrelated, immiscible part of the nation, and even designated by a distinct appellation as "Indian tribes." They form the third class over which the power of Congress to regulate commerce extends.

This power, owing to the diverse localities occupied

<sup>1</sup> *Welton v. Missouri*, 91 U. S. 275; *Walling v. Michigan*, 116 *Ibid.* 446; *Gloucester Ferry Co. v. Penn.*, 114 *Ibid.* 196.

<sup>2</sup> *County of Mobile v. Kimball*, 102 U. S. 691; *Brown v. Houston*, 114 *Ibid.* 622; *Wabash R. R. Co. v. Illinois*, 118 *Ibid.* 557.

by tribes may be exercised anywhere, whether in States or Territories. It is in every sense absolute and without reference to the locality of the traffic or the locality of the tribe,<sup>1</sup> or even of the particular individual with whom such traffic is carried on. So long, therefore, as an Indian continues a member of a tribe under charge of a government agent, he is within the operation of the laws of Congress regulating trade with such tribes, and this notwithstanding the fact that any State may have conferred political rights upon him as an elector.<sup>2</sup>

But this doctrine has had to be qualified in its general application, by restricting its operations to such large tribes only as are in a condition to determine for themselves questions of commerce, or for whom Congress has done so, and not to mere remnants of tribes living within and under the guardianship of some State, and subject to its laws. In dealing with questions affecting commerce with Indian tribes, Courts are guided by the status given to such tribes by the political and executive departments of the government. If the tribal organization is recognized by Congress, then such tribe is a distinct nation, though residing within the limits of some State, and Congress may regulate the conditions of commercial intercourse with it.<sup>3</sup>

The legal status of Indians in the United States may be summarized under the following heads:—

1st. That large tribes, maintaining their tribal organization and governing themselves according to their own laws, whether residing within the limits of a State, or a special territory, are a distinct community or nation in

<sup>1</sup> *Worcester v. State of Georgia*, 6 Pet. 515.

<sup>2</sup> *U. S. v. Holliday*, 3 Wall. 407; *U. S. v. 43 Gallons of Whiskey*, 93 *Ibid.* 188.

<sup>3</sup> *The Kansas Indians*, 5 Wall. 737; *U. S. v. Shawmox*, 2 Saw. 304; *Wall v. Williamson*, 8 *Alab.* 48; *Goodell v. Jackson*, 20 *Johns.* 693.



which the laws of the State have no force; nor can its citizens enter without the assent of the tribe, or according to the provisions of treaties or Acts of Congress.<sup>1</sup> Nor can a State levy a tax upon the lands of such a tribe, if exempted by treaty, under whatever form these lands are held, whether in severalty or in common.<sup>2</sup> Nor upon the property of one trading with these tribes.<sup>3</sup> But the voluntary abandonment of the tribal organization changes its legal status and makes the State laws at once operative upon its members.<sup>4</sup>

2d. That in respect to small tribes, still retaining a denominational appellation, but being in fact only remnants of tribes residing upon reservations within States and under their guardianship, such tribes are not within the tutelary power of Congress. They are either amenable to special laws framed in their behalf, or else fall under the general laws of the State. An Indian territory within a State is not a foreign jurisdiction.<sup>5</sup>

3d. That in respect to individuals, every Indian, while remaining a member of a tribal organization is subject to its laws and the operations of treaties and acts of Congress appertaining to it, except as hereinbefore stated in relation to small or dismembered tribes living under State guardianship. Such a State may pass special laws to punish crimes committed upon a reservation by one Indian upon another; because Indians upon a reservation within a State are not citizens of that State, but alien communities governed by their

<sup>1</sup> *Worcester v. State of Georgia*, 6 Pet. 515; *U. S. v. Ciska*, 1 McLean 254.

<sup>2</sup> *Kansas Indians*, 5 Wall. 737; *N. Y. Indians*, *Ibid.* 761.

<sup>3</sup> *Foster v. Comm'rs*, 7 Minn. 140.

<sup>4</sup> *Webster v. Reid*, 11 How. 437; *Telford v. Barney*, 1 Greene (Iowa), 575; *Wright v. Marshall*, 2 *Ibid.* 94.

<sup>5</sup> *Moor v. Veazie*, 32 Me. 343; *N. Y. v. Dibble*, 21 How. (U. S.) 366; *McCracken v. Todd*, 1 Kansas, 148; *Webster v. Reid*, 11 How. 437; *U. S. v. Ciska*, 1 McLean, 254.

own laws and usages.<sup>1</sup> But the withdrawal of an Indian from his tribe, or the tribe's removal from the State or dissolution, places him in the position of a foreign emigrant before the laws of that State. And he may sue and be sued in a State Court.<sup>2</sup>

4th. That Indian tribes, being as such under an independent government of their own, have the right to make such laws relating to property, contracts, and the domestic relations as they may see fit.<sup>3</sup> A marriage valid, according to their laws or usages, is valid everywhere, though made within the limits of a State, and the same rule holds good with respect to its dissolution.<sup>4</sup>

5th. That the powers of Congress do not extend beyond the regulation of commerce with Indian tribes as distinct, tribal organizations; it cannot, therefore, pass laws invalidating contracts made with Indians within the limits of a State, but outside of a reservation;<sup>5</sup> nor punish crimes committed on Indian territory within a State by one white man upon another.<sup>6</sup> But an offence committed upon a reservation, and which is punishable under the laws of the United States, is not purged by an acquittal in an Indian Court, and under Indian laws.<sup>7</sup>

<sup>1</sup> *Ex parte* Geo. Peters, 2 Johns. Cas. 344; *State v. Foreman*, 8 Yerg. 256; *State v. Tassels*, 1 Dudley, 229; *U. S. v. Ward*, 1 Wood, 17.

<sup>2</sup> *Murch v. Tomeer*, 21 Me. 535; *Jones v. Eisler*, 3 Kans. 134; *Lobdell v. Hall*, 3 Nev. 507; *Strong v. Waterman*, 11 Paige, 607.

<sup>3</sup> *U. S. v. Ragsdale*, Hemp. 497; *Wall v. Williamson*, 8 Alab. 48; *Goodell v. Jackson*, 20 Johns. 693.

<sup>4</sup> *Boyer v. Dively*, 58 Mo. 510; *Morgan v. McGhee*, 5 Humph. 13; *Johnson v. Johnson*, 30 Mo. 72.

<sup>5</sup> *Taylor v. Drew*, 21 Ark. 485; *Hicks v. Euhartona*, 21 Ibid. 106.

<sup>6</sup> *U. S. v. Bailey*, 1 McLean, 234; *Painter v. Ives*, 4 Neb. 122.

<sup>7</sup> *U. S. v. Ragsdale*, Hemp. 497.

## THE CURRENCY.

“To coin money, and regulate the value thereof and of foreign coin, and fix the standard of weights and measures.”

The right to coin money is one of those essential powers of sovereignty which can properly be exercised only by the General Government. It is the right to create a circulating medium on the basis of the precious metals, for these constitute the universal currency of the commercial world. The reason, therefore, for giving this exclusive power to Congress is too apparent to need any argument in its support. In his second speech upon the Sub-Treasury Bill of March 12, 1838, Daniel Webster, in reviewing the objects contemplated by the creation of this new department of Public Finance said: “The coinage power was given to be used for the benefit of the whole country, and not merely to furnish a medium for the collection of revenue. The object was to secure for the general use of the people a sound and safe circulating medium.”<sup>1</sup> In order, also, to guard the uniformity of this currency and to prevent its debasement, the Constitution enacts that no State shall “coin money,” or “emit bills of credit.”<sup>2</sup> This effectually limits the exercise of the coinage power to Congress<sup>3</sup> by placing it beyond the control of the States.

Under the settled and universal meaning of the term “coin” is to be understood a currency consisting of some one of the three metals, gold, silver or copper. These constitute the common circulating medium of commerce the world over. To coin money is to stamp upon it some

<sup>1</sup> Works, vol. 4, p. 460; *Griswold v. Hepburn*, 2 Duval, 20.

<sup>2</sup> Art. I., § 10.

<sup>3</sup> *Von Husan v. Kanouse*, 13 Mich. 303; *George v. Concord*, 45 N. H. 434; *Shollenberger v. Brinton*, 52 Penn. 9.

denominational symbol of its legal value. In this consists the regulation of the value thereof as a legal tender for debts, under the Constitution.<sup>1</sup> Paper money is not, properly speaking currency, beyond the limits of its statutory origin. A true currency is always metallic and reducible to some approximate standard of international value; whereas paper money is only a promise to pay, or to redeem its face value in coin, made by some sovereignty and intended for local use. It can have, therefore, no extra-territorial validity as a legal tender for discharging debts.

But within the limits of the grant of power to coin money, the further and discretionary power to impress a legal tender character upon treasury notes, as well as upon coin, has been held to belong to Congress. As a necessary incident of sovereignty, there can be no doubt of the power residing in every government to declare what shall constitute the lawful money of a country, yet it is equally true that a strict construction of the language of the Constitution would limit the meaning of the power "to coin money" to the creation alone of a metallic currency. That the necessity existed during the civil war for issuing treasury notes for the payment of government debts is unquestionable, and as a war measure, the necessity itself is a sufficient answer to any question addressed to its legality. In the presence of dangers threatening the disruption of a government any measures looking to its preservation are always justifiable.

But whether this necessity authorized Congress, under the power to borrow money, to make them a legal tender in payment of anything beyond national

<sup>1</sup> *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400; *Hague v. Powers*, 39 Barb. 427; *Thayer v. Hedges*, 22 Ind. 282; *Fox v. State*, 5 How. 410.

taxes, dues to the government, and loans, is a question of mixed law and polity which can hardly be regarded as yet settled. The issue involved narrowed itself down to the question whether the credit of the government could be lawfully sustained at the risk of sacrificing that of the nation, and violating a provision of the Constitution. The Supreme Court, by a bare majority decision rendered in the *Legal Tender Cases*,<sup>1</sup> held affirmatively.

In the division of the Court, C. J. Chase, who had himself, when Secretary of the Treasury, proposed some of the financial measures which led to the passage of the legal tender Act, in his dissenting opinion, disavowed ever having suggested the expedient of making the notes of the United States a legal tender. He was joined in his dissent by Justices Nelson, Clifford and Field. The restraining weight of these opinions has seriously impaired the value of the judgment of the Court in public estimation, particularly as in *Hepburn v. Griswold*,<sup>2</sup> decided one year before, it had taken a diametrically opposite position. While therefore, the decision in the *Legal Tender Cases* must stand as the law of the land, until reversed by the same august tribunal which pronounced it, and although a re-affirmance of these extensive powers in Congress was made in *Juilliard v. Greenman*,<sup>3</sup> these decisions cannot be regarded otherwise than as weakening the safeguards which the Constitution has erected against unbridled legislation.

The emphasis of this historical decision, as a precedent for the future guidance of Congressional action, is sensibly weakened by the introductory statement of Justice Strong, that "if we hold the Acts invalid, as applicable to debts incurred or transactions which have taken

<sup>1</sup> 12 Wall. 587.

<sup>2</sup> 8 Wall. 604; G. Bancroft's "*Plea for the Constitution*," etc.

<sup>3</sup> 110 U. S.

place since their enactment, our decision must cause throughout the community great business derangement, widespread distress and the rankest injustice. Men have bought and sold, borrowed and lent and assumed every variety of obligations, contemplating that payment might be made with such notes." This was unfortunately but too true. When this decision was rendered these Acts had been in force nearly nine years; the whole commerce and trade of the country had been resting upon them; statutes of limitation had produced their effects in the various States—judgment creditors had enforced their claims and titles to property had changed hands innumerable. The duty thus devolving upon the Supreme Court by the issue presented was one involving many extra-judicial considerations. In undertaking therefore to administer justice amid so many conflicting equities, and at the same time to interpret a clause of the Constitution, it had to import a new meaning into that instrument, by discovering amid its provisions a resulting war power, in order to sanction its operations by an Act of judicial legislation.

#### WEIGHTS AND MEASURES.

Until Congress acts upon the subject of weights and measures, the States may establish their own system. But when once the Federal authority has been exercised, its power is exclusive in fixing the national standard. Congress has been extremely tardy in legislating upon this subject. The omission to do so was long made matter of complaint and remonstrance, and the Legislature of Pennsylvania in their resolution of April 15, 1834, urged upon the General Government the duty of performing the obligation.<sup>1</sup> The various Acts of Congress relating to weights and measures have in general

<sup>1</sup> *Weaver v. Fegley*, 29 Penn. 27.

been limited to the enforcement of tariff regulations, or coinage at the mints.<sup>1</sup> By Act of July 28, 1866, the use of the Metric system was authorized throughout the United States, not as an obligatory, but only as an alternative standard, and it was thereby enacted that "no contract or dealing or pleading in any Court shall be deemed invalid, or liable to objection, because the weights or measures expressed or referred to therein are weights or measures of Metric system."<sup>2</sup>

In all the States, the system of weights and measures has been governed by a standard fixed either by statute, or the common law of the State. No uniformity has consequently existed among them, and their commerce having for a hundred years been carried on in conformity with local variations, it has become impossible for Congress to change it suddenly, even though supplying a better system, without causing great confusion and loss. The introduction of the Metric system is therefore an invitation to the States to adopt it as their fixed standard, and thus bring the whole country under one uniform rule of weights and measures.

#### POST-OFFICES AND POST-ROADS.

"To establish post-offices and post-roads."

The establishment of postal facilities by designating particular places and buildings as post-offices, and selecting post-roads over which the mails are to be carried, belongs as a power exclusively to Congress. In such a system, in order to insure regularity there must be uniformity. This could never be accomplished, if left to the action of State governments. The further estab-

<sup>1</sup> Resolution of June 14, 1836 ; Act of May 19, 1828 ; August 30, 1842. See U. S. Rev. Stat. Tit. XXXVII. ; Ibid. § 3569.

<sup>2</sup> By cap. 41 of the *Magna Charta* of John (25th of Henry III.) it was declared that there should be but one measure throughout the realm of England, 8 *Evans. Brit. Statutes*, 306.

lishment of particular roads as post-roads, either by actual construction, or repair, or leasing, accompanies, and is auxiliary to the first named power. Congress has plenary authority to make all the necessary contracts for establishing post-offices and roads, wherever such may be needed for the public service.<sup>1</sup> But contractors when carrying mails of the United States, and using any turnpikes, ferries, and bridges owned either by States, corporations, or individuals, must pay the same tolls for passing over them as other persons. Unless the General Government, in the exercise of its right of eminent domain, should buy or build a road within a State, or help make or repair one, the Constitution gives no authority to use it as a post-road without just compensation. It differs in no respect from any other kind of property, and receives the same protection against unlawful appropriation.<sup>2</sup>

Congress may also, as in the case of the Wheeling and Belmont Bridge, which, by a decree of the Supreme Court of May, 1852, had been adjudged to be an obstruction to navigation and ordered to be removed, declare such bridges or structures to be an established post-road for the passage of the mails of the United States, and authorize the owners thereof to maintain them at their present site and elevation. The Legislature of Virginia having in that instance conferred full power to erect and maintain the bridge, and Congress having exercised its power in the regulation of the navigation of the river, it was held that the concurrence of the powers of both State and Federal governments made the authority complete and superseded the effect and operation of the decree.<sup>3</sup>

<sup>1</sup> *Searight v. Stokes*, 3 How. 151; *U. S. v. R. R. Bridge Co.*, 6 McLean, 517.

<sup>2</sup> *Dickey v. Turnpike Co.*, 7 Dana, 119.

<sup>3</sup> *State of Pennsylvania v. Wheeling and Belmont Bridge Co.*, 18 How. 421.



In like manner Congress may authorize a telegraph company to maintain and operate lines along any of the military and post-roads of the United States, because its power is not confined to the postal service known or in use when the Constitution was adopted, but may keep pace with the progress of the country, and adapt itself to any new developments which time and circumstances may bring forth.<sup>1</sup> According as the progress of science makes new discoveries in the instrumentalities of commerce, the postal service of the country will need to keep abreast of its demands for easier and more rapid avenues of intercommunication.

Congress cannot therefore, in its exercise of a power of such vast importance to the public weal as the postal service, be restricted to such narrow means for transporting the mails as were formerly deemed adequate. Even if the property necessary for the purposes of the government in this respect cannot be obtained by purchase, it may so far exercise its right of eminent domain within a State, as to appropriate it upon making just compensation to the owner.<sup>2</sup> It is by virtue of this power that the public streets in some of our cities are made post-roads under the declaration of Congress. For a post-road is any highway over which the mail is habitually carried. But it is evident from the language of the framers of the Constitution, that the power to establish post-roads is limited to designating the particular roads which shall be used as postal routes. Accordingly by the Act of June 8, 1872, all waters of the United States, all railroads, all canals, all plank roads on which mails are carried, and all letter-carrier routes are declared to be established post-roads.<sup>3</sup>

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

<sup>2</sup> *Kohl v. U. S.*, 91 *Ibid.* 367.

<sup>3</sup> U. S. Rev. Stat., § 3964.

## COPYRIGHT.

“To promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”

The protection of property in literary works has always been a subject of public concern in the United States. Copyright in authors had been, from the earliest times in England adjudged to be a right at common law.<sup>1</sup> Inheriting as did the Colonies the common law of the mother country, they were governed by its principles down to the period of the Revolution. But even later than this it continued, by adoption in many States, to govern their jurisprudence, so that whenever a common law right was asserted in a controversy, it became necessary to look to the particular State in which the controversy originated.<sup>2</sup> The States, in this legislation, had long antedated the Constitution in protecting copyright in authors.

In January, 1783, Connecticut passed an Act for the encouragement of literature and genius; and Massachusetts did likewise in March of the same year. The subject received early attention in the Continental Congress, where a committee, of which Madison was chairman, offered the following resolution which was adopted on the 27th of May, 1783: “*Resolved*, That it be recommended to the several States to secure to the authors or publishers of any new books, not hitherto printed, being citizens of the United States, and to their executors, administrators and assigns, the copyright of such books for a certain time not less than fourteen

<sup>1</sup> Story on the Const. 137; *Miller v. Taylor*, 4 Burr. 2310.

<sup>2</sup> *Wheaton v. Peters*, 8 Pet. 591; *Morgan's Law of Literature*, vol. 2, p. 145; *U. S. v. Worrall*, 1 Dall. 385.

years," etc. Virginia passed an Act to that effect in 1785 and New York followed her in 1786. These several State Acts prepared the way for the similar provision in the Constitution of the United States.<sup>1</sup>

The copyright recognized in the Act of Congress as meriting protection, is that form of property which an author has by the common law in his *manuscript*; not literally speaking, because anything dictated by him, although hand-written or type-written by another, may be his individual labor, just as much as his own manuscript or the book printed from it. But in the United States, the author of a published work can have no exclusive property in it except under some Act of Congress.<sup>2</sup> He can have no redress in a State Court for an act of piracy committed upon it, but must resort to the Federal Courts, Congress having given them exclusive jurisdiction over such controversies.<sup>3</sup>

The object contemplated in this clause of the Constitution, was to *secure* this right to an author, because the States might not, or could not individually afford him a just protection. The purpose was to secure the right throughout the whole of the United States. And this the States themselves recognized by surrendering their previous rights in this respect to Congress. No Act of a State Legislature can, in consequence, authorize the infringement of a copyright issued in compliance with the laws of the United States, whether in the hands of an author or his assignee. While a State Constitution may provide that "all judicial opinions shall be free for publication by any person" a copyright may be taken out in the *notes* and *references* of an editor of the volume, which will be protected at law.<sup>4</sup>

<sup>1</sup> Federalist, No. 42.

<sup>2</sup> *Wheaton v. Peters*, 8 Pet. 600.

<sup>3</sup> *Dudley v. Mayhew*, 3 Comst. 12.

<sup>4</sup> *Little v. Gould*, 2 Blatchf. 165, 362.

Even in England, the doctrine that the Crown held a prerogative in the law reports has long ago been abandoned as untenable.<sup>1</sup> In the United States, they have always been regarded as literary property in the hands of their authors or publishers, although published under the authority of Congress or State Legislatures, but through the agency of appointed reporters.<sup>2</sup> Congress may also authorize a copyright law protecting photographs, provided they embody original intellectual ideas, as these may be said to promote the progress of science and the useful arts.<sup>3</sup>

#### OF PATENTS.

The object of this provision, like that applying to copyright, is to secure to inventors compensation for the time and labor employed upon their discovery, by bestowing upon them the exclusive right to make and sell the things discovered for a limited time. The power given to Congress to legislate upon this subject is exclusive, and unrestricted, and it may be exercised in any way which to it may seem most conducive to the public good. So long as it does not disturb existing rights of property in patentees, its legislation is without limitation.<sup>4</sup> Whether it can decide the fact that an individual is the author, or inventor of a certain writing or invention, so as to preclude judicial inquiry into the originality of the invention, has been questioned.<sup>5</sup>

But it may prescribe the conditions, relating to the length of time and the other circumstances under which a patent for an invention shall be granted. And it may

<sup>1</sup> Maugham on Literary Property, 101.

<sup>2</sup> *Wheaton v. Peters*, 8 Pet. 591.

<sup>3</sup> U. S. Rev. Stat., §§ 4952, 4965; *Barrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53.

<sup>4</sup> *McClurg v. Kingsland*, 1 How. 202.

<sup>5</sup> *Evans v. Eaton*, 3 Wheat. 454.

grant the further extension of a patent which has been renewed, or it may reserve rights and privileges to assignees on extending the term of a patent.<sup>1</sup> Although patents are usually obtained by proceedings instituted in the Patent Office, and under rules there promulgated for their issuance, Congress may, by a private Act, authorize the issuing of a patent to an inventor, and the same may be done in relation to its extension, there being no constitutional restriction forbidding it.<sup>2</sup>

Inasmuch, also, as assignees of patentees are often the ones who put the original invention to the best and most profitable use, by the expenditure of money in order to bring it before the public, Congress, while restricted in its power of renewal of a patent to the inventor alone, may yet qualify the grant so as to reserve to these assignees certain rights and privileges. This exercise of a power not specifically conferred in precise terms by the Constitution, has been held to be incidental to the general power to promote the progress of the useful arts, by securing to inventors for limited periods of time the exclusive right to their discoveries.<sup>3</sup>

But Congress cannot lawfully deprive a citizen of the use of his property, after he has purchased the absolute and unlimited right from the inventor. Hence it cannot from time to time authorize the latter to recall rights which he has granted to others, or re-invest him with rights of property, which he had before conveyed for a valuable and fair consideration. While the assignee of the patentee takes only a present interest in the monopoly, which interest terminates at the time limited for its

<sup>1</sup> *Blanchard's Gun Stock Factory v. Warner*, 1 Blatchf. 258; *Jordan v. Dobson*, 4 Fish. 232; *Blanchard v. Haynes*, 6 West. L. J. 82.

<sup>2</sup> *Bloomer v. Stolley*, 5 McLean, 158; *Jordan v. Dobson*, 2 Abb. U. S. 398; *Bloomer v. McQueewan*, 14 How. 539.

<sup>3</sup> *Blanchard's Gun Stock Factory Co. v. Warner*, 1 Blatchf. 258.

continuance by the law creating it, the purchaser of the right to use the invention has an indefeasible title outside the limits of the monopoly.<sup>1</sup>

The powers of Congress to legislate upon the subject of patents being plenary by the terms of the Constitution, it may pass Acts relating to them which are retrospective in their operation. This fact does not impugn their validity—and since there are no restraints upon the exercise of these powers, there can be no limitation of its right to alter patent laws at its pleasure, provided only they do not destroy rights of property in existing patents.<sup>2</sup>

The States having no control of patents, cannot interfere with property in inventions existing under Acts of Congress. They cannot legislate in relation to either the purchase, sale or use of patent rights, nor annex conditions to their enjoyment. So long as the patentee conforms to the laws of the United States under which he holds his franchise, he may freely come and go into any State and offer his property in open market.<sup>3</sup> Should the article manufactured under a patent be dangerous to life or health or property or morals, a State might, doubtless, under the authority of its police power, regulate the conditions of its transportation or sale.<sup>4</sup> But a corporation owning and operating a patent, when bringing it into another State, is not subject to the State laws relating to foreign corporations.<sup>5</sup>

<sup>1</sup> *Bloomer v. McQueewan*, 14 How. 539; *Wilson v. Rousseau*, 4 How. 646 and 662.

<sup>2</sup> *McClurg v. Kingsland*, 1 How. 202; *Blanchard v. Sprague*, 3 Sumn. 535.

<sup>3</sup> *Hollida v. Hunt*, 70 Ill. 109; *Helm v. First Nat'l Bk.*, 43 Ind. 167; *Cranson v. Smith*, 16 Alb. L. J. 330; *Ex parte Robinson*, 4 Fish. 186.

<sup>4</sup> *Patterson v. Comm.*, 11 Bush, 311; S. C. 97 U. S. 501; *Jordan v. Dayton*, 4 Ohio, 294; *Vanini v. Paine*, 1 Harrington, 65; *Thompson v. Staats*, 15 Wend. 395.

<sup>5</sup> *Grover & Baker S. M. Co. v. Butler*, 53 Ind. 454; *W. A. Wood Mowing Machine Co. v. Caldwell*, 54 *Ibid.* 270.

## ESTABLISHMENT OF FEDERAL COURTS.

“To constitute Tribunals inferior to the Supreme Court.”

The necessity of subdividing the judicial power of the United States by the creation of tribunals inferior to the Supreme Court, is recognized in this provision of the Constitution. Accordingly, Circuit and District Courts have been established throughout the country to hear and determine controversies falling within their jurisdictional powers. Congress may enlarge those powers or qualify them at its pleasure, as has often been done.

By the Judiciary Act of September 24, 1789,<sup>1</sup> the entire judicial system of the United States was first organized, with one Supreme Court, thirteen District Courts and three Circuits, known respectively as the Eastern, Middle and Southern. From time to time, as necessity has required, changes and additions have been made in our judiciary system in order to keep pace with the growth of the country. Many of the larger States have been subdivided into districts, and new circuits have also been created.

As a further contribution to the needs of the country Congress, by the Act of February 24, 1855,<sup>2</sup> established a Court of Claims, “to hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract express or implied with the government of the United States, which may be suggested to it by a petition filed therein, and also all claims which may be referred to said Court or either House of Congress.” By means

<sup>1</sup> 1 Stat. at Large, 73; 1 Brightly's Dig. 124; Ibid. 228.

<sup>2</sup> 10 Stat. at Large, 612; 1 Brightly, 198.

of this Act the United States furnishes a tribunal in which it permits itself to be sued, and its attitude therein is that of an ordinary defendant in a suit at law.<sup>1</sup>

The rapid increase of business devolving upon the Supreme Court, through its appellate jurisdiction, having burthened its calendar to such a degree as to place it several years in arrears, in its disposition of cases awaiting argument, and experience showing that there was little hope that the Court could ever contend successfully with this increasing accumulation of *remanets*, Congress, on the 4th of March, 1891, passed a new Federal Judiciary Act, creating Circuit Courts of Appeals. These courts consist of three judges, one of whom may be the Chief Justice, and any associate justice of the Supreme Court assigned to the particular circuit, sitting with the Circuit Judge and a District Judge thereof. In the absence of any member of the Supreme Court, the Circuit Judges shall preside in the order of the seniority of their commissions. All future appeals from either District, or existing Circuit Courts, shall only be subject to review in the Supreme Court of the United States, or the Circuit Court of Appeals. The Act excludes from appeals to the Supreme Court "aliens," also cases arising under the patent laws, revenue laws, and under the criminal laws, and in admiralty, except that in every subject within its appellate jurisdiction, the Circuit Court of Appeals may certify to the Supreme Court any questions or propositions of law concerning which it desires instructions for its proper decision.

In addition to these permanent courts, various commissions and tribunals created at different times for the

<sup>1</sup> Todd v. U. S., Dev. C. C. 129.



trial of claims arising under treaties with foreign countries are illustrations of the exercise of this power.<sup>1</sup>

### PUNISHMENT OF PIRACIES.

“To define and punish piracies and felonies committed on the high seas, and offences against the law of Nations.”

Piracy as defined by the law of nations is robbery upon the sea, and it is thus constitutionally defined by the Acts of April 30, 1790, and of March 3, 1819.<sup>2</sup> In England, it has long been settled that piracy is only a sea-term for robbery committed within the jurisdiction of the Admiralty.<sup>3</sup> This is a broader view than can be taken under the several Acts of Congress, where the *locus in quo* of the crime is sought to be restricted to places “out of the jurisdiction of any particular State,” but yet within that of the United States, or on the high seas; so that localities neutral to war are not permitted to be neutral to crimes.

Congress may therefore bring all waters subject to Federal jurisdiction within the scope of its criminal jurisprudence. But this power being dormant, the place of the crime must be designated by legislative enactment as one over which the authority of the United States can be exercised, before cognizance of the same can be taken by any of its Courts.<sup>4</sup> Congress

<sup>1</sup> As to FRANCE see Stat. at Large, vol. 4, p. 574; as to SPAIN *Ibid.*, vol. 3, p. 768; as to MEXICO *Ibid.*, vol. 9, p. 393; as to NAPLES *Ibid.*, vol. 4, p. 665; as to ENGLAND, Alabama claims, *Ibid.*, vol. 18, p. 245; vol. 22, p. 98.

<sup>2</sup> U. S. *v.* Palmer, 3 Wheat. 610; U. S. *v.* Smith, 5 *Ibid.* 153; U. S. *v.* Furlong, 5 *Ibid.* 184; Rev. Stat., §§ 5368, 5370; 1 Brightly's Dig. 208-11.

<sup>3</sup> Rex *v.* Dawson, 5 State Trials; 4 Blackst. Comm. 73.

<sup>4</sup> U. S. *v.* Wilson, 3 Blatchf. 435; U. S. *v.* Bevans, 3 Wheat. 336; U. S. *v.* Wiltberger, 5 *Ibid.* 76; 4 U. S. Stat. at Large, 115, 116, 117.

may also legislate to punish an attempt to commit a mutiny on a vessel on the high seas; or a conspiracy to burn a vessel with intent to defraud the underwriters.<sup>1</sup>

As to other offences against the law of nations, which have not been ascertained nor defined in any public code recognized by the common consent of mankind, they must be left for definition and punishment to the processes of time and the exigencies of circumstances. In this category of innominate crimes may be placed such offences as recruiting troops without permission on neighboring territory; filibustering; the employment of international spies in times of peace; hovering upon the coast of a friendly power with armed ships; or marching bodies of troops towards their frontiers, all which are minatory actions which nations may well consider and punish as offences against their sovereignty. Over these Congress has plenary power to legislate, for the protection of the whole country.

#### WAR POWERS OF CONGRESS.

“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.

<sup>1</sup> U. S. v. Crawford, 1 N. Y. Leg. Obs. 288; U. S. v. Cole, 5 McLean, 513.

“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.”

It is a recognized principle of international law, that the power of any government to declare war is an attribute of its sovereign right to prosecute or defend its claims by force. It is part therefore of its right of self-preservation. This power the Constitution has lodged in Congress as the political department of the government, and more immediate representative of the will of the people. Its right to exercise physical force is not limited to wars with foreign enemies, but may be employed in the case of those engaged in insurrection against the lawful authority of the United States.<sup>1</sup>

Foreign enemies are simply belligerents, and the only right which can be justly exercised against them, is the right of capture of their persons and property and disarmament. But rebels are traitors as well as belligerents; they have violated the law of their allegiance, and can in consequence be punished by the civil law after capture. In like manner, and as a further penalty, their property on sea and land may be confiscated as a forfeit for their disloyalty.<sup>2</sup> This is the limit to which the power of Congress extends, no bill of attainder working corruption of blood in the ancestor, nor disinherison of the offspring, being permitted under the Constitution.

The power to declare war carries with it the right to

<sup>1</sup> *Texas v. White*, 7 Wall. 700; *Prize Cases*, 2 Black (U. S.), 635; *The Amy Warwick*, 2 Sprague, 123.

<sup>2</sup> *Miller v. U. S.*, 11 Wall. 268; *Tyler v. Defrees*, 11 *Ibid.* 331; *Prize Cases*, 2 Black (U. S.), 673.

the employment of all the means necessary to its successful accomplishment.<sup>1</sup> It is a power to command and to enforce, and not a mere power to contract. Voluntary enlistments are in the nature of contracts; conscriptions are a form of compulsory service.<sup>2</sup> Congress may avail itself of either method to recruit the army of the United States.

The general power to declare war, and the consequent right to conduct it as long as the public interests may seem to require, also carries with it the supplementary power to remedy the evils which may have ensued, or are likely to ensue from its progress and continuance. Hence Congress may suspend the operation of statutes of limitation as a beneficial measure to creditors, and its Acts will apply to cases in the Courts of the States, as well as to those in the Federal Courts.<sup>3</sup> And this war power and the treaty making power have each been held to carry with it the authority to acquire territory.<sup>4</sup> Thus, Louisiana,<sup>5</sup> Florida,<sup>6</sup> and Alaska<sup>7</sup> were acquired under the treaty-making power; and California<sup>8</sup> was obtained partly by conquest and partly by treaty. Texas was annexed under a convention between it and the United States by resolution of March 1, 1845.<sup>9</sup>

Under the Constitution, and as part of its war powers, Congress alone has the authority to confiscate the pro-

<sup>1</sup> *Legal Tender Cases*, 12 Wall. 457; *R. R. Co. v. Johnson*, 15 *Ibid.* 195; *Dooley v. Smith*, 13 *Ibid.* 604.

<sup>2</sup> *Kneedler v. Lane*, 45 Penn. 238; 1 Kent. Comm. 55.

<sup>3</sup> An Act in relation to the limitation of actions passed June 11, 1864; Stat. at Large, vol. 13, p. 123; *Hanger v. Abbott*, 6 Wall. 532; *Stewart v. Kahn*, 11 *Ibid.* 493.

<sup>4</sup> *Am. Ins. Co. v. Canter*, 1 Pet. 542; *Scott v. Sanford*, 19 How. 393.

<sup>5</sup> Stat. at Large, vol. 2, p. 245; *Ibid.*, vol. 8, p. 200.

<sup>6</sup> Stat. at Large, vol. 8, p. 252.

<sup>7</sup> Stat. at Large, vol. 15, p. 240, by Treaty of March 30, 1867.

<sup>8</sup> Stat. at Large, vol. 15, p. 492, by Treaty of Feb. 2, 1848.

<sup>9</sup> Stat. at Large, vol. 5, p. 797.

perty of an enemy, or any debts due to him.<sup>1</sup> And it may also impose conditions upon commercial intercourse with an enemy, and authorize the President to license the same according to such rules as it may establish.<sup>2</sup>

As the granting of letters of marque and reprisal is an act of belligerency under the law of nations, Congress is alone empowered to do so. This has been its course in most of the public wars waged by the United States.<sup>3</sup> At the Congress of Paris, in 1856, a declaration of principles was made by the representatives of the powers lately at war, and the endorsement of other States was invited to the following propositions agreed upon by the signers of this treaty:—

1st. The total abolition of privateering.

2d. The immunity of the neutral flag and of neutral goods not contraband of war.

3d. The abolition of mere paper blockades.

Besides the original signers, consisting of Russia, Turkey, France, Great Britain, and Sardinia, thirty-eight Continental States gave their adhesion to the above declaration of principles.<sup>4</sup> The United States,<sup>5</sup> although invited, declined to enter into this agreement, unless the second proposition was so amended as to protect from capture all private property at sea not contraband of war. This condition not being accepted by the powers, our government has not in consequence acceded

<sup>1</sup> *Brown v. U. S.*, 8 Cranch, 110; *Britton v. Butler*, 9 Blatchf. 456.

<sup>2</sup> *Hamilton v. Dillon*, 21 Wall. 74; Act of July 13, 1861; 12 Stat. at Large, 257 and 13 Ibid. 375.

<sup>3</sup> Against France, by Act of July 9, 1798, 1 Stat. at Large, 579; against Tripoli, by Act of Feb. 6, 1802, 2 Ibid. 130; against Great Britain, by Act of June 18 and 26, 1812, Ibid. 755-59; against Algiers, by Act of March 3, 1815, 3 Ibid. 230, against Mexico by Act of May 13, 1846, 9 Ibid. 9, 10.

<sup>4</sup> Lawrence's *Wheat. Intern. Law*, p. 637, note.

<sup>5</sup> Mr. Marcy's letter to Mr. Buchanan; Cong. Doc. 33d Cong., 1st Sess. H. of Rep's Executive Doc. No. 103; and President's Message and Documents, 1856-7, p. 35.

to the abolition of privateering. When therefore, in 1861, the British Government recognized the Confederate States as belligerents, and admitted their armed vessels into British ports, Congress authorized the President by Act of March 3, 1863,<sup>1</sup> to grant letters of marque and reprisal to cruise against all domestic and foreign enemies. Foreign governments having meanwhile warned their citizens against taking letters of marque from the Confederate Government, and the United States having threatened to treat such persons as pirates cruising against our commerce, these hostile acts became limited to operations by a few vessels constituting the Confederate States Navy.

#### TO RAISE AND SUPPORT ARMIES.

The power to raise and support armies, includes the authority to educate officers at public expense, to establish soldiers' schools in barracks, to commission and salary officers and privates, to enlist volunteers, or to draft conscripts; to feed, clothe, and transport men, provisions, and munitions of war both on sea and land. This power may be exercised in time of peace as well as of war, and is unlimited in the extent of its application.<sup>2</sup>

Since the Act of June 21, 1862,<sup>3</sup> repealing the Act of September 28, 1850, minors may be enlisted in the Army and Navy without the consent of their parents or guardians. The principle on which this departure from past usage is based is one of public policy, and springs from the natural relation of every citizen to his country.

<sup>1</sup> 12 Stat. at Large, 758.

<sup>2</sup> Story's Const., §§ 1178-1192; 1 Brightly's Dig. 55-90; 2 Ibid. 9-50; *Kneedler v. Lane*, 45 Penn. 238; *Booth v. Woodbury*, 32 Conn. 118; *Ferguson v. Landram*, 1 Bush, 548; *In re Griner*, 23 Wis. 423; *Allen v. Colby*, 45 N. H. 544.

<sup>3</sup> 12 Stat. at Large, 339.

In return for her protection she may at any time claim his services, and even require him to imperil his life in times of public danger. His age and immaturity are not necessarily a bar to his usefulness in some branches of the public service. Under a call from Congress, the rights of parents are subordinated to the demands of the nation for soldiers or seamen.<sup>1</sup> But appropriations for the support of the Army cannot be made for more than two years.<sup>2</sup>

#### TO PROVIDE AND MAINTAIN A NAVY.

Making due allowance for the necessary differences between the fields of service of the Army and Navy, and the materials for their equipment, Congress has the same exclusive power over the naval branch of our public service which it has over the military branch. It may authorize the purchase or sale, the building and equipping of vessels; the enlistment of seamen, the establishment of domestic navy yards and arsenals, and of naval stations abroad for purposes of coaling or repairs. It may also establish a naval academy for the education of officers, or school ships for that of seamen; or experiment stations for the practice of naval gunnery, or provide any needed instrumentalities for the promotion of our coast defences, or the protection of our commerce upon the seas. The flag of a nation, as the symbol of its power, does not need protection at home. But in foreign parts it is often the only shield of its citizens in times of peril. The respect shown it by foreign governments, when at issue with such citizens on questions of international law will, therefore, often

<sup>1</sup> U. S. v. Bainbridge, 1 Mason, 71; Comm. v. Gamble, 11 S. & R. 94; *Ex parte* Coupland, 26 Texas, 394; Comm. v. Murray, 4 Binn. 487.

<sup>2</sup> Story on Const., §§ 1118-89; Federalist, Nos. 26 and 41.

depend upon the naval force which that flag can summon to its protection. The influence produced by the presence of force is a controlling element in the councils of nations which none can safely ignore.<sup>1</sup>

#### GOVERNMENT AND REGULATION OF LAND AND NAVAL FORCES.

It would seem to be a logical sequence, that the power to raise and maintain armies and navies, should be accompanied by the power to govern and regulate their discipline. Congress has, therefore, the power to enact a code of laws for the government of both arms of the public service. This includes the authority to provide for the trial and punishment of offences occurring therein, by courts martial. Persons in the public service are primarily within the jurisdiction of the Federal authorities. This being the superior and overshadowing jurisdiction of the country, a State Court or officer is without jurisdiction to try a case involving questions either of military or naval authority in officers, or breaches of discipline in subalterns, or to release on habeas corpus a party when it appears *prima facie* that he is held to service by an officer acting under authority of the United States, and who holds him as an enlisted man, whether soldier or seaman.<sup>2</sup>

In order to meet these exceptional conditions attaching themselves to the legal status of enlisted men, it has been found advisable among all civilized nations to separate the military and naval, from the civil authority of the government. And the cases arising within either of these branches being in their very nature radically unlike, have required the establishment of tribu-

<sup>1</sup> Federalist, Nos. 11, 24, 29, 41; Story's Const., §§ 1193-98.

<sup>2</sup> *In re Neill*, 8 Blatchf. 156.



nals with different jurisdictional powers, and with correspondingly different rules of procedure.

Such tribunals, when acting within the legitimate scope of their authority, impart validity to their acts and immunity to their officers, and to those executing their commands. These findings, when duly approved, are conclusive, and cannot be reviewed by the civil courts. They may be pleaded in bar of any action for the recovery of damages. "With the sentences of courts martial, which have been convened regularly and have proceeded legally, and by which punishments are directed not forbidden by law, or which are according to the laws or customs of the sea, civil courts have nothing to do. If it were otherwise, the civil courts would virtually administer rules and articles of war, irrespective of those to whom that duty and obligation has been confided by the laws of the United States, and from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts." Such is the language of the Supreme Court of the United States in *Dynes v. Hoover*.<sup>1</sup>

#### CALLING OUT THE MILITIA AND ITS GOVERNMENT.

The Constitution distinctly enumerates the three exclusive purposes for which the militia may be called into the service of the United States. These purposes are: 1st, to execute the laws of the Union; 2d, to suppress insurrection; and 3d, to repel invasions.

These three occasions representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered only upon the soil of the United States or of its Territories. Under these circumstances they still remain the militia

<sup>1</sup> 20 How. 65; *In re Bogart*, 2 Sawy. 396.

of their several States, although temporarily in the service of the United States as the superior power constitutionally invoked "to execute the laws of the Union, to suppress insurrection and to repel invasions." In the history of this provision of the Constitution, there is nothing indicating that it was even contemplated that such troops should be employed for purposes of offensive warfare outside the limits of the United States. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the general government, was intended as a distinct limitation upon their employment.<sup>1</sup>

Being the ministers of the law to enforce its commands, they can only be summoned by the law-making power to act within the extent of its jurisdiction, and in the manner prescribed by the Constitution. They cannot consequently, be used to invade the territory of a neighboring country, or to enforce any public rights abroad. While serving as State militia they do not lose their distinctive character, beyond becoming the militia of the United States for the time being.

It was the hereditary fear of standing armies, as a menace to liberty in time of peace, which led the framers of the Constitution to provide that the militia should always remain a militia of the States.<sup>2</sup> It was never designed to be a militia of the United States, nor under

<sup>1</sup> *Kneedler v. Lane*, 45 Penn. 238; *Martin v. Mott*, 12 Wheat. 19; *Houston v. Moore*, 5 *Ibid.* 1.

<sup>2</sup> Charles II. by his own authority kept on foot a body of 5000 troops in time of peace, and James II. increased the number to 30,000, who were paid out of his civil list. This, it was, which gave rise at the Revolution of 1688 to the insertion in the Bill of Rights of the clause that "raising and keeping a standing army within the Kingdom in time of peace, unless with the consent of Parliament, is against law." 1 *William and Mary*, 1689. The complaint that George III. had done so in the Colonies is one of the grievances set forth in our Declaration of Independence. *Federalist*, No. 26; *Macaulay's Hist.*, ch. 23; *Hallam Const. Hist.*, ch. 25.

the control of the President, except when called into actual service under some of the above-enumerated contingencies. Nor was he even then to be allowed to do so at his arbitrary pleasure, but only after the necessity for so doing had been recognized and approved by Congress. "Remember always," says Mr. Webster, "that the great principle of the Constitution on that subject is that the militia is the militia of the States, and not of the general government, and being thus the militia of the States, there is no part of the Constitution worded with greater care and with a more scrupulous jealousy than that which grants and limits the power of Congress over it."<sup>1</sup>

Speaking likewise on this question of the government of the militia, the Justices of the Supreme Judicial Court of Massachusetts in their opinion upon the subject, say that, "Were it otherwise, were the general and State governments to have their own militia, the results would have been that there would be, within the bosom of each State, a large embodied military force, not by its organization amenable to the laws, or subject to the orders of the State government; and also a similar force, on which the general government would have no right to call for aid to repel invasion, suppress insurrection, or execute the laws; a state of things not only rendering each to a great extent inefficient and powerless, but also entirely destructive of that harmony and union which were intended to characterize the combined action of both governments."<sup>2</sup>

The militia of the States restricted to domestic purposes alone, are to be distinguished therefore from the army proper of the United States, which, whether in the form of regular troops or volunteers, may be used to invade a foreign country as well as to repel the attack

<sup>1</sup> Works, vol. 2, p. 95.

<sup>2</sup> 80 Mass. R. 614.

of foreign enemies. The invasion of Mexico in 1846, and of Canada during the war of 1812 with Great Britain, are notable instances of this kind. Although in the latter case some militia did participate in the battles of Chippewa and Niagara on Canadian soil, a portion claimed their constitutional rights and refused to cross the frontier.<sup>1</sup> Guilty as they may have been of flagrant insubordination, it is doubtful whether any Military Court could have vindicated its jurisdiction in punishing this disobedience of an unlawful command.

From 1792<sup>2</sup> to 1862,<sup>3</sup> none but free white male citizens could be lawfully enrolled in the militia of any of the States. By the latter Act "*all* able-bodied male citizens between the ages of 18 and 45" are included, and it is further enacted that "the militia when so called into service shall be organized in the mode prescribed by law for volunteers." As a fact, during our Civil War, the State regiments, whether raised by draft or voluntary enlistments, retained the name of their several States with their appropriate numbers, and they were called volunteers to distinguish them from troops of the regular army.

By the Confiscation Act of July 17, 1862,<sup>4</sup> the President was authorized to enlist persons of African descent into the army for the suppression of the Rebellion. This was the initiation of colored soldiers into our army, and led to the permanent organization of negro regiments.

The power to call out the militia and the power to govern them, authorizes the passage of laws to enforce the call by the infliction of suitable penalties, and the

<sup>1</sup> Hildreth's Hist. of the U. S., vol. 3, p. 358.

<sup>2</sup> Act of May 8, 1792; 1 Stat. at Large, p. 271.

<sup>3</sup> Act of July 17, 1862; 12 Stat. at Large, p. 597.

<sup>4</sup> 12 Stat. at Large, p. 592.

erection of Courts for the trials of offenders. This Congress has done in the various Acts passed between 1792 and 1862, giving to the President the authority to call forth the militia and to provide for their government when in active service.<sup>1</sup>

In respect to their control, the powers of the State and general government over the militia are concurrent in this sense, that, the powers of the State governments ante-dating the Constitution and not having been prohibited by that instrument, still remain with the States, until a necessity arises calling for the exercise of the superior authority of the general government over the same subject.<sup>2</sup> Then the State authority (except in the matter of training and officering them according to the discipline prescribed by Congress), becomes subordinated to that of the President as Commander-in-chief of all our forces. Whenever, therefore, any body of the militia has entered into the service of the United States, its authority over them is exclusive and paramount.

As to the command of the militia, the State alone is authorized to provide its officers. But when it has passed into the service of the United States, the President as Commander-in-chief may exercise his command over them either through regular army officers, or through the officers of the militia themselves. Until such troops have actually been mustered into this service they are not amenable to the articles of war prescribed by the general government, and cannot be punished for disobedience to them. The militia *called* into the public service are still the militia of the States until *organized* in the manner prescribed by Congress.<sup>3</sup>

<sup>1</sup> Revised Statutes of the U. S., Tit. XVI.

<sup>2</sup> *Houston v. Moore*, 5 Wheat. 1.

<sup>3</sup> *Mills v. Martin*, 19 Johns. 7; *Houston v. Moore*, 5 Wheat. 20; *Vanderhyden v. Young*, 11 Johns. 150.

The Revised Statutes of the United States (Tit. xvi.) have re-enacted the Act of 1792, with all its obsolete military terms and references to weapons long since relegated to the museums of military antiquities. Much of its scheme of organization is, in the light of modern science, not only faulty, but under present and accepted rules of formation wholly impracticable. Our highest military authority has pointed this out most forcibly in a recent publication, whose statements should receive the serious attention of Congress.<sup>1</sup>

#### JURISDICTION OVER CEDED PLACES.

“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.”

#### *District of Columbia.*

The necessity of selecting a permanent seat for the Government of the United States had occupied the public mind for several years before the formation of the Constitution. The Continental Congress of the Revolution had been an itinerant body, holding its sessions at various places, according to the circumstances of the times. Now sitting at Philadelphia, Baltimore, Princeton, Annapolis, Trenton, and New York, it had found in each a disadvantage arising either from locality,

<sup>1</sup> “Our Army and Militia,” by General W. T. Sherman, in *North American Review* for August, 1890.

sectional jealousy, or inconvenience to business, which pointed to the need of a Federal district independent of the jurisdiction of any State.<sup>1</sup> This gave rise to the insertion of the above provision in the Constitution.

In order to carry it into operation Congress passed an Act on July 16, 1790, "for establishing the temporary and permanent seat of the Government of the United States."<sup>2</sup> By this Act a district ten miles square was to be selected on the banks of the Potomac, at some place between the mouths of the Eastern branch and Connogochegue, for the permanent seat of the government. Its occupancy as such, and the removal of all public offices to it, was not to occur, however, before the first Monday in December, 1800, until which time Congress should continue to meet in Philadelphia. Maryland, by a cession of land on December 23, 1788, and Virginia by a corresponding one on December 3, 1789, had already surrendered portions of their territory for this purpose to the United States, and these cessions, having been accepted, were organized into a Federal district by the Acts of July 16, 1790, and March 3, 1791.

This district was located, and its lines and boundaries particularly established by a proclamation of George Washington, President of the United States, on March 30, 1791, and Congress assumed complete jurisdiction over it by the Act of February 27, 1801. By the Act of May 13, 1800, the first meeting of Congress in Washington was called for the third Monday in November, 1800.<sup>3</sup> In selecting a name for the place, the official title of "The Federal City" was originally

<sup>1</sup> 1 Curtis's Hist. of the Const., 220 and 227; 2 Ibid., 268; Hildreth's Hist. U. S., vol. 6, 528.

<sup>2</sup> 1 Stat. at Large, 130, 214; 2 Ibid., p. 103

<sup>3</sup> 2 Stat. at Large, 55, 85, 103.

given to the district, but this designation was subsequently changed to that of "The District of Columbia" and the "City of Washington." After having been governed by Congress for seventy years, a territorial government was established by Act of February 21, 1871,<sup>1</sup> which continued until 1874,<sup>2</sup> when it was abolished, and the district placed under the government of a Board of three Commissioners.

The right to exercise exclusive jurisdiction over the District of Columbia being vested in Congress, its legislation partakes of the national character of that body. It is the Legislature of the Union and in that character alone the Constitution confers upon it this power of legislation.<sup>3</sup>

The fact, also, that the District does not enjoy the right of representation, does not invalidate the authority of Congress to impose a direct tax upon it, in proportion to the census directed to be taken by the Constitution. "The difference," says C. J. Marshall,<sup>4</sup> "between requiring a continent, with an immense population to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, unrestrained by no principle of apportionment, and associated with it by no common feelings, and permitting the representatives of the American people, under the restrictions of our Constitution to tax a part of the society, which is either in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained, as is the case with the Territories, or which has voluntarily relinquished the right of representation, and has adopted

<sup>1</sup> 16 Stat. at Large, 419.

<sup>2</sup> Rev. Stat. of the U. S., vol. 1, p. 53, 1874-81.

<sup>3</sup> *Cohens v. Virginia*, 6 Wheat. 264; *Stoutenburg v. Hennick*, 129 U. S. 141.

<sup>4</sup> *Loughborough v. Blake*, 5 Wheat. 317.



the whole body of Congress for its legitimate government, as is the case with the District, is too obvious not to present itself to the minds of all.”

Moreover, there is no division of powers in this district between the General and State governments. Congress has the entire control over it for purposes of government,<sup>1</sup> and it may confer upon the city of Washington authority to assess upon the adjacent proprietors of lots, the expense of repairing streets without making the tax a general one on the city.<sup>2</sup> In exercising its legislative functions over property and persons it may, provided no intervening rights are thereby impaired, confirm the proceedings of an officer in the district, or of a subordinate municipality, or other authority therein, which, without such confirmation, would be void.<sup>3</sup> Congress may also alter a grant made to a corporation in the district for public uses, where there is nothing to show the establishment of an irrevocable, charitable trust.<sup>4</sup>

#### TERRITORIES AND CEDED PLACES.

“To exercise authority over places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings.

“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

<sup>1</sup> *Kendall v. U. S.*, 12 Pet. 524.

<sup>2</sup> *Willard v. Presbury*, 14 Wall. 676.

<sup>3</sup> *Mattingly v. District of Columbia*, 97 U. S. 687; *National Bank v. Shoemaker*, *Ibid.* 692.

<sup>4</sup> *District of Columbia v. Washington Market Co.*, 108 U. S. 243.

construed as to prejudice any claims of the United States, or of any particular State." (Art. 4, § 3.)

At the Declaration of Independence, the title to all lands within the recognized limits of the Union became vested in the people of the several States as successors to the sovereignty of the British Crown.<sup>1</sup> The boundaries of these States, including the unoccupied lands claimed by them, were not then accurately defined. The original colonies being on the seaboard, and founding their title upon charters and grants, claimed lands indefinitely towards the West and Northwest. Much of this territory had not yet been explored, still less of it had been surveyed, and no reliable maps existed to guide the judgment of the parties most interested. The question whether these vacant lands within the United States became a joint property, or belonged to the separate States, gave rise to controversies which delayed the ratification of the Articles of Confederation, and at one time seriously threatened to render their general adoption impossible.

In order to settle the differences of conflicting title, Congress by Resolution of September 6, 1780,<sup>2</sup> resolved that it "be earnestly recommended to those States, who have claims to the Western country, to pass such laws and give their delegates in Congress such powers as may effectually remove the only obstacle to a final ratification of the Articles of Confederation." And a further resolution was passed on October 10, 1780, to the effect that "the unappropriated lands that may be ceded or relinquished to the United States by any particular State, pursuant to the recommendation of Congress of the sixth day of September last, shall be disposed of for the common benefit of the United States,

<sup>1</sup> *Chisholm v. Georgia*, 2 Dall. 419.

<sup>2</sup> *Pub. Jour. of Congress*, vol. 3, p. 124.

and be settled and formed into distinct republican States, which shall become members of the Federal Union and have the same rights of sovereignty, freedom, and independence as the other States, etc. etc.”

Urged by these resolutions and the gravity of the questions involved, the State of New York in 1781, Virginia in 1784, Massachusetts in 1785, Connecticut in 1786, South Carolina in 1787, North Carolina in 1790, and Georgia in 1802, each made cessions of land to the United States.<sup>1</sup> These unoccupied lands being outside the limits of any of the original States were constituted Territories of the United States, and Congress was given exclusive power over them by the 3d section of the 4th Article of the Constitution. It was for the government of this Northwestern territory out of which five States were formed, that the famous Ordinance of 1787 was passed.

It was the custom of the British Crown to make grants of land in the American colonies, while such lands were still in the occupancy of the Indians. Regarding these tribes as savages without vested title in the soil, because without fixed habitations; and over whom, consequently, civilized nations might justly exercise a protectorate and paramount right of government, the European nations claimed rights of ownership in the soil of this continent according to priority of discovery. This right was subsequently consummated by possession. Royal charters and grants purported to convey the soil, as well as the right of dominion, although both the title as well as the possession remained in the aboriginal occupants.<sup>2</sup> “While the different nations of

<sup>1</sup> Hildreth's U. S., vol. 3, pp. 399, 446, 458, 532.

<sup>2</sup> *Clark v. Smith*, 13 Pet. 195; *Latimer v. Poteet*, 14 Ibid. 4; *Van Horn v. Dorrance*, 2 Dall. 304.

Europe," says C. J. Marshall in *Johnson v. McIntosh*,<sup>1</sup> "respected the right of the natives as occupants, they asserted the ultimate right to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in the possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy."<sup>2</sup>

By the law of national continuity in the possession of the soil, the United States not only succeeded to the powers of the British Crown, but adopted the same principle in its relations to Indian titles. Under the laws of most of the original States the rights of the Indians to their lands were respected, until they either abandoned them, or made cessions to the government, or an authorized sale to individuals.<sup>3</sup> Tribes were regarded as corporations under the disability of a government guardianship, without whose authority they could not dispose of their lands.<sup>4</sup>

Whatever may have been the original form of ownership by the revolted Colonies of their soil, it is clear that in ratifying the Constitution they surrendered to the people of the United States the paramount title to its possession and government, whether such lands were

<sup>1</sup> 8 Wheat. 504; *Chouteau v. Maloney*, 16 How. 203; *The Cherokee Nation v. The State of Georgia*, 5 Peters, 1.

<sup>2</sup> The Indian right of alienation was always held subject to ratification and confirmation by the Government. *Mitchel v. U. S.*, 9 Pet. 711; *Wilson v. Wall*, 6 Wall. 83.

<sup>3</sup> *Mitchel v. U. S.*, 9 Pet. 711; *Wilson v. Wall*, 6 Wall. 83.

<sup>4</sup> In the various treaties with Indians involving cessions of land either to States or the general government, the tribes do not grant or convey any title to the soil, but merely quit claim, and transfer the right of present occupancy. On the other hand Indian tribes are capable of taking as owners in fee simple lands by purchase, where the United States in form and for a valuable and adequate consideration so sell them. *Holden v. Joy*, 17 Wall. 211.

in the form of unoccupied territories or of settled States. This was necessary for the creation of a right of eminent domain in the Federal Government. Therefore, and as successors to the sovereignty of the Crown, the people of the United States have the ultimate dominion, and have always asserted their authority over unoccupied or ungranted lands as holding the paramount title. Even though such lands might be subject to the Indian title, the Supreme Court held in *Fletcher v. Peck*,<sup>1</sup> that the peculiar nature of this title was not such as to be absolutely repugnant to a seisin in fee on the part of the State. The principle of escheat would doubtless apply to such lands,<sup>2</sup> because the right of eminent domain in a State for the furtherance of local government, being a constant political necessity, gives it a right over its soil, distinct from and superior to that of ultimate ownership.<sup>3</sup> But as between a State and the general government, whose powers are intended to be exercised for the common benefit of the United States, there can be no question as to the paramount authority of the latter.

For purposes of eminent domain, in the enactment of national municipal laws, the General Government has a

<sup>1</sup> 6 Cranch, 86.

<sup>2</sup> *Am. Ins. Co. v. Canter*, 1 Pet. 511.

<sup>3</sup> In New York it has been held that, under certain colonial grants made to towns on Long Island by the Dutch Governor Keift in 1664, and the English Governor Dongon in 1685, of lands within certain limits, including bays and harbors, the legal title to the soil both under, as well as above water became vested in the towns, to the exclusion of that of the State. These grants had been ratified and subsequently confirmed by the Colonial Assembly in 1691, and by the first Constitution of New York in which the State advocated its sovereignty over them. They present the anomalous feature of towns owning lands under *tide waters*, over which the State has no jurisdiction to grant rights either of *ferriage*, *wharfage* or *oyster planting*. *Rogers v. Jones*, 1 Wend. 237; *Brookhaven v. Strong*, 60 N. Y. 57; *Roe v. Strong*, 107 N. Y. 358; *Southampton v. Mecox Bay Oyster Co.*, 116 N. Y. 1; also, Opinion of Att'y-Gen'l of N. Y. in matter of *Grace & Messenger*, Albany, April 3, 1890.

concurrent jurisdiction with each State over the lands within the latter's limits. This latent indefeasible right it may at any time exercise, whenever necessary for the enjoyment of the powers conferred upon it by the Constitution. Should the circumstances require it, the United States may therefore appropriate any lands, or other property within the States, for its own uses, and to enable it to perform its proper functions. This it may do by virtue of its plenary sovereignty as the representative of the people. "Such an authority," says Mr. Justice Strong in *Kohl v. United States*,<sup>1</sup> "is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority can prevent the acquisition of the means or instruments by which alone governmental functions can be performed."

The right to acquire territory being inherent in every government, the United States, besides cessions made to it by the States, has the same power as any other nation to add to its public domain by either conquest or treaty, and Congress may make provision therefor, as was done in the cases of Louisiana, Florida, Texas, California, and Alaska.<sup>2</sup> This necessarily includes the power of exclusive legislation over such "territory" or "other property" of the United States, for wherever the General Government has rights, it has concurrent authority to protect them.<sup>3</sup> It is under this principle that the public lands within a State are under the control of the General Government as part of its territory, but its authority does not extend beyond them in respect to the exercise of any acts of sovereignty, not embraced in the power of eminent domain.<sup>4</sup> In the

<sup>1</sup> 91 U. S. 367.

<sup>2</sup> *Amn. Ins. Co. v. Canter*, 1 Pet. 511.

<sup>3</sup> *U. S. v. Gratiot*, 14 *Ibid.* 526; *Pollard v. Hagan*, 3 How. 212.

<sup>4</sup> *U. S. v. Railroad Bridge Co.*, 6 McLean, 517.

government of such intra-state lands, Congress may prescribe rules for the leasing, sale, and transfer of the same in whole or in part; may designate the persons who, as patentees, shall have the superior title thereto; and in actions of ejectment in State courts, where the question is whether the plaintiff or the defendant has the superior legal title from the United States, the patent is conclusive as against an equitable title given by a statute of the State.<sup>1</sup>

As part of its authority over public lands, Congress may prohibit and punish trespassers upon them, although such lands be within the territory of a State.<sup>2</sup> But it cannot prevent the State from exercising the functions of its sovereignty in making provisions for intercourse between its citizens, by authorizing the building of common roads, or railroads over such public lands, precisely as over the lands of private individuals. Both are equally subject to this right of eminent domain. Nevertheless, where lands are reserved, or occupied by the General Government for specified purposes, a State cannot authorize the construction of an easement over or through them, which will interfere injuriously with such purposes.<sup>3</sup> And as between the authority of a State and a Territory over its own soil, a territorial Legislature has manifestly no right of eminent domain over lands of the United States, because having no power to exercise the functions of an independent sovereignty. Its political designation and its civil administration are both creatures of the General Government, called into being for the common benefit of its inhabitants.

Being always subordinate, therefore, to the authority of the United States, and subject to the will of Congress,

<sup>1</sup> *Gibson v. Chouteau*, 13 Wall. 92; *Irvine v. Marshall*, 20 How. 558; *U. S. v. Gratiot*, 14 Pet. 526; *Wilcox v. Jackson*, 13 Ibid. 498.

<sup>2</sup> *Jourdan v. Barrett*, 4 How. 169.

<sup>3</sup> *U. S. v. R. R. Bridge Co.*, 6 McLean, 517.

the Legislature of a Territory does not possess any concurrent powers with the latter over its own soil.<sup>1</sup> This arises from the fact, that the power over the public lands is vested in Congress by the Constitution without limitation, and is the foundation on which, in turn, territorial governments rest.<sup>2</sup> In the exercise of this power it may either establish a territorial government, delegating all necessary powers to it, or it may govern directly by the passage of laws operating upon the territory.<sup>3</sup> In like manner it may, while annulling acts of a territorial Legislature, validate the results of such acts by securing to parties their property interests in them.<sup>4</sup> The principle was carried much further in the Mormon Church Case,<sup>5</sup> where it was held that Congress had the power to repeal the Act of Incorporation of the Church of Latter Day Saints, both by reason of its general power over the Territories, as well as by a reservation to that effect in the organic Act of the Territory of Utah, and might consequently direct the winding up of its affairs as a defunct corporation, with a view to the *cy pres* appropriation of its property.

#### CEDED PLACES WITHIN STATES.

The functions of the General Government demanding the establishment of *forts, magazines, and dock-yards*, and the erection of *post-offices, court-houses, mints, custom-houses, and other buildings*, in various parts of the United States, the framers of the Constitution made provision accordingly for acquiring the necessary sites. It was contemplated that such places should be purchased either from States or individuals; and as it was

<sup>1</sup> Pratt v. Brown, 3 Wis. 603.

<sup>2</sup> U. S. v. Gratiot, 14 Pet. 526.

<sup>3</sup> Edwards v. Panama, 1 Oregon, 418.

<sup>4</sup> National Bank v. Co. of Yankton, 101 U. S. 129.

<sup>5</sup> Romney v. U. S., 136 U. S. 1.



necessary for their better government that Congress should have exclusive legislation over them, the clause requiring the consent of the Legislature of the State making the cession was introduced, in order to avoid conflicts of jurisdiction. In such cases, it was felt to be absolutely necessary to determine the boundaries between national and municipal sovereignty, as a fact preliminary to the exercise of an exclusive power of legislation. A portion of the territory of a State was to be severed from its municipal allegiance for public purposes, and placed under the exclusive control of the General Government. This was to be accomplished first by *purchase*, coupled with *consent* of the State to such transfer and surrender of its authority over the place.

Under the above provision of the Constitution, a cession of any portion of the territory of a State, made by permission of its Legislature to the United States, is not, like an ordinary purchase, a mere conveyance of the fee in the soil, but a surrender as well of all political authority over the place, the inhabitants of which thereby lose their State citizenship. Nor can the State resume legislative authority over it, without a fresh grant from the United States through an Act of retrocession.<sup>1</sup> In order to complete a cession or retrocession of any lands within a State, there must be a concurrent acceptance on the part of the grantee, otherwise jurisdiction will not vest in the latter. It is usual, therefore, to await the passage of an Act of acceptance with official notice of its intention before making the transfer.<sup>2</sup> But should a State or an individual refuse to sell a portion of its ter-

<sup>1</sup> Act of July 16, 1790, Accepting Dist. of Columbia, 1 Stat. at Large, p. 130; Act of July 9, 1846, Retroceding the County of Alexandria to Virginia, 9 Stat. at Large, p. 35; *Riley v. Lamar et al.*, 2 Cranch, 344; *Mutl. Assur. Soc. v. Watts's Exr.*, 1 Wheat. 279.

<sup>2</sup> *People v. Lent*, 2 Wheeler Cr. Cas. 548.

ritory, which in the opinion of the General Government is needed for public purposes, the same may be appropriated under an Act of Congress, as decided by the Supreme Court in *Kohl v. The United States*.<sup>1</sup>

In ordinary cases, where the purchase is made from a State with the consent of its Legislature, Congress has an undoubted right, if it please, to extinguish all State authority, legislative, executive and judicial over such places, and to exercise within the limits of the district acquired, not only national, but municipal authority as completely as any State can, within its own limits. In other words the authority of Congress becomes substituted for that of the State.<sup>2</sup> Even a reservation, in an Act of Cession by a State Legislature of lands to the United States of concurrent jurisdiction for the service of State process, is simply a condition of the grant and does not impair the exclusive jurisdiction of the United States under the Act of 1790.<sup>3</sup> For while State process may be served upon individuals within the ceded district for civil obligations incurred, or penal laws violated outside of it, no State laws can be violated within it, and no breaches of them punished in State Courts.<sup>4</sup>

Where such land is purchased within a State for public purposes, but without the consent of the Legislature, the authority of the latter is not superseded, nor its jurisdiction ousted. In such instances as these, the purchase being from an individual, the General Government takes only as an individual grantee subject to the jurisdiction of the State over such premises.<sup>5</sup> Hence the necessity of a ratification by the Legislature of the State, in all cases

<sup>1</sup> 91 U. S. 367.

<sup>2</sup> *Comm. v. Young*, Brightly N. P. 302.

<sup>3</sup> U. S. *v. Davis*, 5 Mason, 356; *Mitchell v. Tibbitts*, 34 Mass. 298; U. S. *v. Travers*, 2 Wheeler's Cr. Cas. 490.

<sup>4</sup> *Comm. v. Clary*, 8, Mass. 72; U. S. *v. Davis*, 5 Mason, 356; *People v. Godfrey*, 17 Johns. 225; U. S. *v. Ames*, 1 Woodb. & M. C. C. 76.

<sup>5</sup> U. S. *v. Cornell*, 2 Mason, 60.

of cession whether by the State or individuals, in order to vest full sovereignty in the United States, where the purchase is with a view to exclude jurisdiction.

The only places over which exclusive jurisdiction is granted to Congress under this Article, are those which have been purchased by the United States for some of the purposes specified in the Constitution, and this grant of exclusive power does not in consequence extend to a place or tract of land which is merely rented for a temporary purpose.<sup>1</sup> The jurisdiction over such rented territory being only temporary, and not exclusive, the consent of the State is not necessary to re-vest jurisdiction, when the General Government has terminated its occupancy. And Congress may relinquish its jurisdiction over it without at the same time abandoning the use of the property, because such jurisdiction is not an original power, but only an acquired one.<sup>2</sup>

#### POWER TO PROPOSE AMENDMENTS TO THE CONSTITUTION.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof as the one, or the other mode of ratification may be proposed by the Congress. Provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall, in any manner, affect the first and fourth clauses in the

<sup>1</sup> *U. S. v. Tierney*, 1 Bond, 571.

<sup>2</sup> *Renner v. Bennett*, 21 Ohio St. 431.

ninth section of the first Article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

The first ten amendments to the Constitution were proposed by Congress on September 25, 1789, and were declared ratified and in force on December 15, 1791. They were intended as so many restraints upon the National Government, and were accepted by the States as a Bill of Rights, guaranteeing freedom of religion, speech, person and property against encroachments by Congress. Several States had withheld their ratification of the Constitution, until tacitly assured that these amendments would be proposed by the first Congress.

The Eleventh Amendment was proposed by Congress on March 5, 1794, and declared to be in force on January 8, 1798. It was intended to protect States from suits brought against them by citizens of other States in the Supreme Court.<sup>1</sup>

The Twelfth Amendment was proposed by Congress on December 12, 1803, and declared to be in force September 25, 1804.

The Thirteenth Amendment was proposed by Congress on February 1, 1865, and declared to be in force December 18, 1865.

The Fourteenth Amendment was proposed by Congress on June 16, 1866, and declared to be in force July 28, 1868.

The Fifteenth Amendment was proposed by Congress on February 26, 1869, and declared to be in force March 30, 1870.

These Amendments were all proposed to the Legislatures of the various States, and not to Conventions of the States.

<sup>1</sup> Oswald *v.* State of New York, 2 Dallas, 415; Chisholm's Ex's *v.* State of Georgia, 2 Dall. 419; Hollingsworth *v.* Virginia, 3 Ibid. 378; Peters's Digest "*Suability of States.*"

## CONCURRENT POWERS WITH THE STATES.

“To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.”

The Constitution of the United States down to the adoption of its Fourteenth Amendment contained no definition of the term “citizen.” During the preceding eighty years of its existence, citizenship of the United States, as the primary and overshadowing citizenship of the country, did not apply to the colored race. In some form or other, whether excluding them from service on a jury, in the militia, or as enlisted men in the regular army; or being required to possess a certain amount of property as a qualification to vote, colored persons even in the non-slaveholding States, were very generally placed in the category of inferior citizens, with an inchoate political status. Nor was this deemed any violation of their fundamental rights.

Although admitted to citizenship in some States, they could not claim the privileges and immunities of citizens in the several States under Article Fourth of the Constitution. And, because persons of African descent were held as slaves in some of them, the taint of this descent excluded all members of that race from the privileges of citizens of the United States. This discrimination on the basis of servitude had been acquiesced in as a necessary result of the status of Slavery in the Constitution. For notwithstanding the fact that the word Slave does not occur in it, nor the words “colored person,” yet it was notorious throughout the country that only colored persons, meaning persons of African descent, were held, or could be held in slavery. Hence in the Slave States, a white person if enslaved could claim his freedom as a

member of the Caucasian race, and on the basis simply of his white blood.<sup>1</sup>

The Fourteenth Amendment, by defining the qualifications necessary to constitute a citizen of the United States, by prohibiting the passage by any State of a law abridging his privileges or immunities, or depriving him of life, liberty or property without due process of law; or denying him the equal protection of the laws, at once imparted to the emancipated colored race within its jurisdiction, the benefits of this primary citizenship.

But even this was not found sufficient to protect it against discriminating statutes in some of the former slave States. Whereupon the Fifteenth Amendment was adopted, reciting by distinct enumeration the former obstacles to citizenship in the form of "race, color and previous condition of servitude," and prohibiting their recognition in any test of the right of such citizens to vote. These three amendments may be said to have completed the universal naturalization of the negro race in the United States, and to have secured their political enfranchisement in every portion thereof.

Indians, although the most aboriginal of our inhabitants, being both born and many of them residing in some State, are not within the operations of these amendments. The maintenance of their tribal organization and self-government, constitutes them independent, sovereign communities, and as such they can neither be accorded the rights of citizens, nor made to bear their responsibilities. But any Indian may withdraw or expatriate himself from his tribe, and become naturalized as any other adopted citizen, by submitting himself to the necessary forms of law.<sup>2</sup>

<sup>1</sup> *Sally Miller v. Belmonti*, 11 Rob. (La.) 339; *Rawlings v. Boston*, 3 Har. & M. (Md.) 139; *Guilford v. Hicks*, 36 Ala. 95.

<sup>2</sup> *Dred Scott v. Sandford*, 19 How. 393.

From the former anomalous position occupied by both Indians and negroes in the United States, it will be seen, that until the adoption of the last three amendments, Federal or primary citizenship existed only in an international sense, the flag of the country covering all its inhabitants alike;<sup>1</sup> while for domestic purposes, or those of inter-state intercourse, Federal citizenship was limited to the white race alone. The propriety therefore of vesting the exclusive power of establishing a uniform rule of naturalization in Congress will at once appear. Otherwise, the States might have made as vexatious discriminations in matters of suffrage against the white race, as against the black, and the emigration of foreigners would have been seriously discouraged.

Moreover, at the adoption of the Constitution, the early eradication of slavery and immediate political enfranchisement of the colored race were events not dreamed of, nor, but for the Civil War would they have occurred; so that the power over naturalization granted to Congress was, by the well understood meaning of the word, intended to be confined alone to persons born in a foreign country, and subjects of a foreign government. And since the primary object of naturalization is to make citizens out of foreigners, by having them renounce their allegiance to the government of which they were born subjects, it would seem to be a solecism to speak of naturalizing a negro or an Indian in the United States, both which had been born and were living within its jurisdiction *in statu pupillari*.<sup>2</sup>

Since the passage of these amendments, therefore,

<sup>1</sup> See letter of J. Adams to Lord Carmarthen, of Sept. 22, 1789, complaining of the impressment of American seamen, including a negro slave, in violation of our flag. Works, vol. 8, p. 453.

<sup>2</sup> U. S. v. Rhodes, 1 Abb. C. C. 281.

Congress may, by appropriate legislation, confer certain rights of American citizenship upon entire classes of persons.<sup>1</sup> The States, however, still retain the right of prescribing conditions and annexing limitations to the exercise of the elective franchise by their citizens. State suffrage, being a state franchise, may be made the subject of any regulations which do not abridge the fundamental rights or privileges of citizens of the United States. Within these limits, and the prohibitions recited in the Fifteenth Amendment, the States may establish such qualifications for electors in their Constitutions as they may deem best. Hence States may so enlarge the right of suffrage as to give it to persons who being aliens, have merely declared their intention of becoming citizens.

In this grant of a political privilege the authority of the States follows the action of Congress, in respect to the treatment of aliens.<sup>2</sup> Not being citizens of the United States by reason of not having completed the period of political apprenticeship prescribed by Congress, they cannot claim the full privileges of citizens of the United States. But the States, though they can not abridge an initiate right, may still enlarge an inchoate one, by permitting aliens to vote, to hold real estate and to convey the same. By such action the States undoubtedly may, and do in a certain sense naturalize aliens, by fiction of law. But their true naturalization can come only from that sovereignty to whom they have sworn allegiance, that is to say from the government of the United States. The conferring of State privileges upon them does not *per se* constitute naturalization, because the first step in this process is to conform to the rules laid down by Congress for the

<sup>1</sup> *People v. Washington*, 36 Cal. 658.

<sup>2</sup> *Hauenstein v. Lynham*, 100 U. S. 483.



government of the States. There is, in consequence, no shorter road than this to citizenship of the United States. Anything less, is a mere grant of State privileges which expires at the boundaries of its jurisdiction.

Congress may also designate the particular Courts that shall be empowered to naturalize, but no State can confer such power upon any Court which does not come within the provisions of the Act of Congress.<sup>1</sup> And no State in turn can be compelled to enforce the provisions of a system of naturalization enacted by Congress. It may therefore prohibit its Courts from exercising any functions of naturalization, since there is no power given to Congress to compel the assistance of the States in this particular.<sup>2</sup>

#### UNIFORM LAWS ON THE SUBJECT OF BANKRUPTCIES.

Bankruptcy laws in England were originally intended for the benefit of creditors, and as a protection against fraudulent debtors. They have gradually changed their character with the enlarged experience born of more expanded commercial relations. The financial history of every country shows that the development of credit as a basis for trade, tends at times to over inflation. Under such circumstances, a sudden call to meet outstanding obligations may bring accidental misfortune upon the most honest traders, without any fault on their part. In order to relieve their distresses, and to enable them to resume business, the parental authority of the State is exercised in their behalf, by interposing bankruptcy or insolvency proceedings as a judicial barrier between them and their

<sup>1</sup> *Ex parte* Carl Wehlitz, 16 Wis. 443; *Lauz v. Randall*, 3 Cent. L. J. 688; *Comm. v. Towles*, 5 Leigh, 743; *Ex parte* Frank Knowles, 5 Cal. 300; *State v. Whitmore*, 50 N. H. 245.

<sup>2</sup> *Ex parte* Beavins, 33 N. H. 89; *Ex parte* Alexander Stephens, 70 Mass. 559; U. S. Rev. Stat. § 2165.

creditors. In the United States, bankruptcy or State insolvent laws have always been laws for the benefit of debtors, and they have gradually assumed this equitable character in the older countries, where experience has shown the facility with which the most sagacious traders have, at times, become mechanically entangled in the resulting losses of a financial convulsion, without having done the remotest act towards its production.

As one of the instruments for regulating commerce between the States, the power of prescribing uniform laws on the subject of bankruptcy falls very naturally within the jurisdiction of Congress. Such laws do not materially differ from State insolvent laws, nor at times is it easy to discriminate between them. They may each contain the same regulations, and produce the same results upon the obligations of the debtor. The only difference would be in the jurisdictional extent of those results.

Thus, a State insolvent law cannot *proprio vigore* operate to extinguish debts outside of its boundaries;<sup>1</sup> while a bankruptcy Act of Congress would be operative everywhere in the United States. The terms bankruptcy and insolvent laws being now synonymous, the former is accordingly applied to Federal Statutes only, the latter to those of a State. A citizen may be an insolvent in one State, who is not so in another. But a bankrupt implies one who is everywhere insolvent and discharged from the duty of paying his past obligations.<sup>2</sup> Inasmuch, also, as States can pass no laws impairing the obligation of contracts, their insolvent laws can act only upon the remedy, and not upon the contract, for the

<sup>1</sup> *Sturges v. Crowninshield*, 4 Wheat. 122; *Gilman v. Lockwood*, 4 Wall. 419; *Cook v. Moffat*, 5 How. 295.

<sup>2</sup> *Kunzler v. Kohaus*, 5 Hill, 317; *Morse v. Hovey*, 1 Barb. Ch. 404; *Sackett v. Andross*, 5 Hill, 327.

right to reach the debtor's property, including future acquisitions, is part of the contract, and therefore by them inextinguishable.

It is for these reasons that there has been a periodical demand for the more sweeping relief of a general bankrupt law, according as financial embarrassments have spread over the country. Responding to these demands Congress has passed five several bankruptcy Acts, viz., that of April 4, 1800; December 19, 1803; August 19, 1841; March 2, 1867, and June 22, 1874. These Acts having accomplished their purpose were either repealed, or expired by limitation of time. During their pendency they superseded all State insolvent laws then in operation. The States therefore have the same power, as always, of legislating on the subject of bankruptcy and insolvency, subject nevertheless to the superior authority of Congress to establish a uniform system for the country.

The relations of Congress to the States, in this field of concurrent jurisdiction, may be summarized as follows, viz:—

1st. That when Congress legislates, it does so with a plenary power over the subject of bankruptcies, save only the condition that its laws shall be uniform throughout the United States.<sup>1</sup>

2d. The power of Congress extends to all cases where the law causes to be distributed the property of the debtor among his creditors; or a discharge of the debtor from his contracts. And all intermediate legislation affecting substance and form, but tending to ultimate distribution and discharge, are included in this power. Uniformity consists in everywhere giving to the assignee

<sup>1</sup> Matter of Reiman, 12 Blatchf. 562; *In re Klein*, 1 How. 277; *Kittredge v. Warren*, 14 N. H. 509; *Day v. Bardwell*, 97 Mass. 246.

the right to whatever property might have been reached by execution creditors, if no bankruptcy law existed.<sup>1</sup>

3d. The benefits of this power are not limited to "traders" or any particular class of persons, but apply equally to all who are unable to pay their debts.<sup>2</sup>

4th. Congress may establish a system of voluntary, as well as involuntary bankruptcy. For, although the former seems more for the benefit of the debtor, in allowing him to select his time and opportunity, still the end accomplished by both systems is similar in the results of distribution and discharge.<sup>3</sup>

5th. The power thus given to Congress authorizes it to make that power efficient unto the end, even to the impairment of the obligation of contracts. Hence it may authorize the discharge of a debtor from contracts existing when the law was passed.<sup>4</sup> And it may enact a law that will annul an assignment that was valid under State laws;<sup>5</sup> or prescribe what kinds, or portions of a debtor's property shall be exempt from the claims of his creditors, all these acts being in furtherance of the remedial intent of bankruptcy proceedings.

6th. That the power of Congress over bankruptcies being discretionary, it may exercise the same according as to it may seem best. A bankrupt law may therefore contain those regulations generally found in insolvent laws, or *vice versa*. But the repeal of such a law confers no new power upon the States. They simply resume

<sup>1</sup> *In re Silverman*, 1 Saw. 410; *In re Irwine*, 1 Pa. L. J. 291; *In re Klein*, 1 How. 277; *In re Beckerford*, 1 Dillon, 45.

<sup>2</sup> *Kunzler v. Kohans*, 5 Hill, 317.

<sup>3</sup> *Thompson v. Alger*, 53 Mass. 428; *Loud v. Pierce*, 25 Me. 233; *McCormick v. Pickering*, 4 N. Y. 276; *Dresser v. Brooks*, 3 Barb. 429; *Cutter v. Folsom*, 17 N. H. 139.

<sup>4</sup> *Russell v. Cheatham*, 16 Miss. 703; *Loud v. Pierce*, 25 Me. 233.

<sup>5</sup> *In re Brennehan*, *Crabbe*, D. C. 456.

that exercise of it which was suspended by the action of Congress.<sup>1</sup>

7th. That the object of a general bankrupt law is to discharge a debtor everywhere in the United States from his past obligations, and to exempt his future acquisitions from the effects of those obligations. It suspends the power of State action upon the same objects, by combining in itself the properties of both a bankrupt and an insolvent law.<sup>2</sup>

TO PROVIDE FOR THE PUNISHMENT OF COUNTERFEITING  
THE SECURITIES AND CURRENT COIN OF THE UNITED  
STATES.

The right to punish counterfeiting would seem to be the necessary concomitant of the power to coin money. But this right would be incomplete, without the further power of punishing the passing of counterfeit money. The crime of passing counterfeit money is both a private and a public wrong. Its evil consists not in the mere imitation by manufacture of a national coin, but in the fraudulent intention of imposing it upon others as current money, and a legal tender in discharge of a debt, or in exchange for valid currency. No government can permit the circulation of any other money than that which bears the stamp of its approval. Hence, for the greater assurance of protection to the authenticity of a currency, the simple imitation of it by manufacture, even without subsequent attempt to introduce it into circulation, is, in all civilized countries, declared to be a crime.

In England a distinction was formerly established

<sup>1</sup> *Sturges v. Crowninshield*, 4 Wheat. 410; *Blanchard v. Russell*, 13 Mass. 1; *Adams v. Storey*, 1 Paine, 79.

<sup>2</sup> *Martin v. Berry*, 37 Cal. 208; *Van Nostrand v. Carr*, 30 Md. 128.

between the two offences. Counterfeiting was made high treason by 25 Edw. 3, c. z. ; whereas by the same statute uttering false money was only made a felony.<sup>1</sup> In the United States, the several Acts of Congress punishing these offences make no distinction between them, either as to degree or punishment.<sup>2</sup> And this power not being exclusively vested in Congress, like the power of coining money, may be concurrently exercised by the States.<sup>3</sup> The reason for allowing this authority to them, arises from the fact that counterfeiting is a crime against the property of their citizens and should be punished as such. This principle has governed legislation very generally, and many, if not all the States have statutes punishing the counterfeiting of the coin of the United States or passing it; while the same offence is punishable by Act of Congress. Either jurisdiction may therefore attack the criminal, and exhaust its powers in respect to his punishment.

The ground upon which the State's action may be based is, that the passing of counterfeit money is a private wrong done to a citizen of the State, which it may punish under its police powers. The ground upon which the General Government may act is based upon the power given to Congress by the Constitution. And in this concurrence of jurisdictions, it seems doubtful whether a conviction or acquittal in a State Court could be pleaded in bar of a prosecution in a Federal Court. Practically considered, the punishment of persons engaged in counterfeiting is rarely undertaken by State authorities, the vigilance of the General Government being unrelaxed in ferreting out and prosecuting such

<sup>1</sup> 1 Hawkins P. C. 20.

<sup>2</sup> U. S. Rev. Stat. § 5457.

<sup>3</sup> *Fox v. Ohio*, 5 How. 410; *U. S. v. Marigold*, 9 Ibid. 560; *Jett v. Comm.*, 18 Gratt. 933; *Moore v. People*, 14 How. 13; *Harlan v. People*, 1 Doug. (Mich.) 207.

offenders. It is otherwise with the mere passing of spurious money which is a fraud practised upon a citizen of a State, and properly punishable by its tribunals.<sup>1</sup>

#### CONCURRENT POWER OVER THE MILITIA.

It has been seen that Congress, under the power of organizing, arming and disciplining the militia, has a concurrent authority with the States over their militia. This power is a latent one, to be exercised only when such troops are mustered into the service of the United States. It may also make rules for their government, which rules for the time being will supersede any State regulations upon the same subject. The militia at such times form part of the army of the United States; may be commanded by a superior officer of the regular army, and are amenable to the provisions of the military code prescribed for its government. Being in the public service, they are excluded from the benefits of the Bill of Rights in respect to trial by jury. But on their way to a government post, and until mustered into its service they are still under the authority of their own officers, and of the laws of the States.<sup>2</sup>

#### CONCURRENT POWER WITH THE STATES OVER ELECTIONS OF MEMBERS OF THE HOUSE OF REPRESENTATIVES.

The right of every elector in the United States to vote, and to have that vote counted under the laws of the State of which he is a resident, is the corner-stone of our frame of government. It is a proposition, how-

<sup>1</sup> U. S. v. Marigold, 9 How. 560; State v. Antonio, 2 Tread. 776; People v. White, 34 Cal. 183; Sizemore v. State, 3 Head, 26; State v. Brown, 2 Oregon, 221; State v. Randall, 2 Aik. 89; U. S. v. Arjona, 120 U. S. 479.

<sup>2</sup> Mills v. Martin, 19 Johns. 7. See *ante*, "War Powers of Congress."

ever, which embodies qualifications both national and local; the first relating either to birth or naturalization, the second to residence within some State. The United States, although the sovereign authority over all, have no electors of their own creation within the States.<sup>1</sup> This arises from the fact that the Constitution has not conferred the right of suffrage upon any one. The right to vote in a State has always come from the State. It is a local franchise which in the days of slavery was denied to slaves. They were not deemed citizens for domestic or inter-state purposes, and not entitled to any of their privileges and immunities. Nevertheless, in establishing the basis of representation they were counted as part of the population.

The Thirteenth Amendment, while it abolished slavery throughout the United States, did not impart any higher legal status to the emancipated slaves than that of freemen. They were placed on the same footing as women and children, lunatics, paupers, and criminals. Though legally enfranchised, they were not politically naturalized and admitted into the ranks of electors. Their position was similar to that of provincial Romans dwelling in the capital, but not admitted to the highest municipal privileges of citizenship. Until the adoption of the Fourteenth and Fifteenth Amendments, the emancipated slave had no political status whatever. He was neither a citizen nor yet an alien, though a native, and the State might have completed its disfranchisement of him, for it alone at that time could create him a *citizen*.

Strange as it may seem, this word had not yet been defined in the Constitution, and each State was at liberty to impart to it by statute, or otherwise, whatever meaning its Legislature or tribunals might choose to affix.



This was so apparent to all, and the consequences likely to follow were so well calculated to nullify the benefits and political advantages that should accompany emancipation, that a joint committee of both Houses was appointed to propose measures for perfecting the purposes of this amendment. Without entering into any detailed history of the course pursued by them, it will be sufficient to say that both the Fourteenth and Fifteenth Amendments were deemed necessary to be added to the Constitution, in order to carry out the one continuing purpose of bestowing full citizenship upon the colored race in the United States.

The Fourteenth Amendment defined citizenship of the United States, by prescribing the qualifications necessary to its enjoyment. It also guaranteed the equal protection of the laws to all citizens, by prohibiting any abridgment of their privileges and immunities by the States. It was followed by the Fifteenth, which completed the work of political rehabilitation. Still, this amendment does not *per se* confer the right of suffrage, but it invests all citizens of the United States with the right of exemption from any discrimination in the enjoyment of the right to vote, founded upon race, color, or previous condition of servitude; and it further empowers Congress to enforce this right by appropriate legislation.<sup>1</sup> This is in entire harmony with the pervading spirit and intent of the Constitution, which in all parts seeks to erect barriers against discrimination between individuals and States, whether in commerce, navigation, personal liberty, taxation, or suffrage.

It is upon the Fifteenth Amendment mainly, that rests the power of Congress to legislate upon the subject of voting at State elections, although under section 4 of Ar-

<sup>1</sup> R. S. Tit. lxx., Sects. 2007, 2008, 5506, 5507, 5519; *Ex parte Siebold*, 100 U. S. 371; *U. S. v. Harris*, 106 *Ibid.* 629.

ticle I., it is empowered to make or alter any State regulations relating thereto, except as to the place of choosing Senators. This power under the Fifteenth Amendment is a suppletory one. It was intended for a specific purpose, and can be exercised only in behalf of wrongs inflicted upon citizens because of their race, color, or previous condition of servitude. This was the purpose plainly contemplated by the Act of May 31, 1870.<sup>1</sup> There being no common law of the United States in the sense of a territorial municipal law, it was necessary that Congress should declare certain offences committed against colored voters to be crimes, in order to create certain jural rights of protection against them, and in order to empower the Federal courts to treat them as such.<sup>2</sup> This *Enforcement Act* having been sustained by the Supreme Court as within the powers of Congress, and not repugnant to the Constitution, in *Ex parte Siebold*<sup>3</sup> and in *Ex parte Clark*,<sup>4</sup> forms part of the "appropriate legislation" belonging to these two amendments.

It is needless to say that this constitutional power being paramount in authority supersedes that of the States. Yet both may co-operate in carrying out their several powers in the matter of the election of representatives. The Constitution itself does not prescribe the measure of duty which each shall perform—whether the State shall first wholly exhaust its powers, or the National Government in making regulations.<sup>5</sup> "If Congress does not interfere," says Mr. Justice Bradley in *Ex parte Siebold*, "of course they may be wholly made by the State; but if it chooses to interfere, there is nothing in the words to prevent it doing so either wholly or par-

<sup>1</sup> 16 Stat. at Large, 140; *U. S. v. Reese et al.*, 92 U. S. 214; *U. S. v. Amsden*, 6 Fed. Rep. 819.

<sup>2</sup> *U. S. v. Hudson*, 7 Cranch, 32.

<sup>3</sup> 100 U. S. 371.

<sup>4</sup> *Ibid.* 399; *U. S. v. Gale*, 109 U. S. 65.

<sup>5</sup> Art. I., § 4.

tially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, general organization of the polls to States, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence, for the power of Congress over the subject is paramount. It may be exercised as, and when, Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the States, necessarily supersedes them."

And in the execution of these powers it is manifest that at times physical force may be necessary to compel obedience to the laws. A government without the means of keeping the peace, or of arresting and punishing those who trample upon its ordinances would be no government at all. The introduction into these Election bills of elements of physical force, due to the presence of deputy marshals, are the result of that same experience of intimidation and violence addressed to voters when unprotected by State laws, which calls for the presence and superintending care of the national government. Its right to employ force in the defence of the privileges of State citizenship would seem to be no longer doubtful, when the Supreme Court in a solemn judgment has said that "In the light of recent history, and of the violence, fraud, corruption and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power if it exists, may be necessary to the stability of our frame of government."<sup>1</sup>

Federal election laws are the last of that series of

<sup>1</sup> 100 U. S. 382; Matter of Engle, 1 Hughes, 592.

acts of "appropriate legislation" which Congress is empowered to pass, under the Thirteenth, Fourteenth, and Fifteenth Amendments. They are the offspring of local necessities created by the operation of these changes in the Constitution. The conventional will of the people having declared itself in favor of the bestowal of the right of suffrage upon the colored race in the United States, the duty was thence devolved upon both the States and the National Government to carry that will into effective operation. These election laws arise, therefore, out of the obligation of the United States to perform their share of this duty, by securing to qualified citizens within the States the benefits of the electoral franchise, wherever denied to them.

Citizenship in the United States, carrying with it both jural rights and political enfranchisement, admits at present of no race boundaries within the Union. It means in fact, as it means in law, the right to exercise, as well as to possess the qualifications of an elector. When once this status is reached, the person is clothed with all the attributes of a perfect citizen. He can register, he can vote, and he can hold office; and it is made the duty of every State, under its republican form of government, to appoint times and places for holding elections, and furnishing him with an opportunity to elect officers of his own choice. If it cannot, or if it will not through its laws, afford to every citizen an equal opportunity with every other citizen to cast his ballot and to have it fairly counted; if it cannot, or if it will not protect him against violence or intimidation at the polls or on his way to them; if it cannot, or if it will not protect the ballot-box, which is the constitutional instrument for declaring the electoral will of the people, against fraudulent interference with its contents; if it cannot, or if it will not enforce an honest

discharge of duty on the part of its own election officers, thus leaving its legislation hostile or incompetent towards securing a free ballot and a just count, then it is made the duty of the National Government to intervene in behalf of these liberties of the people, and by such intervention, to supersede with its own regulations those of the incompetent State. The language of the Supreme Court upon this point, emphatically affirms the doctrine that the United States, in placing a ballot in the hands of a citizen, guarantee him against all interference with its just use.<sup>1</sup>

#### SUPPLEMENTARY AND CORRECTIVE POWERS.

“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.”

A written Constitution, in a Republic, is a charter from the people distributing certain powers of government among its departments, and defining the boundaries of legislative, judicial and executive authority within which the civil rights of citizens are to be protected against invasion, or redressed by guarantees of indemnity. Such an instrument, from its very nature, can only contain outlines of those important powers which represent just so many delegations of the exercise of sovereignty. Necessarily, therefore, it must leave the details

<sup>1</sup> “The principle, however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general, as to the right to be protected against discrimination. The exercise of the right in both instances is guaranteed by the Constitution, and should be kept free and pure by Congressional enactments whenever that is necessary.” Per Miller, J., in *Ex parte Yarbrough*, 110 U. S. 651.

of their application, in respect both to extent and to objects, to be provided for according as the emergency may arise. This has been the experience of every form of government whether administered under a rigid or a flexible Constitution. No one understood this better than the great expounder of our own, C. J. Marshall, who, in the case of *McCullough v. the State of Maryland*,<sup>1</sup> used the following significant language: "A constitution, to contain accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public."

Having carefully considered these things, the members of the Convention desirous, within the limits of a rigid constitution, to give efficacy to the exercise of powers which though enumerated were not intended to be exclusive, inserted the above provision as a means for carrying out the purposes of that instrument. Under the well established principle that every grant of power carries with it the implied right of employing the necessary means to enforce it, this clause justifies the conclusion that it was intended to bestow *incidental* and *reserved* powers upon Congress. The inference is a fair one from the fact that there is nothing in the Constitution which forbids it, while on the other hand, if only powers expressly granted could be used, the particular powers necessary for carrying the greater powers into successful operation would be wanting, and the objects for which these powers were created would be wholly

<sup>1</sup> 4 Wheat. 316.

"In construing the Constitution of the United States that doctrine that what is implied is as much a part of the instrument as what is expressed is a necessity by reason of the inherent inability to put all derivative powers into words." *Ex parte Yarbrough*, 110 U. S. 651.

frustrated. The functions of government would be thereby exposed to the hazards of interruption and defeat, through the exhaustion of a power which though competent to initiate a proceeding, or to pass a law, would lack the supplemental power to complete or enforce it. Such a government would live perpetually in fetters.

“Had the Convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect,” says the Federalist, “the attempt would have involved a complete digest of laws on every subject to which the Constitution relates.”<sup>1</sup> Although, therefore, the practical necessities of government would have required that such non-enumerated powers should result to the United States by unavoidable implication, still, the insertion of this clause into the Constitution was most fortunate. However viewed, it shows that its framers intended to relieve any excess of rigidity in its terms, by a permanent elasticity in the reserved powers it contained, sufficient to enable them to meet all future contingencies. These powers were found equal to the demands of a civil war, and the equally complicated problems of State re-construction. It would seem then, from the tests to which it has been subjected, that there is in the Constitution a capacity for growth, which silently changes the old contour of its powers, and without destroying their barriers, moves them steadily on to keep pace with the demands of our expanding civilization.

The evident purpose of the above clause was to give suppletory power to Congress, so as to enable it to legislate without restriction wherever a general power was given it under the Constitution. The problem of powers in government always presents the two aspects

<sup>1</sup> No. XLIV.

of powers inherent and powers acquired. The former need no enumeration, because they are inseparable from the right to govern. The latter, though enumerated, do not however exclude the former, which are always latent and reserved. Each may be supplementary to the other at times. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional."<sup>1</sup> Such is the language of the Supreme Court in the case just cited.

In relation to the sense in which the word "necessary" should be construed, the authorities do not favor the idea of imparting to it an extreme or superlative meaning. On the contrary, that meaning is to be gathered from all the circumstances which surround the case. It is a question for the political rather than the judicial department to decide, since it involves comparisons of facts, and not of principles of law. The word should be interpreted therefore in a comprehensive sense and as indicating something needful and requisite, without being at the same time indispensable or absolutely essential.<sup>2</sup>

The Federal and State governments being each supreme within the sphere of their respective powers, the former was not intended to be dependent upon the latter for the execution of any of those bestowed upon it. Whatever those powers may be, the manner of employing them has been left to the wisdom of Congress as a matter of discretion. Undoubtedly, as changes occur

<sup>1</sup> *McCulloch v. State of Maryland*, 4 Wheat. 316; *U. S. v. Marigold*, 9 How. 560; *U. S. v. Fisher*, 2 Cranch, 358; *Dickey v. Turnpike Co.*, 7 Dana, 119.

<sup>2</sup> *Comm. v. Morrison*, 2 A. K. Marsh. 75; *Comm. v. Lewis*, 6 Binn. 266.



in the circumstances of the country, either by additions to its territory or population, by more extensive developments of its foreign and inter-state commerce, by the introduction of new methods of transportation and of new instruments of communication, there will have to be found within the Constitution powers adequate to move and to direct the legislation of the day. Nor, because things are happening that were undreamed of in the philosophy of the past, and for which no organic rule could be made by anticipation, are we to distrust and question the right of the present to so construe that instrument as to make it accomplish the recognized objects of its framers? The test of a fair construction is to be sought, not alone in the history or judgment of the past upon its provisions, but in their adaptation to the facts of the day as means to an end.<sup>1</sup>

Under such interpretation of the scope of its "incidental" powers, it has been held that Congress may make or authorize contracts with individuals, or corporations for services to the government; may grant aids by money or land in preparation for, and in the performance of such services, and may make any stipulation and conditions in relation to such aids, not contrary to the Constitution, and may exempt, in its discretion, the agencies employed in such services from any State taxation, which will really prevent or impede the performance of them. But when Congress has not interposed to protect such property from State taxation, such taxation cannot be interfered with, because the power to tax property and persons is original in the States, and has never been surrendered.<sup>2</sup> In like manner Congress may employ all appropriate means for collecting and disburs-

<sup>1</sup> *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400; *Central Bank v. Prate*, 115 Mass. 439.

<sup>2</sup> *Thomson v. Pacific R. R.*, 9 Wall. 579.

ing the revenue;<sup>1</sup> may make treasury notes a legal tender,<sup>2</sup> and may make the United States a preferred creditor of the estate of an insolvent collector.<sup>3</sup>

The power of creating corporations also belongs to it, not as an original one, but simply as a means to an end, and its use is only justifiable, when necessary for the execution of some substantive power affecting the public interests. It may therefore incorporate a national bank—or authorize the formation of national banking associations, over neither of which can the States exercise any control, except so far as Congress may authorize it.<sup>4</sup> Such institutions being government agencies are under its control, and it may prescribe penalties to be incurred for taking usurious interest.

As part of its incidental powers Congress may create, define, and provide for the punishment of crimes against the United States, although the Constitution specifically designates only piracies and felonies on the high seas, and offences against the law of nations.<sup>5</sup> Its right to punish counterfeiting, mail-robbery, stealing, or falsifying a record or process of a Federal Court, or committing perjury, etc., is founded upon its incidental power to employ the necessary means to execute some one of the original powers with which these crimes interfere. Moreover, the right to inflict punishment being an inherent right of sovereignty, may be exercised as an incidental power to the right to govern. Inasmuch as a law without a sanction would be only precatory, so a government without the power to punish would be incapable of enforcing its commands.

<sup>1</sup> *Murray v. Hoboken Co.*, 18 How. 272.

<sup>2</sup> *Legal Tender Cases*, 12 Wall. 457.

<sup>3</sup> *Comm. v. Lewis*, 6 Binn. 266.

<sup>4</sup> *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29; *Veazie Bank v. Fenno*, 8 Wall. 533; *Nat. Currency Acts*, 11 Op. Atty.-Gen. 334.

<sup>5</sup> *U. S. v. Marigold*, 9 How. 560; *U. S. v. Worrall*, 2 Dall. 384.

Now, also, that it has been decided that there "is a peace of the United States" distinct from the peace of any particular State in which a breach of the same may occur, an opportunity is furnished Congress for declaring certain offences committed against either Federal officers, or in particular localities, to be specific crimes against "the peace and dignity of the United States." The General Government, within the extent of its Federal jurisdiction, must be assumed to possess plenary authority to protect its officers, or certain places where its functions are discharged, against violence or disorder. Its authority cannot be confined alone to the District of Columbia, to its Territories, or ceded places. Its right of primary sovereignty over the entire domain of the nation must remain unquestioned, and as a logical consequence it may, in the language of Mr. Justice Miller, "execute on every foot of American soil the powers and functions that belong to it."<sup>1</sup>

That Congress, under the obligations created by treaty stipulations with foreign powers, may legislate for the protection of their subjects domiciled as alien residents in the United States cannot be doubted.<sup>2</sup> And under the supreme powers granted to it for international purposes, it may accord to such aliens residing in any of the States, whatever civil or political privileges fall within the scope of these powers. But neither the General Government nor the States can so interfere with the jurisdictional powers of each other in respect to such aliens, as to enlarge or modify their personal relations to these concurrent jurisdictions. In either case, the extent of the privileges granted is to be determined by the power under which the grant is made.

<sup>1</sup> *In re Naegle*, 135 U. S. Co.

<sup>2</sup> *Baldwin v. Franks*, 120 U. S. 678; *Hauenstien v. Lynham*, 100 U. S. 483.

The treaty-making power of Congress is plenary in an international sense, and in a municipal sense the treaties made by the United States, while they remain in force, are part of the supreme law of the land. This treaty-making power having been surrendered by the States and given to the United States, its contractual obligations, under treaties, are as binding upon States as they are throughout the dominion of the United States. Aliens entering the country under treaty stipulations guaranteeing them protection, or any special rights, privileges, immunities, or exemptions, enter only as wards of the United States, and are not entitled to any better protection, or any greater privileges, or immunities than that power can bestow upon its own citizens. But being within the peace of the United States, its right to punish wrongs inflicted upon such aliens is unquestionable, and distinct in extent.

Congress may, therefore, treat such wrongs as "offences against the law of nations," and under its constitutional powers may designate them as specific crimes against the peace and dignity of the United States, in its capacity of guardian to the treaty rights of such aliens. Its contract with a foreign power calls for good faith in the execution of all its stipulations. Unless it is able to do this, it is unable to fulfil its treaty obligations as a sovereign government within its own dominion. But it must be borne in mind that, in granting political or civil privileges to aliens in the United States, Congress legislates only in a municipal sense, and always within the limits of the powers reserved under the Constitution to the States.

The protection of aliens in the United States, whether entering the country as travellers and transient visitors, or coming to reside as merchants, traders or laborers, is a duty due to humanity, as well as a principle of

international law universally recognized by civilized nations. It creates obligations of hospitality which treaty stipulations both serve to guarantee and to particularize. The Constitution has provided for the protection of their persons and property, by making every treaty while in force, part of the supreme law of the land;<sup>1</sup> and through the distribution of its judicial power, by giving to the Circuit Courts of the United States jurisdiction in suits "between a State and the citizens thereof, and foreign States, citizens or subjects."<sup>2</sup> In this respect, it places aliens, when litigants against citizens or a State, upon an equal footing with its own citizens, and fulfils every duty of international comity. But the protection of their persons against violence, or indignities committed upon them, presents a problem of a very different character. In early days, when travellers and emigrants were few, the guarantee of personal protection by the Federal Government was of easy practice and seldom invoked. But with the present tide of increasing emigration, bringing nearly half a million foreigners annually into the country, who represent many nationalities, and are covered by as many flags, the obligation of their personal protection, while not changing its legal aspects, becomes one of a more difficult character, under our dual form of government. It is a problem without precedents to aid its solution, and which introduces an unparalleled chapter into the history of international law. And it grows out of the fact, that no commonwealth government can guarantee to aliens a larger measure of protection than the laws accord to its own citizens.<sup>3</sup>

A treaty made by the government of the United States is made conformably to its Constitution and

<sup>1</sup> Art. VI.

<sup>2</sup> Art. III., § 2; Judiciary Act of 1789, 1 Stat. 73.

<sup>3</sup> 7 Opin. Atty.-Gen'l, 229.

laws, and its stipulations can only be executed within those limits. The personal protection which it guarantees is, consequently, the protection of its laws as administered under the Constitution. Under these circumstances, which no treaty can change, the legal condition of such foreigners is regulated by the international law private, and their redress must be sought through the courts, and the special interposition of the Legislature.<sup>1</sup> No government could change its Constitution and administrative laws at the demand of another, without abdicating sovereignty over its own territory. The authority to make those laws is an incident of that sovereignty which cannot be surrendered by our treaty-making power. Moreover, in the United States, the executive department of the government does not administer the laws, neither has it any arbitrary or dispensing power over their operation. And as it is with this department solely, that foreign governments can communicate, when claiming reparation for wrongs done to their subjects, their demands can only be satisfied through the judiciary or the legislative department. If a penalty is sought to be inflicted, it can only be administered through the courts. If an indemnity in money is demanded, it can only be obtained through Congress. This is the rule which has uniformly governed our international conduct, when dealing with nations claiming redress for a violation of the rights secured to their subjects under treaty stipulations.

In view of the immense number of aliens in the country who can claim the protection of a foreign flag, it becomes a grave question of municipal law, whether some distinction might not be made by Congress between aliens temporarily sojourning in the country as travellers and visitors, and those permanently residing

<sup>1</sup> 3 Op. Atty.-Gen'l, 253.

here as merchants, traders, and laborers. This distinction is by no means new, nor far-fetched. It is well known to writers on international law, and enters in various forms into the municipal code of European nations, in their treatment of resident aliens. "The distinction," says Phillimore, "between domiciled persons, and visitors in, or passengers through a foreign country, is never to be lost sight of, because it must affect the application of the rule of law which empowers a nation to enforce the claims of its subjects in a foreign State. The foreign domicile does not, indeed, take away this power, but it renders the invocation of it less reasonable, and the execution of it more difficult. A subject who has deliberately domiciled himself in another State can have no ground of complaint, if he be subjected to many taxes and impositions from which the simple stranger would, by the usage of nations, be exempt. Moreover, he must be held to have considered the habits of the people, the laws of the country, and their mode of administration before he established therein his household gods, and made it the principal seat of his fortunes."<sup>1</sup> Grotius has presented the subject in a somewhat similar way.<sup>2</sup>

In the case, therefore, of aliens permanently residing in the country for years, and not renouncing their allegiance to foreign governments, there would seem to be reasons for qualifying protection with some conditions relating either to form or jurisdiction. These persons come voluntarily into some State, make a permanent settlement, perhaps acquire property, incorporate themselves with the people as competing artisans, join labor organizations having the franchise of a charter, or carry on particular pursuits under statutory protection, in

<sup>1</sup> International Law, vol. 2, p. 6.

<sup>2</sup> De Jure Belli ac Pacis, lib. 3, c. 11, § 7.

other words, possess many of the privileges of citizenship, and yet, by remaining unnaturalized enjoy the protection of our laws while covered by the flag of their native country. Declaration of intention to become a citizen is either not made, or if made, is not followed by naturalization until some call of the native government compels a resort to it as a convenient political shelter. In the presence of these facts, the question of the powers of Congress to legislate under treaty stipulations, is no longer one of doubt. It was settled in the Head Money Cases by the Supreme Court, when it enunciated the doctrine which must ever remain the guide of our political department, "that so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such Acts as Congress may pass for its *enforcement, modification, or repeal.*"<sup>1</sup> That decision, twice reaffirmed, may now be considered as one of the pillars of our constitutional jurisprudence.

We have elsewhere shown that, in questions of interstate extradition, there was no power in the General Government to coerce a State Executive into surrendering a fugitive from the justice of another State. Were this possible to be done, "it would place," says C. J. Taney, "every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights."<sup>2</sup> Nevertheless, it is in the power of Congress, by appropriate legislation, to prevent the occasional breaches of comity which occur between States, through the refusal to extradite criminals, by creating special

<sup>1</sup> 112 U. S. 580, 599; *Whitney v. Robertson*, 124 *Ibid.* 190; *Chinese Exclusion Case*, 130 *Ibid.* 602, 606.

<sup>2</sup> *Kentucky v. Dennison*, 24 *How.* 107.



tribunals to carry out this provision of the Constitution. As was done in the case of fugitive slaves by the Act of February 12, 1793,<sup>1</sup> and September 18, 1850,<sup>2</sup> so it may be done in the case of fugitives from justice. "I can entertain no doubt," says Beasley, C. J., in the matter of Voorhees,<sup>3</sup> "of the power of Congress to vest in any national officer the authority to cause the arrest in any State of a fugitive from the justice of another State, and to surrender such fugitives on the requisition of the Executive of the latter State." There would seem to be no good reason, therefore, why the duty of exercising this act of inter-state comity should any longer be devolved upon the political department of a State, acting only in a ministerial capacity, when the matter could be more easily disposed of by Federal courts, sitting to administer justice in a quasi-international manner as between State and State.

Lastly, the bestowal of pensions, as a permanent subsidy upon persons who have received wounds, or contracted diseases while in the military or naval service of their country, or upon their widows and heirs, or upon meritorious civil officers when disabled by age, is an exercise of suppletory power by Congress not created, but inherent in the structure of every government.<sup>4</sup> It is the power to reward merit by encouraging fidelity to public duty. The subject of military pensions was broached at the very beginning of the Revolutionary War, but owing to the loose character of our political union could not be provided for, effectively, by the Continental Congress. Under the Articles of Con-

<sup>1</sup> 1 Stat. at Large, 302.

<sup>2</sup> 9 Ibid. 462.

<sup>3</sup> 32 N. Jersey L. 141.

<sup>4</sup> In *U. S. v. Fairchilds*, 1 Abb. U. S. 74, it was held that while there was no express power given in the Constitution to Congress to give pensions or bounties, it was a power incidental or implied in the power "to raise and support armies."

federation, whatever form of relief existed under the guise of pensions, was addressed mainly to the relief of commissioned officers, and partook more of the character of a bounty than of a pension subsidy. Some of the States, indeed, made independent provisions for their own officers, and in consequence refused to honor the requisitions upon them by Congress for this purpose.

This loose and immethodical system of administering relief to officers was subsequently, under the recommendations of Congress,<sup>1</sup> enlarged, so as to include *invalids* generally. And it was kept alive for a number of years by a provision in the annual appropriation bill, whereby pensions heretofore granted by the State, or the United States, were to be paid for another year.<sup>2</sup> This continued, with some interruptions, until 1808,<sup>3</sup> when all persons on the pension lists of States, for disabilities incurred during the Revolution, were transferred to the list of the United States. This Act may be said to have inaugurated our present system of Federal pensions. Numerous laws were subsequently passed upon the subject, and it had attained to sufficient importance to justify the creation by Act of March 2, 1833,<sup>4</sup> of a special Pension Bureau, with a commissioner at its head. The Civil War gave an unparalleled impetus to this field of legislation by the immense army of invalids which it produced. And, in order to keep pace with their just claims for relief, it became necessary, from time to time, to enlarge the area of pensionable disabilities. To this end, Congress, since July, 1862, has passed over thirty public Acts, besides countless private bills.

Up to the year 1869, none but military and naval

<sup>1</sup> Resolutions of June 7, 1785.

<sup>2</sup> 1 Stat. at Large, 95, 129, 218, 275.

<sup>3</sup> *Ibid.* 496.

<sup>4</sup> 4 *Ibid.* 622.

pensions had generally been granted. In a few instances, annuities had been created for meritorious persons or their heirs, but they were distinguishable from pensions. In that year provision was, for the first time, made for pensioning civilians. By the Act of April 10, 1869,<sup>1</sup> amending the judicial system of the United States, any judge of a Federal Court, who has held his commission as such for ten years, and who shall, after having attained the age of seventy years, resign his office, shall receive the same salary formerly payable to him, during the remainder of his life. The only additional instance of civilian pensions, is that of the limited pension allowed to heirs of members of the Life Saving Service, who may have perished, or succumbed to injuries, or disease incurred while in the discharge of their duties.<sup>2</sup> Exceptional pensions have also been granted to the widows of some of our Presidents.

From the above inquiry into the implied powers of Congress it is evident that, under a strict interpretation of the Constitution, it would be difficult to find a particular and enumerated power for every Act passed by it. In the very nature of that instrument, it could hardly be expected that every power granted should be expressly defined, or its objects by anticipation catalogued and described. As a fact in the history of a century of congressional legislation, very few Acts, as shown below, have been adjudged repugnant to the Constitution.<sup>3</sup> Their general agreement with its spirit and intent, and the disinclination of the Supreme Court to nullify the action of a co-ordinate department of the government, except upon the gravest considerations of

<sup>1</sup> 16 Stat. at Large, 45.

<sup>2</sup> 22 Ibid. 57.

<sup>3</sup> *Marbury v. Madison*, 1 Cr. 137; *Scott v. Sandford*, 19 How. 393; *Ex parte Garland*, 4 Wall. 334; *Civil Rights Cases*, 109 U. S. 7; *U. S. v. Boyd*, 116 Ibid. 616; *U. S. v. Reese*, 92 Ibid. 214; *U. S. v. Harris*, 106 Ibid. 629.

public interest,<sup>1</sup> have rendered it possible to expand this class of legislation to an extent commensurate with the needs of the country, without at the same time violating the organic law on which it was based. The American people have always considered that one of the chief objects of the Constitution was "to promote the general welfare," and they have been in the habit of looking to Congress as their agent to secure it. Wherever their political rights or those of the States were not interfered with, they have been content to credit the Federal Legislature with the possession of all the incidental and implied powers necessary for the execution of those expressly granted. Acts, therefore, relating to commercial enterprises, internal improvements, or domestic commerce, upon which political parties could not found a hope of overturning an administration, have been silently acquiesced in and passed over without question.

While as yet we cannot perhaps say of Congress, as of so many State Legislatures, that there has been a tendency to excess of legislation, still, the necessities of our exceptional development as a nation, have required of it an exercise of *suppletory and corrective* powers which threatens, with the constantly increasing demands put upon them, to strain their elasticity to the utmost. At what point it may be said that the exercise of these powers has already exhausted the residuum of enumerated powers whence they emanate, it remains for Courts to decide. Certainly, until they do so, it would be precipitate to draw any conclusions in the presence of the acquiescence of the people in the doctrine that

<sup>1</sup> "When the law is not prohibited and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground." *McCulloch v. Maryland*, 4 Wheat. 316.

legislation should keep pace with the necessities of the community, and find its justification in that tacit consent which forms the unwritten law of the Constitution.

Under the consequences flowing out of our rapid commercial growth, new forms of business have arisen, involving the creation of new phases of capital and new representatives of value. From these have sprung new personal and corporate rights based upon faith in the limitless possibilities of our soil; of our mines and other mineral resources; of patent rights, and of scientific discoveries as applied to the mechanic arts. Through this influx of flowering conditions, new interests have been created in capital, together with new forms of legal estate therein, of all which facts, both municipal law and legislation have had to take cognizance. The corresponding expansions of trade and commerce have already forced themselves beyond the limits of State lines, and Congress has been appealed to as never before, to aid and promote commercial enterprises or regulate their inter-state relations.

The language of the Constitution, beyond the clause "to regulate commerce" and to promote the progress of science and useful arts, does not certainly exhibit any provisions giving the power to Congress to perform many acts, which have proved beneficial to the whole country. Some of these acts have gone so far as to give a decided preference to certain competing interests by bounties, subsidies, and grants of public lands. Although not endowed with any particular power to dispose of the public moneys, or the public domain in this way, it has been tacitly agreed that such powers if capable of promoting the general welfare must exist, and be included in the entirety of powers forming the legislative will of the nation, and that if sought for, they would be found as an unwritten convention underlying the constitutional

grant of every general power, and intended to be *suppletory and corrective* in the exercise thereof.

It will be noticed that in the original Constitution and its amendments, as they stood, up to 1865, no clause is followed by the additional power given to Congress "to enforce this article by appropriate legislation," an expression which is repeated in each case of the Thirteenth, Fourteenth and Fifteenth Amendments. Is it to be inferred from this that the power of suppletory and corrective legislation did not devolve upon it before that date? Or, that it is restricted to these clauses by words of exclusion? Judging from the past history of Congressional legislation and the judicial reviews of the same, there has never been a time when it could be doubted that Congress had the power of suppletory legislation. The Fugitive Slave Law of February 12, 1793, together with its amendments were Acts to enforce by appropriate legislation a provision of the Constitution. And their validity was never questioned in respect to the absence of any special grant of power to Congress to pass them.<sup>1</sup>

Again, under the prohibition to the States against passing any law impairing the obligation of contracts, Congress could not provide any law for the enforcement of contracts, nor invest the Courts of the United States with jurisdiction over contracts, so as to enable parties to sue upon them in those courts. But, by the 25th section of the Judiciary Act of 1789,<sup>2</sup> giving to the Supreme Court of the United States jurisdiction by Writ of Error, to review the final decisions of State Courts whenever they should sustain the validity of a State statute or authority, alleged to be repugnant to the Constitution or laws of the United States, the neces-

<sup>1</sup> *Holmes v. Jennison*, 14 Pet. 540; *Prigg v. Comm.*, 16 Pet. 539.

<sup>2</sup> 1 Stat. at Large, 85.

sity was met by this early and notable instance of the exercise of a suppletory power, followed by the necessary corrective legislation. The Act of March 3, 1875,<sup>1</sup> giving to the Circuit Courts of the United States jurisdiction of all cases arising under the Constitution and laws of the United States, is another and similar instance.

The Civil Rights Act of March 1, 1875,<sup>2</sup> was passed as a measure to enforce against a State the prohibition contained in the Fourteenth Amendment. It was intended to anticipate and to correct any State legislation that should discriminate adversely to the colored race, by abridging their privileges and immunities, or denying to them the equal protection of the laws. The first and second sections of the above Act, not addressing themselves to *State* action, but only to that of *persons*, have been held to be, on that account, unconstitutional.<sup>3</sup>

The Enforcement Act of May 31, 1870,<sup>4</sup> was an Act to enforce the right of citizens of the United States to vote, under the Fifteenth Amendment. Section 641 of the Revised Statutes providing for the removal into the Federal Court of any civil suit or prosecution "commenced in any State Court for any cause whatsoever against any person who is denied and 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," is another of those acts of corrective legislation which were passed in the interests of the colored race.

The Legal Tender Acts<sup>5</sup> were passed for the purpose of giving to the government at the outbreak of the

<sup>1</sup> 18 Stat. at Large 470.

<sup>2</sup> *Ibid.* 335.

<sup>3</sup> Civil Rights Cases, 109 U. S. 3.

<sup>4</sup> 16 Stat. at Large, 141.

<sup>5</sup> 12 Stat. at Large, 345, 532, 709.

Civil War the means of self-preservation. The crisis in our public affairs which called forth this legislation is thus described by C. J. Chase in *Veazie Bank v. Fenno*.<sup>1</sup> "At the beginning of the rebellion, the circulating medium consisted almost entirely of bank notes issued by numerous independent corporations variously organized under State legislation, of various degrees of credit and very unequal resources, administered often with great, and not unfrequently with little skill, prudence and integrity. . . . There was then no national currency except coin; there was no general regulation of any other by National legislation; and no National taxation was imposed in any form on the State Bank circulation."

These Acts, passed by virtue of the incidental and implied powers of Congress, were first adjudged to be in part unconstitutional.<sup>2</sup> Upon a re-argument and rehearing of the cases the Court retraced its steps, and reversed its former opinion. In doing this it qualified that opinion by deciding "that the Legal Tender Acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage or any regulation of the value of money; nor do we assert that Congress may make anything which has no value, money. What we do assert is, that, Congress has power to enact that the government's promises to pay money shall, for the time being, be equivalent in value to the representative of value determined by the Coinage Acts, or to multiples thereof." The power so to enact which was thus claimed for Congress must be recognized, therefore, as a power supplementary to the power to coin money and incidental thereto. It is an emergency power only, and not to be invoked

<sup>1</sup> 8 Wall. 533; *Legal Tender Cases*, 12 Wall. 457.

<sup>2</sup> *Hepburn v. Griswold*, 8 *Ibid.* 603.



except to save the government from impending bankruptcy.

The Act of July 24, 1866,<sup>1</sup> granting to telegraph companies authority to maintain and operate lines of telegraph over, and along any of the military or post-roads of the United States, which have been or may hereafter be declared so by Act of Congress, is plainly an exercise of suppletory power of the most far-reaching character. Whether Congress has the power to require a railroad corporation to permit telegraph companies to use its road-bed, under its power to regulate commerce and to establish post-offices and post-roads, has been decided affirmatively in the case of the Pensacola Telegraph Co. v. The Western Union Telegraph Co.<sup>2</sup> This decision which appears to rest mainly on grounds of public policy and broadens the powers of the General Government to an unprecedented degree, recognizes the right of Congress to keep pace with the progress of the country, and to adapt itself to the new developments of time and circumstances.

It takes no notice of the fact that the United States have not yet assumed the control of telegraph lines, so as to include them in the postal service of the country; or that they can grant no privilege of maintaining and operating these lines through the streets of a city, notwithstanding those streets have been constituted post-roads. It also ignores the fact that the United States own no post-roads outside of the Territories and within the States—that they own no railroads or bridges<sup>3</sup> and have no control over any, their use of them being precisely similar to that of any in-

<sup>1</sup> 14 Stat. at Large, 221.

<sup>2</sup> 96 U. S. 1. See also dissenting opinions of Justices Field and Hunt.

<sup>3</sup> Although Congress declared by Act of August 31, 1852, the Wheeling & Belmont Bridge to be a *post-road*. 10 Stat. at Large, 112.

dividuals employing them for purposes of transportation and paying tolls therefor. Passing by all these facts, the doctrine asserted by the majority of the Court in their opinion confers limitless powers upon Congress, in respect to controlling whatever agencies, present or future, form part of any commercial enterprises, that promise to become subjects of general utility and adoption.

Grants of portions of the public domain to private corporations to aid in building railroads and opening territories to civilization; as was done in the case of the Union Pacific Railroad, which was incorporated by Act of July 1, 1862,<sup>1</sup> and given a right of way, from the 100th meridian of longitude west of Greenwich to the western boundary of Nevada Territory, to the extent of two hundred feet in width on each side of said railroad, and in addition was granted every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, etc. etc., are illustrations of this power as applied to internal improvements. This magnificent subsidy unparalleled in the history of our legislation, supplied the means—by the further aid of government bonds to be issued under the same Act, as specified therein to the company, and by permission granted to issue its own bonds for erecting bridges<sup>2</sup>—for building that system of trans-continental lines which have united the population and the markets of the Atlantic coast with those of the Pacific. And the same authority applies to the improvement of rivers and harbors.

<sup>1</sup> 12 Stat. at Large, 489; 13 Ibid. 356.

<sup>2</sup> 16 Ibid. 430.

In like manner, the Act of July 2, 1862,<sup>1</sup> donating public lands to the several States and Territories which may provide colleges for the benefit of Agriculture and the Mechanic Arts; the Act of July 28, 1866,<sup>2</sup> allowing the President to detail army officers, upon the application of any college or university, having capacity to educate 150 male students, to act as superintendents or professors therein; the Acts<sup>3</sup> donating public lands as bounties to certain citizens who entered the public service of their country in the War of 1812; and those donating lands for the establishment of schools in Territories;<sup>4</sup> or the older Acts formerly bestowing bounties upon exportations of salted fish;<sup>5</sup> or exported sugar,<sup>6</sup> all come within the scope of these suppletory and incidental powers, and need not be adverted to further.

Most of the criminal legislation of Congress rests upon no express grant of power, since there is no common law of the United States, but on the power to pass "all laws necessary and proper" for carrying into execution the powers conferred. Among the crimes created under this power is that of robbing the mails. This form of robbery is peculiar in its nature, since, at the outset, it has been held that the mail of the United States is not the property of the United States; that leathern bags do not constitute *per se* the mail, but only the packets of letters together with their contents.<sup>7</sup> And as these letters or their contents belong to individuals, they may be purloined by official persons in charge of the mails, as well as by strangers. The crime is a purely statutory one, and was established as a means for protecting the safe carriage of the mails, while in the custody of the post-office or its servants. For the

<sup>1</sup> 12 Stat. at Large, 503.

<sup>2</sup> 14 Ibid. 336.

<sup>3</sup> 3 Ibid. 256.

<sup>4</sup> R. S. § 1946.

<sup>5</sup> 1 Ibid. 27; 3 Ibid. 50.

<sup>6</sup> 4 Ibid. 331.

<sup>7</sup> Searight *v.* Stokes *et al.*, 3 How. 176.

furtherance of the business of safely transporting the mails, the power to establish post-roads and post-offices, is thus seen to include the power to punish offences committed against its administration, by whatever name known.<sup>1</sup>

In like manner the Revised Statutes at §§ 3893–3894, declaring obscene books and other indecent or immoral articles and publications, and letters or circulars concerning lotteries and gift enterprises, to be non-mailable, is a similar exercise of the power to regulate the conduct of the post-office department by *corrective* legislation.<sup>2</sup> The validity of a legislation prescribing what should be carried, and its weight and form, and the charges to which it should be subjected, has never been questioned. And the right to designate what shall be carried, necessarily involves the right to determine what shall be excluded. “Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant issued upon oath or affirmation, in the search for prohibited matter, they may be enforced upon competent evidence of their violation obtained in other ways; as from the parties receiving the letters or packages, or from agents depositing them in the post-office, or others cognizant of the facts.” Such is the language of the Supreme Court in *Ex parte Jackson*.<sup>3</sup>

The Act of June 11, 1864, extending the time for defending any civil or criminal action, within the insurrectionary States, which might be barred by any statute of limitations, is a further application of the

<sup>1</sup> U. S. v. Jenther, 13 Blatchf. 335; U. S. v. Okie, 5 Ibid. 516; U. S. v. Golding, 2 Cranch, 212; U. S. v. Kirby, 7 Wall. 482.

<sup>2</sup> 19 Stat. at Large, 90.

<sup>3</sup> 96 U. S. 727.

power of *remedial* legislation.<sup>1</sup> In that case, the law of Nations of itself suspended the operation of all local laws, when operating against those who were beyond their jurisdiction, or where judicial proceedings were interrupted by the clash of arms.

The result of this examination into the incidental power of Congress to pass all "necessary" laws for carrying its own powers into execution, justifies the following conclusions, viz:—

1st. That whenever any measure appropriate to the execution of a power is presented for its action, the power of determining its *necessity* devolves upon it alone, because it is a question for the political, and not the judicial department of the government.<sup>2</sup>

2d. That, where nothing in the Constitution prohibits the exercise of a legislative Act without which a power could not be fully executed, there Congress is possessed of an incidental and therefore of an implied power to perform it.<sup>3</sup>

3d. That the safest rule of interpretation is to look to the nature, and objects of the particular power in question—to give its language such operation and force as will best explain its intention and the purpose designed by it; and to extract the full sense of that intention by the light of contemporaneous authority.<sup>4</sup>

<sup>1</sup> 13 Stat. at Large, 123; *Hanger v. Abbott*, 6 Wall. 532.

The Act of February 17, 1815, granted lands to the inhabitants of the late county of New Madrid in Missouri, which had been sunk far below their former level and injured by earthquake November 12, 1812. 3 Stat. at Large, 211.

<sup>2</sup> *McCulloch v. State of Maryland*, 4 Wheat. 316.

<sup>3</sup> *Metropolitan Bk. v. Van Dyck*, 27 N. Y. 400.

<sup>4</sup> *Prigg v. Comm. of Penn.*, 16 Pet. 539.

## CHAPTER X.

## THE MECHANICS OF LEGISLATION.

IN the United States, there are forty-four independent Legislatures sitting annually or biennially, and enacting from four to eight thousand statutes, at a cost of from 1000 to 4000 dollars a day for every legislative session. This prodigious fecundity of legislation would seem to represent a sum total of talent, industry, experience and patriotism, well calculated to attract the attention, and to command the respect of the world. At the same time, it materially detracts from the merit of this labor, to be compelled to admit that much of it is crude, incongruous, and even uncalled for by the necessities of the hour. Still, this over-production of laws goes on from year to year, until confusion and contradiction are so increased, that some codification or revision becomes periodically necessary. The old lumber is thereupon destroyed, carrying with it volumes of Reports and Commentaries, and giving place in time to a body of Revised Statutes, destined to afford a short interval of relief to the Bench, the Bar and the general public.

This state of things is not to be wondered at, however, when we consider the extent to which written law, is absorbing the unwritten common law, so that every branch becomes in turn the subject of legislation. Our government, whether viewed in the light of a Federal or State Administration, now appears to be mainly a government of mutable though written laws, in which

Constitutions, Statutes and Codes succeed each other with unparalleled rapidity.

We live in an age of discussion. The air is full of political questions calling for legal solution, and legislation has become so much of an occupation, as to be regarded by the masses more in the light of a domestic art, which any one of ordinary intelligence can practice, than as a species of composite labor, in which a knowledge of local history and of substantive law, whether organic, judiciary, or statutory, should precede its application to practical wants in the form of new enactments.

It is self-evident in all systems of jurisprudence, that, without a proper conception of principles as a basic guide, there can be no proper conception of a rule of procedure to be built upon them. And judging from the large numbers of statutes annually passed, and the haste with which much of the labor of legislation is performed, it is easy to perceive that oftentimes, every element is permitted to be present that can conduce to error, crudity or even to dishonesty. The fact that this is the popular way of making laws, and must therefore, be considered agreeable to the people at large, does not purge the system of its offensiveness either to reason or to sound morals; nor relieve those who participate in it of the responsibility of foisting bad laws upon the community, whether from gross ignorance, gross negligence, or both.

Moreover, as the members of these Legislatures annually give place to new-comers without experience, it seems impossible not to realize the fact that, unless we believe the science of legislation to be intuitional, there is a logical necessity for concluding that ignorance and incompetency must, in the majority of instances prevail over wisdom and experience. Mr. Stuart Mill who,

as a student of mental philosophy takes rank alongside of Sir William Hamilton, says of the making of laws that, "There is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws.<sup>1</sup>

The reason is obvious. Every new law is a displacer of existing conditions in administration. Conditions that have a basis in historical facts, in judicial decisions, and in settled rules of conduct. Unless, therefore, knowledge of all these things be possessed by the law-maker, and duly set opposite to the supposed benefit to accrue from their displacement, he is very sure to bring confusion into his work, and to leave it as a stumbling block in the pathway of the community. An error in legislation is oftentimes a crime. There is no mystery in the evils which flow out of its operations. Let legislators remember therefore that a statute, being a legislative rule of conduct prescribed by the law-making department of the State, should represent knowledge, expediency and conception of its future effects upon the civil rights of the community. It should have a reason, and must have an object, otherwise it is an intruder upon the civil order of the State. Every law should declare a moral purpose and stand for an act of justice. Men should neither vote nor legislate in the air.

#### STATUTES.

A statute may be defined as the written will of the Legislature of a State, expressed in conformity to the principles of its organic law. It differs from an ordinance in that the latter wants the consent of one com-

<sup>1</sup> Rep. Gov. 109.



ponent branch of a tripartite Legislature.<sup>1</sup> Statutes are an imperative direction of the general rule of municipal conduct, under a particular necessity actually existing, or about to exist. Hence, in the early annals of English jurisprudence statutes were called *Constitutiones*, signifying that they were derivatives from, or corollaries to, the one general Constitution, and belonged to it by their spirit, as well as by legal affiliation. The distinctions in the application of the term statute, made by civilians and common-law jurists, have always been very marked, nor can it be wondered at, under the light of such differing systems of instituted law as these two classes of practitioners represent.

Under the civil law, every statute was *proprio vigore* a supreme law and not a derivative. It ran in the form of a royal command, and was more in the nature of a proclamation than of an enactment by a public assembly. Instead of expressing, as in England and the United States, the positive legislation of some parliamentary body acting within the limits of a superior, organic law, it represented fundamentally the whole municipal law of the particular State, from whatever source derived. The value of precedents, which, under the common law, are ever considered landmarks to guide courts in the determination of doubtful principles, has accordingly received but slight recognition among civilians; and it is on this account, chiefly, that in the courts of Continental Europe, their force as authority is secondary to that of codes which embody in a concrete form the legislative will of the State.

In England, a distinction has always been made between ancient and modern statutes, based upon the uncertainty in time of enactment attaching itself to those Acts of Parliament extending from Magna Charta

<sup>1</sup> 4 Inst. 25.

to the reign of Edward III. This classification sprung from the fact that, in the early days of Parliaments, it was customary to write all the acts passed in one session as so many *capitula* or chapters, under the designation of one statute. And it is noteworthy that some of the most important of the early English statutes, like those of Merton and Marlbridge, are not on record, having been originally found in books and memorials.<sup>1</sup> With the reign of Edward III. began the designated modern statutes; nor was it until the reign of Richard III., in 1483, that laws were first given to the English people in their own language.

In the jurisprudence of the United States no similar distinctions can exist. Yet there might be room for a special classification of those English statutes in force before the American Revolution, which being applicable to our condition may be said to constitute an essential part of our common law.<sup>2</sup> Certainly, it has never been questioned that we inherited our common law from the mother-country, and our Constitution is, in many senses, but an offshoot of her own. Nevertheless, the term common law, when applied by courts in our country, must be understood as referring always to so much, and that much only of the law of England before the Revolution, as applied to our actual condition. In no other sense can the term be legally used, for it has been settled by our highest tribunal that Federal courts have no jurisdiction of common-law offences, and that there is in fact no common law of the United States.<sup>3</sup>

<sup>1</sup> Dwarris, 466.

<sup>2</sup> *Catheart v. Robinson*, 5 Peters, 264; *Patterson v. Winn*, 5 Ibid. 233; *State v. Rollins*, 8 N. H. 550; *DeRuyter v. St. Peter's Ch.*, 3 Comst. 238; Vid. Alexander's *British Statutes in force in Maryland*; and *Chalmer's Opinions on Colonial Laws*.

<sup>3</sup> *State of Penn. v. Wheeling Bridge Co.*, 13 Howard, 519; *Sedgwick on Stat. and Const. L.*, p. 13.

Our municipal law represents, therefore, three component roots, viz: Constitutional Law, Statute Law, and Customary or Common Law. Of these three, and because the founders of the Republic foresaw the necessity of setting limits to the law-making power, Federal constitutional law has been proclaimed by the conventional will of the people to 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."<sup>1</sup>

Beneath this organic law, the sources whence our statute law has arisen furnish us with necessary divisions of them based upon the name of the enacting power. These sources are fourfold, viz:—

- 1st. Colonial statutes, or such as were enacted by the American colonies previous to the Revolution.
- 2d. Federal statutes passed by Congress.
- 3d. Acts of State Legislatures, and
- 4th. Acts of Territorial Legislatures.

Public treaties made with foreign powers, although mentioned in the Constitution separately from the laws of the United States, are in the nature of statutes, and therefore of binding obligation upon all citizens.

But all statutes, by whatever authority enacted, may be divided into two general classes, viz., *public and private*. The former relate to the whole body of citizens in a State; and are addressed to them in their collective capacity. The latter relate more especially to particular individuals. Nevertheless, such acts whenever affecting localities, or creating corporations; or declaring and punishing public offences; or giving penalties to the State, have generally been held to be public statutes, and considering how extensive is their

<sup>1</sup> Constitution U. S., Art. VI., sec. 2.

application, and at how many points they affect public interests, this interpretation of their legal character cannot be looked upon as either strained or illogical.

The civilians based their classification of statutes upon the objects to which they referred. Thus, they designated them as either *personal*, *real*, or *mixed*, distinctions which have not been elsewhere adopted, because, in fact, their boundaries are so shadowy that it becomes at times next to impossible to give them any true *locus in quo*. The very rules invented to distinguish them, in controverted cases, show the instability of the foundation upon which such distinctions rest. They are worse, therefore, than arbitrary, being specious and often self-contradictory. Hence, outside of the domain of the civil law they have never been recognized as authoritative.

Reverting to our American classification of statutes in general, as being either public or private, the next division is into such as are declaratory, meaning thereby either a re-affirmance of an old statute, or an explanation of its intent, so as to put at rest all doubts concerning the same. Such statutes, owing to the language employed in them, become necessarily either affirmative or negative. But affirmative words, by themselves, do not supersede the common law, which is always pre-existent.<sup>1</sup> Nor does a similar former statute, nor a former custom, nor a former exemption.<sup>2</sup> This is because affirmative words only repeat existing conditions by legal endorsement, and give them an emphasis they may not have previously possessed.

Wherever, therefore, a negative is neither expressed

<sup>1</sup> 2d Instit., 200; Dwaris, 474; Sedgwick on Stat. and Const. L. 28, 30, 32; Crittenden v. Wilson, 5 Cowen, 165; Livingston v. Van Ingen, 9 Johns. 507; Barden v. Crocker, 10 Pick. 383.

<sup>2</sup> 6 Ad. & Ellis, 33 Eng. Com. Law, 1; 2 Mod. 41; 4 Douglass, 188.

nor implied, the common law remains undisturbed, and is to be construed precisely as it was before the passage of the statute. An affirmative statute, it is thus seen, does not repeal a preceding one of the same kind, merely because later in time, and if they agree substantially, they are allowed a concurrent efficacy. Declaratory statutes may, in a word, be considered as chiefly explanatory of some portion of the common law, which from lapse of time has become disputable. Should, however, any new rights or powers be given to any one by particular designation, there the rule *expressio unius est exclusio alterius* would govern, and the statute would thereupon transcend the previous limits of the common law. But in all such instances, the intention to supersede existing conditions should be made manifest, and express words should be used to remove all inconsistent laws, customs privileges and discharges, as otherwise these might act to exempt persons or places from the operation of the statute.<sup>1</sup>

The concurrence of the common law with any statute is always presumed, except in the case of penal statutes, which, creating offences by definition and limitation in meaning, are to be construed strictly. Every penalty implies a prohibition, and contrariwise prohibitions in a statute are a nullity, without penalties to enforce them. It is generally admitted, nevertheless, that whenever a statute creates an offence which was previously in-nominate at common law, this latter gives the right of an indictment, but it cannot supply the minor details of penalties or forms of procedure, both which must be expressly recited. This has been largely remedied by classifying all prohibited Acts, to which no penalties are attached, as in the lowest class known to the State. This class is usually designated "misdemeanors." Hence

<sup>1</sup> Gael on Legal Comp., 220.

all offences against the State may be classified into two general divisions, viz: either felonies or misdemeanors. So, too, the power of applying funds to defray legal costs does not exist at common law, but must be given by express words.<sup>1</sup>

Many laws are also intended to repeal existing ones, thereby changing the future legal relations of parties who, in the past, may have been operating under their provisions. But the repealing statute cannot disturb past rights having a valid foundation, and which have now become vested.

The language of Puffendorf on this point is unmistakably clear. "A law," he says, "can be repealed by the law-giver; but the rights which have been acquired under it, while it was in force, do not thereby cease. It would be an Act of absolute injustice to abolish with a law all the effects which it had produced."<sup>2</sup> Apart then from the prohibitory provision in the Federal Constitution in regard to *ex post facto* laws, retroactive statutes are generally frowned upon by courts, because of their disturbing effects upon existing rights of persons and property. "Laws," says Mr. Sedgwick, "are constantly passed, either in the shape of repealing or innovating Acts, which disturb plans, or destroy rights, entered into upon the faith of or created by previous legislation. Nothing short of some great paramount emergency or public policy, can justify laws of this kind; and it will be well for all engaged in the business of government, to understand and remember, that the steady and uniform rule should be to make statutes operate prospectively only."<sup>3</sup>

*Negative* Statutes, on the other hand, are such as are written in terms of special negative inhibition. They consequently bind and modify the common law, so as to

<sup>1</sup> 4 Term R., 591.

<sup>2</sup> Lib. 1, Cap. 6, Sec. 6.

<sup>3</sup> Page 173.

exclude to that extent its application. They are used to impose direct and unequivocal limitations upon legal action. Hence they may have *ex vi termini* a retrospective effect, and the rule as to them is that, if a subsequent statute contrary to a former one have negative words, it shall operate as a repeal of the former.<sup>1</sup>

*Remedial and repealing Statutes.* Of these little need be said, as their name sufficiently implies what their intent and purport covers. The former are designed to operate as auxiliary to pre-existing statutes, by way of supplying omissions in them. Hence they may be either *restrictive* or *enabling* statutes.

*Penal Statutes.* The chief point to be considered in framing such laws is that, being prohibitions imposing forfeitures, Courts always construe them closely. Their language should accordingly be as concise and precise as possible. Ambiguity is fatal to their enforcement.

As concrete examples of the principles just enumerated, the following general propositions relating to statutes, have been embodied into decisions by Courts both in England and in the United States, and may therefore be considered as forming part of the common law of both countries upon the subject.

1st. The preamble of a statute is no part of the statute, and should be rarely used because only surplusage. It adds no force to it, though it may throw some historical light upon the reason of the statute, which the language of the law itself does not sufficiently convey. "Nothing," says Seneca, "appears to me stiffer or more silly than a law with a preface," and Bacon, whose wisdom as a lawyer none will dispute, speaking on this same point says: "As far as possible let preambles be avoided, and let the law begin with the command." (Aphorisms 69.) "The true office of the pre-

<sup>1</sup> Dwarria, 475.

amble," says Judge Story, "is to expound powers conferred, not substantially create them." But as a guide to the intentions of the framer, it is often, according to Mr. Sedgwick, of importance. In New York the habit of affixing preambles to statutes no longer exists, the *title* being intended to cover in a general way both the reason and the intent of the law.

2d. The *title* of a statute is no part of a statute. Yet the title is sometimes very material in the construction of a statute.<sup>1</sup>

3d. Wherever the provision of a statute is general, everything which is necessary to make such provision effectual is supplied by the common law. Therefore, wherever a power is given by a statute, everything necessary to the making it effectual, is given by implication.<sup>2</sup>

4th. A statute is operative from its date, unless postponed by its own terms, or by some other law. It is always to be construed prospectively, unless there are express words to the contrary.<sup>3</sup>

Acts of Congress containing no provision as to the time when they shall take effect, go into operation, upon their receiving the approbation of the President. For, by the Constitution of the United States, a public law takes effect from the time of its approval, and then prospectively, and not retrospectively.<sup>4</sup>

5th. The Constitution is superior to any ordinary Act of the Legislature; and the Constitution, and not such Act must govern, where they both apply. (*Quando*

<sup>1</sup> 3 Rep. 33; Ld. Raymond, 77; 7 East, 132-4; U. S. v. Palmer, 3 Wheat. 631; Hadden v. Collector, 5 Wall. 107.

<sup>2</sup> U. S. v. Palmer, 3 Wheat. 631.

<sup>3</sup> Matthews v. Zane, 7 Wheat. 164; Jackson v. Van Zandt, 12 Johns. 169.

<sup>4</sup> Op. Att'y's-Gen'l, vol. 3, p. 82; 2 Story C. C. R. 571.



*jus Domini ac subditi concurrunt, jus Domini praeferre debet.*)

6th. Any statute repugnant to the Constitution is *ipso facto* void, and the Courts have power, and are bound to declare it void. So likewise a statute of any State contrary to a treaty of the United States is void.<sup>1</sup>

7th. Joint resolutions of Congress are not distinguishable from bills, and if approved by the President, or if duly passed without his approval have all the effect of a law.<sup>2</sup>

8th. The statutes passed in England before the emigration of our ancestors, and which were in amendment of the law, and such as are applicable to our situation, constitute a part of our common law. And an Act adopting an English statute, and referring to it by title, is valid to give it effect here.<sup>3</sup>

9th. Acts of Congress are applicable, according to the subject matter, in all parts of the United States; and when this is not so, the case is exceptional, and the exception should be indicated by words, either of exclusion, or inclusion in the Act.<sup>4</sup>

10th. Statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void as far as they are calculated to operate against those principles.<sup>5</sup>

11th. General words following particular words apply only to things *ejusdem generis*.<sup>6</sup>

12th. Negative words are not essential to create a

<sup>1</sup> *Higginson v. Mein*, 4 Cranch, 417; *Ware v. Hilton*, 3 Dall. 199.

<sup>2</sup> *Op. Att'ys-Gen'l*, vol. 6, p. 680.

<sup>3</sup> *Patterson v. Winn*, 5 Peters, 23; *Scott v. Lunt*, 7 *Ibid.* 596; *Ibid.* 264.

<sup>4</sup> *Op. Att'ys-Gen'l*, vol. 7, p. 293.

<sup>5</sup> 1 Blacks. Comm. 41; 1 Bay, 93.

<sup>6</sup> *Chegaray v. Mayor*, 13 N. Y. 220.

valid limitation. It may appear and result from necessary implication.<sup>1</sup>

13th. But a penalty however expressed implies prohibition,<sup>2</sup> though the Act itself is not declared to be illegal.

14th. Absurdities do not *per se* nullify a statute. They should be expounded according to the intention, and not the letter.<sup>3</sup>

No clause in the Constitution prohibits States from passing retrospective laws, unless they are also *ex post facto*.<sup>4</sup> But State Legislatures have no authority to bind their citizens by them, so as to take away any property already vested.

Under our colonial governments statutes enacted by the Assembly and approved by the Governor and Council were valid and operative immediately, and so continued in force until disapproved by the King, but rights acquired under the same were not defeated by such disapproval.<sup>5</sup>

#### INTERPRETATION OF STATUTES.

Although the interpretation of a statute necessarily follows rather than precedes its enactment, yet much time and legal discussion would undoubtedly be saved, if legislators kept in view the general principles which have governed courts in construing laws, and framed them in obedience to the rules of judicial interpreta-

<sup>1</sup> *People v. Draper*, 15 N. Y. 532; 14 Johns. 273.

<sup>2</sup> *Griffith v. Wells*, 3 Denio, 226.

<sup>3</sup> *Dwarris*, 690.

<sup>4</sup> 9 Gill & Johns. 365; 4 Conn. 209; 2 Dallas, 304; 6 Cush. 333; *Taylor v. Porter & Ford*, 4 Hill, 140; *Wilkinson v. Leland*, 2 Peters, 627; *Cochran v. Van Surlay*, 20 Wend. 365; *Calder v. Bull*, 3 Dall. 386; *Watson v. Mercer*, 8 Peters, 88; *Satterlee v. Matthewson*, 2 Ibid. 380; *Charles River Bridge v. Warren Bridge*, 11 Ibid. 420.

<sup>5</sup> *Bogardus v. Trinity Church*, 4 Sandf. Ch. 633.

tion. It is upon courts that ultimately devolves the task of defining words, and assigning limits to their application in any disputed case. They constitute the revising authority, weighing, gauging, and applying the labors of the legislator to the necessities of civil society. Consequently, their judgments are second only to those authentic interpretations which the law-making power can always affix to its own acts. But in the absence of such explicit revelations of intention, courts are the proper, as they are the only, expounders of the legal will of the Legislature. In view of this fact, therefore, and without engaging in any extended discussion of the reasons underlying the principles of judicial construction, we propose explaining briefly in a general synopsis the rules of interpretation recognized in England and the United States.<sup>1</sup>

*First.* The cardinal principle of all interpretation is that the *intention*, rather than the mere words, shall prevail in any case of doubt. Words alone do not compose a law, but ideas. In order to constitute a rule of conduct, these ideas must rest upon definite facts expressive of definite reasons, and be clothed in language suited to the intention. For a thing within the intention is within the statute, though not within the letter, and a thing within the letter is not within the statute, unless within the intention.<sup>2</sup>

*Second.* As custom rather than etymology imparts meaning to words, so these latter are to be understood in their customary, or vernacular, rather than their technical, or even etymological sense.<sup>3</sup>

<sup>1</sup> Vattel, Bk. 2, ch. 17; Lieber Hermeneutics, p. 120; Sedgwick, op. cit. p. 230.

<sup>2</sup> *People v. Utica Ins. Co.*, 15 Johns. 358; *Jackson v. Collins*, 3 Cow. 89; *Dresser v. Brooks*, 3 Barb. 429.

<sup>3</sup> *Maillard v. Lawrence*, 16 Howard, 251; *Parsons v. Hunter*, 2 Sumner, 419; *Levy v. McCartee*, 6 Peters, 102.

*Third.* Wherever there is any doubt as to the intended meaning of a word, or wherever a technical word is employed, its signification is to be gathered from the context, or discovered by analogy. And in any event, words must always be interpreted according to their relation to the subject-matter itself.<sup>1</sup> *Noscitur a sociis.*

*Fourth.* No law will ever be interpreted against the fundamental law of the political society which enacts it. It ceases in fact to be a law the moment it contravenes the supreme law of the land. Although even it may have been obeyed, it gathers no strength from time.<sup>2</sup>

*Fifth.* Custom, wherever recognized as such, supplies any omitted words in a law addressed to that locality.<sup>3</sup>

*Sixth.* Penal laws being in their nature odious, are always strictly interpreted, and equitably as towards the accused. They are never extended by implication.<sup>4</sup>

*Seventh.* All other laws, being favorable to parties, are interpreted with extension rather than restriction of meaning.<sup>5</sup>

*Eighth.* Statutes are to be construed prospectively, unless there are very express words giving them a contrary effect.<sup>6</sup>

The *date* or *time* of the beginning of a statute is also a matter of very grave importance, particularly in the case of penal ones. The ancient rule in England was

<sup>1</sup> *U. S. v. Curtis*, 4 Mason, 232; *U. S. v. Clark*, 1 Gall. 501; *U. S. v. Coffin*, 1 Sumner, 395; *Smith v. Rines*, 2 *Ibid.* 345.

<sup>2</sup> *Marbury v. Madison*, 1 Cranch, 137; *Paisons v. Bedford*, 3 Peters, 433; *U. S. v. Coombs*, 12 Pet. 72.

<sup>3</sup> *McKeen v. DeLancey's Lessee*, 5 Cranch, 32; *Bank of Utica v. Mercereau*, 3 Barb. Ch. 528; *Meriam v. Harsen*, 2 *Ibid.* 232.

<sup>4</sup> *Andrews v. U. S.*, 2 Story 202; *U. S. v. Sheldon*, 2 Wheat. 119; *U. S. v. Wiltberger*, 5 *Ibid.* 760.

<sup>5</sup> *U. S. v. Freeman*, 3 How. 556.

<sup>6</sup> *Jackson v. Van Zand*, 12 Johns. 169; *Hackley v. Sprague*, 10 Wend. 114; *Ibid.* 363.

to date the statute back to the first day of the session, and persons in consequence became amenable to indictment for offences which, although not legally in existence at the date of their commission, were held to be so by constructive application of the above rule. This doctrine is now exploded.<sup>1</sup>

In the United States, the Constitution expressly inhibits the passage of any *ex post facto* laws either by Congress or State Legislatures,<sup>2</sup> and in most of the States, some future day is either named in the statute when it shall take effect, or some permanent Act regulates the time for all laws to go into operation, after their passage. In New York, every law, unless a different time shall be prescribed therein, takes effect on and not before the twentieth day after its final passage as certified by the Secretary of State.<sup>3</sup>

### OF THE FRAMING OF LAWS.

The authority to make laws is one of the most important trusts which can be confided to a representative assembly. It implies confidence on the part of the people, and skill, experience and honesty on the part of the legislator. Unfortunately, however, neither presumption is absolute, and in practice, the duties of law-

<sup>1</sup> King v. Bailey, Russ. & R. C. C. 1. "By the law of England," says Mr. Phillimore, "until the Legislature actually interfered to alter it, every statute had a retrospective operation to the first day of the session when it was passed, therefore, a man who did in March an act perfectly lawful, might be punished for it by a law passed in July; or a man who committed an offence in March punishable by imprisonment, might be hanged for it by a statute passed in August." *Prin. and Maxims of Jurisp.*, 130.

The above rule of the common law of England was not altered until the passage of the 33d George III., c. 13 (A. D. 1793), and was still in force when the Constitution of the United States went into operation. This will serve to explain the introduction into it of the *ex post facto* prohibition.

<sup>2</sup> Art. 1, sees. 9 & 10.

<sup>3</sup> 3 R. S. Pt. 1, Chap. 7, Tit. 4, Sec. 12.

making are largely subservient to the interests of political majorities. Hence bills are more frequently voted upon in obedience to partisan allegiance than to public necessity; in which cases, very little individual knowledge of their merits is possessed by legislators, and very little scrutiny exercised even by the few competent to do so. This is the cradle in which legislative corruption is annually rocked, to the satisfaction of political jobbers, and the misgovernment of the State.

Were legislative sessions less frequent, and were more time given to an earnest and intelligent consideration of the responsibilities devolving upon legislators, it is probable that we should have fewer laws enacted, while it is certain that we should have better ones. But the recurrence of legislative sessions at short intervals, the facility and thus the rapidity with which laws are passed, both combine to induce heedlessness in their composition, as well as indifference to the results which may flow from their enactment. The right to make laws being the political heritage of every citizen in a republic, the knowledge necessary to frame them is assumed to come to him by intuition. While in all the other arts of life, whether mechanical or professional, whether requiring handcraft or headcraft, some preparatory instruction is conceded to be indispensable, it is in the science of law-making alone, that we find the principle of education wholly ignored, and legislative babes and legislative Nestors placed on an equal footing. This would be deemed contrary to reason in any other department of human labor, and will be in this by every mind which reflects upon the nature of the duties devolving upon the legislator.

Every law being in the nature either of a command or a prohibition, is a displacement of existing civil relations, in which society, as well as individuals, have acquired

rights; and its possibilities to work harm must be duly estimated as well as its power to do good. How, it may be asked, can these things be known even inferentially, without a preceding knowledge of the legal nature and consequences of such civil relations? Society is an arch built of legal and moral rights. The moment we displace one of these rights we threaten the stability of the whole structure, unless we at the same time carefully re-adjust their points of inter-dependence. Can such dangers be comprehended intuitively? Or do they not require the same degree of learning to provide for their consequences, as was necessary to erect the original structure?

No writer upon law has failed to perceive the disadvantages to legislation arising from want of preparation in legislators, and no one has more emphatically expressed himself upon this subject than Sir William Blackstone. This is his language:—

“Indeed, it is perfectly amazing that there should be no other state of life, no other occupation, art or science in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical; a long course of reading and study must form the divine, the physician and the practical professor of the laws; but every man of superior fortune thinks himself born a legislator. Yet Tully was of a different opinion, ‘it is necessary,’ says he, ‘for a senator to be thoroughly acquainted with the Constitution; and this,’ he declares, ‘is a knowledge of the most extensive nature; a matter of science, of diligence of reflection; without which no senator can possibly be fit for his office.’”<sup>1</sup>

<sup>1</sup> Comm. vol. 1, p. 8; Cic. de Legibus. 3, 18.

But if the difficulty of correctly framing laws be even conceded, when the matter of a new law is the question at hand, how much greater will that difficulty not become when the question deals with amendments to existing laws, many of which may have already been the subject of legal contention possibly not yet settled, and under whose operation large moneyed interests, or municipal privileges may have long been exercised. Here again Blackstone exclaims with just indignation: "And how unbecoming must it appear in a member of the Legislature to vote for a new law, who is utterly ignorant of the old! What kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!" It is painful to see how constantly the inaccurate, and therefore obscure expression of legislative intention in the wording of statutes, has required the divining rod of judicial interpretation to enable the public to know what their rights were under them. The letter of the law is thus often found at variance with its spirit, or if not actually so, at least obstructive of the very development in legal action which that spirit demands.

No one, for instance, who intelligently examines a statute like the Statute of Frauds, can fail to see why, after having been in operation over 200 years, it should still give rise to the necessity of fresh judicial interpretations, under the varying conditions of human society requiring it at times to be regarded, now as a rule of substance, and then again as a rule of procedure. No modern statute has ever been subjected to such frequent and conflicting interpretations. It has been overwhelmed by commentaries and decisions, and has filled our reports with legal adjudications to the number of many thousands. One section alone, comprising but eighty-six words, has required 171 pages for its elucidation.



tion in Mr. Benjamin's Treatise on Sales; and the cases cited in support of the distinctions noted, may be numbered by hundreds. These distinctions largely dependent upon phraseology, have been a source of ceaseless discussion by Courts and text-writers, in both England and the United States. To undertake now to amend some of its provisions without a previous knowledge of their judicial history, would be tantamount to throwing aside the labors of hundreds of Courts, which have had occasion to adjudicate upon them in some particular litigation. Yet any Legislature may, at its pleasure, alter and revise this, or any other similarly important statute, bringing to the work as little special knowledge, as it would to a statute to lay out a county highway, or to regulate the method of calling a town meeting.

It is evident therefore, that the function of law-making being always in the nature of a tentative effort to create new civil relations, or to re-adjust old ones, renders it necessary, before framing any statute, that the following facts as fundamental propositions should be kept constantly in view:—

1st. The necessity of such a law in order to prevent some present mischief, or remedy some outstanding defect in legislation.

2d. The constitutional power to pass it.

3d. The means by which it is to be operated.

4th. The rights it is to bestow or restrict.<sup>1</sup>

These having been ascertained, the next duty of the legislator is to acquaint himself with the following historical data in their chronological order, viz:—

1st. The preceding laws passed upon the same subject, in order that being statutes *in pari materia*, they may be homogeneous and not conflicting.

<sup>1</sup> Heydon's Case, 3 Rep 76; 10 Ibid. 73 a; Mans v. Logansport R. R. Co., 27 Ill. 77; People v. Greer, 43 Ibid. 213.

2d. Decisions of Courts upon such laws, or opinions of Attorneys-General. And in respect to the former, it must be borne in mind that Courts take judicial cognizance of contemporaneous history, and that all parts of a statute are to be compared, with reference to the effects of context in limiting or expanding a particular meaning.<sup>1</sup>

3d. Debates upon them in the Legislature and reports of committees; as recorded in its Journals.

4th. Views of authoritative writers upon the principles animating these laws.

5th. The extent or limitations put upon them in their personal, public or local application.<sup>2</sup>

6th. Where Acts have been largely amended or repealed, and the superseding Act refers to the one superseded, the former must be construed as far as possible with reference to the latter. This is a rule which applies to all forms of revisions however designated.<sup>3</sup>

In the United States all laws made by *State* Legislatures must, in order to have any valid foundation, conform to the supreme law of the land,<sup>4</sup> by which it is to be understood that they are to be in harmony with

1st. The Constitution of the United States.

2d. The Acts of Congress.

3d. The Public Treaties.

4th. The Constitution of the State by whose Legislature they are passed.

A knowledge of these limitations becomes indispensable to the legislator, since, without them, he can never presumptively know the extent to which his power may

<sup>1</sup> Endlich on Statutes by Maxwell, p. 45.

<sup>2</sup> Symonds, *Mechanics of Legis.*, p. 151.

<sup>3</sup> *Ham v. Boston Bd. of Police*, 142 Mass. 90; *Andrews v. King*, 77 Me. 224.

<sup>4</sup> Constitution of the U. S., Art. VI. Sec. 2.

act. And were bills more generally studied under their facultative aspects, there would be fewer occasions for vetoes, and fewer opportunities afforded for invoking judicial interpretation. It is to the special committees, to whom is entrusted the responsible duty of examining and reporting bills, that belongs the duty of thoroughly studying their *legal* character ; for none other is properly cognizable before them. To do this, and to do it well, is a task which only those familiar with law as a profession, and therefore a science, can accurately accomplish ; and while even Lawyers may err, as even Judges sometimes do, yet all the advantages in knowledge and all the tendencies in accuracy will, under the general law of experience naturally centre in him who has made the interpretation, as well as the philosophy of law, the object of his daily study. The framing of a statute is not a trivial task which any intelligent legislator can accomplish. "It is not the idle pastime of a summer day." It is on the contrary one of the most difficult forms of composition, because requiring the most extensive and varied knowledge, coupled with great logical acumen and lucidity of style.

As it is an established rule in the interpretation of statutes that words are to be construed in their natural, obvious and ordinary signification, it will be perceived that a simple, and chastened style of expression is the only one which can safely be adopted in the framing of legislative enactments. Consequently, all elliptical phraseology, and all mere ornateness of statement, involving the use of metaphors, should be avoided, as derogating to that extent from directness of speech. The necessity for this plainness of style, apart from its greater lucidity, is to be found in the fact that Courts never interpret statutes according to rules of equity, views of policy, or principles of analogy, but according as they

can collect the intention of the Legislature by a sound and reasonable interpretation of its language. For, as has been well said, "the office of interpretation is to bring a sense out of the words, and not to bring a sense into them," and where there is no ambiguity in the words of a statute or contract, it is to be construed according to their plain and obvious meaning.<sup>1</sup>

It follows that where words are ambiguous, the whole context must be explored, to discover their legal purport, and in this way a forced construction is often put upon them, tending either to cramp the original purview of the statute, or contrariwise to expand it unduly. "The test of sound technical language," says Mr. Pollock, "is that it is capable of being put into sensible English."<sup>2</sup> Every one knows that the strength of language depends upon its perspicuity; that confusion destroys logical effect, and that emphasis exhales through limping expressions. Language may be brief without being obscure, but it cannot be prolix without weakening its coherence. It must aim at some point and reach it by the most direct road. The *Ars Poetica* of Horace is still the best guide to lucid composition in law as well as in letters.<sup>3</sup>

It should be borne in mind always, that there are some radical differences between literary and legal composition. These differences are not merely verbal, nor even syntactical, but are much wider, and embrace everything included in the idea of style. Hence, style becomes an important feature in the drafting of public

<sup>1</sup> *Beebe v. Griffin*, 14 N. Y. 244; *McCluskey v. Cromwell*, 11 Ibid. 593; *Potter's Dwaris*, 196 and 205 n.

Essays in Jurisprudence, p. 258.

"Quidquid praecipies, esto brevis, ut cito dicta  
Percipiant animi dociles, teneantque fideles;  
Omne supervacuum pleno de pectore manat."

documents, where, as in one department at least, that of diplomacy so much depends upon conformity to established rules of expression, and to technical meaning of words. As every obscure phrase may, in such cases, become the instigator of international differences of a momentous character, so the chief aim of the diplomatic draughtsman is to employ the most exact and at the same time elaborate language, a predicament which often leads to paraphrase and ambiguity.

Legislative bodies, however, do not pay such particular attention to legal composition as is generally necessary. It is only when measures of supreme importance, like constitutions, are being drafted and discussed, that adequate care is given to the subject through the appointment of a committee on style. Thus, when the Constitution of the United States was in process of construction, some of the most astute and erudite members, like Morris, Hamilton and Madison were selected as a committee on style to give the final touches to its phraseology. And it is to them that we owe that perspicuity of expression, and that luminous interpretation of the underlying intention, which has made it an incomparable masterpiece and model of political law.

In literary composition, we aim chiefly at elegance and perspicuity; force occupies but a secondary place to ornament, and affluence of diction is permitted wherever a picturesque effect is needed. We must give color to words in order to paint pictures with them. No such conditions existing in the case of legal composition, the rule of its structure becomes of necessity a very different one. The subjects with which it deals; the manner in which they must be dealt with; and lastly, the imperative voice which must everywhere animate the structure of a legislative enactment, all combine to narrow the rhetorical margin within which

it must speak its language. It is in every sense a command addressed to a community. Neither the phraseology of exhortation, of expostulation, or of rogation can be employed. As it speaks in the categorical imperative, it must speak in plain, concise and emphatic language that carries its own meaning in every sentence. Not to be clear in expression, is to be deceitful in intention.

Hence, it admits of no coloring, of no rhetorical amplification, and of no implied reservations in meaning. It employs no metaphors, and tolerates no elliptical phraseology. Its tone should be colloquial and uniform throughout, and marked by as little redundancy as possible, having in view always the necessity of repeating certain clauses descriptive either of classes of persons, of particular subjects, or of inhibitions upon conduct. The only emphasis permissible is the emphasis of repetition. Therefore, the rules of brevity and clearness require that every law should suggest nothing but what it states, and imply nothing it does not express.

Legal composition in its broadest sense includes statutes, ordinances, and by-laws of corporations, canons of churches, rules of courts, treaties between nations, judicial documents of every kind, also conveyances and pleadings. In every one of which class of compositions the law of precedents, the rules of convention, and the whole body in fact of the unwritten or common law, as well as of the statute law, must be kept constantly in view.

Anciently statutes were not punctuated, and as they were read without stops, it became necessary to determine the relation between particular clauses by the context. The modern style of composing them with an appropriate punctuation, enables them to be read distributively as well as collectively, and thus to give to

each sentence its proper weight and interpretation. Thus, in *State v. Underground Cable Co.*,<sup>1</sup> which arose upon a proviso to the effect that, "this Act shall not apply to railway or religious corporations, or purely charitable or educational associations, or *manufacturing companies or mining companies carrying on business in this State*;" the question mooted was whether the restriction extended to mining companies only, or to manufacturing companies as well, and it was conceded that if there had been a comma after "manufacturing companies," the proviso in its effect on such companies would not have been confined to those carrying on business within the State. Again, in *U. S. v. Isham*,<sup>2</sup> it was held that the words "*memorandum, check*," which occur in that part of the schedule of instruments required by the statute of June 30, 1864,<sup>3</sup> to be stamped, and was so printed in the statute books, should read *memorandum-check* with a hyphen instead of a comma.

Generally speaking, punctuation is not allowed to control the plain intent of a statute, not being considered any part of it. Yet, as all the cases show in which it has been made the subject of an issue, punctuation is so far a grammatical and indispensable adjunct to the perfection of verbal composition, that it is constantly resorted to by courts to discover the true meaning of an ambiguous sentence. Its part in the mechanics of framing laws, is too important to be overlooked as a guide in the interpretation of legal phraseology.

<sup>1</sup> 18 Atlantic Reports, 581.

<sup>2</sup> 17 Wall. 496, 502; *Comm. v. Shopp*, 1 Wood. Penn. Dec. 123, 129; *Hammock v. Loan & Trust Co.*, 105 U. S. 77; *Hamilton v. Steamboat Hamilton*, 16 Ohio N. S. 428; *Cushing v. Worrick*, 9 Gray, 382; *U. S. v. 3 R. R. Cars*, 1 Abb. U. S. 196; *Squire's Case*, 12 Abb. Pract. N. Y. 38; *Gyger's Appeal*, 74 Penn. St. 42.

<sup>3</sup> 13 Stat. at Large, p. 298, § 158.

The omission to repeat a descriptive word in the title of an Act, occurring at some advanced stage of its passage, and when its designation by number on the calendar of the House, is otherwise so well preserved as to maintain its identity, is not considered fatal to its validity.<sup>1</sup> And where part of a statute is judicially impeached and declared to be void and inoperative, the remainder may still be enforced as a distinct and distinguishable part, having all necessary legal attributes of its own. This is the advantage secured by constructing a statute of homogeneous parts, the removal of any one of which only affects its derivatives, but need not inevitably destroy the entire structure. The chief fact to be kept in view in the mechanics of legislation is, that every statute should be so framed as to be able to represent, under a logical interpretation, both the reason of the law and the intent of the legislator. Under this test it would never need any authentic interpretation, but only a doctrinal or grammatical one, according to the issue raised by the circumstances of any given case. If we add to this the historical element, or that explaining the previous condition of the law, and the change made in it by the new law which is the subject of interpretation, we shall then be able to trace the position of that particular statute in the system of jurisprudence of which it forms a part. This mode of constructing a statute is based upon the system of Savigny, and though originating with his doctrines of interpretation by analysis, supplies the true elements of synthesis to be utilized by the legislator.

Preambles, being now almost entirely dispensed with, it is unnecessary to enter into any extended examination of the part once played by them in English statutes.

<sup>1</sup> *Walnut v. Wade*, 103 U. S. 691; *Larrason v. Peoria, Atlanta & Decatur R. R. Co.*, 77 Ill. 11.



Parliament, formerly, was in the habit of indulging itself in ratiocinative preambles, by way of argument to justify its action before the nation in passing some particular statute. These preambles were exceedingly lengthy, comprising very often narratives of events supposed necessary, in order to explain the occasion for such a statute, coupled with a running exposition of its intent. Some of these introductory remarks have become historical for their peculiarity of style and amplitude of statement, and have made the statutes with which they are associated shining landmarks in history, as well as legislation. For instance, the account of the Holy Maid of Kent, in the 25 Hen. 8th, cap. 12, occupies by way of preamble 280 lines of the size of a folio page, while the statute itself is comprised in 53. The gunpowder plot is unfolded in 3 Jac. 1, cap. 1 and 2. The recital of the Duke of Marlborough's Victories, in the 3d and 4th Ann., c. 4, and in the 5th Ann., cap. 6, are further illustrations of this now obsolete custom. The most remarkable preambles are to be found in the reign of Henry VIII. The last of the English statutes which contains a long, legal argument is the 3d Geo. 4th, cap. 92. In like manner, the history of steamboat navigation in the United States may be traced through the legislation of New York, in the various statutes granting rights of navigation to Messrs. Fitch, Livingston, and Fulton.<sup>1</sup>

#### TITLES.

Although the title of an Act is no part of it, and has been frequently so declared by courts, they have not hesitated, whenever the enacting clause has been either

<sup>1</sup> Chap. 55 of 1787; *Ibid.* of 1798; *Ibid.* 94 of 1803; *Ibid.* 165 of 1807; and *Ibid.* 248 of 1815.

doubtful or too general, to resort to it for explanation and guidance in restraint of its generality.<sup>1</sup> Therefore titles should distinctly recite what the particular subject of the law is, otherwise, as was formerly the custom in New York, many subjects, the most disconnected and unrelated, are likely to be jumbled together in one statute and under a single title. This afforded such an opportunity for fraud in the enactment of private and local bills, that the method was finally prohibited by the Constitution of 1846, ordaining that "no private or local bill shall embrace more than one subject, and that shall be expressed in its title."<sup>2</sup>

In order to prevent concealment of the subject-matter of any Act by a misleading title, nearly every State in the Union has introduced into its Constitution some guardian provision against it. These prohibitions against promiscuousness of subjects in one enactment, apply as well to *special* as to *general* legislation, and in either case, are intended to defeat any attempts to obtain, surreptitiously, special privileges or advantages for persons or corporations under color of some alleged benefit to the public. It has been found that the only way, therefore, in which to meet and to defeat statutes seeking to introduce discriminations in favor of certain persons or classes of interests, is to compel them openly to declare in their titles the object in view. Then the legislator is made fully aware of what he is asked to promote, and can govern himself accordingly under his responsibilities to the public.

Without repeating in detail these constitutional pro-

<sup>1</sup> Myer v. Western Car Co., 102 U. S. 11; Comm. v. Marshall, 69 Penna. 328; Jackson v. Gilchrist, 15 Johns. 89; Field v. Gooding, 106 Mass. 313; Henry v. Estey, 13 Gray, 336; Arnot v. McClure, 4 Denio, 40; Tuthill v. Tracy, 31 N. Y. 157; Endlich on Statutes by Maxwell, § 63, and cas. ci.

<sup>2</sup> Art. 3, § 16; People v. Supervisors of Chautauque, 43 N. Y. 10.

visions, which may be found in their appropriate places in the Revised Statutes of the various States, it will be sufficient to say that they all agree in the one idea of requiring unity in the subject. However verbally expressed, their general phraseology similarly directs that every bill or law shall embrace but one subject, and which subject shall be expressed in the title. These words expressed in the imperative, and relating to a duty of the legislator to the State, cannot be regarded otherwise than as mandatory. All legislation must be in conformity with them, and any law passed in violation of their command is liable to be declared void, not only as to those objectionable portions which overrun the title, but also as to those other portions which, not being separable from them, may have operated as a "rider" to their passage.<sup>1</sup> Thus a word of wide significance like "*regulate*," "*provide*," "*undertake*," "*alter*," when coupled with powers conferred, unless qualified by a recital of the particular direction and extent, or the precise circumstances under which such powers can alone be used, might easily mislead the Legislature. For, while the body of the Act might express its object, the title might disguise if not absolutely conceal it.<sup>2</sup> It is not sufficient, therefore, that a subject be expressed, but it must be the true and actual subject, and this can only be ascertained by a comparison of the body of the Act with its title. The character of an Act is to be determined by its provisions rather than by its title.<sup>3</sup>

### ENACTING CLAUSES.

A brief analysis of some of the technical difficulties which lie in the path of the legislator in the drafting of

<sup>1</sup> *People ex rel. Failing v. Commissioners of Highways*, 53 Barb. 70.

<sup>2</sup> *People v. O'Brien et al.*, 38 N. Y. 193.

<sup>3</sup> *People v. McCann*, 16 N. Y. 58.

statutes, will serve to show the extreme care necessary for a correct expression of any written law. Ordinary skill in composition will not of itself suffice for this purpose, nor does even judicial experience always protect against errors in the framing of enactments. As an example of this may be cited the instance of Lord Loughborough who, after having served as Lord Chancellor, drew up a law against young men of fortune granting annuities in their minority, to the ruin of their fortunes. The Act was repealed on account of inaccuracy in wording, and the repealing statute has been explained by three subsequent Acts.<sup>1</sup>

In drafting statutes describing offences, a wide margin exists for erroneous definitions; thus the distinctions between *larceny and embezzlement* have given rise to some very subtle conflicts of opinion. In one case in New York, the captain of a canal boat having pig-iron for freight, sold and converted to his own use a portion of the same. He was indicted for larceny, but acquitted on the ground that the offence was embezzlement. He was then indicted for embezzlement and convicted. But upon appeal, the conviction was reversed, the Court holding the offence to be larceny. Thus he was once convicted and twice acquitted of the same technical offences, under two different interpretations of a statute by the highest Courts.<sup>2</sup>

The framing of statutes in England, has accordingly been surrendered into the hands of special draughtsmen skilled in such labors, and accustomed to the use of a style not elsewhere to be acquired. Nothing of a similar kind appears to have been done in the United States, the function of the engrossing clerks being limited to copying bills passed, verbatim, including

<sup>1</sup> Lieber's *Hermen.*, p. 21 n.

<sup>2</sup> *Nichols v. People*, 17 N. Y. 114; *Comm. v. Adams*, 7 Gray, 43.

omitted and misspelt words, and defective punctuation. Under Art. 3d of the first Constitution of New York adopted in 1777, a Council of Revision was created, consisting of the Governor, Chancellor and any two Justices of the Supreme Court, to whom all bills were submitted for approval before receiving the signature of the Executive. These bills might be returned unapproved to either House within ten days, with objections. But the same might nevertheless be passed by a two-thirds vote. This Council continued to exist until abolished by the Constitution of 1821 which leaves the sole power in the hands of the Governor, and the reasons given in the Convention for the abolition of this body, were, that the same line of distinction which governed parties in the Legislature, in the passage of bills, uniformly marked the decisions of the Council.<sup>1</sup>

The direction, however, in which more particularly our present inquiry lies, is not that of valid enactments, so much as that of the grammatical and historical pitfalls into which legal compositions may easily lead us.

Thus, the careless use of the ellipsis in the omission of important connective words; or, hypothetical expression of the alternative, in clauses relating to contingent events and their consequences; the abuse of the parenthesis in introducing explanatory conditions by way of limitations, and overlooking the rule that a limiting clause is to be restricted to the last antecedent.<sup>2</sup>

Again, the employment of abstract words in contradistinction from specific ones describing distinct acts and concrete examples; the transposition of words like current expenses of the year, instead of expenses of the current year; revenue laws instead of laws for raising revenue, or, the repetitious use of negative expressions

<sup>1</sup> Debates of the Convn. 1821, p. 37.

<sup>2</sup> *Cushing v. Worrick*, 9 Gray, 385.

and synonyms; the wrongful employment of the subjunctive mood in the place of the indicative, not to mention particular words like "*it*," "*and*," "*or*," and "*may*," "*in*" instead of "*within*," or "*into*," all which being difficult to use rightly at particular times and in particular places, have given occasion for varying judicial interpretations. Thus an Act of Massachusetts of 1855, provided that "the real and personal property of any woman who may be married *in* this Commonwealth, and its rents, issues and profits shall remain her sole and separate property," etc.; and it was held to apply to the case of a woman who with her husband had their domicile in that Commonwealth at the time of their marriage, although the marriage was solemnized out of the State.<sup>1</sup>

These are the things which constitute obstacles to lucidity of expression in legal composition, and to avoid them as far as possible, should be the aim of the legislative draughtsmen. As before said, laws should be written in a style in which words express a meaning rather than suggest it, and from which a sense can be directly extracted consistent with the underlying intention.

A defective arrangement of pronouns and their antecedents, is a frequent source of confusion in the interpretation of a statute, more particularly so, when these pronouns occur in dependent clauses which suspend the sense. Notwithstanding the fact that proximity does not always decide the connection between the pronoun and its antecedent, it is still necessary, for lucidity of expression, that they should not be placed at any great distance apart. In legal composition, it is better to repeat the antecedent, in order to leave no doubt as to the person intended. Unless this be done, ambiguity of

<sup>1</sup> Woodbury v. Freeland, 82 Mass. 105.

expression will be caused by pronouns being so placed, that they will admit of a double, or uncertain relation. Thus, in the Revised Statutes of New York, Part 2, Chap. 8, Tit. 3, Sec. 8, relating to Guardian and Ward, it is recited that "Before appointing any person guardian of a minor, the Surrogate shall require of such person a bond to the minor, with sufficient security, to be approved by *him*," etc. etc. Now who does *him* refer to? To the minor or to the Surrogate? In the sentence it stands nearest to the word minor, which according to grammatical construction is its antecedent. Yet the legal sense requires that it should refer to the Surrogate. Why then should not the legal sense be expressed in a grammatical way? It is better at times, therefore, to resort to repetition rather than to fail in precision of meaning.

Qualifying words like adjectives and adverbs are, also, frequently misleading, by reason of the limitation in definition which they affix to the word qualified. In the construction of that provision of the New York Code of Civil Procedure relating to allowances additional to costs, in "*difficult and extraordinary cases*," there are already over twenty decisions defining the judicial meaning of these words. So, with such terms as "*substantial right*," "*reasonable care*," "*deliberate intent*," "*negligent*," none of which can have any absolute meaning, because they are all terms expressive of *relation*, consequently varying with the circumstances to which they are applied.

And the same is the case with explanatory words introduced to exemplify a definition broad enough to include an entire class. Thus, in *Comm. v. Whitney*,<sup>1</sup> which arose out of an indictment under the statute to punish common drunkards (no other but intoxicating

<sup>1</sup> 11 Gray, 477.

*liquors* being mentioned in such statute), it was held that evidence of habitual intoxication from the use of chloroform, would not sustain the indictment. In other words, that a chloroform drunkard was not a statutory or common drunkard, and could not be punished under that designation.

In like manner the term spirituous liquor has been variously interpreted, according either to its chemical constitution, or its effects upon human beings. The interpretation has often been made to depend upon the context. Thus, in *State v. Oliver*,<sup>1</sup> it was held that "cider or crab cider" (regardless of its age) "is not spirituous, nor of a like nature as wine, ale, porter, or beer," the Court resting its distinction upon the process of "distillation" as the distinguishing feature, and not upon the presence of alcohol alone. The learned judge who rendered this decision evidently overlooked the fact, that there is no chemical difference between the alcohol of fermentation and that of distillation, except in the percentage of combining water; one alcohol being merely a rectification of the other by evaporation of its water.

So difficult is it at times to use such words intelligently, and to interpret them rightly when in litigation, that a question recently arising in Pennsylvania under a lease, giving a party the sole and exclusive right of mining and excavating for petroleum, rock, or carbon oil, or other "volatile substances," as to whether this latter clause included "natural gas," the Court below held that it did not, inasmuch as gas was not, either in the popular or the chemical sense, a "volatile substance." On appeal, it was held that these words had no well-defined legal meaning; that they created an ambiguity, and that their construction became a

<sup>1</sup> 26 W. Va. 422.



mixed question of law and fact, in which the Court, and if necessary the jury, must have the aid of scientific men.<sup>1</sup>

There is a class of words which, from their very nature, are unsusceptible of precise or definite meaning, because they describe neither facts nor things, but merely inferences varying with the circumstances under which they are drawn. They are matters of personal opinion upon a state of mutable facts, that may be, and often are, differently interpreted by different minds. Such, for example, is the adjective "reasonable," which has no fixed standard of meaning when applied to such facts as *time*, *distance*, *compensation*, *cause*, or *cause to believe*. What is reasonable in relation to any one of the above facts under certain circumstances may, by a change in those circumstances, become unreasonable.<sup>2</sup> The same difficulty of indefiniteness attaches itself to the adjectives "substantial,"<sup>3</sup> as applied to *justice*, *error*, *rights*, *facts*, *notice*, *claim*; to "proper," "appropriate,"<sup>4</sup> and other words expressive of changes in approximate adaptation to particular circumstances.

Similar inherent difficulties accompany words expressing degrees of quality in substances, like *sound*, *firm*, *inflammable*, *intoxicating*, *poisonous*; or inhuman conduct like *malicious*, *murderous*, *criminal*, *dilatory*; or again words relating to *seasons*, or hours of the day, like *dawn*, *twilight*, *fall*, *winter*, *spring*; or referring to *color* or *health*, or mental states. Now, inasmuch as there is no such thing as absolute language, and every law must express its commands in words of relation, it is better for the sake of precision to speak

<sup>1</sup> Ford *et al. v. Buchanan*, 111 Penn. St. 31.

<sup>2</sup> Campbell *v. Woodworth*, 24 N. Y. 304; Toland *v. Sprague*, 12 Peters, 336; Wiggins *v. Burkham*, 10 Wall. 129; Toof *v. Martin*, 13 Ibid. 40.

<sup>3</sup> Allard *v. Lamiraude*, 29 Wis. 510.

<sup>4</sup> U. S. *v. Reese*, 92 U. S. 214.

in general terms leaving courts to apply the principle to particular instances by analogical reasoning, than to qualify the principle by specific instances which narrow its application to those enumerated cases.

This is particularly necessary in criminal statutes, as they must be strictly construed, and it is always conducive to accuracy in their interpretation, as well as to facility in their enforcement, to define the crimes which the particular law declares to be such, together with the times and places which shall constitute an aggravating circumstance in their commission. But statutes which may be liberally or equitably construed, do not call for such precision in their phraseology, since, in cases of ambiguity of expression courts will seek for a channel of interpretation through the maxim, *noscitur a sociis*.

The introduction of illustrations, by way of explanations of the intended purport of a statute, is calculated to mislead at times, by creating a different scale of meaning in its different parts. The employment of mathematical proportions, as a means of establishing statutory qualifications in substances requiring licenses for their sale, is a common instance of this kind. The subsequent use of adjectives denoting degrees of approximation to these arbitrary standards, gives opportunity for variety of interpretation and conflict of opinion, in matters that should be intelligible without the aid of experts. And where descriptive words constitute the very essence of an Act, any mistake which renders them incapable of being applied to the particular subject intended, destroys its efficiency.<sup>1</sup>

So, too, the use of general words after a number of particular ones, is uncalled for by any ordinary necessity. A mention of the particular persons or things

<sup>1</sup> *Blanchard v. Sprague*, 3 Sumn. 279; *Comm. v. Evans*, 132 Mass. 11.

having been made, there should be no need of including any others by an all-embracing clause which creates an indefinite class. The rule of construction for such cases makes general words apply to the particular ones which they follow, or the things they refer to, which are *ejusdem generis*.<sup>1</sup> This renders them largely surplusage.

Even such common phrases, also, as *food*, *medicine*, *person* have given rise to many conflicts of opinion in the interpretation of statutes.

The moral of these examples is easily perceived. As all public acts are addressed to classes of persons, the important point in mentioning a class is not to add any definitions under it, since such definitions act as terms of exclusion for all outside of them.

Sufficient has now been said upon these points to show that they play an important part in the mechanics of legislation. They belong logically to the *mens legis*, or letter of the law, forming the essential structure through which the *ratio legis*, or spirit of the law, can be applied to existing necessities.

Passing to the next topic which claims our attention we come to that of—

#### AMENDATORY AND REPEALING STATUTES.

Many new statutes having the effect either to amend or to repeal existing laws, familiarity with the operations of these laws, and the consequences produced by them upon the rights of persons and of property, should be obtained before undertaking to alter them. No one can be competent to disturb, even for purposes of a better adjustment, an existing system of legal principles until he has fully studied its operations, under the light

<sup>1</sup> U. S. v. Weise, 2 Wall., Jr., 72; U. S. v. Coombs, 12 Pet. 72; Chegaray v. Mayor, 13 N. Y. 220.

of practice and judicial determinations. When we remember that society is always in a fluent state, and civil rights are daily seeking enforcement under constantly varying circumstances, we perceive why attention must always be given to the protection of each class of rights, which the amendment or the repeal seeks to affect.

Hence, rights that are perfect, and rights that are inchoate; rights in possession and rights in expectancy, as determined by constitutional limitations and judicial decisions; or, in more general terms, both legal and equitable rights are to be duly weighed and considered, in all contemplated amendments or repeals of statutes affecting the operations of such rights, as attached either to persons or property. It becomes an imperative necessity, therefore, that rights in controversy and undergoing interpretation in any judicial forum, should be left to its decision, under existing principles of law and rules of procedure obtaining therein, at the time when such proceedings were inaugurated. This precaution in legislation is a right due to the citizen who, in good faith, may have commenced any civil suit, or answered one, or pleaded to an indictment under an existing law.

So, too, when rights to property have become vested in any one in present possession, there are obligations thence imposed upon the Legislature not to disturb the quiet of such tenures. The general rule being that statutes shall be construed as prospective, it follows that when the effect of a retroactive construction would be to destroy a vested right, the construction must be prospective.<sup>1</sup> It must be borne in mind however in

<sup>1</sup> Sedgwick Stat. and Const. L., 161; Matter of Prot. Ep. School, 58 Barb. 161; People v. Supervisors, 63 Ibid. 83; People v. Carnal, 2 Selden 463.

connection with this principle and as a qualification to its application in practice, that interests *in expectancy* are not always to be regarded in the light of such absolutely vested rights, that no Legislature can disturb them. Acts of legislation are not violations of such rights until the latter at least are *initiate* and have begun to take effect, "and if," in the language of one of the New Hampshire Courts, "before the rights become vested in particular individuals, the convenience of the State procures amendments or repeals of those laws, those individuals have no cause of complaint. The power that authorizes or proposes to give, may always revoke before an interest is perfected in the donee."<sup>1</sup>

With these exceptions, relating to rights that are mostly contingent, like those of *dower*, *descent*, *tenure of office*, *corporate franchises* and to particular remedies, the principle of protection against legislative interference is afforded to all forms of vested rights, as a matter of public conscience, the good faith of the State being presumptively pledged to the support of those legal conditions which its laws have encouraged. Hence the dogma of non-interference.

It is for these reasons therefore, and in obedience to the provisions of the Constitution forbidding the passage of any laws "*impairing the obligation of contracts*," or of any statutes in the nature of *ex post facto laws*, that, whenever any existing law is to be repealed, or so amended, as to seriously disturb its provisions and to affect vested rights, some *provisos*, or exceptions, should be made in favor of *contracts* or transactions arising out of it, and still pending, or undetermined at the time of such repeal or amendment.

<sup>1</sup> Per Woodbury, J., in *Merrill v. Sherburne*, 1 N. H. 214; *Rich v. Flanders*, 39 N. H. 304; *Cooley Const. Limit.*, pp. 359-362.

Hence every repealing statute should except from its operation the following things, viz:—

1st. Any act done or right accrued, or established, or any suit or prosecution, or proceeding had, or commenced in any civil case, *previously* to the time when such repeal shall take effect.

2d. Any offence committed, or penalty or forfeiture incurred, or any suit, prosecution or proceeding for an offence, or for the recovery of any penalty or forfeiture, pending at the time when such repeal shall take effect.

3d. Any appointment made, or office held by virtue of any such statutory provision.

4th. Any deed, contract, security, act, matter or transaction, executed, made or done by virtue of such existing statutory provision.

But every such act, right and civil suit, prosecution or proceeding; and every such offence, penalty, forfeiture and penal suit, prosecution or proceeding; and every such appointment or office, and every such deed should remain, as if such statutory provision had not been repealed, and in all respects subject to the law in force for the time being after such repeal.<sup>1</sup>

In the United States, under the restrictions above enumerated, it has been held without exception, that a Legislature may give a retroactive or retrospective effect to a statute, provided it be not an *ex post facto* law aggravating a crime, increasing its punishment, or altering legal rules of evidence.<sup>2</sup> Nevertheless, as laws are generally intended to have a prospective operation, and Courts will so adjudge them unless their language imperatively demands an opposite construction, it may be said that retrospective statutes are as a general thing objectionable, in that they conflict with established

<sup>1</sup> Gael on Legal Compos., p. 224.

<sup>2</sup> *Calder v. Bull*, 3 Dallas, 386; *Hartung v. People*, 22 N. Y. 95.

principles upon which rules of practice have been built. They often, in this way, disturb many rights, while undertaking to vindicate a few.

In relation more particularly to statutes impairing the obligation of contracts, as distinguished from *ex post facto* laws, care must be taken to discriminate between the contract itself and its obligation. It is the obligation of the contract which the Constitution protects, and not the contract itself. This obligation is the *lex loci*, the municipal law of the place binding the parties where the contract was made, and under which it is to be executed. The inviolability of this obligation is accordingly protected, because the rights of parties have become vested under it in the form of existing obligations, and correlative duties have sprung out of them which each must discharge towards the other.<sup>1</sup>

It is hardly necessary to remark that the doctrine of vested rights applies chiefly to that class of statutes, in which a surrender of rights is made for the purpose of permitting the formation of contracts under them. Such statutes become in their nature and application *grants* for a specific purpose, and as such, parties acting under them in good faith will be protected against legislative interference. In the language of Chief Justice Marshall, "A grant in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant."<sup>2</sup>

In the presence of these legislative pitfalls, it cannot be too often repeated that amendatory and repealing statutes should distinctly state the title of the Acts amended or repealed by them; and also, for greater

<sup>1</sup> *Ogden v. Saunders*, 12 Wheat. 213; *Sturges v. Crowninshield*, 4 Wheat. 122; *Bronson v. Kinzie*, 1 How. 311.

<sup>2</sup> *Fletcher v. Peck*, 6 Cranch, 87.

definiteness, the number of the particular section amended or repealed. Such amendatory statutes are governed by the same rules as other Acts, in respect to the unity of the subject embraced in their titles. They must not disguise amendments under misleading statements of purposes.<sup>1</sup> Varieties of amendment, in the nature of revisions, consolidations, or codifications of many statutes *in pari materia*, may be treated as a new enactment thereon; and it is usual to append to them a clause repealing all past Acts inconsistent with their provisions. The titles of these consolidating statutes, whether designated as revisions or codifications, may, from their generality of purpose, accordingly embrace under one head the entire class of subjects to which they refer; as, for instance, Banking, Insurance, Railroads, Civil or Criminal Procedure, etc.

But the most insidious and misleading of all enactments, those in fact whose surreptitious character needs most to be vigilantly scrutinized, may be described for want of a better designation as *engrafting* or *extending* Acts. By this term is to be understood such statutes as incorporate into, and make part of their substance existing laws, by mere reference to them, and extending their application to the newly enacted law. Now, inasmuch as these engrafting Acts, unless they insert the existing law, or part thereof, which is to be deemed a part of their substance, do not always disclose upon their face the extent to which they affect public or private interests, they may easily entrap legislators into voting for their passage by misconception of their ultimate scope and intent. This danger has been provided for in the Constitution of New York (Art. III., § 17), which forbids the passage of such Acts, except when

<sup>1</sup> *Stewart v. Father Matthew Soc.*, 41 Mich. 67.



the existing law, or part referred to, is inserted in them.<sup>1</sup>

### THE FRAMING OF STATUTES.

Every law can have but two objects in view, viz:—

1st. To describe some person or thing upon which, or through which, it is to operate; and

2d. The means or instrument through which its objects are to be attained. It is through these two avenues alone that the purpose of any law can be accomplished.

Legal relations may be said to consist of rights or privileges on the one part, and duties or obligations on the other. These subsist between *persons*, either directly or through the agency of things. The practical effect of such relations is to create rights and duties as correlative conditions. Hence, as has been truly said, a single man existing on the surface of this earth would have certain physical powers over external things, but no legal rights.<sup>2</sup>

This springs from the fact that natural law is not in itself legally authoritative, except when recognized and supported by the power of the State. In order to be judicially operative, it must first be incorporated with positive law.

In whatever light we view *rights*, as affected by the will of the State expressing itself through positive legislation, we find them always considered with relation either to a *subject* or *object*.

Persons, as subjects of rights, may be either the *agents* or *objects* of action, while things can only be the objects, either of rights or of actions. Things can have no rights in themselves dissociated from persons, be

<sup>1</sup> People *ex rel.* McConvill *v.* Hills, 35 N. Y. 449.

<sup>2</sup> Reddie's *Inq. Elem.*, p. 171.

cause right implies, as its correlative, duty, and there can be no idea of duty apart from a moral being to discharge it. Therefore, the *rights of things* so called, when applied to property, means simply the rights of persons considered with reference to specific things; for all municipal law, when reduced to its ethical foundations, must be in its very nature *personal*.

Varieties of relation between men may, indeed, give rise to differences in the application of laws to them by inclusion or exclusion; but this is a fact affecting the classification only, and not the foundation of laws. And these distinctions being of universal recognition are admitted in international as well as municipal law.<sup>1</sup> "Certain laws," says Hobbes, "are addressed to all citizens indiscriminately; others to certain districts of country; others again to certain classes of men, and others, sometimes, to a particular individual."<sup>2</sup>

Another point of great importance in framing laws is, that of constantly keeping in view the constitutional or absolute rights of persons (as described or defined in the organic law of the State), in contradistinction from their relative rights, in respect to other persons owing corresponding obligations; or again, in their relations to the supreme power of the State as its ministers, trustees, or public agents. The two former may be called their *private* rights, the latter their *public* rights. The former are founded in *natural* rights and positive laws conjoined; the latter rest solely upon constitutional provisions, or statutory enactments.<sup>3</sup>

In the United States, *original* sovereignty is always assumed to have its fountain-head in the *people*, although

<sup>1</sup> Story, Conflict of Laws, sec. 51; Bowyer, Univ. Pub. L., pp. 144-7.

<sup>2</sup> Hobbes, Leviath. De Civitate, cap. xxvi.

<sup>3</sup> Austin, Prov. Jur., appendix 24-5; Mackeldy, Comp. Mod. Civ. L. Introd., sec. 15, 16.

a qualified sovereignty is delegated to the law-making branch of the government, as representative of that people acting in a legislative capacity. Hence, the name of the authority from which any law emanates must always be stated. The enacting clause of a statute, the precise language of which differs in many of the States,<sup>1</sup> needs to be stated but once, as it is present by implication at the beginning of every new paragraph. Congress by Act of February 16, 1871, has forbidden its use in any section of an Act or Resolution of that body, except the first.<sup>2</sup> The enacting clause of all Acts of Congress reads thus: "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled."

In the State of New York it reads: "The people of the State of New York represented in Senate and Assembly do enact as follows:"—

In Massachusetts it reads: "Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same."<sup>3</sup>

In Maine it reads: "Be it enacted by the Senate and House of Representatives in *Legislature* assembled."

In Connecticut it reads: "Be it enacted by the Senate and House of Representatives in General Assembly convened."

In New Jersey it reads: "Be it enacted by the Senate and General Assembly of the State of New Jersey."

And in different States the enacting clause differs with the differences in the appellation of their legislative Houses, as designated in the Constitution. In England formerly, and before the successive revolutions which gave Parliament a preponderating voice in legislation, statutes ran thus: "The King commands" or

<sup>1</sup> See the various State Constitutions and Revised Statutes.

<sup>2</sup> 16 Stat. at Large, 431; R. S. § 9.

the King wills ; or “ Our Lord the King hath ordained,” but without mentioning the consent of the Commons. Now they read thus : “ Be it enacted by the Queen’s most Excellent Majesty, by and with the *advice* and *consent* of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same,” etc.

Having thus unfolded in a general way the principles upon which rest the legal reasons of all positive laws, we are next brought to consider their structure, as an exponent of the legislative will expressing itself through the phraseology of an enactment.

The three fundamental propositions to consider in connection with any proposed law are : *first*, its necessity ; *second*, its expediency ; *third*, its adaptability to existing constitutional limitations. The answer to the first of these propositions is to be sought for in the history of past legislation upon the same subject, and in the judgments of courts pronounced in cases relating thereto. The answer to the second is to be found in the general or public demand for such a law as a matter of local policy. The answer to the third is to be obtained through a proper apprehension of the spirit, as well as the letter of the State Constitution. Hence, apart from distinct and enumerated limitations prohibiting certain acts, all laws which are hurtful to the interests of Christianity, morality, or are against public policy must be considered, by implication, as forbidden. Whenever such laws are enacted, it is the duty of courts before whom they may pass in revision to declare them null and void.<sup>1</sup>

The *person* or *thing* through which a law operates is called the *legal subject*.

<sup>1</sup> Bonham’s Case, 8 Rep. p. 118 ; Sedgwick, Const. L., p. 125.

The duty enjoined, or the prohibition announced constitute its *legal action*.

The legal subject describes the extent and instrument through which the law acts; the legal object defines the character *per se* of the law; *i. e.*, whether it be a criminal, equitable or personal statute. In other words, whether the law is of universal application, or if not, then what are the particular cases to which such legal action is limited, and the conditions which must precede its operation. The nature of any particular law will be seen to turn therefore upon its legal action, or commandment, as the one great object of all its functions; while at the same time the legal subject defines the extent and instrument through which these functions are to be accomplished.

Correct legislative expression requires, that the legal action should appear as early in the phraseology of the law as possible. If this can be done in the first, or second sentence of an enactment, it announces at once its nature, and prepares the way for a concise and discriminating development of its subsequent terms and conditions. By closely adhering to this rule, no errors need occur in properly adjusting, according to the needs of existing circumstances, either rights, privileges, powers, obligations or sanctions. Lucidity and precision in statement are the best protection against ambiguity and confusion of meaning; and in order to secure these chastening qualities in style, the draughtsman should have mastered the foundations of the subject before attempting to formulate it in legislative language. When he has accomplished this preparatory task, the subsequent labors of composition will be light and orderly. "*Cui lecta potenter erit res, nec facundia deseret hunc, nec lucidus ordo.*"

It is never necessary to declare by statute what are known as *absolute* rights, since whatever does not

infringe the natural or moral law, and is not inhibited by the civil authority, is permitted. But inasmuch as every law contemplates a benefit to some person or community, it becomes necessary to distinguish between 1st a *right*, which is an absolute grant to one, or to many; 2d a *privilege* which is a concession to a limited number of persons to do certain acts; and 3d a *power*, which is a trust confided to one or more persons for the benefit not of themselves, but of others.

Whenever either a *right*, a *privilege*, or a *power* has been granted or created by the supreme authority in a State, there ensues, by implication, a corresponding obligation upon all citizens to regard the same as imposing conditions *pro hoc vice* upon them. No mention of such obligation, and its corresponding duties, need be made in a statute, for they follow as of course. The law being a rule of conduct prescribed for all, need not furnish a commentary upon itself. If properly written, it should explain itself as well by implication, as directly. It becomes then the rule of conduct for all, or in the language of the civilians it is *norma agendi*, as contra-distinguished from *facultas agendi*.

In view of the great importance of the *legal subject*, which, for convenience sake, is sometimes spoken of as a thing, meaning thereby some right, privilege or power enjoyed by a person in respect to some thing, as for instance an estate *in fee*; *for years*; *or in expectancy*; *or some special legal remedy*, it is necessary to describe with the utmost precision the person or class of persons, to whom such a law is confined, as also all the details of condition under which their rights, privileges, or powers shall vest, together with their prescribed limits. It is best, and certainly more grammatically correct, to put things, wherever mentioned in an enactment, in the *objective* case, making their whole consequence to depend

in law, as it does in fact, upon their relationship to persons. It is upon them that persons act, in their several relations to them, as objects of ownership. Properly speaking therefore, they should not be put in the nominative case, for they always imply an actor outside of themselves without which they cannot be set in motion. The maxim "*res perit domino suo*" correctly implies that a thing in law depends upon a person for its rights, since it can have no inherent ones.

In every law the legal subject and legal action must be conjoined, and the phraseology or legislative expression should be such as to maintain a close relation between them. All disconnected and parenthetical forms of expression should be avoided as tending to produce ambiguity. Short sentences being the easiest and most direct way in which to convey meaning, should be resorted to in preference to longer and more involved forms of expression. It must be self-evident that if a law be the declaration of the legislative will of a people, it is to that extent a command requiring no reasons to be stated in it for its existence. It suffices that they so declare it in proper legislative form, to impart to it the quality of an Act of sovereignty.

It follows from the foregoing principles that, the use of the *impersonal* form of expression, such as "*It shall, or shall not be lawful,*" etc., should always be avoided, if possible being less definite and precise than the *imperative* naming directly a particular class of persons; or applying its behests universally to all citizens such as for example "*No person shall*" do this or that; or "*no person shall be arrested, or committed ;*" or no "*Sheriff, Constable, etc., shall levy,*" etc. In the former or impersonal phrase, the legal subject is kept from view unnecessarily long, and thus requires a redundancy of expression to bring it into the field of description; in

the latter, the legal subject leads the way in the legal sentence, and at once prepares the mind to accompany in comprehension the spirit as well as the letter of the law. It must always be borne in mind that nothing is gained in force, while much is lost in clearness and intelligibility, by holding the moving intent of the statute suspended in the atmosphere of circumlocution. The language should carry us as directly as possible to the object contemplated. *Festinet ad eventum.*

When things are spoken of as legal subjects resulting from duties associated with them, it is necessary to describe contiguously the persons whose relations to those things have created a valid reason for the right of existence of the latter. Thus, for example, in relation to *Injunctions*, sec. 604 of the New York Code of Civil Procedure recites that, "Where it appears by affidavit, that the defendant during the pendency of the action threatens, or is about to remove or dispose of his property with intent to defraud the plaintiff, *an injunction order may be granted to restrain* the removal or disposition."

The following is an instance of treating as a legal subject an *event*, contingent upon human action and the continuance of a particular state of things:—

"An *accumulation* of *rents* and *profits* of real estate for the benefit of one or more persons, may be directed by any *will or deed*, sufficient to pass real estate, as follows." 1 R. S. (N. Y.) 726, sec. 37.

The next is an example of a thing treated as an absolute legal subject on which personal rights may entirely depend, because acting as a perpetual witness, in lieu of all oral testimony, and standing as a living substitute for it.

"Every *conveyance* of real estate, within this State hereafter made, shall be recorded in the office of the



clerk of the county where such real estate shall be situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." 1 R. S. (N. Y.) 756, sec. 1.

It will be perceived from the above examples that it is next to impossible to avoid treating legal rights, whether associated with incorporeal property, or with instruments of procedure, as things personified and therefore as proper legal subjects in an enactment. The chief point to keep in view in a legal sentence is that of considering things as always dependent for their rights upon antecedent persons, whose names or description must be recited in close proximity to the rights, privileges or powers bestowed upon them.

In order of time the legal subject must precede the legal action, because no command can be operative in advance of the existence of an actor, to whom such command can be addressed.

In like manner, also, the language necessary to convey, through an enactment, the will of the Legislature must express its intention and ultimate purpose, in a phraseology suited to that end. There are modes of speech conventionally and immemorially consecrated to the uses of legal composition, and to these we should adhere, as the best means for securing facility and uniformity of interpretation of statutes when judicially interrogated. No insurmountable difficulty need surround the law-maker, if he will but bear in mind that all statutes may be phraseologically divided into two great classes, viz., such as confer rights, privileges, or powers; and such again as impose obligations to do, or to abstain from doing some particular act or acts. The language of

the first class is said in law to be *facultative*, a *faculty* meaning a *license* or *authority*.<sup>1</sup> The language of the second class is said to be *imperative* or *prohibitory*. But in both classes the language must be *authoritative* and succinct, and without rhetorical admixture.

The enacting verb is the one which describes, defines or limits the rights, privileges, powers or obligations of the legal subjects. To this verb there can properly be but two auxiliaries, viz., *may* or *shall*, with their negatives; the former implying *quasi* discretion or option to act (except only when the public interest will be advanced by such act); the latter, when alone, being always peremptorily imperative. To these auxiliary verbs, by reason of the conjunction which they effect between the legal subject and the legal action, the term legal *copula* is applied. The value of this copula will at once be perceived in the part which it plays as a differentiating term between a *facultative* and an *imperative* or *prohibitory* clause. Thus "*may*" or "*may not*" are both facultative with this difference only, that the power of choice in action conferred by the former upon the legal subject, is qualified and abridged, without being abrogated, however, by the latter.<sup>2</sup>

On the other hand, "*shall*" or "*shall not*" admit of no choice of action whatever on the part of the legal subject, for whom, also, the incidental employment of the active or passive verb, will depend upon the part in *action* or *submission* which is prescribed to him.

The general presumption obtaining that the law has relation to *present* as well as to *future* events, and is in consequence speaking *now*, as well as *then*, renders the frequent use of "*shall*" somewhat of a limitation upon

<sup>1</sup> In Scotch law, a faculty is an ability or a power. 1 Term R. 429; 12 Coke, 106; Kames's Equity, 404.

<sup>2</sup> See Chapter on Words.

the *absolute* purview which a word of command should always convey. It gives a contingent character to this copula, particularly when preceded by an "if," which renders it modal, thus apparently removing the legal action of the enacting verb to some future day, and by logical inference ignoring a present case, however otherwise included. In actual practice this, perhaps, does not occur, and the misuse of language is overlooked in its supposed necessity, in order to discriminate between a *prospective* and a *retrospective* statute. But even this does not justify the evil practice, now so common, of constantly employing the future and perfect future "*shall, shall have, shall have been,*" to express existing conditions which could better be recited in the present tense. If language be intended to convey rather than to confuse meaning, there seems to be no reason why we should cling, for tradition's sake, to inelegant forms of expression, calculated to produce obscurity in that department of law where the interests of society most require directness and intelligibility of phraseology. The two cardinal points to remember in legislating for *cases* and *conditions*, involving the use of the future, perfect future, and past conditional, is, to describe the *case* or *condition* in the *present* or *perfect* tense; and the language of command constituting the legal action in the future, whether that language be of necessity facultative, imperative, or afflictive.

Mr. Coode, in his monograph upon Legislative Expression,<sup>1</sup> has condensed in the following succinct rules the part severally occupied by the *copula* and the *enacting verb*, viz:—

1st. That the copula which joins the legal subject and the legal action is to be "*may,*" or "*may not,*" or "*shall*" or "*shall not,*" etc.

<sup>1</sup> Law Library, vol. 44.

2d. That the whole of the enacting verb is always to be an active verb, except only where the legal subject is to submit or suffer, etc.

3d. That whenever an act is allowed *as a right or a privilege*—that is, to all the members of the community, or to certain persons for their own benefit, the proper copula is “may.”

4th. That whenever the act is authorized *as a power*—that is, to certain persons to perform, not for their own benefit, but for the benefit of others on whose behalf the power is given, the proper copula is “*shall*.”

Wherever there is either one or several legal subjects coupled to one legal action, a single copula suffices to unite them; in proportion, however, as the legal actions are multiplied, corresponding copulæ will be necessary, in order to discriminate between such actions as are facultative, or bestow rights, privileges, or powers; or between such actions as are prohibitory; and such actions, again, as inflict penalties. The repetition of the copula becomes imperatively necessary before each enacting verb, by reason of the fresh declaration of authority which it imparts to the legal subject, or the new imperative to do or abstain from doing which it imposes upon him.

The office of legislation being to provide rules of conduct for future contingencies, there arises an immediate necessity for determining at the outset whether a new law is to operate universally and at all times, or only under given circumstances, and if the latter, then what those circumstances must be as a condition precedent to its application. The modal conditions under which alone a law can take effect constitute its legislative limits, and as, outside of these, it can have no proper effect, it is of paramount importance that those particular circumstances, or modal conditions, should be distinctly set forth at the very beginning of the statute.

If they relate to *time* only, the opening sentence should begin with the adverb “*when*” or “*whenever* ;” if they relate to special circumstances independent of time, then the adverb “*whenever*” should be used as a prefix. This form of expression, starting as it does with an admitted fact, is superior in definiteness to the use of the subjunctive or conditional “*if*” or “*should*.”

One of the most difficult questions flowing out of the frequent necessity of qualifying the operation of a law, so as to exclude a particular case or instance, is that relating to the use of *provisos*. Such a clause constitutes, in the language of the Supreme Court of the United States, “a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided.”<sup>1</sup>

In England, it has been held that when the proviso of an act of Parliament is directly repugnant to the main body of it, the proviso shall stand and be held a repeal of the purview, as it speaks the last intention of the makers.<sup>2</sup> But an *exception* in a statute has a narrower purpose than a proviso, although the latter is sometimes, from the form of language used, impossible to be discriminated from the former, and in consequence the legal distinction between the two cannot be applied. The general rule of judicial interpretation imparts to an *exception* the character of an absolute exemption from the operation of an enactment; while a proviso under the same formula implies only a *conditional* defeasance.<sup>3</sup>

<sup>1</sup> *Voorhies v. Bank of U. S.*, 10 Peters, 449; *Wayman v. Southard*, 10 Wheaton, 130; *State v. Stopp*, 29 Iowa, 551.

<sup>2</sup> *Atty.-Gen'l v. Chelsea Water Wks.*, Fitz-Gibbon, 195; *Dwarris on Statutes*, 515; *R. v. Justices of Middlesex*, 2 B. & Ad. 818.

<sup>3</sup> 8 Am. Jur. 242; *Plowd.* 361; *Carth.* 99; 1 Saund. 234, and note; *Bacon*, also *Comyn's Abt.*, Tit. “Conditions;” *Dwarris on Stat.* 660.

But the liability to confusion, arising from the careless employment of language which does not express in distinct terms the intention of the legislator in this particular, has furnished occasion for so wide a range of conflicting adjudications, that it is unsafe to undertake any general application of these doctrines to the great variety of cases in which provisos and exceptions may be called for. Nothing so manifestly imperils the force and directness of a legislative command, as loading it down with conditions that neutralize its operations, and to that extent appear to contradict the reason for its existence. Knowing how indispensable to the correct interpretation of any law is clearness in its expression, it is painful to be compelled to confess that the most omnipresent error of style in legislative composition, consists in that habit of surplusage now grown prescriptive by age and immemorial use; consequently and as a logical result, it becomes necessary to negative its confusing results by a consistent remedy of deforming *conditions, provisos or exceptions*. These are the convenient avenues of escape for the inexperienced law-maker, of whom Mr. Coode very expressly says that "wherever matter is seen by the writer to be incapable of being directly expressed in connection with the rest of any clause, he thrusts it in with a proviso; whenever he perceives a disparity, an anomaly, an inconsistency or a contradiction, he introduces it with a 'provided always.'"<sup>1</sup>

Sometimes, indeed, an attempt is made to direct how certain terms in a statute shall be construed, but this is generally looked upon with disfavor; because it is practically a limitation upon the right of the judiciary to declare the law according to their own interpretation of its meaning. Nevertheless, and before the circum-

<sup>1</sup> Op. cit.

stances of litigation call for any judicial construction of the terms of a statute, there may be a need of so determining the application of particular words to particular persons, things or cases, as to enable a required classification of them to be made. This need would, of course, justify giving a direct construction to the meaning of the particular word describing a person or thing mentioned in a statute. Objection does not lie against defining a word, so much as against declaring how a clause shall be construed, for there the context being the standard of measure, it is evident that it belongs to the judiciary alone, to apply a rule of interpretation, as to its effects upon the controverted meaning of a doubtful term. "It is," says Shaw, C. J., in *Thompson v. Burnham*, "one of the familiar and first principles of law that the making, altering and repealing of all laws pertain to the Legislature of the Commonwealth, but the construction and interpretation of them to its jurisprudence."<sup>1</sup>

The old style of framing statutes in England, and largely followed in our country, was to overload them with verbiage by numerous repetitions of predicates and subjects; using many derivatives from one antecedent, and then seeking by punctuation to harmonize the context. Although this was an improvement upon the early custom of no punctuation in England, still, its failure to clarify the written text left much occasion for conflicts of interpretation. A misplaced comma or semicolon might easily disconnect two sentences intended to form a separate clause; or the omission of a comma might permit derivatives to be connected with an antecedent to which they did not properly belong.

Another former defect, was that of suspending the meaning and intent of the law to a fatiguing length,

<sup>1</sup> 13 Gray, 211; *Todd v. Clapp*, 118 Mass. 495.

by joining too many predicates to one subject, or too many subjects to one predicate. In this way the same idea was repeated in different terms, and more words of variable meaning were introduced, to increase the difficulties of interpretation. This multiplied sentences, and as every clause of a statute constitutes a separate enactment, it will be readily perceived how fatal to perspicuity was the accumulation of many distinct legal subjects in the same sentence, and by the same copula.

The frequent misinterpretation of the phraseology of certain portions of a law, due to these manifestly obscuring agencies, has given rise, of late, to a change in the mechanics of drafting bills, both in England and the United States. It is now becoming the custom to frame them in shorter paragraphs, and more succinct sentences, each intended to enunciate a distinct fact, or rule of conduct, expressive of some connection with the dominant idea embraced in the statute.

The substitution also of the present tense for the future and future perfect, as indicative of a condition reached, or fact accomplished upon which the law is to operate, is another improvement in the mechanics of legal composition which commends itself to general favor.

From this analysis of the proper rules of law-making, we can see, why, from an insufficient acquaintance with, or inattention to them, so much obscurity should at times envelop the phraseology of statutes. Noting particularly the fact, that no law can stand in a purely unrelated position towards an established system into which it is introduced, an obvious reason arises for making every law harmonize with every other, at whatever distance apart.

The first of all indispensable means for securing this



harmony is through a familiarity with the Constitution of the State, in its political and judicial aspects. As the permanent will of the people, their political charter dominates all other authorities. Every jural right must ultimately be determined by this standard. It is the fruit that marks the organic development of the civil life of the community. A legislator without this knowledge, is like the master of a ship who should undertake to navigate her blindfolded, or without a compass.

The next step towards legislative accuracy consists in a historical knowledge of past legislation in the same direction, together with the judicial consequences that have attended it.<sup>1</sup> The State Reports will furnish this information. They may always be profitably consulted. Even when not interrogated specially upon a point at issue, their style and language will furnish the forms of expression commonly used by Courts, in applying canons of interpretation. Therefore, they familiarize us with the language of the law, which is the most proper grammar for the Legislature to study. Idiomatic phrases, derivative meanings from particular contexts, maxims unfolding settled rules of construction, and words differing in their vernacular from their etymological sense, will all be found to have given occasion for judicial interpretation. There is, consequently, an imperative necessity for seeking the legal meaning of these terms at the highest sources.

<sup>1</sup> See article entitled "*Legislative Humorists*" by I. H. Hopkins, in Albany Law Journal, vol. 22, p. 385, and a similar article signed R. at p. 435, wherein it is shown that the Legislature of New York during the session of 1880, in many instances amended Acts and portions of Acts some of which had been twice repealed—passed an absurd Act relating to judgment-debtors; also another which was in conflict with the Constitution, and revised and amended sections of laws printed in an unauthorized edition of the Revised Statutes! Comment is unnecessary.

Lastly, the practice itself of legal composition is a benefit, as a logical exercise. It trains the mind in habits of ready, lucid and accurate expression, and teaches the art of conveying thought in perspicuous language. This was evidently the intention of that divine faculty of speech by which we reproduce a thought identical to our own in the minds of others, and so, hand it down from its intellectual source to future generations. Thus the Ten Commandments, given upon Sinai, and the Sermon on the Mount, preserved in written speech as so many sacred statutes, will be repeated by mankind down to the last syllable of recorded time.

## CHAPTER XI.

## WORDS OF COMMON USE IN STATUTES AND THEIR JUDICIAL MEANING.

THE value assigned to particular words when used in statutes, imparts to them an importance which deserves the attention of all engaged in the duty of framing laws. As these written commandments are addressed both to lay and professional readers, it is manifestly necessary that they should speak "a language understood by the people." Ordinary and colloquial phraseology has consequently always been regarded as the proper storehouse from which to draw the language of the law ; for there can be no other more universally understood and more popular than that which is recognized as the vernacular of the community. Courts when called upon to interpret statutes, have constantly recognized the necessity of searching for the hidden meaning of any ambiguous phrases in the ordinary language of the people.

The result of years of legislation will eventually show itself in an accumulation of statutes, many of which, without being repealed have yet become obsolete through changes in the social condition of a people, and others have so often been amended or variously construed, as to make it necessary, either to digest them into a distinct code, or to pass an Interpretation Act, re-adjusting their relations to the present wants of the community, by establishing new land-marks and new boundaries for the guidance of legislation. Recognizing this necessity as a pressing one, the English Parliament, partaking of the double character of a judicial and legislative body, passed a General Interpretation Act<sup>1</sup> in 1889 (52-3 Vict. ch. 63), which was intended to cover the entire field of needed statutory interpretation. It was, in fact, a re-enactment of several existing statutes, with an enlargement of

<sup>1</sup> "An Act for consolidating enactments relating to the construction of Acts of Parliament, and for further shortening the language used in Acts of Parliament," passed August 30, 1889. Law Reports, Statutes, vol. 26.

their scope. The following is a synopsis of its provisions, many of which might be profitably imitated by American Legislatures.

Section 1. Rules as to gender and number.

- “ 2. Application of penal acts to corporations.
- “ 3 to 7; 12 to 25; 27 to 30. Definitions.
- “ 8. Sections to be substantive enactments.
- “ 9. Acts to be “public” Acts.
- “ 10 Amendments or repeal of Acts in same session.
- “ 11. Effects of repeal in Acts passed since 1850.
- “ 26. Meaning of “service by post.”
- “ 31. Construction of Statutory Rules.
- “ 32. Construction of provisions as to exercise of powers and duties.
- “ 33. Provisions as to offences under two or more laws.
- “ 34. Measurement of distances.
- “ 35. Citation of Acts.
- “ 36. Definition of commencement.
- “ 37. Exercise of statutory powers between passing and commencement of Act.
- “ 38. Effect of repeal in future Acts.
- “ 39. Definition of Act in this Act.
- “ 40. Saving for past Acts.
- “ 41. Repeal.
- “ 42. Commencement and short Title.

Alongside however of the language in common use, has grown up the language of the law, not essentially different in its roots, although markedly so in its idiomatic application to civil rights, remedies and rules of conduct. Legal phraseology is often intertwined with historical incidents, and imbedded in local customs, religious beliefs or political traditions. All which tend to impart varying hues to the same terms as differently employed by them. There is, therefore, a legal sense to language as well as a popular sense. And beyond this even, there is a technical sense of restricted application to particular art or science. Thus the word “BEARING” has one meaning in navigation, a different one in architecture, and a still more different one in morals. Again the word “TABLE” has one meaning in ecclesiastical law, a different one in mathematics, in literature, and chemistry, another in anatomy and another in the domestic arts.

From these simple illustrations of the adaptability of language

to all phases of human necessity, it is easy to ascend to a higher and more complicated use of its instruments. For example the common word "TENEMENT" popularly signifies a dwelling-house, but in law, it means any estate held from and under a feudal superior. Here the word feudal does not necessarily impart a manorial lord as in the Middle Ages, but simply a person having a superior estate in kind to that of the tenant who holds under him. Hence, although lands in the United States are generally held by allodial tenure, yet tenants leasing the same are nevertheless feudatories of their landlord. So with the term servitude, which in law describes a variety of obligations either of persons or things to each other, without reference to any political status thence arising, consequently no change in the form of government can affect some of these servitudes, which may be either *natural* and arising from the condition of the soil; or *personal* or *mixed*; or again either rural or urban.<sup>2</sup>

A comparison between the popular and legal meaning of the following words will show the importance of their right use in statutes :—

**ABDUCTION.** Means popularly, any form of abstraction. But in law it means forcibly taking away a man's wife, his child, or his female servant. 3 Blacks. Comm. 139, 143; *Carpenter v. People*, 8 Barb. 603.

**ABET.** *Raiford v. State*, 59 Ala. 106.

**ABOUT.** Is an ambiguous word, depending for its meaning upon the context. *Bradley v. U. S.*, 6 Otto, 170.

**ACT.** A statute passed by a Legislature, in accordance with the Constitution. *People v. Tiphaine*, 13 How. Pr. 74.

**AFORESAID.** Is used as referring to a preceding person, or place or thing already described. *Natl. Bk. of Whitehall v. Lamb*, 50 N. Y. 95; *Central Natl. Bank v. Pratt*, 115 Mass. 544; *Beaumont v. Squire*, 17 Q. B. 906.

**ADJACENT.** In law signifies only proximity. Thus lands may be adjacent and yet not adjoining. *Henderson's Lessee v. Long*, 1 Cooke (Tenn.), 128; this definition qualified in *People v.*

<sup>1</sup> Cushing's *Domat. Civ. Law*, § 1018; 3 Kent, 434; Lieber, *Legal and Political Hermenentics*, *passim*. *Vid.* for more extended interpretation of Words in their judicial aspects, Lawson's *Concordance of Words and Phrases*; Irving Browne's *Judicial Interpretation of Common Words and Phrases*; Endlich's *Maxwell on Interpretation of Statutes*.

Schemerhorn, 19 Barb. 556; *Peverelly v. People*, 3 Park Cr. 59, 69; *Mayor of New York v. Hart*, 16 Hun, 380.

**AFFINITY.** Means in law all forms of relationship between married persons and their kindred, other than those which flow from consanguinity. Hence no legal succession follows from a relation by affinity. *Carman v. Newell*, 1 Den. 25; *Higbie v. Leonard*, 1 Ibid. 186; *Paddock v. Wells*, 2 Barb. Ch. 331; *Solinger v. Earle*, 45 N. Y. Superior C. 80.

**AMONG and BETWEEN.** Are equivalent terms, particularly in wills where property is directed to be divided. *Myres v. Myres*, 23 How. Pr. 410, 415.

**AND.** This conjunction is in law frequently disjunctive and means "or." See "OR." *Englefried v. Wolfepart*, 1 Yeates, 45-6; *Griffith v. Woodward*, 1 Ibid. 319; *White v. Comm.*, 1 S. & R. 141; *Jackson v. Topping*, 1 Wend. 389; *Roome v. Phillips*, 24 N. Y. 463.

**ANY.** According to the logical rule that indefinite words are equivalent to universal, the word "any" becomes at times equivocal, and may mean "all" or "some." *Heaton v. Wright*, 10 How. Pr. 79; *U. S. v. Palmer*, 3 Wheat. 631; and *People v. Clark*, 7 N. Y. 385; *People v. Carnal*, 6 Ibid. 463; *People v. Dowling*, 84 N. Y. 487. It may when applied to persons, extend to corporations or bodies politic. *U. S. v. Amedy*, 11 Wheat. 392.

**ARTICLES.** Means popularly goods and movables. In law it means specifications or divisions of matters. *Wells v. Shook*, 8 Blatchf. 254. Or *provisions of war* such as animals. *U. S. v. Sheldon*, 2 Wheat. 119.

**AS.** Is either used positively, thus "*as of*" meaning actually; or again, it is used approximately, or again elliptically for *WHEREAS*.—*SO AS*, expresses comparison of quality; *as to*, signifies reason or extent; *likewise* implies similitude. *As well as* has two meanings, viz: together with, or in like manner. *Rubber Co. v. Goodyear*, 6 Wall. 153; *Colt v. Hubbard*, 33 Connt. 286.

The phrases "*heretofore has been*," "*now is*," and "**HERE-AFTER SHALL BE**," although pleonasm, are permitted in law. *Ely v. Hotton*, 15 N. Y. 595; *Den. v. Goldtrap*, 1 N. J. (L.) 272; *Moore v. Mansert*, 49 N. Y. 332; *Comm v. Inhabitants*, 106 Mass. 268.

**BAGGAGE.** Means popularly the personal effects of a traveller. In law it means trunks, wearing apparel, and jewelry suitable

to the rank of the owner. Even money in a trunk, when in no larger amount than necessary for travelling expenses, is held to be baggage. *Orange Co. Bank v. Brown*, 9 Wend. 85; *Weed v. Saratoga & Schen. R. R. Co.*, 19 Wend. 534; *Taylor v. Monnot*, 1 Abb. Pr. R. 325; *Van Wyck v. Howard*, 12 How. Pr. 147.

**BENEFIT.** Means such profit or use as constitutes a legal consideration. *Fitch v. Bates*, 11 Barb. 473; *Hewitt v. Wilcox*, 1 Metc. 154.

**BEER.** Is now a generic term, expressing many varieties of malt liquor. *People v. Wheelock*, 3 Park. Cr. 9; *Nevin v. Ladue*, 3 Den. 43.

**CANON.** In the Ecclesiastical hierarchy, means a prebendary or member of a chapter. In law it signifies a rule of doctrine or discipline.

**CAPACITY.** In law signifies possession of the requisite qualifications to do a particular act; or difference between actual and alleged productive powers. *Collector v. Beggs*, 17 Wall. 182; *Eaton v. Beggs*, 8 Vroom, 113.

**CARGO.** The entire load of a ship whether goods or human beings. Strictly speaking, it is that portion only from which freight is earned. *Flanagan v. Demarest*, 3 Roberts (N. Y.), 173; 1 Dall. Penn. 197; *Kreuger v. Blank*, 5 Law Rep. 183; *The Gov. Cushman*, 1 Abb. (U. S.), 173.

**CASE.** This, in law, is a term of wider significance than cause. It includes not only causes, but also special proceedings. Hence, actions at law and suits in equity both fall into the category of cases. *Benson v. Cromwell*, 26 Barb. 222; *Beecher v. Allen*, 5 Ibid. 169; *Kundolf v. Thalheimer*, 12 N. Y. 592; *Amer. Ins. Co. v. Canter*, 1 Peters, 511; *Carroll v. Green*, 2 Otto, 510.

**CERTAIN.** In law means some, as well as a distinct thing; any term or number of years. *Pemberton v. Roe*, 7 B. & C. 2.

**CHAPTER.** Means popularly one of the subdivisions of a subject. In ecclesiastical law it means a congregation of clergymen. *Huff v. Alsop*, 64 Mo. 51.

**CHARITABLE USES.** Means popularly gifts for the relief of the poor. In law it signifies any gifts to public uses dependent solely upon the will of a donor. *Drury v. Inhabitants*, 10 Allen, 169; *Jackson v. Phillips*, 14 Ibid. 539; *Salstonstall v. Sanders*, 11 Allen, 446; *Boyle on Char.* 281; 4 Wheat. Appendix; *Owens v. Missionary Soc.*, 14 N. Y. 380.

- CHATTELS.** Movable goods of any kind. *People v. Holbrook*, 13 Johns. 90; *People v. Maloney*, 1 Park. Cr. 593; *Smith v. Wilcox*, 24 N. Y. 353.
- CHRISTIAN.** Means a believer in the divinity and atonement of Christ. *Atty.-Gen. v. Shore*, 9 Clark & Finn. 355.
- CHURCH.** Means popularly any body of persons organized for the purpose of publicly worshipping God. In law it signifies a society of persons who profess the Christian religion. *Stebbins v. Jennings*, 10 Pick. 193; *Robertson v. Bullions*, 9 Barb. 64, 95; *Silsby v. Barrow*, 16 Gray, 330.
- COHABIT.** Means to lie together as man and wife; or to live together in the same house without regard to the relationship of parties. *Rex v. Inhabit. of St. Peters, Burr. Settlement Cas.* 25; *Clark v. Clark*, 2 Vern. 323; *Dunn v. Dunn*, 4 Paige, 426; *Forster v. Forster*, 1 Hagg 144; *Pollock v. Pollock*, 71 N. Y. 135.
- COLLEGE.** Means an incorporated school of learning with power to confer degrees. *Female Inst. v. Rock Hill College*, 51 Md. 470; *State v. Ross*, 24 N. J. (L.) 479; *Stanwood v. Pierce*, 7 Mass. 458.
- CORPORATION.** One or more persons established as an artificial body by act of law, with right of succession of members. *Warner v. Beers*, 23 Wend. 103, 142, 175; *Georgia v. Atkins*, 1 Abb. U. S. 22; *Dartmouth Coll. v. Woodward*, 4 Wheaton, 466.
- DOMICIL<sup>1</sup> and RESIDENCE.<sup>2</sup>** The former imports a fixed place of abode and the habitual home of the person; the latter only a place of temporary sojourn. See **RESIDENT.<sup>3</sup>**
- DUTY.** This is usually a mandatory word in a statute when applied to conduct and especially that of public officers, but sometimes it means only a moral obligation. *Caswell v. Allen*, 7 Johns. 63; *Comm. of Kentucky v. Dennison*, 24 How. 66.
- ESTATE.** This means popularly property in lands. In law, it means the right to the enjoyment of real property mediately or

<sup>1</sup> *Crawford v. Allen*, 4 Barb. 504; 5 Mete., Supplement; *Putnam v. Johnson*, 10 Mass. 488; *Chain v. Wilson*, 1 Bosw. 673; *Bartlett v. The Mayor, etc.*, 5 Sandf. 44; *Haggart v. Morgan*, 5 N. Y. 422; *Isham v. Gibbons*, 1 Bradf. 69; *Hegeman v. Fox*, 31 Barb. 475; *Putnam v. Johnson*, 10 Mass. 488.

<sup>2</sup> *Matter of Thompson*, 1 Wend. 45; *Frost v. Brisbie*, 19 Ibid. 13. For distinctions between, see *Burrill v. Jewett*, 2 Robts. (N. Y.) 701.

<sup>3</sup> *Luhv v. Eimer*, 80 N. Y. 171; *Palmer v. Phoenix Ins. Co.*, 84 Ibid. 67.



immediately. Thus, one party may have a legal estate in land, while another has an equitable one in the same.

**FAMILY.** One or more persons descended from a common ancestor; or several persons occupying the same house and living under the authority of another. Hence, the word family may include servants as well as relatives. In the construction of wills the word has a more restricted meaning, and is limited to blood relatives alone. *Cox v. Stafford*, 14 How. Pr. 519; *Kain v. Fisher*, 6 N. Y. 597; *Wright v. Atkyns*, 17 Ves. 257; *Doe v. Joinville*, 3 East, 172.

**FROM and WITH.** These words, when used singly, are ambiguous, and other words should be coupled with them, in order to define their intent more certainly; thus, "*from and out of*;" "*from and after*;" the same applies to "*with and by*;" which should be written, "*together with*;" "*and by*;" "*or by*." *Sims v. Hampton*, 1 S. & R. 411; 3 Ib. 496; 15 Mass. 193. In computing time in statutes the first day is excluded; but in contracts the first day is included as the *terminus a quo* of computation. *Deyo v. Bleakley*, 24 Barb. 9; *Arnold et al. v. U. S.*, 9 Cranch, 104, note; *Peebles v. Hannaford*, 18 Me. 106; *Cavence v. Butler*, 6 Binney, 53.

**GOODS.** Means popularly personal chattels. In law it means in addition to this, choses in action and chattels real. *Jackson v. Robinson*, 1 Yeates, 101; *Hornblower v. Proud*, 2 Barn. and Ald. 327; *Chamberlain v. Western Transp. Co.*, 44 N. Y. 305.

**HIGHWAY.** Means in law a road or street, or public way, other than a turnpike. *Brace v. N. Y. Central R. R.*, 27 N. Y. 269; *Seneca Road Co. v. Auburn & Rochester R. R.*, 5 Hill, 170; *Blackstone v. Worcester*, 108 Mass. 68. Railroad track not a highway. *State v. Johnson*, Phillips's R. (N. C.) 140; Am'n L. Reg. (O. S.) vol. 8, p. 138.

**HOUSEKEEPER or HOUSEHOLDER.** Means popularly any one who directs the concerns of a house; or who provides its necessaries as an independent master. In law it means a person occupying a whole house as either owner or lessee. *Woodward v. Murray*, 18 Johns. 400; *Browne v. Witt*, 19 Wend. 475; *Griffin v. Sutherland*, 14 Barb. 456; *Rex v. Poynder*, 1 Barn. & Cr. 178; *Parme's Case*, 2 Martin, La. R. 313; *Cantrell v. Connor*, 51 How. Pr. 45.

**HOUSE.** Means ordinarily a "dwelling-house." But it may mean a legislative assembly, or church, or theatre. *Thompson*

*v. People*, 3 Park. Cr. 208; *Trinity Church v. Boston*, 118 Mass. 167; *State v. Garity*, 46 N. H. 61; *Comm. v. Wood*, 97 Mass. 228; *Southworth v. Jackson*, etc., 2 Mich. 287.

IF. Implying condition, is sometimes supplanted by the present participle, as for instance "*failing in such or such thing*;" or again "*in case of*;" "*if desired*." *Sheph. Touchstone*, 123; *Coke*, Litt. 204, 214; *Schmaire v. Maxwell*, 3 Blatchf. 410; *Chandler v. Rider*, 102 Mass. 271.

INFANT. Means popularly a young child, so, also, does the term "*MINOR*;" in law both mean any person under twenty-one years of age.

IMMEDIATELY. Means legally "such convenient time as is reasonably requisite for doing a thing." *R. v. Francis*, Ca.; *Temp. Hardw.* 114; *Pyms v. Mitford*, 2 Leon. 77; *People v. Woodruff*, 32 N. Y. 377.

INHERITANCE. Means popularly descended from an ancestor; in law it means a perpetuity in lands to a man and his heirs. *Bent v. St. Vrain*, 30 Mo. 268; *Swanson v. St. Vrain*, 2 Swan. 457.

INSOLVENT. Means popularly a man unable to pay his debts; in law it means one who has been released by act of law from the obligation to pay his debts. *Herrick v. Borst*, 4 Hill, 650; *Walkenshaw v. Perzel*, 4 Robts. 426; *Austin v. New Jersey Steam Co.*, 43 N. Y. 75; *Lee v. Kilbourn*, 3 Gray, 600; *Teale v. Young, McClell. & Younge*, 498.

IT. When used inceptively refers to some subsequent clause as "*It shall be lawful*," etc., or else forms an impersonal verb in which the action is stated, and the agent implied. The phrase "*it shall be lawful*" is not an imperative mandate, but leaves it discretionary with the agent named. In England it has been held to be imperative whenever a certain duty is imposed upon public officers. *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84; *Williamson v. Williamson*, 1 Johns. Ch. 491; *Reg. v. Warwick*, 8 A. & E. 919.

JOINT. Is intended to express identity of relation in kind or degree between persons and things. *Jenkins v. De Groot*, 1 Caines Cas. 122; *Russell v. Tomlinson*, 2 Day, 206; *Babcock v. Hubbard*, 2 Ibid. 536; *Reed v. Garvin*, 7 S. & R. 356; *Att'y-Gen'l v. Mercantile Marine Ins. Co.*, 121 Mass. 524. *SEVERAL* means that the same thing is predicted of two or more subjects considered separately; and *RESPECTIVE* implies relation of two or more things to a third. *Heath v. Heath*,

2 Atk. Ch. 122; *Watson v. Foxon*, 2 East, 41; *Ewington v. Fenn*, 10 Eng. L. & E. 235.

**LAND.** Means popularly the soil of the earth including rocks; in law it means everything resting upon the earth such as growing trees, grass and waters. *Pond v. Bergh*, 10 Paige Ch. 140; *Leavitt v. Cambridge*, 120 Mass. 157; *People v. Bd. of Assessors*, 30 N. Y. 81.

**LAW OF THE LAND.** Means due process of law according to the principles of the common, rather than to the provisions of the statute law. That is to say that life, liberty, property and health shall be placed under the protection of general rules governing society. *Sedgwick Const. Law*, p. 475; *Embury v. Conner*, 3 N. Y. 511; *Taylor v. Porter*, 4 Hill, 140; *Randall v. Brigham*, 7 Wall. 523; *Parsons v. Russell*, 11 Mich. 129; *Westervelt v. Gregg*, 12 N. Y. 212; *Wynehamer v. People*, 13 N. Y. 378; *Wall v. Kennedy*, 2 Yerger (Tenn.), 554.

**LOTTERY.** A scheme for the distribution of prizes by chance. *Governors of N. Y. Almshouse v. Amn. Art Union*, 7 N. Y. 228; *Comm. v. Thacher*, 97 Mass. 583; *Hall v. Ruggles*, 56 N. Y. 424.

**MAJORITY.** Popularly means the greater number. In law it means full age to enjoy all civil rights.

**MALICE.** Popularly means hatred towards some being; in law it means doing a wrongful act intentionally, without just cause or excuse. *Bromage v. Prosser*, 4 Barn. & Cr. 255; *Comm. v. York*, 9 Metc. 104; *Mitchell v. Wall*, 111 Mass. 492; *Nye v. People*, 35 Mich. 16; *U. S. v. Coffin*, 1 Sumner, 394; *Viele v. Gray*, 10 Abb. Pr. 1, 5; *State v. Pike*, 49 N. H. 399.

**MAY.** Is not by itself a mandatory word even in a statute, but is always treated as permissive, except when a duty to the public requires of an officer that he should exercise some power bestowed upon him. In such cases the language will be regarded as peremptory. And the same rule applies to the words "*it shall be lawful.*" *Supervisors v. U. S.*, 4 Wall. 435, 446; *In re Mayor of the City of New York*, 3 Hill, 614; *Mason v. Fearson*, 9 Howard, 248; see also *Opinions of Justices of S. J. Court*, 11 Pick. 543; *Phillips v. Fadden*, 125 Mass. 198, 201; *Sedgwick on Stat. & Const. Law*, p. 375, etc.; *Galena v. Amy*, 5 Wallace, 705; *People v. Comm. Council of Brooklyn*, 22 Barb. 404; *Buffalo & Batavia Plank R. v. Commrs. of Lancaster*, 10 How. Pr. 237; *Mullins v. People*, 24 N. Y. 399.

- MERITS.** Popularly means a man's moral possessions; in law, it means the abstract justice upon which a case rests as distinguished from the technical. *Wilkes v. Hotchkiss*, 5 Johns. 360; *Davenport v. Ferris*, 6 Ibid. 131; *St. John v. West*, 4 How. Pr. 329; *Megrath v. Van Wyck*, 3 Sanf. 750; *Bowen v. Bissell*, 6 Wend. 511; 3 *Watts & Serg.* 273.
- MONEY.** Popularly means the currency of a country; in our law it means gold and silver coin, which alone are a legal tender. *Mann v. Exrs. of Mann*, 1 Johns. Ch. 231; *Hepburn v. Griswold*, 8 Wall. 603; *Beach v. Smith*, 30 N. Y. 116; *Morrill v. Brown*, 15 Pick. 173.
- MONTH.** At common law means LUNAR; commercially it means CALENDAR. The latter interpretation is made obligatory by statute in New York (R. S., pt. 1, ch. 19, Tit. 1, § 4), and in Massachusetts, Pennsylvania, and some other States. Hence, TWELVE-MONTH means a calendar year. *Leffingwell v. White*, 1 Johns. Cas. 99; *Loring v. Halling*, 15 Ibid. 119.
- MUST.** Is absolutely imperative in a statute. *Eaton v. Alger*, 57 Barb. 190; *Wallace v. Feely*, 61 How. Pr. 225.
- NEAR.** Or "*as near as may be.*" Means reasonable vicinity, though not next to. *Emma Silver Mine Co. v. Park*, 14 Blatchf. 414; *Beardsley v. Littell*, Ibid. 104; *Fall River Iron Works v. Old Colony R. R.*, 5 Allen, 221. Nor does it mean "*as near as may be possible,*" or "*practicable.*" Each case must fix its own standard. *Indianapolis and St. Louis R. R. v. Horst*, 3 Otto, 291.
- NECESSARY.** Whenever used in a statute means that the exigency has arisen requiring some particular action. *Stuyvesant v. The Mayor of N. Y.*, 7 Cow. 607; *Curtis et al. v. Leavitt*, 15 N. Y. 168; *People v. Kingman*, 24 Ibid. 559; *Stetson v. Kempton*, 13 Mass. 272; *Minot v. West Roxbury*, 112 Ibid. 1.
- NECESSARIES.** Means popularly those things essential to the preservation of life or health; in law it means all this and more, including many of the conveniences and ornaments of refined society. It is a relative term purely. *Bent v. Manning*, 10 Vt. 225; *Tupper v. Cadwell*, 12 Met. 559; *Waithman v. Wakefield*, 1 Camp 120; *McAuley v. Tracy*, 61 Me. 523; *People v. Kingman*, 24 N. Y. 559.
- NEXT.** Is a wholly ambiguous word, unless qualified by the suffix "FOLLOWING" or "PRECEDING."<sup>1</sup> In law the

<sup>1</sup> *Burn v. King*, 2 Johns. 190.

words "NEXT TERM," means the next regular and general term, and not special-motion days.<sup>1</sup> In New York it has been held to refer to the day of the month, and not to the month itself. *Tompkins v. Corwin*, 7 Cowen (N. Y.), 255.

**NEXT OF KIN.** Has a special meaning according to the use made of it in wills, or civil actions. *Merchant's Ins. Co. v. Hinman*, 34 Barb. 410; *Green v. Hudson R. R.*, 32 *Ibid.* 25; *Delaney v. McCormick*, 25 Hun, 574.

**OR.**<sup>2</sup> Is often used for "AND"<sup>3</sup> and *vice versa*. It may also be employed either to signify opposition or choice, or the varying application of several names for the same thing. In order to purge it from ambiguity, the word "EITHER" should be used before the first named, and "OR" before the last; and for greater precision, when several names or verbs are used, the conjunction should be repeated before each. But AND cannot be construed to mean "OR" in a penal statute, nor wherever it includes some part of a prescribed duty.<sup>4</sup> When "OR" is coupled to some command involving a disjunctive description, it must connect words that either describe synonymous things, or alternative acts. Hence, the terms "*spirituous or intoxicating liquors*" has been held to be incorrect, since all spirituous liquor is intoxicating, but all intoxicating liquor is not spirituous.<sup>5</sup> But "OR" may be used in a statute as synonymous with "TO WIT," in which case it is a word implying conditional limitation rather than substitution.

**ORDER.** Is in law a direction of a court or interlocutory decision, and differs from a judgment, which is a final decision. *Bentley v. Jones*, 4 How. Pr. 335; *Darrow v. Miller*, 5 *Ibid.* 247; *Ford v. David*, 13 *Ibid.* 193; *People v. Schoonmaker*, 50 N. Y. 499.

**PERPETUITY.** Means popularly everlasting continuance; in law it means a condition of things established to exist for more than a life or lives in being, and twenty-one years beyond. *Ould v. Washington Hospital*, 5 Otto, 312.

<sup>1</sup> *Smith v. Cutler*, 10 Wend. 589.

<sup>2</sup> *People v. Van Rensselaer*, 8 Barb. 206; *Van Vechten v. Pearson*, 5 Paige, 512; *Phyfe v. Phyfe*, 3 Bradf. 45, 52; *Miller v. Phillip*, 5 Paige, 573; *Jackson v. Topping*, 1 Wend. 396; *Roome v. Phillips*, 24 N. Y. 463.

<sup>3</sup> *U. S. v. Hann*, 8 Am. L. R. 663; *U. S. v. Ten Cases Shawls*, 10 Paine, 162.

<sup>4</sup> *Hale v. Sweet*, 40 N. Y. 97.

<sup>5</sup> *Comm. v. Grey*, 2 Gray, 502.

**PERSON.** Means popularly a human being; in law it also means a corporation, being artificial persons, and may include even the State. Sedgwick, Stat. and Const. Law, p. 372, note; *People v. May*, 27 Barb. 238; *State of Indiana v. Woram*, 6 Hill, 38; *U. S. Teleg. Co. v. Western Un. Tel. Co.*, 56 Barb. 46; 3 Brewst. 124; *U. S. v. Amedy*, 11 Wheat. 392; *Beaston v. Farmers' Bank*, 12 Peters, 102. In the civil law it also means a man, when considered with reference to a certain status. Heineccius El. Jur. Civ. Lib. 1, Tit. 3, § 75.

**PLEDGE.** Means popularly a promise; in law it means a pawn or bailment of personal property as security for some debt or engagement. "*Collateral*" is the modern commercial term. *Hays v. Riddle*, 1 Sandf. 248; *Stearns v. Marsh*, 4 Den. 227; *Shoemaker v. Nat. Bk.*, 2 Abb. (U. S.) 416.

**PRESCRIPTION.** Popularly means a written formula; in law it means a method of acquiring title to incorporeal property by long-continued and undisturbed enjoyment. Twenty years is generally deemed sufficient to create a prescription. 3 Kent, 442; *Arnold v. Foot*, 12 Wend. 330; *Hart v. Vose*, 19 Ibid. 365.

**PROPERTY.** Popularly means something possessed; in law it means the right to its enjoyment and possession irrespective of any conditions. *Jackson v. Housel*, 17 Johns. 283; *Soulard et al. v. U. S.*, 4 Pet. 511; *Wilson v. Boyce*, 2 Otto, 320. And it may also mean the franchise of a corporation. *Wilmington R. R. v. Reid*, 13 Wall. 264.

**PROVISIONS.** Means popularly food, or supplies, or conditions, or munitions of war. *U. S. v. Barber*, 9 Cranch, 243; *U. S. v. Sheldon*, 2 Wheat. 119; *State v. Connor*, 73 Mo. 572.

**PURCHASER.** Popularly means one who comes into the proprietorship of property by the payment of a consideration; in law it means the holder of property acquired in any other way than by descent. *Talmage v. Wilgers*, 1 N. Y. Leg. Obsr. 42, 45; *Wheelright v. De Peyster*, 4 Edw. 239, note; *Wood v. Chapin*, 13 N. Y. 509; *Van Rensselaer v. Clark*, 17 Wend. 25.

**QUARANTINE.** Means popularly the detention of ships, persons, or goods for the purposes of cleansing or disinfection; legally it means the forty days during which a widow has a right to remain in her late husband's mansion immediately after his death.

**SAID, AFORESAID.** Are terms of reference to things already mentioned, though not necessarily immediately, whereas the

**SAME** refers to the very next antecedent. So also with the word **SUCH**, though more indefinitely. *Wilkinson v. State*, 10 Ind. 372; *First National Bank of Whitehall v. Lamb*, 50 N. Y. 100; 1 *Ld. Raymond*, 256, 405; *Gould's Plead.*, c. 3, § 63; *Central National Bank v. Pratt*, 115 Mass. 544.

**SANCTION.** At law means a penalty.

**SATISFACTION.** Means at law an entry duly made on the record of a judgment by a party in whose favor it was rendered, declaring it to be paid; or it is a certificate duly executed and testifying to the same thing in relation to a mortgage. Or it implies the completion of some stage in a contract or legacy. *Sloan v. Hayden*, 110 Mass. 141; *Beck v. McGillis*, 9 Barb. 57.

**SECURITY.** Any right or interest which is a charge upon specific property. It includes a lien. *Storm v. Waddell*, 2 Sanf. Ch. 494; *U. S. Trust Co. v. Brady*, 20 Barb. 119; *Ross v. Jones*, 22 Wall. 577.

**SEPARATION.** At law is in meaning technically restricted to the domestic relations, and signifies a cessation of cohabitation between husband and wife by mutual agreement. *Carson v. Murray*, 3 Paige's Ch. 483; *Rogers v. Rogers*, 4 *Ibid.* 516; *Cooper et al. v. Clason*, 3 Johns. 521.

**SHALL.** Is imperative, and therefore mandatory. *Caswell v. Allen*, 7 Johns 63; *Morris v. People*, 3 Denio, 381. But when it is recited in a charter that "it *shall* and may be lawful" this makes it discretionary. *Verplanck v. Merc. Ins. Co.*, 1 Edwards, 84. (Compare with "MAY.")

**SPECIALTY.** Means popularly some exclusive department of labor; at law it means a writing under seal and duly delivered containing some agreement. 2 *Sergt. & R.* 504; 2 *Coke*, 5; 1 *P. Wms.* 130.

**TALES.** At law means any number of jurors selected at random to supply deficiencies in a panel.

**TENANT.** Means popularly one who hires the use of a house or lands from another; at law it means one who possesses or holds lands or tenements by any kind of title whatever. *Hosford v. Ballard*, 39 N. Y. 151; *White v. Maynard*, 111 Mass. 250; *Sparker v. Cook*, 16 *Ibid.* 567.

**TENEMENT.** Means popularly a house, or rooms let in houses; at law it means every kind of property whether corporeal or incorporeal, which being of a permanent nature may be holden, such as lands, houses, inheritances, rents, and profits. *Coke*

Litt. 6; 2 Blacks. Comm. 17; 1 Washburn, 10; Comm. v. Dam, 107 Mass. 210; Young v. Boston, 104 Ibid. 95; People v. Westervelt, 17 Wend. 673; Mayor, etc., v. Mabie, 13 N. Y. 159.

**THEN.** May signify either "at that time," "further," or "in that case," according to the suffix. Ash v. Coleman, 24 Barb. 645; 2 Atk. Ch. 310; 4 Vesey, 698; Comm. v. Butterick, 106 Mass. 12.

**THOROUGHFARE.** Means a public street or highway opening at both ends into another highway. Bissell v. N. Y. Central R. R., 23 N. Y. 61; Galatian v. Gardner, 7 Johns. 106.

**THREAD.** At law is use figuratively to denote the central line of a stream, and thus to determine riparian rights.

**TRADITION.** In the civil law means the act by which a thing is delivered.

**TRUST.** Means in law a right in property, real or personal, held by one person for the benefit of another. The legal title rests in the trustees, the equitable in the beneficiary. Or it may mean in commerce an unincorporated joint-stock company or partnership between the stockholders of various corporations. 4 Kent's Comm. 295; 3 Blacks. Comm. 431; Perry on Trusts; Kerr's Business Corporations, § 112.

**USE.** Means in law the right in the beneficiary of a trust to take the profits of the land; hence, while nominally creating a trustee, it virtually supersedes him in fact by uniting the seisin with the use.

**VALUE.** Means in law the worth of an object in purchasing other things, hence it differs from price, the former meaning value in use, the latter value in exchange. Troy Iron Co. v. Winslow, 45 Barb. 231; Wilson v. Maxwell, 2 Blatchf. 321; Wolfe v. Harvard Ins. Co., 7 N. Y. 583.

**WARD.** Means at law any person placed by legal process under the guardianship of another.

**WAGES and SALARY.** Are held to be synonymous terms without regard to the particular service rendered; and apply as well to the compensation of public officers and members of the Legislature, whether estimated on a *per diem* basis, or on an aggregate sum for the whole year. Jenks v. Dyer, 102 Mass. 235; Somers v. Kelcher, 115 Ibid. 167; Comm. *ex rel.* Wolfe v. Butler, 99 Penn. St. 535.

**WRITING.** Henshaw v. Foster, 9 Pick. 312; Hart v. Gray, 3 Sumn. 340; U. S. v. Lawrence, 13 Blatchf. 211.



# 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 Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

### ARTICLE I.

SECTION. 1. All legislative Powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

SECTION. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a Citizen 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 Rep-

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.

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

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall 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 Case of Impeachment shall not extend further than removal from Office, and Disqualification to hold and enjoy any

Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

SECTION. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the places of 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.

SECTION. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of Absent Members, in such Manner, and under such Penalties as each House may provide.

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

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy, and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

SECTION. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony, and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was Elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been 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.

SECTION. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both houses shall be determined by Yeas and Nays, and the Names of the persons voting for or 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 Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

SECTION. 8. The Congress shall have Power

To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

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

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

To establish Post Offices and post Roads;

To promote the progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

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

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

To provide and maintain a Navy;

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

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

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the Officers, and the authority of training the Militia according to the Discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such district (not exceeding ten Miles square) as may, by Cession of the Particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings; And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

SECTION. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or Duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be sus-

pended, 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 Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

SECTION. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make 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.

SECTION. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows :

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress ; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

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.”

SECTION. 2. The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the

several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal Officer of each of the executive Departments, upon any Subject relating to the Duties in their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in case of a Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the officers of the United States.

SECTION. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### ARTICLE. III.

SECTION. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation which shall not be diminished during their Continuance in Office.



**SECTION. 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers, and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of Different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

**SECTION. 3.** Treason against the United States shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

#### ARTICLE. IV.

**SECTION. 1.** Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceeding shall be proved, and the Effect thereof.

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

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State,

shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

SECTION. 3. New States may be admitted by the Congress into this Union, but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion, and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

#### ARTICLE. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year one thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

## ARTICLE. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the Several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

## ARTICLE. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

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

GEO. WASHINGTON,

*President and Deputy from Virginia.*

*NEW HAMPSHIRE.*

JOHN LANGDON,  
NICHOLAS GILMAN.

*MASSACHUSETTS.*

NATHANIEL GORHAM,  
RUFUS KING.

*CONNECTICUT.*

WM. SAML. JOHNSON,  
ROGER SHERMAN.

*NEW YORK.*

ALEXANDER HAMILTON.

*NEW JERSEY.*

WILL. LIVINGSTON,  
WM. PATERSON,  
DAVID BREARLY,  
JONA. DAYTON.

*PENNSYLVANIA.*

B. FRANKLIN,  
ROBT. MORRIS,  
THO. FITZSIMONS,  
JAMES WILSON,  
THOMAS MIFFLIN,  
GEO. CLYMER,  
JARED INGERSOLL,  
GOUV. MORRIS.

*DELAWARE.*

GEO. REED,  
JOHN DICKINSON,  
JACOB BROOM,  
GUNNING BEDFORD, Jun'r,  
RICHARD BASSETT.

*MARYLAND.*

JAMES M'HENRY,  
DANL. CARROLL,  
DAN. OF ST. THOS. JENIFER.

*VIRGINIA.*

JOHN BLAIR,  
JAMES MADISON, Jr.

*NORTH CAROLINA.*

WM. BLOUNT,  
HU. WILLIAMSON,  
RICH'D DOBBS SPAIGHT.

*SOUTH CAROLINA.*

J. RUTLEDGE,  
CHARLES PINCKNEY,  
CHAS. COTESWORTH PINCKNEY,  
PIERCE BUTLER.

*GEORGIA.*

WILLIAM FEW,  
ABR. CALDWIN.

Attest,

WILLIAM JACKSON, *Secretary.*

The Constitution was adopted on the 17th September, 1787, by the Convention appointed in pursuance of the resolution of the Congress of the Confederation, of the 21st February, 1787, and was ratified by the Conventions of the several States, as follows, viz :

Delaware, 7th December, 1787.

Pennsylvania, 12th December, 1787.

New Jersey, 18th December, 1787.

Georgia, 2d January, 1788.

Connecticut, 9th January, 1788.

Massachusetts, 6th February, 1788.

Maryland, 28th April, 1788.

South Carolina, 23d May, 1788.

New Hampshire, 21st June, 1788.

Virginia, 26th June, 1788.

New York, 26th July, 1788.

North Carolina, 21st Nov., 1789.

Rhode Island, 20th May, 1790.

## ARTICLES

IN ADDITION TO, AND AMENDMENT OF,

THE CONSTITUTION

OF THE

## UNITED STATES OF AMERICA,

*Proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth article of the original Constitution.*

## ARTICLE I.

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 person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in 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 vote shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. 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.

*The following is prefixed to the first ten of the preceding amendments.*

CONGRESS OF THE UNITED STATES,

Begun and held at the City of New York, on Wednesday, the fourth of March, one thousand seven hundred and eighty-nine.

The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution;

*Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, That the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; viz.*

Articles in addition to, and Amendments of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States pursuant to the fifth article of the original Constitution.

The first ten amendments of the Constitution were ratified by the States as follows, viz.:

- By New Jersey, 20th November, 1789.
- By Maryland, 19th December, 1789.
- By North Carolina, 22d December, 1789.
- By South Carolina, 19th January, 1790.
- By New Hampshire, 25th January, 1790.
- By Delaware, 28th January, 1790.
- By Pennsylvania, 10th March, 1790.
- By New York, 27th March, 1790.
- By Rhode Island, 15th June, 1790.
- By Vermont, 3d November, 1791.
- By Virginia, 15th December, 1791.



*The following is prefixed to the eleventh of the preceding amendments.*

THIRD CONGRESS OF THE UNITED STATES.

*At the first session, begun and held at the city of Philadelphia, in the State of Pennsylvania, on Monday, the second of December, one thousand seven hundred and ninety-three :*

*Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, That the following Article be proposed to the Legislatures of the several States, as an amendment to the Constitution of the United States; which when ratified by three-fourths of the said Legislatures shall be valid as part of the said Constitution, viz :*

*The following is prefixed to the twelfth of the preceding amendments :*

EIGHTH CONGRESS OF THE UNITED STATES.

*At the first session, begun and held in the city of Washington, in the Territory of Columbia, on Monday, the seventeenth day of October, one thousand eight hundred and three.*

*Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that in lieu of the third paragraph of the first section of the second article of the Constitution of the United States, the following be proposed as an amendment to the Constitution of the United States, which, when ratified by three fourths of the legislatures of the several States, shall be valid to all intents and purposes, as part of the said Constitution, to wit :*

The ten first of the preceding amendments were proposed at the first session of the first Congress, of the United States, 25 September, 1789, and were finally ratified by the constitutional number of States, on the 15th day of December, 1791. The eleventh amendment was proposed at the first session of the third Congress, 5th March, 1794, and was declared in a message from the President of the United States, to both Houses of Congress dated 8th January, 1798, to have been adopted by the constitutional number of States. The twelfth amendment was proposed at the first session of the eighth Congress, 12th December, 1803, and was adopted by the constitutional number of States in 1804, according to a public notice thereof by the Secretary of State, dated 25th of September of the same year.

## ARTICLE XIII.

*Submitted by Congress to the Legislatures of the several States, February 1st, 1865, and on the 18th of December following was officially declared to have been ratified by the requisite majority of three fourths of all the States.*

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

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

## ARTICLE XIV.

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

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, representatives of Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male members of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a senator or representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged

in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

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

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

#### ARTICLE XV.

SECTION 1. The right of the citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.

SECTION 2. The Congress shall have power to enforce by appropriate legislation the provisions of this article.



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